*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Abraham Denyssen, in his capacity of Secretary of the South African Association for the Administration and Settlement of Estates,* v. *Sybrand Jacobus Mostert, Junior, from the Supreme Court of the Cape of Good Hope; delivered 6th June,* 1872.

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Present:

Sir James Colvile.
Sir Montague Smith.
Sir Robert P. Collier.

THIS was an action of debt on a bond brought by the Plaintiff as acting executor of the late Cornelis Mostert, against the Defendant for the recovery of the sum of 3,750*l.* Among other pleas, not now material to notice, the Defendant pleaded that he had been released from this obligation by the terms of the mutual will of Cornelis Mostert deceased, and his surviving wife. The Plaintiffs replied by a general denial, and further that the Defendant was at all events liable for half the amount of the bond, the share of the surviving spouse, who had repudiated the mutual will. Judgment was given for the Defendant by the Chief Justice and Mr. Justice Fitzpatrick,—the majority of the Court,—Mr. Justice Denyssen dissenting. The Appellants now contend that they are entitled to judgment for one-half, but only one-half, of the amount of the bond.

The facts material for the decision of this case are as follows:—

The bond was executed by the Defendant on the 11th of November, 1859, in favour of Cornelis Mostert, whose nephew he was, and whose daughter he had married, to secure the purchase-money of a

farm which Cornelis Mostert had sold to him. Cornelis Mostert had been married to Elizabeth Jacoba his wife, in community of goods. On the 31st of August, 1860, Cornelis Mostert, and his wife, made what is commonly called "a mutual will," in the manner customary in the Colony.

The provisions of that will, as far as they are material to the present case, were these:—

An estate, together with the fixtures, furniture, &c., was left as a prelegacy to the survivor, on condition of the survivor paying 3,000*l.* to the estate of the predeceaser.

Certain specific legacies were given to some of the children and grandchildren, to be paid after the death of the survivor of the testators. Certain "sole and universal heirs" were nominated, being the survivor of the testators, and their children and grandchildren, mentioned by name, in the whole to the number of ten, all of whom were to take equal shares; and "in case of the predecease of one or more of them their lawful descendants by representation *per stirpes*," subject to the following among other stipulations, to wit:—

"1st. That in computation with the inheritance of each of the instituted heirs bein children or grandchildren of the testators, shall have to be brought all that he or she respectively shall be found to be indebted to the estate of the testators.

"2ndly. That when and where such debts should happen to exceed the amount of the inheritance from the estate of the first dying, the heir or heirs, whom it may concern, shall not need to bring up (pay) the excess directly, but that it shall be sufficient for them to remain indebted to the survivor for such excess above inheritance from the estate of the first dying, to be afterwards at the death of the survivor of the testators brought into computation with his, her, or their inheritance, from the estate of the latter.

"3rdly. That, in so far as the inheritance from the estate of the first dying falling to the share of one or more of the instituted heirs, might exceed the amount of his, her, or their debts *to the estate*, the excess of inheritance above, debts may and shall be paid out to him, her, or them respectively, free and unburdened.

"4thly. That all that shall fall to the share of the aforesaid instituted heirs of the testators, as inheritance from the estate of the survivor of the testators (and in case, and in so far as the said heirs may have remained indebted to the survivor of the testators for surplus of debts above the inheritance from the first dying, then after deduction of such debts), shall be and remain as the same is hereby, burdened with the entail of *fidei commissum* in such manner that only the interest or usufruct thereof shall be enjoyed by the heirs of the testators and their surviving spouses, the latter so long as they remain unmarried, whilst the

capitals themselves shall devolve and go over, after their death, undiminished and unburdened, to their lawful descendants, *per stirpes*. And the testators did further declare that they have made this *fidei commissary* disposition in order to insure to their aforesaid heirs, as also to their children and spouses (the latter so long as they remain unmarried), maintenance and the means of living in case of misfortune, going backwards in pecuniary circumstances or mercantile affairs, insolvency or bankruptcy, or other accidents, and especially in so far as they may at present be insolvent."

And other provisions follow which are not so material to the present case.

"5thly. If, however, it should come to pass that one or more of the aforesaid instituted heirs of the testators is or are indebted to the estate of the survivor of the testators more than the amount falling to his, her, or their share as inheritance therefrom, it is in such case the will and desire of the testators that any excess of debts above the inheritance falling to the share of such heir or heirs *shall be remitted* to him, her, or them, as the same is hereby remitted to him, her, or them, *nunc pro tunc*, and that such excess of debts above inheritance shall not be allowed to be taken in the computation *of the inheritance of the respective heirs*, as *it is not the* desire of the testators that the same shall be *considered as forming* any part of the estate, but that, on the contrary, the inheritances of the respective heirs shall be decreased equally in proportion to the joint amount of the excess of debt above inheritance remitted in manner aforesaid."

Then follows the appointment of executors in these terms—

"And the testators declared to nominate and appoint as executors, testamentary administrators of the estate, and guardians of the Union and *fidei commissary* heirs, to wit: the testator, his wife, the present testatrix, together with the South African Association for the administration and settlement of estates, and the testatrix declares to nominate and appoint her husband the present testator alone."

Cornelis Mostert died on the 15th of December, 1862.

On the 23rd of December, 1862, a certificate was duly granted by the proper authority to the widow of Cornelis Mostert, and to the South African Association, appointing them executors testamentary of the will of Cornelis Mostert. On the 21st January, 1863, the widow wrote the following letter to the Association :—

"To the Board of Directors of the South African
Association for the Administration and
Settlement of Estates, Cape Town.

"Cape Town, 21st January, 1863.

"Gentlemen,—With reference to the will of my late husband, Mr. C. Mostert, senior, I hereby declare that I do not accept the

pre-legacy made to me of the garden or estate called Welgedaan, situated at the upper end of St. John Street, with all the movable property, trinkets, and cattle which are therein, and request you to sell the same publicly, for account of the estate, in the month of March. I shall supply you with a list of some articles which I wish to keep out for myself.

"With respect to the piece of land with the buildings thereon, situated in Breda Street, now occupied by Mr. J. J. Meintjes, I desire that the same be without delay transferred to my daughter, Jacoba Anna Mostert, married without community of property to the said Meintjes, to whom the same was sold by my late husband for 1,500*l.*, when a mortgage bond must be passed by my said daughter for the full amount of the purchase money, 1,500*l.*, bearing interest from ————————, *in favour of the estate of my husband*, all the expenses of this transfer, and of the mortgage bond to be passed by my daughter, also transfer dues, expenses of diagram, and all other expenses in connection with the said transfer and mortgage bond, must be paid out of the estate of my husband.

"With regard to the different shares in companies which have been found in the estate, and are set forth on the inventory, it is my desire that the same be sold as advantageously as possible for the estate; with the exception, however, of one share in your association, with regard to which my desire is that the same may be taken over by my son, Jan Fredrik Mostert, at the value now set upon it in the books, without any premium; and as it will be necessary to take the opinion of the members of the association upon this subject, I request you will employ your influence as much as possible to have this my wish gratified.

"I am, your servant,

"Widow C. Mostert, born Louw."

On the 28th August, 1863, she executed the following document:—

"I, the undersigned, Elizabeth Jocoba Louw, widow of the late Mr. Cornelis Mostert, senior, in my capacity as co-executrix testamentary with the South African Association, &c., of my aforesaid husband, Cornelis Mostert, senior, do hereby declare to ratify and approve of everything which has already been done and performed by the said Association in the administration of the estate of the said Cornelis Mostert, senior, and which shall hereafter be done and performed; and also hereby to grant full power and authority to the said Association, in their own name, and also (as acting for me) in my name to make transfer and conveyance to the respective purchasers of immovable property from said estate, and such transfer shall be considered by me as having been made with my concurrence and knowledge, under obligation of my person and property, according to law.

"E. Mostert."

"Cape Town, 28th August, 1863."

On the 18th September, 1863, the Widow Mostert wrote the following letter:—

"To the Board of Directors of the South African
Association for the Administration and
Settlement of Estates.

"Cape Town, 18th September, 1863.

"Gentlemen,—I have resolved to claim only the net half of the joint estate of my late husband and myself, and which, by virtue of the community of property which has existed between us, belongs to me by law, and to forego all legacies, and also the child's portion bequeathed to me by my late husband. I now kindly request you, as the administering executors of the said estate, to liquidate the same as speedily as possible, and to pay me the half share due to me, in cash, as I am not inclined to take in payment any bonds due by my children.

"I am, your obedient servant,

"E. Mostert."

The Association proceeded to administer the estate, and filed accounts headed as follows:—

"Liquidation and distribution account of the joint estate of the late Cornelis Mostert (sole and surviving spouse Elizabeth Jacoba Louw, as relinquished by him), according to mutual will, which accordingly is framed by the said Elizabeth Jacoba Louw and the South African Association, in their capacity as executors testamentary, pursuant to letters of administration of the 23rd December, 1862."

And they received the ordinary commission as executors.

Subsequently, the executors relinquished all their interest to the Plaintiff, who instituted this suit.

It was contended on behalf of the Appellants, that, under these circumstances, the widow had a right to revoke the will as far as it dealt with her own property, and to claim that half of the joint estate of her late husband and herself, to which she would have been entitled if she had made no will; that, consequently, she could sue the Defendant for half of the debt owing by him to the joint estate, and transfer the power of suing for it to the Plaintiff.

On the part of the Respondent, it was contended that she had no power to revoke any part of the will, and that consequently the debt could not be sued for.

The main questions which arise in the case are these:—

(1.) Could the Widow Mostert revoke the will, as far as it affected her share of the property, if she took or elected to take the benefit of its provisions in her favour?

(2.) Could she revoke it if she did not take or elect to take such benefit?

(3.) Did she or did she not take or elect to take such benefit?

The views of the Judges of the Supreme Court of the Colony, may be shortly stated thus:—

The Chief Justice inclined to the opinion that she had so elected, but held that, even if she had not, she could not revoke the will. Mr. J. Fitzpatrick held the latter proposition.

Mr. Justice Denyssen held that she had not so elected, and, that being so, that she had the power of revoking the will.

It is not to be expected that much light will be thrown upon the questions which arise in this case, by the very scanty authority to be found on the construction of documents in the nature of mutual wills in this country, where they are of rare occurrence, and where the laws regulating the relations of husband and wife are in many respects different from those of the Colony.

It may be enough to observe that, in the case of Dufaur *v.* Pereira,* Lord Camden held that a husband and wife, having made a mutual will, and that the wife, after her husband's death, having possessed all his personal estate, and enjoyed the interest thereof during his life, by that act bound her assets to make good all her bequests in the mutual will, and that her subsequent will, so far as it broke in upon the mutual will, was void. And that, in the case of Walpole *v.* Lord Orford,† Lord Loughborough refused to confirm the compact of a mutual will, under circumstances which are thus stated in Mr. Justice Williams' book on Executors, 6th edition, vol. i, p. 122:—

"The will of George, Earl of Orford, made in 1756, and Horace, Lord Walpole's codicil of the same date, made in concert, constituted, in effect, a mutual will. Horace, Lord Walpole, died in 1757, without revoking his part of the mutual will, viz., the codicil of 1756. George, Earl of Orford, died in 1791, when it appeared that he had made a codicil in 1776; and this, by reason of a reference to his last will, bearing date in 1752, was construed a revocation on his part of the mutual will, viz., the will of 1756. A case was then raised in Equity,

* 1 Dick, 219, the Judgment is also reported in 2 Harg, Fur. Arg., 272, and 2 Harg, Juridical Cases, 101.

† 3 Vesey, jun., 402.

that the mutual will of 1756 became irrevocable on the death of Lord Walpole in 1757, though it was admitted to be revocable by either during the joint lives of Lord Walpole and Lord Orford, with notice to the other. And the Judgment of Lord Camden in Dufaur *v.* Pereira, was mainly relied upon in defence of that position. Lord Loughborough, however, refused to enforce the compact of the mutual will; but this was chiefly, it seems, by reason of the uncertainty, and, in some sense, unfairness of the compact; so that it leaves the principle of Lord Camden's decision in Dufaur *v.* Pereira wholly unshaken."

The solution of the questions in this cause must be found in the authorities on the Roman Dutch law in use in the Colony.

By the Roman law the property of husband and wife was separate, and each was entitled to dispose of it at pleasure, either during life or by will.

The customs of the Dutch introduced community of goods between husband and wife, the husband being the administrator of the property, and holding the relation of curator or guardian to the wife; and this community of goods was enforced and preserved by a strict prohibition of all contracts relating to property between husband and wife. On the death of either, the survivor took half of the property; the other half, in the absence of testamentary disposition, going to the heirs of the deceased.

Both husband and wife retained the power of disposing of their respective shares by will, and any agreement renouncing this power was void.* By custom, the form of mutual wills was introduced, which, sometimes adopted by persons not related to each other, became the common form of testamentary disposition by husband and wife. Much authority (as was to be expected) is to be found bearing upon wills of this description, and the following general rules of law may be treated as clearly established:—

1. That such wills, notwithstanding their form, are to be read as separate wills, the dispositions of

* Voet ad Pandectas, lib. xxviii, tit. 3, s. 10: "Ambulatoria est hominis voluntas ad extremum vitæ halitum . . . ideo revocationem testamenti a jure concessum impedire nequit pactum de non revocandâ vel mutandâ voluntate interpositum."

each spouse being treated as applicable to his or her half of the joint property.

2. That each is at liberty to revoke his or her part of the will during the co-testator's lifetime, with or without communication with the co-testator, and after the co-testator's death.

In support of these general rules of law may be cited Grotius' Introduction to Dutch Jurisprudence, B. 1, c. v, s. 25; B. 2, c. 17, s. 24 and notes; Bynkershoek, Questiones Juris Privati, L. 3, c. 7; Huber's Heden daaghe Reghtsgeleeirheid, B. 2, c. 12; Schorer on Grotius, B. 2, c. 15, s. 9; Vanderkeesel, thes. 298; Vander-Linden, Institutes of the Laws of Holland, p. 129, and other authorities referred to in the judgment of Mr. Justice Denyssen.

The general rule being established, it next becomes necessary to ascertain the exceptions to it. They are thus stated by Grotius, B. 2, c. 15, s. 9 (translated by Mr. Herbert):—

"When the spouse, who dies first, has bequeathed any benefit in favour of the survivor, and has afterwards limited the disposal of the property in general after the death of such survivor, then such survivor, if he accepts such benefits, may not afterwards dispose of his or her share by last will in any manner at variance with the will of the deceased."

The substance of this doctrine, though expressed in varying terms, is to be found in the leading authorities from the time of Grotius to the present day.

Van Leeuwen, in his Censura Forensis, a book of high authority, after stating the general rule, thus describes the exception:—

"Quæ tamen regula limitatur (præsertim inter conjuges) casu quo duo simul testantes, alter alterum herædem instituit, sub eâ conditione atque onere; ut omnia ea bona quæ post mortem ultimi morientis, ex mutuâ hereditate supererunt, relinquantur hinc aut illi. Quo facto supervivens, *postquam hereditatem primi morientis adierit*, pro suâ etiam parte aliter, aut contra voluntatem mutuam de novo disponere haud potest, mutuo quasi consensu, eorumdem patrimonio consolidato, et ad unicum patrimonium reducto."

A passage to the same effect is to be found in Van Leeuwen's Commentaries on the Roman-Dutch Law, Book 2, c. 3, s. 8,

Their Lordships understand the expression, "postquam hereditatem primi morientis adierit"—"after he has *adiated* the inheritance of the predeceaser," as equivalent to the "*acceptance* of benefits" spoken of by Grotius. "Adiation" is a term well known to the Roman Dutch Law, and although Mr. Justice Connor in the case of Oosthuyseen *v.* Oosthuyseen (reported in Buchanan, p. 51), may be correct in saying that its technical sense, as applicable to the institution of an heir, may have become obsolete, it appears to be used by Van Leeuwen and other writers, when applied to the survivor of two co-testators under a mutual will, in a sense equivalent to the adoption and confirmation of the will by the acceptance of benefits under it.

Many extracts from the "Hollandsche Consultatien," translations of which certified by the Registrar of the Supreme Court of the Colony, have been sent to us, are in accordance with these doctrines; (among them may be cited vol. i, Consultation 50; vol. ii, Consultation 53; vol. iii, Consultation 3; vol. iv, Consultation 43.) To the same effect are extracts translated and certified in the like manner from Vandenberg's Advies Boek.

The circumstances of the case referred to in Consultation 210 of the second book of this work very much resemble those of the present.

There the husband made a will to which the wife gave her written assent, (the effect of which is stated to be equivalent to her having been a party to a mutual will,) whereby the property of both was given to the wife for life, with remainder on her death if she should survive and die unmarried, to the blood relations of both in the proportion of two-thirds to those on the side of the testator, one-third to those on the side of the testatrix. There was also a provision "that the testing parties concurred in giving to the testator's brother all that he was in any way indebted to the estate, not wishing that he should be called upon to pay it."

The widow, for four years after the death of her husband, remained in possession of the common estate; nevertheless, it was held that she could revoke the will as far as it related to her half of the joint property, and that she could sue the testator's brother for her half of the debt due by him to the

estate. It was said, "there is no difficulty in the way of the widow now repudiating the testament and retaining the half of the common estate by virtue of the community that she has for four years remained in possession of the common estate, for such continuance in possession is not an act from which it can be understood that she wishes to renounce her right of community and take under the will, for, as survivor, she was entitled to remain in possession until such time as she was called upon to make partition."

Other extracts from Vandenberg's Advies Boek, some from the Consultations of Utrecht, and others from Corens' "*decisiones* et *concilia*" support the doctrine laid down by Grotius.

These authorities have been recognized and confirmed by three cases decided in the Supreme Court of the Colony: viz., Britz *v.* Britz, Hofmeyr *v.* De Wet, and Oosthuysen *v.* Oosthuysen, to be found in Mr. Buchanan's Reports of Decisions of the Supreme Court of the Cape Colony.

In Hofmeyr *v.* De Wet, Sir John Wilde, then the Chief Justice, thus lays down the law: "A husband and wife may both make their testament in one and the same paper writing, but the paper is considered to contain two separate testaments, which each of them may always alter separately, and without the knowledge of the other, before as well as after the death of either of them; but if they have benefited each other reciprocally, and directed how the common estate is to go after the death of the survivor, if the latter has enjoyed or wishes to enjoy the benefit of it, such survivor can make no other last will or testamentary disposition of his or her share, unless he or she had rejected the benefit made and ceded the same." In Oosthuysen *v.* Oosthuysen, Sir Wlliam Hodges, then Chief Justice, says, "If the joint sponses have benefited each other, and have jointly and by common consent directed how the estate shall go after the death of the survivor, such survivor cannot, after the adiation of the estate and the enjoyment of the benefit, make another testament of his or her share of the joint estate."

Much on the same principle it was decided by the Supreme Court of the Colony that an express renunciation by the wife during her

husband's life of her right to a half of the joint property, and an agreement to accept in lieu thereof the provisions of his will, were not binding upon her after his death, but that the right of election remained.*

It may be added that Mr. Burge in his Commentaries on Colonial Law, vol. 4, p. 405 lays down the same doctrine.

These authorities (to which more might be added) establish that the power which a surviving spouse generally has to revoke a mutual will as far as it affects half of the property, is taken away on the concurrence of two conditions.

1. That the will disposes of the joint property on the death of the survivor, or, as it is sometimes expressed, where the property is consolidated into one mass for the purpose of a joint disposition of it.

2. That the survivor has accepted some benefit under the will.

It may be observed that these conditions appear to apply as much to a will made by one spouse with the authority of the other, as to a mutual will in the strict sense of the word, *i.e.*, a will executed by both.

It next becomes necessary to inquire what authority there is for rejecting the second condition? and holding that a mutual will "consolidating into a mass" the joint property, is absolutely irrevocable and unalterable by the survivor?

The main authority cited in support of this proposition appears to be a passage in Peckius, Lib. 1, c. 43, which is as follows:—

"Quoniam verò est alterius loci inquirere, quomodo in universum testamenta sunt revocabilia, quibusque in hoc cautionibus utendum sit: supersedebò illis omnibus huc extra ordinem congerendis, si illud unum addidero consultum quoque esse ad impediendam revocationem, ut alter conjugum cum consensu alterius, de utriusque bonis et eorum parte ad communium utilitatem liberorum solus testetur. Tunc enim dispositio, licet revocabilis sit ex parte testantis, tamen ex parte consentientis transit in contractum et sit irrevocabilis."

It is to be observed that the authorities which

* Scorey *v.* Scorey. Mensies' Rep. to book ii, p. 231.

Peckius cites in support of this proposition are not by his own statement of them directly in point, inasmuch as they do not refer to wills of husband and wife, and further, that it is not easy to conceive a testamentary *contract* by which one party is bound while the other is left free.

This doctrine, however, of Peckius is controverted by Huber in his "Prelectiones" (lib. 28, tit. 3), who contends with much force that it is opposed to the law which prohibits contracts between husband and wife for prescribing the manner and extent to which the common property shall be enjoyed by the survivor, and observes "Verius tamen videtur, non obstante tali pacto, testamentum posterius factum valere: quià contractus et ultimæ voluntates sunt res ita separatæ, ut hæ per illos impediri non debeant, neque possint, adeo ut ne quidem pactis dotalibus de futurâ successione, testamenti factio cuiquam adimatur."

A passage from Coren's Observ: 12, p. 54, cited by the Chief Justice in his Judgment, confirms the view of Huber. After stating a case of a mutual will and adiation by the surviving wife, Coren proceeds, "she had given her consent to the husband's disposing as he did, and then *by adiating her husband's inheritance*, she bound herself by a quasi contract to the observance of his will." The *quasi* contract arose not upon her consent being given to the making of the will (as the Chief Justice appears to read the passage), but on her election to accept the benefit of it after her husband's death.

It is to be observed, however, that Van-Leeuwen in the extract above quoted from his "Censura Forensis," in which he lays down "adiation" as one of the conditions necessary to deprive a surviving spouse of the power of revocation, refers to the above cited passage in Peckius as an authority for his position, from which it would seem probable that reading the passage in connection with the context, he understood this condition to be implied. It is further to be observed that Groenewegen would appear to take this view, for in his note to the passage of Grotius above quoted, he also cites the same passage in Peckius as supporting the doctrine laid down in the text. If the passage is to be read with this qualification, it is consistent with all the authorities. Their Lordships have not found any

other passage than the above in Peckius, in which a gift over of the joint property to children is suggested to be less revocable than such a gift to other relations or indeed to strangers.

A passage from Voet *de pactis dotalibus* (lib. 28, tit. 4, s. 63) has been read, in which he does not mention "adiation" as necessary to deprive a surviving spouse of the power of revocation; but inasmuch as he cites the extract above given from the Censura Forensis, it cannot be assumed that he intends to controvert its authority.

A celebrated cause to which the will of Philip, Duke of Arshot, and Johanna Van Halewyn his consort gave rise, wherein it was decided that the mutual will was irrevocable by the survivor, was cited on behalf of the Respondents from Decker (Dissert. Jur., lib. i, c. I), who reports his own argument at great length but the decision somewhat shortly. Whether or not the survivor in that case had "adiated," does not appear very clearly from Decker's report, but "adiation" may be inferred from the reference to the case in Van-Leeuwen's Roman Dutch Law (Book 3, c. 3, s. 8), which is as follows:—"When two married persons have reciprocally benefited each other, and directed how the goods of the common estate should devolve after the death of the survivor of them, such *survivor having enjoyed* the *benefit*, cannot dispose of his or her share by such rule; and so it was adjudged in the causes upon a will between Philip Duke of Arshot, and Mrs. Johanna Van Halewyn, his consort, by the High Court of Mechlin."

On the whole, their Lordships are of opinion that the great preponderance of authority (to say the least of it) supports the doctrine laid down by Grotius, and reaffirmed but a few years since by two successive Chief Justices of the Colony, whereby "adiation" or reception of benefits, is treated as one of the conditions without which a surviving spouse is not deprived of the power of revocation.

It remains to apply the law to the facts of the present case.

It has been argued that the joint disposition of the property after the death of the survivor in the present case applies only to part of it, that some provisions of the will indicate an intention that the

dispositions of the respective testators should apply only to their own shares, and that in this case even "adiation" would not deprive the widow of the power of revoking the instrument as far as it applies to her share of the property.

Their Lordships, however, are of opinion that the will so deals with the joint estate, that the widow would not have had the power to revoke any part of it, if she had "adiated" in the sense before explained.

On the 18th of September, 1863, she wrote a letter expressly repudiating any benefit under the will, and declaring her election to take her share of the inheritance to which she would have been entitled if no will had been made. Their Lordships are unable to concur with the Chief Justice that before this she had declared her election to adopt the will. They do not infer this election from her letter of the 21st of January, 1863, in which she renounces the pre-legacy of the farm, at the same time expressing to her co-executors her desires with respect to the administration of portions of the property; nor from her acceptance of commission, even if that commission were more than she might be strictly entitled to as executrix of her husband's will; nor from the form of the accounts made out by the association, which were certainly intended to be prepared on the footing of the letter of the 18th of September, whereby she renounced the will. Their Lordships, therefore, find upon the evidence, concurring herein with Mr. Justice Denyssen, that the widow Mostert did not "adiate" or adopt the will, in the sense of electing to receive the benefits to which she would have been entitled under it, and that being so, they are of opinion that she had by law a right to revoke it as far as it affected her property, and to claim her half of the inheritance.

The Chief Justice expresses his opinion that "it is much more consistent with justice and fair dealing, and much more conducive to confidence and good feeling between spouses to hold that the survivor has made his or her election in the life time of the predeceaser, than that the survivor, having given the predeceaser every reason to believe that the arrangement between them would

be operative after his or her death, may after the death of the predeceaser altogether upset it by resorting to his or her rights."

This reasoning applies with equal force to the power of revocation during the life of a co-testator without communication with him, a power which appears to be placed beyond doubt by the authorities. If the question were to be discussed upon principle independently of authority, it should be borne in mind that, while the power of revocation may be in some cases open to the objections urged by the Chief Justice, yet that to limit it as his judgment would do, might enable husbands disposed unduly to exercise their marital authority and influence to coerce their wives into renouncing irrevocably those rights of inheritance which it appears the especial policy of the Law of the Colony to protect. But these considerations are for the Legislature. Bynkershoek indeed speaks with strong disapprobation of abuses of the Law, not infrequent in his time, whereby one co-testator, whose testamentary dispositions had been the consideration of those of the other, revoked his part of the will without communication with his co-testator: but Bynkershoek treats the right to do this by law as clear, nor can it be doubted that that great Judge and Jurist would have deemed himself bound to give effect to the law, as he had laid it down, whatever may have been his opinion of its policy. Their Lordships have but one duty—to declare what they deem to be the law: and for the reasons they have given will humbly advise Her Majesty to reverse the judgment of the Supreme Court of the Colony, and to order that judgment be entered for the Plaintiff for one moiety of the bond with interest, credit being given for any payment in account which have been made. The Appellant will have the costs of this Appeal.

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