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whole of the occurrences, and though I feel the weight of the contrary opinions entertained by my learned brothers, these facts press so strongly upon my mind as to leave no doubt that the case is a proper one for the jury, and that the judgment of the majority of the Full Court of Victoria ought not to be disturbed.

Appeal allowed. Judgment appealed from discharged. Appeal from the County Court dismissed with costs.

Solicitor, for the appellants, *A. Phillips.*

Solicitors, for the respondent, *McInerney, McInerney & Wingrove.*

B. L.

[HIGH COURT OF AUSTRALIA.]

THE DEPUTY FEDERAL COMMISSIONER OF LAND TAX, SYDNEY . . . } APPELLANT;

AND

HINDMARSH AND ANOTHER . . . RESPONDENTS.

ON APPEAL FROM DISTRICT COURT OF NEW SOUTH WALES.

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SYDNEY, *May* 15, 17.

Griffith C.J., Barton and Isaacs JJ.

Land Tax—Deductions—Annuity—Uncertain sum—Land Tax Assessment Act 1910 (*No.* 22 *of* 1910), *sec.* 34.

A testator who died in 1908 directed his trustees to pay to the guardian of his children "a fair and reasonable allowance for their maintenance education and support not exceeding in the whole the annual sum of £200"—

Held, by *Barton* and *Isaacs* JJ. (*Griffith* C.J. dissenting) that this provision for the children's maintenance, &c., was not an "annuity" within the

meaning of sec. 34 of the *Land Tax Assessment Act* 1910, and that the word "annuity" in that section was used in its technical sense as meaning a sum certain payable periodically.

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APPEAL from the District Court at Kiama, New South Wales.

An appeal by Anna Maria Hindmarsh and Charles Thomas Hindmarsh, as executors and trustees of the will of Thomas Alfred Hindmarsh, deceased, from an assessment of them as such executors and trustees by the Deputy Federal Commissioner of Land Tax in respect of certain land, was heard in the District Court at Kiama. The testator died on 24th July 1908. By his will he devised and bequeathed all his real estate and the residue of his personal estate upon trust (*inter alia*) "to pay unto my said wife Anna Maria Hindmarsh out of the rents issues profits and produce thereof so long as she shall live and remain my widow for her sole use and enjoyment an annuity of £200 . . . And upon further trust to pay unto my said wife whom I hereby nominate and appoint guardian of my children during their respective minorities a fair and reasonable allowance for their maintenance education and support not exceeding in the whole the annual sum of £200."

It was claimed by the trustees that the latter sum of £200 was an "annuity" within the meaning of sec. 34 of the *Land Tax Assessment Act* 1910, and that a deduction should be made from the unimproved value of the land in respect thereof. The Deputy Commissioner refused to allow such a deduction, but the District Court Judge, on the hearing of the appeal, held that a deduction of the value of the sum of £200 to be paid yearly until the youngest child should attain her majority to the widow for the maintenance of the children should be made.

From this decision the Deputy Commissioner now appealed to the High Court.

Flannery, for the appellant. The allowance for the maintenance of the children is not an "annuity" within the meaning of sec. 34. The characteristic of an annuity is that it is a sum certain payable periodically: *Co. Litt.*, 144*b*; *Viner's Abridgment*, vol. II., p. 502. That is the technical meaning of "annuity," and that is the meaning it has in sec. 34. The gift here is not of the

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whole sum of £200 annually, but there is only a discretionary trust given to the trustees. He referred to *Jarman on Wills*, 6th ed., p. 886; *Cope* v. *Wilmot* (1); *In re Stanger*; *Moorsom* v. *Tate* (2); *In re Sanderson's Trust* (3).

[ISAACS J. referred to *In re Booth*; *Booth* v. *Booth* (4).]

Harvey (with him Dr. *Waddell*), for the respondents. The definition of "annuity" in *Co. Litt.* is, not for all purposes, but only for the purpose of distinguishing between annuities and rent charges. In this case there is a charge on the land which can be valued. It is an "annuity" because it is an annual sum, and its value is capable of calculation.

[GRIFFITH C.J. referred to *Rudland* v. *Crozier* (5).]

Flannery, in reply. The trustees will have to exercise their discretion in respect of facts varying from year to year. That discretion cannot be determined now. The payment cannot be reduced to a certainty. He referred to *Co. Litt.*, 142*a*.

Cur. adv. vult.

GRIFFITH C.J. Sec. 34 of the *Land Tax Assessment Act* 1910 provides that "Where under a settlement made before 1st July 1910, or under the will of a testator who died before that day, land is charged with an annuity—(*a*) the value of the annuity shall be calculated according to the prescribed tables for the calculation of values; and (*b*) there shall be deducted from the unimproved value of the land a sum which bears the same proportion to the value of the annuity as the unimproved value of the land bears to its improved value."

The will under which the question in this case arises was that of a gentleman who died in 1908, prior to the date mentioned. By his will he devised the land the subject of the assessment upon trusts not necessary to be mentioned, but directed his trustees to pay "out of the rents issues profits and produce therefrom" an annuity of £200 to his widow, and in respect of that

(1) 1 Coll., 396.
(2) 64 L.T., 693.
(3) 3 K. & J., 497.
(4) (1894) 2 Ch., 282.
(5) 2 De G. & J., 143.

annuity a deduction has been made under sec. 34. He also directed them "to pay unto my said wife whom I hereby nominate and appoint guardian of my children during their respective minorities a fair and reasonable allowance for their maintenance education and support not exceeding in the whole the annual sum of £200." The question is whether that is an annuity within the meaning of sec. 34.

The object of sec. 34 is plainly that, in the case of a will or settlement made before the Act was introduced, the owner of land should get the benefit of a charge made upon it by the testator or settlor from whom he took, and should not be called upon to pay tax upon more than the real value of the land to him. It is a temporary provision, but that is the clear intention of it.

The contention for the Commissioner is that an annuity must be of a sum certain and the contention is based on a passage in *Coke upon Littleton*. No doubt that is the meaning which the word ordinarily bears, but I confess I am not for myself able to say that, because that is the ordinary meaning of the word "annuity," the protection which was intended to be given by the section should be denied to an owner of land upon which there is an annual charge not exceeding a named sum. In my opinion any charge of any annual sum the burden of which is capable of being ascertained is within the Act, notwithstanding that the amount is not definitely fixed by the will or settlement. There is no real difficulty in ascertaining the burden in this case. But as I understand that my brethren are of a different opinion the appeal will be allowed.

BARTON J. The land is, of course, taxable without deduction unless sec. 34 authorizes it. The unimproved value being taxable within the Act, it must be shown that it is partially relieved of taxation by such a deduction as is authorized by the section. In my view the deduction claimed cannot be allowed. The section deals by way of exception with matters arising under certain settlements and wills. That is, it deals with matters relating to legal documents, and in speaking of an annuity it uses a term well known in real property and conveyancing law. *Primâ facie* therefore the term is to be understood in its legal or technical sense.

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"*Primâ facie* it appears to me that the rule applies that technical words must have their technical meaning given to them unless you can find something in the context to overrule them." *Jessel* M.R. in *Laird* v. *Briggs* (1).

Similarly, *Collins* M.R. said in *Attorney-General* v. *Glossop* (2):—"The Acts have been framed by draftsmen acquainted with conveyancing terms, and they must in the nature of things be addressed to a large extent to a section of the public familiar with those terms; and I do not think that it would be right or possible, in dealing with the provisions of the Finance Acts, to ignore altogether the technicalities of conveyancing, and to disengage one's mind entirely from all acquaintance with the technical terms which conveyancers use, and in which likewise to some extent the draftsmen of Acts of Parliament couch the provisions which they frame."

What then is the meaning of "annuity" as a legal or technical term? According to *Co. Litt.*, 144*b*, an annuity is "a yearly payment of a certain sum of money granted to another in fee for life or years, charging the person of the grantor only." *Viner's Abridgment*, vol. II., p. 504, repeats the definition, with further passages showing that the sum need not be payable each year if only it is a yearly sum. *Bacon's Abridgment*, vol. I., p. 233, says that "an annuity, strictly taken, is a yearly payment of a certain sum of money granted to another in fee simple, fee tail, or life or years, charging the person of the grantor only: if payable out of lands, it is properly called a rent-charge; but if both the person and estate be made liable, as they most commonly are, then it is generally called an annuity."

The text books generally adopt the definition in *Co. Litt.*; no case was found in which any other definition was offered; nor any case in which an indeterminate sum was held to be an annuity.

It is therefore a characteristic of an annuity that it be of a sum certain.

The testator, who died in 1908, devised to trustees all his realty and bequeathed the residue of his personalty, after a legacy to his wife of household furniture and effects, upon trust to pay debts and testamentary expenses, and then to pay his wife "an annuity of £200 payable quarterly in equal instalments of £50 each; and

(1) 19 Ch. D., 22, at p. 34. (2) (1907) 1 K.B., 163, at p. 172.

upon further trust to pay to his wife" (whom he appointed guardian of his children) "during their respective minorities a fair and reasonable allowance for their maintenance education and support not exceeding in the whole the annual sum of £200." The Deputy Federal Commissioner of Land Tax allowed a deduction of the value of the annuity to the widow from the unimproved value of the estate. On appeal to the District Court under sec. 44 of the *Land Tax Assessment Act* 1910 *Fitzhardinge* D.C.J. held that the value of the other annual sum of £200 should also be deducted. Sec. 34 is as follows: (His Honor read the section). The testator appears to have understood the distinction between an annuity and an indeterminate yearly sum; for he gives a yearly sum certain of £200 to his wife and calls it an annuity; and he seems to have abstained from applying that name to the allowance "not exceeding in the whole the annual sum of £200." The testator in fixing a maximum of £200 in any year for the maintenance and education allowance, has to my mind had in view that varying sums up to that limit would probably have to be spent in different years, according to the varying requirements of the several children. Such an allowance, expressed as it is to be variable according to what is fair and reasonable, does not, in my opinion, come within the definition of an annuity as a term of law, nor does the section include it, for the section, as I have pointed out, must, in the absence of a controlling context, which has not been indicated to us, be read as employing the word in its legal or technical sense.

I am therefore of opinion that the correct view is that the allowance in question, not being an annuity, cannot be made the subject of a deduction from the unimproved value of the land under sec. 34; and that the appeal ought to be allowed.

ISAACS J. In my opinion also the appeal should be allowed. The intention of a taxing Act must be deduced from its provisions. Section 34 speaks of an annuity charged on land. That is a technical expression; an expression evolved as a legal conception, and well understood and acted on with invariable consistency by judicial tribunals. In *Co. Litt.*, 144*b* its definition includes the element of certainty in the sum granted. True it is as argued by Mr. *Harvey* that we find in the definition the words

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"charging the person of the grantor only." He sought to place the stress on that final quality. In that it differs from a rent charge. But in saying an annuity charges the person only, that is merely as to its primary effect. It may also be charged on the land, and on the other hand as stated by *Cotton* L.J. in *In re Blackburn and District Benefit Building Society; Ex parte Graham* (1) an action for debt will in certain cases lie for a rent charge. But I cannot discover any departure from the characteristic requirement as to certainty of amount, in the ordinary legal conception of an annuity.

It is a clear rule of construction that technical words are to receive *primâ facie* their technical meaning in a Statute. See per *Parke* B. in *Burton* v. *Reevell* (2), and other cases. I shall refer only to one other judicial expression on the subject. In *Lord Advocate* v. *Stewart* (3) Lord *Robertson* said :—"The principle that in Statutes words are to be taken in their legal sense, has . . . a special cogency when the words in question represent only legal conceptions. The popular use of such words does not represent the primary meaning of the words, but some half understanding of them."

If this be so, and there is no context to affect the primary construction of the section the only question is whether a direction to pay to the wife a fair and reasonable allowance for the children's maintenance and support, not exceeding in the whole the annual sum of £200, is an annuity. If the limitation be omitted, clearly no one would suggest it was, because there would be no pecuniary limit to the indefiniteness of the gift except the amount of the trust fund. But putting a maximum limit upon the amount cannot make the gift that of a certain sum. It would or might vary according to circumstances, and therefore is outside the legal conception of an annuity, as required by sec. 34.

Appeal allowed.

Solicitor, for the appellant, *C. Powers*, Crown Solicitor.

Solicitors, for the respondents, *Weaver & Allworth*, for *Ryan & Wheeler*, Kiama.

B. L.

(1) 42 Ch. D., 343, at p. 349. (2) 16 M. & W., 307, at p. 309.
(3) (1902) A.C., 344, at p. 356.