Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Commissioner of Stamp Duties v. *Stephen, from the Supreme Court of New South Wales; delivered the 25th November* 1903.

Present at the Hearing:

LORD MACNAGHTEN.
LORD LINDLEY.
SIR ANDREW SCOBLE.
SIR ARTHUR WILSON.
SIR JOHN BONSER.

[*Delivered by Lord Lindley.*]

The question to be determined on this Appeal is whether probate duty is payable in New South Wales in respect of property appointed by will under a special power to appoint amongst a limited class of persons. The facts are stated in a Special Case, and are, shortly, as follows:—

In 1842 a settlement was made on the marriage of Mr. and Mrs. O'Connell; and property belonging to the lady was vested in trustees upon trust (as regards the property now in question) for her for life for her separate use, and after her death upon trust for the children of the marriage as she should by will appoint, and in default of appointment, for them in equal shares.

There were children of the marriage. Mrs. O'Connell died on 2nd December 1901, leaving a will by which she disposed of property as to which no question arises, and appointed the property, settled as above mentioned, amongst

28888. 100.—11/1903. [70] A

her children in certain proportions. She appointed the Respondent, A. C. Stephen, her executor. The value of the property so appointed was 25,543*l.*, and the question is whether, under the Stamp Duties Acts of New South Wales, her executor had to pay duty on this sum, in order to obtain probate of her will. The Commissioner of Stamp Duties insisted on payment of duty on this sum; and the executor paid it, but required a case to be stated for the decision of the Supreme Court upon the question whether the Commissioner was right in his assessment, and in requiring this duty to be paid by the executor. The Supreme Court decided this question in favour of the executor, and hence this Appeal.

Before examining the Stamp Duties Acts applicable to the case, it will conduce to clearness if a few preliminary general observations are made and borne in mind.

The distinction between a person's own property and property which is not his own, but which he can dispose of by will in any way he pleases by virtue of a power conferred upon him, is well established. Such last-mentioned property is not his own in any proper sense; and even if he executes the power by his will, no probate duty is payable upon that property unless such duty is made payable by a statute so worded as clearly to comprehend it. A statute imposing duty on a testator's property generally is not sufficient for this purpose. This was finally settled in *Drake* v. *The Attorney-General* (10 Cl. and Fin., 257), affirming *Platt* v. *Routh* (6 M. and W. 756).

But it has long been settled that property appointed by will under a general power of appointment is subject to the payment of the appointor's debts (*Beyfus* v. *Lawley*, 1903 A.C., 411); and if such property is personal property,

it is equitable assets of the testator which his executor can claim for distribution in the proper order (*see* In re *Hoskin's Trusts*, 6 Ch. Div. 281, and In re *Lawley*, 1902, 2 Ch. 799, at p. 807). Notwithstanding, therefore, the difference between a person's own property and property which he can dispose of as he pleases and does dispose of although it is not his own, the distinction is one which the legislature can hardly be expected to recognise when imposing probate or other duties payable on the death of a person who has exercised his power of disposition. Accordingly modern acts imposing such duties are almost always, if not always, so framed as to include both classes of property; and this is reasonable and just.

But a special power to appoint property amongst a limited class of persons is so entirely different in its scope and operation from a general power of disposition that mere general language in a probate duty statute applicable to the property of deceased persons and to property subject to a general power of appointment cannot reasonably be supposed to be meant to extend to property subject to a special power only. If it is intended to include such property and to compel the executor of the appointor to pay duty on property with which the executor has no concern and which he has no right to collect, it is only reasonable to suppose that such intention will be clearly expressed and be accompanied by provisions for practically carrying it out without injustice.

Passing now to the statute applicable to the case, viz., Act No. 27 of 1898, consolidating the laws relating to stamp duties, the statute will be seen to be divided into parts. Part I. is headed "Preliminary," and contains a definition clause (Section 3), and an enacting clause (Section 4) imposing the duties mentioned in the Second and

Third Schedules, subject to the exemptions contained therein. Part II. and Schedule 2 relate to duties on deeds and instruments *inter vivos*, but not to wills. Part III. and Schedule 3 relate to "Duties on estates of deceased persons." This expression is not of itself sufficient to extend to property over which a deceased person had even a general power of appointment. Section 40 (1) is confined to duties payable on the property of deceased persons, and is not applicable to the property in question in this case. Then comes clause (2), which is much wider, and clearly covers property over which the deceased had a general power of appointment by deed or will. The clause runs thus :—

"Duties to be levied, collected, and paid according to the "duties mentioned in the said Third Schedule shall also be "charged and chargeable upon and in respect of :—

"(A) All estate, whether real or personal,—

"(*a*) Which any person, dying after the twenty-second day "of May, one thousand eight hundred and ninety-four, has "disposed of, whether before or after that date, by will or by "settlement containing any trust in respect of that estate to "take effect after his death, under any authority enabling "that person to dispose of the same by will or deed, as the "case may be."

The Third Schedule to the Act is as follows :—

"THIRD SCHEDULE.

"*Duties on the Estates of Deceased Persons.*

"PART I.

"1. On the probate or letters of administration to be granted "in respect of any estate real and personal of deceased "persons.

"Where the value of such estate is under," &c.

Then follow the rates.

"PART II.

"2. Settlement of property taking effect after death of settlor—same duties as under Part I."

Their Lordships are of opinion that the foregoing language would be wide enough to cover property over which a deceased person had only a special power of appointment if there was any indication of an intention to include

such property; for such a power is to some extent and in some sense a power of disposition, although within narrow limits. But the language itself is much more appropriate to general powers of disposition than to special powers of selection or distribution amongst a particular class, and the words cannot, in their Lordships' opinion, be extended so as to include the latter class of powers without some plainer indication of intention to include them. No such indication is to be found. On the other hand, there are indications, and strong indications, to show that such a result could not have been intended.

There is no clause to the effect that such property shall be deemed to form part of the deceased's estate (as in Section 52); and there is no resemblance between property appointed under a special testamentary power, and those properties which once belonged to the deceased and which are made chargeable under the later clauses of Section 49 and under Section 52. But what is very significant is the exemption in the second Schedule of appointments by deed in exercise of powers contained in deeds or wills duly stamped. If the settlement of 1842 had conferred on the testatrix a special power to appoint by deed or will and she had appointed by deed, that appointment would have been exempt from duty; and yet if Section 49(2) A(*a*) is construed as the Appellant contends, the appointment by will is chargeable with duty. A construction which produces this result should not be adopted in the absence of language so clear that its meaning cannot be mistaken.

Again, if this duty is probate duty payable by the executor, it is to be deemed to be a debt of the testatrix payable out of her personal estate (Seection 56), and probate is not to issue until the duty is paid by the executor (Section 57).

This machinery is adapted to property of a deceased person and to property over which he has a general power of appointment exercised by his will; but it is obviously inapplicable to the present case.

Their Lordships have therefore come to the conclusion that Section 49(2) A(*a*) of the Stamp Duties Act 1898 does not apply to property over which a deceased person has only a special, as distinguished from a general, power of appointment by will.

They will therefore humbly advise His Majesty to dismiss the Appeal, and the Appellant must pay the costs of it.