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was misused, were really arguments which would, if upheld, take away the privilege altogether.

Under these circumstances I am of opinion that, even assuming the existence on the part of the Institute of the knowledge referred to by Mr. Ferguson, there was no evidence that the privilege was misused. Under these circumstances I agree that the appeal should be dismissed.

Appeal dismissed with costs.

Solicitors, for appellant, *Brown & Beeby.*
Solicitors, for respondents, *Sly & Russell.*

C. A. W.

[HIGH COURT OF AUSTRALIA.]

WEBB, MASTER-IN-EQUITY OF VICTORIA . . APPELLANT;

AND

McCRACKEN . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

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MELBOURNE, *June* 28, 29, 30.

Griffith C.J., Barton and O'Connor JJ

Administration and Probate Act 1903 (*Vict.*) (*No.* 1815), *sec.* 13—*Probate Duty—Property over which deceased had general power of appointment by will—Whether property over which deceased had "a general power enabling him by will or deed to dispose thereof."*

Property over which a deceased person had at the time of his death a general power of appointment by will is property over which he had "a general power enabling him by will or deed to dispose thereof," within the meaning of sec. 13 of the *Administration and Probate Act* 1903 (Vict.), and is liable to probate duty accordingly.

Decision of the Full Court (*In re the Will and Codicil of McCracken*, (1906) V.L.R., 356 ; 27 A.L.T., 233) reversed.

APPEAL from the Supreme Court of Victoria.

A special case stated by the Master-in-Equity under sec. 98 of the *Administration and Probate Act* 1890 (Vict.) for the opinion of the Supreme Court was as follows:—

"1. Robert McCracken, the husband of the said Margaret McCracken, deceased, died in the State of Victoria on the 17th day of February 1885.

"2. The said Robert McCracken left a will, dated the 22nd day of June 1876, probate whereof was on the 12th day of March 1885 granted by the Supreme Court of Victoria to the above-named Margaret McCracken, deceased, Peter McCracken (the brother of the said Robert McCracken, deceased), and Alexander McCracken (a son of the said Robert McCracken, deceased, and of the said Margaret McCracken, deceased). The said Peter McCracken died on the 4th day of October 1892, and the decease of the above-named Margaret McCracken left the said Alexander McCracken the sole surviving executor of the will of Robert McCracken, deceased.

"The above-named Margaret McCracken (hereinafter called the testatrix), died in Victoria on the 19th day of September 1905.

"4. The testatrix left a will dated the 25th day of June 1901, and a codicil thereto dated the 30th day of June 1904, probate of which will and codicil was on the 22nd day of January 1906 granted by the Supreme Court of Victoria in its probate jurisdiction to the said Alexander McCracken, the sole executor named in and appointed by the said will.

"5. Under the will of the said Robert McCracken, the testatrix had a life interest in one-third of his estate, and a general power of appointment by will over one-third of the said estate, the words of the trust being:—'I direct that my trustees shall pay to or permit my wife to receive from my death one-third of the net annual income actually produced from my real and personal estate howsoever constituted or invested and including the profits of any trade or business if carried on pursuant to the directions hereinbefore contained. And from and after the decease of my said wife if she shall continue my widow but not otherwise I direct my trustees to stand and be possessed of one-third part or share of my said trust estate and the investments thereof in trust

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for such person or persons for such estate or estates interest or interests and in such shares and manner as my said wife shall by will appoint and in default of any such appointment' etc.

"6. The testatrix remained the widow of the said Robert McCracken, and by her said will, in addition to disposing of her own property, exercised the said power of appointment, the words used being:—'I devise and bequeath and in exercise of the power of appointment vested in or given to me by the will of my late husband Robert McCracken and of any and every other power of appointment vested in me by any means whatsoever appoint all the rest and residue of my personal estate whatsoever and wheresover situate of which I shall be seized possessed or entitled at the time of my decease or over which I shall at my decease have any power of appointment by will unto my said son Alexander McCracken upon trust' etc.

"7. The testatrix left real and personal estate of the value of £76,183 12s. 6d. and the property over which the said power of appointment was exercised is of the value of £113,449 7s.

"The question for the opinion of the Court is:—

"Is the estate of the said Margaret McCracken deceased liable for any duty under the *Administration and Probate Acts* in respect of the property appointed under the said general power of appointment contained in the will of Robert McCracken deceased?"

The Full Court answered the question by saying that the estate was not liable for any duty in respect of the property so appointed: *In re the Will and Codicil of McCracken* (1).

From this decision the Master-in-Equity appealed to the High Court.

Isaacs A.G. and *Weigall*, for the appellant. The words "all property . . . . over which a deceased person had at the time of his death a general power enabling him by will or deed to dispose thereof," in sec. 13 of the *Administration and Probate Act* 1903, according to their natural meaning include property over which the deceased had a general power of appointment by will, property over which he had a general power of appointment by deed, and property in respect of which he might exercise his power of appointment either by will or by deed. The words being

(1) (1906) V.L.R., 356; 27 A.L.T., 233.

wide enough to cover property coming within any one of those three classes, there is sufficient indication in the other sections of the Act, and in secs. 112 and 115 of the *Administration and Probate Act* 1890, that the legislature intended the words to have that wide meaning. The decision of the Privy Council in *Commissioner of Stamp Duties* v. *Stephen* (1) is directly in point. See also *In re O'Connell* (2). Property of which a person can dispose by will and property of which he can dispose by deed are so nearly his own property that it is reasonable that the legislature should treat them as his own for the purpose of probate duty. Property appointed by will is assets for the payment of the appointor's debts: *Beyfus* v. *Lawley* (3); See also *In re Van Hagan*; *Sperling* v. *Rochfort* (4). The power is described not as a power of appointment but as a power to dispose of, and it might include a power to take property out of a settlement. Apart from sec. 13 of the *Administration and Probate Act* 1903 this property would come within sec. 97 of the *Administration and Probate Act* 1890, and would be liable to taxation: *In re Patterson* (5); *In re Brodie* (6). The grant of probate enables the executor to take this property and administer it, and therefore it is taxable: *Blackwood* v. *The Queen* (7); *Commissioners of Stamps* v. *Hope* (8); *In re Peacock's Settlement*; *Kelcey* v. *Harrison* (9); *Williams on Executors*, 10th ed., p. 1306; *Fleming* v. *Buchanan* (10); *In re Wilson* (11).

Mitchell K.C. and *Guest*, for the respondent. On the proper grammatical construction of sec. 13 of the *Administration and Probate Act* 1903 property of which a testator has power to dispose by will only is not taxable. Even if that is not the plain meaning of the section, the tax is not imposed in clear and unambiguous language: *Heward* v. *The King* (12). The words "a general power enabling him by will or deed to dispose thereof" are a common form, and indicate one power only which may be exercised in either of two ways: *Evans* v. *Saunders* (13); s.c. *sub-nom.*

(1) (1904) A.C., 137.
(2) (1902) 2 S.R. (N.S.W.), 426.
(3) (1903) A.C., 411.
(4) 16 Ch. D., 18.
(5) 11 V.L.R., 768; 7 A.L.T., 137.
(6) 26 V.L.R., 562; 22 A.L.T., 123.
(7) 8 App. Cas., 82, at p. 98.
(8) (1891) A.C., 476, at p. 481.
(9) (1902) 1 Ch., 552, at p. 555.
(10) 3 De G. M. & G., 976.
(11) 24 A.L.T., 168.
(12) 3 C.L.R., 117.
(13) 1 Drew., 415, at p. 433.

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Evans v. *Evans* (1). If the legislature had intended to include a power to dispose of by deed and a power to dispose of by will, as well as a power to dispose of by deed or will, it could easily have used language which would have removed all doubt, as was done in the *Finance Act* 1894 (England) (57 & 58 Vict. c. 30), sec. 22 (2) (*a*). This property would not be taxable apart from sec. 13 of the *Administration and Probate Act* 1903. The decision in *In re Wilson* (2) is contrary to that in *Drake* v. *Attorney-General* (3), *Commissioner of Stamp Duties* v. *Stephen* (4), and *In re Patterson* (5). In determining whether this property is taxable the question to be answered is:—Had the testatrix a general power by deed or will to dispose of the property? The question is not:—Had she a general power to dispose of it?

Isaacs A.G. in reply.

Cur. adv. vult.

GRIFFITH C.J. In this case the Court is called upon to construe sec. 13 of the *Administration and Probate Act* 1903, which is as follows:—"All property of any kind whatsoever over which a deceased person had at the time of his death a general power enabling him by will or deed to dispose thereof (other than a power exercisable by him as a trustee under a disposition not made by himself) shall upon his death be deemed to form part of his estate for the purpose of estimating the duty payable under the Administration and Probate Acts and shall be chargeable with the duty thereon accordingly." The learned Judges of the Supreme Court were of opinion that a general power to appoint by will, under which the donee of the power has not also a power to appoint by deed, is not within the section. The testatrix had a general power to appoint by will, which she exercised, and the question is whether the property the subject of the power is liable to duty under the Administration and Probate Acts.

The principles to be applied in construing an Act of this kind are collected in *Hardcastle on Statutes*, 3rd ed., p. 126, referred to in the judgment of Barton J. in *Heward* v. *The King* (6).

(1) 1 Drew, 654, at p. 661.
(2) 24 A.L.T., 168.
(3) 10 Cl. & F., 257.
(4) (1904) A.C., 137.
(5) 11 V.L.R., 768; 7 A.L.T., 137.
(6) 3 C.L.R., 117, at p. 127.

We must also, of course, have regard to the subject matter with which the legislature is dealing; and the first thing to be done is, having regard to that subject matter, to find out what the legislature has said as a matter of English, that is, to discover the grammatical construction of the words used, of course giving to words of art their technical meaning. Now, the *Administration and Probate Act* 1890, of which the Act of 1903 is an amendment, is, as pointed out by the Lords of the Privy Council in *Blackwood* v. *The Queen* (1), in one aspect a scheme to impose probate duties, and in another aspect a scheme to impose succession duties. The section of the Act of 1903 now under consideration clearly deals with what is in the nature of a succession duty, because it imposes a duty upon property the title to which does not pass to the executor upon grant of probate. Bearing that in mind, what have we here? The only term of art is the expression "general power." That is no doubt a term of art, and its meaning is well known. It was admitted in the Supreme Court, and is admitted before us, that it means a power unlimited as to its objects. We also take notice of what is known to all lawyers, and is supposed to have been known to the legislature, that the execution of powers is in these days practically limited to two modes, by deed and by will. The next observation that occurs to me in the consideration of this section on the point of grammatical construction is that the word "or" is disjunctive, and cannot be read conjunctively unless the context compels it to be so read. No doubt, when you give a man a power, and tell him he may exercise it in this way or in that way or in a third way, the word "or" is in that context conjunctive, because three different modes are specified, in any one of which the thing may be done. But, in the absence of a context of that sort, the word "or" is disjunctive, and, *primâ facie*, it must be read as disjunctive in this section.

Applying these rules, what do these words mean:—"A general power enabling him by will or deed to dispose thereof"? As I have said, there are no words of art except the words "general power." The rest of the phrase used is that commonly used in settlements and wills in conferring powers to appoint. They are ordinary

(1) 8 App. Cas., 82.

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words of English, and we should read them as an ordinary person acquainted with the English language would read them, having discovered what the words "general power" mean. I think the plain grammatical meaning of the words is:—"A general power enabling him to dispose thereof by will or to dispose thereof by deed."

Then is there anything in the context to show that that is not the right conclusion, and that some other construction should be adopted? If the words are not in themselves ambiguous we must find some strong context to make them ambiguous. If a real ambiguity can be shown, the respondent should no doubt have the benefit of it. The suggestion that prevailed in the Supreme Court was that there are known to lawyers three kinds of powers, namely, a power to appoint by deed or will, *i.e.* by deed or will at the option of the donee of the power, a power to appoint by deed only, and a power to appoint by will only; that the legislature applied its mind to that distinction and selected powers of appointment of the first kind, and intended to deal with that kind of power only. But the fallacy that lurks in that argument, I think, is in supposing that these are three different kinds of powers. In my opinion, there are only two kinds of powers, general powers and what Lord *St. Leonards* calls particular powers, (see *Sugden on Powers*, p. 394). In *Farwell on Powers*, chap. 6, powers are divided into general and limited powers. Lord *Lindley* in *Commissioner of Stamp Duties* v. *Stephen* (1) speaks of them as general and special powers. In my opinion, those are the only two kinds of powers. A power is one thing; the mode of its execution is another thing. A power is an authority conferred upon a particular person, the donee of the power. The mode prescribed for the exercise of the power is a mere incident of the power, and does not differentiate one power from another. That was Lord *St. Leonards'* opinion, as is plain from his language in his book on *Powers*, p. 203. Therefore, I think nothing can be founded on that argument. The legislature was thinking of those two kinds of powers, and intended the provisions to apply in the case of general powers, and not in the

(1) (1904) A.C., 137.

case of particular or special or limited powers, as spoken of by those learned writers.

Is there anything then in the scope of this part of the Act to lead to a different conclusion? It is quite clear that this part of the Act deals with the matter in the aspect of succession duty. The *Administration and Probate Act* 1890 had already dealt to a certain extent with what are really succession duties. Sec. 112 provided that every settlement of any property by any person containing trusts or dispositions to take effect after his death should upon his death be registered within a prescribed time, and that the registration should not be effected until a statement of the value of the property comprised in the settlement had been filed, and duty thereon had been paid. By sec. 8 of the *Administration and Probate Act* 1903 it was declared that "'settlement' includes every conveyance transfer appointment under power declaration of trust or other document or non-testamentary disposition of property made by any person containing trusts or dispositions to take effect or which shall or may take effect upon the death of such person." The legislature, therefore, by sec. 8 carefully provided for the case where a person had a power of appointment by deed, and had executed it during his lifetime, but so that the appointment should not take effect until after his death. But that section does not apply to the case where a person had a power of appointment by deed, but did not exercise it, although the property would in that case equally devolve upon his death. Then sec. 12 clearly provides for something in the nature of a succession duty, for it enacts that, when a person has voluntarily transferred property to himself and another person jointly so that a beneficial interest therein passes on the death of the person first mentioned to the other person by survivorship, the property to the extent of such beneficial interest is to be liable to duty as part of estate of the deceased. Then comes sec. 13 which I have already read. It clearly deals with property which is not the property of the deceased but the succession to which passes on his death to someone else. In the case of a power to appoint by deed, if the power is executed during the donee's lifetime, the case is caught by sec. 8, provided the appointment is not to take effect until after his death. So if the power

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is a power to appoint by will, and is executed, that section takes effect. So that, whether the power is to appoint by deed only, or to appoint by will only, if the power had been exercised, that section was equally effective. But the case where the power had not been exercised was not provided for. The object of the legislation in sec. 13 was, in my opinion, to deal with that case, so that, whether the power had or had not been exercised, all property over which a testator had an absolute disposing power, and which passed on his death, should pay a succession duty.

I can therefore see nothing in the context or the scope of the Act to alter what seems to me to be the grammatical meaning of the words used, or to induce us to depart from what I conceive to be the grammatical meaning of the words.

With respect to the other argument of Mr. Weigall, viz., that this property of which this testatrix disposed by will would be taxable apart from sec. 13 of the *Administration and Probate Act* 1903, I am inclined to think that, on the authority of *In re Wilson* (1), that argument is sound; but I do not think that that case can be supported in view of the law as stated by the House of Lords in *Drake* v. *Attorney-General* (2), and declared by the Privy Council in *Commissioner of Stamp Duties* v. *Stephen* (3).

I am of opinion therefore that this property is liable to duty, and that the question should be answered accordingly.

BARTON J. I am of the same opinion.

O'CONNOR J. read the following judgment:—I am of the same opinion. After the full statement of my learned brother the Chief Justice, I propose to add a few words only as to the interpretation of the Act. The section in question imposes a succession duty, and it is aimed at property which, although not the testator's own property, is property of which he can dispose as he pleases, and which may, therefore, be regarded as potentially his own property. It is admitted that the section does include certain property of this kind, that is, property of which the

(1) 24 A.L.T., 168.

(2) 10 Cl. & F., 257.

(3) (1904) A.C., 137.

testator may dispose by deed, as well as by will. But it is alleged that the section goes so far, and no farther, and does not touch property of which the testator was entitled to dispose by will only, or by deed only. The grammatical meaning of the section, taking the words in their ordinary sense, is plain enough. The property made taxable is property over which a deceased person had, at the time of his death, a general power enabling him to dispose thereof—but not all such property; there is a limit founded on the mode of disposition. It is only where the power of disposition is by deed, or is by will, that the property is taxable under the section. It is urged that the words are to be taken, not in their ordinary sense, but as a conveyancer would understand them, and that, taken in that sense, the only property included is that of which the testator has power to dispose, either by deed or by will, at his option. Where the legislature has used a phrase or a group of words which have a well-recognized technical legal meaning, it will be taken, *primâ facie*, that they were intended to have that meaning, and the Act will be so construed. But the Court will not treat a group of words as having a technical legal meaning merely because they would convey to a lawyer the same meaning as a known technical legal phrase. In *Earl of Zetland* v. *Lord Advocate* (1), the question arose as to what was meant by the expression "devolution by law," as used in 16 & 17 Vict., c. 51, sec. 2. "Devolution by law," said Lord *Blackburn* (2), "is not a technical set of words . . . . probably it was purposely chosen as being a phrase which the law had neither appropriated nor to which it had given any particular meaning, and we have to arrive at its meaning by taking the whole context and looking at the subject-matter, and thus seeing what the words do mean." So, in the section under consideration, the expression, "a general power enabling him by will or deed to dispose thereof," is not, to adopt Lord *Blackburn's* expression, a technical set of words. If the power of disposition had been described as a "general power of appointment 'by deed or will,'" a phrase with a well-known technical meaning, there would have been some ground for the respondent's argument. But the legislature has avoided the use of any technical phrase,

(1) 3 App. Cas., 505. (2) 3 App. Cas., 505, at p. 522.

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and has described the power of disposition in ordinary language, which must, therefore, be interpreted according to the ordinary meaning of the words used. Nor can I see any reason why the legislature should have drawn the distinction suggested. No doubt, the power is larger where the right of disposition is operative in the testator's lifetime, as well as after his death. But succession duty is only concerned with the state of the property after his death, and as regards that period, there is no difference between the power of disposition by deed or by will, or by will only. For these reasons, I am of opinion that the words of the section are to be construed in their ordinary sense, and construed in that sense, they impose a duty upon the property in question. I therefore agree that the appeal must be upheld.

Appeal allowed. Question answered accordingly.

Solicitor, for appellant, *Guinness*, Crown Solicitor for Victoria.

Solicitors, for respondent, *Hedderwick, Fookes & Hedderwick*, Melbourne.

B. L.

[HIGH COURT OF AUSTRALIA.]

DUKE OF WELLINGTON GOLD MINING COMPANY NO LIABILITY . . DEFENDANTS, } APPELLANTS:

AND

ARMSTRONG . . . . . PLAINTIFF, RESPONDENT.

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MELBOURNE, *June*, 5, 6, 7, 8, 11.

Griffith C.J., Barton and O'Connor JJ.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Mining on private property—Compensation—Purchase money—Agreement between applicant for lease and land-owner—Transfer of application—How far agreement binding on transferee—Royalty—Effect of surrender of lease—Mines Act 1897 (*Vict.*) (*No.* 1514), *secs.* 29, 73-79, 98, 112—*Mines Act* 1904 (*Vict.*) (*No.* 1961), *sec.* 37.