Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Bank of Montreal v. *Sweeny, from the Supreme Court of Canada; delivered 25th June* 1887.

Present:

THE LORD CHANCELLOR.
LORD HOBHOUSE.
LORD MACNAGHTEN.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

Their Lordships consider it to be proved in this case that Rose held the disputed shares upon a trust not disclosed by the entry in the Company's books; that he transferred them to the Bank in breach of his trust; that at the time of the transfer the Bank knew of Rose's position; and that the Plaintiff turns out to be the person in whose favour the trust existed.

It has been argued for the Appellants that these things are not proved, because they require a written *commencement de preuve*, and have not got it. But on this point their Lordships stopped the Respondent's Counsel. They are quite clear that if a written *commencement* is needed, it is to be found in the letters of Crawford and Lockhart coupled with the books of the Rolling Mills Company, and in the transfer executed by Rose to Buchanan on the 3rd June 1876.

Under these circumstances the question arises whether the Bank must not be in the same position as if they had known that the Plain-

50269. 100.—6/87.

25

tiff was interested in the shares, and that the transfer by Rose was in violation of his duty to the Plaintiff. Their Lordships do not impute moral blame to Mr. Buchanan or to any agent of the Bank, for those gentlemen may be guilty of nothing more than a mistake of law. Nor do they think it necessary to examine how far the relations between Rose and the Plaintiff may have resembled or differed from those of an English trustee and his beneficiary, or to go into the English doctrines of constructive fraud, or constructive notice. The Bank had express notice that as regards the property transferred to them Rose stood to some person in the relation expressed by the words "in trust," and the only question is what duty was cast upon the Bank by that knowledge. Their Lordships think it wrong to say that any less duty was cast upon them than the duty of declining to take the property until they had ascertained that Rose's transfer was authorized by the nature of his trust. In fact they made no inquiry at all about the matter, following, as Mr. Buchanan says, the usual practice. So acting, they took the chance of finding that there was somebody with a prior title to demand a transfer from Rose, and as the Plaintiff is such a person they cannot retain the shares against her claim.

Their Lordships are led to this conclusion by the ordinary rules of justice as between man and man, and the ordinary expectations of mankind in transacting their affairs. If indeed they found any principle of Quebec law which absolutely forbad that property should be placed in the name of a person, with a simultaneous notice providing that his power over it should not be absolute but restricted, that would control their decision. That view has been pressed upon them from the bar with great ability and force, but, as they hold, without authority to support

it. The authorities cited relate to *mandataires prête-noms*, and are to the effect that, when once property has been placed under the dominion of such an agent, third parties may safely deal with him alone, even though notice is given to them that his principal is not assenting to his acts. Their Lordships think it unnecessary to examine this statement of the powers of a *mandataire prête-nom*, for they find no definition or description of such an agent which does not require that he should have a *titre apparent*, which they understand to mean that he must be ostensible owner, made to appear to the world as absolute owner. They asked whether there was any text or case to show that an agent can be a *mandataire prête-nom* when the instrument conferring the property on him carried upon its face a declaration that his property is qualified. No such authority could be found. In this case Rose was never for an instant held out to the world as absolute owner, and therefore he never could have given a good title to a third party by his own sole authority.

Then it was argued that the words "in trust" do not show a title in any other person, and that they might be merely a mode of distinguishing one account from another in the Company's books. Their Lordships think that they do import an interest in some other person, though not in any specified person. But whatever they mean, they clearly show the infirmity or insufficiency of Rose's title; and those who choose to rely on such a title cannot complain when the true owner comes forward to claim his own.

It is worthy of remark that, in their plea, the Appellants claim to be the true owners of the shares upon the very same principle upon which the Plaintiff's claim is founded. Rose did not transfer them to the Bank by name, but to Buchanan "in trust." The Appellants aver

that this transfer was made as security for a debt due from Rose to them, and that the shares " are now legally held for the said Bank."

If that is the essential truth of the transaction as between Buchanan and the Bank, why should it be otherwise as between Rose and the Plaintiff?

The result is that their Lordships agree in all material points with the Supreme Court of Canada. They will humbly advise Her Majesty to affirm the decree of that Court, and dismiss the appeal. The Appellants must pay the costs.

Judgement of the Lords of the Judicial Committee of the Privy Council on the appeal of Uman Parshad v. *Gandharp Singh from the High Court of the Judicial Commissioner of Oudh; delivered July 6th*, 1887.

Present:

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

IN this case only one question was argued, and that was whether the two transfers executed by Gulab in the years 1863 and 1864 to Bissesur, the husband of her only daughter, were real transfers, or benami. That question turned out to be a complicated one, and it was necessary to go into a good deal of evidence of a varied and rather voluminous nature. The Plaintiff maintains that the substance of the transaction is the same as the form of it, and that the property, consisting of four villages, conveyed to him by deeds, duly attested registered immediately afterwards and subsequently proved and filed in a suit, was actually sold to him. As to the deeds there was no doubt. The only question is whether Bissesur the grantee was a benamidar.

It is familiar to us all that the system of putting property benami is so extremely common in India that the mere fact of a deed being executed in proper form, and apparently effecting a valid transfer to another, is not as good evidence of a real transfer as it would be in other countries, and even a slight quantity of evidence to show that it was a sham transaction

A 51695. 125.—7/87. Wt. 328. E. & S.

26

will suffice for the purpose. Still, such a transfer cannot be considered as nothing. The person who impugns its apparent character must show something or other to establish that it is a benami or sham transaction.

The first question here is, what are the probabilities of the case on consideration of the deeds themselves, and the position of the grantor? What motive had Gulab for putting the property into benami? She was not purchasing the property. It was vested in her in possession, and had been so for a considerable number of years. It is not suggested that she was in any difficulties, so that creditors might be baffled by the proceeding. On the contrary it appears that she was a woman of substance and position in her own country. The only suggestion is, that inasmuch as there was a suit between her and her brothers-in-law, represented by one Balbhadar, concerning these villages, she used this transaction in order to impede Balbhadar's proceedings. But whatever such a transfer might do to impede general creditors, it is difficult to see how it could impede Balbhadar, who was claiming the property by a title as directly available against a transferee from Gulab as against Gulab herself. Moreover the four villages were part of fifteen villages which were the subject of dispute between her and her brothers-in-law, and which she had received on a partition between them. With regard to some of the fifteen villages she was out of possession. With regard to these four she was in possession. She was in possession of more, it requires a minute examination to tell how many, but certainly of five, and no reason can be assigned why she should have selected four villages out of those which were in dispute, and which were in her possession, and have placed those four in the name of a benamidar. There is no

antecedent probability that this is a benami transaction.

Then their Lordships ask what is the direct evidence on the point, oral evidence given by witnesses who profess to speak to it. There are two witnesses called for the Defendant — Hira Singh, and Sitaram—who say that the transaction was a sham one, and that Gulab remained in possession, apparently they mean to say during the rest of her life. But they give no details; they speak to no acts of possession; even as to the time of possession their language is quite vague and general; and they tell, both of them, the most extraordinary story with respect to these deeds, namely, that when Balbhadar, the person against whom it was suggested that these deeds were to be a defence, appeared upon the scene, Gulab immediately told Balbhadar that the deeds were all sham deeds. Their Lordships have no hesitation in treating the evidence of those witnesses as worthless.

The only other witness who gives direct evidence on the subject is in rather a curious position. He was the patwari of one or more of these villages—certainly of the village of Turni—and he was called in this suit. His name is Sheo Sahai. In this suit he stated first that the transaction was a sham one, and that Gulab remained in possession, and received the rents. But then a document was put into his hands, which was a deposition made by him in a mutation proceeding sixteen years before and within three or four years of the date of the transactions, and he was asked whether it was true, and he said it was true. He was rather indignant at the truth of it being impugned, and he said:—"Do you think I would tell a falsehood? Of course it is true." But that deposition shows that there was a sale by Gulab to Bissesur, and that Bissesur entered into possession and received

the rents, and that when Fatteh, who was the common heir of the two, Gulab and Bissesur, applied for a mutation of names, she applied for it on the footing of Sheo Sahai's evidence, and as the heir of Bissesur. Therefore the evidence of Sheo Sahai must be taken as some evidence to show possession on behalf of Bissesur. There is actually no evidence the other way, and so the balance of testimony on that point inclines in favour of the Plaintiff.

Their Lordships will now turn to another branch of the case. It is said that there is no mutation of names; that no witnesses have been called to prove the deeds; that no proof has been given of payment of the money; no proof of the receipt of the rents; and no proof of the payment of the revenue by Bissesur. It is quite true that all that negation of evidence appears in the case. With regard to the mutation of names, the matter is explained in this way. It is said that owing to the dispute between Gulab and her brothers-in-law the application for mutation was delayed; and their Lordships certainly find it to be the case that when a decree had been given in favour of Gulab in August 1866, and when such a time had elapsed as, in the opinion of the patwari Sheo Sahai, had precluded an appeal, the application is made, namely towards the end of 1866 or the beginning of 1867. That may be the true explanation. But however that may be, the absence of any mutation of names hardly tells much in favour of the Defendant's view, because if this were a benami transaction entered into for the purpose of baffling somebody who was claiming the property, the mutation of names would be an important part of the proceeding; because without that mutation Gulab remained the ostensible owner in the Collector's records, and the process of baffling her adversary would be a very imperfect one.

Indeed it is common experience that in these benami transactions there is a mutation of names when it is intended to baffle creditors, and all the proceedings which would attend a real transfer are carefully gone through in order to throw a veil over the reality.

With regard to all the other points, it must be remembered that this is not the ordinary case of a benami dispute. In the ordinary case you have the benamidar or those claiming under him on the one side, maintaining that the transaction is a real one; and you have the former owner and those claiming under him on the other side, maintaining that it is a sham; and each party has in his own power such receipts, such evidence of payments, such connexion with the agents concerned, as should suffice to prove his own case if it is a true one. But the peculiarity of this case is that the title of benamidar, and the title of the original true owner, coalesced in the person of Fatteh Kunwar within four years of the first transaction and within three years of the second; and it was she—and it is the Defendant who is her representative—who have had in their hands the whole of the evidence necessary to prove whether the transaction was a sham or a real one. Therefore the absence of evidence certainly does not tell against the Plaintiff, but it rather tells against the Defendant, who might have produced both witnesses and documents which would throw light upon the case.

Under these circumstances great importance is to be attached to assertions of title made, either by Gulab or Fatteh, from time to time in legal proceedings. Let us follow them in chronological order. In the first place there was Balbhadar's suit, which was commenced in 1863, and in which a decree was made in 1866. The Judicial Commissioner has rested

great weight upon the decree in that suit as against the Plaintiff. What he says is:— "Seeing then that Gulab Kunwar continued in possession long after the sale "deeds, and sued on her own title in her own "name, and got a decree for this property "in her own name for herself and her heirs, "I can hardly imagine a clearer case of adverse "possession as against Bissesur Bakhsh and "his heirs." As to the possession, that has been dealt with; as to the suit, there is clearly an inaccurate statement by the Judicial Commissioner. The suit was instituted by Gulab for recovery of several villages which came to her under the partition, and of which, by a series of complicated proceedings, she had lost possession. She never sued for the five villages of which she was clearly in possession, and of which the four now in suit are part. The way in which those villages came in was on the plea of the Defendant, who said that, so far from Gulab having the right to recover from him the villages for which she sued, he had the right to recover from her five villages of which she was in possession. How exactly that matter was dealt with in Court before the Judge we do not know. It may have been that the parties agreed there should be a decree covering the whole matter in dispute, but those five villages were not regularly in suit at all. The decree does deal with them. It gives to Gulab the absolute proprietary right in them, and dismisses the Defendant's claim—the counterclaim to recover from the Plaintiff the five villages in her possession. Those words are relied upon as proving Gulab's possession. But it is obvious, independently of the fact that it was quite irregular to make a decree about these villages, that there was no question of possession as between Gulab and Bissesur in this suit.

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 9th 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

27+28

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).	For what Executors sold in 1883.	Deficiency.
	£ s.	£ s. £ £ s. d.	£ 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 bye-laws 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

Such an issue never was raised or thought of. The only question of possession, if any, was as between Gulab and Balbhadar. Strictly and regularly there was no question whatever of possession, but if any were brought in, then it was only as between Gulab and Balbhadar, and as between those two she was in possession. She was then recorded in the Collector's books, and it was quite sufficient for the determination of any question that could possibly be brought, even irregularly and by consent of the parties to that suit, to treat her as the party in possession. And in point of fact the decree uses the right language upon that point. It decrees to her a right against the Defendant Balbhadar Singh, and against nobody else.

Then come the mutation proceedings on the 1st of January 1867, in which the evidence of Sheo Sahai, which has been before observed upon, was given. In those proceedings Fatteh Kunwar, who was the heir both of Gulab and of Bissesur, claims to be registered as the heir of Bissesur. Why should she have made that claim? Her interest was all the other way. If she were heir of Gulab she had absolute dominion over the property. If she were heir of Bissesur, she had only the widow's estate, and we shall see presently what importance she attached to that distinction. Moreover it was more simple to claim as the heir of Gulab. She was the recorded owner, and, as far as the Collector's records went, Fatteh had only to show that she was Gulab's only child, and the mutation would be made as a matter of course. But she does not do that. She introduces that which is entirely new matter into the Collector's records—the conveyance to Bissesur, and then makes out her claim as heir of Bissesur. That seems to their Lordships strong evidence that, in the opinion

of Fatteh Kunwar, or of her advisers at that time, her true title was as heir of Bissesur.

Next comes Ratan Singh's suit in 1868. Ratan Singh after the death of Gulab revived the old dispute between Gulab and her brothers - in - law, with only this difference: that whereas in Gulab's lifetime they contended that she was entitled only to maintenance, now after her death they contended that she was only entitled to the widow's estate. That dispute was raised in 1868. Fatteh Kunwar appears and puts in a plea by her agent, in which she again sets up her title through Bissesur. The judgement proceeds on that footing. The judgement is to the effect that the Plaintiff's claim is declared "not to lie "against Defendant, who holds as her husband's "heir the property acquired by him by purchase "from Gulab, who was possessed of the legal "power to settle." Of course that is no decision binding the present parties, but it shows as distinctly as anything can show the position which Fatteh Kunwar thought it right to assume in the year 1868.

All these things are rather emphasised by the wajib-ul-arz which was made at Fatteh Kunwar's instance in 1869. Before dealing with the effect of it, their Lordships wish to make some observations upon the extraordinary and startling character of that document. A wajib-ul-arz has been considered to be an official record, of more or less weight according to circumstances, but still an official record, of the local customs of the district in which it is recorded. It has been received before this tribunal and elsewhere as important evidence. In the case cited from the 7th Indian Appeals it is stated that "these documents are entered on record in "the office. They must be taken upon the "evidence, which is general evidence, to have

" been regularly entered, and kept there as " authentic wajib-ul-arz papers." In that case effect was given to the wajib-ul-arz produced. In this case the Judicial Commissioner has treated the wajib-ul-arz in question as a document of weight, which must be taken as showing local customs until some proof to the contrary is produced. But on looking at the evidence their Lordships find that this wajib-ul-arz was the concoction of Fatteh Kunwar herself, received by the settlement officer as an expression of her views which she had a right to enter upon the village records, because she was proprietor of the estate. But they are not entered as her views, they are entered as the official record of a custom. And supposing 50 years had gone by, and then a dispute arose about the family or the local custom, this would probably have been produced from the office as an entry made 50 years ago, under circumstances of no suspicion at all, and it would be taken that the Government officer had recorded it as the local custom. And now we find it deliberately stated (though there was an appeal from the entry of this wajib-ul-arz) by the Oudh Courts that the proprietor has the right to enter his own views upon the village records, and have them recorded as if they were the official records of the local customs. Well, that is an exceedingly startling thing, and their Lordships think that the attention of the Local Government should be called to what has appeared in this case to have been done in one instance, and may be done in other instances. It does not only render those records useless — they are worse than useless — they are absolutely misleading, because they are evidence concocted by one party in his own interest. It is to be hoped that under the Act of 1876, which empowers the Local Government to make rules under which these records shall be

framed, such proceedings will not take place any more.

So much for the character of the document. Now for its effect. It is not now contended that, if Bissesur was entitled, the custom which the wajib-ul-arz asserts can prevail. In fact there is no evidence of it. Mr. Graham most properly abandoned that part of the case. But that does not get rid of the circumstance that in 1869 Fatteh Kunwar thought it to her interest to put this fictitious document on the village records, asserting her own power to alienate such estate as she had got from Bissesur. If she had taken everything as the heir of Gulab, there was no object in getting the entry made; but if she was the heir of Bissesur, then she had a strong object, because otherwise she could not make a complete alienation of the estate.

That, in their Lordships' opinion, strengthens the circumstance that up to that time she had always been asserting herself to be the heir of Bissesur, and leads them to conclude that she could not have asserted it for any other reason than because it was the truth.

Then comes the gift by Fatteh Kunwar to her daughter in 1876; and again we find that though it is not very precise as to the nature of her title, she states that Munnia is a natural heir "after me and my husband." Now that exactly accords with the position which Munnia would have if the property came from Bissesur, and it does not accord with the position which Munnia would have if the property came from Gulab. Therefore it appears again that Fatteh Kunwar considered herself as taking the property from Bissesur, and as conveying it to Munnia under that right which she alleged on the face of the wajib-ul-arz that she possessed, but which in fact she did not possess.

The only remaining proceeding is the declaratory suit by Uman Parshad in 1876. That raised the very question which has now to be decided in this suit. The suit was got rid of because it was declaratory only. But the parties had now come face to face. Uman Parshad, the very man, or representing the very family, against whom the benami transfer was said to be effected, comes and claims the property. Now clearly is the time when this benami title should be set up to embarrass the enemy. But it is not set up. Nothing is said about it, except what may be gathered from a very obscure, and probably very imperfect sentence taken down by the Judge as either the plea or the argument of Mr. Jackson, who was the counsel for Fatteh Kunwar. It is difficult to gather anything precise from it; but he seems to have suggested that Bissesur took as benamidar, not for Gulab, but for his wife Fatteh Kunwar—a totally different case from that which is made on the present occasion. That again is very strong evidence that Fatteh Kunwar, or her advisers, felt that they could not with truth and honesty declare that it was a sham transaction.

Thus we find that Fatteh Kunwar had gone on from 1866 to 1879 asserting herself to be in possession of this property as heir of Bissesur; and no assertion to the contrary was made during her lifetime. If she had made the contrary assertion, perhaps some proceedings might have been taken; but the lapse of time affords an additional reason why her grantee or representative should not be allowed to turn round and assert a directly contrary title.

The result is that all these lines of consideration point in favour of the Plaintiff's contention; and inasmuch as he has the form of the transaction on his side, and everything points in favour of the substance of the transaction being with him too, his case should prevail.

Their Lordships will humbly advise Her Majesty to discharge the order of the Judicial Commissioner, and to dismiss the appeal to him with costs, and the Respondent must pay the costs of this appeal.