[HIGH COURT OF AUSTRALIA.]

QUEENSLAND TRUSTEES LIMITED . . APPELLANTS;

AND

THE DEPUTY FEDERAL COMMISSIONER OF LAND TAX (QUEENSLAND) . } RESPONDENT.

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BRISBANE, *July* 23.
SYDNEY, *August* 14.

Isaacs, Gavan Duffy and Rich JJ.

Land Tax—Assessment—Deductions—Annuity—Charge on land—Land Tax Assessment Act 1910-1916 (*No.* 22 *of* 1910—*No.* 33 *of* 1916), *sec.* 34.

A testator, who died before 1st July 1910, by his will devised his real estate in Brisbane to trustees "upon trust out of the clear annual income derived from the said lands hereditaments and premises to pay the several annuities hereinafter charged."

Held, that such annuities were made a charge on the land within the meaning of sec. 34 of the *Land Tax Assessment Act* 1910-1916, and that the owner was entitled to the statutory deduction.

Cochrane v. *Federal Commissioner of Land Tax*, 21 C.L.R., 422, distinguished.

CASE STATED.

On an appeal by the Queensland Trustees Ltd. to the Supreme Court of Queensland from an assessment of them as trustees of the will of William Perry, deceased, for land tax for the year 1916-1917, *Chubb* J. stated a case, substantially as follows, for the opinion of the Full Court of the High Court:—

1. William Perry, hereinafter called "the testator," died in 1882. His estate in Queensland consisted only of certain land in Brisbane on which a building was erected.

2. Queensland Trustees Ltd. are the present trustees of the Brisbane property under the will of the testator.

3. By his will, dated 15th June 1882, the testator devised the

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Brisbane property to trustees "upon trust out of the clear annual income derived from the said lands hereditaments and premises to pay the several annuities hereinafter charged," and as to any surplus income of the Brisbane property, after answering the said charges, trusts and purposes, upon trust for Annie Perry, the wife of the testator's son William Perry, for her sole and separate use during her lifetime without power of anticipation, and from and after her decease or remarriage upon trust (so far as is material in the events which have happened) for such of the children of the testator's son William Perry as the said Annie Perry should by will appoint.

4. With the exception of the annuity mentioned in the next succeeding paragraph, all the several annuities granted by the said will were determined and ceased to be payable before the year 1910.

5. One of the said annuities granted by the will was an annuity of £300 to the testator's daughter Mary Hay Perry, now Mary Hay Kilby, payable by equal monthly instalments on the first day of each month commencing from the first day of the month succeeding the testator's death.

6. By the said will certain of the said annuities, including the annuity to Mary Hay Kilby, were charged in favour of the annuitants thereof for their sole and separate use without power of anticipation; and it was declared by the said will that all the annuities or annual payments thereby charged or declared to be payable were charged and were to be payable in the order and rotation in which they were set out and enumerated in the will, and that, in case from any cause the income derived from the said property should be insufficient to meet the whole of them, they should take priority and be payable in the said order accordingly. And it was by the said will expressly declared that the share, estate and interest which any female might become entitled to under the trusts thereby declared with respect to the testator's Brisbane property should be for her sole and separate use, and should be settled as far as lawfully could be done for the benefit of herself and her children without power of anticipation on her part. And by the said will it was also provided that in case there should not be any children or child or remoter issue of the testator's said son William Perry taking under the trusts in the said will declared, then the Brisbane

property should fall into and become part of the testator's residuary estate. And the testator by his said will declared that the respective trustees for the time being of the Brisbane property and certain other property mentioned therein should have full powers of leasing, letting and generally managing the same, and all other powers necessary to the exercise of their office of trustees, and that all trustees and the executors of the said will should have all powers and authorities given and afforded by any Acts of Parliament of New South Wales or Queensland.

8. The trustees did not at any time appropriate or set apart any part of the Brisbane property to answer the said annuity granted to Mary Hay Kilby.

9. The said Annie Perry did not marry again, and died in 1917; and by her will she duly exercised the power of appointment aforesaid in favour of certain of her children.

10. The trustees of the Brisbane property from time to time have granted leases of the said property and appropriated the clear annual income derived therefrom according to the directions of the said will, and the said income has at all material times been sufficient for that purpose.

11. In the land tax years prior to 1916-1917 the trustees of the Brisbane property were assessed and have paid land tax upon the unimproved value thereof less the general exemption of £5,000 and less also the value of the annuity to Mary Hay Kilby, calculated according to sec. 34 of the *Land Tax Assessment Act* 1910-1916.

12. For the land tax year 1916-1917 the net rental of the Brisbane property and the unimproved value of that property were respectively £1,000 and £15,180.

13. For the land tax year 1916-1917 the Deputy Commissioner issued an assessment claiming land tax for the year upon the full unimproved value of the Brisbane property less the general exemption of £5,000, but not (as in previous years) less also the value of the annuity to Mary Hay Kilby calculated as aforesaid. It is agreed that the amount of this deduction, if allowable, is £3,951.

14. The trustees delivered a notice of objection in accordance with the said Act, whereby they claimed that "the estate therefore is entitled to the deduction provided for by sec. 34 of the *Land Tax*

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Assessment Act 1910-1914, in addition to the ordinary statutory deduction."

15. The objections specified in the said notice were not allowed by the Deputy Commissioner, and the trustees duly asked that the said notice of objection should be treated as a notice of appeal. The Deputy Commissioner duly transmitted the said objection to the Supreme Court of Queensland at Brisbane for determination as a formal appeal.

16. The appeal came on for hearing before this Court on 6th June 1919, 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 this Court are questions of law :—

(1) Are the Brisbane lands charged with the annuity granted to Mary Hay Kilby within the meaning of sec. 34 of the *Land Tax Assessment Act* 1910-1914 ?

(2) Are Queensland Trustees Ltd., as trustees of the Brisbane property and the persons assessed and liable in respect of land tax, entitled to a deduction of the said sum of £3,951, or any and what deduction, from the unimproved value of the Brisbane property in respect of the said annuity to the said Mary Hay Kilby in addition to the general statutory deduction of £5,000 ?

Stumm K.C. (with him *Wassell*), for the appellants. The question is whether the land is charged within the meaning of sec. 34 of the Act. It is immaterial whether it is the corpus or the income that is charged. An annuity which is a continuing charge on income is in the same position as if there were a charge on the corpus (*In re Young* ; *Brown* v. *Hodgson* (1)). Here the annuities are a charge on the corpus.

[RICH J. The fact that surplus income is given over is against that contention.]

The trusts are to pay out of income from land ; that is a charge on the corpus or, at all events, on the land. In either case the land

(1) (1912) 2 Ch., 479, at p. 486.

is charged. [Counsel also referred to *Deputy Federal Commissioner of Land Tax* v. *Hindmarsh* (1); *Taylor* v. *Taylor*; *In re Taylor's Estate Act* (2); *Horton* v. *Hall* (3); *In re Boden*; *Boden* v. *Boden* (4); *In re Howarth*; *Howarth* v. *Makinson* (5); *In re Watkins' Settlement*; *Wills* v. *Spence* (6).]

Drake, for the respondent. Unless there is a charge on the corpus, there is no charge on the land. "A charge on the land" does not cover the case of "a charge upon income," and at most the annuities are charged upon the income; there is no such interest as that of a rent-charge. [He referred to *Cochrane* v. *Federal Commissioner of Land Tax* (7); *Foster* v. *Smith* (8); *Earle* v. *Bellingham* [*No.* 1] (9); *Sheppard* v. *Sheppard* (10); *In re Trenchard*; *Trenchard* v. *Trenchard* (11).]

Stumm K.C., in reply. A charge on the income is a charge on the land.

Cur. adv. vult.

Aug. 14.

The judgment of the COURT, which was read by ISAACS J., was as follows:—

This is a case stated by *Chubb* J. under sec. 46 of the *Land Tax Assessment Act* for the opinion of this Court. Two questions are stated, but in effect they depend on one, namely, whether under the will of William Perry, deceased, certain Brisbane lands are, within the meaning of sec. 34 of the *Land Tax Assessment Act*, charged with the annuity given to the testator's daughter Mary Hay Perry, now Mary Hay Kilby.

It was argued for the Deputy Commissioner that *Cochrane's Case* (7) governed this, because, as it was there held that an annuitant having a rent-charge in respect of lands was not liable to taxation as owner, it followed that the owner was liable notwithstanding the charge. But that consequence does not follow. Cochrane was

(1) 14 C.L.R., 334.
(2) L.R. 17 Eq., 324.
(3) L.R. 17 Eq., 437.
(4) (1907) 1 Ch., 132.
(5) (1909) 2 Ch., 19.
(6) (1911) 1 Ch., 1.
(7) 21 C.L.R., 422.
(8) 15 L.J. Ch., 183.
(9) 24 Beav., 445.
(10) 32 Beav., 194.
(11) (1905) 1 Ch., 82.

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held not liable because of the express directions of sec. 32. The question here is the independent one—whether the owner is, by the express directions of sec. 34, entitled to the deduction of the value of the annuity. The matter must therefore be determined apart from *Cochrane's Case*.

The appellants claimed the benefit of the section on two grounds: (1) because the annuity was, on the true construction of the will, charged on the corpus of the land; and (2) because, even if charged only on the income, there was nevertheless a charge on the land within the meaning of the section. If either is decided in the affirmative, it concludes the matter in favour of the appellants.

The first point depends entirely on the construction of the will. There is no doubt—for the testator has expressly so declared—that he has "charged" the annuity. No doubt, it is a charge on the "income"; but is it also a charge on the corpus?

Cases have been cited to aid the Court in discovering what, if any, principle or canon of construction should guide it in determining the case. But, as Lord *Brougham* said in *Baker* v. *Baker* (1), "nothing, generally speaking, can be more unfruitful than a reference to other cases where, instead of the question arising upon a principle of law, or a rule of law, the whole question arose upon the meaning of the words employed in the will; and the least difference between the case at the bar and the case cited, will make all the difference in the world, and render the application of the case cited utterly useless." That passage acknowledges, as of course, the necessity of observing principles of law or rules of law; but, that done, the intention of the testator must be judged of by his own words. In *Gee* v. *Mahood* (2) *Cotton* L.J. states two relevant propositions, viz.: (1) "If there is a direct legacy of an annuity, then *primâ facie* the annuitant is entitled to have that made good, not only out of the income, but out of the capital, unless there are words sufficient to cut down the claim of the person to the income only"; and (2) "Although there is a gift of an annuity, yet there may be expressions in the will that show that what the testator has provided as a fund for payment of the annuity is to be handed over to those who are to take after the death of the annuitant

(1) 6 H.L.C., 616, at pp. 626-627. (2) 11 Ch. D., 891, at pp. 897, 899.

in the same state as when first set apart." In other words, if the source of the annuity is given to another "intact," it is not charged with the annuity. When that case was in the House of Lords (*Carmichael* v. *Gee* (1)) Lord *Selborne* L.C. proceeded on those lines. Lord *Hatherley* (2) divided the cases into two classes. One class is where "a general trust fund . . . is *partitioned* between two parties, the one taking a life interest and the other taking an interest in the remainder." In that class of cases, the annuitant's only right is against the income accruing from the fund. The other class is where there is a gift of an annuity to one person, and others are to take *subject to that gift*, the others must submit to any loss or inconvenience occasioned by satisfying the gift of the annuity. Whether a case falls into the one class or the other may be easily settled if express words are used such as "subject to," or their equivalent. But there is no rule of law requiring any specific words, and if the intention can be gathered from the will as a whole, that is sufficient.

In the present case the first significant fact is that a fund is designated, viz., "the clear annual income derived from the said lands," out of which the annuities are to be paid. True, the testator says "the several annuities hereinafter charged," but, when we look to see on what they are charged, it appears they are charged on nothing but the fund out of which they are payable, because no intimation of a charge on corpus is given, and there is one provision which shows it is not on the corpus of the estate. That provision is this: "It is hereby declared that all the said annuities or annual payments hereby charged or declared to be payable are charged and are to be payable and paid in the order and rotation" &c. So that "charged" and "payable" are used in respect of the one fund out of which the annuities are to be paid, which, as before stated, is the annual income. Then the will proceeds to make provision for what is to happen in case of insufficiency of income to meet all the annuities. They are to be paid in priority; that means, up to that point, that some may have to go unpaid altogether. And nothing is said as to any further recourse to the estate to make good the deficient annuities. Then provision is made for the case

(1) 5 App. Cas., 588. (2) 5 App. Cas., at p. 597.

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of the income being more than sufficient to meet the annuities: the surplus is to go to Mrs. Annie Perry, or, if the trust to her fails, then for her then husband's children's maintenance until the youngest attains twenty-one years. On that event happening a new trust of the land and any accumulated income is created. Altogether it is clear that there is no charge on the corpus. There is what Lord *Watson*, in *Carmichael* v. *Gee* (1), called "an intention on the part of the testator to limit the fund out of which" the annuity "was to be paid to the income."

The next question is: What is the nature of the charge on the income? It is to be noted in this connection that in the case of the three grandchildren annuitants, two of them being other than the beneficiaries under the new trust, the annuities are not to cease until they attain twenty-two. The two beneficiaries referred to, Beryl Ham and Herbert Ham, might not attain that age until after the surviving parent of William Perry's children had died and the new trust had arisen. But the annuities to the Ham grandchildren were to continue until they were twenty-two, notwithstanding the new trusts. The specific term of duration fixed by the will in those two cases makes that clear. This provision is, in Lord *Brougham's* words above quoted, the difference that, in view of the cases (notably the judgment of *Parker* J. in *Re Boulcott's Settlement*; *Wood* v. *Boulcott* (2)), makes all the difference in the world, because if, as is plain, those annuities are not to cease till the period mentioned, it is the better construction that Mrs. Kilby's annuity, being unlimited, would naturally be intended to continue (together with, in her case, the charge on the income to secure it) during her life, the period corresponding to the attainment of twenty-two years in the other cases.

Does that bring the case within the words of sec. 34 of the *Assessment Act*, "land is charged with an annuity." In *Payne* v. *Esdaile* (3) Lord *Macnaghten* says "A charge means something carried, a burthen or an imposition." It is necessary to distinguish between the *charge* itself, however created, and the *remedy* to effectuate it. Here the charge is equitable. Applying, accordingly,

(1) 5 App. Cas., at p. 598.
(2) 104 L.T., 205.
(3) 13 App. Cas., 613, at p. 626.

the reasoning of Lord *Macnaghten* in the case cited to the present case, we may say that beyond all doubt the liability to apply the income of the land to satisfy the annuity subtracts something from the profitable enjoyment of the land ; it must be taken into account on the occasion of a sale, or a mortgage, or a lease with notice. An intending purchaser of the interest of the remainderman would give so much less purchase money ; an intending mortgagee of that interest would strike the amount off the rental in calculating the value of his proposed security, and an intending lessee of the beneficial owner's interest would offer so much less rent. According to the ordinary understanding of mankind, that is a charge upon land which cannot be dissociated from the land, and which charges the remainderman when he receives the income of the land and charges similarly anyone who takes his interest with notice. That is, therefore, a charge on the land within the meaning of sec. 34, and entitles the owner to the statutory deduction.

The questions are answered in the affirmative, and the case is remitted to the Supreme Court of Queensland with this opinion. Costs will be costs in the appeal.

Questions answered accordingly. Costs to be costs in the appeal.

Solicitor for the appellants, *R. McCowan.*

Solicitor for the respondent, *Gordon H. Castle*, Crown Solicitor for the Commonwealth, by *Chambers, McNab & McNab.*