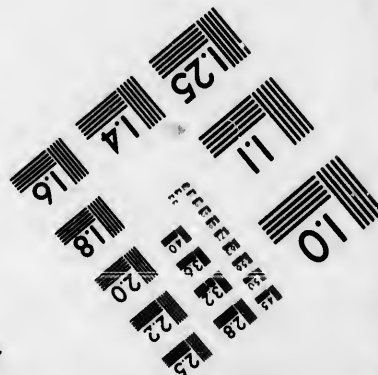
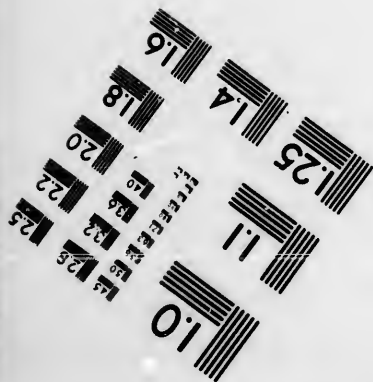
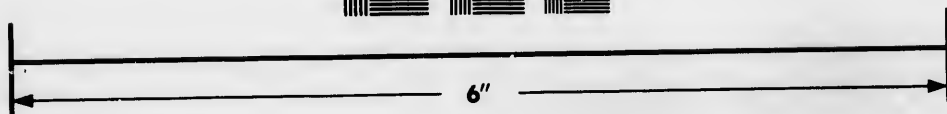
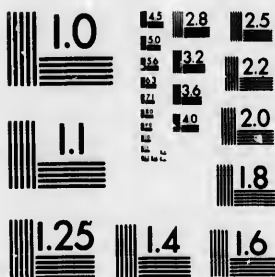


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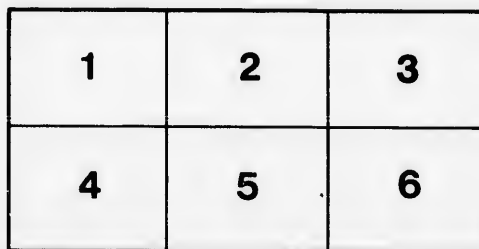
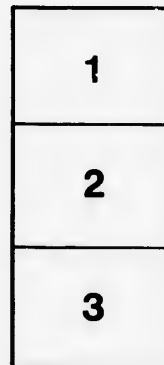
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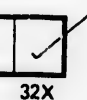
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IN THE PRIVY COUNCIL.

ON APPEAL FROM PRINCE EDWARD ISLAND.

BEFORE

*Edmund Walters*

APPELLANT:

AND

*John Young and William Young* RESPONDENTS.

CASE OF THE APPELLANT

To be heard at the Court of Appeal, on the \_\_\_\_\_ day  
of \_\_\_\_\_ 192\_\_\_\_\_

B.R.A.  
328

HALL AND BROWNLEY,  
*New Brunswick Court.*

IN THE PRIVY COUNCIL.

IN

App

# IN THE PRIVY COUNCIL.

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On APPEAL from Prince Edward Island, in North America.

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BETWEEN

*Edmund Waters* - - - - - APPELLANT;

AND

*John Young and William Young* - - - RESPONDENTS.

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## CASE OF THE APPELLANT.

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**T**HE APPELLANT some years since was a Merchant in London, and carried on trade in partnership with Alexander Birnie, in London, and at a precedent period, also carried on business in Charlotte Town, Prince Edward Island, North America; in the former place under the firm of Alexander Birnie and Co., in the latter under the firm of Waters and Birnie.

From 1813 to 1816, the Appellant and Alexander Birnie had employed a Mr. William Pleece, as their agent in Prince Edward Island, but he having given them dissatisfaction by exceeding his authority and disobeying his instructions, they displaced him in favour of Mr. Fade Goff, then resident in the said Island. The Appellant had also granted Pleece a separate Power to collect the debts due to him in that Island in his individual capacity, but when Pleece was thus removed from the management of the partnership affairs, the latter Power also was withdrawn, and a similar one conferred by the Appellant upon the said Fade Goff.

Appendix No. 1.

The Power of Attorney granted by the Appellant on this occasion to Mr. Goff, is dated the 9th April 1816, and after reciting and revoking the Power previously granted to Mr. Pleece, proceeds to appoint the said Fade Goff, "to be the true and lawful Attorney for him (the Appellant) and in his name, or in his (the said Fade Goff's) own name, or otherwise, *to make up, settle, and adjust all accounts* now depending, and unsettled between him (the said Appellant) and any person or persons whomsoever, either in Prince Edward Island, or any other British Settlement in North America; *and to ask, demand, sue for, recover and receive the balances to be found due thereon, and also to ask, demand, sue for, recover, obtain, and receive, all and every debt and debts, sum and sums of money* whatsoever that are now due, or shall at any time hereafter become due, or owing to him from any person or persons whomsoever, in Prince Edward Island, or any other British Settlement in North America, whom it doth, may, or shall, concern, or who shall be liable to pay or account for the same; and in case of nonpayment thereof, or of any part thereof, for him and in his name, or in (the said Fade Goff's) own name, or otherwise, to sue, arrest, attach, prosecute or otherwise proceed against, all and every person and persons whomsoever, as aforesaid, in any Court or Courts of Law or Equity, in Prince Edward Island, or any other British Settlement in North America, where it may be necessary, and to proceed to judgment and execution therein, or otherwise, according to the form and usual course of practice of such Courts or Tribunals; and also for him, and in his name or otherwise, to appear, and his person to represent and personate in all Courts, and before all Ministers, Judges and Magistrates, and otherwise as may be necessary, and as to his Attorney shall seem meet; and upon payment or receipt of any such debts, sum, and sums of money, or any of them or any part thereof respectively for him and in his name, or otherwise, to make, sign, seal, execute, and give, all and singular good and sufficient receipts, releases, acquittances, and other discharges as may be necessary in the premises, or as may be required; *And in case any dispute or difference shall arise, touching the payment of any of the said debts, sum or sums of money, or any of them, or any part thereof, or touching the settlement of any account, or accounts relating thereto, or in the execution of the powers and authorities hereby given, he hereby authorises and empowers his said Attorney to refer any such dispute or difference to arbitration in the usual way, and to sign, seal, execute, and deliver any agreement, bond, or other instrument of reference, and to abide by, and perform the award and determination which may be made in pursuance thereof, and to compel the observance and performance of such award and determination, by the other parties thereto, respectively; and if expedient and*



" necessary to accept and take a security, or securities, for any of the said debt or debts by instalments, and in cash, goods, bills of exchange, or other mode of payment, or to compound for and take less than the full amount of such of the said debt or debts whereof the full payment cannot be obtained. And generally to transact, manage, conduct, and execute all and every such further and other lawful acts, deeds, matters and things, as the said Fade Goff shall find needful and necessary for accomplishing all, any, or either, of the purposes aforesaid; and that as fully and effectually, to all intents and purposes, as he could do in his own person, hereby giving unto his said Attorney all his full and whole power and authority, and hereby ratifying and confirming all and whatsoever his said Attorney shall lawfully do or cause to be done in and about the premises, by virtue and in execution of these presents. IN WITNESS whereof, &c."

With respect to the power of Attorney, granted to Mr. Goff by the *partnership*. It will be sufficient to observe that this also revoked their previous power to Pleace, that it was of the same date with that last above recited, and that it was in general of the same tenor. It differed indeed in some particulars, but these will not be found material to the merits of the present Appeal. These differences are, that it omitted the provision authorising Goff to refer disputes to arbitration, and it empowered him, " for them, and in their name, to sell and dispose of any goods, wares and merchandize belonging or that may belong to them, in the said Island, or any other British Settlement in America, for the most money and best price, or prices, that can be reasonably had or gotten for the same, and to remit the proceeds thereof, from time to time, to the said Alexander Birnie and Edmund Waters in the usual way."

Both these powers so granted to Goff were enclosed to him with the following letter of Instructions from A. Birnie and Co. :—

" London, 12, Great St. Helens.  
April 9th 1816.

" Mr. Fade Goff,  
" Charlotte Town, Prince Edward Island.

Appendix No. II

" Sir,—In consequence of the irregularity and extreme want of attention which we have experienced from Mr. William Pleace, our present Agent at Prince Edward Island, and by which our interest has most materially suffered from his having acted contrary to our positive instructions, and his written agreement, we have made up our minds to remove him altogether from our employ.

" Mr. John Stewart of Newfoundland, and Mr. George Birnie of this Town, having strongly recommended you to us, as a fit and proper person to manage our business, and assuring us, that, in their opinion you would have no objection to take upon you the superintendance thereof: have enclosed you our joint power (and also our Mr. Waters, to recover what debts may be due to him individually,) in order to enable you to supersede Mr. William Pleace our present agent in the Island, or any other part of North America.

" It may be necessary to suggest as your first step towards carrying our intentions into effect, to have the powers privately registered in order to prevent cabal and intrigue. You will afterwards take possession of our premises, on which you should remain, and take, with the assistance of Mr. William Pleace, a regular Inventory of all the Stock in Trade, Furniture, Books, Bills, and Cash, with the Iron Chest, and two keys: but should he decline performing his duty, you will immediately procure two respectable Storekeepers, who will with yourself take an exact account of every article on the premises, and at the end of the said Inventory cause an affidavit to be attached, sworn to by those who took the same, taking care to transmit us an attested copy thereof. You will also observe to let all persons know, indebted to the concern jointly or severally, on account of rent, goods, or otherwise, not to pay any one but yourself. You will also cause to be inserted three times in the Island Newspaper, and Halifax Gazette, stating that Mr. William Pleace no longer acts as agent to the House of Birnie and Co. of London, or of Charlotte Town Prince Edward Island, and also notify any persons with whom he may have transacted business at Halifax, Newfoundland, or other places, of the same in writing.

" As we have not received a regular state of our affairs from Mr. William Pleace, we are at a loss as to our future mode of transacting business at the Island, but in the mean time propose to allow you five per Cent on the amount of all outstanding debts recovered, and also five per Cent on the amount of sales of goods on hand, which we wish you to dispose of to the best advantage for ready money, and remit it, together, with such debts as may be recovered in Government Bills, which we apprehend may be got at Halifax, but should you remit Cash you will advise us thereof for our government as to Insurance. You will occupy the dwelling attached to the Store, (observing the furniture is kept in order) until such time as we have determined what is to be done with the same, as we understand the upper part of the Store can be easily converted into a dwelling house, and the under part of the Store being considered as quite sufficient to carry on a trade adequate to the funds of the Island. As this is the only arrangement we can at present make from our imperfect knowledge of the state of the concern, and as we hope it will not materially interfere with your present engagements, we trust you will think it an object worth exerting yourself for our interest. As our books were made up to

" the commencement of Mr. Pleace's responsibility, we have no doubt but he will consider it his interest and duty to deliver them so made up to the commencement of your's. You will write us by every conveyance, giving us an account of your proceedings for our government, and also let us know the stock on hand, debts and credits, state of repair of the houses, in short every information you consider necessary for our interest. Referring to our next we remain,

" Sir,  
" Your most obedient humble Servants,  
A. BIRNIE, & Co.

By these two powers of attorney and letter of instructions, it will appear that Mr. Goff was not a *general* but a *special* agent, with an authority strictly limited and clearly defined.

Acting for the Appellant as an individual, he had simply an authority to collect his outstanding debts.

As agent for the firm of A. Birnie and Co., his duties were to collect outstanding debts, to sell the goods on hand, to remit the proceeds of such debts and goods in ready money, and to take care of the lands and houses.

This is the plain and unquestionable construction of the documents, and coincides (it will be observed) with the nature of the compensation which the agent was to receive: viz. 5 per cent. on the amount of debts recovered, 5 per cent. on the amount of sales, and the use of the house and furniture. There was nothing to authorise him to trade with the funds of A. Birnie and Co., or of the Appellant, or to purchase or exchange goods in their name, or in any manner to bring them into debt, or commit their credit.

Mr. Goff entered on his agency in June, 1815, at which time there remained on hand out of a tolerable investment that had been sent out with Mr. Pleace, by A. Birnie and Co., various articles of Merchandize, of the value according to his (Goff's) own statement of 6251*l.* 12*s.* 8*d.* These with the outstanding debts of the firm, amounting to three times that sum, were together with the private debts due to the Appellant, duly transferred to him by Mr. Pleace.

Mr. Goff seems from the first, to have wished to enlarge as much as possible the sphere of his agency (with a view of course to the increase of his profits), for soon after entering upon his employment, he sent a letter to his constituents, of which the following is an extract.

*June, 14th, 1816.*

Appendix No. III.

" I shall be glad as soon as possible to be favoured with your determination as to future supplies. A good assortment of saleable articles, such as Mr. Geo. Birnie knows suitable for our consumption to amount of about 5000*l.*, I think could be well run off in the autumn and winter, and remitted for in the spring: but should you prefer fully winding up the present concern, before any further investments are made, I should wish to be informed of it, that I may regulate matters accordingly and curtail every possible expence."

Again he writes—

*1st. July, 1816.*

Appendix No. IV.

" I shall be anxious till I am favoured with your further intentions as to business here. I have no doubt but that a snug trade may be continued, which will support the establishment and leave a moderate profit if care is taken to lay in the goods well at home, and a suitable assortment forwarded."

The next letter is written in the same general view, and at the same time proves the important fact, that he was well aware of the strict limitation of his actual powers, and felt it to be necessary to obtain further and specific authority before he could safely make purchases or take consignments of goods on account of his Principals, or even consign the goods then on hand for a foreign market, instead of retaining them in his own hands (according to the intention of the power of A. Birnie and Co.), for sale on the Island.

*8th. July, 1816.*

Appendix No. V.

" I should wish to be informed as speedily as may be, if you permit me to make any purchases of suitable goods here, or at Halifax, or Newfoundland, particularly in the article of West India produce, without an assortment of these articles other goods cannot be so readily got off. I also wish to know, if you have any objection to my taking any consignment of goods that might offer for your benefit that did not interfere with the sale of goods on hand. I shall always be glad to have your decided instructions upon these and every other point that you may deem requisite, which shall be punctually attended to on my part. I shall also be glad of your determination as to shipping goods for the Newfoundland, and Halifax markets. At present the prospects there are dull."

Soon after he had dispatched this letter, it appears that Mr. John Young, one of the respondents, arrived from Halifax on a visit to Prince Edward Island, and having formed an acquaint-

ance with Mr. Goff, entered into communications with him upon business, the result of which was, that Mr. Young persuaded Mr. Goff to ship to the house of the Respondents at Halifax, a variety of articles from the stock of A. Birnie and Co., then under his care, amounting in value to 1327*l.* 8*s.* 1*d.* and upwards. This measure (it will be observed) was adopted by Mr. Goff without waiting for any answer to his letter of 8th July, addressed to A. Birnie and Co., and even before sufficient time had elapsed for the receipt of such answer, though it is evident from the terms of that letter, that he was aware of his existing want of authority to send these goods to Halifax.

Of this transaction he afterwards gave to A. Birnie and Co. the following account:—

10th September, 1816.

Appendix No. VI.

" I have further to acquaint you, that in consequence of the recommendation of Mr. John Young, of the house of John Young and Co. of Halifax, who was here a short time ago, I have forwarded, consigned to their care, the silks, kerseymers, velvets, indigo, and noyau, for the purpose of exchanging them for articles that are saleable in this market. These would not have gone off here for years, and the declining state of the quality of part of the goods made some measure of this nature requisite. I have also forwarded the cases of furniture, which Mr. Young stated he felt confident would be disposed of to some of the government officers. They have all arrived safe, and I purpose following them in a few days, and doing all I can for your interest."

Mr. Goff soon afterwards followed the goods to Halifax; and though in the letter last quoted, he had represented his object to be merely to procure other articles in exchange for these goods, he did not act upon that plan, but took a course still more plainly beyond his authority, viz. that of making purchases of goods on account of A. Birnie and Co. from the respondents, leaving those which had been consigned to them from Prince Edward Island, still in their hands for sale upon Commission.

The effect of this transaction, supposing it to be valid, was of course to bring the house of A. Birnie and Co. largely into debt, with the respondents. It is submitted however that it was not valid, for neither the Powers of Attorney, nor the letter which accompanied them, gave Goff any authority either to contract debts, or to purchase goods on account of A. Birnie and Co., or of the Appellant, and his own letter of the 8th of July, shews that he well knew the inadequacy of his powers to these purposes.

Mr. Goff soon afterwards returned to Prince Edward Island, but neither from the stock remaining in his hands at that place, nor from the outstanding debts then due to the Appellant, and to A. Birnie and Co., nor even from the proceeds of the goods which he had purchased from the Respondents, did he ever remit either to the Appellant, or to A. Birnie and Co. one shilling: the only remittance which he made during the whole course of his agency consisting of the sum of 124*l.* sterling, part of the proceeds of a Cargo of Timber, not included under any of the above heads of account.

In October, 1817, William Young, one of the Respondents arrived in Prince Edward Island, and came to an account with Mr. Goff, in respect of the above-mentioned transactions, when it appeared that the property which had been consigned to the Respondents, was by that time sold, but though of the original value of 1327*l.* 8*s.* 1*d.* had realized under their management, only 512*l.* 14*s.* 6*d.* which when set against their claim for the goods bought of them, and for Commission, left a balance of 1438*l.* 12*s.* 9*d.* currency, alleged to be due to them from A. Birnie and Co. This sum Mr. Goff thought proper (without previous communication either with the Appellant, or with A. Birnie and Co., upon the subject, and without having even apprized them of the existence of any debt) to acknowledge as justly due from them to the Respondents, on the balance of account, and on the 29th October in the same year, granted two Warrants of Attorney, one in the name of the Appellant, and the other in the names of himself and his partner, to enter up judgments for double the amount of the pretended balance, and with defasaunces respectively on payment of such balance with interest on or before the 1st November then next. The granting of these Warrants of Attorney was another flagrant excess of authority on the part of Mr. Goff, neither his Powers nor Instructions having enabled him to confess judgments.

Upon each of these Warrants of Attorney, so granted, judgment was entered up in Hilary Term, 1818, for the sum of 2877*l.* 5*s.* 6*d.*, and also for 1*l.* 16*s.* 8*d.* damages and costs, after which the alleged balance of Account was reduced, by various payments out of the stock of A. Birnie and Co. in Mr. Goff's hands, to 600*l.* 14*s.* currency. The Respondents forbore for a very long period, to put their judgments in force, but afterwards revived them by Scire Facias, and on the 31st July, 1820, sued out writs of Fieri Facias, and levied under those writs upon the houses and lands of the Appellant, and also upon the houses and lands of A. Birnie and Co. for the said sum of 600*l.* 14*s.*

Though Mr. Goff afterwards made several communications to his Principals upon the state of their affairs, in letters produced in evidence in this cause, and dated 12th December 1817, 15th September, 1817, 14th February, 1818, and 18th July, 1818, and though the Respondents were, during the whole course of these transactions, aware on whose account he was professing to act, yet neither Mr. Goff or the Respondents ever chose to apprize either the Appellant or A.

Birnie and Co. of the settlement of accounts, of the Warrants of Attorney, or the judgments and executions which followed them, but studiously kept them in profound ignorance of the whole of these proceedings. At length, and not till late in the year 1820, they were apprized of them by Mr. John Stewart, a friend resident in the Island: upon receiving this communication the Appellant and A. Birnie and Co. immediately sent out Powers to Mr. Stewart superseding Mr. Goff, and gave instructions for setting aside the Warrants of Attorney, and the proceedings founded thereon. Afterwards, on the 15th May, 1821, the Respondents finding that the affair was probably by that time known to A. Birnie and Co. addressed to them a Letter of that date, being their first communication upon the subject, and demanded payment of the balance pretended to be due. A. Birnie and Co. in their answer, disclaimed the acts of their agent, and intimated their intention to resist the claim.

Accordingly, in Trinity Term, 1822, and before any sale had been effected in pursuance of the said levies, the House of A. Birnie and Co. moved the Supreme Court of Judicature in the said Island, (the Court in which the said judgments were entered up) for a Rule to shew cause why the judgment and execution which had been obtained against them by the Respondents, and all proceedings thereunder, should not be set aside, and the Warrant of Attorney under their hands and seals by Fade Goff, their then agent, taken off the file, and all proceedings in the mean time stayed. This motion was supported by an affidavit of the said John Stewart, containing a statement of the facts of the case, and proceeded on these grounds. That the said Fade Goff had no authority to make the said purchases, on account of the said house of A. Birnie and Co. nor to execute in their name the said Warrant of Attorney, nor to sell their goods for any other consideration than money or good Bills of Exchange, nor to send such goods out of the Island for sale.

A similar motion, supported by a like affidavit of the said John Stewart, (mutatis mutandis) was made on the part of the Appellant, in the said Supreme Court, and in each case the said Supreme Court granted a Rule to shew cause.

Afterwards, in the same term, the Respondents shewed cause against the said rule obtained on the part of A. Birnie and Co., and produced an affidavit of the said Fade Goff, the Power of Attorney, granted by the said A. Birnie and Co. to him, and such parts of the correspondence between him and them as it was thought convenient for the purposes of the Respondents to select, but comprising inter alia the letters to which reference has already been made in this case. The grounds of the opposition to the rule, may be collected from Mr. Goff's affidavit in which he swears that he acted "with the idea and belief that he was not merely to wind up and close the concern of the said defendants on the said island, but was to carry on with their funds, and on their account a moderate trade, such as their previous agents had been employed to conduct. That the grounds of this belief were, the communications of George Birnie, the transactions of Mr. Pleace, the ordinary course of business here, the tenor of the said letter accompanying the said power, and subsequently the silence and apparent assent of the said defendants, to the various and earnest representations of this deponent."

In the same term the Respondents shewed cause against the rule obtained on behalf of the Appellant, and opposed that rule by a similar affidavit, and on the same ground as was taken in the case of A. Birnie and Co.

In what was thus alleged on the part of the Respondents, there is nothing which does not admit of an obvious and conclusive answer. When Mr. Goff asserts that he believed himself authorized not merely to wind up the concerns of his Principals, but also to carry on with their funds a moderate trade, he is directly contradicted by the tenor of his own letters above quoted of 14th June, 1st July, and 8th of July, all of them, but particularly the last, furnish the most unanswerable evidence, that he had no such belief as stated in his affidavit, but, that, on the contrary, he well knew himself unauthorized to trade without the express consent of his Principals, nor had he any reason for entertaining such belief, and the several grounds for it set forth in the affidavit are absolutely fallacious and untenable. First, he relies on some supposed communications from George Birnie, but he does not venture to swear distinctly that he had any communications from that gentleman, directing or approving the acts in question; nor is any letter produced from him that can fairly receive that construction, nor would his sanction, even if given, have been sufficient to authorise Mr. Goff's proceedings, as Mr. George Birnie, though a son of one of the firm of A. Birnie and Co., was not a partner in their House. Another ground alleged, is, that William Pleace engaged in similar transactions.

This also is an assertion of a loose kind and unsupported by any evidence out of the affidavit, and is besides open to these obvious answers, that if Mr. Pleace did so, he exceeded his authority, and that even were it otherwise, the legality of Mr. Goff's proceedings is to be decided not by reference to the acts of any other person, but by the language of the power which he held. The next pretence is that his proceedings were warranted by the ordinary course of business in the Island. To this the same remarks apply; no proof beyond this mere assertion in the affidavit was given, that such was the ordinary course of business, and even if it was, Mr. Goff could not be justified in pursuing that course, except so far as it might coincide with the powers under which he acted. It was his Powers that was to determine the extent of his authority, and their effect could neither be controlled or enlarged by the custom of the place. The affidavit next relies upon the tenor of the letter accompanying the power, but that letter (which has already been given at length under date of 9th April 1816) will be found upon inspection to contain no permission to Goff to carry on trade, or to enter into any such transactions as those in which he

afterwards thought proper to engage with the Respondents. That he himself did not so construe that document, is evident from his Letter of the 8th July. With respect to the reason which he last alleges for his belief, that he was entitled to carry on trade with the funds of his Principals, viz., their "silence and apparent assent to his various and earnest representations," it may be sufficient to observe that their silence could under no circumstances be considered as giving him authority to engage in dealings, for which he had himself felt it necessary (in the language of his above cited Letter of the 8th July) "to have their decided instructions." But the futility of this pretext will be still more broadly apparent when it is recollected that these "various and earnest representations" were no other than those contained in his letters of 14th June, 1st July, and 8th July, and that so soon afterwards as the 10th September, and before sufficient time had elapsed for his Principals to answer the last of these communications, the goods under his care had already been dispatched from the Island and had arrived at Halifax.

But independently of these answers to the case set up for the Respondents, it is evident that the case even if established to the fullest extent, did not form a foundation sufficiently wide to support the proceedings taken against the Appellant. It tends at most only to shew that Goff's commercial transactions with the Respondents were within the scope of his authority, but leaves wholly undefended that proceeding out of which the present appeal more immediately arises, viz., his granting them the warrants of Attorney, for the balance alleged to be due. It is submitted that even supposing his acts of trading to have been within the limits of his powers, *this* transaction at least was upon the widest possible construction of those powers plainly unwarrantable.

The Supreme Court, however, thought proper upon such cause shewn as above mentioned to discharge as well the said rule obtained by the Appellant, as also that obtained on the part of A. Birnie and Co. and consequently to confirm the whole of the proceedings that had taken place against them in the said Island.

Messrs. A. Birnie and Co. and the Appellant in his individual capacity on the 10th July, 1822, each brought an Appeal, by way of Writ of Error, before the Lieutenant Governor and Council, composing the Court of Error and Appeals in the said Island, who affirmed the Judgments of the Court below with Costs.

The Appellant, however, humbly hopes that the said Judgment of Affirmance in the proceedings in which he was individually a party, and the said original Judgment entered up against him, and all subsequent proceedings thereon will be reversed, and the said warrant of Attorney given under his hand and seal, by the said Fade Goff, will be taken off the file to be cancelled for the following among other

## REASONS :

- I. THAT the Appellant was not liable for the debt alleged to have been contracted by the said Fade Goff, in the course of his transactions with the Respondents, those transactions having been wholly unauthorized by himself or his firm : the powers granted by himself and his firm respectively to the said Fade Goff, having been of a special kind, not intitling him to send the goods under his care out of the Island for sale by other persons, nor to purchase other goods on account either of the Appellant, or of the firm in which he was a partner.
- II. THAT even supposing the Appellant to have been liable to pay the balance due to the Respondents upon the above mentioned transactions, yet the said Fade Goff had no authority to execute in their favour the said Warrant of Attorney under the hand and seal of the Appellant.

HENRY J. STEPHEN.

