Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Salmon v. *Duncombe and others, from the Supreme Court of Natal; delivered 25th June* 1886.

Present:

LORD WATSON.
LORD HOBHOUSE.
SIR BARNES PEACOCK.
SIR RICHARD COUCH.

The sole question is whether under the terms of the Ordinance No. 1 of 1856 Charlotte Salmon had the power of giving her property to her husband the Appellant; for if she had the power she has undoubtedly made the gift. The Respondents contend that she was prevented from so doing partly because they can claim legitimate portions and partly by force of the law known as *Hâc edictali*, Codex, Lib. V., Tit. IX., pl. VI.

The facts which raise the question are few and simple. Charlotte Salmon was twice married. The Respondents are the children of her first marriage. The second marriage took place at Durban in Natal on or soon after the 25th of February 1857. On that day she and the Appellant executed an ante-nuptial contract the terms of which will be presently mentioned. Mr. and Mrs. Salmon continued to reside in Durban till the year 1874, and during that time she acquired the real or immoveable property in Durban which is the subject of the present

dispute. On the 14th January 1874 she made the will in question, constituting the Appellant her executor and sole heir. She then left the colony with the intention of dying in England, being then afflicted with a fatal though lingering disease. She did die in England in February 1880. There are two children of the second marriage, and they are parties to the suit, but they have disclaimed interest in favour of their father and do not appear upon this appeal.

The Roman-Dutch law, of which the law *Hâc edictali* is part, was made the law of Natal in the year 1845. The effect of the law is that if a widow having children marries again, she shall not give to her husband any share of her property, however acquired, larger than the smallest share to which any of the children is entitled. If she does make a gift of the prohibited kind, the excess amount given by her to her husband is to be divided among the children of the former marriage. The same rule is applied to a man marrying a second time. It is clearly aimed at discouraging second marriages, to which it affixes consequences which are calculated to put the children of the first marriage in a much more favourable position than if their parents remained in a state of widowhood, and to operate with great harshness on the second family.

In the year 1856 was passed the Ordinance which has now to be construed; it is entitled,—

"Ordinance to grant to certain natural-born subjects of Great Britain and Ireland, resident in this district, the right to dispose by last will and testament of their real and personal property according to the law of England."

The preamble is as follows:—

"Whereas it is expedient to exempt persons settled in this district, being natural-born subjects of the United Kiugdom of Great Britain and Ireland, from the operation of the laws in force in this district relating to testamentary dispositions of property, both real and personal, and also to make provision

for exempting such natural born subjects of the United Kingdom of Great Britain and Ireland from the said law in cases of marriage contracted within this district."

Then it is enacted by Sect. 1 :—

"1. Any natural-born subject of Great Britain and Ireland resident within this district may exercise all and singular the rights which such natural-born subject could or might exercise according to the laws and customs of England in regard to the disposal by last will or testament of property, both real and personal, situated in this district, to all intents and purposes as if such natural-born subject resided in England."

Sect. 3 provides that natural-born subjects who shall, after the passing of the Ordinance, enter into marriage within Natal shall not be entitled to exercise the rights aforesaid unless an ante-nuptial contract be made by the parties, agreeing to reserve the exercise of the rights contained in the first section.

Sect. 2 makes an analogous provision for persons already married at the date of the Ordinance. The expression "natural-born sub-"jects" is defined to mean all the Queen's subjects.

By the ante-nuptial contract of February 1857 it was agreed—

"That all inheritances legacies gifts or bequests which may be left or bequeathed to either of the said intended consorts, shall be the property of him or her to whom they shall have been left or bequeathed, with liberty, except with respect to the donation *inter vivos* herein-after made, to dispose of the same by will codicil or other testamentary disposition in such manner as he or they shall think."

And after a recital which does not mention but evidently refers to the Ordinance of 1856, the intending husband and wife declare—

"That they wish to enjoy the same rights and privileges of devising all the property which they or either of them now possess, or which they may hereafter possess, of any nature or kind soever, both moveable and immoveable, as they would be entitled to do and exercise under the laws and customs of England; and that, in case of the death of the said parties or either of them, no division or distribution of their property shall be made according to the colonial law on that head."

The suit was raised by the Appellant, who claimed to have a transfer of the property which

was registered in the name of his wife, and also a declaration that he was entitled to the whole of the property and estate of his wife. To this suit the Registrar of Deeds and both sets of children were made parties. The Registrar and the children of the first marriage pleaded in bar of the claim, and the children in reconvention further claimed to have their mother's will declared inofficious, and to have decreed to them their legitimate portions and also the portions accruing to them under the law *Hâc edictali.* The Appellant excepted to the Registrar's plea and to the claim in reconvention, and his exceptions were heard and overruled by the Supreme Court, consisting of Mr. Justice Cadiz and Mr. Justice Wragg. The suit then proceeded to a hearing before the same two Judges together with the Chief Justice. The members of the Court were unanimous in their decision, though not in their reasons. By the decree the property is divided equally between the Appellant and his three stepsons, the Registrar is absolved from the instance, and the Appellant is saddled with the whole costs of the suit. He does not dispute the decree so far as regards the Registrar, but he seeks in this appeal to have the rest of it reversed.

The decision of the Chief Justice is founded on the conclusions to which he had come a short time before in a similar case known as *London's case.* He considers that, though the Ordinance of 1856 was clearly framed for the purpose of giving to all the Queen's subjects the option of devising property in Natal as freely as they could devise property in England, it has, owing to faulty expression, wholly failed of effect. This view has been supported at the bar by the Respondent's Counsel with great ability and resource. It cannot be expressed more clearly than in the words of the Chief Justice in *London's*

case. "No powers are given by Sect. 1 except "such as a resident in this colony could exercise "if he resided in England, but his residing in "England might not prevent his being legally "domiciled in Natal, and the law of the domicile "generally governs the devolution of moveable "property. But even if he not only resided in "England but was legally domiciled there, he, by "the laws and customs of England and of other "countries, would be controlled in respect of im-"moveable property in Natal by the *lex situs*, "by the law of Natal." He considers that the intention of the Legislature cannot be effected unless the words at the end of the section are altered in a way which would be legislation rather than construction. Upon this view, if the word "resident" be construed in its ordinary sense, and their Lordships see no reason for construing it otherwise, the Ordinance effects nothing at all. And even if the word "resident" be construed to mean "domiciled," the Ordinance effects nothing so far as regards real property. For the purposes of the argument founded on failure of intention, it does not make any great difference which construction is given to the word "resident."

It is however a very serious matter to hold that when the main object of a statute is clear, it shall be reduced to a nullity by the draftsman's unskilfulness or ignorance of law. It may be necessary for a court of justice to come to such a conclusion, but their Lordships hold that nothing can justify it except necessity or the absolute intractability of the language used. And they have set themselves to consider, first, whether any substantial doubt can be suggested as to the main object of the Legislature; and, secondly, whether the last nine words of Sect. 1 are so cogent and so limit the rest of the statute

as to nullify its effect either entirely or in a very important particular.

As to the broad intention of those who framed the Ordinance, their Lordships cannot find that anybody has ever intimated a doubt, nor do they find it possible to entertain one, that it was intended to give to all the Queen's subjects resident or settled in Natal the option of disposing by will according to English law, of property both real and personal which otherwise would devolve according to Natal law. The title may be looked at for aid in finding out the object. The preamble is of great importance in finding out the object. They have been quoted above, and nobody who reads to the end of the preamble and there stops, can doubt that the object is to provide a substantial measure substituting English law for Natal law in the cases mentioned.

That object is carried into effect by Sect. 1, on which the subsequent sections turn. Now supposing that Sect. 1 ended with the words "in this district" or with the words "intents and purposes." Though it would then be very inartificially drawn, it would not be difficult to construe it so as to give effect to the before declared object. The conditional words "could or might exercise" would require the implication of an unexpressed condition; otherwise the sentence would result in a nullity. But the implication would be by no means a difficult one. By implying after the words "customs of England" the addition "over property subject to those "laws and customs," the enactment would become sensible and harmonious.

The difficulty is, and their Lordships quite agree that it is a great difficulty, that a condition which is apparently and at first sight the correlative condition of the conditional words "could

or might exercise" is expressed by the last nine words of the section. And the question is whether that expression excludes all other implication. If such a construction left a substantial operative effect to the enactment, it might be necessary to answer that question in the affirmative; but, as it destroys the expressed objects altogether unless the word "resident" be construed to mean "domiciled," and in that case destroys the expressed objects so far as regards real property, their Lordships answer it in the negative. It is true that they cannot find a sensible meaning for the nine words in question. Very likely the draftsman, whose want of skill is shown by other expressions in the Ordinance, attributed to residence a legal effect which it does not possess. But he does not make the Legislature say that the powers conferred are not to be any greater powers than would be conferred by a residence in England. He makes it in the rest of the section use terms which, with the easy implication that is necessary to give them meaning and to harmonize with the declared objects, confer the power of escaping from Natal law and coming under English law; and he then adds words which may add nothing to what has gone before, but which ought not without necessity to be construed so as to destroy all that has gone before. A man exercising the powers conferred does not in any way violate or contravene the nine words in question. He does exercise these powers as if he resided in England, because it is perfectly immaterial for their exercise whether he is supposed to reside in England or not, and because wherever he is supposed to reside he exercises them in the same way. It is very unsatisfactory to be compelled to construe a statute in this way, but it is much more unsatisfactory to deprive it altogether of meaning. Their Lordships choose the lesser of two difficulties.

Support is given to this view by the wording of Section 2. As mentioned before, Sections 2 and 3 are complementary to one another, and they deal with the cases of marriages contracted before and those contracted after the Ordinance. In Section 3 there is a simple reference to Section 1; but in Section 2 different language is used. It provides that persons married before the Ordinance may reserve to themselves the rights given by the Ordinance; provided that the parties to the marriage execute a deed testifying "their consent to such natural-"born subject exercising all and singular the "rights possessed by such natural-born subject "as to the disposal according to the laws and "customs of England by last will and testament, "of property, both real and personal, situated in "this district." Now the rights which may be reserved under Section 2 are those given by Section 1; and the form of the prescribed declaration clearly expresses the reservation of a right to dispose by will of property, both real and personal, in Natal according to the laws and customs of England. That is the very right which the Appellant contends to have been conferred by Section 1, and which their Lordships, even without the aid of Section 2, think that Section 1 must be held to confer.

Then it is said that Section 1 only enables persons resident in Natal to exercise the powers thereby given, and that Mrs. Salmon was not resident at Natal at the date of her death when her will took effect. It is not clear what her domicile was, nor does anything turn upon domicile, because, as intimated before, their Lordships construe the word "resident" in its ordinary sense. They cannot discover any reason why the powers conferred should be limited by either domicile or residence, and if they were to guess, would guess that the word

"residence" had been used upon an erroneous view of its legal effect. Therefore not having any clue which leads them to any secondary meaning of the word, they must read it in its primary meaning. Now Mrs. Salmon was resident in Natal when she made the declaration which reserves to her the rights conferred by Sect. 1, and also when she made the will which is an exercise of those rights. It is true that, until her death, the will was ambulatory, and might have been cancelled; but in the events that have happened it remains operative, and their Lordships are of opinion that the testatrix did, by her ante-nuptial contract and her will, exercise the powers conferred by the Ordinance while she was resident in Natal.

The two learned Judges who heard and disallowed the exceptions do not differ from the foregoing conclusions. The ground on which they decided the case against the Appellant is that, prior to the passing of the Ordinance of 1856, the interests now claimed by the Respondents were rights absolutely vested in them, and that they could not be touched by the Ordinance unless clear and positive words gave a retrospective force to its provisions. Now supposing that there were any such interests vested in the Respondents, it would be very difficult to maintain in the face of Sect. 2, which shows how persons already married are to avail themselves of Sect. 1, that the Ordinance had not any retrospective effect. But their Lordships do not dwell upon that, because they are unable to see how, when the Ordinance passed, the Respondents had anything resembling a vested interest in this property. They had not even an expectancy; not even such a chance as an heir apparent has of succeeding to property vested in his ancestor. Their mother had no immoveable property when the Ordinance was passed; she

might have aliened any that she afterwards acquired; and she might have survived any or all of her issue. Those contingencies affect all the interests claimed by the Respondents. As regards the claims under the law *Hâc edictali*, those only accrued on the re-marriage of Mrs. Salmon. The canon of construction relied on by the learned Judges, though expressed somewhat too absolutely, is a sound one, because it is generally bad policy for a Legislature to disturb vested interests, and therefore *primâ facie* improbable that it should have done so. But to attribute the character of a vested interest to something which depends on the chance that a lady may acquire property, and on the chance that she may retain it till her death, and on the chance of survivorship between her and the expectants, and on the chance that she will marry a second time, is, in their Lordships' opinion, to give to that very remote possibility a substance which neither lawyers nor statesmen have ever attributed to such things. If this view of the majority in the Court below be correct, there is not a person born before the date of the Ordinance who would not have a right to claim the benefit of the displaced Natal law whenever it would bring him anything which he could not get by the substituted English law.

It was ingeniously argued by Mr. Davis that, supposing the case governed by English law, still the gift cannot take effect, for the English law would carry with it the disability of a married woman to devise land. That objection is answered by reference to the ante-nuptial contract. It appears that all of the property now in dispute cannot, if any of it can, be brought under the head of inheritance legacy gift or bequest. But the later clause of the contract, by which the parties elect to come under the English law, does, in their Lordships'

opinion, amount to a clear expression of intention that the husband and wife should have full testamentary power, each over their own property. That is by English law a permissible arrangement.

Their Lordships are of opinion that the Supreme Court should have given to the Appellant the relief he asked, and that the proper course on this appeal is to discharge the decree except so far as it affects the Registrar of Deeds, to declare the Appellant entitled to the whole of Mrs. Salmon's property, to reject the claim in reconvention, and to order the Respondents to pay to the Appellant the whole costs of the suit, except such as have been caused by the improper joinder of the Registrar. They will humbly advise Her Majesty to this effect. The Respondents must pay the costs of this appeal.