[HIGH COURT OF AUSTRALIA.]

COCHRANE . . . . . APPELLANT;

AND

THE FEDERAL COMMISSIONER OF LAND TAX . . . . . RESPONDENT.

H. C. OF A. 1916.

MELBOURNE, *May* 15, 16.

Griffith C.J., Barton, Isaacs, Gavan Duffy and Rich JJ.

Land Tax—Assessment—Owner—Rent-charge—Security for money—Land Tax Assessment Act 1910-1912 (*No.* 22 *of* 1910—*No.* 37 *of* 1912), *secs.* 3, 32.

A testator who died before 1st July 1910, by his will, after making certain bequests, gave the residue of his estate real and personal to trustees. He gave to his widow an annuity which he declared should be a yearly rent-charge charged upon and issuing out of certain specified freehold lands in Melbourne and all other lands of his, freehold or otherwise, in Victoria and elsewhere.

Held, by the whole Court, that the testator's widow was not liable to land tax in respect of the lands upon which the rent-charge was charged.

By *Griffith* C.J. and *Barton*, *Gavan Duffy* and *Rich* JJ., on the grounds that she was not either at law or in equity "entitled to receive, or in receipt of, or if the land were let to a tenant . . . entitled to receive, the rents and profits" of those lands, and therefore was not an "owner" of them within the definition of that term in sec. 3 of the *Land Tax Assessment Act* 1910-1912; and that, even if she were an "owner" of those lands, she held the rent-charge by way of security for money, and was therefore exempted from liability to land tax by sec. 32 of the Act:

By *Isaacs* J., on the ground that, although by virtue of the rent-charge she was an "owner" of those lands within the definition, she held the rent-charge by way of security for money, and so was exempted from liability to land tax by sec. 32.

CASE STATED.

On an appeal by Robert Cochrane to the High Court from an assessment of him as agent for Emma Brooks, deceased, for land

tax for the year 1910-1911, *Gavan Duffy* J. stated a case for the opinion of the Full Court which was substantially as follows :—

1. Henry Brooks, the husband of the above-named Emma Brooks, died in the year 1895 leaving a will dated 20th February 1893 and a codicil thereto dated 1st May 1895.

4. The said Emma Brooks was at all times material an absentee within the meaning of the *Land Tax Assessment Act*.

5. The said Emma Brooks died in the month of January 1914 without having remarried.

6. The trustees of the will of the said Henry Brooks did not at any time set apart or appropriate any fund from the testator's residuary personal estate to answer the annuity bequeathed to her by the said will and codicil, and the net rents and profits received from the Victorian property owned by the said Henry Brooks were not at any time sufficient to answer the said annuity. The said annuity for the land tax year 1910-1911 was paid out of the following funds :—£1,500, rent of premises Elizabeth Street, Melbourne ; £250 or thereabouts, rent of property in or near City Road, South Melbourne ; and the balance required to make up the sum of £2,000, from investments in England. The said sums of £1,500 and £250 constituted the whole of the rents and profits of the testator's real estate.

7. Land tax returns have been furnished from year to year on behalf of the trustees of the estate of the late Henry Brooks to the Federal Commissioner of Land Tax in respect of all lands owned by him in the State of Victoria, and such trustees have been assessed and have paid tax upon the unimproved value thereof less the general exemption of £5,000 and less also the value of the said annuity calculated in accordance with the provisions of sec. 34 of the said Act.

8. On 9th March 1915 the Commissioner of Land Tax issued an assessment against the said Emma Brooks, her agent or her estate, as secondary taxpayer, claiming tax for the year 1910-1911 upon the full unimproved value of the said lands owned by the said Henry Brooks, deceased, in the State of Victoria. The amount of tax payable by the trustees as primary taxpayers in respect of

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the said lands was deducted from the tax claimed under the said assessment.

9. The appellant Robert Cochrane is and was at all times material the agent of the said Emma Brooks and assessed to land tax as such agent.

10. On 9th April 1915 the appellant's solicitors delivered to the respondent a notice of objection to the said assessment.

11. The objections specified in the said notice were not allowed by the respondent, and the said assessment was not cancelled, and the said appellant duly asked that the said objection should be treated as an appeal, and the said respondent duly transmitted the said objection to the High Court at Melbourne for determination as a formal appeal.

12. The appeal came on for hearing before this Court on 14th February 1916, and the Court thought fit to state this case in writing for the opinion of the High Court in Full Court upon the following questions arising in the appeal, which in the opinion of the Court are questions of law :—

(*a*) Was the said Emma Brooks or the appellant as her agent the " owner " of the said lands within the meaning of the *Land Tax Assessment Act* 1910-1912 ?

(*b*) Was the said Emma Brooks or the appellant as her agent assessable to land tax in respect of the said lands or of the said annuity ?

(*c*) Is the *Land Tax Assessment Act* 1910-1912 valid and effective in so far as it purports (if at all) to impose any tax upon the said Emma Brooks or the appellant as her agent in respect of the said annuity ?

By his will the testator, after making certain bequests, gave the residue of his real and personal estate to trustees with a direction to sell and dispose of his residuary real estate. He then declared that the trustees should stand possessed of the trust estate " Upon trust thereout to pay to and I devise and bequeath to my said wife Emma so long as she shall be my widow the annual sum of £3,000 to be paid to her by equal quarterly payments whereof the first shall be made at the expiration of three calendar months next after my death and to accrue and be deemed to accrue from day

to day so that and to the intent that she shall be entitled thereto and to a proportionate part thereof to and inclusive of the last day of her widowhood And in case she shall marry after my death I devise and bequeath to her from the time of her so marrying until her death the annual sum of £1,000 to be paid to her by equal quarterly payments whereof the first shall be made at the expiration of three calendar months next after her so marrying and to accrue from day to day so that and to the intent that she shall be entitled thereto and to a proportionate part thereof to and inclusive of the day of her death And I devise the same several annual sums of £3,000 and £1,000 to her as two several and I declare that the same several sums of £3,000 and £1,000 shall be two several yearly rent-charges charged upon and issuing out of my freehold lands and buildings in and near Elizabeth Street in the City of Melbourne in the Colony of Victoria and all lands tenements and hereditaments of mine to which I shall be entitled at the time of my death freehold or otherwise in the said City of Melbourne and in on or near the City Road in the City of South Melbourne in the Colony of Victoria and elsewhere in the same Colony of Victoria and elsewhere wherever and to be respectively paid quarterly as aforesaid and a proportionate part of each of the same rent-charges to be paid to and inclusive of the last day of her widowhood and the day of her death respectively I empower my said wife by distress and also by entry upon and perception of the rents and profits of my said hereditaments so charged as aforesaid to recover payment of the said rent-charges respectively whenever in arrear for twenty-one days . . . I direct the trustees or trustee for the time being of this my will to set apart and appropriate with all convenient speed after my death enough of my said residuary personal estate property and effects to constitute a sufficient fund for and as much more than shall be enough of the said residuary personal estate property and effects as the trustees or trustee for the time being of this my will shall in their his or her absolute discretion think fit to constitute and also as much more than shall be enough of the said residuary personal estate property and effects as my said wife shall require them him or her to set aside and appropriate to constitute the same fund for answering

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the said several annuities of £3,000 a year and £1,000 a year to my said wife either in and with the aid or without the aid of all or any part or parts of the rents and profits of all or any of the freehold lands and tenements which shall be mine or to which I shall be entitled at the time of my death and to provide against the case of the same rents and profits not being punctually or fully paid or issuing By separating setting apart and appropriating any of the securities or other property at the time of the same appropriation forming part of my said trust estate and applying them or it and the income thereof to answering the said two several annuities to my said wife and to that purpose only and exclusively of every other purpose And also by investing money in the purchase in the names or name of the trustees or trustee for the time being of my will of some one or more kinds of the securities hereinbefore described in the general power of investment clause of this my will and applying the securities so purchased and the income thereof to answering the said two several annuities to my said wife and to that purpose only and exclusively of every other purpose Provided always and I declare that neither the lands tenements and hereditaments nor any other part of my said trust estate real and personal shall be exonerated from the said two several annuities and rent-charges of £3,000 a year and £1,000 a year respectively by such appropriations or otherwise unless my said wife shall and that it shall be necessary for the exoneration of my said trust estate real and personal or any part of it from the same annuities and rent-charges or any part or parts of them that my said wife shall at the very time or after the time of the making of the same appropriation expressly and as the case may be entirely or only partially discharge by sufficient assurance or other act the said lands tenements and hereditaments from the said rent-charges by this my will created and all other parts of my said trust estate from the same two several annuities of £3,000 a year and £1,000 a year respectively I declare that for or towards payment and satisfaction of the same annuities it shall be lawful for the trustees or trustee for the time being of this my will to resort to raise money from on or out of and apply and my said wife shall have the right and be entitled to resort to and recover from or out of the corpus of the property or funds so

appropriated I declare that the trustees or trustee for the time being of this my will shall stand and be seized and possessed of my said trust estate but subject and without prejudice to the herein declared and contained trust and powers for payment satisfaction retention discharge and security of my debts funeral expenses testamentary expenses and two several annuities and rent-charges of £3,000 a year and £1,000 a year to my said wife." By the codicil the sums of £3,000 and £1,000 were respectively reduced to £2,000 and £500.

Starke, for the appellant. Under the will Mrs. Brooks, who never remarried, held the rent-charge as security for payment of the annuity, and was exempted from taxation by sec. 32 of the *Land Tax Assessment Act* 1910-1912. [Counsel was stopped.]

Mann, for the respondent. The rent-charge was not given as security for payment of the annuity, but the annuity was declared to be a rent-charge, and the only thing that can be called a security is the power of distress, which is a security for the rent-charge. The case therefore does not fall within sec. 32. Mrs. Brooks was, by virtue of the rent-charge, the owner of a specific interest in the land which was subject to the rent-charge, and she was in fact in receipt of the whole of the rents and profits of that land. The owner of a rent-charge who in fact is in receipt of the whole of the rents and profits of the land is an " owner " within the meaning of the definition in sec. 3. Mrs. Brooks was both at law and in equity entitled to receive and in receipt of the rents and profits of the land. The proviso to sec. 34, which is an exception to sec. 31, recognizes the position that an annuitant may in certain cases be an owner. [He referred to *Halsbury's Laws of England*, vol. XXIV., p. 466.]

Starke, in reply. If the case falls within the express exemption of sec. 32 the definition of " owner " cannot override the exemption. The rents and profits referred to in the definition of " owner " mean the moneys produced by the use of the land. Under the will the annuity would have remained even if the testator had sold the

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land during his lifetime. [He referred to *In re Trenchard*; *Trenchard* v. *Trenchard* (1).]

[RICH J. referred to *Eyton* v. *Denbigh, Ruthin, and Corwen Railway Co.* (2).]

Cur. adv. vult.

May 16.

GRIFFITH C.J. The appellant in this case was the agent in Victoria for Mrs. Emma Brooks, a lady who lived in England up to the time of her death, and was the widow of the late Henry Brooks, who died in 1895. He left a will by which he devised land and other property in Australia to trustees upon various trusts. He gave his widow an annuity of £3,000 to be reduced to £1,000 in the event of her marrying again, which sums were by a codicil reduced to £2,000 and £500 respectively. He declared that these annuities should be "two several yearly rent-charges charged upon and issuing out of" certain specified freehold lands in Melbourne and all other lands of his, freehold or otherwise, in Victoria and elsewhere, and he gave his wife power by distress and entry to recover payment of the rent-charges whenever they might be in arrear for twenty-one days. He then proceeded to make large gifts, including legacies of £20,000 to each of his children. Finally, he gave the residue of his estate equally among his children.

In the events that have happened, the rents of the land charged with the annuity have not been sufficient to pay the annuity of £2,000, and the balance has been supplemented from other sources. The trustees of the will have been assessed for land tax according to the value of the land which they held as trustees, but it seems to have occurred to the Commissioner that as Mrs. Brooks was an absentee he might get a larger amount of tax in respect of the same land if he could make out that she was the owner of it, and so was taxable as a secondary taxpayer without the right to a deduction of £5,000. Accordingly he gave her, through her agent, a notice of assessment as owner of the testator's land. The notice of assessment sets out that she is charged as secondary taxpayer—credit, of course, being given for the amount of tax paid by the trustees.

(1) (1905) 1 Ch., 82. (2) L.R. 7 Eq., 439.

The Commissioner rests his case primarily upon the contention that Mrs. Brooks was owner of the land by virtue of the rent-charges. It is clear that she was not the owner in any other sense. She was not the beneficial owner of the land under the will.

The first question asked is: Was Mrs. Brooks owner of the land within the meaning of the *Land Tax Assessment Act* 1910-1912? By the definition in sec. 3 the word "owner" includes, among others, every person who jointly or severally, whether at law or in equity "is entitled to receive, or in receipt of, or if the land were let to a tenant would be entitled to receive, the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession, or otherwise." How is it possible to say that Mrs. Brooks was entitled to receive the rents and profits of this land? Suppose the income from the land were double the amount of the rent-charge. No one could seriously put forward the theory that in that case she was entitled to receive the rents and profits. The fact that the rents are actually less than the annuity makes no difference. The amount of the rent actually received is wholly irrelevant to the amount of the annuity and *vice versâ*. If, for instance, there were a dozen annuitants each having a small rent-charge, could it be said that they were the joint owners of the land or joint owners with the devisees under the will, and so entitled to the receipt of the rents and profits? In my judgment the words "entitled to receive the rents and profits" mean entitled directly to receive all the rents and profits (not some of the rents and profits), that is, the *reditus* from the land; if the land is let, to receive payment of the rent; if it is occupied without lease, to receive compensation for such use and occupation. They do not, as contended by the Commissioner, include the case of a person who is merely entitled to receive a sum out of rents and profits received by another person.

Another way in which it is suggested that Mrs. Brooks may be held to be an owner within the Act is by saying that a rent-charge is a hereditament. But it is not every hereditament that is "land" within the meaning of the Act. If this argument were otherwise worthy of serious attention, it is excluded by sec. 32, which provides that "a mortgagee, or other person owning any estate or interest in land by way of security for money, shall not be liable to land tax

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in respect of that mortgage, estate, or interest." Rent-charges are, beyond doubt, interests in land which are held as security for money. It could not be made plainer than it is by this will that the annuities are first given, and that the rent-charges are merely given as security for them. This is further emphasized by the codicil.

For these reasons the first two questions should be answered in the negative. The third question has not been argued, and nothing need be said about it.

BARTON J. I agree.

ISAACS J. I agree that the first two questions should be answered in favour of the appellant, but I do so entirely on sec. 32.

Mrs. Brooks is, under the will, the owner of a rent-charge. So much is conceded, and cannot be denied. By the express words of the will the testator said :—" I devise the same several sums of £3,000 and £1,000 to her as two several and I declare that the same several sums of £3,000 and £1,000 shall be two several yearly rent-charges charged upon and issuing out of my freehold lands and buildings in and near Elizabeth Street in the City of Melbourne " and wherever else he had realty. The definition of " owner " includes " every person who jointly or severally, whether at law or in equity . . . is entitled to receive, or in receipt of, or if the land were let to a tenant would be entitled to receive, the rents and profits thereof, whether as beneficial owner, trustee, mortgagee in possession, or otherwise." Mrs. Brooks as the owner of a rent-charge would come within that definition. A rent-charge granted for life is a tenement, though not a hereditament (*Preston on Estates*, vol. I., p. 12). It is an interest in the land itself (*per* Lord *Cottenham* in *Creed* v. *Creed* (1)). She had, to the extent of her annuity in the form of a rent-charge, and excluding for the moment the notion of the rent-charge being a mere security, a right, in my opinion, to demand from the trustees who are the legal owners of the land sufficient of the rents and profits to satisfy her claim (see *Burton on Real Property*, 7th ed., p. 333 ; *Vaizey on Settlements*, vol. II.,

(1) 11 Cl. & Fin., 491, at 510.

pp. 931 and 933). She was in fact to that extent as between herself and the trustees, as I view the law, entitled to the rents and profits sufficient to satisfy that rent-charge upon the land, and had the power of distress and entry in case of arrears for twenty-one days—as to which see *Sanders on Uses and Trusts*, 5th ed., vol. II., p. 125.

But sec. 32 provides that "a mortgagee, or other person owning any estate or interest in land by way of security for money, shall not be liable to land tax in respect of that mortgage, estate, or interest." The section contains a proviso to which it is immaterial to refer. The question to my mind is this: Did Mrs. Brooks own that interest in the land as security for money? Now, the will is worded very curiously. The testator undoubtedly declares that these annual sums given to his widow are given to her as "two several yearly rent-charges," and that they shall be "two several yearly rent-charges" charged upon the land. If those words stood alone I do not think there could be any answer. But the question arises whether the rent-charges come within sec. 32—in other words, whether, notwithstanding that declaration, they are held by way of security for money. As I view the matter, that involves this consideration: A thing cannot be security for itself; it must be security for something else. Unless I could find in the will, read as a whole, that the sums of money which are now £2,000 and £500 were given to Mrs. Brooks as personal annuities and that the rent-charges were created as security in order to see that she got those personal annuities, I should decide in favour of the Commissioner. But reading the will as a whole I see that the trustees have power to sell and that the proceeds are to be held "upon trust thereout"—that is, out of the whole proceeds of the estate—"to pay to and I devise and bequeath to my said wife Emma so long as she shall be my widow the annual sum of £3,000 to be paid to her by equal quarterly payments whereof the first shall be made at the expiration of three calendar months next after my death and to accrue and be deemed to accrue from day to day so that and to the intent that she shall be entitled thereto and to a proportionate part thereof to and inclusive of the last day of her widowhood." Then, in case she should marry after his death, he gave her an annuity of £1,000 in

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Isaacs J.

similar terms. So that primarily the gift is apparently a personal annuity. Then comes the creation of the rent-charge, as already quoted. The testator then creates a power of distress and entry, by which she undoubtedly is to have the right of taking the rents themselves *in specie* to the extent of her claim. He then directs the trustees to set apart and appropriate a fund to answer the annuities out of the residuary personal estate. But he adds the words " and to provide against the case of the same rents and profits not being punctually or fully paid or issuing." That, again, throws a little doubt upon the matter, as if he were providing for punctual payment of the rent-charges. But throughout the will whenever the testator refers to the annuities in connection with the charge on the land he calls them rent-charges, and whenever he refers to them apart from the land he calls them annuities, and in various places he calls them " annuities and rent-charges " and not " rent-charges " simply. Reading the will as a whole, as I have to do in order to arrive judicially at its meaning, the testator's constant reference to these sums as " annuities " when not connected with the land leads me to the belief that he intended them to be personal annuities and that the rent-charges were intended to be security for payment of those annuities. The charge being created as security for money, namely, the personal annuities, sec. 32 applies and relieves the rent-charges from liability to land tax. For that reason I agree that the first two questions should be answered in the negative.

GAVAN DUFFY J. I agree with what has been said by the Chief Justice.

RICH J. I also agree with the judgment of the learned Chief Justice.

Questions (a) and (b) answered in the negative.

Solicitors for the appellant, *Malleson, Stewart, Stawell & Nankivell.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

B. L.