Judgement of the Lords of the Judicial Committee of the Privy Council on the Appeal of Wentworth v. *Humphrey, from the Supreme Court of New South Wales; delivered 24th July* 1886.

Present:

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

This is a suit for specific performance of a contract by which the Plaintiff agreed to sell and the Defendant to buy certain lands in the city of Sydney. The Defendant, who is the present Respondent, objects to the Plaintiff's title as insufficient. The governing question is whether on the death of one Abraham Elias, who was absolutely entitled to the property, it was to be treated as of the nature of freehold or as a chattel real. If the latter, the Plantiff has purchased it of the legal personal representative of Abraham Elias, and, subject to any prior interests, has an indisputable title.

This question turns on the construction of the Colonial Statute called the Real Estate of Intestates Distribution Act, 1862. The preamble of the Act runs thus:—"Whereas "it is expedient to alter the law relating "to the succession to real estate in cases "of intestacy." The operative part of the Act

Q 9657. 100.—7/86. A

material for the present purpose consists of Section 1, and the first sentence of Section 2. They are as follows :—

" 1. From and after the passing of this Act, all land which, by the operation of the law relating to real property now in force, would, upon the death of the owner intestate in respect of such land, pass to his heir-at-law, shall instead thereof pass to and become vested in his personal representatives in like manner as is now the case with chattel real property.

" 2. Lands held in trust or by way of mortgage passing under this Act shall be subject to the same trusts and equities as the same would have been subject to if they had descended to the heir; and all other lands so passing shall be included by the administrator in his inventory and account, and be disposable in like manner as other personal assets, without distinction as to order of application for payment of debts or otherwise."

The property in question was devised in the year 1856 to Harriet Elias for life, with remainder to Abraham Elias, son of Rosetta Elias, and his heirs. In the year 1877 Harriet Elias died, and the remainder to Abraham fell into possession. But he had died in the year 1865 at the age of 20 years. It has been the subject of a great deal of dispute whether there has been any sufficient proof that he died unmarried, and without issue, but it is not a material question. He was certainly a bastard, and had no next of kin to him in the colony. His personal estate, therefore, fell within the provisions of the Act 11 Vict., No. XXIV, and on the 12th April 1877 the Supreme Court made an order empowering Mr. Slattery, the Curator of Intestate Estates, to collect manage and administer the estate of Abraham. Slattery, treating the property now in question as subject to his administration, sold it by auction, and on the 18th July 1878 conveyed it to the Appellant who had bought it at the auction for the sum of 7,569*l*. This sum was paid into Court to the account of the estate, and after payment of expenses the balance was paid out to Rosetta Elias the mother of Abraham, in

whose favour the Governor and Council of the Colony had, under the advice of the Attorney General and the Minister of Justice, waived the claims of the Crown. The Appellant bought up an annuity charged upon the property in favour of Rosetta, and so became complete owner of the property, if Slattery had the right to sell it.

The case was heard before Mr. Justice Faucett, who considered that the Appellant was bound to get in a legal fee simple vested in one John Beeson or his heir, and also a charge created in favour of a Mr. Plomer. This having been done, the cause came on for further hearing, and Mr. Justice Faucett made his final order decreeing specific performance and giving certain directions as to the purchase money in accordance with the contract. He rested his decree on the conclusions that it was proved that Abraham Elias died intestate and unmarried, that his estate did not escheat to the Crown, and that the Crown, having a right to his property as *ultimus hæres*, had formally waived all right thereto, and that the Curator of Intestate Estates had power to sell and convey.

The Defendant appealed from this decree to the Full Court, who were of opinion that on the grounds assigned by Mr. Justice Faucett the title was not such as could be forced on an unwilling purchaser. The case was reheard upon the sole question whether Slattery could make a good title, when C. J. Martin and Mr. Justice Innes thought that he could not, and Mr. Justice Windeyer that he could, although the last mentioned learned Judge still considered that the title was too doubtful to be forced upon an unwilling purchaser. The result was that the decree of Mr. Justice Faucett was reversed, and the suit dismissed with costs. That is the decree now appealed from.

Their Lordships are of opinion that the intention of the Act of 1862 was to introduce a new rule of succession to real estate, and to enact that, in cases of intestacy, it should be administered and should devolve precisely as chattels real did before. The reasons for such a change are well known and need not be recapitulated here. One of them clearly appears on the face of the statute to be the payment of the Intestate's debts, and that is a reason which must apply to all Intestates and not merely to those who happen to leave an heir-at-law. The words used to effect the object are not quite complete, and something must be implied to give them a full meaning. The Supreme Court has read them as meaning that the change of law is to take place only in those cases in which the dead owner actually leaves an heir to take his property. Their Lordships consider it quite sa consistent with the grammar of the sentence to read it as meaning that the change is to take place whenever the intestate leaves property which, by force of the old law, would go to his heir if he had one. To express the same thing another way, they think that the words used are meant to describe the kind of property which is for the future to be treated as a chattel real, and not any particular state of an individual Intestate's family.

No reason is assigned for the narrower construction except that the wider one disturbs the rights of the Crown, who is interested whenever there is no heir. There is no doubt that, owing to this change of law, the position of the Crown is changed in the cases in which there is no heir. The Crown might lose in some cases and gain in others. In the present case it would be a gainer, because, if the property is to be treated as under the old law, the Crown would take nothing on account of the legal estate

outstanding in Beeson. But their Lordships are of opinion, first, that this general change of the law of succession to property, founded on reasons applicable to all cases alike, is not prevented by the prerogative of the Crown from applying to cases in which, by accidental circumstances, the Crown is found to be a party interested; and, secondly, that the intention to abstain from touching cases in which the Crown happens to be interested is not to be imputed to the framers of the statute.

The inconvenience of the limit which the decision under appeal places on the statute is very serious, especially in those cases in which it is desirable to apply the machinery of the 11 Vict., No. XXIV. It would be necessary in every case to abstain from action until it had been ascertained whether the deceased owner had or had not left an heir, an inquiry which is often a long and difficult one. Arguments *ab inconvenienti* must be used with great reserve when they are opposed to the grammar of a statute, but are of great weight in determining between two constructions, each consistent with the grammar.

The only other point made in the argument which their Lordships think it necessary to notice now relates to the outstanding legal estate of Beeson. That has been got in, not by conveyance from his heir, but by vesting order under the Trustee Act 1852. It is said that the order was inoperative because, there being no *cestui que* trust, Beeson's heir was not a trustee. But that Beeson and his heirs were bare trustees is clear. It might be that under the old law they could have retained their estate because there was no hand to take it away from them. But as the property is subject to the Act of 1862, Slattery was clearly entitled to have the legal estate got in for the purpose of administration, and that right he has passed to the Appellant.

Their Lordships consider that the Full Court should have dismissed with costs the appeal from Mr. Justice Faucett's decree, and that should now be done. The declarations contained in that decree with respect to Abraham Elias and to the interests of the Crown are not necessary and perhaps not sufficient to support it, and their Lordships would not make them if they were dealing with the matter *de novo*. But it also contains the declaration that Slattery had power to sell and convey, which their Lordships consider to be the true foundation of the decree. It is not worth while to alter it by expunging the useless matter. Their Lordships do not know what has been done with the deposit of 5,000*l.* made by the Respondent, and it may have become necessary to follow a course different from that directed by Mr. Justice Faucett with regard to that deposit and to the payment of the residue of the purchase money. But they conceive that it will be sufficient if Her Majesty directs that Mr. Justice Faucett's decree shall be restored, and that the Courts below shall make such further orders as are necessary, if any are so, for the proper payment of the purchase money. They will humbly advise Her Majesty to that effect. The Respondent must pay the costs of the appeal.