Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Heirs Hiddingh v. *De Villiers, Denyssen, and others, Willem Hiddingh* v. *Denyssen and others, and Denyssen* v. *Willem Hiddingh, from the Supreme Court of the Cape of Good Hope; delivered* 9*th July* 1887.

Present:

LORD FITZGERALD.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

These appeals all relate to property subject to the trusts of the will of Petrus Hofstede Hiddingh, and all the questions raised by them lie between persons entitled to his estate on the one hand, and his executors or administrators on the other. They have therefore been heard together, but the decrees appealed from were made in two separate actions raising separate issues, in which it will be proper now to make separate decrees.

The testator's will bears date the 13th of July 1876. He first gives to his wife the sum of 7,500*l.*, entailed with the burthen of fidei commissum, under which the interest is to be enjoyed by her for life, with remainder to his children for their lives, with remainders to their issue. He then appoints his seven children by name and any future children to be sole heirs and heiresses of his estate after payment of the legacy, but as to one half of their shares

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burthened with the entail of fidei commissum, under which they are to enjoy the interests of their shares for life, with remainder to their issue. It is not material to state the nature of the interests ulterior to those of the children. He further directs—

" That his three executors herein-after appointed shall receive, by way of commission, each the sum of five hundred pounds sterling, and that his estate shall be charged with guarantee commission, and not his wife, on the bequest of seven thousand and five hundred pounds sterling bequeathed to her."

And he declares—

" To nominate and appoint Mr. Paul de Villiers, D.A., son, his wife Dorothea Wilhelmina Christina Anthing, and the South African Association for the Administration and Settlement of Estates, and in case the last-mentioned executor declines to accept the appointment, then and in that case ' the ' Colonial Orphan Chamber and Trust Company ' in its stead, to be the executors of his will, administrators of his estate and effects, and guardians of his minor heirs and legatees."

On the 12th of May 1881 the testator made a codicil, in which he enlarges the entailed portion of the inheritances from one half to three quarters of each share. And he continues as follows:—

" I hereby revoke the appointment of the South African Association for the Administration and Settlement of Estates as the sole administrators of the fidei-commissary inheritances of my heirs under this will and codicil, and desire that the said South African Association and the Colonial Orphan Chamber and Trust Company shall have the joint administration of the said fidei-commissary inheritances devolving upon my said heirs, that is to say, that each institution shall have the administration of half the amount of the fidei-commissary inheritance devolving upon each of my heirs.

" I further desire that the sum of five hundred pounds, bequeathed to each of my executors by way of commission, shall be in full satisfaction of any commission or fees which they may be entitled to under this will."

On the 13th September 1881 the testator died, leaving his wife and seven children surviving him, and on the 13th October letters of administration were granted to his three executors. The South African Association has been the

acting executor, though the others are of course responsible for the due liquidation of the estate.

[FIRST APPEAL.]

The first action was brought by four of the testator's children against the three executors. It was commenced by summons dated the 16th November 1883. The Plaintiffs thereby claimed to amend the Defendants' accounts by expunging certain items relating to the sale of shares, and also claimed damages sustained on the sales of certain shares and debentures. In their declaration the Plaintiffs stated that part of the testator's estate consisted of shares in Companies; that for a considerable time after his death the shares were in public demand, and profitable prices might have been obtained for them; that the Defendants did not dispose of any of the shares till the 14th July 1883, when they sold some at prices far less than might have been obtained earlier; and they claimed 1,138*l*. 17*s*. 6*d*. as damage on account of the negligence charged. The Plaintiffs make out their claim in the way shown by a table set out in the Appellants' case, which is here transcribed :—

Shares.	Market Value (claimed by Plaintiffs). £ s.	For what Executors sold in 1883. £ s. £ / £ s. d.	Deficiency. £ s. d.
34 South African Bank	At £35 0=1,190 0	20 at 13 5=265 } 14 at 11 0=154 } 419 0 0	771 0 0
15 National Bank, O.F.S.	„ 6 10= 97 10	At £4 17*s*. - 72 15 0	24 15 0
23 Gas Light Company	„ 35 0= 805 0	„ £30 12*s*. 6*d*. 704 7 6	100 12 6
2 Board of Executors	„ 300 0= 600 0	1 at £187 } 1 at £176 } - 363 0 0	237 0 0
10 Brick and Lime Company.	„ 1 11= 15 10	At £1 - - 10 0 0	5 10 0
	£2,708 0	£1,569 2 6	1,138 17 6

The price of the various shares (except those of the Brick and Lime Company) in November

1881, and again in April 1882, was stated by certain brokers called by the Plaintiffs. It was shown that in November and again in December 1881 the Association invited tenders for the shares, which resulted either in nothing or in offers at prices which they considered inadequate. After December 1881 they made no attempt to dispose of the shares, except by offering them for the acceptance of the adult heirs. It does not appear in what form or at what date this offer was made. It was probably made in conversation, and shortly before the date of the answer to it. That answer is contained in the following letter addressed to Mr. Denyssen as the Secretary of the Association, and as administering executor, estate late P. H. Hiddingh:—

"Sir, Cape Town, 3rd April 1882.

"With regard to bank and other shares belonging to the above estate, about which the executors desire to know the intention of the heirs, we the undersigned have come to the resolution not to take over any of them, and therefore request the executors to dispose of the same as soon as possible."

The letter is signed either by five of the children, or by four and the widow.

The executors did nothing whatever after the receipt of this letter. Mr. Denyssen says, "When the heirs asked us to sell, the Board "thought it not desirable" Two of the Directors say the matter was continually discussed at the Board, and one of them, Mr. Ebden, says, "We "thought that, short of dire necessity, it would "be undesirable to realize the shares with a "falling market, and a reasonable prospect of a "rise at no distant date." There is no other reason given for their inaction, nor any evidence as to the reasons for expecting a rise. In point of fact they did not sell till July 1883, after they had been warned by the Plaintiffs' solicitor that they would be held responsible for loss.

Upon these facts the Supreme Court made

their decree on the 14th January 1884, and thereby dismissed the action on the ground that the executors did no more than exercise a discretion which was vested in them. It gave the costs out of the estate. This is the decree appealed from.

It seems that no rule has been laid down in the colony equivalent to the arbitrary but convenient rule adopted by the Court of Chancery here, that a year should be taken as the ordinary reasonable time within which an executor should realize investments which it is not proper to retain. It is suggested that in this colony six months would be a reasonable period, because that is the time by which it is expected that liquidation accounts shall be lodged, and after which any person interested may summon the executors for an account. The Chief Justice, with whom Mr. Justice Dwyer agrees throughout, adopts this view. Mr. Justice Smith, who dissented from the judgement and thought the executors were liable for negligence, considered that twelve months was a reasonable period, because after that time the Master may of his own authority summon the executor to file his accounts. Their Lordships do not desire to be considered as laying down any general rule on this point. They think that, having regard to what passed in April 1882, the executors having been called upon by the major portion of the heirs to do as soon as possible the duty which the law laid upon them, were bound to delay no longer. A sale as soon as possible after the 3rd April 1882 coincides very nearly with the six months which the Chief Justice lays down to be the reasonable time, and which would expire on the 13th April. And their Lordships cannot find that, even if the longer period of a year were taken, the executors made any effort to sell during the remainder of that period.

The law applicable to the case is, their Lordships think, very well laid down by the Chief Justice. He says,—

"The correct view appears to me to be that, in the opinion of the Legislature, six months is not as a general rule an unreasonable time to allow executors to realize, and that, under certain circumstances, twelve months and more may be perfectly reasonable. I would go even further, and say that where a loss has occurred through the failure of an executor to realize within six months of his acceptance of the trust, the *onus* would lie upon him of proving that he acted *bonâ fide* and exercised a reasonable discretion. In deciding whether a reasonable discretion was exercised or not, the Court would look into all the circumstances of the case, such as the nature of the investment, the confidence the testator had in the investment, the efforts made by the executor to realize, the state of the market, and of course as an important ingredient the length of time which has elapsed since the testator's death. But I cannot concur in the view that, after the lapse of six months, mere error of judgement would be sufficient to fix the executor with liability."

But it is not a mere error of judgement which is charged against the executors. They are charged with unreasonable delay and negligence in performing their legal duty. The Court appears to treat the discretion of the executors as if it were a perfectly free discretion like that of an absolute owner. It was vigorously contended at the bar by Sir Horace Davey that the true test of an executor's reasonable discretion is to see what a reasonable owner might do. But an executor's discretion is limited by the duty of bringing the assets into a proper state of investment within a reasonable time. That duty was in this case rendered more imperative by the circumstance that in two sets of shares the liability is unlimited, and the circumstance that the inheritance is subject to trusts in favour of unborn persons, which must endure for many years, and for which investments of stable character are especially required. And it was a duty urged upon the executors by the greater part, if not the whole, of the adult heirs.

Their Lordships agree with the Court below

that the *onus* lies on the executors of proving that they acted *bonâ fide* and exercised a reasonable discretion. Against their good faith not an insinuation has been made. But, in their Lordships' opinion, they have not proved that they exercised reasonable discretion. Taking the tests propounded by the Chief Justice, we know nothing as to the confidence the testator had in the investments beyond the fact that he held them. But their nature was such as to demand conversion, the executors made no efforts to realize between December 1881 and July 1883; the state of the market was such as to create alarm, and the length of time was excessive.

On these grounds the executors must be held liable for loss, and then the question is what loss? The rule in England is, that if the executor fails within a reasonable time to convert investments which require conversion, the end of a year is, in the absence of circumstances pointing to a different date, to be taken as the time for ascertaining the value which he ought to have got. Their Lordships have given their reasons for fixing an earlier date in this case, and they adopt the Chief Justice's term of six months. There is a trifling item of Brick and Lime Company's shares as to which there is no evidence to show any loss. As to the other items their Lordships cannot find that the evidence supports the prices charged by the Plaintiffs in their table; but the evidence of the brokers does show some substantial loss upon the prices current some time in April 1882. The proper course will be to order an inquiry, what was the mesne market value of the shares of the four Companies which the executors could have realized on the 13th April 1882, or as near thereto as can be ascertained, and to charge the executors with that value, with lawful interest from that date. The executors should also be disallowed the items of

expense incurred after that date in connection with the shares, which are mentioned in paragraphs 2 and 5 of the second count of the plaint. On the other hand the executors should be allowed the amount of dividends accrued since the 13th April, with interest, and also the price of purchase money actually credited to the estate on sale of shares, with interest; also the shares themselves if any of them remain on the executors' hands.

As regards costs, having regard to the difficulty of the position, and the unimpeached good faith of the executors, their Lordships think that justice will be done by ordering the Plaintiffs' costs of suit as between solicitor and client, to be paid out of the estate, and by making no order with respect to the costs of the executors.

They will humbly advise Her Majesty in accordance with the foregoing opinion. And they will deal with the costs of the appeal on the same principle which they have applied to the costs of the suit.

[SECOND AND THIRD APPEALS.]

These are cross appeals in another action commenced on the 5th May 1885 by the testator's son, Willem Hiddingh, against the executors. Mr. Denyssen, as representing the Association, is sued both as administering executor and as administrator. It will be convenient to deal separately with the several heads of relief sought in the action.

The Plaintiff states that the Defendants are in default for not enforcing contracts made on or after the 14th July 1883 for the sale of some of the shares which are the subject of the first action. If it were necessary to decide this issue, the action would fail, because the Plaintiff brings no evidence to show that it was expedient,

or even possible, to enforce such contracts. But the result of the first action has now removed the ground for this portion of the second action.

The Plaintiff then seeks relief in respect of 150 shares in the Cape Commercial Bank which the executors have not sold. The Bank has failed, and the estate has been charged with the sum of 5,250*l.* for calls, with a prospect of further calls. The Defendants plead the decree in the first action as a bar to the second, and the Court has allowed the plea. It appears, however, to their Lordships that the first action was confined entirely to the shares which were sold in or after July 1883, and in respect of which the sum of 1,138*l.* 17*s.* 6*d.* was claimed as damages. The damage by retention of the Commercial Bank shares is a totally different matter, which was not and could not, as the declaration was framed, have been adjudicated in the first action. There is no evidence in the Record that it was practicable to sell these shares, or that the estate would have escaped liability if they had been sold within a reasonable time, and the executors may, for aught that appears, have a complete defence on the merits. But the Court below declined to receive evidence or to go into the merits at all, on the ground that the question had been already decided between the parties. Their Lordships think that the case should be remitted to the Supreme Court for trial of the issue raised with respect to the Cape Commercial Bank shares.

Another complaint is that the Association has charged commission against the fidei-commissary or settled estate, and is wrong in doing so, on the ground that the sums of 500*l.* given to the executors must be taken in lieu of all commission or fees which they might otherwise claim in any character which the will confers on them. No

doubt the codicil is capable of being read in this sense; but their Lordships agree with the Supreme Court in thinking that it is not the true sense. The testator clearly contemplated that a guarantee commission should be paid on the legacy given to his wife, and that is paid, not to his executors, but to his administrators. In the passage of his codicil which is relied on by the Plaintiff he distinguishes correctly between executors and admistrators, using the former term when he is thinking of the legacies of 500*l.* and the latter when he is thinking of the fidei-commissary inheritance, The Plaintiff's construction would create an inequality between the various trustees which it is impossible to think that the testator could have contemplated. The two executors who are not administrators would get 500*l.* each for executorial duties alone, the Company which is both executor and administrator would get the same sum for both sets of duties, and the Company which is administrator but not executor would be left free to make its full charge. Moreover the testator was well acquainted with the byelaws and the working of the Association; and in the 17th byelaw, which provides for their remuneration, there are three distinct heads of charge, and the charges which relate to executorships are kept quite distinct from those which relate to more permanent trusts, such as fidei-commissary inheritances. Their Lordships hold without hesitation that the legacy given to the Association does not preclude charges made by them in the character of administrators.

The remaining and the principal objections made by the Plaintiff to the accounts rendered by the Association are of a more complicated and difficult character. The liquidation accounts of the executors (and for the present purpose the

Association must be regarded as sole executor), show that they have made over to the Association and to the Orphan Chamber Company, as administrators and on account of the amounts entailed, a large number of mortgage bonds belonging to the testator. The Orphan Chamber Company are not parties to the action, and with their dealings we have now nothing to do. The Association, it is said, have taken over mortgage bonds to the amount of 76,000*l*. They claim to be the absolute owners of that property, and say that the estate can claim nothing from them but the amount of the principal debts secured by the bonds, with interest at 5 per cent. until payment. Further, for this process, they deduct at once what is called a "guarantee commission" of $2\frac{1}{2}$ per cent. on the capital sum.

To put the matter into figures, for the sake of clearer illustration, the Association take over securities, which are considered to be prime securities carrying 6 per cent. interest, say for 76,000*l*.; they have free use of that money; and because they become debtors for it and liable to pay it, they say they have guaranteed it, and charge 1,900*l*. down for the operation. Then, if they keep the money invested in prime securities carrying only 6 per cent., they take 760*l*. a year for their administration. It is stated that the commission covers the expenses of administration, but it is not easy to see how there can be much expense when the administration is reduced to the single process of paying half-yearly interest on the Company's own debt.

When the Plaintiff received from the Association the accounts of his separate share he objected to this mode of treating the estate. He made both before action and by his action some other objections to the accounts which have not been urged at the bar. The claims which we have now to deal with are, first, that the cessions

of the bonds shall be cancelled, with the consequence of disallowing the costs of those cessions; secondly, that the charge for guarantee commission shall be expunged; and thirdly, that the testator's assets shall be kept distinct from the other property of the Association, and that the Association shall account for the actual amount of interest received from those assets.

The Supreme Court have decided in favour of the Plaintiff, that the Association at all events cannot claim the guarantee commission during his life, but must pay him interest on his full share. And in favour of the Association they have decided that they are entitled to treat the testator's assets as their own property, and are responsible only for the value at which they took those assets with 5 per cent. interest.

The Association carries on its business under the authority of Act 17 of 1875. They are empowered to make such charges as shall be agreed upon, or, when not agreed upon, as shall be just and reasonable. And the Directors may frame and establish byelaws in relation (amongst other things) to the charges made by the Company, which byelaws, after the observance of prescribed formalities, are to have the same force and effect as if inserted in the Act. They have made byelaws to the validity of which no objection is taken except on the ground that they are not reasonable.

The important byelaws are the 16th and 17th. The 16th, as before observed, is divided into three heads. That which relates to the present question is as follows :—

"In guardianships, fidei-commissary and trust money, and curatorships :—

"5 (five) per cent. on the receipts of interest, dividends, house rents, or other income.

"2½ (two and a half) per cent. on property or moneys taken over from executors, guardians, or others, by the Association, and guaranteed by them.

"2½ (two and a half) per cent. for transcribing and guaranteeing inheritances, legacies, fidei-commissary inheritances, donations, and other bequests of whatever nature, from liquidation accounts of estates administered in this office to the separate accounts of the parties concerned.

"1 (one) per cent. on the appraised value of entailed immoveable property."

The 17th byelaw is as follows :—

"The Association allow and pay interest half yearly on all moneys administered by or entrusted to them either as executors, administrators, guardians, or curators. Such interest shall be at the rate of one per cent. less than the current rate of interest charged by the public Companies at Cape Town at any time on bonds on security of landed property in this colony."

The theory of the Association was very clearly stated at the bar. It is the duty of executors, they say, to turn the whole of the estate into money; that they have properly done in the case of the bonds by selling them to the Association at the full amount of the sums secured by them; the purchase money is properly invested by being left in the hands of the Association; the testator was very familiar with the practice of the Association, and must be taken to have agreed to their charges when he made them his administrators; or if not, still their byelaws are reasonable and are binding on all parties, and the byelaws authorize the course adopted. They also contend that this course is in accordance with universal, or at least very general, practice.

Their Lordships cannot assent to the first of this string of propositions. They have not been referred to any authority to show that an executor must turn all the assets into money. It is laid down that his duty is to liquidate the estate. But an estate is liquidated when it is reduced into possession, cleared of debts and other immediate outgoings, and so left free for enjoyment by the heirs. The startling theory broached on behalf of the Association is discountenanced by the opinion of the Chief Justice,

who says that an individual executor would be bound to keep the trust fund separate and distinct from his own; therefore he could not be bound to go through the absurd process of turning proper investments into money, in order to put the money back again into proper investments. The same law must apply to Companies who are appointed executors, and if any justification is to be found for the wholesale conversion effected in this case, it must be found in the special contract or circumstances, not in the general law.

That brings us to the construction of the byelaws, which regulate the rights of the parties unless at least they can be shown to be unreasonable. Their Lordships do not think that the testator's connection with the Association makes their charges "charges agreed upon" within the meaning of the Act, nor can they attribute to him any intention that the Association should be paid except by lawful charges, or any intention that they should have advantages neither indicated by their byelaws nor necessarily incidental to administration.

It is indeed argued that the byelaws do not contemplate any administration of the assets in specie, and therefore compel, or at least authorize, the course of turning them all into a simple debt due from the Association. If however the effect of the byelaws were that in every case there must be conversion of investments however unexceptionable into money for the mere sake of lending it to the Association, their Lordships think they would be unreasonable. But the 16th and 23rd Articles, which apply to administrations, clearly contemplate administration in specie, and so does Article 12, though possibly that Article may apply to agencies only. Not only is there nothing in the byelaws to debar the Association from administering the assets which the testator

had separately from their own property, but their Lordships cannot find anything to warn persons dealing with them that their practice is to sell to themselves such part of the asssets as they desire to hold, and to remain accountable only for the price.

If that is so, the effect of the cession in this case must be decided by the same tests as are applied to other acts of persons in a fiduciary position. Neither the form of the bonds nor that of the cessions is shown in the Record. It may be that a formal transfer in every case is proper for the purposes of administration, as, for example, if it become necessary to enforce payment, or if the debtor desires to redeem. It may be again that, in some cases, the money was wanted for strict executorial purposes, as for payment of debts or costs, and in those cases there could be no objection to the Association making to themselves both a formal and a substantial transfer on paying the whole of the money secured. But the present controversy relates to the fidei-commissary inheritances, of which there can be no distribution until an absolute and unburthened interest has vested in the heirs or some of them. And the facts are that an executor has of his own mere will, without the consent of the adult beneficiaries, against the will of the only one whose wishes are in evidence, without the order of any Court, transferred to himself debts secured by specific charges on land, not making any payment for the transfer, but only giving to the owners of these debts an unsecured claim against himself, with the effect of putting large emoluments into his own pocket by the transaction. To hold that the beneficial ownership has been shifted from the heir to the executor by such a process seems to their Lordships to be a violation of the fundamental principles which are applied to

fiduciary relations by every law with which they are acquainted.

It will be understood that their Lordships are confining themselves to the strict legal principle. They are not doubting the perfect stability of this Company. It is clearly one that is regarded with great confidence in the Colony. For aught they know, to be inscribed in the books of the Company as a creditor may there be considered as desirable a mode of investing money as the purchase of Bank of England stock is in England. They are not suggesting that estates may not, in some cases, benefit by such a process. It may be that, even in this case, others of the beneficiaries, or the co-executors if they had exercised any judgment in the matter, or a Court judging on behalf of infants or unborn takers would have approved or may still approve of such a process, either partially or wholly. But, as before said, the Association is practically a sole executor. No one has interposed on behalf of the beneficiaries to correct any bias felt by the sole executor, or to adjust the balance of his judgement. And under such circumstances he cannot claim that a transfer by himself to himself shall stand.

Then comes the question of the guarantee commission. If any guarantee had been given, their Lordships would feel difficulty in deciding the cross appeal on this point. They hardly understand whether the Supreme Court disallowed the immediate deduction of the commission on the ground that the byelaw does not authorize it, or that a byelaw authorizing it would not be reasonable, or that the testator could not have intended it. All these considerations are mentioned, and all with some degree of doubt. But it is needless now to go further into those questions, because no guarantee has been given. The very notion of a guarantee

requires that there shall be two sources of security to the creditor, the original source and the guarantor. But, on their own theory, the Association are the sole debtors of the estate. If they have used the word "guarantee" to apply to debts due from themselves and from nobody else, that is a misleading use of the word, and cannot avail them. But their Lordships think that they have not so used it. The mention of guarantees in the 16th byelaw is one of the passages in that article which have led their Lordships to the conclusion that the Association contemplate the administration of assets in specie, and apart from their own property. When the Association have given a guarantee, it will be time enough for them to claim a commission; possibly none may ever be given.

It has been pointed out that the Plaintiff represents only one of seven shares, and that only as regards his life interest. But if the corpus of the estate has been dealt with in a manner which cannot be justified in law, it is competent for any one interested to insist on the right principle being applied. In the recent case of Beningfield *v.* Baxter this Committee held that they were bound to declare that a sale by an executor to himself was void, at the suit of one person among many interested, and a person whose interest in the property might possibly, and even probably, be reduced to nothing by the intervention of prior claims. The decision now pronounced does not prejudge the way in which it may hereafter appear desirable to administer the estate on proper consideration and with due regard to legal methods.

Their Lordships think it is proper—

(*a*) To declare that, under the circumstances appearing in this case, transfers made to the Association of

securities belonging to the testator's estate, in consideration only of the Association taking upon itself the obligation of paying to the testator's estate the sums secured thereby, do not confer upon the Association any right of treating such securities or the money thereby secured as their own property.

(*b*) To declare that the Association are bound to administer such securities and money for the benefit of the testator's estate, and to pay to the Plaintiff in respect of the income thereof such sums as, upon a due statement of account between him and the Association, are found to be coming to him.

(*c*) To declare that the Association, not having guaranteed any portion of the fidei-commissary inheritances, are not entitled to any guarantee commission.

(*d*) To dismiss the cross appeal.

(*e*) In other respects to affirm the order of 13th July 1885 now appealed from.

(*f*) To direct the accounts to be taken and reformed with reference to the declarations hereby made.

It will be observed that their Lordships decide nothing as to the costs of the cessions, because, for the reasons before stated, they cannot tell whether it may not have been proper to make cessions of all the securities to the Association, though they could not thereby become the absolute owners of the property transferred. Neither have they decided what the Association are entitled to charge for their administration of the assets on the new footing

which is assigned to them. They conceive that those matters will best be dealt with by the Supreme Court in taking the further accounts. They will humbly advise Her Majesty in accordance with the foregoing opinion, and the Association must pay the costs of the appeals.