

for upwards of twelve years, it was held that he had acquired a right of permanent occupancy as regards that land also, by the operation of the law of limitation.

It will thus be seen that in the cases above referred to, in which it was held that title to a right of permanent occupancy in land subject to the payment of a fixed rent was acquired by the operation of the law of limitation, the person who thus acquired title was, at the time from which the period of limitation was reckoned, in possession of the land really as a trespasser under an invalid lease or under a lease which prior thereto had been determined either by the landlord having given notice to quit or otherwise.

The District Judge having disposed of the appeal on the preliminary question of limitation, alone, which forms the subject of the seventh issue, and as his finding on that issue cannot be supported, the decree is reversed and the appeal remanded to him for disposal according to law, with reference to the remaining issues in the case. The costs of this second appeal will abide and follow the result.

SESAMMA
SHETPATI
v.
CHICKAYA
HEGADE.

ORIGINAL CIVIL.

Before Sir Arnold White, Chief Justice.

*IN RE LAKSHMINARAYANA AMMAL, DECEASED.**

1902.
February
14.

Court Fees Act—Act VII of 1870, sched. I, item 11—Will by husband conferring general power of appointment over a fund on his wife—Payment of probate duty on the fund on the husband's decease—Exercise of the power by the wife by will—Decease of wife—Liability of her estate for probate duty in respect of the power—"Property."

By his will, A directed that Rs. 7,000 out of his property should be lent out at interest, that the interest derived from time to time should be added to the principal amount, and that the amount so accruing should be paid to whoever B, his wife, by her will, should appoint. A died and his will was proved, probate duty being paid on the principal amount of Rs. 7,000. B executed a will in which she exercised the power of appointment and also died. Her executor now applied for probate of her will, and the question was raised whether he was liable to pay probate duty on the fund or any part thereof :

* Testamentary Petition No. 33 of 1902.

In re
LAKSHMI
NARAYANA
AMMAL.

Held, that the power of appointment created by the will was property, within the meaning of section 11 of the Court Fees Act and the estate of the testatrix was liable to probate duty in respect thereof.

In the goods of George, (6 B.L.R., Appx., 138), commented on.

PETITION for probate. The facts of the case are set out in the headnote and in the judgment.

JUDGMENT.—In this case the testatrix by her will exercised a general power of appointment created by the will of her deceased husband. The will of the testatrix recites that by the will of her deceased husband it was stated that Rs. 7,000 out of his property should be lent out on interest, that the interest derived from time to time should be added to the principal amount and that the amount so accruing should be paid to those whom the testatrix might appoint by will. The fund has been paid into Court under an order made in a suit to administer the husband's estate and now stands invested in Government promissory notes. The will of the testatrix appointed an executor and directed that he should take the "aforesaid amount" after payment of debts and funeral expenses, should pay certain specified amounts to certain specified persons and the residue to A. B.

On the death of the husband of the testatrix, his will was proved and probate duty was paid on the principal amount of Rs. 7,000. The executor appointed by the will of the testatrix now applies for probate of her will, and the question is whether the executor is liable to pay probate duty on the fund or any part thereof. Under item 11 of the first schedule to the Court Fees Act, the fee payable is a percentage on "the amount or value of the property in respect of which the grant of probate is made." The form in schedule III (which was first introduced in the amending Act of 1899) requires the executor to state on affidavit that he has truly set forth all the property and credits of which the deceased died possessed or was entitled to at the time of his death and which had come or were likely to come to the hands of the executor.

In my opinion the testatrix's power of appointment to the fund is "property" within the meaning of item 11 of the schedule and of the statutory form of affidavit as to valuation. It seems to me that section 19C has no application since the grant which is now applied for is clearly not a "like grant" to that which was obtained in respect of the husband's estate. The two estates are

different. There appears to be a conflict of authority upon the question whether, where a general power of appointment over a fund is exercised by will, the appointed fund passes to the executor, as executor. For the purposes of section 9, sub-section (1), of the English Finance Act, 1894, Buckley, J., has held that it does; see *In re Moore*(1), whilst Kekewich, J., and Byrne, J., have held that it does not, see *In re Treasure*(2), *In re Maddock*(3) and *In re Power*(4). It is not necessary, however, to discuss these decisions since, as it seems to me, the question turns on whether the general power of appointment which the testatrix enjoyed is "property" in respect of which the grant is applied for. I think it is. "Property is the most comprehensive of all terms which can be used, inasmuch as it is indicative and descriptive of every possible interest which the party can have" per Langdale, M. R., in *Jones v. Skinner*(5). The testatrix took no life interest under the will of her husband, but it is clear that the power gave her an interest which she can exercise to her own advantage. For instance, she might have contracted debts and made the creditor one of the appointees.

Under section 27 of the English Wills Act, a gift of all a testator's property passes everything over which he has a general power of appointment, and, under section 78 of the Indian Succession Act, a general bequest of property includes property as to which the testator has a general power of appointment by will. An enactment which imposes a duty or a penalty must no doubt be construed strictly, but I see no good reason for placing a more restricted interpretation on the word "property" as used in the schedule to the Court Fees Act than that which the Legislature has declared it shall bear for the purpose of the construction of a will. With regard to the case of *In the goods of George*(6) to which my attention was called by Mr. King, all I can say is that I find myself unable to agree with it. In that case the widow took a life estate with a power of appointment by deed or will among children. Sir Richard Couch was of opinion that the words in the schedule to the Indian enactment if read literally would make the property over which the power was exercised liable to duty, but he considered the case to be substantially the same as if it had arisen under the English Act (36 Geo. III, cap. 52, s. 18), and he held

In re
LAKSHMI-
NARAYANA
AMMAL.

(1) [1901] 1 Ch., 691.

(3) [1901] 2 Ch., 372.

(5) 5 L.J., Ch., 87 at p. 90.

(2) [1900] 2 Ch., 648.

(4) [1901] 2 Ch., 659.

(6) 6 B.L.R., Appx., 138.

In re
 LAKSHMI-
 NARAYANA
 AMMAL.

that duty was not payable on the authority of *Drake v. The Attorney-General*(1). Under the will in question in that case there was a life interest to the testator's daughter with a power of appointment by will among such persons as the daughter might appoint other than certain persons named in the will. The House of Lords, affirming the Court of Exchequer (see *Constables, &c., of Chorlton v. Walker*(2), held that, the property appointed by the daughter was not liable to duty. This decision turned entirely upon the construction of section 18 of the Act of Geo. III. The enactment which was in force when the case of *In the goods of George*(3) was considered by Sir Richard Couch was 23 Vict., cap. XV, s. 4, and this enactment expressly provides that duty shall be payable in respect of the personal estate which any person disposes of by will under any authority enabling such person to dispose of the same as he thinks fit.

I decide this case upon the short ground that the power of appointment created by the husband is property within the meaning of that word as used in the Court Fees Act, and I hold that the estate of the testatrix is liable to probate duty in respect thereof.

As regards funeral expenses I think Rs. 200 may be allowed free of duty.

Mr. H. C. King—Attorney for petitioner.

(1) 10 Cl. & F., 257.

(2) 10 M. & W., 742 at p. 756.

(3) 6 B.L.R., Appx., 138.
