1914. *April* 9, 16. WARD, J.

Will.—Prodigal.—Leave to make.—Authority of State.—Court.

A will made by a person declared a prodigal, which deals equitably with his property, is good. He may obtain leave from the State to make such a will, but the Court has no authority to grant him such leave.
In re Kemp (2 Menz. 435), approved.

Application to the Court to grant the petitioner leave to execute a will in the form of a draft attached, or for such other or further relief as to the Court might seem meet. The petitioner's estate had been placed under a curatorship by an order of this Court, on September 29th, 1910, and was still in charge of a curator. On June 27th, 1903, the petitioner executed a will which he now wished to alter, in order to effect better provision for his wife and family, and to cut down certain legacies to his friends.

R. F. MacWilliam, for the applicant: The following authorities lay down that a prodigal has capacity to make a will subject to leave being granted to him: *Voet* (38, 1, 34); Paulus Voet, *Comm. ad Inst.* (2, 12, sec. 2); Van Leeuwen, *Cens. For.* (Part 1, Book 3, 3, 3 and 4); *Roman-Dutch Law* (Kotzé's Translation, p. 631); Groenewegen, *ad Inst.* (2, 12, sec. 2); Sande (*Dec. Fris.*, 4, 1, 3); *Holl. Cons.* (appendix to vol. 3, p. 48); Brunnemann, *Comm. in Pand.* (28, 1); Van der Keessel (sec. 218); Grotius (2, 15, 5), says prodigals are incapable of making wills, but this is qualified by remarks in *Regts. Obs.* (2, 37); De Bruyn, *ad Grot. p.* 175). Maasdorp, *Inst. of Cape Law* (vol. 1, 120), evidently regards a prodigal as *capax* without dealing with the question of leave, or limitation of disposition. Schorer, *ad Grot.*, evidently approves of the remarks of Brunnemann, who seems to put the matter on a wider basis in regard to the wife than some of the older authorities.

As to who should grant leave, *Voet* (38, 1, 34), says the court may grant leave, and this is followed by Schorer, *ad Grot.*, and De Bruyn, *ad Grot.* (p. 175). Sande (4, 1, 3), gives a case in which the court dealt with the matter. From *Holl. Cons.* (appendix to vol 3, p. 48), it would seem that the court gave its approval on the application of the testator. This is evidently approved of by Van der Keessel (sec. 218), and Lybrecht, *Red. Vert. over 't Not. Ambt* (vol. 1, p. 231). Groenewegen, *ad Inst.* (2, 12, sec. 2), and Paulus Voet, *ibid*, say the *Magistratus* should approve, and

from Boey's *Woordenboek, sub-voce "Magistratus"* it would appear that this term would not include a judge of a superior court.

On the other hand the following authorities state that the Sovereign power is the one to grant leave: Van Leeuwen, *Roman-Dutch Law* (p. 331); Van der Linden (Juta's Trans., p. 56); *Holl. Cons.* (vol. 1), *Cons.* (168); *Regts. obs.* (2, 37); but *vide* the second case there given: see also *Ex parte Kemp* (2 Menz. 435).

Cur. adv. vult.

Postea (April 16).

WARD, J.: In this matter the applicant has been interdicted from dealing with his property on account of prodigality. He now wishes to make a will altering a former will made by him.

The alteration he wishes to make is to effect better provision for his wife and family and cut down certain legacies to his friends. This he wishes to do owing to the fact that his property is not so valuable as it was when his former will was made.

If he had been placed under curatorship on account of alienation of mind there is authority to show that I should refuse this order, because though a person who suffers from mental incapacity may make a will in lucid intervals, this Court is not entitled to prejudge the matter by giving permission to make a will.

With regard to prodigals the result of the authorities is set out by Burge iv, p. 347: "A will made by a prodigal whilst he was under interdict was void by the civil law. But by the 30th *Novel* of Leo his disposition would be sustained if made in favour of his necessary heirs, or of the poor or for pious uses or for any other purpose which did not evince prodigality. On this authority the will of a prodigal having no children and who bequeathed by it the usufruct of his estate to his wife was sustained. But as the interdict deprives the person of the power of making any disposition of his property, it is considered more safe that he should obtain permission to make his testament."

This passage, as I say, sets out the law as expressed by all the writers on the subject in Roman-Dutch law since Grotius. But the question remains from whom is he to get authority.

Van Leeuwen says (Kotzé, vol. 1. p. 331): "It is better to obtain the approbation of the Government and consent of the guardians." Groenewegen, *Institutes* (2, 12, 2), "*aut magistratus*

aut saltem curatorum adhibere tutius est atque consultius." Van der Linden (Juta, p. 56), says: "*Prodigi* are allowed to make a will if they do so after leave has been obtained." The translator adds a note "that is of the Sovereign."

Voet (28, 1, 32), also agrees with Groenewegen and Paul, that it is safer to obtain the *venia testandi*, the testament being exhibited to the provincial court or other magistrate. This passage of *Voet* is apparently the one which was quoted to the supreme court of the Cape Colony in the case of *Ex parte Kemp* (2 Menzies 435). That was the case of a person suffering from insanity and the court was asked to allow Kemp to make his will in their presence in accordance with the authority of *Voet*, or should, after enquiry, find and declare that at that time he enjoyed such a lucid interval or was so sane as to be capable of making a will. The Court held that the authority quoted only referred to provincial and magistrates' courts, and not to the supreme court.

Following that authority, none of the authorities point to this Court as the proper authority to give consent to such a will being entered into. There remain three passages to be considered.

Brunnemann, *ad Dig.* (28, 1), states the law in much the same terms as Burge, but adds "*sed in praxi extra pias causas vix admittitur testamentum ejus cui bonis interdictum est nisi judex ad administrationem bonorum prodigium admissit.*"

He does not define what he means by *extra pias causas*, but if it is to be restricted so as to exclude the appointment of his children as heirs the passage is hardly in accordance with the other authorities. In any event, I am not asked to remove the interdict, and I could not do so if I were asked merely for the temporary purpose of allowing the prodigal to make a will.

The next passage occurs in *Rechtgeleerde, Obs.* (2, 37). Here reference is made to the case of *Dr. Isaac Smitsbergen*, who asked leave to dispose of his goods with the result that the States by Resolution granted him his request so that he could make his will before the commissioners of the court or to communicate it to them after an examination by the court as to its orthodoxy. This seems much the same procedure as is referred to by *Voet*. In any event the permission is obtained from the State.

The next case is that reported in Sande, iv, 1, 3. This was a peculiar case. The prodigal made a will in favour of his maternal aunt. He was then interdicted and her husband was then appointed curator. He then made a will in which he left only a portion of

his property to his aunt. He left a portion to his father's sisters and legacies to friends, the poor, and an orphanage at Leeuwaarden. He applied to the court for approbation. The court gave judgment in these words: "'t Hof ziet voor goed het testament, zo veel in hem is, onvercort partijen neederzijdes hun recht."

The testator died and the will was disputed. The maternal aunt admitted that she had had him placed under curatorship to prevent his making another will, and there was evidence that he was not a prodigal, but suffering from the *morbus fallicus*.

The court found in favour of the will on two grounds; one, that the order had been fraudulently obtained and the other that the *Novel* of Leo was in accordance with natural justice, and that insofar as a prodigal wills his property prudently in favour of his posterity, next of kin, and the needy, it is valid. No reference was made to the order of court above stated, and it does not seem that it had any bearing on the case.

There is no authority, therefore, for the statement that this Court can give permission to the applicant to make a will. There is a reference to such permission in Fockema Andreae's *Grotius* (11, 15, 5), but he also refers to leave from the *Hooger Raad*.

The better opinion appears to be that a will made by a prodigal which deals equitably with his property is good. He may, it is clear, obtain leave from the State to make such a will, but I cannot find that there is any authority in this Court to prejudge the rights of parties and give leave to make such a will. The order given in the case cited by Sande appears to me to be nugatory, and I am not prepared to make an order in those terms.

Even if I gave the order as prayed I might be affecting the rights of those who are not and cannot be before the Court. To use the words in the decision in *Ex parte Kemp*: "This court as the supreme tribunal in this district, might hereafter, be called upon to adjudicate on the validity of any such will whether made in their presence or by virtue of any such order as is asked for."

The application must be refused.

Applicant's Attorney: *H. D. Crozier.*

[G. W.]