Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of McGibbon v. *Abbott and another, from the Court of Queen's Bench for Lower Canada, Province of Quebec; delivered* 18*th July* 1885.

Present:

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

This is an appeal from a decision of the Court of Queen's Bench for Lower Canada, in the Province of Quebec, which reversed a decision of the Superior Court in that province in favour of the Plaintiff, who is now the Appellant. He sued in the character of tutor *aux biens* of Humphrey Gordon Eversley Macrae, a minor, whom it will be convenient for the purpose of this judgement to treat as the Plaintiff.

It appears that the late William Macrae, who was domiciled in Lower Canada, executed his last will at Montreal on the 3rd March 1868, in the English language.

The 12th clause of the will was in the following words:—

"I give and bequeath unto my executors herein-after named for the use, benefit, and behalf of the children issue of the present or any future marriage of my son John Octavius Macrae, one third of the residue and remainder of my

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estate and succession, to have and to hold the same upon trust; firstly, to invest the proceeds thereof in such securities as to them shall seem sufficient, and from time to time to remove and re-invest the same, and during the life of my said son, John Octavius Macrae, to pay the rents and revenues derived therefrom, to my said son, for his maintenance and support, and for the maintenance and support of his family; and secondly, upon the death of the said John Octavius Macrae, then the capital thereof, to his children in such proportion as my said son shall decide by his last will and testament, but in default of such decision, then share and share alike as their absolute property for ever; and I hereby will and ordain that my said son, John Octavius Macrae, shall have the right to receive the said revenues and profits for his maintenance as aforesaid, without their being subject to seizure for any debts created, or due, or payable by him, but shall be deemed and are hereby declared to have been given as an alimentary provision for his support, and that of his family, and *insaississables*."

It will be convenient in this judgement to call the father "William" and the son "John." John was twice married, first in 1859, and secondly on the 20th November 1879. He died on the 12th May 1881, leaving four children the issue of his first marriage, viz., Lucy Caroline Macrae, now of age and one of the Respondents in this case, John Ogilvy Macrae, Ada Beatrice Macrae, Catherine Alice Lennox Macrae, and Humphrey Gordon Eversley Macrae, the Plaintiff, the issue of the second marriage, who was born on the 25th January 1881, and is the Appellant.

John, by his will, dated the 5th April 1880, directed and appointed that his son John Ogilvy Macrae and his three daughters, Lucie Caroline Macrae, Ada Beatrice Macrae, and Catherine

Alice Lennox Macrae, should be entitled equally, share and share alike, to the trust fund over which he had a power of appointment under his father's will; and by a subsequent provision of his will he bequeathed to his second wife the usufruct of all of his property beyond the trust fund and the amount comprised in the settlement made on his first marriage, and to all of his children, including any who might be born after his second marriage, the capital of such other property, share and share alike.

It is evident that the intention of William was to tie up the capital of the share of his son John for the benefit of John's children as a class after his death. William, when he made his will, could not foresee what children John might have at the time of his death, or what might be their respective wants or requirements. He did not, therefore, attempt to specify in what proportion the capital should be divided, but he left that to the decision of his son, who would naturally be better acquainted with the circumstances of his own children. For example, John, during his lifetime, might make advances to some of his children, as it appears from another part of the will the testator himself had done with regard to his own sons George and John, and to his daughter Catherine, and not to others. Some of the children might be otherwise amply provided for, and might need no portion of the property left by their grandfather. It is contended, however, and was contended in the Courts below, that John was bound to give some share, however small, to each of his children, and that, according to the intentions of William as expressed by his will, in default of his doing so, all the children were entitled under it to take in equal shares.

The case was heard in the first instance in the Superior Court, when Mr. Justice Torrance

decided in accordance with that view of the case.

On appeal to the Court of Queen's Bench, that Court, consisting of Chief Justice Dorion and four other Judges, reversed the decision of the Superior Court, and unanimously held that John had not only the right to apportion the capital between all his children, as well those of his then existing marriage as those of any future marriage, but also the right to dispose of the property in favour of one or more of his children to the exclusion of the others, as he had done by will. From that judgment the Plaintiff has appealed to Her Majesty in Council, for the following amongst other reasons :—

1. By the law of Lower Canada the Court is bound to give effect to the intention of the testator as evidenced by the whole will. Martin *v.* Lee, 14 Moore, P.C.C., 142.

2. That in the case of a will in the English language and couched in English legal phraseology, it was proper for the Courts of Lower Canada, in accordance with the case of Martin *v.* Lee, to have regard to the meaning and effect of that phraseology in the English language and law at the date of the will, in order to arrive at the intention of the testator.

3. That at the date of the execution of the will and down to and at the date of the death of the testator, the language of the said will would by the law of England, as it then stood, have given no right to John Octavius Macrae to exclude any of his children, but only to direct the proportions in which they would share.

4. That it appears from the will to have been the intention of the testator to benefit all his said grandchildren, and to give their father a power only to apportion but not to exclude.

5. That there is nothing in the law of Lower

Canada opposed to this construction or to this intention.

The reasons of Mr. Justice Ramsay for his judgement in the Court of Appeal are set out in the Supplemental Record, and it appears from a letter from the Clerk of Appeals at Montreal to the Registrar of the Privy Council that Mr. Justice Ramsay rendered the unanimous judgement of the Court of Appeal, and that the other Judges have no notes, and have not sent any reasons for their concurrence in the judgement.

As to the first reason for the appeal to Her Majesty in Council, there can be no doubt that, according to the law of Lower Canada as well as according to the law of England, "the paramount "duty of the Courts" (to use the words of Lord Justice Turner in the case of Martin *v.* Lee, 14, Moore's Privy Council Cases, 153) "is to ascertain "and give effect to the intention of a testator to "be collected from the whole will, and not from "any particular word or expression which may "be contained in it." But it is not their duty, by adhering to the strict letter of a will, so to construe general words as in the absence of clear and unambiguous language to impute to a testator an unreasonable intention.

The doctrine of the English Courts of Equity as to illusory or unsubstantial appointments under a power is not, and never was, any part of the old French law or of the law of Lower Canada, nor is it included in any of the Articles of Chapter 4 of the Civil Code of Canada, relating to substitutions.

The question whether John could exclude any one of his children from a share must, in their Lordships' opinion, be decided according to the law of Lower Canada, and not according to the English law. They do not understand the case of Martin *v.* Lee as deciding

that a will executed in Lower Canada by a person domiciled in Lower Canada, if written in English, must be interpreted with regard either to moveable or immoveable property in Lower Canada according to the rules of English law, and have the same effect given to the phraseology as if that phraseology had been contained in a will executed in England by a person domiciled in England, or relating to land or other property in England. All that they understand that case to decide is that the word "children," used as it was in the will then to be interpreted, was not intended to have the more extensive meaning which may sometimes be given to the word "*enfants*" in the old French law. Lord Justice Turner, at p. 154, said, "The true question there-"fore in this case is not whether the word "'*enfants*' may include grandchildren and even "more remote descendants, but whether upon "the true construction of this will it was intended "to include them." See also the remarks at pp. 154 and 155.

It could never have been intended by their Lordships to lay down a rule of construction which might render it necessary to apply the rule in Shelley's case to a conveyance or devise written in the English language of lands in Lower Canada to a man for life, with a substitution in favour of his heirs upon his death.

The question to be considered is whether, according to the law of Lower Canada, the gift in the will of William, by the words, "and, "secondly, upon the death of the said John "Octavius Macrae, the capital thereof to his "children in such proportion as my son shall "decide by his last will and testament," contained an exclusive or non-exclusive power. It may be said that, according to the words taken in their strict grammatical sense, each child was entitled to a share; but it is to be borne in mind

that, as the old English rule of equity as to illusory appointments was not in force in Lower Canada. John, even if the power is to be construed as non-exclusive, might have given a share of one cent each to four of the children, and the whole of the remainder to the other. In other words, that 100,000 dollars, the amount at which the property is valued by the Plaintiff, *minus* four cents, might have been given to one of the children, and one cent, or a share in the proportion of one to ten millions, might have been given to each of the others.

It is to be observed that at the date of his will John had only the four children, amongst whom he thereby decided that the property charged should be divided. His decision at the time was quite in accordance with the will of his father, whatever construction is to be put upon it. He was not bound at that time to make by general words provision for a child who might be afterwards born. He was not bound to make his decision *uno flatu* (see Cunningham *v.* Anstruther, 2, Law Reports, Scotch and Divorce Appeals, p. 223). He might have revoked the will and made a new will, or he might have amended it by a codicil; and all doubt as to the validity of the will which was made before the birth of the Plaintiff would have been removed if John had executed a codicil amending his will by giving one cent to the Plaintiff, and the remainder to the four children named in the will.

William, if he had pleased, might have provided by express words that each child of John should have a share, and that no share should be less than a certain amount, but he was not prepared to fix the amount of the shares. To hold that when he left to his son to fix the proportion he intended to render it compulsory upon him to give each child a share, though it should only be in the proportion of one to ten millions, would be

to impute to him a most unreasonable intention. To do so would violate the rule of interpretation, "*Qui hæret in litera hæret in cortice.*"

In England, Lord Alvanley, in the case of Kemp *v.* Kemp (5 Ves. Jun., 861), in holding a power to be non-exclusive upon finding a current of authorities against the words being construed as giving an exclusive power, observed :—" My inclination is strong to support " the execution of the power if I could consis- " tently with the rules I find established ;" and on referring to the case of Burrell *v.* Burrell, in which a testator gave all his real and personal estate to his wife, to the end that she " might " *give his children such fortunes as she should* " *think proper,*" remarked :—" Lord Camden, " as I conceive, was of opinion that these words " were so ample that if she thought fit to give " nothing to one she might so execute the power. " I am willing to subscribe to that opinion of " Lord Camden upon such a doubtful question, " being perfectly satisfied that in setting aside " these appointments, by criticising the words " ' to and amongst,' &c., and the rule as to " illusory shares, the Court goes against the " intention. I must therefore think that, " under the words of that will, Lord Camden " thought that the wife might have given the " whole to one child, and had a right to exclude " any who, in her opinion, did not want it." In the case then before him, Lord Alvanley held that the power was non-exclusive, but at the conclusion of his judgement, having given his reasons at length, he added,—" For these reasons, " but with less satisfaction than I have had in " any other judgement that I have given, being " satisfied that the person creating the power " meant a much larger power than I can hold " the person executing it had, I must declare the " appointment void."

In Sugden on Powers it is said, "In many "cases an exclusive appointment may be autho- "rized by the apparent intention of the donor, "although no words of exclusion are expressly "used. Thus, he says, in Bovil *v.* Rich, 1 Chan. "Cases, 309, the testator gave all the rest of "his estate to A B in trust, 'to give my children "'and grandchildren according to their demerits.' "A B gave the estate to one, excluding the "rest. Lord Nottingham refused to set aside "the appointment, as the children were to come "in by the act of the devisee, and he was to "give or distribute according to their demerits, "therefore he was to judge." So in the present case John was charged with the fiduciary substitution and was to decide.

It was contended in the argument at the bar that John could not properly decide with reference to the Plaintiff without considering his case, and that as his will was executed before the Plaintiff was born he must have decided without considering. This is not so. He had the power to revoke or alter his will, and if he had thought that the Plaintiff ought to have a substantially proportionate share, or even a nominal share, he could have decided in his favour by a codicil. In Domat's Civil Law, Part 2, Book 5, para. 3877, it is said, and with very good reason, "If he "who was charged with a fiduciary bequest or "substitution at the time of his death in favour "of some one of his children whom he should "think fit to choose, has given in his lifetime, "to one of his children, the things which were "subject to the fiduciary trust, this donation "would be in the place of an election if the "same were not revoked. For although the "liberty of this choice ought to last until the "time of the death of the person charged with "the fiduciary substitution, and it was for the

" interests of all the children that the said " donation should not destroy the said liberty, " yet it would be sufficient that the donee had " been made choice of, and that the said choice " had not been revoked ; seeing the choice would " be confirmed by the will of him who, having " it in his power to make another choice, had " not done so. So it would be the same thing " as if the choice had been made at the time of " his death."

The Courts in Lower Canada are not bound by the current of decisions in England, as the Judges in England before 1874, and Lord Alvanley in the case of Kemp *v.* Kemp, considered themselves to be bound in deciding whether a power was exclusive or non-exclusive. Even in England those decisions had caused so much inconvenience that it was found necessary to resort to legislation upon the subject, and the law was amended by Act 37 & 38 Vict., c. 37.

A similar Act was not necessary in Lower Canada. The Courts there were not trammelled by the current of authorities to which Lord Alvanley and other Judges in England were forced to yield.

Judge Ramsay, in his written reasons, says, and says with some force, speaking of the law of England before 1874, " It is only by the help of " repeated legislation that the law there has " come down to that reason from which I " apprehend our law starts. It was therefore " quite unnecessary for us to make any Act similar to the English Act 37 & 38 Vict., c. 37."

Mr. Justice Ramsay also, in his reasons, states that, " Under the Roman law and under the old " *régime* of France there was a great question " as to the effect of the substitution of the " children or of a class, as for instance the " relations, and that at last it seems to have

" been determined that when the children of the " Grevé were called *nominatim* they held of the " original testator, and that the father could " not affect the disposition; but that when the " children were called collectively, there was a " difference of opinion as to whether the father " could select among the children so as to " give to some and exclude others." He adds, " Although the affirmative of the proposition " cannot be supported on a strictly legal argu- " ment, it seems to have prevailed." He then cites some authorities in support of his argument.

Their Lordships are not prepared to say that that exposition of the law is not correct. If, then, a man to whom an estate is given for life, charged with a substitution in favour of his children after his death, can substitute one or more of his children to the exclusion of others, the addition of the words in the present case, " in such proportion as he shall decide," does not affect the nature or substance of the substitution. It only gives power to the father to do that which he could have done under the general words of the substitution in favour of his children.

It would be lamentable if their Lordships, in a case arising in Lower Canada and to be determined by the law of that country, should feel themselves bound by a course of English decisions which have been swept away by the Legislature as fraught with inconvenience and mischief, and thus be driven to such a construction of the will of William as would form a precedent in future cases of a similar nature, and thereby introduce into Lower Canada all those difficulties and inconveniences which it required the force of an Act of Parliament in England to remove. In their Lordships' opinion the decision

of the Court of Queen's Bench is correct. They will therefore humbly advise Her Majesty to affirm the judgement of that Court.

The Appellant must pay the costs of this appeal.