preferent creditors objected to the composition, and objected to the rehabilitation. In this case the preferent creditors raise no objection to the composition, and are prepared to consent to the rehabilitation, provided their bonds may remain registered against the title of the mortgaged property.

If the Court could not impose the conditions set out above the only other way of attaining the same object would be a re-transfer of the bond by the trustee to the insolvent, and the passing *pari passu* of fresh mortgage bonds in favour of the preferent creditors. It appears to us that this would entail unnecessary expenses, and that sec. 135 allows the Court to annex conditions to the rehabilitation, in order to avoid this very cumbersome practice.

The Court therefore orders that the insolvent be rehabilitated, subject to the condition that the claims of the preferent creditors remain intact, and that their mortgage bonds remain as valid and binding against the titles of the property of the insolvent mortgaged to them prior to the insolvency.

There will be no order as to costs.

MASON and GREGOROWSKI, JJ., concurred.

Applicant's Attorneys: *Pienaar & Marais;* Attorneys for the bondholder: *Tindall & Mortimer.*

[J. M. M.]

BROOK & OTHERS v. BROOK'S EXECUTORS AND ANOTHER.

1915. *November* 23, 24; *December* 3. MASON, BRISTOWE and GREGOROWSKI, JJ.

Will.—Bequest of property subject to conditions in a certain letter. —Failure of testator to write letter.—Evidence as to intention. —Effect of bequest.

A testator, in bequeathing certain property to S, declared that it should not accrue to S unless the executors certified in writing that S had complied with all the conditions laid down by the testator in a certain letter. The testator died without having written such letter. *Held,* that extraneous evidence relevant to the question why the testator did not write the letter was admissible. *Held,* further, that as the non-performance of the condition was due to some cause over which S had no control, and as the testator had failed to write the letter in question, S was entitled to the bequest.

Action to determine the rights of the third defendant, A. A. Struben, under the will of the late James Brook. The will was executed on June 20th, 1901, and the testator died on November 21st, 1901. The widow of the testator died in September, 1914. The will, after bequeathing the usufruct of the estate and legacies to the wife and several legacies after her death, divided the estate into four equal parts, which were to be distributed after her death amongst the heirs named in the will. One of those heirs was the third defendant, A. A. Struben, and as regards his share the following conditions were attached: "And I direct that the inheritance which I have set apart for my stepson, Archibald Anderson Struben, shall not accrue to him and neither he nor the heirs of his body have any claim thereto in any one of the following cases, to wit . . . . (*b*) If it shall not be certified by my executors by a certificate granted at the time of the general distribution and division of my estate . . . . that the said Archibald Anderson Struben has so acted and conducted himself that, in the opinion of my said executors, he has fulfilled and complied with all the conditions laid down and specified by me in certain letter, dated 20th June, 1901, containing my private instructions to my executors."

The executors had never issued such a certificate on the ground that they had never received any such letter as was referred to in the will, but had filed a distribution account in which they proposed to award to A. A. Struben his share under the will.

The plaintiffs, who were also heirs under the will, claimed that A. A. Struben was not entitled to anything under the will.

Further facts appear from the judgments.

D. de Waal (with him *C. T. te Water*), for the defendants: The condition as to the letter must be held as *pro non scripta*. See *Voet* (28, 7, 2, 9); Kersteman, *Woordenboek* (vol. 2, p. 131, *sub voce conditie*; (*Code*, 6, 25, 8); (*Dig.*, 31, 77, par. 33); Hunter, *Roman Law* (2nd ed., p. 956); *Yates* v. *University College of London* (L.R. 7, H.L. 438); *In re Williams* (24 T.L.R. 716: see also p. 29); Roper on *Legacies* (p. 623); *Keates* v. *Burton* (14 Ves. 434); Colquhoun, *Roman Civil Law*, sec. 1265, p. 241; Halsbury, *Laws of England* (Vol. XV, p. 422, sec. 836); *Croxon* v. *Ferrers* (1904, 1 Ch. 252); Theobald on *Wills* (6th ed., pp. 468, 469); *Hancock and Others* v. *Watson and Others* (1902, A.C. 14); *Holl. Cons.* (vol. 6, *Cons.* 102, p. 179); Groeneweg, *de leg. abrog. ad Inst.* (2, 14, 10); Domat, *Civil Law* (vol. 2, secs. 3230, 3237, 3248).

B. A. Tindall, for the plaintiffs: There is a strong presumption

that there was such a letter. It is possible that it might have been executed. The condition is a condition precedent; before Struben can be said to have any vested right, the certificate must be there: see Williams on *Executors* (Vol. I, pp. 1004, 1008); Grotius, *Rom. Holl. Recht.* (2, 23, 6—10; 2, 18, 20); Van Leeuwen, *Cens. For.* (1, 3, 8, par. 29; 13, 5, 26); *Voet* (28, 7, 2, 18, 20); (*Dig.*, 35, 1, 72; Jarman on *Wills* (6th ed., Vol. I, p. 135). As to costs: see *Galliers* v. *Rycroft* (17 S.C. 569).

de Waal, in reply: If the letter had been written the presumption is that it was destroyed by the testator; Jarman (*Ibid.*, p. 152); *Nelson* v. *Currey and Others* (4 S.C. 355); *In re Beresford* (2 S.C. 303); Burge, *Colonial Law* (new ed., Vol. 4, Part I, p. 802). Costs of the action should come out of the estate.

Cur. adv. vult.

Postea (December 3).

MASON, J.: This is an action to determine the rights of the third defendant, A. A. Struben, under the will of James Brook, executed on the 20th June, 1901. This will, after bequeathing the usufruct of the estate and legacies to the wife and several legacies after her death, divided the estate into four equal parts, which were to be distributed amongst the heirs named in the will. The testator directed that the share set aside for A. A. Struben should not accrue either to him or his heirs if his mother declared in writing that he was to be debarred therefrom, or if the executors should not certify in writing that he had so acted and conducted himself as to fulfil and comply with all the conditions laid down and specified by the testator in a certain letter dated the 20th June, 1901, containing his private instructions to his executors.

James Brook died on the 21st November, 1901. Letters of administration were taken out first by the executor, W. C. M. Struben, the first defendant, and later on by the second defendant, R. D. McKenzie. The third executor never took out letters of administration. The distribution of the estate was to take place after the death of Mrs. Brook. This occurred in September, 1914.

The executors have not issued any certificate in connection with the share of A. A. Struben on the ground that they have never received any such letter as is referred to in the will, but they propose in an interim account to treat A. A. Struben as one of the heirs entitled to a share under the will.

The plaintiffs are the children of the testator's half-brother, A. W. Brook, to whom is bequeathed in equal shares a fourth of the estate. They claim that A. A. Struben is not entitled to anything under the will.

The following are the circumstances under which the will was executed. The testator had married the mother of first and third defendants. The wife of the second defendant was her only daughter. The testator had no children of his own. The third defendant, A. A. Struben, who had been brought up in the house of his mother and stepfather, became involved in horse-racing, and in 1899 incurred debts which the testator paid. The testator took a very serious view of his conduct, and this was undoubtedly the origin of the clause in the will.

Early in 1901, at the request of the testator, A. A. Struben, who had been in military service, came home and lived with the testator and his mother. He used to help his stepfather in various ways, run messages for him, help him sign cheques, used to go to the bank, and kept the keys of the office, the safe and the testator's desk, from which he took documents as they were required. The testator was paralysed on his right side, and, though able to sign his name, could not write letters. His private correspondence was done for him by one, Malcolm Clark, but beyond this physical disability he was able to transact his own business fully.

In June, 1901, he consulted his solicitor, Mr. Findlay, about a will, and discussed particularly the position of A. A. Struben, then a young fellow. There is no doubt he was fond of the third defendant, but he thought that he required protection against designing persons, and that if these persons thought he actually had the inheritance, it would be dissipated. He told Findlay that the young fellow was running quite straight, and there was every hope he would continue to do so. As a matter of fact, there is no reason to doubt the third defendant's statement that he did not do any horse-racing after 1899. The testator desired that the letter should act as a restraint upon Struben's conduct. The will was drafted in accordance with the testator's instructions, the date of the letter for the executors being left blank and being filled in by Findlay at the time of the execution of the will. The will was put in an envelope, which Findlay endorsed and gave at the time of execution to the testator. That envelope containing the will was locked up in a dispatch-box by Struben at the request of the testator in the envelope so endorsed. The same envelope contain-

ing the will was produced to Findlay a few days after the testator's death. There is no doubt the envelope did not contain any letter of instructions to the executors; no such letter was ever handed to them, nor was the subject of any such letter ever mentioned to them. Clark, who had all the testator's private correspondence, never wrote and never heard of any such letter. It was suggested that the third defendant, who had access to all the testator's documents, might have destroyed it. There is no foundation for such a suggestion. All the probabilities point to the letter not having been written, as the testator was himself unable to write such a letter, and as none of those whose services he would employ for that purpose ever heard anything about it. It is, of course, quite possible that he got somebody to write the letter and then destroyed it, but this is very unlikely. The exact reason why such a letter was not written it is impossible to determine with certainty. There are several alternatives. The testator may never have intended to write the letter unless special circumstances arose, or he may have intended to write it at some future time, and then have forgotten or postponed until too late the execution of his purpose. It seems certain, so far as can be judged from surrounding circumstances, that he never intended to disinherit the third defendant absolutely. The power given to his mother during her lifetime would undoubtedly operate as a restraint, and he may have considered that this would be sufficient so long as no conduct on A. A. Struben's part called for special interference by him.

Objection was taken to evidence about the testator's intentions in connection with his will, and that objection may have been well founded if the evidence were directed to vary the meaning of clear provisions of the will, but such evidence seems to me relevant to the question as to why the testator did not write the letter of private instructions for his executors, unless, of course, the terms of the will and the law applicable to them are such as to allow no enquiry into the cause of the non-production of the letter.

Coming then to the will itself, we find different provisions in respect of each set of heirs; the portions devised to the children of W. C. M. Struben and of A. W. Brook vest upon the death of the testator, though as with the other heirs, the distribution is postponed. The children of R. D. McKenzie take in his stead, if he predeceases the testator. But the shares of R. D. McKenzie and A. A. Struben are charged with the payment of certain legacies.

The devise to A. A. Struben is made subject to the subsequent special provisoes and conditions which, apart from the charging of legacies, are contained in section 22 of the will. This section declares that his inheritance shall not accrue to, or be claimable by him or his heirs, in any one of the following cases:—(*a*) if his mother by a written document debars him from the inheritance, and (*b*) if the executors do not grant a certificate in terms of the private letter of instructions of the 20th of June, 1901. There is a proviso in favour of A. A. Struben's heirs, if he dies before the general distribution. Failing such issue, as also in case of his mother's veto, or the executors' refusal to grant the certificate mentioned, then his inheritance is to devolve upon the other heirs under the will.

Now though neither his mother nor the executors were bound to give reasons for their action, it is clear that the testator intended A. A. Struben to inherit if he conducted himself in accordance with the letter of the 20th of June, 1901. The executors were not bound to produce the letter if they granted the certificate, nor could any person challenge that grant on any grounds whatsoever, but if they refused the certificate, A. A. Struben could then call for the production of the letter. It is clear that the executors were bound to consider the matter and to act in terms of the letter, but there is a striking difference in the language as to their discretion in refusing, and their uncontrolled discretion in granting a certificate.

The terms of the will itself, just as the surrounding circumstances, proclaim the testator's desire that he should have the opportunity of receiving his inheritance. Is there any reason in law why this desire should not be fulfilled?

The general principle laid down in all the authorities is that the intentions of the testator rather than the actual language used, should govern the construction of wills and the conditions which they may contain (*Dig.* 35, 1, 19; 34, 2, 33; *Voet* 28, 7, 30).

There are many rules as to conditions, some of which do not seem to comply fully with this general principle of construction: all the jurists seem to agree, for instance, that an immoral condition is regarded as null and the bequest is unconditional (*Dig.* 28, 7, 14; *Voet* 28, 7, 15 and 16; Grot. *Introd.* 2, 23, 9), but there is a difference of opinion as to whether devisory conditions, as they are called, are to be rejected so as to leave an unconditional bequest (*Dig.* 28, 3, 16; 28, 7, 1; 35, 1, 3; *Voet* 28, 7, 15 and 16; 36,

2, 4; Van der Keessel, *Theses Sel.* 310; Van der Linden, *Inst. of Holland,* 1, 9, 6; *Holl. Consult.*, Vol. III., part ii. Cons. 181 n. 33; Pothier, *Traité des Testamens,* Cap. ii. art. 8, sec. 11 *ad fin.*), or as avoiding the institution on the ground that there was no serious intention of making an appointment (Grot. *ibid.*, 2, 18, 20; Groen., *ad Inst.*, 2, 14, 10; Van Leeuwen, *Cens. For.*, 3, 5, 24-26, but see *Roman-Dutch Law,* 3, 6, 11); but there does not seem to be any difference of opinion that in other cases where the condition demands a performance, and that performance is in the nature of things impossible the bequest is as a rule free from the condition. The two books of the *Digest* (28, 7, and 35, 1) dealing with conditions in wills abound with instances showing how strong was the tendency to reject impossible testamentary provisions.

And the Civil Law goes further than this, because it lays down the general rule that, where the non-performance of a condition which the beneficiary is called on to fulfil, is due to some cause over which he has no control, he is released from the condition (*Dig.*, 28, 7, 23). Two examples may be given: where a penalty is imposed on an heir on his failure to erect a monument to the satisfaction of some specified person, the penalty is discharged if that person is not alive or cannot be found or refuses to adjudge (*Dig.*, 35, 1, 6). Where such a penalty is imposed for failure to erect a monument similar to some specified monument, the heir is released from the penalty if it cannot be discovered what was intended as a model (*Dig.*, 35, 1, 27).

Now in the present case neither the heir, A. A. Struben, nor the executors can or have ever been in a position to carry out the terms of the will.

But Mr. *Tindall,* in his able argument for the plaintiff, contended that as the inability to perform the condition arose from the act or omission of the testator himself, we must infer that he did not intend A. A. Struben to be able to inherit, and for this proposition he relied on *Voet,* 28, 7, 18. In this passage *Voet* states that if non-performance is due to the act of the testator, the condition is considered unperformed, and the bequest lapses, and most of the commentators follow on the same line. As authority for this statement, *Voet* cites two passages from the *Digest* (32, 29, 4; 35, 1, 33 (4)), which lay down that when two slaves are bequeathed, or when liberty is bequeathed to two slaves, and the testator alienates one of them during his lifetime, the bequest takes effect only in respect of the other slave. *Voet* also cites

another *lex* of the *Digest* (35, 1, 72 (7)) which is always referred to in this connection; that *lex* deals with a devise in these words:— "Let Pamphilus be free, if he pays what I owe Titius," and lays down that though the devise is good if nothing be due to Titius, yet it lapses if the testator, after making his will, pays the debt.

Now the first two are clearly instances where the testator has shown unequivocally that he desires to cancel the bequest, and the third case seems to me referable to the same principle, because slaves were property and the payment presumably was to be the price of his freedom.

But apart from the fact that, in this action, we are not dealing with an instance where the testator has himself performed the testamentary condition, none of the circumstances show any intention of the testator to cancel the bequest he has made.

The Roman-Dutch jurists also deal with cases where the performance of a condition has become impossible through the act of some party not concerned in the matter at all; they lay down that in such instances, the bequest is void if the testator were ignorant of the impossibility, but if he knew of the circumstances preventing the performance, the condition was considered waived (*Voet*, 28, 7, 20, 21).

This rule would also support the position taken up by the defendants.

The Civil Law deals specifically with the case of a testator referring to subsequent or future conditions, and then failing to embody them in any document (*Code*, 6, 25, 8); an institution so conditionally made is declared to be free of the condition. This is in accordance with *Digest*, 30, 2, 77 (33) and especially *Dig.*, 28, 5, 36.

The rule thus laid down and adopted by *Voet* (28, 7, 2), Brunnemannus (*ad Cod.*, 6, 25, 8) and Perezius (*ad Cod.*, 6, 25, 9) seems to meet the present case completely. But a passage is cited from *Marcellus* (*Dig.*, 28, 5, 9 (5)), which seems to qualify, if not to contradict, the Code. Marcellus considered that the institution failed if it were made subject to a condition which the testator had made up his mind to, but failed to insert. Cujacius (Vol. I., p. 950, *ad Dig.*, 28, 5, 9), Brunnemannus (*ad Dig.*, 28, 5, 9 (5), and Perezius (*ad Cod.*, 62, 5, 8) attempt to harmonize the two passages, but the right explanation seems to me to be that the passage in the Code is of a later date and, being a definite enactment, must be considered to have overruled the opinion of Mar-

cellus. But these writers all state clearly that the institution is not avoided where the condition was omitted, because the testator forgot or changed his mind or was prevented by death from inserting it.

The Roman-Dutch law, therefore, in my opinion does not prevent the Court from giving effect to the true intention of the testator, but on the contrary, both in matters of form and of subsance, is antagonistic to the plaintiff's contentions.

And the English law seems to agree on the main points in question. Both *Theobald* (2nd ed., p. 400) and *Jarman* (6th ed., p. 1481) lay down that performance of a condition precedent is excused if it be made impossible by the act or default of the testator, and this accords with the House of Lords decision in *Darley* v. *Langworthy* (3 Br. P.C. 359).

The defendants are therefore entitled to judgment in their favour.

As the difficulty in this case has arisen out of the testator's own action and the matter is one of considerable complexity and importance, the costs of both parties should come out of the estate.

BRISTOWE, J., concurred.

GREGOROWSKI, J.: The late James Brook made his last will on the 20th June, 1901, and died on the 21st November, 1901. At the time of his death, he left a widow surviving him, who died in September, 1914. He had no children of his own, but in the course of the case two stepsons were mentioned, namely, the first defendant, one of the executors, and the third defendant, and there was also mention of Mr. Robert McKenzie, the second defendant, who had been married to a stepdaughter. The other relatives mentioned were his brother, the plaintiff, Alexander William Brook (or Brooks), resident in Scotland, and the children of this brother, who are the other plaintiffs.

About a year or eighteen months prior to his death, the deceased had a paralytic stroke, which left him paralysed on his right side. As the result of this he was to a large extent helpless. He was confined to his house, and had to depend on others for assistance. He had extensive private property, and he employed Mr. Malcolm Clark to come twice a week to his house to do his private correspondence, which he dictated, and the third defendant, Archibald Struben, collected his rents, wrote out cheques, kept the keys of

his safe, and looked after his documents and generally transacted such business as the deceased entrusted to him. The deceased could sign his name, but Archibald Struben stated that even to do this he required his hand to be held.

Under his will the widow enjoyed the usufruct of the estate until her re-marriage or death, and on her death last year the estate had to be liquidated and distributed in four equal parts; one fourth had to go to the children of the first defendant, a second fourth to the children of Alexander William Brook, a third fourth to Robert Downie McKenzie; the remaining fourth was bequeathed to Archibald Anderson Struben, "subject to the special provisos and conditions hereinafter contained."

There were a number of legacies, but it is not necessary to refer to these. These legacies had to be deducted from the inheritances of the heirs.

In section 21 of the will the testator provided: "And I direct that the inheritance which I have set apart for my stepson, Archibald Anderson Struben, shall not accrue to him neither shall he have any claim thereto in any of the following cases: "If (*a*) (which has been satisfied); (*b*) if it shall not be certified by my executor by a certificate granted at the time of the general distribution and division of my estate . . . . that the said Archibald Anderson Struben has so acted and so conducted himself that in the opinion of my said executors he has fulfilled and complied with all the conditions laid down and specified by me in certain letter dated 20th June, 1901, containing my private instructions to my executors."

It is common cause that the estate is now being distributed, and the plaintiff's case is that the executors have not given this certificate and have refused to give such a certificate, and the plaintiffs claim that in the absence of the certificate the third defendant cannot take the fourth of the estate conditionally given to him, and that in terms of the will this fourth must go to the other beneficiaries.

The executors admit that they have not given a certificate as required by the terms of the will, and they say that they are unable to give such a certificate, because the letter referred to in section 21 (*b*) of the will never was written by the testator, or if written by him, it has never come into their possession, nor have they any knowledge of it or of its existence.

Evidence was called to prove that diligent search was made for

the letter immediately after the death of the testator. Neither his widow nor any person in his house, or who had access to the testator, knew anything about the letter. The deceased had an office at his house, and this was ransacked without success. The will was in an envelope and was put in a deed box in the safe, but the letter was not with it. The third defendant had charge of the office, and the deceased's documents were under his control, and he said he had never seen this letter.

It is clear from the will and also from the evidence that the testator wanted his stepson to inherit the share of the estate intended for him, but he was also solicitous that his stepson should not squander what he got. The oral evidence established that this stepson had been severely reprimanded for gambling at horse-racing shortly before the will was made, and that in deference to the testator's wishes the third defendant had abandoned those bad habits for good. The third defendant was not cross-examined as to those matters, and I accept his evidence that he had no desire and no interest to suppress any such letter as that mentioned in the will, if there had been such a letter. Of course, if it had been proved or come out in cross-examination that the conduct of the third defendant after the making of the will had been unsatisfactory, especially as regards the weaknesses objected to by the deceased, it would have created a suspicion that he might have been responsible for the disappearance of the letter, but as there had been no reflection whatever upon his conduct, his evidence that he never saw the letter is entitled to every weight, and goes far to establish that the letter never was written and did not exist. The conclusion I come to is that the letter never was written. If the letter had been written, and if the deceased intended that the executors should have acted upon it, he would have placed the letter where they could have found it, and there is no reason to think that the third defendant or anybody on his behalf had any reason to fear the contents of the letter.

The question then arises as to what the position of the third defendant is under the will as the result of the non-existence of the letter and the inability of the executors to give the certificate referred to in the will as a condition precedent to the third defendant inheriting under the will.

Voet, 28, 7, 2, appears to refer to a case very similar to the present, where he speaks of a testator appointing an heir *secundum conditiones infra scriptas*, and then not stating any conditions, and

says that in such a case the appointment is valid and is to be regarded as unconditional and that the *pollicitatio conditionum* is surplusage or is *supervacua*. But *Voet* goes on to say that the conclusion would be different if the testator had decided to insert a condition in the appointment of the heir, and yet had not done so, and that this omission would render the will defective as the expression of the testator's intention (*voluntas*), and, therefore, the appointment of the heir would be void, and he refers to *Dig.*, 28, 5, 9, 5, where Ulpian cites Marcellus. *Voet* adds that a similar result would follow if a condition were found in an institution of the heir, and it were clear that the testator meant an unconditional appointment. On referring to *Dig.*, 28, 5, 9, it is obvious that Ulpian throughout is dealing with cases of *error* arising in the writing of the will as a result of misunderstanding on the part of the draughtsman or in the expressions taken down from the lips of the testator, and that Ulpian is not discussing cases similar to those treated in the first part of the passage quoted from *Voet*. He is not considering the case where a testator has made a will, and stated his intention to introduce conditions thereafter, and where there is no question of *error* in the terms of the will. It seems to me that *Voet*, 28, 7, 2. is in favour of the view that the defendant in this case gets the benefit of an unconditional appointment owing to the testator having failed to write the letter restricting the appointment contained in the first part of the will.

It was argued that owing to the absence of the letter and the consequent inability of the executors to give the certificate, we have to do with an impossible condition which the heir cannot satisfy in order to be qualified to take the inheritance, and that under Roman-Dutch law this would render the appointment void. It appears that Roman law showed great favour to last wills, and conditions impossible of fulfilment either from their nature or from their surroundings were deemed *non scriptae*, and the heir took unconditionally. The Roman-Dutch law is not quite so clear on this point (Grotius, *Introd.*, 2, 18, 20; Groenewegen, *De Leg. Abr. ad Inst.*, 2, 14, 10; Van Leeuwen, *Cens. For.*, 3, 5, 26; *Voet*, 28, 7, 9 and 16). Groenewegen tersely says that one ought to regard the probable intention of the testator as this is the most important matter to consider in order to arrive at the interpretation of the will, and if a testator gave a bequest provided the legatee drank up the sea, such a bequest could not but be regarded as ridiculous and null. Van Leeuwen says such a disposition must be

taken as made in jest and with the intention of making sport, and vitiates the disposition. *Voet*, 28, 7, 16, gives the reason why an impossible condition voids a contract, but is regarded as *non scripta* in a will, but the reason does not seem quite satisfactory. When a testator makes a will he is not always *in extremis*, nor is he necessarily always so seriously minded that he cannot be capable of perpetrating a joke. If the circumstances show that he was joking, his bequest ought to be construed in this light, and to this extent there is a great deal to be said for the view advanced by Grotius and adopted by Groenewegen and Van Leeuwen. In the present case the testator seriously intended to clog the inheritance given to the third defendant. He did not impose an impossible condition on the heir intentionally, nor did he require the heir to perform a scandalous or immoral act. If he had done so, *Voet's* authority (and the other authors do not really dissent), would render the decision of the question not a difficult one. What occurred, however, in this case is that there was a resolve or contemplation on the part of the testator to impose a laudable condition, with the view of reforming the heir, and this was never carried out, because the testator for some reason or other, probably because he found it unnecessary, did not write the letter of private instructions to his executors, and consequently neither the executors nor the heir were able to comply with what the will required. It is not suggested that the heir had behaved in such a way, that the executors could never have given the contemplated certificate, nor that the intention of the testator would be frustrated if the heir were permitted to take the inheritance. It is also a case here where the impossibility only arises after the making of the will, and the impossibility is not inherent or in the nature of things. This is eminently a case where the supervening impossibility ought not to affect the rights of the heir.

But it is urged that *Voet*, 28, 7, 18, applies where *Voet* says that if the act of the testator renders it impossible for the heir or legatee to fulfil the condition imposed by the will, then the condition fails and the inheritance or bequest cannot be demanded. The illustration given by *Voet* is the case where the testator makes a bequest to Titius on the condition that he pays Maevius a debt owing to Maevius by the testator and thereafter the testator pays this debt so that at his death there is no debt owing. The passage in the *Digest* referred to is the case where slaves are manumitted subject to paying a debt owing by the testator (*Dig.*, 35,

1, 72). It does not seem to me that it necessarily follows in all cases that if the testator renders it impossible for the heir to comply with a condition or to carry out a certain object prescribed by the testator, that the bequest must fail. Much must depend on the value of the gift and the surrounding circumstances.

It seems, however, that the case must really be decided on the principle laid down in *Voet*, 28, 7, 2, which was based on the decision given by Justinian in *Code*, 6, 25, 8 (Hunter, *Roman Law*, 2nd ed., p. 956). Justinian states that the decision is in conformity with Papinian's opinion in *Dig.*, 31 (2), 77, 33—where the testator intends to supplement his will and burden the heir and says that such is his intention, and yet abstains from so doing.

The case in which Papinian gives his opinion is one in which the testator makes a *fidei commissum* of farms to a *civitas*, and states in the bequest that he will in another document indicate the boundaries he wishes fixed, and prescribe the games to be annually celebrated, and then death prevents him from completing this document, and the opinion was that the bequest took effect (*cf.* *Yates* v. *University College, London*, L.R. 7 H.L., p. 438; 45 L.J. Ch. 137; and *In re Williams*, 24, T.L.R. 716).

The passage in the *Code* (6, 25, 8) is quite general, and says that if an heir is instituted *ille heres esto secundum conditiones infra scriptas*, and no conditions are anyhere added in the will, then *supervacuam esse conditionum pollicitationem sancimus, et testamentum puram habere institutionem.* Thus the mere *pollicitatio conditionum* is meaningless, if no conditions are stated the institution holds good free from any condition.

This passage in the *Code* has been much commented on by the commentators. Brunneman (*ad C.*, 6, 25, 8) says that Justinian introduced a new rule, and that but for this interference such an institution would have been void under *Dig.*, 28, 5, 9, par. 5. Other commentators do not take this view. Cujacius (vol. 9, p. 687; *in Tit.*, 25 *de Inst.* and *Liber.* VI *Cod.*) says that Justinian decided in *l. pen.* of *Cod.*, 6, 25, 8, that the institution of the heir under the circumstances is unconditional whether the testator omitted the condition intentionally, or by forgetfulness, or owing to death anticipating his completing the conditions, and that the *pollicatio conditionum* is of no effect. He refers to *Papinian* in *Dig.*, 31 (2), 77, 33, and then continues that *lex* 9, par. 5 of *Dig.*, 28, 5, is no objection, as this *lex* reads that he is not to be considered heir who has been instituted unconditionally, when the testator had

intended to institute him conditionally, and is easily explained by pointing out that the *juris* consult is treating of *error*, since less was written in the will than the testator had dictated. It is the error which vitiates the institution, as if it were not written *ex iudicio defuncti*. In the case dealt with in *Cod.*, 6, 25, 8, there is no error but forgetfulness of the intended restriction, or intentional omission, or else the testator is incapacitated by death intervening from imposing the intended limitation (*Vide* Baldus *ad Cod.*, 6, 25, 8, and Wissenbach *ad id.*).

Perezius follows Cujacius, *videtur enim testator remisisse quod postea non adscripsit.* On the other hand he says, if the testator did not wish the person to be heir otherwise than conditionally, and he instituted him unconditionally, it is a case of error, which Marcellus (quoted by Ulpian in *Dig.*, 28, 5, 9, 5) thinks renders the institution void, just as if the testator, intending to appoint Titius had written Gaius as heir. In the present case there is no error but only an omission of what the testator had promised.

I need only in addition refer to Donellus, *Comm. de jure Civili* (Book 6, *Cap.* 21, secs. 20 and 21). He points out that it is the intention (*voluntas*) of the testator which gives force and validity to the will, and if the will as written does not express the intention, then it is void, and this is a matter of proof; but as regards *Cod.*, 6, 25, 8, it cannot be said that the will does not correspond to the testator's intention (*voluntas*). The words of the will must be adhered to, which contain an unconditional institution, and the same applies to every instrument against which nothing has been proved. The words, "according to conditions underwritten" do not prove that the testator intended to add conditions, indeed if he did not add the conditions, the will rather proves that he did not wish to add them, because he could have added them, as he had the power, and was in the position to add them. He did not add them, therefore he did not wish to add them, there was no *voluntas*, as it appears what he said about conditions was merely what he proposed doing (*consilium*), and he was considering whether he would add conditions or not, and subsequently he decided not to impose the conditions.

Hilleger in the note to this passage points out that Duarenus considers that *Dig.*, 28, 5, 9, 5, is repealed by the *Code*, taking the same view as Brunneman.

The testator, in this instance, had contemplated and had entertained the idea of restricting the institution of the third defendant by requiring the executors to certify to his good conduct in certain respects, but he never carried out this intention (*consilium*), he never wrote the letter. There was no error, no conflict between the words of the will as written and the intention (*voluntas*) of the testator, and the action must fail and judgment be given for the defendants. Costs to come out of the estate.

Plaintiff's Attorneys: *Lunnon & Nixon;* Defendant's Attorneys: *Pienaar & Marais.*

[G. v. P.]

NICHOLSON v. VAN NIEKERK.

1915. *December* 7, 8, 9. WESSELS, MASON and GREGOROWSKI, JJ.

Elections.—Parliamentary.—Ord. 38 *of* 1903, *sec.* 108.—*Interpretation of.—Election petition.—Examination of ballot papers.—Practice.—"Cross opposite" name of candidate.—Meaning of.—Additional marks on ballot paper.—What are.—Identification of voter.—Numbers placed on ballot papers by presiding officer.—Illegal act.—Affecting result of election.—What are crosses.—Ballot paper.—Form of.—Position of crosses.—Sched. II, Transvaal Constitution Letters Patent,* 1906, *secs.* 49 (ii) (iii), 55 (3) *and* 59.

Sec. 108 of Ord. 38 of 1903 provides that on the trial of an election petition complaining of an undue election or return, and claiming the seat for some person, the respondent may give evidence to prove that the election of such person was undue in the same manner as if he had presented a petition complaining of such election. *Held* (GREGOROWSKI, J., *diss.*), that though the respondent need not file an independent petition, he—in order to be entitled to prove certain facts—had to set out those facts in his replying affidavit.

Where the Court on an application allows an inspection of the ballot papers, each party may only make use of and produce before the Court the particular