Cruse *vs.* Executors of Pretorius.

Will: construction of.

Where a testator had one daughter by his first marriage, and afterwards entered into a second marriage by which he had issue three sons and three daughters, and in a mutual will with the second spouse "the testator" instituted as heirs "his daughter" by the first marriage by name, together with his spouse and the children of the second marriage, and then the will contained a proviso "with regard to the portions accruing to the appearers' daughters, they the appearers declared" that they should be burdened with fidei commissum,—*Held that the proviso applied only to the inheritances of the daughters of both the appearers, and not to the inheritance of the daughter by the first marriage.*

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The plaintiff, George Lymington Cruse, on the 21st October, 1874, married Gertruida Pretorius (now Cruse) in community of property, with the full consent of her father. The said Gertruida was the only child of the late Mathys Pretorius by his first wife. Pretorius contracted a second marriage with the defendant Maartje Johanna van Jarsveld, in community of property. On the 16th July, 1876, Pretorius and his second spouse executed their mutual will, wherein the testator, in case of his dying first, instituted as his heirs his spouse in one-third of the whole undivided estate; and his daughter by his first marriage together with his children already or thereafter to be begotten of the second marriage in equal portions in the remaining two-thirds, share and share alike. And the testators by the said mutual will further provided as follows:—

"The appearers further declare their desire to be, that with a view to the better education and support of their minor children, the survivor of them shall be authorised and allowed to retain the whole of their estate under his or her sole and entire administration, and to remain in the full and undisturbed possession thereof, and in the enjoyment of the usufruct, or the rents and profits of their said joint estate, without giving any security for the same, excepting in case he or she should be minded and desirous of re-marrying, when he or she shall, one month at least previous to the solemnization of such intended marriage, secure according to law the portions of the minor heirs by notarial bonds to be passed by the survivor in

their favour; and provided further, that the survivor shall pay out to them the respective portions of the appearers' male heirs on their attaining the age of twenty-one years respectively, and not before.

"With regard to the portions accruing to the appearers' daughters, they the appearers declared their will to be, that the survivor shall pay over when they get married, the portion of only of such of them as marry by ante-nuptial contract (excluding their husbands from community of property with them) to trustees appointed by such daughters for such ante-nuptial contract, and that the portions of such of their daughters as marry without having such ante-nuptial contract, as also the portions of such of their daughters as shall attain their legal majority before marriage, shall be entailed with *fidei commissum*. Provided always, that as soon as the latter shall get married by ante-nuptial contract as hereinbefore stipulated, their portion shall be released from the entail of *fidei commissum*, and paid over to their trustees as aforesaid. And for this purpose the appearers authorise and instruct the executors of this their will, and the administrators of this their joint estate, to pay to such daughters as shall remain unmarried, or shall not marry by ante-nuptial contract, during the time of their natural lives, annually the interest of their respective portions or inheritances from the day they shall have attained the age of twenty-one years.

"And the appearers further direct, that upon the decease of such daughters whose portions shall be under entail of *fidei commissum* as heirs before provided, those portions shall devolve upon such heirs as they the said daughters shall have instituted in their respective wills, or in the event of any of them dying intestate, then upon such heirs as can legally claim from their respective estates."

Pretorius died on the 8th May, 1877, without altering or revoking the said will. There were six children of the second marriage, three males and three females, all minors and unmarried. The surviving spouse, the said Maartje Johanna, and the defendant H. B. Humphries, took out letters of administration on the 25th May, 1877, as executors testamentary of the late Pretorius pursuant to their appointment as such by the said mutual will. The said Maartje Johanna subsequently, in the month of December, 1878, married the defendant P. Watermeyer in community of property.

The plaintiff submitted, that according to the true construction and meaning of the said will, the share of paternal inheritance of the said Gertruida (the daughter of the testator by his first marriage), became due and payable to the plaintiff upon the death of the said testator, or otherwise upon the re-marriage of his widow, the first defendant above named, absolutely and without being burdened with *fidei commissum*.

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The defendants contended that according to the true construction of the said will, the plaintiff was entitled only to the annual interest accruing upon the share of the paternal inheritance during the time of the natural life of the said Gertruida, and that upon her death her share should devolve upon such heirs as she should by will appoint, or failing such will then upon her heirs *ab intestato*.

The parties agreed upon a special case embodying the above facts, to be submitted for the opinion of the Court under the new Rule of Court.

Cole, for the plaintiff, cited from *Wigram on Extrinsic Evidence*, prop. II., p. 18, to show that in interpreting the will the primary sense of the words used must first be considered. In the part of the will instituting Mrs. Cruse, "the testator" spoke of "his daughter," specially naming her. Afterwards when burdening the inheritances different language was used. "The appearers" declared their will with regard to the portions accruing to "the appearers' daughters." It was perfectly consistent with what might be passing in the testator's mind to suppose that as his eldest daughter had married in community of property with his consent, he did not intend to burden her share. It was for the defendant to show that the will imposed a burden on the inheritance. If there was any doubt the rule of law ought to be followed which would be in favour of a free estate rather than a burdened one.

Stockenström, for the defendants, stated that the executors had come into Court purely in self defence. The amount of plaintiff's inheritance was properly invested, and the question was whether it was to remain so or be handed over to the plaintiff. He submitted it was Pretorius' desire to protect the portion of all his daughters. Supposing Mr. Cruse had died, the words would clearly apply if Mrs. Cruse entered into a subsequent marriage.

De Villiers, C.J., in giving the judgment of the Court, said:—There is no doubt that this will is not free from some difficulty; but, after considering the matter, I think the true meaning of it is, that the burden of *fidei commissum* should apply only to the shares bequeathed to the daughters of both the testators. The argument of Mr. *Cole* is correct, that where it is matter of doubt whether a *fidei commissum* has

been imposed or not, that construction should rather be adopted which will give the legatee or heir the property unburdened. So that if there is any doubt in this case, the Court ought to give that construction to the will which will confer a free estate on Mrs. Cruse. This is a proper case for the executors to refer to the Court, so the usual rule as to costs will be adopted, namely, that they be paid out of the estate.

Judgment for the plaintiff accordingly, for the inheritance of his wife to be paid absolutely, without being burdened with *fidei commissum ;* costs to come out of the estate.

[Plaintiff's Attorneys, FAIRBRIDGE. ARDERNE, & SCANLEN.
Defendants' Attorney, TRUTER.]

VAN DER HOEVEN *vs.* TRUSTEE OF DE WIT.

Property in ostriches leased.—Insolvency.

Where ostriches had been leased on half profits, the birds to be delivered up after the expiration of the term, but to be at the risk of the lessee in case of loss or death during the lease, the property in the birds remains in the lessor, and on the insolvency of the lessee does not vest in his trustee.

Failure to carry out the conditions of the contract for the proper care and feeding of the birds is sufficient ground for rescinding the contract.

A special case was stated for the opinion of the Court setting forth the following facts :—

The plaintiff delivered to S. A. de Wit two ostriches, upon certain terms and conditions contained in an agreement in writing dated the 22nd June, 1877. On or about the 4th of July, 1877, De Wit surrendered his estate as insolvent, and the defendant was duly appointed his trustee. On the 10th of October the plaintiff wrote to defendant stating that he considered the contract of the 22nd June cancelled, because of the failure of the insolvent to feed the ostriches in terms of the contract, and demanded possession of them. The defendant on the 13th of October sold the two ostriches by