Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of De Montmort v. *Broers, from the Supreme Court of the Cape of Good Hope; delivered 22nd December* 1887.

Present:

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

The question in this appeal arises out of a protracted litigation concerning the estate of Jacob Letterstedt, who died in March 1862, leaving him surviving his wife, Lydia Letterstedt, and an only daughter, Lydia Corinna Letterstedt. Jacob Letterstedt carried on in his lifetime a brewing, distilling, and malting business at Mariedahl, in the suburbs of Cape Town, and at Cape Town. By his will he directed that this business should be carried on after his death as the same was carried on by him, and that his executors should advance capital for that purpose. This capital was to be sufficient, but not to exceed 10,000*l*. He further directed that the profits of this business should, until his child or children attained the age of 25 years, be divided into six shares, whereof four shares should be for the benefit of his child or children, one share for the manager of the business at Mariedahl, and one share for the manager at Cape Town. He appointed David Thompson to be manager

55

at Mariedahl, and Oscar Hedelius, and failing him Tobias Spengler, to be manager at Cape Town.

The testator also carried on a business in partnership with Oscar Hedelius under the name of Jacob Letterstedt & Co. There is no direction in the will with reference to this business, but by the deed of partnership the testator was not bound to carry it on after the 1st January next after Hedelius' death. Hedelius died in July 1863, and therefore the executors were not authorized to carry on this business after 1st January 1864. They carried it on, however, till the end of 1872, after which it was put in liquidation. This is the business which, in the litigation, is called the unauthorized business. The will, after giving specific legacies to his wife and daughter, and other legacies, and also giving directions concerning the brewing, distilling, and malting business, contained the following clauses:—

"And I devise and bequeath all the rest, residue, and remainder of my estate, property, and effects, as well moveable as immoveable, and wheresoever situate, and whether the same be in possession, reversion, remainder, or expectancy, which shall remain after payment of my just debts and funeral and testamentary expenses, and not hereby otherwise disposed of, unto my said daughter, if and when she shall attain the age of 25 years, or marry under that age, the same to be bound with fidei-commissum, so that my daughter may enjoy the interest, dividends, and annual income thereof, to be paid to her annually upon her receipt, or in case of her absence from the place of residence of my executors, upon a power of attorney to be executed by her, and which interest, dividends, or annual income shall not be under the control of any husband whom she may marry, but shall be applied solely for her use and benefit; and after her death the said residue shall be paid and belong to her child and children upon such child or children attaining the age of 21 years being male, or attaining 21 years or marrying with consent of parents or guardians being female, and if she shall die without leaving any child or children who being a son or sons shall live to attain the age of 21 years, or being a daughter or daughters shall live to attain that age or marry, I give and bequeath my estate, property, and effects, subject to the

legacies and bequests hereby given, to the person or persons who, according to the law of the Cape of Good Hope, would be entitled thereto if I died intestate and unmarried.

"If I should leave any child or children hereafter born, who being a son or sons shall attain the age of 25 years, or being a daughter or daughters shall attain that age or marry under it, I declare that such child or children shall participate in all the legacies, bequests, and benefits hereby given to my said daughter in equal shares with her, and in that case I revoke and withdraw from this will the last clauses herein-before contained.

"And I direct that all moneys and effects which shall accrue by way of rents, profits of business, or otherwise, shall be paid to the Board of Executors as follows, that is to say, the said rent within six months after the same shall become due, and the said profits within six months after the books shall be closed, and the profits of the business ascertained."

The will then, after an appointment of guardians of his daughter, said :—

"I appoint Tobias Spengler, Per Oscar Hedelius, and the Board of Executors at Cape Town, the executors of my will and testament and administrators of my estate, with all such power and authority as is required in law, and especially the power of assumption, substitution, and surrogation.

"I give to the said Board of Executors an annuity of one hundred pounds sterling so long as the business at Mariedahl shall be carried on."

Finally, after some directions not now material, the testator declared that his will should be construed and his property be distributed under it in accordance with the law of the Cape of Good Hope.

The position of an executor under the Roman Dutch law is thus stated by Van der Keessel, in his Select Theses on the Laws of Holland and Zeeland, Thesis 323, Lorenz's Translation, p. 116 :—"The executors of a testament, since "they are, as it were, procurators appointed by "the testator to manage his funeral, to recover "what is due to him, to pay his legacies and "debts, and to administer his property until a "division thereof can be effected, and since "therefore they manage the affairs of the heirs "also, cannot debar the heirs from the in- "heritance, unless the testator has directed

"otherwise, nor alienate the property without "their consent. And hence it has not improperly "been enacted at Middleburg that if all the "heirs agree amongst themselves, they may, after "payment of what has been left to the executors "in the testament, and on giving security to "carry out the will of the deceased within a "year, remove them from the office." The words in the will which follow the bequest to Miss Letterstedt in fidei-commissum when she attains 25 or marries cannot be construed as intended to debar her from the inheritance expressly given to her. If effect cannot be given to them according to the law of the Cape of Good Hope, they are inoperative. There is no bequest of the estate to the executors. They are only appointed administrators, and the will does not, in their Lordships' opinion, contain any direction which can be construed as debarring Miss Letterstedt from the inheritance as the heir by birth of the testator until she attained 25 or married, and after that time as the heir burthened with a fidei-commissum. Van der Keessel, Thesis 311, Lorenz's Translation, p. 112, says:—"A "person instituted heir from a particular time "does not become heir before such time, and the "legitimate heir will in the meantime be the "heir. Similarly, a person appointed heir up to "a certain time ceases to be heir after such time, "and the person whom the testator has substi- "tuted either directly (as in the case of military "substitution), or by way of fidei-commissum, "or, failing such substitute, the legitimate "heir of the deceased, will succeed to the "inheritance."

This being the position of Miss Letterstedt, in February 1874 an action was commenced by Mr. Fairbridge, an attorney, as her curator *ad litem*, she being then a minor. On her attaining her majority in May 1874 the Record

was amended so as to make her the Plaintiff. In this action the Plaintiff sought to have the accounts furnished to the guardians, in accordance with a direction in the will, up to and including 31st December 1872, amended by omitting all charge for commission and claimed that the Defendants should be ordered to refund to the estate a sum of 28,512*l.* 2*s.* 4*d.* which they had allowed themselves for commission, partly on gross sales in the unauthorized business in which she then alleged large profits had been made; and she prayed for a declaration that the Defendants were not entitled to make any charge for commission, as they had received the annuity of 100*l.* as provided by the will. The action came on for trial in October 1874, but was not tried out, as a compromise was come to. The record states that, on the 26th November 1874, having heard Mr. Attorney General Jacobs, of Counsel for the Plaintiff, who handed in a consent paper signed by Counsel for the parties respectively, and prayed judgement in the terms thereof, and having also heard Mr. E. J. Buchanan, of Counsel for the Defendant, who consented to judgement in terms of the said consent paper, the Court grants judgement accordingly in terms of the said consent paper, which is in the words and figures following, that is to say :—

"It is hereby agreed that judgement shall be entered in favour of the Plaintiff upon the following consent paper :—

"1. That the Defendants shall, on account of the charges on the gross sales claimed in this action, refund the sum of 21,000*l.* (including a sum of about 8,000*l.* lying undrawn in the Defendants' hands), in settlement of every claim or demand that can or may be made on the Defendants in connection with their administration of the estate of the late Jacob Letterstedt, and of all transactions relative thereto, or business connected therewith, up to the 31st December 1872 inclusive.

"2. That the said sum of 21,000*l.* shall be taken to include any amount which may be claimable and payable to Mr. Thompson in his capacity as manager at Mariedahl for his one sixth share of the profits of the brewery and distillery

business up to the said 31st December 1872; and that, subject to such claim or demand of Mr. Thompson, the said sum of 21,000*l.* be brought up and accounted for to the estate in a liquidation account to be forthwith framed; 1,000*l.*, part of the said 21,000*l.*, to be paid to Mr. Thompson forthwith in cash.

"3. That the several liquidation and all other accounts made out up to and including the 31st December 1872, relative to the administration of the estate or of the business heretofore carried on in connection therewith, shall be considered finally approved and for ever settled and confirmed by this judgement.

"4. That Miss Letterstedt, within six months from this date, shall come to an arrangement with the executors as to the future conduct of the business undertaking and the control of the property acquired after the death of Mr. Letterstedt.

"5. That, failing such an arrangement, Miss Letterstedt shall either take over the property acquired after the death of Mr. Letterstedt, or shall authorize a sale thereof by the Board of Executors, failing which the Board shall be authorized to make a sale thereof, so that the executors may be placed in a position to carry out Mr. Letterstedt's will, and limit their administration to the property and business authorized by the will.

"6. That the acceptance of the annuity of 100*l.* bequeathed by the testator to the Board of Executors shall not disentitle them to commission and remuneration from and after the 31st December 1872, in like manner as if the said bequest had never been made.

"7. That no commission or gross sales be charged since this action or thereafter.

"8. That the Defendants pay the costs of this suit."

It appears to their Lordships that when Miss Letterstedt was let into possession of the brewery and distillery under this order, the view of her legal position before stated must have been taken apparently without material doubt or discussion by the parties to the then litigation. The only alternative view is that which was strongly urged at the bar by Sir Horace Davey, viz., that the residuary gift must be construed as a trust bequest, such as is familiar to English lawyers. But under such a trust the tenant for life would not have been let into possession.

In 1878 Miss Letterstedt, on attaining the age of 25 years, commenced another action against

the executors, in which she sought,—1st, an investigation of all the accounts which had been rendered by the executors; 2ndly, the right of conducting the business; and, 3rdly, the removal of the Board of Executors on account of misconduct. It is unnecessary to state more of the proceedings and judgement in that action than that on the 11th July 1879 judgement was given "that the compromise effected in "1874, in terms of which judgement was given "by consent on the 26th November 1874, was "a final settlement of everything before the "31st December 1872 inclusive, and cannot in "this action be reopened or set aside."

Miss Letterstedt (then Vicomtesse de Montmort) appealed to Her Majesty in Council against this judgement, and, on the 22nd of March 1884, this Committee gave judgement that the judgement pronounced on the 11th July 1879 was final and conclusive. Other questions were decided which need not be mentioned. Her Majesty, by an Order in Council made on the 14th April 1884, ordered and decreed accordingly.

Miss Letterstedt had in 1879 married the Vicomte de Montmort, and has issue now living two children, one born on the 2nd August 1881 and the other on the 29th July 1882. The present action is brought by the Vicomte de Montmort, as their father and natural guardian, against the Secretary of the Board of Executors, and the matter of complaint in it is substantially the same as the matter of complaint in the action of 1878 for which relief was sought under the first head of relief. The Defendant excepted to the declaration upon the ground that the matter complained of was *res judicata*, and it is stated by Mr. Justice Smith, in his reasons for the judgement of the Supreme Court, that

Counsel on both sides agreed to treat the exception as a plea, considering it was desirable that the records in the previous suits should be before the Court. The Supreme Court, on the 7th January 1886, allowed the plea of *res judicata*, with costs, and this appeal is from that decision. It appears to their Lordships that the main question is whether the children, on whose behalf the present action is brought, are bound by the compromise which was made in 1874. If they are, it is unnecessary to consider the effect of the judgement in 1879.

The opinion of Voet, referred to by Mr. Justice Smith in his reasons, is that, where the fidei-commissum is conditional, the fidei-commissary may be bound by a compromise made by the fiduciary, if he acts *bonâ fide* in respect of a doubtful right (Voet, 2, 15, 8), and the Thesis 516 of Van der Keessel which was relied upon by the Plaintiff's Counsel is not opposed to the application of this opinion to the present case. He says that a person who has been prohibited from alienating cannot, it seems, so compromise as to effect an alienation, nor, therefore, can an heir who is burthened with a conditional fidei-commissum do so without the consent of the fidei-commissary. This compromise, by which part of the disputed claim against the Board of Executors upon the accounts is accepted, is not, in their Lordships' opinion, an alienation of property, and the Thesis appears to recognize the power to compromise where there is not an alienation.

Miss Letterstedt, when she attained 25, took the residue of the estate burthened with a fidei-commissum which was conditional upon her having a child or children who should attain 21, or, being a female, marry with consent of parents or guardians. Until she attained 25 or

married, she was the heir by birth, subject to the bequest to herself if and when she should attain that age or marry. It closely resembles a conditional fidei-commissum, and the reasons which Voet gives for the power to compromise are equally applicable to it. In 1874 Miss Letterstedt fully represented the estate. She was the only person who could sue the Board of Executors on behalf of it, and it was uncertain who would become entitled under the fidei-commissum. Their Lordships are not disposed to place any reliance upon the terms of the compromise having been made the judgement of the Court. It cannot be regarded in the same light as a judgement given after a hearing where the Court has had all the facts before it, but still the Court must have considered it to be a compromise which it might sanction.

It was contended by Sir Horace Davey that the compromise cannot bind the unborn children, because the Court made no inquiry and exercised no discretion on that behalf. But that argument is answered by the fact that the gift is made not under English law, but under the law of the Cape of Good Hope, and is by the testator's direction to be construed according to that law. It does not appear that there is in that law the peculiar practice of the English Court of Chancery, by which it takes on itself the responsibility of judging for those who cannot judge for themselves. On the other hand, by the Cape law the inheritance is represented in circumstances where by English law it would not be represented. In this instance, Miss Letterstedt, the representative of the inheritance, had the same interest as her children in pressing claims against the executors.

For these reasons, their Lordships are of opinion

that the minors on whose behalf the Plaintiff sues are bound by the compromise, and they will humbly advise Her Majesty to affirm the decree of the Supreme Court and to dismiss the appeal. The Appellant will pay the costs of it.