[HIGH COURT OF AUSTRALIA.]

EXECUTOR TRUSTEE AND AGENCY COMPANY OF SOUTH AUSTRALIA LIMITED } APPELLANT;

AND

THE DEPUTY FEDERAL COMMISSIONER OF TAXATION (SOUTH AUSTRALIA) . } RESPONDENT.

H. C. OF A. 1940.

MELBOURNE, *March* 28.

ADELAIDE, *Sept.* 20.

DIXON J.

Land Tax (Cth.)—Assessment—Deduction—Annuity, whether charged on land—Annuity payable out of income from trust property including land—Unqualified and unconditional gift over of corpus and income—Land Tax Assessment Act 1910-1937 (*No.* 22 of 1910—*No.* 5 *of* 1937), *sec.* 34*.

Will—Construction—Annuities—Payable out of income—Test of whether annuities are charged on trust property.

A will of a testator who died before 1st July 1910 provided that a number of annuities be paid out of the income of certain trust property, including real estate, and, that, in the event of a deficiency in income in any year to pay the whole of the annuities, certain of them should abate. The will then provided that, on the death of the final annuitant, there was to be an immediate, unconditional and unqualified distribution of the corpus and income of the trust property.

Held that the annuities were neither a continuing charge on the income nor a charge on corpus; consequently the annuities were not charged on land and the trustee was not, for the purposes of land tax, entitled to any deduction in respect of the annuities as provided for in sec. 34 of the *Land Tax Assessment Act* 1910-1937.

Queensland Trustees Ltd. v. *Deputy Federal Commissioner of Land Tax (Q.)*, (1919) 26 C.L.R. 485, distinguished.

* Sec. 34 of the *Land Tax Assessment Act* 1910-1937 provides: "Where under a settlement made before the first day of July, one thousand nine hundred and ten, 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."

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Re Boulcott's Settlement, (1911) 104 L.T. 204, *In re Boden*; *Boden* v. *Boden*, (1907) 1 Ch. 132, and *Foster* v. *Smith*, (1845) 1 Ph. 629, applied.

Principles of construction stated by *Romer* L.J. in *In re Coller's Deed Trusts*; *Coller* v. *Coller*, (1939) Ch. 277, at p. 280, approved and applied.

APPEALS from the Federal Commissioner of Land Tax.

The Executor Trustee and Agency Co. of South Australia Ltd. was the trustee under the will of David Bower, late of Woodville, South Australia, deceased, who died on 14th July 1898, and it appealed to the High Court from an assessment made by the Deputy Federal Commissioner of Taxes for the financial year beginning 1st July 1938 in respect of land held on the trusts of the will. The trustee claimed certain deductions under sec. 38 (7) of the *Land Tax Assessment Act* 1910-1937 in respect of the individual interests held by the beneficiaries in the estate, but the deputy commissioner disallowed these in his assessment, and, upon appeal to the High Court, the opinion of the Full Court was sought on a case stated as to whether the deductions were properly allowable: the court held that they were not (*Executor Trustee and Agency Co. of South Australia Ltd.* v. *Deputy Federal Commissioner of Taxes* (*S.A.*) (1)). During the course of the argument, however, it was suggested that deductions might be claimed under sec. 34 of the *Land Tax Assessment Act* 1910-1937, and when the opinion of the Full Court was returned to *Dixon* J., who stated the case, it was argued on behalf of the trustee that deductions should be made under sec. 34 as suggested. Objection was taken on behalf of the deputy commissioner that the notice of objection given by the trustee did not raise the point. It was agreed, however, that *Dixon* J. should decide the point, and, in order that any difficulty raised by the notice of objection should be overcome, *Dixon* J. reserved his judgment for such period of time as to allow the trustee to be assessed for the financial year beginning 1st July 1939 and to file a notice of objection properly and clearly raising the point as to whether deductions were allowable under sec. 34. *Dixon* J. then proceeded to give judgment in the two appeals.

The facts are set out in the judgment hereunder.

Ligertwood K.C. and *McEwin*, for the appellant.

Mayo K.C. and *Brebner*, for the respondent.

Cur. adv. vult.

(1) (1939) 62 C.L.R. 545.

The following written judgment was delivered :—

DIXON J. These are two appeals from assessments for Federal land tax. The first appeal is from an assessment for the financial year beginning 1st July 1938 and the second for that beginning 1st July 1939. The appellant is the trustee under the will of David Bower, deceased, who died on 14th July 1898.

In the first appeal the parties joined in preparing a case for the opinion of the Full Court, which, at their request, I stated under sec. 44M (8) of the *Land Tax Assessment Act* 1910-1937.

The purpose of the case stated was to obtain the determination of the question whether the appellant was entitled, for the purpose of the assessment, to six deductions of £5,000 each from the unimproved value of the lands which it held as trustee of the estate of David Bower, deceased, or to one such deduction only.

The will contains directions to pay certain annuities out of the income of the residuary estate and a discretionary trust to accumulate surplus income and to apply the accumulations in the like manner as income, namely, by distributing the same to the persons for the time being entitled to the income of the estate. Two orders were made by the Supreme Court on originating summons, one interpreting the will, and the other declaring the effect produced by the operation of the *Thellusson Act* after the expiration of twenty-one years from the testator's death. As a combined result of the terms of the will and of the orders, a discretion arose in the appellant as trustee to distribute among the annuitants the income of the residuary estate remaining after the payment of the annuities, and this was done. At the material dates there were six annuitants surviving, all of whom were relatives of the testator. The appellant claimed that, as a consequence, under the will, the beneficial interest in the income from the lands forming part of the residuary estate was, for the time being, shared among these six beneficiaries in such a way that they were taxable as joint owners and that each of them had an original share ; and on that ground the appellant claimed six deductions of £5,000 each under sub-secs. 7 and 8 of sec. 38 of the *Land Tax Assessment Act*. For many years six deductions had in fact been allowed by the Commissioner of Taxation, but in the assessment for the financial year beginning 1st July 1938 he rejected the appellant's claim and allowed but one deduction. The Full Court upheld his disallowance of six deductions and decided that the appellant was entitled to one deduction only of £5,000 (*Executor Trustee and Agency Co. of South Australia Ltd.* v. *Deputy Federal Commissioner of Taxes* (*S.A.*) (1)).

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In the course of the argument in the Full Court a question was asked whether the commissioner had considered the possible right of the appellant under sec. 34 to deduct the value of the annuities. It appeared that he had not done so, because the appellant had placed its case on sec. 38 (7) and (8). In his reasons for judgment the Chief Justice said that, as for many years the commissioner had allowed several deductions of £5,000 and as it was now held that those deductions were not properly allowable, the applicability of sec. 34 should be considered, and his Honour referred to *Queensland Trustees Ltd.* v. *Deputy Federal Commissioner of Land Tax (Q.)* (1).

The appeal from the assessment for the financial year beginning 1st July 1938 was then brought on again before me for hearing. It was stated that the commissioner had in the meantime considered the application of sec. 34 to the assessment, but had formed the opinion that no deduction on account of the value of the annuities should be allowed under that section, because the land was not charged with the annuities. The appellant then sought to controvert this conclusion and claimed to be entitled under the notice of objection to contend that the assessment should be reduced by allowing deductions in respect of the value of the annuities. The notice of objection begins with the simple ground that the assessment is excessive, and, according to the appellant, that ground is enough for the purpose. It was said also that, having regard to what had occurred before the Full Court, the question was thrown open independently of the objections. At length, however, it was agreed that, in order to raise the question unembarrassed by difficulties of procedure, steps should be taken to bring before me an appeal in respect of the ensuing financial year, the year beginning 1st July 1939, and that, when that had been done, I should give judgment upon both appeals without a second argument. The question of substance was argued, and I reserved judgment to enable the arrangement to be carried out.

The materials upon which both appeals are to be determined consist of the assessments, objections and transmissions, the case stated in the first appeal for opinion of the Full Court, the order of the Full Court, and two agreed statements of fact.

In the circumstances I shall not decide whether, in the first appeal, it is open to the appellant to claim deductions under sec. 34 on account of the value of the annuities. For, in my opinion, that claim finds no foundation in the provisions of David Bower's will. Omitting an immaterial proviso, sec. 34 is as follows: "Where under a settlement made before the first day of July, one thousand

(1) (1919) 26 C.L.R. 485.

nine hundred and ten, 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 testator did of course die before 1st July 1910; but in my opinion the land is not charged with the six annuities still on foot.

I assume that it is a consequence of *Sendall* v. *Federal Commissioner of Land Tax* (1) that, notwithstanding sec. 33 (1), when a trustee is assessed to land tax in respect of land held upon the trusts of a will a deduction must be allowed under sec. 34 on account of an annuity which the will creates and charges upon the land. But the trusts of the will in the present case contain no charge upon the land. There are two sets of annuities arising under the will. The annuities given by the earlier part of the will have now all terminated, and the six annuities upon which the appellant's present claim depends are to be provided out of what is in effect the income of residue. After making a number of specific gifts and bequeathing pecuniary legacies long since paid and the set of annuities now terminated, the will directs the trustees to stand possessed of the estate, however constituted (*scil.*, of real and personal property), upon trust, after providing for outgoings, "to pay the income arising therefrom as under," viz., to two named annuitants, each £250 per annum, and, to seven named annuitants, each £400 per annum. The will then goes on to declare that, if such income after payment in full to all other beneficiaries shall be insufficient to pay all such last-mentioned seven annuities of £400 per annum each in full, they should be reduced equally, but gives the trustees a discretionary power to make up the reductions from time to time when they consider the income will warrant it. The annuity of any of the named beneficiaries dying is, until the period of distribution, to be in trust for his or her children, if any, and, if none, is to fall into the residuary personal estate. Upon the death of all the annuitants, the residuary estate (real and personal) is to be converted and the proceeds and any income accrued thereon is to be divided amongst the children then living of the annuitants. These provisions amount to a direction to apply the income of a trust of realty and personalty in paying specified annual sums until the death of the last surviving annuitant and then to distribute corpus. There is no continuing charge of arrears on income in the case of any of the annuities, and

(1) (1911) 12 C.L.R. 653.

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in the case of those of £400 per annum there is an express provision for abatement when the income of any year proves insufficient. When the last life drops, all claims to answer the annuities out of future income end, and in no event is there any recourse to corpus.

It will be seen that it is not a bequest of an annuity independently of its source, which, like a general pecuniary legacy, must be paid or provided for before the corpus of residue is ascertained. An annuity so bequeathed is considered to be a charge on corpus because it must be answered out of the general estate and until it is so answered there can be no final ascertainment of residue. Further, this consequence is not met by a mere direction to pay the annuity out of the income, or to set aside a fund to answer the annuity, if it is no more than a superadded direction or an appropriation of a fund or of income to secure the annuity and it is not the sole expression of the gift of the annuity : See *In re Mason* ; *Mason* v. *Robinson* (1) and *Carmichael* v. *Gee* (2).

Again, notwithstanding that the gift of the annuity is contained in a direction to apply income to the purpose or to set aside a fund and pay a specified amount of the income thereof to the annuitant, yet, if the gift of the corpus on the annuitant's death is made subject to the satisfaction of the annuity, then arrears of the annuity will be payable out of future income, and this may amount to a continuing charge upon income. Thus, in *In re Mason* (3) *Jessel* M.R. says :— " Now there are two classes of cases between which I think a distinction should be made. The first is a class of cases of which *Baker* v. *Baker* (4) is an instance, in which the testator has not given the annuity at all, but has directed a sum of money to be set apart which shall be sufficient to pay an annual sum, and then directs the income of the sum so set apart to be paid to a person for life. That is not a gift to an annuitant of a sum of money specifically mentioned, but it is a direction to set apart a capital sum, and what is given, and what the person to whom the income is to be paid takes, is the income of that capital sum which accrues due during his life, and nothing else. That is the true explanation of the decision in *Baker* v. *Baker* (4). There is another class of case of which *Booth* v. *Coulton* (5) is one, in which there is not a gift of an annuity *simpliciter*, but a fund is directed to be invested, or there is an existing investment, or an existing estate producing income, and the testator directs that out of the income of the sum to be invested, or of the existing investment, or out of the rents of the existing estate,

(1) (1878) 8 Ch. D. 411.
(2) (1880) 5 App. Cas. 588 (H.L.); (1878) 9 Ch. D. 151 (C.A.).
(3) (1878) 8 Ch. D., at p. 414.
(4) (1858) 6 H.L.C. 616 [10 E.R. 1436].
(5) (1870) 5 Ch. App. 684.

a life annuity is to be paid, and subject thereto the fund or estate is to go elsewhere. That class of cases has been held to mean this, that, there being no direction that the annuity is to be paid out of the income to accrue during the life of the annuitant, the annuity is a charge upon the income even beyond the life of the annuitant, so that no one can take the income till the arrears of the annuity are satisfied." In *Birch* v. *Sherratt* (1), which is a case of the latter class, *Rolt* L.J. said :—"If an annuity is given out of rents and profits, or dividends and interest, and the capital, or corpus, is given intact, from and after the annuitant's death, to another, the case is equivalent to the case of a life interest with remainder over. But if the capital is given over, not 'from and after the annuitant's death,' but, 'from and after the satisfaction of the annuity and subject to the annuity,' then I think the case is equivalent to the case of a legacy and a residuary bequest, especially if the gift of the annuity itself admits of a construction charging it on the capital of the estate, or of the trust fund."

When, either because there is no gift over of corpus immediately upon the death of the annuitant or because the gift over is so expressed that it is made subject to the full satisfaction of the annuity, the proper conclusion is that there is a continuing charge on income extending beyond the life of the annuitant, that charge may amount to a charge on corpus. But whether this is always so or depends upon the intention disclosed by the will is the subject of some difference of opinion: See, e.g., per *Cozens Hardy* M.R. in *In re Howarth*; *Howarth v. Makinson* (2); per *Parker* J. in *In re Young*; *Brown* v. *Hodgson* (3); per *Greene* M.R. in *In re Coller's Deed Trusts*; *Coller* v. *Coller* (4); *contra*, per *Fletcher Moulton* L.J. in *In re Boden*; *Boden* v. *Boden* (5); *Law Quarterly Review*, vol. 31, pp. 424-428. In *Queensland Trustees Ltd.* v. *Deputy Federal Commissioner of Land Tax* (Q.) (6) this court held that the provisions of a will charging an annuity upon realty amounted to a continuing charge upon income but not upon corpus: See the provisions as abstracted in the report (7) and discussed (8) and the conclusion (9). A continuing charge for the satisfaction of annual payments accruing over a limited period must, of course, be distinguished from an indefinite charge upon the income of property, that is, a charge of annual sums accruing indefinitely. But in my opinion the provisions of the will in the present case do not subject

(1) (1867) 2 Ch. App. 644, at p. 649.
(2) (1909) 2 Ch. 19, at p. 21.
(3) (1912) 2 Ch. 479, at pp. 482, 487.
(4) (1939) Ch. 277, at p. 279.
(5) (1907) 1 Ch. 132, at p. 153.
(6) (1919) 26 C.L.R. 485.
(7) (1919) 26 C.L.R., at p. 486.
(8) (1919) 26 C.L.R., at p. 491.
(9) (1919) 26 C.L.R., at p. 492.

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the income to a continuing charge. In *In re Coller's Deed Trusts* (1), in the course of a full and clear exposition of the principles of construction involved, *Romer* L.J. conceded that, in the case of a trust to pay an annuity out of the income of a trust fund without, on the one hand, any subsequent indication being given that the annuity is in any case to be paid in full or, on the other, without any express words confining the annuity for one year to the income of that year, the income is prima facie a continuing charge upon the income of the fund and the personal representatives of the annuitant would be entitled prima facie to have the income accruing after his death impounded until all arrears of the annuity are paid. But he also pointed out that provisions inconsistent with the rights which flow from a continuing charge are enough to rebut this prima-facie conclusion and to show that there is no continuing charge.

It has always been held that an unqualified or unconditional gift over of the corpus and income of the fund to some other beneficiary upon the death of the annuitant is inconsistent with a continuing charge upon income after that event: See *Re Boulcott's Settlement*; *Wood* v. *Boulcott* (2), *In re Boden* (3) and *Foster* v. *Smith* (4).

Under David Bower's will the annuities in question terminate on the death of the last surviving annuitant and there is an immediate trust as from that time for the distribution of the corpus and income of the residuary fund. There is therefore no continuing charge, and there can be no charge on corpus. Although it has been held in *Queensland Trustees Ltd.* v. *Deputy Federal Commissioner of Land Tax* (*Q.*) (5) that sec. 34 of the *Land Tax Assessment Act* covers not only a charge on corpus but a continuing charge on income arising from land, the reasons of the court, to which I have already referred, necessarily imply that the section is not satisfied by a mere direction to apply income in paying specified annual sums during a life or lives. In my opinion such a direction does not amount to a charge on the land within the meaning of sec. 34.

Appeals dismissed with costs, including costs of the case stated.

Solicitors for the appellant, *Baker, McEwin, Ligertwood & Millhouse.*

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

O. J. G.

(1) (1939) Ch. 277, at p. 281.
(2) (1911) 104 L.T. 205.
(3) (1907) 1 Ch. 132.
(4) (1845) 1 Ph. 629 [41 E.R. 772.]
(5) (1919) 26 C.L.R. 485.