Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Letterstedt (now Vicomtesse de Montmort) v. Broers and another, from the Supreme Court of the Cape of Good Hope, delivered 22nd March 1884.

Present:

LORD BLACKBURN.
SIR ROBERT P. COLLIER.
SIR RICHARD COUCH.
SIR ARTHUR HOBHOUSE.

This is an appeal against part of a judgement of the Supreme Court of the Colony of the Cape of Good Hope, dated the 11th July 1879, an order dated the 14th September 1880, and a judgement of the 2nd day of July 1881.

These judgements and order were made in an action commenced by the Appellant in June 1878 against the Defendant Broers, in his capacity of Secretary to "the Board of Executors of Cape Town," who are the principal Defendants below, and Respondents now.

This is a body incorporated by an Ordinance of the Cape of Good Hope. It is not necessary to say more of them than that, by the terms of their deed, they might act as executors and trustees, on the terms that they were to have remuneration for so acting.

The other Respondent was added during the litigation by directions of the Court below. It is not necessary to notice him further until the costs of this litigation are to be disposed of.

It is desirable before proceeding to discuss the judgements and order to state so much of the facts as is necessary to make them intelligible.

The Appellant is the only daughter of Jacob Letterstedt. She was born on the 13th May 1853, and consequently attained the age of 21 on the 13th May 1874, and the age of 25 on the 13th May 1878.

Jacob Letterstedt, her father, died on the 10th day of March 1862, leaving a will.

This appeal does not require their Lordships to construe that will, and it is not necessary to state its provisions further than is required to make intelligible the questions which their Lordships are called upon to decide.

The testator carried on in his lifetime a brewing distillery and malting business, at two places, Mariedahl and Cape Town, and he directed in his will that this business should be carried on after his death as the same was carried on by him, and that his executors should advance a sufficient capital for the purpose, not exceeding in all 10,000*l*. He makes rather elaborate provisions as to how the business should be carried on by managers; and he directs that the profits of the business should, until his child or children should attain their age of twenty-five years, be divided into six shares, "whereof four shares "shall be for the benefit of my child or children, "one share to the manager of the business at "Mariedahl, and one share to the manager of "Cape Town." He appoints David Thompson to be manager at Mariedahl. At Cape Town he appoints Per Oscar Hedelius, and failing him Tobias Spengler. And he directs that in case of a vacancy the executors shall, when requisite, appoint a fit person to be manager. If the manager at Cape Town prefers it, he is to receive an annual salary of 350*l*., with a further allowance of 150*l*. for a clerk, instead of a share in the

profits. So long as the business is carried on in the above manner the executors are to appoint two persons to inspect the property and examine the accounts twice in every year, receiving two guineas a day for their trouble.

The testator also at the time of his death, carried on a business in partnership with Per Oscar Hedelius, under the firm name of Jacob Letterstedt & Co.

There is no direction in the will as to this business; but, under the terms of the deed of partnership, paragraphs 13 and 14 (Record, p. 178), it is clear that the testator was not bound to carry on that business after the 1st day of January next ensuing after the death of Per Oscar Hedelius; that is, as he died on the 6th July 1863, after the 1st January 1864. What might be the obligations of the testator's executors under that deed during the twenty-one months between the death of the testator in March 1862 and 1st January 1864 it is not necessary to consider; but, after that date, they had no authority to carry on the business.

The following parts of the will may conveniently be read now:—

"I declare that in case my said daughter shall marry, and have a son or sons, such son or the eldest son shall, upon his attaining the age of twenty-one years, be absolutely entitled to the house and premises situated No. 5, Heeren Gracht, including the stores, Nos. 3, 4, and 5, Castle Street, or in case the same shall have been sold, the proceeds of the sale of the said house, premises, and stores, provided that, until such son of my said daughter shall attain the age of twenty-one years, my said daughter shall receive the rents of the said property, or the interest of the proceeds thereof, if sold as aforesaid. And I declare that the second son or such other younger son of my said daughter as shall take my name shall be entitled to the amount of a certain policy effected with the Alliance Life and Fire Assurance Company, London, upon my life for the sum of three thousand pounds, executed in the year one thousand eight hundred and fifty, with the interest which shall have accrued thereon from my death when he shall have attained the age of twenty-one years. And in case there shall

be no such son the same shall fall into and become part of my general estate. And I declare that my said executors shall be entitled to administer the said house, premises, and stores in the Heeren Gracht and Castle Street, or the proceeds thereof, until the same shall devolve upon my grand-children, and shall also administer the amount of the said policy of insurance and accumulations, until my grandson herein mentioned shall become entitled thereto, or until the same shall fall into my general estate."

The importance of this is that it shows that some at least of the trusts to be administered by the executors did not terminate on the Appellant attaining the age of twenty-five years. And in the possible event of her dying before her children attain 21, the question who are to be the trustees during their minority may be of practical importance.

Then, after giving some legacies, he proceeds :—

" And I devise and bequeath all the rest, residue, and remainder of my estate, property, and effects, as well moveable and 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 twenty-five 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 twenty-one years being male, or attaining twenty-one 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 twenty-one years, or being a daughter or daughters shall live to attain that age or marry, I devise 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 at 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 twenty-five 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 rent, 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.

"I appoint Stads Kadet Carl Johan Malmsten, of Stockholm, Iven Gustav Letterstedt, and Rich Antiquarian B E Hildebrand, guardians of my daughter and of any other child I may leave during their minority; and in case of the death, resignation, or incapacity of any such guardians, or of any guardians to be appointed under this power, I empower the surviving or continuing guardian or guardians, or the executors or administrators of the last surviving or last acting guardian, to appoint a new guardian or guardians in the place of the guardian or guardians so dying, resigning, or becoming incapable. It is my wish that my said daughter, or any other child I may have, shall be educated in the Lutheran religion, and shall reside in Sweden after she or they shall have attained the age of thirteen years. I appoint Tobias Spengler, Per Oscar Hedelius, and the Board of Executors, 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.

"I declare that if any dispute should arise between the executors hereby appointed the same shall be decided by the vote of the majority, the Board of Executors having in such case one vote as if consisting of one person. I desire that an inventory shall be made of my estate within six weeks after my death, or if I shall die while absent from the Cape of Good Hope within six weeks after information of my death shall be received within the colony. I direct that my executors shall render to the guardians a full and particular annual account of all receipts and payments in respect of my estate, with proper vouchers for the same."

The will was proved on the 19th May 1862 by the three executors, Per Oscar Hedelius who died in 1863, Tobias Spengler who died in 1866, and the Board. No fresh executors were appointed under the power of assumption, substitution, and surrogation which the testator

especially conferred on his executors, and so in 1866 the Board were the sole executors and trustees under the will. After the death of Spengler, certain directors of the Board took the management of the Cape Town business.

The testator, who was by birth a Swede, and who by his will desired that his daughter, after attaining the age of 13, which she did in 1866, should reside in Sweden, appointed as guardians Swedish gentlemen, no one of whom resided in the colony, or had as far as appears any connection with it. It can hardly be supposed that if the testator had foreseen what was going to happen in 1866, he would have wished the trusts of his will to be administered thus; and it is not surprising that in 1871, when the Appellant was growing up, the state of things became such that she was, or her advisers were, discontented.

On the 11th April 1872 the guardians announced to the Board that, one of the guardians having resigned, they had appointed Madame Lydia de Jouvencel, the mother of the Appellant, to be co-guardian in his room. This information was conveyed in a long and ably argued letter, which, though signed by and in the name of Mr. Malmsten, one of the Swedish guardians, bears internal evidence of having been, in part at least, drawn up by a lawyer, probably Mr. C. A. Fairbridge, who represented the Appellant in the subsequent litigation. This letter may be considered as the commencement of the litigation between the Appellant and the Respondent.

In October 1872 the other guardians resigned, leaving Madame Jouvencel sole guardian. An action was commenced in the name of Mr. C. A. Fairbridge as curator *ad litem* of the Appellant, then a minor. On her attaining the age of 21 it was amended, so as to make the Appellant herself the Plaintiff. The object of the action

was to surcharge the executors with sums stated as amounting to 28,512*l.* 2*s.* 4*d.*, which they had allowed to themselves in the accounts of the business carried on by them.

Had that action been tried out to the end and a regular judgement obtained, the Plaintiff and Defendant would have been bound by its result as to the matters involved in that action, but either might, if so advised, have brought other actions for other matters. But a compromise was come to, the terms of which were sanctioned by the Court in a judgement which is as follows :—

"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 at the rate of five per cent. 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 of Executors 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 or remuneration from and after the 31st December 1872, in like manner as if the said bequest had never been made.

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

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

The Board of Executors rendered liquidation accounts subsequent to the 31st December 1872, which have been investigated in this action.

The Appellant, during the interval between the compromise and the commencement of this action, succeeded in establishing a claim to "her legitimate portion." The effect of this was greatly to reduce the amount subject to the trusts of the will.

The Appellant, on attaining the age of twenty-five, commenced the action in which the judgements and order now appealed against were made.

By the first eighteen paragraphs of the declaration the Appellant sought an investigation of the accounts from the date of the appointment of the executors, and relief thereupon, and she claimed the right of conducting the testator's business.

By the 19th paragraph she charges the Board with various acts of misconduct and malversation, mostly before 1873, and these are so expressed as to impute to the Board, or at least to those for whom the Board was civilly responsible, that they were instigated by a corrupt motive. And then, in the 20th paragraph, she prays that the said Board may be removed from the said office of executors under the said will, and that proceedings for the appointment of another executor

or executors in the place of the Board may be directed to be taken.

This statement is, their Lordships think, all that is necessary to render intelligible the first judgement appealed against.

That judgement is as follows :—

" First Judgement.

" 1st. 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.

" 2nd. That the accounts after the 31st December 1872 be referred to James Rose Innes, Esq., advocate, assisted by Mr. Syfret the accountant.

" 3rd. That Plaintiff is absolutely entitled to the four sixths of the profits claimed by her.

" 4th. That Plaintiff is absolutely entitled to take over the business for her life, and to manage it as she thinks proper, proper inventories to be taken, and also to the use of the ten thousand pounds sterling invested in the business.

" 5th. That the question of the removal of the executors be reserved until the report is presented.

" Question of costs also reserved."

The Appellant had not at any time taken steps to set aside the compromise on any ground whatever. It has been contended on her behalf that the compromise should be construed as only applying to the questions raised in the action. But their Lordships think that the Court below rightly held that it was impossible to construe the compromise, and particularly the 1st and 3rd paragraphs of the compromise, in so narrow a sense. This was, indeed, hardly contested on the argument before their Lordships. They think therefore that the 1st paragraph of the judgement of 11th July 1879 was right.

The 3rd and 4th paragraphs are not complained of, and their Lordships are not called upon to say more as to them than that the four sixths of the profits to which the Plaintiff is declared to be absolutely entitled must mean the

four sixths from the time when the business began to be carried on by the trustees.

The 2nd paragraph of the judgement was right, as far as it went, but at the very first meeting before the referee it appeared that it did not authorize the referee to investigate a question which, as it did not affect the liability or responsibility of the Respondents, was not settled by the compromise, viz., how much of that sum which, on the assumption that every item of the accounts before 31st December 1872 was correct, the Respondents had in hand belonged absolutely to the Plaintiff, and how much was part of those sums in which she had only a life interest. The Plaintiff asked the referee to determine that question; the executors objected; the referee could not act; and the Plaintiff moved the Court in the terms mentioned in the next order. On the 14th September 1880, it was ordered "that the "Plaintiff's application for an order on the said "first-named Defendants to make and deliver "to the Plaintiff an account, supported by "vouchers, showing the amount of the four "sixths share of profits, commencing with their "administration of the estate as executors, be "refused, with costs." This is the order secondly appealed against.

The Judges' reasons for this order nowhere appear. The argument in support of it at the bar was that the order applied for was too large, and that as prayed for it was to have an inquiry not limited, as the proposal made before the referee was limited, by having the inquiry made on the assumption that every item of the accounts before 1873 was correct, and that it was intended to open up the questions which by the first paragraph of the judgement of 11th July 1879 were settled, or at least that an order granted in the terms prayed for would have had that effect.

This seems to their Lordships a sufficient ground for not granting an order in the terms prayed for, but not a sufficient ground for refusing an inquiry as to how much the Plaintiff held in her own right absolutely, and how much was only to be enjoyed by her for life. Their Lordships therefore think that this order should be varied. It seems probable that when the inquiry is made it will require nothing more than a dissection of the figures, but this cannot be certainly known, and the Court should take whatever steps are necessary for making the inquiry effectual, and do whatever is proper when its result is known. Their Lordships will afterwards state what they conceive should be the form of inquiry.

The final judgement of the 2nd July 1881 after confirming the final report of the referee, directs "that the prayer for removal of executors be "refused, Plaintiff to have her costs out of the "the estate up to the first hearing. Defendant "(the executors) up to that time to pay their "own costs, and also the costs of the reference "as to accounts, and of this final hearing, with "the exception of the costs of the last reference "as to the 4,396*l*. 12*s*. 3*d*. which are to be paid "by Plaintiff. The curator to have his costs out "of the estate."

Their Lordships have felt much anxiety about this judgement.

The 19th, 20th, and 21st paragraphs of the Plaintiff's declaration are in the following terms:—

"19. And the Plaintiff further says that the said Board of Executors has since its appointment as executors by the said Master as aforesaid been guilty of misconduct in its trust and malversation in its administration of the estate of the said testator, in this, to wit:—

"(1st.) The said Board has improperly, illegally, and in abuse and breach of its trust as executors, contrary to the true intent and meaning of the said will, and in order to profit from the

commissions which would be payable to it, employed and invested part of the estate of the said testator in the said trade or business of Jacob Letterstedt & Co., and in speculations and transactions connected therewith, and gave improper credit, whereby losses have been incurred which have been charged and debited against the said estate to its great damage and detriment.

"(2nd.) The said Board has wrongfully and unlawfully charged and appropriated to itself a commission of 10 per cent. upon its transactions in connection with the said trade or business of Jacob Letterstedt & Co., whereas it was only entitled, even if it was right and lawful to charge a commission at all, to a commission of not more than 5 per cent. upon the said transactions, the amount of the commissions so improperly charged in excess of the said rate of 5 per cent. being a very large sum of money, of which the said Board has refunded twenty-one thousand pounds, and no more.

"(3rd.) That the said Board has made out the accounts which have been rendered and filed by it in an improper and misleading way, in order to conceal the amount of commission really charged by it, and the said accounts have not been supported by vouchers, and the vouchers thereof have been withheld, the said accounts also having been purposely different as to the said commission from the books from which they purported to be taken.

"(4.) The said Board has wrongfully and unlawfully, and in abuse and breach of its trust as executors, applied and expended large sums of money belonging to the said estate in the purchase of landed property, machinery, and the erection of buildings, such expenditure not being required for the purpose of carrying out any of the provisions of the said will, and having entailed a heavy loss and charge upon the testator's said estate.

"(5th.) The said Board has wrongfully, unlawfully, and negligently omitted to invest the annual proceeds of the said estate after deduction of such annual payments as had to be made out of the same for the benefit of the heiress and residuary heirs of the said testator, and has, in like manner, neglected and omitted to invest the share of the profits which the Plaintiff was entitled to as aforesaid for the benefit of the Plaintiff, as directed by the said will.

"(6th.) The said Board has, contrary to the true intent and meaning of the said will, and without regard to the true interests of the said estate, abused the power entrusted to it by the said will, by instituting the said Board, or some of the members thereof on its behalf, to the office of manager of the testator's business in Cape Town, in order by so doing to retain and appropriate to itself the salary by the said will appointed to be paid to the manager of the said business in Cape Town.

"(7th.) The said Board, contrary to the meaning and intention of the said will, which directed that two Commissioners should be appointed to examine the said testator's business

books, accounts, stocks, and other matters in his estate, has from time to time, to wit, from the year 1862 to the year 1872, appointed two members of the said Board to be such Commissioners.

"20. And the Plaintiff further says that, in consequence of the said acts of misconduct and malversation, and of other matters and things herein-before referred to, the said Board has ceased to be fit and proper to be entrusted with the administration of the said estate, and has forfeited its claim to retain the office of executors under the said will. Wherefore the Plaintiff prays that by judgment of this Honourable Court the said Board may be removed from the said office of executors under the said will, and that proceedings for the appointment of another executor, or other executors, in the place of the said Board may be directed to be taken.

"21. And the Plaintiff lastly prays that, with regard to the several matters herein-before set forth, she may have such further and other relief as to this Honourable Court may seem fit, and that the Defendant in his said capacity may be ordered to pay the costs of this suit."

The whole of the matters which have been complained of, and the whole that, if this judgement stands, may yet have to be done by the Board, are matters which they had to do, as having accepted the burthen of carrying out the trusts which on the true construction of the will were imposed upon them, and so become trustees. What they had to do as executors merely, such as paying debts, collecting assets, &c., have long ago been over, and by the terms of the compromise the Plaintiff cannot now say they have not been done properly. There may be some peculiarity in the Dutch Colonial law, which made it proper to make the prayer in the way in which it was done to remove them from the office of executor; if so, it has not been brought to their Lordships' notice; the whole case has been argued here, and as far as their Lordships can perceive in the Court below, as depending on the principles which should guide an English Court of Equity when called upon to remove old trustees and substitute new ones. It is not disputed that there is a jurisdiction "in cases requiring such a remedy," as is said

in Story's Equity Jurisprudence, Sect. 1287, but there is very little to be found to guide us in saying what are the cases requiring such a remedy; so little that their Lordships are compelled to have recourse to general principles.

Story says, Sect. 1289, "But in cases of "positive misconduct, Courts of Equity have no "difficulty in interposing to remove trustees "who have abused their trust; it is not indeed "every mistake or neglect of duty, or inaccuracy "of conduct of trustees, which will induce Courts "of Equity to adopt such a course. But the acts "or omissions must be such as to endanger the "trust property or to show a want of honesty, "or a want of proper capacity to execute the "duties, or a want of reasonable fidelity."

It seems to their Lordships that the jurisdiction which a Court of Equity has no difficulty in exercising under the circumstances indicated by Story is merely ancillary to its principal duty, to see that the trusts are properly executed. This duty is constantly being performed by the substitution of new trustees in the place of original trustees for a variety of reasons in non-contentious cases. And therefore, though it should appear that the charges of misconduct were either not made out, or were greatly exaggerated, so that the trustee was justified in resisting them, and the Court might consider that in awarding costs, yet, if satisfied that the continuance of the trustee would prevent the trusts being properly executed, the trustee might be removed. It must always be borne in mind that trustees exist for the benefit of those to whom the creator of the trust has given the trust estate.

The reason why there is so little to be found in the books on this subject is probably that suggested by Mr. Davey in his argument. As soon as all questions of character are as far

settled as the nature of the case admits, if it appears clear that the continuance of the trustee would be detrimental to the execution of the trusts, even if for no other reason than that human infirmity would prevent those beneficially interested, or those who act for them, from working in harmony with the trustee, and if there is no reason to the contrary from the intentions of the framer of the trust to give this trustee a benefit or otherwise, the trustee is always advised by his own Counsel to resign, and does so. If, without any reasonable ground, he refused to do so, it seems to their Lordships that the Court might think it proper to remove him; but cases involving the necessity of deciding this, if they ever arise, do so without getting reported. It is to be lamented that the case was not considered in this light by the parties in the Court below, for, as far as their Lordships can see, the Board would have little or no profit from continuing to be trustees, and as such coming into continual conflict with the Appellant and her legal advisers, and would probably have been glad to resign, and get out of an onerous and disagreeable position. But the case was not so treated.

In exercising so delicate a jurisdiction as that of removing trustees, their Lordships do not venture to lay down any general rule beyond the very broad principle above enunciated, that their main guide must be the welfare of the beneficiaries. Probably it is not possible to lay down any more definite rule in a matter so essentially dependent on details often of great nicety. But they proceed to look carefully into the circumstances of the case.

The first and most obvious fact that arrests the attention is the entire change which events made in the position of the Board from that which the testator assigned to it. His will is

marked by much caution. He appointed three executors. If they differ the majority is to prevail, the Board voting as one person. The different branches of the business are to have each its own manager, with a substantial remuneration. Paid commissioners are to examine the stock and the accounts at frequent intervals. On failure of executors powers are given to appoint new ones. It is quite conceivable that the testator thought that, with such safeguards, it would be for the benefit of all that the Board should perform, and be paid for performing, the necessary work. But it is difficult to suppose that he would wish it to be the sole executor, as it became and remained, managing one branch of the business through its own directors, and appointing no examining commissioners except persons connected with itself.

It is true that at the present time the functions of the trustees are of a simple character, perhaps extending little further than the safe custody of the trust estate. But the death of the Plaintiff leaving infant children would alter that state of things; and questions might then arise both concerning the brewery business and the rest of the estate, not far differing from those which have caused so much dissatisfaction.

From the course which has been pursued below there has been no full inquiry into what took place before the 1st January 1873, and the charges in the first head of para. 19, of *mala fides* and corrupt motive cannot perhaps be said to be disproved, but they certainly are not proved, and are such as ought not to be assumed without proof to be well founded.

The terms of the compromise bind the Plaintiff to treat the result of the breaches of trust to have been such that she elected as most for her benefit to adopt them, and take the things as they stood, rather than undo the whole and take

an account. Their Lordships see no reason to doubt that her advisers exercised a sound discretion in advising her to take that course, but it is enough to say that she elected to take it. And the same remark applies as to the 4th, 5th, 6th, and 7th heads. The compromise equally binds the Defendants in so far as they admit that a very considerable sum beyond what they were entitled to had been taken by them.

The third head seems to be true so far as that the accounts rendered to the guardians were not so full as they ought to have been, and did not disclose the amount of commission taken by the Board, though before the first action, which resulted in the compromise, or at all events before the compromise itself, the Appellant and her advisers had the deficient information supplied. The latter part of the third head, though, as already said, it cannot perhaps be said to be disproved as to what took place before 1873, is certainly not proved, and is of such a nature as not to be assumed without proof.

As regards the accounts after 1872, their Lordships find it difficult to understand how it was possible for men of business to think themselves entitled to the large sums charged by them in the 11th liquidation account for commission, and disallowed under the second and third exceptions. The commission charged on the sum of 4,396*l.* 12*s.* 3*d.*, in the 13th liquidation account, and disallowed by the reference, is perhaps more extravagant still. Nor can their Lordships understand, even with all the assistance given by Counsel, why the sum in question was entered as it stands in the account. It seems not to have been understood by the Plaintiff's advisers, nor by the referee when he made his first report, nor by the executors' advisers when they erroneously consented to have it expunged. Again, it is impossible to suppose that the executors could really

have thought themselves entitled to the sums charged by them, but never paid, for taxation in the Master's office.

It has been imputed to the executors at the Bar that the disallowed charges for commission have been entered in the accounts in such a way as to amount to concealment and bad faith. Their Lordships do not accept that imputation. They think that the 11th account is clear and explanatory upon its face, however erroneous it may be in principle. So is the 13th account to this extent, that on its face it contains an item challenging inquiry. So the nature of the charges for taxation fees is clear enough, only they are not vouched.

But though their Lordships acquit the Board of concealment in these accounts, the spirit which permits such charges is naturally offensive to the Appellant and unfair towards the trust estate. They can only be made by persons who are themselves exasperated by the course pursued towards them, and determined to try somehow or other to get remuneration of which they conceive themselves to have been unjustly deprived. The making of such charges, and the vexatious course pursued by the Board in opposing the perfectly reasonable inquiry which the Plaintiff asked before the referee, are calculated to introduce additional irritation into a relation which was disturbed enough before. And they have an important bearing on the question whether, in view of the future welfare of the trust estate, it is expedient that the Board should remain trustees.

It is quite true that friction or hostility between trustees and the immediate possessor of the trust estate is not of itself a reason for the removal of the trustees. But where the hostility is grounded on the mode in which the trust has been administered, where it has been caused

wholly or partially by substantial overcharges against the trust estate, it is certainly not to be disregarded.

Looking therefore at the whole circumstances of this very peculiar case, the complete change of position, the unfortunate hostility that has arisen, and the difficult and delicate duties which may yet have to be performed, their Lordships can come to no other conclusion than that it is necessary, for the welfare of the beneficiaries, that the Board should no longer be trustees.

Probably if it had been put in this way below they would have consented. But for the benefit of the trust they should cease to be trustees, whether they consent or not.

Their Lordships think therefore that the portion of the final judgement which is, "That the "prayer for removal of the executors be refused," should be reversed, and that in lieu of it the Court below should be directed to remove the Board from the further execution of the trusts created by the will, and to take all necessary and proper proceedings for the appointment of other and proper persons to execute such trusts in future, and to transfer to them the trust property in so far as it remains vested in the Board. The rest of the judgement should stand.

It only remains to dispose of the costs of appeal.

Their Lordships think that the Appellant not having succeeded in what was one main ground of her appeal, and having persisted in charges of fraud which the evidence does not sustain, ought to bear her own costs of the appeal. The Board having good grounds for thinking that to submit to the appeal would be derogatory to their character, and so injurious to their business, ought not to be made to pay costs, but as they are wrong in resisting the inquiry concerning the profits, and as their removal is held to be

necessary, ought to bear their own costs of the appeal. The nominal Respondent, Mr. Giddy, whom the Court have appointed to represent the interests of the reversioners, should have his costs of this appeal out of the estate.

Their Lordships consider:—

1. That the judgement pronounced on the 11th July 1879 by the Supreme Court ought to be affirmed.

2. That the order made on the 14th September 1880 by the Supreme Court ought to be varied and the motion refused, giving no costs to either party.

3. That the judgement pronounced on the 2nd July 1881 by the Supreme Court should be varied by discharging so much as directs that the prayer for removal of the executors be refused. And that in other respects such judgement should be affirmed.

4. That the following directions should be given:—

a. The Supreme Court to take all proper steps for removing the Board of Executors from the further execution of the trusts of the will, and for the appointment of other and proper persons to execute such trusts in future, and for transferring to them the trust property now vested in the Board of Executors.

b. The Supreme Court to ascertain what portion of the property constituting the testator's estate is rightly attributable to the four sixths of the profits to which the Plaintiff is by the judgement of the 11th July 1879 declared to be absolutely entitled. For that purpose all proper accounts to be taken and inquiries made; but so that the accounts rendered by the Defendants, the Board of Executors, and covered by the compromise of the 26th of

November 1874, and by the final report of the referee in this suit, be taken as finally settled, and be in no respect opened or disturbed.

c. The Supreme Court to do what is right and just when the last-mentioned portion of the testator's estate has been ascertained.

5. That the costs of the Respondent R. W. S. Giddy incurred in this appeal be taxed as between solicitor and client, and be paid out of the residue of the testator's estate.

Their Lordships will humbly advise Her Majesty in accordance with this opinion.