Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Natal Bank, Limited, v. Hendrick Theodor Rood and others, from the Supreme Court of the Transvaal; delivered the 15th July 1910.

PRESENT AT THE HEARING:

LORD ATKINSON.
LORD GORELL.
LORD SHAW.
SIR ARTHUR WILSON.

[DELIVERED BY LORD SHAW.]

This is an Appeal from a Judgment of the Supreme Court of the Transvaal. The Judgment was delivered on the 29th March 1909 by Sir James Rose Innes (C.J.), and Sir William Smith (J.) concurred. The Suit was brought by the Appellant Bank, who are creditors of the insolvent estate of Karel Rood. The Respondents are the children of Karel Rood and his wife Anna Margaretha Buhrmann. These spouses were married in February 1874, and by their ante-nuptial contract it was provided, *inter alia*, that there should be community of property between them.

In August 1877 these spouses executed a mutual will, and certain clauses therein fall to be construed in this Appeal.

Mrs. Rood died on the 1st March 1894, survived by her husband and her eight children, the present Respondents.

Under the mutual will the testators respectively appointed each other executor and executrix and also administrator or administratrix of their estate and effects and guardian of their children during minority. Upon his wife's death Karel Rood took out letters of administration as executor, but made no inventory of the estate of his late wife or of the joint estate and obtained no valuation. In the following year, 1895, Karel Rood realised the joint estate along with other properties over which he had obtained certain options as after-mentioned, and the whole transaction resulted in a substantial profit.

Twelve years thereafter, namely 1907, Karel Rood, who had become insolvent, surrendered his estates. In the clearing up of the accounts relative to the joint estate of the spouses and any separate estate of Karel Rood, it is to the interest of the Appellants as his creditors to have the corpus of his insolvent estate, in the first place, fully credited with all separate acquisitions by him which would increase the value of his estate available for distribution; in the second place, to put forward such a construction of the mutual will as will give to him a large share of the succession in, *inter alia*, the joint estate; and, finally, to place, if possible to the debit of the joint estate rather than of his separate estate, all liabilities and debts incurred by the husband after the dissolution of the marriage, this depending on the argument that the community of interest and property was continued and prorogated after the wife's death. On the other hand, the separate attribution of profits to Karel Rood's estate instead of to the joint estate would lessen the amounts falling to the Respondent children under the mutual will. And their interests would be further lessened if effect were given to the plea as to the large

rights of succession in Karel Rood himself, or if the joint estate were charged with Rood's separate debts. It is out of this clashing of interests that the suit has arisen.

Various questions were raised in the course of it which were not put in issue at their Lordships' bar; and certain adjustments of the accounts took place in the Court below with regard to which no separate issues were stated. Upon all these no observations need be made.

But three substantial questions of principle were fully argued, and according to the lines of their settlement the Judgment of the Court below will be altered or maintained. In the treatment of these it should be premised (1) that by an ante-nuptial contract of marriage, dated the 10th February 1874, it was provided that the parties "have agreed that the said marriage "shall be solemnized in lawful community of "property as such community is laid down and "regulated by law"; (2) that the bulk of what is admitted to have been the joint estate was certain farms or portions of farms, over thirty in number, sold to the Lydenburg Estates Company, Limited, as after mentioned. Certain of these farms were held in undivided shares with other part owners.

With regard to the construction of a mutual will such as that of Mr. and Mrs. Rood, the general principles thereof will be found laid down by Sir Robert Collyer in the case of *Denyssen* v. *Mostert* (Law Reports, 4 Privy Council Appeals, p. 236), and there seems no reason to vary in the present case from the first of these principles, namely, that:—

"such wills, notwithstanding their form, are to be read as "separate wills, the dispositions of each spouse being treated "as applicable to his or her half of the joint property."

It would appear to be a natural consequence that the estate of the predeceasor, being thus

disposed of by what is construed to be in effect a separate will, should fall to be ascertained so that its distribution to the beneficiaries sharing thereunder should be capable of approximately accurate measure. It may be, as in the present case, that the surviving spouse, who is also appointed executor and administrator, may be charged with the duty of holding the separable estate as part of the joint estate until the majority or marriage of children, when the shares of what has fallen to them under the predeceasor's will will fall to be paid over, but, in the opinion of their Lordships, such a state of affairs gives no ground for the argument that the community of property is continued after the dissolution of the marriage by death—continued to the effect of substantially making the children benefited by the will and entitled to their mother's share the partners of their surviving father. It is plain that—were this to happen with the ordinary results—these might be serious, for the children's share, instead of being either set aside or reserved and secured, might be depleted or disappear in the course of administrative and trading loss. The argument was hardly so high as this, but it was distinctly maintained that the present was a case of that guarded partnership or continuance of community of interest known as *boedelhouderschap*. Even under this, however, it would appear to be fairly clear from the authorities that there will not be community of profits and losses in the ordinary sense, but that:—

"the half of everything which accrues to the estate after "the death of the first dying, whether by inheritance or "otherwise, goes to the children without their being liable, "however, for any part of the loss which may accrue during "the same period or their being in any way prejudiced by "encumbrances effected or anything else done by the "surviving parent."

(Maasdorp. Introduction to Dutch Jurisprudence of Grotius, Chapter 13, Section 3.) It might not

accordingly affect the result though the suggestion that this is a case of *boedelhouderschap* were given effect to. But upon that it is not necessary to express an opinion, for their Lordships see no reason to differ from the Judgment of the Court below that the present is not a case of *boedelhouderschap*.

The present case indeed shows the serious risks that might result if effect were given to the broad argument that the community continued after the dissolution of Mr. and Mrs. Rood's marriage.

In the Appellant's case it is submitted :—

"that the true legal effect of the mutual will was to continue the community of property between the surviving spouse and the children of the marriage up to the date or dates when the said children respectively attained their majority or married, that such a continuation of the community had been acquiesced in by those of the children who had already become majors, and that during the continuation of the community both major and minor children were liable at least to the extent of their 'inheritances' for the debts of the joint estate."

Rood had gone on trading with the joint estate and had landed in insolvency, and apparently the argument is that the shares inherited by the children in their mother's half of the joint estate could have been wholly lost in consequence of the community in the joint estate being continued after the dissolution of the marriage, coupled with the fact that the administration of it was left in the hands of the father. Their Lordships see no justification for such an argument.

The learned Chief Justice remarks that :—

"in this Colony, save where the will so directs, as in *Cloete's* case, there is, so far as I am aware, no principle of *boedelhouderschap* allowed either by statute or by practice";

and he also observes that, to his mind this is not a case of *boedelhouderschap*.

It seems fairly clear that, while the custom of continuation or prorogation of the community

beyond the dissolution of the marriage appeared to have been permissible in certain towns or districts of Holland, the general law was clearly against it. *Voet* states the point in these words (XXIV. III. 28) :—

"Sed sine statuto aut consuetudine satis manifestâ "communionis hujus prorogatio, tanquam à jure communi "societatis recedens, admittenda non est."

Had the mutual will in this case specifically prescribed that the community of interest should continue in the sense argued for, that of course would have formed the rule, but their Lordships do not so read the will, and when the learned Chief Justice remarks that, to his mind, this is not a case of *boedelhouderschap*, their Lordships find themselves in complete agreement. It appears to them to be further plain that a practice so specific and peculiar and so out of accord with the common consequences either on the one hand of partnership or on the other of administration of estates, ought not lightly to be extended. The simple view appears to be also the sounder in the present case, namely, that Karel Rood was constituted by the mutual will executor and administrator of the joint estate and that the rights therein, namely in one-half thereof which belonged to his predeceasing wife, are to be adjusted on the familiar rules of accounting applicable to executory estates. The question then is simply what upon a fair reckoning was that half.

There is thus reached the second important branch of the case, and to understand this it is necessary to state in a word what was the transaction with regard to the realization of the property which took place. As already stated, the joint estate consisted mainly of over 30 farms, many of these held in undivided shares jointly with other part owners. Karel Rood was not only administrator of this joint estate, but he was in own right owner of one-half of it, and

in addition had a certain right of succession, which will be afterwards referred to, under his wife's will. In order to obtain a better realization of these farms, some of which appeared to have mining possibilities, he secured an option over the interests of certain joint owners in these farms and also over other adjoining properties, and having, so to speak, massed together these with the joint estate, he sold the whole at a large profit for 36,000*l.* in cash and 64,000*l.* in shares of the before-mentioned Lydenburg Estates Company, Limited. Out of the amounts received he paid out the part-owners and the owners of the separate properties which he had acquired at fixed options. In all, a balance of over 78,000*l.* remained for distribution.

Up to this stage the transaction appears to have been not only judicious and profitable, but to have proceeded upon accurate accounting. It is maintained, however, that what ought to be done with reference to the properties is this:—The outside properties and the joint estate properties have been slumped together and the slump price ought to be apportioned relatively to the value which these properties bore to each other. Suppose accordingly, as a test figure, that the outside properties and the joint estate properties were half and half, the profit should be halved. One-half would go to the joint estate and the other half, not to the owners of the separate properties who have been paid that and no more which was fixed as the price at option, but that other half of the profit should go into the estate of Karel Rood personally, the argument being that it was his device and his judicious administration in procuring the options and slumping the whole estates that brought about this profit.

Their Lordships do not doubt that the transaction was a piece of good business. So far as

the options were concerned, however, Karel Rood had risked nothing. No separate capital of his had been embarked in the purchase of those properties, and it must not be forgotten that as administrator of the joint estate, apart from his being himself interested therein, his duty was to obtain the best possible price for what was committed to his charge. While that duty might not and would not have compelled him to enter into speculations with other properties for the purpose of procuring a slump transaction, yet if he has done so, and particularly if he has done so without having embarked any of his own private capital, there seems no good reason for withholding from the estate which he was administering the entire profit on the whole transaction after the options were satisfied. Karel Rood's responsibility in that respect was simply that of a trustee, and a trustee cannot be allowed to secure for himself a profit arising out of transactions with the estate committed to his charge. Such profits form part of the estate and fall to be distributed as such. The enrichment of a trustee at the expense of the estate or of the beneficiaries is contrary to the established principles of trust accounting. Further, in regard to the present transaction, there seems also no reason to doubt that it was the fact that Karel Rood was administering the joint estate that put him into the position of obtaining the options and carrying the slump transaction through. It would, in their Lordships' view, be a principle accompanied by great danger if, before an inventory was lodged, as was the case here, and before segregation, and while the whole estate was administered together, any administrator could be heard to say that he had acted cleverly and made a good deal, and therefore, seeing that he alone had secured those options which made a larger and better realisable estate, he was entitled to allocate all the profits apportionable

to the option properties to himself. This is simply another way of saying that a trustee can enrich himself by pocketing a proportion of the speculating profits in an estate transaction.

The last question is one of undoubtedly great importance in the law of succession to estates in the Transvaal.

The mutual will contains the following clauses : –

" The testators declare to nominate and appoint each " other reciprocally as executor and executrix of this their " testament, likewise administrator or administratrix of " their estate and effects, as well as guardian of their " surviving minor child or children, heir or heirs, as they " do hereby nominate and appoint the survivor of them, " with power of appointing agents in their place if they " choose to do so.

" Now, proceeding to the choice of heirs, the testators " declare and appoint each other reciprocally, that is the " first dying the survivor of them, as his or her sole and " universal heir of all the property to be left by the first " dying, movable as well as immovable, claims and credits, " inheritances and legacies, nothing whatsoever excepted, to " be entered upon and possessed for ever by the survivor " of them as free and 'encumbered' (*sic*) property without " gainsay of anybody whomsover, but the survivor shall be " bound and obliged to educate and maintain the child or " children born or to be born of this marriage in an " honourable and Christian-like manner till their ages of " majority, marriages, or other majority, when their father's " or mother's portion shall be paid to each of them, but in case " the survivor should come to enter into a second marriage " he or she shall be bound and obliged, before the solemni- " sation thereof, to choose and appoint two good and " irreproachable men as supervising guardians of the " 'Kinderbewijs', then to be provided, without, however, " the necessity of paying out the portions of the minors, but " such portions to remain committed to the care of the " survivor for the purpose of thus being better able to " educate and maintain the minor child or children by the " usufruct of their inheritances."

It is maintained for the Appellants that what was given to the children by this will was simply their *legitima portio* under Roman-Dutch law, that is to say, in the present case where the

family exceeds four in number, a division of one-half of the mother's estate among the eight children, and that the other half fell to the father who was appointed sole and universal heir.

With regard to the argument that the children's share falls to be limited to the *legitima portio*, it is of course plain that no doubt can be thrown upon the validity of that portion of the Roman-Dutch law which was the law of the Transvaal until 1902, and is in accord with many systems of jurisprudence, and founded on the law of Rome, under which a portion of a parent's estate is succeeded to by the child as by legal right, and notwithstanding the terms of the parent's will. The power of testacy is thus limited so as to prevent disinherison or the limitation of the legal right of the children.

It must be added, however, that it seems in principle unlikely that, unless the language of a will expressly limits the share of the child to the *legitima portio*, the law would apply a restriction by a will to what the child could have taken irrespective of that will.

It must be admitted that there does seem to be authority for the operation of tying up till majority even the *legitima portio*. In the words of Van Der Keessel's Select Theses, being a Commentary on Grotius' Introduction to Dutch Jurisprudence, Second Edition, page 110:—

> "The legitimate portion due to minor children may, by "our law, be left to them, subject to the condition that the "surviving parent need not pay them anything before "majority, but may receive the fruits thereof for their "maintenance."

As, however, in their Lordships' opinion, the children's share conferred by Mrs. Rood's will was not confined to a *legitima portio*, it is not necessary to discuss or decide upon the application of the doctrine thus quoted from Van Der Keessel.

In the next place, it appears to their Lordships to be clearly established that the clauses which have been above cited from the mutual will are the common, accepted, and habitual forms of language employed in such documents. Here and there there may be certain variations, but forms at least very similar to, if not identical with, the present appear for at least about 80 years in South Africa. Reference, for instance, may be made to the case of *Widow Cleeaweek* v. *Beryh*, December 1832 (2 Menzies, 396).

It is, in their Lordship's opinion, eminently desirable that the utmost respect should be paid to the customary and acknowledged interpretation both by Judges and among the people of the Transvaal and the Cape of Good Hope of their ancient and accustomed forms of transmission of property at death. On that subject there can, on the whole, be little doubt. The principle of interpretation may have occasionally been questioned, but the long standing interpretation itself has been acknowledged. In 1868, for instance, in the case of *Oosthuizen*, reported in Buchanan's Cape of Good Hope Reports, 1868, page 71, Mr. Justice O'Connor, while saying that it was not easy to understand the principle of the matter, proceeds:—

> " Mr. Porter, the Plaintiff's Counsel, stated it to have " been decided in this Court that in such a will the sur- " viving spouse is entitled absolutely to a child's portion. " And from instances which have come before me, I think it " not unlikely that that is the construction commonly " adopted in practice."

In *Oosthuizen* v. *Moeke* (1 Roscoe, p. 330), Mr. Justice Watermeyer deals with the matter thus, his Judgment being delivered on the 16th January 1866:—

> " The important question in this case arises as to the " effect in a mutual will of an institution of the survivor " as " " sole and universal heir or heiress in all the common " " estate, nothing excepted, to be adiated and possessed by

" ' the survivor as free and allodial property, with the con-
" ' dition that the survivor shall be held and bound to
" ' educate and bring up the child or children of the
" ' marriage, already born or yet to be born, in a decent
" ' and Christian manner until they shall become of age,
" ' or be married, or enter some other approved state,
" ' when to each of them for, or instead of father's or
" ' mother's portion (bewys) shall be paid such amount as
" ' the survivor, according to conscience, in the position of
" ' the estate shall find to be due (behooven).' After a
" careful consideration of the principle by which the Court
" should be guided—for there is no direct authority on the
" subject—the conclusion arrived at is that the survivor is
" not entitled to cut off his children with the mere ligitimate.
" The will, it is true, makes the survivor sole heir, but
" notwithstanding, she is not the sole heir: unless the
" children take *titulo institutionis*, they do not take at all.
" Strictly, such a will might be deemed inofficious, and
" would have been so by the Roman law. The more liberal
" construction of the Dutch law allows the will to be read
" as if the children were instituted, and thus *ex necessitate*,
" it must be read as if the survivor and the children were
" joint heirs. During the minority of the children the
" survivor remains in possession of the entire estate. When
" they attain their majority, the survivor must give to each
" such amount as he or she shall, according to conscience, in
" the position of the estate find to be due. If without sale
" the survivor can pay the amount, the estate need not be
" sold. The survivor must value conscientiously, and on an
" honest valuation, calculate the children's shares. It is
" not to be presumed that the testator intended the children
" to have the legitimate merely, when he did not say so.
" The children are to have as paternal or maternal portions
" what shall really be such portions on an honest valuation
" of the estate, to which captious objections are not to be
" made."

Their Lordships have, in the present case, had the advantage of a full argument, and they entertain, after hearing the careful presentation of the case upon practice made by Mr. Gregorowski, no doubt as to the soundness of the conclusion reached by the Supreme Court. They desire in terms to found upon the Judgment of the learned Chief Justice, not only in his view as to *Oosthuizen's* case, but more particularly in

his statement as to professional and common practice :—

"The will there was in terms practically identical with " the one which came before the Court in Wium's case, and " it was held that the children shared equally with the " survivor in the estate of the first dying—in other words, " that the survivor had a half of the estate plus a child's " portion. That was a decision pronounced by Water- " meyer, J., a Judge distinguished for his knowledge of " Roman-Dutch law, and his acquaintance with Colonial " circumstances and Colonial practice; and it has always " been followed at the Cape. We were not referred to any " other South African decision inconsistent with *Moeke's* " case, and I am satisfied that, as this is a very common " form of will among the country population in South " Africa, the decision in *Moeke's* case has virtually settled " the law in regard to the interpretation of such will, and " certainly we should follow it in the Transvaal. Moreover, " the present will is stronger in favour of the children than " either of the wills considered in the two cases to which I " have referred. In those wills the survivor was ordered, " in place or instead of the father's or mother's portion, to " pay out to the children when they attained majority, such " shares as, in accordance with the condition of the estate, " and according to conscience, they thought the children " were entitled to. Here the survivor is directed to pay to " the children at majority their actual paternal or maternal " portions—that is, not their legitimate, but their filial " portions. I am, therefore, of opinion that the meaning of " the present will is that the survivor should retain his half of " the joint estate and a child's portion of his wife's half, and " that, therefore, each child would be entitled to one-ninth of " what the testatrix was entitled to bequeath; subject to " the further provision that the survivor was to enjoy the " usufruct of the children's portions during their minority " in order to support and educate them."

In any circumstances a pronouncement of this kind would be weighty; but, stating as it does the established practice, their Lordships view it as in a special sense authoritative. The argument of the Appellants in giving one-half only to the children and, under the clause as to sole and universal heirship, giving the other half to the father, although possibly in accord with English ideas of interpretation in regard to the

mutual will as a whole, would, if given effect to, make an inroad into interpretation, custom, and practice so violent as to result in a subversion of the settled law of the Transvaal. The argument has been considered with care, but their Lordships, without hesitation, reject it. The law so settled must be respected and maintained.

This ought to be so in principle, and it is very fully warranted by authority. When a construction in conveyancing law has become locally settled, then it is of especial importance that ideas foreign to and subversive of the adopted interpretation should be avoided. A striking instance may be given in the case of *Kirkpatrick's Trustees* v. *Kirkpatrick* (1 Rettie, H.L. p. 37). There it was held that a *mortis causa* disposition of real estate was wholly invalid because the word "dispone" was not used. Lord Cairns put the point thus :—

"It appears that the later deed of 1867 has not in it "that word of art and style of such efficiency according to "Scotch law, I mean the word 'dispone,' and it has been "held unanimously by all the Judges of the Court of "Sessions that as the law stood at the time this deed was "executed the want of that word 'dispone' was fatal to the "deed as a conveyance of heritable property. My Lords, "the Appellants at your Lordships' bar challenged this "decision, but during the argument it was your Lordships' "opinion, after hearing all they had to urge against it, that "looking to the unanimity prevailing in the Court below "upon this question, and the dicta which have fallen from "Judges in Scotland upon the subject, looking to the "expressions of text writers as indicating the opinion and "practice of the profession, it would be impossible now to "open or disturb the question as to the necessity for this "word 'dispone' in a conveyance of heritable property."

It had, it may be explained, required the action of the legislature to alter by statute the settled rule of practice referred to; but as the Act was passed subsequent to the death of the testatrix Mrs. Kirkpatrick, the old standing law of Scotland was held to apply. Lord Cairns admitted that the opinion might appear to be "a very

"technical view", but the House unanimously affirmed the binding nature of locally accepted practice.

Their Lordships will humbly advise His Majesty that the Appeal should be dismissed with costs.

In the Privy Council.

THE NATAL BANK, LIMITED,

v.

HENDRICK THEODOR ROOD AND OTHERS.

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