EX PARTE SMIT AND ANOTHER, *N.O.*

1910. *May* 2. WARD, J.

Will.—Legacies.—Election.

Where undivided shares in a farm were bequeathed under a mutual will to the testators' children on payment of a sum of money into the joint estate, and the survivor repudiated, a rule *nisi* was granted calling on certain of the legatees, who had been called on by the executors to elect, but had failed to do so, to show cause why they should not elect whether or not they would accept half of the bequest granted in the will to be paid from the deceased's half of the joint estate, subject to the payment of half the sum required under the will and costs incidental to transfer of the undivided shares, and, failing such election, why leave should not be granted to the executors to sell the undivided shares and distribute the proceeds in terms of the deceased's will with costs against the legatees who had not already made election.

The applicants had been appointed executors under a mutual will made by the first applicant and his deceased wife, to whom he had been married in community of property. Under the will the farm Vlakfontein, district Jacobsdal, had been bequeathed to the eight children of the testators in equal undivided shares, subject to the usufruct of the survivor and to the payment of £600 into the estate by the legatees before they should be entitled to receive transfer. The survivor had repudiated the will and decided to take his half of the joint estate by virtue of the community. The applicants had liquidated the estate, and their liquidation and distribution account had been approved on the 1st March, 1910, and transfer of the undivided half of the farm Vlakfontein registered in the name of the survivor. A deed of repudiation had been duly served on the eight legatees, and they had been called upon through registered letters from the applicants to show cause why they should not each accept one-sixteenth of Vlakfontein on payment of £37, 10s. and costs incidental to the transfer of the shares. Five had accepted

these terms. One of the remaining three had accepted, but had omitted to pay the amount due and costs and another debt of £50 on a promissory note due by her husband to the joint estate. A rule *nisi* was asked for, calling upon the respondents to show cause why they should not elect whether or not they would accept their respective legacies of one-sixteenth undivided share of the farm Vlakfontein subject to the payment of £37, 10s. and costs incidental to transfer, and a further £50 in the case of the legatee whose husband had given the promissory note, and failing such election why leave should not be granted to the applicants to sell the undivided shares and distribute the proceeds in terms of the will of the deceased with costs against the respondents.

Blaine, K.C., for the applicants: See *Strauss' Executor* v. *Strauss* (16 S.C. 441).

WARD, J.: The case quoted seems on all fours with the present one, with the exception of the promissory note due from the husband of one of the legatees. A rule *nisi* will be granted returnable on the 17th May in terms of the prayer, except as regards the promissory note.

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