Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Martin and others v. *Lee, from the Court of Queen's Bench (Appeal side) of Lower Canada; delivered 6th February*, 1861.

Present:

LORD CHELMSFORD.
LORD JUSTICE KNIGHT BRUCE.
SIR EDWARD RYAN.
LORD JUSTICE TURNER.

THIS is an Appeal from a Decree of the Court of Queen's Bench in Lower Canada, affirming a Decree of the Superior Court of that Province. The only question raised by this Appeal upon which their Lordships think it necessary to give any opinion, is the question upon the construction of the Will of Jane Gilley, the testatrix in the cause in Canada from which the Appeal arises. Jane Gilley, the testatrix, was, at the date of her Will, and at the time of her death, the wife of George Black. She was a spinster when she married him; she had, at the date of her Will, five children living, the issue of her marriage with George Black—three sons, George, Edmund, and James; and two daughters, Isabella and Elizabeth. She had had another child, the issue of the same marriage, a daughter, Ann, who had been married, in the year 1841, to Thomas Conrad Lee, and had died on the 20th March, 1842, leaving issue of her marriage a child, Ann Lee, the Plaintiff in the suit in Canada, who was born on the 5th March, 1842. She herself died on the 13th February, 1845. Her son George afterwards died on the 27th August, 1849, leaving four infant children, all of whom are still living, and one of

whom was born before the date of Jane Gilley's Will. Her Will, which was dated the 24th December, 1844, was, so far as is material, in these terms :

" Thirdly. I do hereby give and bequeath unto George Black, my beloved husband, the use, enjoyment, and usufruct during his life of all my property, moveable or immoveable, goods, chattels, moneys, and other things which may belong to me at the time of my decease ; the present gift of the usufruct of my property I, however, make to my said husband, on the express condition that he shall not marry again, and in case of his marrying again a second time, the present legacy of the usufruct of my property shall from that day cease and determine.

" Fourthly. I do hereby give, devise, and bequeath all my share in the books on the science of ship-building or naval architecture, drawing instruments, moulds for drawing, and models belonging to my husband, to my two sons, Edmund and James Black, provided they shall follow the said business of ship-building carried on by my husband ; and in case only one of them should follow the said business of ship-building, then the said books, instruments, moulds, and models shall belong to him alone ; and in case none of them follow the said business, then the same shall belong to my eldest son George.

" Fifthly. I do hereby give, devise, and bequeath unto all my children issue of my marriage with the said George Black living at the time of my decease, by equal portion between them, all and singular the property, moveable or immoveable, goods, chattels, moneys, ware, or merchandise, or other things, which may in any way belong to me at the time of my death, hereby instituting my said children my sole and universal legatees without any reserves or exceptions, excepting that my said husband shall use and enjoy the same during his lifetime, and that my said children shall take possession of the same only after his death.

" Sixthly. I order, will, and direct, that none of my said property be partitioned or divided between my said children until the youngest of them shall have attained the age of twenty-one years.

" Seventhly. It is my wish, order, and direction, that if my said husband should die before all our children shall be of age, that in such a case all the moveable property should be sold by auction to the highest bidder, and the proceeds lent out at interest upon good security, and the immoveable property leased until the time the youngest child becomes of age, the lessee to be bound to keep and maintain the whole in good order and condition, reasonable tear and wear excepted ; and that out of the proceeds of the revenues or rents of the whole a sufficient sum be first taken out to educate and bring up in proper manner the youngest of the children, and the residue to be divided between the others, advising my said children not to disagree between themselves, and to take time to divide judiciously my property.

" Eighthly. I do hereby nominate and appoint the said George Black my husband to be the executor of this my last will and testament, in whose hands I hereby divest myself of the whole of my property according to law, hereby willing and directing that

his executorship shall not end at the expiration of a year and a day after my decease, but that he shall continue and remain as such executor, with all powers and rights thereunto appertaining, until the full, entire, and complete execution of the present will, and of all matters and things therein contained; and it is my wish and desire that my said husband, George Black, should be appointed tutor to our minor children.

"Ninthly and lastly. I hereby revoke and annul all other or former wills or codicils which I may heretofore have made to the prejudice of the present one, to which I stand as being my true last will and testament."

George Black, the husband of the testatrix, died on the 19th May, 1854. The suit in Canada was instituted in the year 1857 by Thomas Conrad Lee, as the tutor of Ann Lee, his daughter, against the surviving children of the testatrix, and the widow and children of George Black, the son, claiming, on behalf of Ann Lee, to be entitled to a share of the testatrix's estate, under the dispositions in favour of her children contained in her Will. The Judges, both in the Superior Court and in the Court of Queen's Bench, with the exception of a single Judge in the latter Court, have been unanimous in favour of the claim of Ann Lee, and the Decrees under Appeal have been in her favour accordingly.

Their Lordships, after having fully considered this case, find themselves unable to agree with the conclusion at which the Courts in Canada have arrived upon the construction of this Will. That a more extensive signification is frequently given by the old French law which prevails in Canada to the word "enfans" than is generally given by the English law to the word "children," their Lordships do not doubt; but they are satisfied that by the old French law, no less than by the English law, the paramount duty of the Courts in construing Wills is to ascertain and give effect to the intention of the testator or testatrix, to be collected from the whole Will, and not from any particular word or expression which may be contained in it: and extensive as has been the signification which the old French law has in many cases given to the word "enfans," their Lordships accordingly find that in cases where it has sufficiently appeared that that word was intended to embrace only the first generation of issue, it has been so confined in construction, of which the following case is an example: "Invitatis ad fidei commissum liberis qui ex Titio et Sempronia nascerentur, soli primi

gradus liberi non etiam nepotes invitati videntur, quia licet liberorum appellatione continentur adeoque filiorum cum de favore et commodo ipsorum agitur, illud tamen non minus verum quam tritum est, articulo 'ex' non nisi proximam et immediatam causam significari; ut perinde sit ac si fidei commissum iis duntaxat relictum esset, qui ex Titii et Semproniæ corporibus nascerentur, quo casu apertius est vocatos eos videri non posse qui non ex Titio et Sempronia sed ex eorum liberis suscepti essent." This case is to be found in 4 Burge's Comments., 567, but their Lordships refer to it only by way of example. There are many other cases to the like effect to be found in the books. The true question, therefore, in this case is, not whether the word "enfans" may include grandchildren, and even more remote descendants, but whether, upon the true construction of this Will, it was intended to include them, and their Lordships are perfectly satisfied that it was not so intended by this testatrix.

It appears to their Lordships to be clear that throughout this Will the testatrix was referring to her own children, and to her own children only. She gives a life-interest to her husband in all her property, plainly looking to him for the maintenance of the children, for she provides against the event of his marrying again, and provides also for the maintenance of the children in the event of his dying before they should be of age. Again, the children to take are to be the children of her marriage, and they were to be living at her death; which at least tends to show that she could not be referring to her daughter, whom she must of course have known to be dead. Her husband, too, was to be appointed tutor to her children. These indications of the testatrix's intention are, in the judgment of their Lordships, abundantly sufficient to countervail the general force of the word "enfans," and are so manifest that their Lordships feel bound to give effect to them. They have dealt with this case upon the footing not only that it ought, as of course it ought, to be decided according to the Law of Lower Canada, but that according to that law it ought to be disposed of, as it has been in the Courts there, upon the footing of the Will being rendered into French, and the word "children" read "enfans;" but their Lordships

desire to be most distinctly understood as not having intended to decide that the case ought to have been dealt with upon that footing. That mode of dealing with the case is open to all the inconveniences pointed out by Mr. Justice Storey, in his invaluable work on "The Conflict of Law," secs. 275 and 276, and by Lord Lyndhurst in his Judgment in Trotter *v.* Trotter (4 Bli., N. S., 505); and it may well be that this Will having been written in the English language, the proper mode of dealing with the case may have been for the Courts in Canada to ascertain what, according to the English law, was the meaning of the word "children," as used in the Will, the law of the domicile, according to which the case must, of course, be decided, resorting to the foreign law or language for the purpose of deciding the meaning of the words used in the Will. This, however, is a question of great importance, more especially having regard to the number of foreigners domiciled in this country, and of Englishmen domiciled abroad, who may prepare their Wills in their native languages; and their Lordships are anxious to be understood as having given no opinion upon the point, which was not, indeed, fully argued. It is sufficient to say that, taking the case in the view most favourable to the Respondent, the Judgments of the Courts in Canada cannot, in their Lordships' opinion, be supported.

They will, therefore, humbly recommend to Her Majesty to reverse the Decree of the Court of Queen's Bench, and to substitute for it a Decree dismissing the suit without costs, and to give no costs of the Appeal.