Privy Council Appeal No. 114 *of* 1920.

Eileen Louise Nicolle - - - - - - *Appellants*

v.

John Winter Nicolle - - - - - - *Respondents*

FROM

THE ROYAL COURT OF THE ISLAND OF JERSEY.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 14TH FEBRUARY, 1922.

Present at the Hearing:

LORD ATKINSON.
LORD PHILLIMORE.
LORD CARSON.

[*Delivered by* LORD PHILLIMORE.]

The circumstances in which this appeal comes before their Lordships are the following: The late James Nicolle, an inhabitant of Jersey, had land, *immeubles*, in the island, some of which had descended to him, and the other part of which he had acquired in his lifetime. He had also considerable personal property, *biens meubles*. He died a widower and without legitimate offspring on the 20th September, 1919, having made two wills, one of his *biens meubles* and the other of his "*biens immeubles tenant nature d'acquêts.*"

By the will, with a codicil, disposing of his *biens meubles*, which was duly proved in the Ecclesiastical Court of the Island, he left a number of legacies and the residue to "his daughter, Eileen Louise Nicolle." This is how she is described in the will. All their Lordships know further about her is that she was his illegitimate daughter. The validity of this residuary bequest was disputed by the next of kin, who pleaded "que la loi et coûtume de cette Île défend à aucun de donner par testament à son enfant illégitime au délà des aliments." The suit came on for trial in the Royal Court before the Inferior Number, when a decision

was given in favour of Eileen Louise Nicolle. An appeal was asserted but was abandoned, and no further question arises as to the will of *biens meubles*.

By the will of *immeubles* he left his house at St. Heliers, which was an acquisition or "*acquêt*" and any other "*héritages et rentes tenant nature d'acquêts*" to Eileen Louise Nicolle, again described as his daughter and living in England.

The lawful heir of the testator, who at his death was his brother, died, leaving a son. An action was brought on behalf of this son as the heir, to quash and annul the will, as being "contre loi et usage qui défend à aucun de donner à son enfant bâtard aucune chose de son héritage." Eileen Louise Nicolle, in her defence, while admitting "qu'aux termes de l'ancien coûtumier de Normandie aucun ne peut donner à son fils bâtard aucune chose de son héritage," proceeded to point out that at that time no will of *immeubles* or *héritages* could be made, and to rely on a *réglement* passed in 1851, the dispositions of which were extended by a *réglement* of 1902. Under the terms of these *réglements* (as she contended) not only was liberty given to dispose by will of such *immeubles*, but the liberty was absolute and unqualified.

The reply to this was to the effect that the liberty of testamentary disposition must be taken subject to the well-known provisions of the *coûtume* against dispositions in favour of illegitimate children.

The cause then came on for hearing before the Court of the Inferior Number, but was, by reason of its difficulty, referred to the Full Court, which, on the 5th July, 1920, by a majority decided against the validity of the dispositions; and it is from this decision that Eileen Louise Nicolle has appealed to His Majesty in Council, the original respondent to the appeal being the heir, acting by his curator.

It may be the case that at one time by the ancient *coûtume* dispositions of *biens meubles* in favour of illegitimate children could not extend beyond an alimentary or maintenance grant, but that this is no longer the law of the island seems clear by the decision given in the case of the same parties in the contest on the validity of the residuary bequest in the will of *biens meubles*. As has been already said no question could have arisen under the *coûtume* as to the validity of a testamentary disposition of *immeubles*, because there was no power of testamentary disposition at all, as there is still no power of disposition of *immeubles propres*, that is which have come to the deceased by descent except in certain cases. It is admitted on behalf of the appellant that as regards dispositions *inter vivos* there was a fetter in respect of illegitimate children, that a man could not give or sell or even mortgage in favour of an illegitimate child. This rule, however, can hardly be stated absolutely, but must be taken in the way in which it would be worked out. The disposition *inter vivos* was not void, but only voidable. The heirs of the giver had a year and a day after his

death within which to impeach the disposition; if they did not use this opportunity, the disposition stood.

This being the state of the law before the *réglement* of 1851 their Lordships have to consider this *réglement*, and in doing so, to pay full respect to the condition of the law as it stood, so that no further change be made in the previous law of the island than such as the new *réglement* fairly considered will make.

The preamble of this *réglement* is as follows :—

" Considérant qu'il est utile de permettre aux propriétaires n'ayant enfans ni autres descendans, de disposer de leurs immeubles par Testament : Les États ont adopté le Réglement suivant, pour avoir force de loi, moyennant la Sanction de Sa Très Excellente Majesté en Conseil :—

" Du Droit de Léguer des Immeubles.

" Art. 1.

" Toute personne ayant capacité pour faire un Testament de biens meubles, et ne laissant enfans ni autres descendans, pourra disposer par Testament des immeubles suivans, savoir :—

" 1. De ses acquêts.

" 2. De ses propres, s'ils ne descendent d'aucun ancesseur de ses héritiers.

" Art. 3.

" Les dispositions Testamentaires d'immeubles pourront être faites au profit de toute personne qui aurait droit de recueillir un legs de biens meubles fait par le Testateur, et qui peut possèder des héritages dans cette Île."

The *réglement* then provides that these provisions are to be without prejudice to the rights of a widow to dower, or of a surviving husband, to tenancy by courtesy, or to the feudal rights of the Crown and the Lords of fiefs, or to the rights of the Dean to require probate of any will which contains a bequest of *biens meubles*. And then by Article 30 :—

" Nos Lois et Coutumes touchant les Testamens de biens meubles, en ce qu'elles ne sont point contraires aux dispositions de ce Réglement, seront applicables aux Testamens d'immeubles."

To this it should be added that by the *réglement* of 1901 the power of testamentary disposition was extended to the case where the deceased left children or other descendants.

The language of these two *réglements* is wide and general. Special attention should be called to Article 3, which states the terms under which the devisee is to be capable to take. Every person who could receive a legacy of *biens meubles* or who is capable of possessing *héritages* or *immeubles* in the island is made capable.

As regards the second condition, their Lordships were referred to a decision cited in the record in the case of *Beakbane* v. *Beakbane*, given on the 8th December, 1915, where a devisee was a citizen of the United States and was held for this reason not to be " habile à recueillir et posséder des immeubles dans cette Île." It is not necessary to express any opinion about this decision, because the appellant would not come within it. There is no rule that a person of illegitimate birth cannot hold *immeubles*.

Then comes the first qualification. Any person is capable of profiting by a disposition of an *immeuble* who could receive a legacy of *biens meubles*. It might have been said at one time that the language of the *coûtume* rendered an illegitimate child incapable of receiving such a legacy if it extended beyond maintenance. But since the decision as to the validity of the residuary bequest in the will of *biens meubles* in favour of the appellant, unappealed from, it is not possible for the respondent to contend that if this was the ancient *coûtume* of Normandy it had not become altered in time or that the appellant was not now capable of receiving a legacy of *biens meubles* from her father.

This being so, the language of Article 3 seems precisely applicable to the present case. It was contended before their Lordships that this view of the law would create an anomaly. An illegitimate child would still remain incapable of taking *immeubles* from his or her putative father by gift *inter vivos*, while becoming capable of taking under a will. The anomaly, however, is not so great as it seems at first sight. The gift *inter vivos*, as already said, is voidable only, and not void. It has not been suggested to their Lordships that the giver could himself avoid it, and if it be the law that he could, he is not very likely to do so. So if he intends the gift to be absolute and not voidable by his heirs he would only have to avail himself of Articles 1 and 3 and confirm the gift by a devise under his will.

What then remains ? It is no doubt a sound principle of all jurisprudence that a prior particular law is not easily to be held to be abrogated by a posterior law, expressed in general terms and by the apparent generality of its language applicable to and covering a number of cases of which the particular law is but one. This as a matter of jurisprudence, as understood in England, has been laid down in a great number of cases, whether the prior law be an express statute as in *Hawkins* v. *Gathercole* 6 D.G. M. & G. 1, *Seward* v. *Vera Cruz* 10 A.C. 68, or be the underlying common or customary law of the country, *Heydon's Case* 3 Co. Rep. 7A, *River Wear Commissioners* v. *Adamson* 2 A.C. 743.

To quote from the *Vera Cruz* case : " Where general words in a later Act are capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation . . . that earlier and special legislation is not to be held indirectly repealed, altered or derogated from merely by force of such general words without any indication of a particular intention to do so."

But this argument, which would have much force if the *réglement* contained only Article 1 loses its strength when reference is made to Article 30 and above all to Article 3 ; and without refusing all weight to the considerations to which it gives rise, their Lordships cannot hold that the plain language of Article 3 is to be restricted in the way for which the respondent contends.

Their Lordships think that the effect of the *réglement* of 1851 is that the power thereby bestowed on testators extends not merely

to enable them to bestow their acquired *immeubles* by will, but also to dispose of them to any person capable of receiving *biens meubles* by legacy, and fulfilling the second condition, and that the appellant is such a person and is therefore capable of receiving the *immeubles* devised to her by her putative father's will.

Their Lordships will humbly recommend His Majesty that the sentence of the Full Court of the Royal Court of Jersey should be reversed, and that it should be declared that the *testament d'immeubles* of the late Saumarez James Nicolle is valid and operative.

Their Lordships while allowing the appeal think that it is right to follow in respect of costs the principle adopted in this case by the Royal Court ; and that as the point is a new one the costs of appellant and respondent should come out of the estate of the deceased, or in the language of the judgment of the Royal Court " seront tous les frais du procès prélevés sur la masse de la succession," and their Lordships will humbly recommend His Majesty accordingly.

In the Privy Council.

EILEEN LOUISE NICOLLE

v.

JOHN WINTER NICOLLE

DELIVERED BY LORD PHILLIMORE.

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