[HIGH COURT OF AUSTRALIA.]

HEDGER . . . . . APPELLANT;
DEFENDANT,

AND

KIEL AND OTHERS . . . . . RESPONDENTS.
PLAINTIFFS AND DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *Nov.* 16; *Dec.* 6.

Latham C.J., McTiernan and Williams JJ.

Will—Power of appointment—Power to appoint to "such person or persons at such ages or times and in such manner" as donee thinks fit—General or limited power of appointment—No express appointment by donee—General testamentary disposition of her property by donee—"Persons"—Quaere, inclusion of non-natural persons—Wills, Probate and Administration Act 1898-1947 (*N.S.W.*) (*No.* 13 *of* 1898—*No.* 41 *of* 1947), *s.* 23 (2), (3).

A testator, by his will, gave a trust fund to his trustees upon trust "for such person or persons at such ages or times and in such manner as my wife . . . by will appoints."

Held, by *Latham* C.J. and *McTiernan* J. (*Williams* J. dissenting), that the words "at such ages or times" were not a limitation of the class of objects of the power but a specification of the mode in which it might be exercised; that, accordingly, the power was a power to appoint in any manner the donee might think proper to which s. 23 (2) and (3) of the *Wills, Probate and Administration Act* 1898-1947 (N.S.W.) applied; and that it had been effectively exercised by a general residuary devise and bequest by the donee.

Decision of the Supreme Court of New South Wales (*Sugerman* J.): *Kiel* v. *Berghofer*, (1949) 49 S.R. (N.S.W.) 363; 66 W.N. 206, by majority, affirmed.

APPEAL from the Supreme Court of New South Wales.

Frank Owen Hedger died on 6th July 1939, and on 3rd October 1939 the Supreme Court of New South Wales, in its Probate Jurisdiction, granted probate of his will to his widow, Martha Maud

Hedger, and Clarence Reginald Cecil Kiel and Thomas Gavan Douglas Marshall the executrix and executors and trustees named therein.

By his will the testator, after providing for certain specific and pecuniary legacies, gave the residue of his estate to his trustees upon trust for sale and conversion and upon trust to stand possessed of the residuary trust moneys as therein defined and the investments for the time being representing the same upon trust to pay the income thereof, subject to an annuity to his adopted daughter, Phyllis Martha Hedger, to his wife during her lifetime. He directed that from and after the death of his wife his trustees were to stand possessed of the trust funds upon trust to divide the same into three equal parts or shares, and, in clause 14 of his will, he directed his trustees to stand possessed of one of such third parts or shares "Upon Trust for such person or persons at such ages or times and in such manner as my wife the said Martha Maud Hedger by will appoints And in default of and subject to any such appointment Upon Trust to pay one-half thereof to the said Phyllis Martha Hedger and to apply the remaining half thereof so that the same go to augment the third part or share of the trust funds hereinafter settled upon trust for the said Phyllis Martha Hedger and her children." By clause 15 the testator directed his trustees to stand possessed of one other of such third parts or shares upon trust for Phyllis Martha Hedger absolutely, but, by clause 16, that if Phyllis Martha Hedger died in his lifetime leaving a child or children who survived him and attained the age of twenty-one years that child or those children should take (and if more than one equally between them) the share which Phyllis Martha Hedger would have taken in the trust funds if she had survived the testator. Clause 17 of the will was as follows: "If the said Phyllis Martha Hedger shall predecease me without leaving a child or children capable of taking under this last provision then I direct my trustees to stand possessed of the share which the said Phyllis Martha Hedger would have taken in the trust funds if the said Phyllis Martha Hedger had survived me upon such trusts and to or for such ends intents and purposes as my said Wife Martha Maud Hedger shall by will appoint and subject to any such appointment in trust to invest the same and to pay the income thereof to the trustees for the time being of The Methodist Church of Australasia at Haberfield . . . the Sustentation and Home Mission Society of the Methodist Church of Australasia in New South Wales and the Overseas Missions Department of the Methodist Church of Australasia in equal shares." By clause 18 of the will the testator directed his trustees to retain

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the remaining one-third part or share of the trust funds, together with any accretions thereto, upon trust to pay the income thereof to Phyllis Martha Hedger during her life and so that she should not have power while under coverture to anticipate the same, and after her death in trust to invest the same and to pay the income thereof to the three organizations of the Methodist Church mentioned in clause 17 in equal shares.

On 26th November 1940, Martha Maud Hedger retired from the trusts of the will and the trust property became vested in and remained vested in Kiel and Marshall. Martha Maud Hedger died on 24th July 1948, and probate of her will, dated 16th November 1932, was granted by the Supreme Court of New South Wales in its Probate Jurisdiction to Henry William Berghofer and Phillip Walter Smyth King the executors and trustees named therein.

Her will, after the appointment of those executors and trustees, proceeded: "I give devise and bequeath all my property of whatsoever kind and wheresoever situated to my Trustees," and then followed certain trusts upon which the property was to be held, including certain specific provisions relating to the testatrix's property at Haberfield, certain directions as to the care of graves and the erection of memorials, and certain pecuniary legacies, followed by a trust as to the rest and residue of her estate, to divide the same equally between a number of institutions named in her will.

The trustees of the will of Frank Owen Hedger caused an originating summons to be issued out of the Supreme Court of New South Wales in its equitable jurisdiction for the determination of the following questions:—

1. (a) Whether upon the true construction of the will of Frank Owen Hedger deceased and in the events which had happened the testamentary power of appointment exercisable by Martha Maud Hedger over a one-third part of the trust funds of the deceased's estate had been effectually executed by the will of Martha Maud Hedger, now deceased; or (b) Whether the said one-third part of these trust funds over which Martha Maud Hedger had a testamentary power of appointment devolved as in default of appointment.

2. If the answer to question 1 (a) was in the affirmative, for what persons and in what proportions did the trustees of the trusts of Frank Owen Hedger's will stand possessed of the one-third part of the trust funds appointed by Martha Maud Hedger's will.

3. (a) If the answer to question 1 (b) was in the affirmative whether the trustees stood possessed of the one-third part of the

trust funds of Frank Owen Hedger's estate as to one-half thereof to pay the same to Phyllis Martha Hedger and as to the remaining half thereof to pay the income arising therefrom to Phyllis Martha Hedger during her life and thereafter to the trustees for the time being of the Methodist Church of Australasia at Haberfield, the Sustentation and Home Mission Society of the Methodist Church of Australasia in New South Wales and the Overseas Mission Department of the Methodist Church of Australasia ; (b) If not, for what persons and in what proportions.

The defendants to the summons were the trustees of the will of Martha Maud Hedger, deceased, Phyllis Martha Hedger, and Robert Bathurst Lew representing the three organizations of the Methodist Church as mentioned above.

Sugerman J. answered Question 1 (a) in the affirmative, and Question 2 that the trustees of the trusts of Frank Owen Hedger's will stood possessed of the one-third part of the trust funds appointed by Martha Maud Hedger's will upon trust for the executors of Martha Maud Hedger's will (*Kiel* v. *Berghofer* (1)).

From that decision Phyllis Martha Hedger appealed by special leave—notice of an appeal as of right being slightly out of time—to the High Court.

The relevant statutory provisions are sufficiently set forth in the judgments hereunder.

J. D. Holmes K.C. (with him *R. M. Hope*), for the appellant. The criterion determining the application of s. 23 of the *Wills, Probate and Administration Act* 1898-1947 (N.S.W.) is primarily whether the class of objects is unlimited. On its true construction clause 14 of the will limits the class of objects to whom the property may be appointed. Section 23 refers to a power to appoint in any manner thought proper. The legislature has drawn a distinction between the power to appoint in any manner thought proper described in sub-ss. (2) and (3) of s. 23 and a " general power " : see s. 46A. It is not sufficient for all purposes to divide powers up into two classes, general and special : *Jarman* on *Wills*, 7th ed. (1930), p. 763. The limitation of a particular person as an object of the power is sufficient to exclude the operation of the provision in the English *Wills Act* 1837 (*In re Byron's Settlement* (2)). Although the question involved was not precisely similar some assistance on the construction of the power can be obtained from *In re Jones* ; *Public Trustee* v. *Jones* (3).

(1) (1949) 49 S.R. (N.S.W.) 363 ; 66 W.N. 206.

(2) (1891) 3 Ch. 474, at p. 478.

(3) (1945) Ch. 105.

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This particular power is not within the section. The power given by clause 14 of the will was a limited power. The words " at such ages or times " restrict the words " person or persons " to natural persons, that is to say, persons who have an age, therefore " persons " who are the objects of the power do not include corporations, institutions or associations, nor do they include aims and purposes such as memorials and the maintenance of graves. The objects must be living at the date of the death of the donee and do not include the donee of the power herself. Classical statements of the rule are to be found in *Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.* (1). The way in which s. 23 should be used was shown in *Phillips* v. *Cayley* (2). That case shows that *Cofield* v. *Pollard* (3) was wrongly decided. In clause 17 the testator used general words whereas in clause 14 he used words of limitation. That raises a presumption that a difference was intended, that difference being in the class of persons, the objects : *Halsbury's Laws of England*, 2nd ed., vol. 34, p. 208, par. 263. That being the limitation upon the power s. 23 does not apply because it is not within a power to appoint in any manner.

K. F. E. Torrington, for the respondent Lew. The arguments addressed to the Court on behalf of the appellant are adopted on behalf of this respondent, particularly the submissions that to exercise a power by virtue of the *Wills, Probate and Administration Act* 1898-1947 (N.S.W.) the objects of the power must be unlimited, and that upon the proper construction of clause 14 of the will the class of objects is limited to natural persons (*In re Byron's Settlement* (4) ; *In re Jones* ; *Public Trustee* v. *Jones* (5) ; *Phillips* v. *Cayley* (6)). A power which is covered by s. 23 is a power which amounts to absolute property. The power must be one in very wide terms and any exclusion would fail to bring it within s. 23 (*Moss* v. *Harter* (7)). It is significant that the testator did not use in clause 17 the words used by him in clause 14. That fact indicates that he intended that the words used in clause 14 should be given a meaning different from the meaning given to the words used in clause 17. The power conferred by clause 17 was a general power referring not merely to natural persons but also to non-natural persons, whereas the power conferred by clause 14 is limited to natural persons. The testator sought in clause 14 to limit the power which was there given to his

(1) (1880) 5 App. Cas. 857, at pp. 862, 868, 869.
(2) (1889) 43 Ch. D. 222.
(3) (1857) 3 Jur. (N.S.) 1203.
(4) (1891) 3 Ch. 474.
(5) (1945) Ch. 105.
(6) (1889) 43 Ch. D. 222.
(7) (1854) 2 Sm. & Giff. 458, at p. 465 [65 E.R. 480, at p. 483].

widow from the general power which was given to her under clause 17. The true construction of the will is to give the widow a power limited only to natural persons.

M. F. Loxton, for the respondents Berghofer and Smyth King. The only issue between the parties is : What was the power that was created by the will of the testator ? It was a power to dispose of the property in any manner that the donee saw fit. The words are very wide. The class of persons who were to be the objects of the power were not limited in any way. The words " such ages or times and in such manner " in clause 14 are nothing other than surplusage. They relate not to the objects of the power but to the manner in which the power could be exercised (*Phillips* v. *Cayley* (1)). They in no way limit that manner. They do not impose any obligation, but simply express or confer an authority which the donee of the power already had. Even if those words were to be taken as indicating by inference that the testator had in mind creating the power in respect of natural persons only, they are not capable of supporting that inference. It was a power to appoint to any persons and it may be an appointment by reference to ages or to time. The words " ages or times " used in that connection, even though they might indicate that when he used the words " person or persons " the testator had in mind natural persons, do not indicate that he did not also have in mind artificial persons, even if the word " times " had been omitted. The words " ages or times " are disjunctive, " ages " being referable to natural persons and " times " to artificial persons. They did not limit the class of person but were simply directed to the manner of exercising the power. The word " times " lets in corporations. It does not matter whether the testator thought of that. Being so let in then the presence of the word " ages " is insufficient to exclude them. That being so, the class was a class without any exception whatsoever. The will clearly shows that the testator had in mind institutions.

R. G. Henderson, for the respondents Kiel and Marshall. The words " ages or times " must be taken as a single phrase and the reference to " times " must be construed as having regard to the use of the word " ages." The generality of the remarks of Lord *Blackburn* in *Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.* (2) were commented upon and to some extent cut

(1) (1889) 43 Ch. D. 222.

(2) (1880) 5 App. Cas., at pp. 869-873.

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down in *Willmott* v. *London Road Car Co. Ltd.* (1). *Re Jeffcock's Trusts* (2) was an *ex parte* application only.

J. D. Holmes K.C., in reply. Passages from the judgments in *Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.* (3) were relied upon in *Law Society* v. *United Service Bureau* (4). The difficulty arose by reason of the terms used by the testator in his will, therefore the appellant's costs should be paid out of the estate.

(On the question of costs reference was made to *Currie* v. *Glen* (5); *Sumpton* v. *Downing* (6); *Gray* v. *Perpetual Trustee Co. Ltd.* (7) and *Gale* v. *Gale* (8)).

Cur. adv. vult.

Dec. 6.

The following written judgments were delivered :—

LATHAM C.J. By his will Frank Owen Hedger, who died on 6th July 1939, after providing for certain legacies, gave all his real and personal estate not otherwise disposed of by the will to his trustees upon trust to sell and convert into money. The income of these residuary trust moneys was given to his wife Martha Maud Hedger for life. From and after the death of his wife he directed his trustees to stand possessed of the trust funds upon trust to divide them into three equal parts or shares. As to the first of such shares he directed his trustees to stand possessed thereof "upon trust for such person or persons at such ages or times and in such manner as my wife the said Martha Maud Hedger by will appoints." The will contained provisions to take effect in default of, and subject to any appointment of, the said third share.

The wife of the testator survived her husband and died on 24th July 1948, leaving a will made on 16th November 1932; that is, the will of the wife was made before that of her husband. By her will the widow devised and bequeathed all her property of whatsoever kind and wherever situated to her trustees upon the trusts therein declared. The question which arises is whether by this disposition she effectively exercised the power of appointment given to her by her husband's will so as to dispose of the one-third share of the proceeds of conversion of her husband's residuary estate.

The *Wills Probate and Administration Act* 1898-1947 (N.S.W.), s. 23 (3), provides as follows :—". . . a bequest of the personal estate of the testator, or any bequest of personal property described

(1) (1910) 2 Ch. 525, at pp. 533, 534.
(2) (1882) 51 L.J. (Ch.) 507.
(3) (1880) 5 App. Cas. 857.
(4) (1934) 1 K.B. 343.
(5) (1935) 54 C.L.R. 455.
(6) (1947) 75 C.L.R. 76.
(7) (1928) A.C. 391.
(8) (1914) 18 C.L.R. 560.

in a general manner shall be construed to include any personal estate, or any personal estate to which such description extends (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will." The question which arises for determination is whether the power of appointment given to the widow is a " power to appoint in any manner she may think proper." In order that the section should become applicable, there must be no limit in respect of objects of the power. If certain persons or a class or classes of persons are excluded as objects of the power, the power is not a power to appoint in any manner the donee of the power may think proper: if, for example, the power is a power to appoint only to living persons, there is no power to appoint to unborn persons or to corporations, corporations not being capable of life or death in the ordinary meaning of those words (*In re Byron's Settlement* (1); *In re Jones* (2)). *Sugerman* J., in proceedings by way of originating summons in the Supreme Court of New South Wales, held that the power given to the widow was a power to appoint in any manner she might think proper.

The appellant contends that the reference in the clause of the will creating the power to " ages or times " shows that the power was intended to apply only in favour of natural persons, and not in favour of corporations, institutions or associations such as those to which the testator made gifts by other provisions of his will. I agree with *Sugerman* J. that there are two answers to this contention. In the first place, the power is a power to appoint to such person or persons in such manner as the wife by will should appoint and at such ages or times as she should appoint. There is nothing in these words to require an appointment to be made so as to become operative at some specified age or at some specified time. An appointment would be valid if it contained no reference to age or time. In other words, the words " at such ages or times " are not words which limit the power of appointment. They are words which show that, if the donee of the power thinks proper, an appointment may be made to take effect upon a person attaining a specified age or at some specified time. Further, even if the words are construed as words of limitation, they permit of an appointment, not only at the age of a person, but also in favour of any person at any " time." The word " person " prima facie includes corporations, though the provisions of an instrument may show in a particular case that it was intended to apply only to natural persons

(1) (1891) 3 Ch. 474. (2) (1945) 1 Ch. 105.

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(*Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.* (1)—a decision upon a statute which was applied to a will in *Re Jeffcock's Trusts* (2): see also *Willmott* v. *London Road Car Co. Ltd.* (3)). Thus an appointment to a corporation is an appointment to a person and is within the power. I am therefore of opinion that the appeal should be dismissed and that, as the question to be decided arises directly from the terms of the will and is, as *Sugerman* J. said, a question not without difficulty, the costs of all parties should be paid out of the estate of the testator, those of the trustees as between solicitor and client.

McTIERNAN J. The question is whether the power of appointing a third share of the testator's estate, which is created by clause 14 of his will, is a power of the class to which s. 23 of the *Wills, Probate and Administration Act* 1898-1932 refers. This section applies to a general devise or a bequest made by a testator who may have power to appoint real or personal estate in any manner he may think proper. Clause 14 directs the trustees to hold the share "upon trust for such person or persons at such ages or times and in such manner as my wife . . . by will appoints." It is necessary to consider whether this power of appointing the third share is a power to appoint it in any manner that his wife may think proper. The power is exercisable by will only. In *Hawthorn* v. *Shedden* (4) the Vice-Chancellor, Sir *John Stuart* said: "This power of appointment is confined to an appointment by will, and does not authorize an appointment by deed. But one of the points which I understand to be well settled is that a general power of appointment by will is, within the meaning of the language of this clause, sufficiently general to be considered a power to appoint in any manner the donee of the power may think proper." (5). The clause is s. 27 of the *Wills Act* (1 Vict., c. 26): s. 23 follows this clause. In *Stillman* v. *Weedon* (6), it had been decided that the power to which s. 27 refers is not a general power because the words "in any manner he may think proper" mean "by any instrument he thinks proper." In *Sugden* on *Powers*, 8th ed. (1861), p. 307, where this case is mentioned, it is stated this is not a true construction of s. 27. The author goes on to say (at p. 307) that "The act applies to powers which are unlimited in their objects, although a particular form of execution may be required, but of

(1) (1880) 5 App. Cas. 857.
(2) (1882) 51 L.J. (Ch.) 507.
(3) (1910) 2 Ch. 525.
(4) (1856) 3 Sm. & Giff. 293 [65 E.R. 665].
(5) (1856) 3 Sm. & Giff., at p. 303 [65 E.R., at p. 669].
(6) (1848) 16 Sim. 26 [60 E.R. 782].

course the statute will not operate unless the power is capable of being executed by will." In the discussion of the subject of the execution of general powers by will the author cites *Cofield* v. *Pollard* (1) as an example of a power—apparently considered by him to be " unlimited " in its objects—which is executed by will under s. 27. In that case there was an assignment of shares and money subject to a gift for life " for all and every the person or persons, child or children " as the donee of the power should by deed or will appoint. The author says of this case " Vice Chancellor *Stuart* considered it clear that the power was a general one within the 27th section of the Act." According to the report of the case in (2), the Vice Chancellor said : " . . . there was no question the power contained in the settlement was such a general power." The case is cited in *Farwell* on *Powers*, 3rd ed. (1916), p. 257, as an example of a " general power " within the meaning of the words of s. 27. In *Sugden* on *Powers*, 8th ed. (1861), p. 312, the author states that s. 27 does not apply to " particular powers." An example which is given is " a power to appoint an estate to children." The word " general " is more frequently used than the word " unlimited " to describe the class of powers to which s. 27 applies : the word " special " is used to describe the nature of a power which is subject to the old law (*In re Esther Williams* (3) : see also *Farwell* on *Powers*, 3rd ed. (1916), p. 256 ; and *Jarman* on *Wills*, 6th ed. (1910), vol. 1, p. 809).

Section 27 does not use the words " general powers " or " powers unlimited in their objects." It is of the essence of a general power that the donee may exercise it for his own benefit (*In re Hughes* (4) ; *In re Park* (5)). If the donee can appoint to himself, but certain persons are excluded as objects of the power, such a power is not of the nature of the power referred to in s. 27 or s. 23 of the Act of New South Wales (*In re Jones* (6) ; *Jarman* on *Wills*, 6th ed. (1910), vol. 1, p. 789). In *In re Byron's Settlement* (7) there was a power to appoint by deed or will " for such person or persons (not being her present husband or any friend or relative of his)." *Kekewich* J. said of this power : " It is a power to appoint in any manner the donee may think proper except in a particular manner which is specified ; and, there being a specified exception, the generality of the power is gone " (8). To an objection that the exception was too vague *Kekewich* J. said : " I cannot decide that there is no person excepted under the words ' any friend or relative of his '." (8)

(1) (1857) 3 Jur. (N.S.) 1203.
(2) (1857) 108 R.R. 964.
(3) (1889) 42 Ch. D. 93, at p. 97.
(4) (1921) 2 Ch. 208, at p. 212.
(5) (1932) Ch. 580.
(6) (1945) Ch., at p. 106.
(7) (1891) 3 Ch. 474.
(8) (1891) 3 Ch., at p. 479.

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In deciding that s. 27 did not cover the case, *Kekewich* J. said: "Upon the construction of the Act, and upon principle, it appears to me that we have here a power not general—that is to say it is not a power to appoint 'in any manner' the donee may think proper, but it is a power to appoint 'in any manner' with an exception, which exception destroys the generality of the power" (1). It is to be noticed that in the present power there is not, as there was in the power in the last-mentioned case, any specified exception to the generality of the power.

In deciding the question whether the present power belongs to the class of power to which s. 23 refers, it is necessary to bear in mind the nature of a general power. I think that the right question to answer is not whether the power is absolutely general but whether it is sufficiently general for the purposes of the section. It has been pointed out that the section does not use the words "general power."

In *Jarman* on *Wills*, 6th ed. (1910), vol. 1, p. 789, it is said that "the essence of a general power is that the donor of the power can appoint to whomsoever he pleases." The words "or whatsoever" are not included. The argument in the present case is that unless "person or persons" in the power include artificial persons, the power is not wide enough for the purposes of s. 23. In *Farwell* on *Powers*, 3rd ed. (1916), p. 8, the authors say "General powers are such as the donee can exercise in favour of such person or persons as he pleases, including himself."

In describing the nature of a general power for the purposes of s. 27, none of the authorities appears to have thought it necessary to say that the object must include not only natural persons but in addition, artificial persons of every description.

In *Jarman* on *Wills*, 6th ed. (1910), vol. 1, p. 809, the conception of a general power, which has been stated, is applied to s. 27. In applying that conception the author says: "But a power is not general within the meaning of this section if the instrument creating the power prescribes conditions as to the exercise of the power (not being conditions as to the mode of execution), and in such a case a general devise or bequest will not under s. 27, be a good execution of the power unless the conditions are complied with." The case of *In re Byron's Settlement* (2) is given as an example of a power prescribing conditions as to its exercise: these conditions were that the power could not be exercised in favour of any of the persons whom the donor expressly specified. On the other hand *Cofield*

(1) (1891) 3 Ch., at p. 481.

(2) (1891) 3 Ch. 474.

v. *Pollard* (1) is given as an instance of a general power which came within the scope and operation of s. 27: this case is also referred to in *Farwell* on *Powers*, 3rd ed. (1916), as an example of a power which has been held to be a general power for the purposes of s. 27.

In *Jarman* on *Wills*, 6th ed. (1910), vol. 1, p. 822, it is said: "As a general rule, the objects of a power are determined by the same rules of construction as those which apply to direct gifts in similar terms." Apart from any light thrown on the question by the word "ages," I think that the words "person or persons" in clause 14, read in their context mean natural persons. The way in which the testator changed the language when he proceeded to create the power in clause 17 strongly supports the view that the testator had human beings in mind when he created the power in clause 14. In my opinion it would do violence to the testator's intention and to the general scheme of the will to read person or persons in clause 14 as including artificial persons. To read the words in that way would lead to a highly artificial result, which taking the language of clause 14 and of the whole will, I cannot think the testator intended.

Reading the power created by clause 14 to have human beings as its objects, it is not necessary for the validity of its exercise that the gift is to take effect at any specified age or time. Neither the reference to age or time prescribes any condition as to the exercise of the power. The power is to appoint in any manner the donee may think proper unless it must be regarded as a power of lesser generality than that because artificial persons as well as natural persons are not specifically made objects of the power. I think that a proper question to ask is whether the third share of the estate is at the disposition of the testator's wife under a general power. The section does not say in terms that it is a power to appoint to whomsoever or whatsoever the donee pleases: it is not stated that it is a necessary incident of the power that its objects should be unlimited. The section is remedial. Its objects are explained by *Kekewich* J. in the case of *In re Byron's Settlement* (2).

In my opinion the power created by clause 14 is sufficiently general for the purposes of s. 23. The power which was held in *Cofield* v. *Pollard* (1) to be a general power for the purposes of s. 27 could hardly be read as a power to appoint to human beings and artificial persons. For the purposes of the application of the section, that case is not distinguishable from the present case. I

(1) (1857) 3 Jur. (N.S.) 1203.

(2) (1891) 3 Ch., at pp. 478, 479.

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think that there cannot be any question that the case of *Cofield* v. *Pollard* (1) proceeds upon the proper construction of the section and correctly applies it.

It is to be noted that in the report of *Cofield* v. *Pollard* (2), Sir *John Stuart* V.C. dealt with two points. First whether the will was an execution of any general power vested in the testatrix and secondly whether the will having been executed before the power was created could be taken to be an execution of the power. It was decided that the power was general for the purposes of s. 27 and that by reason of the section the will operated as an execution of the power. In the authorities which I have mentioned where the power in *Cofield* v. *Pollard* (1) is given as an example of a power which is general for the purposes of the section, the words of the power indicating the persons to whom the donor may appoint are mentioned, to show why the power is an example of such a general power. These words are " in trust for all and every the person or persons child or children as E. T. should appoint."

Assuming a power to appoint to any persons whom the donee thinks proper and that, upon its true construction, " persons " do not include corporations or some class of corporations, I cannot think for that reason alone the power would lack the generality required to bring it within s. 23, and a general devise or a bequest as the case may be of the property, subject to the power, for example, to the testator's children, would not, by force of the section, be executed by the will.

In the present case the donee of the power has under clause 14 a power of sufficient generality to answer to the description of a power to appoint in any manner she may think proper. By her will she devised and bequeathed all her property of whatsoever kind and wheresoever situated to her trustees upon the trusts set forth in her will. I am of the opinion that the power of appointment is within s. 23 and was exercised by virtue of the provisions of the section.

I should dismiss the appeal. I agree with the order as to costs proposed by the Chief Justice.

WILLIAMS J. This appeal raises a short but difficult point. It arises in this way. By his will dated 9th April 1937 F. O. Hedger, who died on 6th July 1939, gave, devised and bequeathed his residuary real and personal estate to his trustees upon trust for sale and conversion into money and to stand possessed of his trust

(1) (1857) 3 Jur. (N.S.) 1203.

(2) (1857) 108 R.R. 964; 3 Jur. (N.S.) 1203.

funds upon trust to pay an annuity to his adopted daughter Phyllis Martha Hedger and subject thereto to pay the income thereof to his wife Martha Maud Hedger during her life. After her death the testator directed his trustees to stand possessed of his trust funds upon trust to divide the same into three equal parts or shares. Clause 14 is in the following words: "I direct my Trustees to stand possessed of one of such third parts or shares Upon Trust for such person or persons at such ages or times and in such manner as my wife the said Martha Maud Hedger by Will appoints And in default of and subject to any such appointment Upon Trust to pay one-half thereof to the said Phyllis Martha Hedger and to apply the remaining half thereof so that the same go to augment the third part or share of the trust funds hereinafter settled upon trust for the said Phyllis Martha Hedger and her children." This is the clause which is the subject of this appeal. But the will also contains another clause (17) conferring a power of appointment upon Martha Maud Hedger and Counsel for the appellant relies upon the contrast between the wording of this clause and the wording of clause 14. Clause 17 is in the following words: "If the said Phyllis Martha Hedger shall predecease me without leaving a child or children capable of taking under this last provision then 'I direct my Trustees to stand possessed of the share which the said Phyllis Martha Hedger would have taken in the trust funds if the said Phyllis Martha Hedger had survived me upon such trusts and to and for such ends intents and purposes as my said wife Martha Maud Hedger shall by Will appoint and subject to any such appointment in trust to invest the same and to pay the income thereof to the Trustees for the time being of The Methodist Church of Australasia at Haberfield aforesaid the Sustentation and Home Mission Society of the Methodist Church of Australasia in New South Wales and the Overseas Missions Department of the Methodist Church of Australasia in equal shares'."

Martha Maud Hedger died on 24th July 1948. By her will dated 16th November 1932, she gave, devised and bequeathed all her property of whatsoever kind and wheresoever situated to her executors and trustees upon the trusts therein mentioned. She did not expressly exercise either of the powers of appointment conferred upon her by the will of the testator, which is not surprising because her will was made before his. But her personal representatives call in aid s. 23 (2) and (3) of the *Wills, Probate and Administration Act* 1898-1947 (N.S.W.). As the will of the testator directed the sale and conversion of his residuary estate into money, the appropriate sub-section is sub-s. (3) which provides that a bequest of the

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personal estate of the testator shall be construed to include any personal estate which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention appears by the will. We know from *Phillips* v. *Cayley* (1) that the true meaning of the words, which come from s. 27 of the English *Wills Act* 1837, " may have power to appoint in any manner he may think proper " is " may have power to appoint by the will in question in any manner he may think proper."

In the present case the will in question is the will of the testatrix, so that if the power of appointment in clause 14 of the will of the testator is a power to appoint in any manner the testatrix may think proper the residuary bequest in her will must by virtue of s. 23 (3) of the *Wills, Probate and Administration Act* be construed to include the one-third share of the residuary estate of the testator referred to in this clause and operate as an execution of the power of appointment conferred on her by this clause unless a contrary intention appears by her will. Such a contrary intention to be effective must be clearly expressed : *In re Box's Settlement* ; *Box* v. *Plaut* (2) and there is no such contrary intention in her will. And it is immaterial that her will was made before the creation of the power (*Boyes* v. *Cook* (3)).

But s. 23 only operates where the power of appointment is to appoint in any manner the donee of the power may think proper, that is to say the power must be a general power of appointment. The donee must have power to dispose of the property in any manner in which he could dispose of his own property or in other words the donee must have the right to appoint the property to whomsoever he pleases. If the power had been a power to appoint to a person or persons at such times and in such manner as the testatrix appointed by will, it would have been such a power. She could then have appointed to natural or artificial persons. For in technical language the word " person " prima facie includes both natural and artificial persons (*Pharmaceutical Society* v. *London and Provincial Supply Association Ltd.* (4) ; *Willmott* v. *London Road Car Co. Ltd.* (5)). But the power includes the words " at such ages " and it is to these words that Mr. *Holmes* clings. He contends not that they make it necessary for the donee to specify an age to make the exercise of the power effective, but that only a natural person could be said to have an age in the ordinary use of language,

(1) (1889) 43 Ch. D. 222.
(2) (1945) 172 L.T. 312.
(3) (1880) 14 Ch. D. 53.
(4) (1880) 5 App. Cas., at p. 869.
(5) (1910) 2 Ch. 525.

and accordingly the power to appoint is limited to an appointment to natural persons and such a power is not a power to appoint in any manner within the meaning of s. 23. On the other hand it is contended by Mr. *Loxton* that the words " at such ages or times and in such manner " merely set out modes in which the power may be exercised, so that the power is to appoint to any person or persons the donee thinks proper whether natural or artificial. He also contends that the words " ages or times " are used disjunctively and that the former are apt to refer to natural and the latter to artificial persons.

The learned judge below, agreeing in substance with Mr. *Loxton's* contentions, said that he did not regard the phrase " at such ages or times and in such manner " as casting any obligation on the donee of the power, but merely as indicating that it was open to her to specify an age or a time or a manner if she thought fit. I agree with this, but it does not seem to me really to solve the problem whether the testator intended the appointment to be limited to persons to whom the donee of the power could if she wished appoint at any age. The point is finely poised but it should, in my opinion, be resolved in favour of the appellant. The powers of appointment that are executed by s. 23 are general powers of appointment in the strict technical sense, that is powers which enable the donee by the exercise of the power to give an absolute interest in the property to whomsoever he pleases including himself or his executors or administrators or any natural or artificial person. Thus in *Re Caplin's Will* (1), Sir *R. T. Kindersley* V.C., referring to the form of general power that would be executed by the section said: " I cannot think that the testator intended that his wife should have the power to appoint to a perfect stranger, or to a charity, as she might do if it were held to be a general power." I have searched a number of cases in which powers have been held to be powers within the meaning of s. 23 where the power was to appoint to such person or persons as the donee thought fit, whether with or without the addition of such words as " at such times," " for such purposes," or " in such manner " as the donee thought fit. The words " person or persons " would in these contexts be wide enough to include artificial persons, but there is no case which I have been able to find, and none was cited, where the power has referred to the ages of the appointees. Apart from the reference to ages the words in clause 14 of the will of the testator would technically include an artificial person, but the reference to ages is, in my opinion, sufficient to indicate that the testator intended the

(1) (1865) 2 Dr. & Sm. 527, at p. 531 [62 E.R. 720, at p. 721].

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appointees to be natural persons. The words "at such ages or times" are no doubt in the disjunctive, but they are both intended to be applicable to all possible appointees, and to indicate that the power is wide enough to make the appointment contingent on appointees attaining a certain age or to make successive appointments.

Accordingly artificial persons are excluded from the class of appointees and the power is not one to appoint by will in any way the donee pleases (*Commissioner of Stamp Duties* v. *Stephen* (1)). The words are equivalent to a subtraction from the generality of objects of all corporate bodies, charities and the like and the power is not a general power in the strict technical sense. It is a power to appoint in any manner with an exception which exception destroys the generality of the power (*In re Byron's Settlement* (2) ; *In re Jones* (3)).

This construction of clause 14 is assisted slightly by the more limited wording of this clause compared to the wording of the power of appointment in clause 17 which is a true general power. This difference in language points to a different intention as to the scope of the two powers. It is also assisted slightly by the difference in the gifts in default of appointment in the two clauses. In clause 14 the trusts in default of appointment are limited to individuals and follow naturally in default of the exercise of a power to appoint to individuals, whereas in clause 17 the trusts in default of appointment are to charities and follow naturally in default of the exercise of a power of appointment wide enough to enable the donee to appoint to charities.

For these reasons I would allow the appeal.

Appeal dismissed. Costs of all parties out of the estate, those of the trustees as between solicitor and client.

Solicitors for the appellant and the respondents Kiel and Marshall, *T. G. Marshall, Landers and Giblin.*

Solicitors for the respondents Berghofer and Smyth King, *W. U. Smyth King & Son.*

Solicitors for the respondent Lew, *Tress, Cocks & Maddox.*

J. B.

(1) (1904) A.C. 137, at p. 140.
(2) (1891) 3 Ch. 474.
(3) (1945) 1 Ch. 105.