[HIGH COURT OF AUSTRALIA.]

GREY . . . . . APPELLANT ;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT

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MELBOURNE, *April* 7, 8 ; *May* 15.

Latham C.J., Rich, Starke, Dixon, and Evatt JJ.

Estate Duty—General power of appointment by will—Exercisable upon a contingency—Exercise of power before contingency determined—Estate Duty Assessment Act 1914-1928 (*Cth.*) (*No.* 22 *of* 1914—*No.* 47 *of* 1928), *sec.* 8 (3) (*a*)—*Wills Act* 1928 (*Vict.*) (*No.* 3803), sec. 25.

A donee of a general testamentary power of appointment contingent upon the death of himself and his brother neither leaving issue died without issue leaving his brother him surviving. His will contained a residuary devise to his brother, but no express exercise of the power. The Federal Commissioner of Taxation claimed that the property subject to the power formed, under sec. 8 (3) of the *Estate Duty Assessment Act* 1914-1928, part of the dutiable estate of the deceased as "real property over which he has a general power of appointment, exercised by his will," and assessed the estate accordingly. The executor appealed against the assessment.

Held, by *Rich*, *Starke*, *Dixon* and *Evatt* JJ., that the property was not dutiable, because unless and until the brother died without issue the power would not affect it and sec. 8 (3), on its true interpretation, did not include the exercise of a contingent power in anticipation of a contingency depending on an uncertain event occurring, if at all, after the death of the deceased.

Per Latham C.J. : Although sec. 8 (3) (*a*) does not extend to appointments which give no beneficial interest to any person, the exercise of the power in the present case, if it was exercised, gave an interest in the land to the deceased's brother. *Quære*, however, whether the power was exercised and whether the appeal against the assessment was a proper proceeding for the determination of that question.

CASE STATED.

Robert Grey, late of Pakenham East in the State of Victoria, by his last will devised certain real property in Victoria to his sons

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Robert William Grey and John Grey as tenants in common in equal shares during their joint lives and made further provisions as to the said real property including the following provisions: "5. I also declare that if my said sons Robert William and John shall both die without issue then I devise an estate in fee simple of the said lands to such person or persons as he the said Robert William may by will or codicil appoint."

Both the sons Robert William Grey and John Grey survived the testator. Robert William Grey died on 9th June 1937 without issue and unmarried. John Grey was still living and had no issue. By his last will Robert William Grey appointed his brother John Grey to be executor and trustee thereof, and gave the whole of his real and personal estate to his trustee "upon trust to hold the same during the lifetime of my sisters . . . and to pay one half of the income from time to time to them in equal shares and upon the death of one to pay such half of the income to the survivor during their respective lives or life and as to the other half of such income to retain the same for the benefit of my said brother all such incomes to be on protective trusts" and "upon the death of the survivor of my said sisters . . . to my said brother absolutely," but did not otherwise purport to exercise the said power of appointment.

The Federal Commissioner of Taxation assessed the estate to Federal estate duty on the basis that the present value of the interest in the said real property which was subject to the general power of appointment should be included in the dutiable estate by reason of sec. 8 (3) (*a*) of the *Estate Duty Assessment Act* 1914-1928.

On an appeal to the Supreme Court of Victoria by John Grey, the executor and trustee of Robert William Grey, against the assessment, *Gavan Duffy* J. stated a case for the opinion of the High Court under sec. 27 of the *Estate Duty Assessment Act* 1914-1928 upon the following questions of law:—

(*a*) Whether the testator, Robert William Grey, deceased, had a general power of appointment over the said real property within the meaning of sec. 8 (3) of the said Act.

(*b*) If yea, whether the testator, Robert William Grey, deceased, exercised such general power of appointment by his will.

(*c*) Whether the said real property formed part of the estate of the testator, Robert William Grey, deceased, for the purposes of the said Act.

Herring K.C. (with him *Dethridge*), for the appellant. There is a contrary intention shown in the will of Robert William Grey to prevent the devise of the whole of the real and personal estate operating as the exercise of the power of appointment (*Wills Act* 1928 (Vict.), sec. 25). The court is concerned with the property and its value at the time of the death of the testator, and in truth he had no power to dispose of this property, because all he had was a contingent interest. At the time of his death he did not have such a general power of appointment as was contemplated by sec. 8 (3) (*a*). What the legislature is concerned with is the power of appointment existing at the time of death and it has no relation to a power depending upon a contingency. At the time of the death of the testator there was nothing which could be assessed, because there is no machinery in the Act for assessing the value of a contingent interest (*Platt* v. *Routh* (1); *Drake* v. *Attorney-General* (2); *Thomas* v. *Jones* (3)). There are two points, the existence of the power and the method of exercising it (*Farwell* on *Powers*, 3rd ed. (1916), p. 169; *Hanbury* v. *Bateman* (4)). The legislature was not intending to bring in anything which would not go to the testator's executor. The appointment has to operate and the estate has to pass: Cf. *Wills, Probate and Administration Act* 1898-1932 (N.S.W.), sec. 46A. Either there has never been an operative exercise of the power, or the exercise of the power is not such as the Act contemplates.

Tait, for the Commissioner. The matter before the court is really one of the construction of sec. 8 (3) (*a*) of the Federal *Estate Duty Assessment Act*. The Federal legislature does tax property which is not available for the payment of debts. It is not logical

(1) (1840) 6 M. & W. 756, at p. 792 [151 E.R. 618, at p. 632].
(2) (1843) 10 Cl. & Fin. 257 [8 E.R. 739].
(3) (1862) 2 John. & H. 475 [70 E.R. 1145]; 1 De G.J. & S. 63 [46 E.R. 25].
(4) (1920) 1 Ch. 313.

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to say that it is not taxable because it is not available for the payment of debts. This is so in secs. 32 and 175 of the Victorian *Administration and Probate Act* 1928. The Act is a death-duties Act and the mere fact that it is taxing property which is not available for the payment of debts is not to the purpose. Under sec. 8 (3) (*a*) two things are necessary: one, that the testator had a power of appointment; the other, that he exercised it by his will. It is not necessary under that section that the power should be effective. When property subject to a contingency is being valued, the contingency must be taken into account. Three different matters must be considered; first, the power, secondly, the exercise of the power, and thirdly, the operation of the exercise of the power on the appointee so as to give him some interest. There is nothing in the words of the testator's will which can imply a contrary intention within sec. 25 of the *Wills Act* 1928. [On the question of the exercise of a power he referred to *Farwell* on *Powers*, 3rd ed. (1916), p. 166, proposition 9; *Hanbury* v. *Bateman* (1).] Estate duty may be imposed on property, even though the testator's will did not deal with that property at all, because he exercised a disposing power in relation to it. The important thing is that the testator has a disposing power, not that he does dispose of the property. The ground for bringing in property as to which there is a general power of appointment is adverted to in *Commissioner of Stamp Duties* v. *Stephen* (2). Ordinary contingent remainders are within the section. Here it was a fact that the testator had a general power of appointment and that it was exercised by his will. The words in sec. 8 (3) (*a*) are clear and there is no reason for giving them an extended or limited meaning or for reading in something which is not there.

Herring K.C., in reply. The authorities are clear that there is no real exercise of the power until the happening of the contingency. Here the power has been exercised before the contingency has happened (*Wandesforde* v. *Carrick* (3)).

Cur. adv. vult.

(1) (1920) 1 Ch. 313.
(2) (1904) A.C. 137, at p. 140.
(3) (1871) I.R. 5 Eq. 486, at p. 495.

The following written judgments were delivered :—

LATHAM C.J. This is a case stated for the opinion of the court under sec. 27 of the *Estate Duty Assessment Act* 1914-1928. The question which arises is whether Robert William Grey, who died on 9th June 1937 without issue, had a general power of appointment over certain real property, which he exercised by his will, so as to make that property part of his estate for the purposes of the *Estate Duty Assessment Act*. Sec. 8 (3) of the Act provides : "For the purposes of this Act the estate of a deceased person comprises—(*a*) his real property in Australia (including real property over which he had a general power of appointment, exercised by his will)."

Robert Grey, who was the father of Robert William Grey, died on 29th June 1916, and devised certain real property to his sons, Robert William Grey (to whom I shall hereafter refer as the testator) and John Grey, as tenants in common in equal shares during their joint lives. His will contained the following further provision : "5. I also declare that if my said sons Robert William and John shall both die without issue then I devise an estate in fee simple of the said lands to such person or persons as he the said Robert William may by will or codicil appoint." The testator has died without issue. John Grey is still living. He is aged fifty-eight. He is married but has no issue, but he still might have issue.

Under clause 5 of Robert Grey's will the power to appoint which is given to the testator is a power to appoint to such person or persons as he may choose. This is a general power of appointment.

Clause 5 devises the estate in fee simple to the testator's appointees only "if my said sons . . . shall both die without issue." There has been argument as to whether this clause confers upon the testator a power of appointment to be exercised upon a contingency, or whether it provides only for a power which is to arise (to come into existence) upon a contingency—the contingency being the death of both sons without issue. If the power has not yet come into existence because John is still living then it has not been exercised and no question arises under sec. 8 (3) (*a*) of the Act. But it seems to me clear that the power has come into existence. It cannot reasonably be said that it was intended that the power should

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come into existence only after the donee of the power had died, when, of course, he could not exercise it.

The question to which most attention has been directed in argument is whether sec. 8 (3) (*a*) of the Act operates to impose a liability in respect of estate duty in cases where, though a power of appointment has been exercised, the non-occurrence of a contingent event may prevent any person taking any property by virtue of the exercise of the power of appointment.

I propose in the first place to consider the case upon the assumed basis that the power of appointment has been exercised. I will later deal with the question whether it has actually been exercised. It would appear to follow that the real property in question in this case was comprised in the estate of the deceased by virtue of sec. 8 (3) (*a*). But the result of so holding would, it is contended, be very remarkable. If John were to die leaving issue, no person would or could take any interest by virtue of the exercise of the power of appointment. But, if sec. 8 (3) (*a*) applied, duty would nevertheless be charged in respect of the value of the whole of the land in question. (The words of the section bring into the estate not the interest passing by the appointment but the " real property over which " the power of appointment exists.) If, as pointed out by my brother *Dixon*, two persons each had powers of appointment by will over the same land in different events and both exercised their powers, but neither event happened, duty would be chargeable twice, though no person benefited by either appointment.

Though the general words of sec. 8 (3) (*a*) would, taken by themselves, bring about this result, other provisions of the Act are relied upon to show that this is not the intention of the section. Sec. 34 (3) provides for the case where there is no administrator of the estate of a deceased person. Par. *b* of sub-sec. 3 provides that the duty assessed shall be payable by " the persons who received the estate " from the deceased person. This provision purports to deal with the whole duty. But it would be impossible to apply it where the only property dealt with by the will of a deceased person was property over which he had a general power of appointment but where, owing to the non-occurrence of a specified contingency, the will did not operate so as to give any interest in the property to the

appointee. In such a case there would be no " person who received " any estate from the deceased person. In the present case, where other property is dealt with by the will if there were no administrator, the result of applying par. *b* by itself would be that duty alleged to be payable in respect of the land in question would be payable by the persons who received the estate of the testator though they did not ever enjoy any interest in that land and though no person might ever enjoy any interest therein by virtue of the appointment. But par. *c* of sec. 34 (3) apportions the duty among beneficiaries in proportion to the value of the property received by them respectively. The application of this provision would prevent the result which has just been stated, but it would leave the duty upon the land unprovided for so far as the scheme of sec. 34 is concerned. The duty would have to be paid out of the estate (sec. 38) and would, therefore, be borne by the beneficiaries or some of them, though none of them would have enjoyed any interest in the land in respect of which the duty was charged. It is plain that sec. 34 does not contemplate such a result.

Sec. 35 provides for the normal case where there is an administrator. This section provides that (subject to any different disposition made in a will and to an exception which is immaterial for the present purpose) " the duty " (that is, the whole duty) payable in respect of an estate shall be apportioned by the administrator among the persons beneficially entitled to the estate. Under par. *a* the duty must, in the first instance, be apportioned among all the beneficiaries in proportion to the value of their interests. The word " received " is not used in this paragraph, but the provision can refer only to the interests to which the beneficiaries become entitled by reason of the will. Thus this section also contemplates that the amount necessary for the payment of duty in respect of the property taxed will be provided by the persons who receive that property and not by other persons who do not receive it, and that the whole amount of the duty will be so provided.

I therefore agree with the contention that, in order to make the Act workable, it is necessary to exclude from the operation of sec. 8 (3) (*a*) appointments which give no beneficial interest to any person.

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It is, however, still necessary to consider whether, upon the basis that the power of appointment has been exercised in the present case, it has or has not operated to give to the son John an interest in property. In my opinion it has so operated if it is an exercise of the power at all. It gives to John an estate in fee simple in the land in question in the event of John dying without leaving issue. This is a contingent estate. It is not a contingent remainder. It is created by the exercise of the power of appointment and not by the will which creates the power of appointment (*De Serre* v. *Clarke* (1); *Sweetapple* v. *Horlock* (2); *Jackson* v. *Commissioner of Stamps* (3)). But there is no estate upon which it is expectant, no precedent estate, which is created by the same instrument, that is, by the will of the testator by which the power is exercised. Such a limitation cannot create either a legal contingent remainder or an equitable contingent remainder (*Challis*, *Real Property*, 2nd ed. (1892), pp. 109, 111). The limitation is an executory devise creating a contingent executory interest. At common law both contingent remainders and executory interests were only possibilities, but they were possibilities coupled with an interest " which so soon as the person in whom they will vest, if they do vest, is ascertained, are both descendible and deviseable " (*Challis*, *Real Property*, 2nd ed. (1892), p. 66). Such an interest is now transferable *inter vivos* (*Property Law Act* 1928 (Vict.), sec. 19).

Therefore the position is that the exercise of the power of appointment in favour of John, if it was exercised, gives to him an estate in fee simple in the land contingent upon him dying without issue. He can dispose of this estate by his will or he can now transfer it to another person. Thus by reason of the exercise of the power he has obtained an interest in the land. Accordingly, even if the statute is construed in such a way that sec. 8 (3) (*a*) applies only to cases where the result of exercising the power of appointment is to give a person an interest in the land, the statute would apply in the present case if the power has been exercised. This brings me to the question of whether the power has actually been exercised.

In his will the testator appointed his brother John executor and trustee. He made no reference to the power of appointment. He

(1) (1874) L.R. 18 Eq. 587. (2) (1879) 11 Ch. D. 745.
(3) (1903) A.C. 350.

devised and bequeathed the whole of his real and personal estate to his trustee upon trust to hold during the lifetime of the testator's sisters and to pay one half of the income to each of them and upon the death of one to pay one half to the survivor and as to the other one half of the income to retain the same for the benefit of John Grey "all such incomes to be on protective trusts." Upon the death of the survivor of the testator's sisters he devised and bequeathed the whole of his real and personal estate to John absolutely.

In these provisions there is no express exercise of the power of appointment. The commissioner, however, relies upon the provisions of sec. 25 of the *Wills Act* 1928 (Vict.). This section provides that a general devise of real estate shall be construed to include any real estate which a testator may have power to appoint in any manner he may think proper, and that it shall operate as an execution of such power unless the contrary intention appears by the will. It is contended that the testator's will contains a general devise of real estate, that there is no expression of a contrary intention, and that, therefore, the devise is an exercise of the general power of appointment.

There is no doubt that the devise is a general devise of the real estate of the testator. Is there then any evidence of a contrary intention within the meaning of the section? Such evidence can be obtained only by looking at what appears on the face of the will (*Boyes* v. *Cook* (1)). In applying this section the courts have considered the words used in the will for the purpose of ascertaining whether upon a fair construction the words should or should not be regarded as being intended to be applicable to the property over which the testator had the general power of appointment. There is a difficulty in applying a provision such as sec. 25 to cases where probably the testator had no real intention in the matter at all, but the courts have applied the provision by inquiring whether there is anything in the will which can fairly be described as inconsistent with the view that the general devise was meant as an execution of the power (*Scriven* v. *Sandom* (2))—and see *In re Stokes*; *Public Trustee* v. *Brooks* (3).

(1) (1880) 14 Ch. D. 53.
(2) (1862) 2 John. & H. 743 [70 E.R. 1258].
(3) (1922) 2 Ch. 406.

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By his will the testator upon the death of one of his sisters gives to his brother John one half of the income of his real estate subject to a protective trust (as to the nature of which see *Trustee Act* 1928 (Vict.), sec. 34). This provision plainly contemplates the actual receipt of the income by John during his life. But the testator cannot make any appointment as to the land in question which can become operative until after John has died. It is, therefore, at least doubtful on this ground alone whether there is not an expression of a contrary intention which prevents this devise of real estate from operating under the *Wills Act* as an exercise of the power of appointment.

But the parties now before the court are the executor and the Commissioner of Taxation. It would, in my opinion, be undesirable (unless it were absolutely necessary) to determine upon this proceeding the question whether the power of appointment has been well exercised in the absence of the parties who are interested in maintaining opposing contentions upon that issue.

In my opinion the proper course to follow is to postpone the delivery of formal judgment in this matter until the parties have had an opportunity of considering the position, and, if they are so advised, have instituted proceedings in the Supreme Court, to which the Commissioner of Taxation as a creditor of the estate might be made a party, and in which the question of whether or not the power has been exercised could be determined in such a manner as to bind all those who are interested.

Rich J. We are asked to answer a question submitted in a case stated as to whether certain real property for the purposes of the *Estate Duty Assessment Act* 1914-1928 forms part of the estate of the testator as real property over which he has a general power of appointment exercised by his will.

The relevant section of the Act, sec. 8 (3), provides: "For the purposes of this Act the estate of a deceased person comprises—(*a*) his real property in Australia (including real property over which he has a general power of appointment, exercised by his will)." The testator was given a testamentary power of appointment, not limited but general, and made conditional on the death of himself

and his brother dying without issue: Cf. *Earle* v. *Barker* (1). The testator died without issue, but his brother survives him. The testator's will, the commissioner contends, contains a residuary devise which is an exercise of this power. It has been decided that "if a power is to arise upon two contingencies, one of which may not be capable of being ascertained until the death of the donee of the power, it is competent to the donee to exercise it at any time during his life, although neither of the contingencies has happened" (*Sugden* on *Powers*, 8th ed. (1861), p. 263, citing *Countess of Sutherland* v. *Northmore* (2)). "Now it has been decided many times, that a power to operate upon a contingent event, like that of a death, may be exercised in the lifetime of the party upon whose death alone that contingency can take effect; otherwise you might never exercise it at all. That is a settled point of law" (*Eden* v. *Wilson* (3)). But although the power has been duly exercised it does not operate or take effect until the testator's brother dies without issue. Is the scope and object of sec. 8 (3) (*a*) to drag into the tax net potential assets or property which does not pass immediately on death, but remains unaffected until the happening of the remaining contingency—in this case the death without issue of testator's brother?

A taxing Act, generally speaking, is aimed at obtaining a subvention to the treasury at the expense of the citizen either on some occasion when the citizen is found with replenished resources or in respect of his possession of property. Among such Acts those imposing death duties are usually concerned with the transmission of property on death. In order to prevent resort to gifts and dispositions *inter vivos* on the part of men of property who manifest more benevolence to their offspring or other claimants on their bounty than interest in the budgets of their country some provision is almost invariably included in such Acts whereby property, the subject of the gift, is treated as comprehended in the deceased's estate: Cf. *Horsfall* v. *Commissioner of Taxes* (*Vict.*) (4). Further, as a general power of appointment enables the donee of the power to dispose of property as if it were his own, it is usual to levy duty upon property subject to such power as

(1) (1865) 11 H.L.C. 280, at p. 285 [11 E.R. 1340, at p. 1342].
(2) (1729) Dick. 56 [21 E.R. 188.]
(3) (1852) 4 H.L.C. 257, at p. 283 [10 E.R. 461, at p. 471.]
(4) (1918) 24 C.L.R. 422, at p. 441.

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if it were part of the estate passing upon death. Sec. 8 (3) (*a*) by the bracketed words reaches after property devolving upon the exercise of a general power. But it is to my mind clear from the nature of the Act and provisions other than sec. 8 (3) (*a*) which it contains that it means to include in the tax only property which is affected by an exercise of the general power. Now in the case of a contingent power property is not affected by its exercise until the contingency happens. When a testator devises his own property upon contingent limitations the limitations are, under our present law, effective to create interests which are assignable and descendible. Although contingent interests and not vested estates, they are property which will pass by death, bankruptcy or alienation. I do not say that an equitable assignment may not be made of the expectation of an appointee under a contingent power, but so can an equitable assignment of the *spes successionis* of a next of kin or legatee of a living person. The difference is that one is present property and the other the expectation of future property. When a contingent power is given the power has no operation until the contingency occurs. The fact that the donee of the power may, according to the construction of the instrument, exercise it in advance of the contingency means no more than that the donor has determined that his proleptic judgment or indication of intention shall suffice when the contingency occurs. If the contingency does not occur the donee of the power continues to be a stranger to the estate. His death is then an irrelevancy, and the property passes under another person's testamentary or other disposition. I do not think that we ought to construe the words of the bracketed words of sec. 8 (3) (*a*) as extending to a case where at the death of the deceased whose estate is under assessment it is completely uncertain whether his present exercise of a future contingent power will ever produce any effect on the passing of the property, or will turn out to be merely an irrelevancy.

I answer the question with which I prefaced my judgment in the negative.

STARKE J. Case stated by the Supreme Court of Victoria under sec. 27 of the *Estate Duty Assessment Act* 1914-1928.

The Act, sec. 8 (3), provides that the estate of a deceased person comprises (*inter alia*) his real property in Australia including real

property over which he had a general power of appointment exercised by his will. The will of Robert Grey contained the following provision : " I also declare that if my said sons Robert William and John shall both die without issue then I devise an estate in fee simple " (in certain lands) " to such person or persons as he the said Robert William may by will or codicil appoint." Both sons survived Robert Grey ; Robert William died in 1937 without issue, John is still alive and without issue.

By his will the son, Robert William, gave devised and bequeathed the whole of his real and personal estate to trustees upon certain trusts in the will set forth but did not otherwise exercise his power of appointment. The questions are whether Robert William Grey had a general power of appointment within the meaning of the Act which he exercised by will.

" A power which is not to arise until a future or contingent event happens, or until a condition is fulfilled, cannot be exercised until the event happens or the condition is fulfilled ; for until then it has in fact no existence." " A power," however, " presently given to a designated person, the exercise of which does not depend on the happening of a contingency, but an appointment under which can only take effect after the happening of a contingency, can be well exercised before the contingency happens " (*Farwell* on *Powers*, 3rd ed. (1916), ch. V, secs. 9, 10, pp. 166 et seq. ; *Hanbury* v. *Bateman* (1)). The power in the present case falls into the latter class of cases.

It is contended for the commissioner that the power given to Robert William Grey was a general power of appointment and that his will operated as an exercise of that power by force of the *Wills Act* of Victoria, sec. 25. It was not disputed that the execution of the power could have no operation or become effective until the contingency happened. It is possible that the contingency may never happen, but still it is said that the will of Robert William Grey operates as the exercise of that power within the meaning of the *Estate Duty Assessment Act*.

In my judgment the contention is ill founded. The Act contemplates an exercise of a general power which is effective and operates

(1) (1920) 1 Ch. 313.

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as a disposition of property not depending for its effectiveness upon the happening of some contingency. Otherwise a deceased's estate would be liable for estate duty upon property in respect of which a general power was exercised but never took effect. Clearer words are required than those in sec. 8 (3) to impose such a tax. Again the provisions of secs. 34 (3) and 35 of the Act for apportioning the duty amongst the beneficiaries would be difficult and I think unworkable if the contention of the commissioner were sustained.

The case can be disposed of by answering question *c* in the negative.

DIXON J. The question for decision is whether certain land has been properly included in the assessment for estate duty as part of the testator's estate within the meaning of sec. 8 (3) (*a*) of the *Estate Duty Assessment Act* 1914-1928. That provision enacts that, for the purposes of the Act, the estate of a deceased person comprises, among other items, his real property in Australia (including real property over which he had a general power of appointment, exercised by his will).

The testator had a brother, named John, who survives him. The lands in question were disposed of by the will of their father. After a devise to the brothers for their joint lives as tenants in common and some further limitations which it is unnecessary to describe, this will conferred upon the testator a power in the event of himself and his brother dying without issue. The power was expressed as a devise, in that event, of an estate in fee simple in the said lands to such person or persons as the testator might by will or codicil appoint. The testator did in fact die without issue, thus fulfilling half the double condition on which the power depends. His will contained a residuary devise which is said to amount under sec. 25 of the *Wills Act* 1928 (Vict.) to an exercise of this contingent power.

A power given to a designated person for his benefit and expressed to be dependent on a contingency is as a rule capable of being exercised either before or after the happening of the contingency. The court is inclined to treat the contingency as a condition of the operation of the appointment rather than as a condition of

the exercise of the power (per *Sargant* J., *Hanbury* v. *Bateman* (1)). With this principle as a foundation for his claim, the commissioner says that the case falls within the literal words of sec. 8 (3) (*a*); that is to say, the lands are real property over which the testator had a general power of appointment exercised by his will. It is plain, however, that unless and until the testator's brother who survives him dies without issue, the appointment said to be made by the residuary devise contained in the testator's will can have no operation. In other words, the exercise of the power has no effect in passing any estate or interest in the land unless and until a contingent event occurs. Upon the facts of the case the occurrence of the event seems not unlikely; but the decision of the question must be the same whether the contingency upon which the power depends is so unlikely to occur that it is almost certain that no interest will pass or, at the other extreme, is so imminent as to make it almost certain that an estate will pass under the exercise of the power.

It may be conceded that if a testator possesses a power to appoint in any manner he may think proper in the event of a contingency which has not happened at his death, and if a clause is found in his will capable of operating as an exercise of the power, it may be described not incorrectly as a general power of appointment exercised by his will. But the question which we have to determine is whether it is intended by the enactment that property subject to such a contingent power should be brought under liability to estate duty as part of the estate of the deceased person. Does the statute mean to bring about that result by saying that the estate is to include real property over which he had a general power of appointment exercised by his will? It is quite clear why it was thought proper to include in the dutiable estate property over which a testator had exercised a general testamentary power of appointment. It is because the donee of a general power of appointment has a right of disposition which is in many respects the equivalent of property. The power enables him to appoint to himself or his executors. It enables him to devise or bequeath the property subject to the power as freely and effectually as if it were his own. That property becomes subject to his debts as if it were his own

(1) (1920) 1 Ch. 313, at p. 318.

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estate. He may release the power instead of exercising it. Further, all these things he may do for valuable consideration. A general power immediately arising, therefore, has many practical results which ordinarily flow from the ownership of property. At the same time, in point of law, property subject to a general testamentary power forms no part of the property or assets of the donee of the power and the instrument exercising the power, though in form a will operates rather as the completion of a conveyance than as a testament (*In the Goods of Tomlinson* (1); *O'Grady* v. *Wilmot* (2)). But in the ordinary case of an absolute power the property devolves or passes upon the death of a testator. In the very special and unusual case of a power contingent upon events taking place, if at all, after the death of the testator who is donee of the power, the property passes only on the occurrence of the contingent event. Until that event happens the property is unaffected by the testator's dispository act, the appointment made in exercise of the power.

The *Estate Duty Assessment Act* 1914-1928 requires the assessment of the duty as at the testator's death and contains no provision for the re-opening of the assessment at a future date, so that, on the occurrence of the contingency, the property might be included. If the frame of the Act had been such as to take into account future events in virtue of which property either accrued to the estate or fell within some description making it dutiable, it might be right to construe the references in sec. 8 (3) to general powers of appointment as including powers the operation of which to pass any estate or interest depends on some future uncertain event. But, as the Act is framed, I think a more limited meaning and application should be given to the words. They should be limited to powers under which property must pass according to the dispositions contained in the instrument exercising the power in the events specified in that instrument. The words should not be understood as extending to property upon which the will may or may not operate.

Considerations justifying and requiring this interpretation, in my opinion, appear upon the face of the statute. In the first place, what is made dutiable by the material part of sec. 8 (3) is not the interest, whether vested or contingent, conferred by the

(1) (1881) 6 P.D. 209, at p. 210.

(2) (1916) 2 A.C. 231.

appointment, but the estate or other property subject to the power. Thus, if a testator possessing a general power over an estate in fee simple chose to exercise it by appointing only a life estate or a future contingent interest, the whole fee simple would be included in the dutiable estate, not merely the life estate or the future contingent interest. If the sub-section were construed as including property over which the testator had a contingent general power of appointment, contingent upon events happening after his death, it would, if he exercised the power by his will, impose estate duty on the property subject to the power, notwithstanding that the contingency did not occur and that the property passed, not under the power, but under other dispositions made by the donor of the power, and was unaffected by the testator's will. Indeed, in the case of alternative powers to different donees depending on a contingency according as it did or did not happen, it would follow that if each donee exercised the power in anticipation respectively of the occurrence and of the non-occurrence of the contingency, the property would be included in both of their estates. Thus, if a general power of appointment by will were given to A, if he should leave a child or children him surviving who should attain twenty-one, and, if he should not, a general power of appointment to B, events might occur which, if contingent powers depending on future events are included in sec. 8 (3), would result in the inclusion of the property subject to the power both in the dutiable estate of A and in the dutiable estate of B. For example, A might die leaving children all under twenty-one. Before any of them attain twenty-one B might die. Both the will of A and that of B might contain general residuary dispositions amounting to exercises of their respective powers. According to the construction contended for by the commissioner in the case both of A and of B the conditions would be satisfied upon which the property must be included in his estate. And this would be so whether in the event any of the children did or did not attain twenty-one. The whole value of the property would be liable to duty in both estates, although the property could pass under one only of the two wills.

From other provisions of the Act it clearly enough appears that the purpose of sec. 8 was to include property devolving upon the deceased's

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death or which, but for an alienation or a form of ownership struck at by sub-sec. 4, would have so devolved. This purpose appears to be fundamental to the operation of many provisions. A clear example is supplied by sec. 8 (6). That sub-section reduces the rate of duty when the beneficiaries are the widow, children, or grandchildren of the deceased, but it is expressed as reducing the rate in respect of so much of the estate as *passes* to such beneficiaries by the will, intestacy, gift *inter vivos* or settlement. Secs. 34 and 35 deal with the burden of the duty. As they stood in the original Act of 1914 their meaning and effect are discussed in *In the Will of Harper*; *Harper* v. *Harper* (1): Cf. *In the Will of Davidson*; *Perpetual Executors and Trustees Association of Australia Ltd.* v. *Davidson* (2). Sec. 34 has been amended in an important manner, and the amendments give strong support to the inference I would draw from the original section. That inference is that the Act contemplates the imposition of duty upon property an interest in which passes on the testator's death, or would have passed but for an alienation *inter vivos*. Under sec. 34, as amended, provision is made for the case of there being no person administering the estate. A person receiving property forming part of the estate is in that case made liable to so much of the total duty as is proportionate with the value of the property received. Under sec. 35, which has not been amended, in the absence of a contrary direction in the will, the duty is to be apportioned among all the beneficiaries in proportion with the value of their interests. If property over which the testator has and has exercised a general testamentary power of appointment arising on a future contingent event is included in the estate, how is it possible to apply the provisions relating to the reduction of duty in favour of widow, children, and grandchildren, in relation to estates without an administrator, and the provisions relating to the distribution of the burden of the duty among beneficiaries? Suppose the power is exercised in favour of a widow. Unless and until the contingency happens no property passes to her. In whosesoever favour the power may be exercised, until that event there is no person who receives property subject to the power in virtue

(1) (1922) V.L.R. 512; 43 A.L.T. 197.

(2) (1917) V.L.R. 748; 39 A.L.T. 140.

of the appointment, and if there be no administrator, apparently the duty must, on the commissioner's construction of sec. 8 (3), be levied upon persons who take quite independently of the testator and of his will. If there be an administrator, it would be necessary for him to distribute the burden of the duty "among the persons beneficially entitled to the estate" by apportioning the duty "among all the beneficiaries in proportion to the value of their interests." Who are the beneficiaries, pending the happening of the contingency, and what interest do they take? To give to sec. 8 (3) a meaning wide enough to include general testamentary powers contingent on future events must, as it appears to me, involve imposing duty upon property which at the time of the assessment has not been, and may never be, affected by the testator's will. General words should not receive such a construction unless their meaning is plain.

In my opinion the words are reasonably open to a construction which restricts them to powers effective at the time of the testator's death. Upon that construction the lands ought not to be included in the present assessment.

In answer to the questions in the case stated, I think it should be declared that the real property did not for the purposes of the *Estate Duty Assessment Act* form part of the estate of the testator as real property over which he had a general power of appointment exercised by his will.

The costs of the case stated should be costs in the appeal to the Supreme Court.

EVATT J. I agree with the judgment of *Rich* J.

Questions answered as follows:—(*a*) *No answer.* (*b*) *No answer.* (*c*) *No. Costs of case stated to be costs in the appeal to the Supreme Court. Case remitted to Supreme Court.*

Solicitors for the appellant, *Lucas & Mumme.*

Solicitor for the respondent, *H. F. E. Whitlam,* Commonwealth Crown Solicitor.

H. D. W.