OTHELIA KRESFELDER v. ANNETTE KRESFELDER AND OTHERS.

HIGH COURT CIVIL CAUSE NO. 12 OF 1936.

Joint will—not invalid in English law—absolute gift followed by proviso amounting to condition subsequent—construction.

In this case the effect of a joint will was considered and also the construction of a portion of the will. While a joint will is rare under English law it is not unknown (see *In bonis* Stracey, referred to in the judgment reported below) and in the present case was held to be a valid instrument.

The will under consideration which had been made by a husband and wife appointed the survivor to be the sole and universal heir of the whole of the joint estate and effects without qualification subject to the condition that on the death of the survivor the rest, residue and remainder of the joint estate and effects was to devolve upon the children of the marriage.

The husband died and the question arose whether, under the true construction of this will, the widow took an absolute or only a life interest.

The matter was brought by means of an Originating Summons before the High Court which decided that the widow took an absolute interest.

Francis, J.: This is a matter brought before me on an originating summons taken out by the plaintiff, Othelia Kresfelder, for the purpose of seeking a determination as to the proper construction to be placed upon the operative clause of the will of the late August Kresfelder. Probate of the will was granted by this Court to the plaintiff as sole executrix on the 2nd February, 1932.

Counsel for the plaintiff referred to the cause as a friendly action, necessitated by the challenge of title in the matter of an intending conveyance. To this action there have been joined as defendants, three children of the testator by his marriage with the plaintiff, the two minor children being represented by Counsel.

The will in question is the joint act of the testator and the plaintiff, and was executed at Cape Town in the Union of South Africa on the 24th January, 1929. The material point for examination reads as follows:

> "We hereby appoint the survivor of us to be the sole and universal heir of the whole of our joint estate and effects of what kind soever and wheresoever situate, nothing excepted, subject to the condition that on the death of such survivor, the rest, residue and remainder of our joint estate and effects aforesaid shall

devolve in equal shares upon the children of our marriage. In the event of any one or more of our said children predeceasing us or either of us, then the descendants of such child or children shall succeed to his, her or their parent's share and if such predeceased child or children shall leave no descendants then the share or shares of such predeceased child or children shall devolve upon the remainder of our children in equal shares."

The question submitted for my determination is—

" whether upon the true construction of the testator's said will the testator's real and personal property is given to the plaintiff absolutely for her own use and benefit or whether the same is given to the plaintiff for her life only and after her death to the children of the marriage of the testator in equal shares or what is the effect of the dispositionary portion of the said will."

I confess that the matter has given me difficulty principally by reason of the unfamiliar form of instrument. It may be that a joint will is a not uncommon incident where Roman-Dutch law recognises the system of marriage in " community of property ". In *Williams* Vol. 1, p. 7, the statement is made that under English law such a will is unknown. I do not understand this to mean that where such a will is in evidence it is necessarily invalid for contrariwise there is authority showing that in ordinary cases such an instrument is looked upon merely as the will of each testator disposing of his share of the massed property, and may be proved on the death of one (*In bonis* Stracey (1855), Deane and Swabey 6; English Reports, Vol. 164, 484), as has been done in the present case.

Whatever the intention of the testator at the date of execution as to the law to be applied in the contingency of any future conflict, there can be no doubt that the instrument is, at this juncture, quite properly before this Court, and construction must therefore proceed according to the principles of English law.

The opening words " appoint . . . to be the sole and universal heir of the whole of . . . estate and effects of what kind soever and whereso-ever situate " would appear to amount to an absolute gift, and this is conceded by defendants' Counsel, who, however, submits that the words next following—" subject to the condition . . . the rest, residue and remainder . . . shall devolve . . . upon the children of our marriage " are of a restricting, modifying and curtailing nature. In other words he argues that the will confers but a life interest in the survivor.

I hold the view that in the operative clause of this will there is an absolute gift to the plaintiff of such of the testator's property as he disposes to be enjoyed by her for her maintenance and support. In words she is his sole heir to everything nothing excepted.

To this gift there is annexed a proviso amounting to a condition subsequent, because the performance of it is subsequent to the vesting of the right. Now it has been decided that where a gift is made in terms absolute it can be reduced to a limited interest only by clear words cutting down the first estate. Does this gift over purporting to be created by the

condition subsequent in any way lessen the absolute interest ? I think not, for the condition imposed amounts to no more than a duty to leave to the children all such property as she did not alienate during her lifetime. Such being the case the gift over is inconsistent with the absolute gift and cannot be enforced.

I have given much study to this case and in coming to my conclusion rely on *Perry* v. *Merritt*, L.J. (1874) Eq. 43: 608; *Henderson* v. *Cross*, English Reports Vol. 54: 610; *Watkins* v. *Williams*, English Reports Vol. 42: 402; and *Richards* v. *Jones*, 67, L.J. (1898): 211, all of which are to the point.

I have read *Bibben* v. *Potter* (1879), 10 Ch. D., 733, but do not think it governs this case. There an absolute gift had been made but provision was varied subsequently by codicil. Consequently it was easier to construe the variation as intended to give a life interest.

For the reason given above it is declared that the plaintiff takes an absolute interest.

It is ordered that costs of this application as respects the defendants be paid from the estate.

End of Volume I.