Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Azéma otherwise Emma Lagesse v. *Lucie Allard and another, from Mauritius; delivered 29th January*, 1873.

Present:

Sir James W. Colvile.
Sir Barnes Peacock.
Sir Montague Smith.
Sir Robert P. Collier.

THE facts in this case are undisputed. On the 24th of December, 1866, Léonce Lagesse, who was domiciled in the Island of Mauritius, made his will in what is termed the mystique or secret form. He was at that time living in cohabitation with the Appellant, who had had two children by him, and was then *enceinte* of a third.

The first clause of the will, upon the construction of which the determination of this Appeal depends, is in these words:—"J'ai reconnu pour mes enfants naturels Cécile et Marie, filles de Mademoiselle Azéma Bouché, aussi appelée Emma Bouché; je déclare reconnaître par le présent aussi pour mon enfant naturel l'enfant dont la dite Demoiselle Bouché est actuellement enceinte; et je donne et lègue à ces trois enfants la moitié de tous les biens généralement quelconques que je laisserai au jour de mon décès."

By the second clause he made certain bequests in favour of the Appellant; by the third he gave a sum of 10,000 dollars to his sister, Madame Allard the Respondent, adding these words, "Avec la condition expresse que si elle venait à mourir sans enfants, la dite somme reviendra pour une moitié à mes

trois enfants naturels sus-nommés et pour l'autre moitié à mes autres héritiers." By subsequent clauses he gave various other legacies, and by the 15th he gave all the residue of what he might leave to his brother Edmond, his brother Alphonse, his sister Madame Allard, and the children of another sister named Madame Roussel, in four equal shares. By the 16th clause he made Edmond and Alphonse his testamentary executors, and by the 17th he imposed as a condition on the legacy given to the Appellant, that she should not have "la jouissance légale des biens qui proviendront à ses trois enfants sus-nommés de ma succession;" but should administer that property under the control of his brother Alphonse, and a notary named Pelte, as her counsellors, and further directed that two particular debts of 55,000 dollars and 10,000 dollars which were due to him should form part of his children's share in his succession.

The child, of which the Appellant was *enceinte* at the date of the will was afterwards born, but died in the testator's lifetime; and it being now admitted that her interest in the legacy, whatever it may have been, survived to the other children, the will may be read as if there had been no mention of her therein.

On the 10th of August, 1867, the testator married the Appellant, thereby legitimatizing her children; and on the 28th of April, 1870, he died without having, either before or after his marriage, revoked, altered, or republished his will.

The law applicable to these facts, so far as it relates to the status of the children and their general rights in their father's estate, is equally undisputed.

By the will the children were placed in the category of "enfants naturels reconnus." As such, their father leaving brothers and a sister, they would have been entitled to one half of his succession if he had died intestate. If he died testate, they would have been entitled, as is now admitted on both sides, by analogy to the rights of legitimate children, if not by the letter of the code, to a legal reserve to the extent of three-eighths of the succession, if there were three of them, and of one-third if there were but two of them. And their father was precluded by the 908th Article of the

Code Civil from exercising his power of disposition over the rest of the property in their favour, so as to make their share exceed one-half of the whole succession; or, according to some authorities (as will be afterwards seen), even so as to give them more than their legal reserve. By the marriage the children were raised to the status of legitimate children. They therefore became the sole legal heirs of their father, entitled as such to the whole succession if he died intestate, and to a legal reserve of two-thirds of it if he died testate. And they further became entitled, if in competition not with other heirs, but with the legatees of the testator, to take the benefit of any legacy, whatever its amount, which he might give them by his will, in addition to their legal reserve, out of the remaining one-third of the succession, unless he should express an intention that the gift was not to be cumulative.

These propositions, which were ultimately admitted by both sides during the argument, are supported by Articles 334, 756, 757, and 908, and by Articles 331, 745, 913, and 857 of the Civil Code.

On the 28th of April, 1870, the Respondent, Madame Allard, brought her suit against the Appellant, "acting as the legal guardians of Cécile Lagesse and Marie Lagesse, the two infant children born from her marriage with the testator Léonce Lagesse," and against Alphonse Lagesse, "acting as the testamentary executor of the testator," for the recovery of the legacy of 10,000 dollars bequeathed to her by will, with interest thereon from the date of the service of the Declaration on the Defendants.

The Appellant originally filed three pleas. The first simply alleged that the Plaintiff had no right of action against the minors Cécile Lagessse and Marie Lagesse for the causes set forth in her Declaration. The second alleged that the legacy given to the Plaintiff was null and void to all intents and purposes, inasmuch as it contained a "substitution prohibée," or prohibited entail, within the meaning of the 896th Article of the Civil Code. The third plea was to the effect that, even if the legacy were good and valid in law, it ought to be reduced according to law, inasmuch as that and the other legacies given by the will exceeded the disposable proportion ("quotité disponible") of the

testator's succession; and inasmuch, further, as the above-named minors, Lagesse, were themselves, under and by virtue of the said will and testament, the legatees of one-half of the ("quotité disponible") disposable proportion of their father's succession, which said legacy the Defendant alleged ought to be paid in preference to all the other legacies given by the testator.

The Respondent filed her replication on the 14th of June, and on the 13th of July, 1870, the Appellant filed a notice, whereby she formally abandoned her first and second pleas, and declared that she would on the trial of the cause rest her defence only upon the third plea, which she had pleaded on behalf of her minor children.

The cause was accordingly tried on that plea, and the Court held that upon the true construction of the will the legacy given by its first clause was a gift of a moiety of the whole succession, and not of a moiety of the "quotité disponible" only. The formal judgment was as follows:—"The Court rejects the pleas of the Defendant, widow Lagesse; but, inasmuch as the children of the late Léonce Lagesse are entitled to a legal reserve of two-thirds of the estate of their late father, and that if they determine to claim such legal reserve, the amount of the Plaintiff's legacy may have to be reduced, the Defendant is hereby ordered within two weeks from this date, to state whether she takes the one-half of the estate under the testament, or the reserve of two-thirds established by the law in favour of the children. Costs of the action hitherto to be costs of succession." The Appeal is against this Judgment. The Appellant by her case and at the Bar has sought, notwithstanding her former abandonment of her second plea, to raise again the question whether the legacy to the Respondent is not void by reason of its containing a forbidden substitution; and she has also taken objection to the Judgment for treating the costs of the actions up to that stage as costs of succession. But the principal question argued before their Lordships has been, as it was in the Court below, that which arises on the third plea, viz, whether upon the true construction of the will, the minors are entitled to a legacy of one-half of the ("quotité disponible") disposable proportion of their father's succession, in addition to their legal

reserve. The Appellant has by her Counsel given up the point raised by the last sentence of the plea, and no longer contends that this legacy, if given, is payable in preference of the other legacies.

The present claim, therefore, on behalf of the minors, is that they are entitled to two thirds of the whole succession as their legal reserve; and also to a moiety of the remaining one-third or to one-sixth of the whole estate as a legacy, but subject as to the latter to any reduction which may be necessary by reason of the insufficiency of the estate to pay that and the other legacies in full.

The determination of the question thus raised seems to their Lordships to depend solely on the interpretation of the will; and in particular the first clause of it.

There was some discussion at the Bar as to the rule of construction to be applied. Their Lordships are, however, of opinion that it is their duty to consider, and if possible ascertain, what were the meaning and intention of the testator when he penned or dictated the words: "Je donne et lègue à ces trois enfants la moitié de tous les biens généralement quelconques que je laisserai au jour de mon décès;" and that the surrounding circumstances, if any, which are to enter into the consideration of that question must be those which existed at the date of the will. They are also of opinion that when the true construction of the gift has been thus ascertained the construction cannot be affected by any alteration in the circumstances of the testator, between the date of his will and that of his death. The words cannot be taken to mean one thing at one time, and another thing at another time. Mr. Mackeson in his reply, as their Lordships understood him, fairly admitted this; but argued for another proposition, which their Lordships think is equally incontestable, viz., that although the construction of the gift must be constant, its operation and effect may vary at different times, and must ultimately be determined by the circumstances of the testator, and of his family, at the time of his death.

Thus if the true construction of the clause be that it imports a legacy of a moiety of only the disposable proportion of the estate, the amount of that legacy

will be determined not only by the state of the testator's assets at the time of his death, but by the fact that by means of their legitimation the children had acquired a right to a legal reserve of two-thirds instead of one of one-third. And a further consequence of the legitimation of the children was that they thereby became entitled to claim the full benefit of the legacy in addition to their legal reserve; whereas, had their status remained unaltered, they could at most have claimed the difference between their legal reserve and one moiety of the whole succession. On the other hand if the Respondent's construction is to prevail, and the claim is to be held to import a gift of one-half of the whole succession, it may have come to pass that although such a disposition was for the benefit of the children so long as they were merely "enfants naturels reconnus," because it gave them something in addition to their legal reserve, it ceased to be of any benefit to them when, as legitimate children, they had become entitled to more than one-half of the succession by way of legal reserve.

Their Lordships have now to consider which of the two constructions is the true one.

The words of the clause in question, taken in their natural sense, are undoubtedly consistent with the construction put upon them by the Court below; and the circumstances of the testator when the will was made strongly favour that construction. His first and undisputed object was to acknowledge the children as his natural children. He must be taken to have known that by doing that he gave them a right to one-half of his succession, if he died intestate; and that, if he died testate, he could not give them more, although he might cut down their share to their legal reserve of three-eighths or one-third according to their number. If the state of the family had remained unaltered, it would be difficult, if not impossible, to resist the conclusion that the intention of the testator when he sat down to make his will was to ensure to his children all that the law would have given to them if he had died intestate; and that he therefore determined to divide his whole possessions into two equal parts, giving one to the children, and disposing of the other, of which they could not in any circumstances take any share, amongst the other

members of his family. Every clause and every word of the will is consistent with this construction. The 17th clause in particular shows that at least in that part of his will the testator was advisedly dealing with his succession, including the children's reserve. On the other hand, the construction for which the Appellant contends, viz., that the first clause is a gift only of one moiety of whatever might be the "quotité disponible" at the time of the testator's death, implies that when he made his will, he was intentionally giving to his children more of his estate by $\frac{3}{16}$ths or $\frac{1}{3}$rd, as the case might be, than the law would permit them to take. It is true that Demolombe, in commenting upon the 908th Article of the Code (see Traité des Testaments, livre 3, titre 2, part 1, chap. 2, Article 554 ter., tom. 1, p. 557), puts the case of a disposition somewhat similar to that which the construction of the Lower Court in this case assumes the testator to have made, and comes to the conclusion that it is not competent to a testator having a natural child, and a brother, to will away, or to throw the whole of his legacies upon that brother's moiety, leaving the moiety of the natural children untouched. And he seems to hold, that the effect of the 908th Article is, that if a father dies testate, leaving legal heirs, his natural children cannot take more than their legal reserve. He admits, however, that this is a contested and doubtful question. The antecedent improbability, therefore, of such a disposition is not so great as that of one which would necessarily contravene the 908th Article.

Mr. Mackeson insisted that the legacy in question is a universal legacy within the terms of the 1003rd Article of the Code. Being the gift of an aliquot part only of the whole succession, or of "la partie disponible" (as the case may be), it seems to be rather a legacy "à titre universel," as defined by the 1010th Article. The distinction, however, may be immaterial for the purposes of the argument under consideration. Mr. Mackeson further argued that, inasmuch as a testator cannot give more than that over which the law gives him a power of disposition, a universal legacy, however expressed, must be taken to be only a gift of that which the testator might give to a stranger; and therefore that, according to French law, if a testator in terms

bequeaths "that of which he may dispose," or even his "quotité disponible," that is as much a universal legacy as one which in the amplest terms professes to dispose of the testator's whole property. But why is this? The reasons will be found in Demolombe's "Traité des Testaments," livre iii, titre 2, chapter v, Article 540 (tome iv, p. 472). He says a legacy is universal when it gives to the legatee a possible right to all that the testator may have at his decease; and he goes on to show that this is the effect of a gift which is in terms one of only "la partie disponible," since it is possible that by the death in the testator's lifetime of his children, or other heirs entitled to a reserve, the legatee may eventually become entitled to the universality of the estate. Again, it is no doubt true that a universal legacy, which purports in the amplest terms to be a gift of all the property which the testator may have at his decease, may take effect only as a gift of "la partie disponible;" but that is because the law has imposed upon the succession certain charges in the way of legal reserve or otherwise, which override and control the terms of the gift and limit its effect. It is, however, difficult to see how these different propositions affect the question of construction which their Lordships have to decide. It does not follow because a legacy of the whole succession and a legacy of "la partie disponible" may in some cases have the same effect, that therefore, when they would not have the same effect, a testator who has used the larger terms is to be taken to have meant only that which would have been expressed by the other and more restricted terms. Their Lordships can find nothing in the Civil Code which supports the proposition that a testator, whatever language he may have used, cannot be taken to have intended to deal with any but the disposable proportion of his succession. On the contrary that Code in all its elaborate provisions for "rapport" and "partage" seems to assume that testators may in point of fact attempt to exceed their legal power of disposition. And in livre iii, titre 2, chapter vii (Articles 1075 *et seq.*) it expressly gives to a father the power of directing by will what particular portions of his estate shall form part of the legal reserve of his children. The first clause of the will in question, if construed as the Court below has

construed it, merely sought to secure that the children should receive the full moiety of the succession, to which they would have been entitled *ab intestato*. The circumstance that by reason of subsequent events such a provision has become practically inoperative is no reason for holding that it was never made.

The various decided cases cited from Sirey and Dalloz do not really affect the question of construction. They undoubtedly show a preponderance of authority in favour of the proposition that an heir entitled to a reserve is, when in competition with legatees, either universal or particular entitled to claim the benefit of any legacy which may have been given to him out of the "quotité disponible," in addition to his legal reserve, unless the testator has clearly manifested an intention to the contrary. But this proposition was not contested in the present suit. The only question was, whether there was any legacy capable of so taking effect?

It was further argued by Mr. Mackeson that the construction for which he contended would be natural, had the will been republished by the testator after his marriage. The answer to that argument is that the will was never republished; and that it is, therefore, unnecessary to consider how far the altered circumstances of the testator would have affected its construction if, having been republished, it had to be construed as a document speaking from the date of the republication. It seems to their Lordships that, in the absence of republication, it is mere matter of speculation whether the testator, in leaving his will after his marriage as it was before that event, acted from mere carelessness, or advisedly. If he did so advisedly, it would not follow that he must therefore be taken to have conceived that the legacy was one which would take effect in favour of his legitimatized children. He may have thought that their reserve of two-thirds was a sufficient provision for them, and have intended the remaining one-third to be applied, so far as it would extend in satisfaction of the other legacies. It is clear that he cannot have had a continuing intention to secure to his children, after they were legitimatized, all that the law would have given to them on an intestacy; since, in that case, he would have revoked the will, and allowed

the whole succession to pass to them by operation of law. Again, if he advisedly omitted to revoke his will, he must have had a continuing intention to make some provision for the other members of his family; nor does it seem probable that, having originally bequeathed to them legacies to an amount which, apparently, exceeds one-third of the whole succession, he should have left their legacies unqualified if he intended to leave only one-sixth of his estate to satisfy them. It is, however, obviously unsafe to act on speculations of this kind. The duty of a Court of Justice in such a case is to ascertain, as it best may, by the ordinary rules of construction, what the testator intended when he made his will; and to give effect to that intention so far as present circumstances will permit. And the conclusion to which their Lordships have come is that, in this case, the Court below has put the right construction upon the disputed clause of the will in question.

Two other points which were raised at the Bar remain to be noticed. The first is that which is founded on the alleged invalidity of the gift to the Respondent, by reason of its containing a forbidden substitution. Their Lordships are clearly of opinion that, after the formal abandonment of this point in the Court below, it would be improper to allow it to be argued here. They give no opinion upon it further than by saying that it does not appear to them to be by any means so clear as the learned Counsel for the Appellant have represented it to be (see Demolombe, Traité des Donations, &c., tom. i, pp. 67, *et seq.*, Articles 68 *et seq.*) If the minors have any substantial interest in raising the question, their proper course is to apply to the Court below for leave to do so in the subsequent proceedings of the cause. The Judgment under appeal is obviously only an interlocutory one, and must be followed by proceedings for the due division and administration of the assets, and the proportionate abatement of the different legacies. It is difficult, however, to see how the minors can be interested in raising this question, if they elect to take (as no doubt their guardians will, for them, elect to take) their legal reserve, since, in that case, they will receive in full all that upon the true construction of the will they are entitled to. Had the Appellant's

construction prevailed, the minors would have had a material interest in disputing the validity of any particular legacy, if, as would seem from the 1013th Article of the Code and Demolombe's Commentary thereon (Traité des Testaments, livre iii, titre ii, chap. i, Articles 602, *et seq.*); they, as legatees, "à titre universel," are not only not entitled to be paid in preference of the particular legatees, but are bound to contribute rateably with the heirs to the extent of "la quotité disponible" towards the payment of particular legacies. It was, however, suggested that, in their quality of heirs entitled to a reserve, they might incur responsibility to the other persons interested in the estate by reason of their omission to raise this question. Their Lordships cannot conceive that they can do so, particularly in this suit, which seems likely to become a general administration suit. But this too is a point which, if there be anything in it, should be submitted to the Court below in the subsequent course of the suit.

The only remaining question is, whether the Judgment under appeal can be impeached on the ground that it directs the costs of the action up to that stage to be costs of succession. It is unnecessary for their Lordships to consider whether it is in accordance with the practice of this Tribunal to allow an Appeal, which has failed on all other points, to be supported as an Appeal upon the question of costs; because they are of opinion that in this case the objection cannot be maintained. The Declaration prayed that the costs should be costs of succession of the said Léonee Lagesse, but, in case of contestation, should be paid by the contesting party. The words of the Judgment are "costs of the action hitherto to be costs of succession." Mr. Mackeson's objection was founded on the 1016th Article of the Code, which says:— "Les frais de la demande en délivrance seront à la charge de la succession, sans, néanmoins, qu'il puisse en résulter de réduction de la réserve legale." There is nothing in the words of the Decree from which it can be inferred with certainty that in the final administration of the estate, the Court below will not apply this Article in its integrity. But even if it be intended to throw the costs upon the whole succession, including the reserve, their Lordships are not prepared to say that it exceeded

its powers in doing so. Demolombe, in commenting on this Article of the Code (Traité des Testaments, livre iii, titre ii, chap. v, art. 519, vol. 4, p. 459), after stating as a general proposition that the aggregate amount of the legacy and of the costs of the "demande en délivrance" must not exceed the disposable proportion of the estate, or break in upon the legal reserve, goes on to say—"Il n'en serait autrement qu'autant que l'héritier réservataire aurait élevé une prétention mal fondée ; car, il devait être alors condamné aux dépens, lors même que sa réserve s'en trouverait entamée."

Again, what was in this case the contestation which has occasioned the chief part of the costs of this litigation? It was in effect a claim by the heirs entitled to a reserve to a legacy in addition to their legal reserve; a claim in the character of legatees, not of heirs protecting the succession, which they have failed to establish. It cannot be doubted that, in such a case, the Court below might have acted on the prayer of the declaration, and under the 130th Article of the Code of Civil Procedure have condemned the Appellant in costs. The decree therefore, however to be construed, is in ease of the Appellant and of those whom she represents.

Their Lordships will humbly advise Her Majesty to affirm the Judgment under appeal, and to dismiss the Appeal with costs.

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