Privy Council Appeal No. 41 *of* 1936

Iain Alasdair Macleay - - - - - *Appellant*

v.

William James Treadwell and another - - - *Respondents*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH FEBRUARY, 1936

Present at the Hearing:

LORD BLANESBURGH.
LORD MAUGHAM.
LORD SALVESEN.
SIR JOHN WALLIS.
SIR LANCELOT SANDERSON.

[*Delivered by* LORD BLANESBURGH.]

John Macleay, of Wanganui, in the Province of Wellington, farmer, a Highland Scot by origin and probably also by birth, at the time of his death in 1895 was resident and, as has been assumed, domiciled in the Dominion of New Zealand. By a will, in 1891, he made provision for different collateral members of the Macleay family, still resident in the Highlands of Scotland—(he appears to have had no children of his own)—and the question now at issue relates to a devise of all his real estate " whatsoever and wheresoever " thereby made to trustees for the benefit of a brother and his eldest son during their joint lives and the life of the survivor, and then after 21 years to be conveyed and transferred absolutely to " the heir-at-law of such survivor his heirs and assigns." Who within the intendment of the will is that " heir-at-law " ? Is he a *persona designata*—in point of fact the appellant, as the eldest son of the survivor lately deceased? Or, is the expression, in this will, a *nomen collectivum*, signifying a class to be referred to in what follows as the survivor's statutory next of kin—composed of persons who, as a result of modern New Zealand legislation with reference to the succession to real estate in the Dominion, would be entitled to succeed in an administration in intestacy to any New Zealand real estate of his own of which the " survivor " might have died possessed. The question, one, as will be found, of pure construction, can only be approached effectively after the provisions of the will as a whole have been reviewed and after the words immediately in debate have been seen in the setting in which they there are found, due regard being had to the effect, if any, of the legislation referred to upon the meaning otherwise attributable to them. To the will therefore their Lordships at once turn.

It is dated the 11th September, 1891. It opens with the gift of a legacy of £50 to each of the children of the testator's sister Kate " now or lately residing near Wingwall in Ross-shire in Scotland " : then follow legacies of a like amount to a daughter of the testator's sister Ann " also now or lately residing near Wingwall aforesaid," and to a son of the testator's brother Donald—in his case, by way of exception, with no reference to the place of residence of either son or father.

The will then proceeds :—

> " I give, devise and bequeath all the rest of my personal estate whatsoever and wheresoever unto my brother Alexander Macleay and his son John both now or lately residing near Wingwall aforesaid for their absolute use and benefit in equal shares."

Thereupon follows the devise now in question :—

> " I give and devise all my real estate whatsoever and wheresoever unto Archibald McDonell of Kauangaroa in the said Provincial District, Farmer and Donald Stewart of Wanganui aforesaid farmer who with their heirs executors administrators and assigns are hereinafter called my trustees upon trust to pay the rents profits and emoluments to my said brother Alexander and his said son John in equal shares for their absolute use and benefit and upon the death of either of them my said brother and nephew upon trust to pay the whole of the said rents profits and emoluments to the survivor for his absolute use and benefit And upon further trust " [and now is reached the provision upon which the present question arises] " at the expiration of twenty-one years after the death of such survivor to convey and transfer the whole of my real estate absolutely to the heir-at-law of such survivor his heirs and assigns the true intent of this my will being that the heir-at-law of such survivor shall ultimately take the whole of the corpus of my real estate And upon further trust until such conveyance and transfer to pay the said rents and profits and emoluments after the death of such survivor to such heir-at-law for his absolute use and benefit And I empower my said trustees to lease my said real estate or any part thereof from time to time at their discretion at such rent as may be obtained therefor without fine premium or foregift for any term not exceeding twenty-one years to take effect in possession on such terms as they may think proper."

And the testator appointed these named New Zealand trustees to be the executors of the will.

A summary statement of subsequent events may conveniently precede the consideration of these provisions.

The testator died on the 26th of June, 1895. On the 5th July following his will was proved by the executors. In 1913 they retired from the trusteeship, and the respondents William James Treadwell and George Stannard Gordon were duly appointed trustees of the will in their place, and have since acted in the trusts thereof. The testator's brother Alexander and his nephew John—the full name of the nephew was John Leed Macleay—both survived him. Of these Alexander, the father, was the first to go. John Leed, the son and " survivor ", died on the 6th July, 1931. He had been twice married, and he left surviving him, his second wife, with sons and daughters of both marriages, seven in number. Three of these children in 1935 were still infants. The youngest of them is now deceased. The

appellant is the eldest son. He asserts that he is " the heir-at-law " of the survivor referred to in the testator's will and he claims an immediate conveyance of the whole real estate to himself. The rival contention of the statutory next of kin other than the appellant is that all of them collectively are in the event the " heir-at-law " to whom the testator in the will referred and as such are now entitled to the testator's real estate in the proportion of one-third to the widow of John Leed Macleay and two-thirds to his children who survived him.

The appellant's claim was not accepted by his immediate relatives and in order to have determined the question which it raised the trustees, on the 24th of January, 1935, issued from the Supreme Court of New Zealand the originating summons out of which this appeal emerges. The appellant was cited as defendant and following an order made in the proceedings the summons was served upon the respondent Mr. G. W. Currie as representing the statutory next of kin of John Leed Macleay other than the appellant, his eldest son.

The questions propounded by the summons were as follows:—

> " 1. Who is, or are, the person or persons now entitled to succeed to the real estate of the said John Macleay deceased—the testator?
>
> " 2. Whether the person or persons so found to be entitled to succeed are entitled to a conveyance from the trustees immediately or at the expiration of twenty-one years from the death of the survivor of the brother and nephew of the testator? "

These questions by an order of the Supreme Court of the 16th February, 1935, were removed into the Court of Appeal for determination, and that Court after full argument by a majority of three learned Judges to two—these latter accepting the contentions of the appellant—answered the first in favour of the statutory next of kin and caused that answer to be embodied in an order of the Court dated the 5th July, 1935. It is from that order containing in effect a deliverance in the sense stated—the actual terms of the order will be considered later—that the eldest son now appeals.

The second propounded question has ceased to be a matter of contest. For the moment it may along with its answer be left alone.

Returning now to the will of the testator in order to ascertain from its terms who is the " heir at law " selected by him as the ultimate devisee of his real estate, the first inquiry, it would seem, should be directed to the question what is the system of law under which that " heir at law " is to be constituted. And such an inquiry might well have been a difficult one.

The real estate, the subject of the devise, is all the testator's real estate, whatsoever and wheresoever—that is to say beyond quite as much as within New Zealand. A single heir-at-law is the devisee of the whole—but there is no indication given of the country by whose law, be he one person

or many, that heir-at-law is to be constituted. It seems clear from the will that at its date the law of New Zealand was not the personal law either of Alexander or of John Leed Macleay. It may perhaps be hazarded that the law of Scotland was then the personal law of both, and had the testator died possessed of Scottish real estate only or of Scottish, as well as of New Zealand real estate, it might have been difficult indeed to determine whether it was the Scots heir-at-law or the New Zealand heir-at-law of the survivor who was named by the testator as devisee. And the difficulty would have been enhanced by two considerations never throughout this case to be lost sight of : the first that it was open to the testator by the law of New Zealand to devise his real estate there to anyone it pleased him to select and identify by any title or description : and the second that the heir-at-law of the survivor named by the testator took nothing in his character of heir-at-law, that expression in this will being no more than the label by which might be identified the beneficiary selected to take by direct gift from himself his, the testator's, real estate all over the world but no property of the " survivor's " anywhere.

But these, and other difficulties easily suggested, are it is found met by the fact that, whatever may have been the position at the date of the will—and in this respect it may be assumed perhaps to have remained unaltered when he died, all the testator's real estate at his death was situate within New Zealand. Indeed it consisted of no more than his farm at Wanganui of 500 acres in area and of £6,000 in value.

It is therefore only to New Zealand real estate that the devise, notwithstanding its complete generality actually attaches, and when to that are added the accepted assumption that the testator himself died domiciled in New Zealand, and the facts that his devisees in trust were both New Zealanders, and that the " survivor " would at his death be, under the will, tenant for life of this New Zealand property and possibly be himself in occupation, it becomes on construction, sufficiently clear, whatever may have been the testator's own view, if he had any, that the New Zealand heir-at-law of the survivor and no other must be taken to have been the heir selected by him as ultimate devisee. The only consideration remaining to bar that conclusion, viz. that at the date of the will the law of New Zealand was not, in the view of the testator, the survivor's personal law, cannot in any Court of construction successfully withstand these opposing considerations. Indeed their Lordships have dealt with this question at length, not so much because, in the result, the answer to it is doubtful, as because by the inquiry made they have been enabled to disclose, and this, it will be seen, becomes important in the sequel—that these considerations on this point, separately or collectively, balanced by counter-considerations or the reverse, are merely pointers to the true meaning of the testator's words, the only problem for solution in this case, and a problem, be it said

at once, to be solved with no permissible judicial preferenc for one solution over another.

Interpreting now the will of the testator armed with the finding that the heir at law there named is the heir at law constituted by the law of New Zealand the next step in construction is not contested in any quarter. It is agreed that had the testator's will been executed in 1874 before the passing of the statute of that year to which reference will immediately be made the heir at law of the survivor therein referred to must have been the appellant as his eldest son and that that must still in New Zealand be the effect of the will unless, on construction, that effect in the case of a will made after it was passed is displaced by the legislation of 1874 and an Act of 1879 which superseded it.

The basic law of succession to real estate in New Zealand is the old common law of England as modified in 1833 by the Inheritance Act. That Act (3 & 4 Will. 4. c. 106) is part of the law of New Zealand: and, except as modified by any subsequent Dominion enactment, remains in force in New Zealand to-day. It has never been there repealed. But it is said that the New Zealand legislation just referred to by which, as in the different States of Australia, a new rule of succession to real estate has been introduced, so that in cases of intestacy realty is to be administered and is to devolve precisely like personalty has in that Dominion operated to deprive of its content the term " heir at law " as theretofore in use. In the absence of some controlling context to the contrary the effect of the legislation has been, so it is said, to attach to that expression when found in a will, say of 1891, the signification which before that legislation would have attached to the expression " statutory next of kin ". In a New South Wales case, which has been much discussed—*Morrice* v. *Morrice*, 14 N.S.W. Law Rep.: Eq. 211—Owen C.J., referring to analogous legislation in that State asked " Can it really be said that there exists such a person as an heir at law in this Colony? " and the answer to that question, applied to New Zealand, and given by the majority in the Court of Appeal, in the present case is in the negative. In New Zealand these learned judges hold there is in its old signification no longer any heir at law at all. In the vocabulary of the law, and as a term of art too, the expression still survives, but in meaning and content it is now, apart from a sufficient context, the equivalent of the expression statutory next of kin.

This is the real basis of their judgment in favour of these next of kin here, and their Lordships accordingly proceed to examine the legislation referred to in order to ascertain what foundation is there to be found for an assertion as far reaching as it is novel—no authority apart from the rhetorical question of Owen C.J. in New South Wales being adduced in its support.

The relevant sections of the legislation in question are to be found in the Real Estates Descent Act, 1874, the

Administration Act, 1879, and the Administration of Estates Act, 1908. It will be convenient for facility of reference to collect these. They are not lengthy.

Section 3 of the Act of 1874 is as follows :—

"All land in New Zealand of which any person to whom this Act applies shall die seized or possessed as owner without devising the same, or which he shall only partially devise, shall, with all powers, privileges and rights of action attaching or relating thereto, go and pass to and become vested in the personal representative of the person so dying, if undevised absolutely, or if partially devised then subject to such partial devise; and such personal representative shall hold the said land and the unapplied proceeds thereof for division or distribution in like manner as is now the case with chattel real property, and such land shall be distributable and disposable in like manner as other personal assets, without distinction as to order or application in the payment of debts or otherwise:

"Provided that mortgages, trusts and equities upon or affecting such lands shall be as valid as if the said lands had descended to the heir-at-law."

"*Section* 18.

"In the reading and construction of all Acts of Parliament, and of all deeds and documents that shall from time to time, after the day on which this Act shall come into operation, subsist and be in force, the word 'heir' or 'heirs,' so far as relates to the deceased owners of undevised or partially devised lands, shall be taken to mean and include the person to whom letters of administration of the personal estate or probate of the Will of such deceased owner, where such will only partially devises his lands, or only affects personal estate, shall be granted, and any person who shall take any lands by virtue of this Act shall so take as if the same had come to him by will of the deceased owner."

"THE ADMINISTRATION ACT, 1879.

"[This Act repealed the Real Estate Descent Act, 1874.]

"*Section* 6.

"Immediately upon the granting of probate of the Will or administration of the estate, or an order to administer the estate, of any deceased person, all the real estate then unadministered of such person, whether held by him beneficially or in trust, shall vest in the executor or administrator to whom such probate, or administration, or order shall be granted, as the case may be, for all the estate therein of such person."

"*Section* 10.

"Subject to the provisions of this Act, the executor or administrator shall hold—

"(1) The real estate of any person who dies leaving a will, according to the trusts and dispositions of such will, so far as such will devises or affects such real estate:

"(2) The real estate of any person who dies intestate as to such real estate after this Act comes into operation, upon trust for the person or persons who, if such real estate were personal estate, would be entitled to such personal estate; and such person or persons shall in all respects have the same shares, estates, powers, and interests in and over such real estate as he or they would have in case the same had been personal estate.

> " (5) The real estate of any person who died on or before 1st October, 1875, intestate as to such real estate upon trust for the persons who would have been entitled, if ' The Real Estate Descent Act, 1874, and this Act had not been passed.' "

By the Administration of Estates Act, 1908, a consolidation statute, section 6 and section 10, subsections (1), (2) and (5) of the Administration Act, 1879, are substantially re-enacted.

Little more than a superficial examination of these enactments is required, as their Lordships think, to show, in the words of a learned Judge in Victoria with reference to a corresponding statute of that State that " the heir at law is not extinguished yet." *Larkin* v. *Drysdale*, 1 Vict, L.R. 164, 166. So far as the Act of 1874 is concerned the survival of the " heir at law " to whom lands would but for the Act have descended is by the proviso to section 3 assumed: and whereas by section 18 a more extended meaning is, as a result of the Act, thereafter to be attached " to the word ' heir ' or ' heirs ' " in the reading and construction in future Acts of Parliament, deeds and documents, no such extended meaning is directed to be attributed to the words " heir at law " when there found, an omission the more significant when it is recalled that the " heir at law " has been in terms treated as existing in the proviso to section 3.

But, as has been stated, the Act of 1874 was repealed by the Act of 1879, which thenceforth took its place, and still remains in force by re-enactment in the Act of 1908. It is important therefore to note that by the Act of 1879 and in an even more striking fashion than in the repealed Act of 1874, it is made clear that the old " heir at law " remains in New Zealand an existing personage notwithstanding anything contained in the new Act. Under section 6 the vesting of the real estate of a deceased person in the executor is, as will have been seen, to take effect immediately upon " the granting of probate of the will or administration of the estate or an order to administer the estate " of the deceased. But not before. And in Victoria, under the Administration Act, 1872, of that State, No. 427, section 6—a section admittedly indistinguishable from this section 6 of the New Zealand Act of 1879—it was held as long ago as 1875 in the case of *Larkin* v. *Drysdale ubi cit* that there was in that section nothing to destroy the status of the old heir at law between the death of the deceased and grant of administration to his estate, and an action of ejectment brought during that interval by the heir at law in respect of the property of the deceased was accordingly there sustained. The correctness of the principle enunciated in *Larkin* v. *Drysdale* was not canvassed by the respondents here. Nor could it well have been: it is fundamental: it has been applied in England in analogous circumstances under the Land Transfer Act, 1897, when in *E.p. The School Board for London*, [1914] 2 Ch. 547, 552, Lord Cozens-Hardy M.R. observed " Until there is a personal

representative the property vests in the heir ". And perhaps upon this subject the judgment of this Board in *Wentworth* v. *Humphrey*, 11 App. Cas. 619, may be referred to. In that case their Lordships were called upon to deal with section 1 of " Lang's Act " the New South Wales Real Estates of Intestates Distribution Act, 1862. That section, which will later have to be referred to again, is as follows :—

> " 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 property 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."

In *Wentworth* v. *Humphrey* the deceased owner was illegitimate and died leaving no heir, and the Board held that the section applied to all cases and not merely to cases in which the dead owner had actually left an heir. So far from the view being taken, however, that after the Act there was no common law heir for him to leave, the Board were of opinion that inquiry as to whether the deceased owner had or had not left one was not always required for the reason that such an inquiry was (p. 626) " often a long and difficult one " : not in any way be it observed because it could have no result.

To sum up, this examination of the legislation in question appears clearly to show that in New Zealand it has not put an end to the common law heir at law : it merely results that he shall not ultimately take beneficially as heir. So far from denying his continued existence it leaves vested in him, for an interval of indefinite duration, it may even be permanently, the New Zealand real estate of every owner who dies possessed of such property. During that term of vesting too the rights of ownership with reference to the property are not in suspense; so that the status of the heir at law is brought literally within the words of Blackstone's well known definition of an heir as being one

> " upon whom the law casts the estate immediately upon the death of the ancestor." Comm. vol. I, p. 201.

In view of all this is it remarkable, that as was shown to their Lordships by cases cited on behalf of the appellant the term " heir at law " meaning thereby the common law heir is in constant judicial use in New Zealand? In short their Lordships cannot but conclude that the New Zealand legislation above detailed at length is in no way operative to justify an interpretation of the term " heir at law," when found unqualified in a will made after it was enacted which would not have been appropriate had the legislation never been passed,—to apply the phrasing of S. 10 (5) of the Act of 1879.

A passage from the judgment of the Lord Chancellor in the well known case of *Jones* v. *Ogle* L.R. 8 Ch. 192 is helpful, at this point. Lord Selborne, there envisaging a will dated after the passing of a relevant statute, makes this comment :—

> " I can quite follow the argument which would say that in such a case a testator makes his will having the Act of Parliament in

> view and that the words he uses are not to be construed without reference to the Act of Parliament."

This process may very usefully be applied to this testator and his will. The words of the will " heir at law of such survivor " have here to be interpreted. These words admittedly—the legislation of 1874 and 1879 apart—describe the survivor's common law heir: had that legislation not been passed he would have been under this will the ultimate devisee of the testator's real estate. The legislation has been examined in this judgment and it is now found that while thereby the old heir at law may have been reduced to a shadow of his former self, at the date of the will he survived in New Zealand and he still survives there with definite rights and privileges appertaining to his status, remaining an heir—a circumstance for the purposes of this case specially important—capable of being ascertained and identified as easily as before. The result appears to their Lordships to be that this will of the testator, unambiguous in this respect apart from that legislation, remains when construed with it in view as unambiguous as ever. The words in debate—here as has been shown words of identification only—remain the sufficient, probably the most strictly correct description of the survivor's common law heir—a description moreover which remains in New Zealand as exclusively applicable to that heir—as it ever was.

But the majority of the Court of Appeal, moved by the magnitude of the change in the law of succession to New Zealand real estate effected by the legislation in question, have been able to find in this will in the words " heir at law of such survivor " a reference to the survivor's statutory next of kin—a reference that is to say not to a single individual, but to a class—here as it has happened to a numerous class of persons, one of them—the widow of the survivor—neither of his kin nor of the testator's. The grounds assigned for this view must presently be looked at. Meanwhile, however, it will not be inconvenient to ascertain from an examination of the will itself, how far the word as a *nomen collectivum* is consistent with its other provisions either as a whole or in detail. This subject has been very fully dealt with in the judgments under review and in the arguments before the Board.

And if the will be read—as presumably it still should—with the legislation of 1874 and 1879 in view—the testator is seen thereby to be exercising to the full the power of testamentary disposition over his real estate which remained his under section 10 (1) of the Act of 1879. The destination of his real estate under that Act had evidently no attractions for the testator. His will counters it at every turn. The Act brings about in intestacy a complete fusion of the real and personal estate of the deceased: the testator's will maintains, as a predominant purpose, and throughout, the complete separation of the two. The personalty alone is made the subject of the residuary gift: that is to say—such is the favour extended to the realty—it is upon the personalty that the legacies are exclusively charged and,

in contra-distinction to the Act of 1879 it is thereout that the debts and testamentary expenses are primarily to be paid. Again, while the interests taken by the testator's brother and nephew, whether in his residuary personalty or devised realty are in every respect equal, each takes in the personalty immediately, and by appropriate language an absolute interest, while in the realty, neither of them, putting it shortly, takes more than an equitable life estate. In other words the residuary personalty is at once disposed of out of hand. But the real estate in direct contrast is, intact, retained settled by directions calculated to ensure first that so long as it remains vested in its trustees there shall never be any disposition of any part of it for more than 21 years and, next, that, as real estate and still intact, it may, 21 years after the death of the survivor of the two tenants for life, father and son, be conveyed " to the heir at law of such survivor his heirs and assigns "—words of limitation appropriate to real estate only. And when it is remembered that John Leed Macleay was the eldest son of his father, and that accordingly, and as has in fact happened, the same person would in all probability be the common law heir of each, as survivor, that heir being a Macleay of a later generation, the inference becomes compelling that it was not upon a heterogeneous collection of individuals, but upon such a single clansman as has just been described, that the testator had it in mind to direct, as in words he did direct, that his real estate should devolve.

But the indications of the will to this effect do not end here. There are others no less arresting. The limitation to the " heir at law " in the singular is the more striking when found, as it is, in immediate association with the " heirs and assigns " in the plural of that same " heir at law." Again, the inference that the " heir at law " was in the testator's contemplation a single person is made as it seems well nigh irresistible by the statement of his " true intent," namely that the heir at law " shall ultimately take the whole of the corpus." Lastly the direction that pending conveyance and transfer the trustees are to pay the rents, profits and emoluments of the property to him " for his absolute use and benefit " is a final indication, clear as their Lordships think, that the " heir at law " in this will, whatever else he may be, is not a noun of multitude.

Indeed, if the will be read as a whole the conclusion seems inevitable that the survivor's statutory next of kin are not within its provisions, so that even if the conclusion of the majority of the Court of Appeal could be accepted, namely, that in view of preceding legislation the heir at law must in a New Zealand will of 1891, *prima facie* at least be held to mean the statutory next of kin of the *propositus* that conclusion is, in this will, displaced by other provisions inconsistent with it. Here their Lordships find themselves in complete agreement with the minority of the Court of Appeal—the Chief Justice and Reed J. when these learned Judges hold that even if the conclusion of the majority of

the Court were well founded as to the *prima facie* signification of the words " heir at law " the claim of the appellant to be, by this will, the devisee of the testator's real estate, was nevertheless established.

But is that conclusion of the majority well founded? The view of the Board that even if justified, it is displaced by other provisions of the will now deprives the question of practical importance. But it raises a matter of general interest, and in any case their Lordships, out of respect for the elaborate and most careful judgments in which it has been justified by the learned Judges who reached it, would not refrain from dealing with it, albeit less elaborately than might otherwise have been fitting.

It is in the judgment of Johnston J. that these views of the learned Judges are most elaborately expounded. The conclusion reached by him is really based upon the proposition that to describe as the heir at law say of A.B., a person who can, as such, inherit no real estate from A.B., is a contradiction in terms. With some hesitation perhaps, but still definitely, the learned Judge further holds that the statutory next of kin of A.B. to whom, by Act of Parliament, his real estate with his personalty passes on his death intestate, have now, in New Zealand phraseology, so far become his " heir at law " that they may be held to have been properly and sufficiently so described without more in a New Zealand will, made, as was the testator's, in 1891.

The first of these propositions is primarily based upon definitions of authority found in English judgments and text books which import that the heir of A.B. is in England one who on A.B.'s death intestate inherits the real estate of which he died possessed. Sir George Jessel's definition of " lawful heirs " in *Smith* v. *Butcher* 10 Ch. D. 113, 116, is specially relied upon :—

> " Lawful heirs," the Master of the Rolls says there, means " the person or persons who either alone or together would succeed to the fee simple estate of which the intestate ancestor died seised in possession at the time of his death."

And this definition is made more appropriate to this case by adding to it the statement in Challis on Real Property, 3rd edition, p. 230. " The word ' heir ' has no meaning except in relation to an estate to which the person so designated might possibly succeed by inheritance."

The learned Judge, while relying on these definitions in support of his first proposition, has not paused to consider how far they may be subversive of his second. If there must be an estate to constitute an heir, so also it would seem must there be an " ancestor " from whom he may inherit. That is to say, an heir strictly so called must be of kin to the *propositus*. His widow, for example, cannot in any proper sense be described as " heiress " of her deceased husband.

But their Lordships do not pursue this discussion, on which there is much to be said. They content themselves with the observation that in England when these definitions were propounded there was no legislation in

force analogous to the New Zealand legislation of 1874 and 1879, the effect of which in New Zealand on this very subject has been already noted. Their Lordships however do not pursue the discussion because it is, they think, irrelevant to the one question before the Board. In this case they are concerned only to discover according to the terminology of the law of New Zealand the meaning in a New Zealand will of the expression " heir at law " and that meaning is surely authoritatively to be ascertained from the legislation in force in New Zealand with reference to the succession to real property there on the death of its owner intestate. Each of the learned Judges of the Court of Appeal has expressed his conclusion on this point without making any reference to the provisions of that legislation to which apparently the attention of the Court was not in this connection directed. Their Lordships have taken a different course, and now that on examination the legislation is shown to have on this will the effect already stated, that effect cannot be nullified by considerations which may ignore but cannot be operative to displace it. And the above and other like considerations upon which the learned Judges of the majority rely for their conclusion may all, their Lordships venture to think, be so described.

But the learned Judges have further felt themselves supported in their conclusion by what they take to be the result of a great number of authorities found in the law reports, not only of New Zealand but of the different Australian States in which legislation in substance but not in terms the same as the New Zealand legislation of 1874 and 1879 has been passed. Their Lordships, under the guidance of the learned Judges, who have tabulated these cases with great care, have considered them all, but they have not found there any real assistance in the task of construing the testator's will here. Reed J., in the course of his judgment referring to the New Zealand authorities, observes that it might with confidence be said that they raised no doubts as to what, with the Chief Justice, he held to be the true construction of the testator's will. This in their Lordships' opinion may be said of all the authorities cited.

It will suffice as an illustration of what they mean by this statement to refer to the most typical, the case of *Morrice* v. *Morrice ubi cit.* : a New South Wales decision of 1893 specially relied upon by Johnston J. in his judgment and constantly referred to by the other learned Judges.

The enactment in force in New South Wales and governing that case was section 1 of the Act of 1862—Lang's Act already cited. By the will there the testator devised lands to his son in fee, with power in the event of the son's dying without issue to appoint to his wife for life, and upon the death of the wife for the testator's " heirs." There was no context. Who were designated under the word " heirs "? That was the question. The learned Judge, Owen C.J., applying Lang's Act, decided that the personal

representative of the testator was the person designated by him as his " heir " and that he held the property in trust for the testator's statutory next of kin. The decision has been much canvassed. Hard as it is to understand it is unnecessary for their Lordships to consider or express any opinion here on the question whether or not it was, in view of Lang's Act, well decided. Their present difficulty is to see how the case can have any application to the testator's will: where the gift is not to the " heirs " in the plural of the testator, but is to the " heir at law " in the singular of a third person altogether. Upon this second point of difference in respect of description Johnston J. seems in his judgment to suggest that Owen C.J. would have decided *Morrice* v. *Morrice* in the same way, if in the will there the words " heir at law " had been substituted for the word " heirs." This suggestion, if it be intended by the learned Judge, their Lordships cannot accept. In section 1 of Lang's Act the " heir at law " and the statutory next of kin are as beneficiaries brought into immediate contrast. It is difficult to see how a devise to the testator's heir at law without context, construed with that Act in view, could be anything else than a devise to his common law heir. This statement is important, because, prior to the order now under review, there is no recorded instance, either in New Zealand or Australia, of the words " heir at law " in a will with no context being construed as the equivalent of statutory next of kin, while the view that the words are too inelastic to be so extended is more than once judicially expressed, and is supported by the implications of the Act of 1874 to which reference has already been made.

It may be noted that the order now under review reproduces almost textually the order in *Morrice* v. *Morrice*. It declares that " the estate in fee simple in the testator's real estate is held by the testator's *executors* upon trust for the persons who would under the Administration Act, 1908, have taken any real estate of the survivor of Alexander Macleay and John Leed Macleay, if such survivor had died intestate." It seems that the executors there referred to are the executors appointed by the will. If this be so, the order in *Morrice* v. *Morrice* has first been followed and has then been extended to a state of circumstances to which that order had no application. The executors here have long since ceased to function in favour of the respondent trustees, Messrs. Treadwell and Gordon, who since their appointment as trustees in 1913 have as devisees held the property upon the trusts declared by the testator's will. And they have never been executors of the will. There is no evidence that the appointed executors *or* either of them are now even alive.

But it may be that it is the respondent trustees to whom, under the name of executors, reference is made in the order. If so the order imports that the testator's will which in terms directs that the property shall be conveyed by the trustees to the " heir at law of such survivor " means on its true construction that the property is to be conveyed to that

survivor's statutory next of kin—a finding for which in their Lordships' judgment for the reasons already given there is no sufficient reason.

The learned Judges of the majority are not unconscious of the difficulties in the way of their construction created by the inconsistent provisions of the will to which attention has been drawn. They deem these insufficient to affect the result which in their view is reached apart from them. Johnston J. seems to agree that these provisions, had the only issue been whether the testator was referring to one New Zealand heir or to another, might have satisfied him that it was an heir in the singular who was pointed at. He considered himself entitled, however, to disregard or to discount these provisions because to permit them to have effect would result, as he saw it, in the introduction of elements of foreign law into a disposition of New Zealand real estate. That this would result seems also to have been the view of Smith J. Their Lordships find it difficult to follow the learned Judges here. Their Lordships, on what has seemed to them to be the true construction of the testator's will, have held that it is to the appellant as the New Zealand heir at law of his deceased father that the testator's real estate now passes. But if on the true construction of the will it had been held that it was John Reede Macleay's Scots heir at law who was so entitled, the acceptance of that conclusion would not have involved the introduction of the Scots system or any part of it into this administration. To give effect to a devise even to a foreigner who can be identified is not to introduce any foreign law. Rather is there thus recognised the quite lawful exercise of a testator's valuable right of testamentary disposition enjoyed by him under the law of New Zealand. To refuse for any such reason to recognise such a devisee is to prejudice that right, one which in its lawful exercise it is, as their Lordships feel will be, on all hands, recognised, a primary duty of every New Zealand tribunal, as it is of their Lordships on appeal to His Majesty in Council, to acknowledge and vindicate.

Their Lordships need go no further. In their judgment the appellant has established that he is the heir at law referred to in the will of the testator, and, if so, it is now agreed that he is entitled to an immediate conveyance from the respondent trustees of the entirety of the testator's real estate.

The order of the Court of Appeal except as to costs should be discharged and a declaration made to the above effect.

And their Lordships will humbly advise His Majesty accordingly.

The costs of all parties of this appeal taxed as between solicitor and client should before conveyance be defrayed by the trustees out of the property in their hands.

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In the Privy Council

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