



60, 1937

No. 64 of 1936.

In the Privy Council.

APPELLANTS' CASE.

ON APPEAL

FROM THE SUPREME COURT OF HONG KONG (APPELLATE JURISDICTION).

BETWEEN

HAROLD JOHN ARMSTRONG and MICHAEL HOWARD TURNER - - - - - Appellants

AND

10 THE ESTATE DUTY COMMISSIONER - - - Respondent.

Case for the Appellants.

1. This is an appeal from a judgment of the Full Court (His Honour Mr. Justice Lindsell Chief Justice and His Honour Mr. Justice Hayden) delivered on 17th February 1936 affirming a judgment delivered on 27th June 1935 by His Honour Mr. Justice MacGregor the then Chief Justice. The last-mentioned judgment dismissed a petition of the trustees of the will and codicils of Sir Catchick Paul Chater (hereinafter called "the testator") appealing against a certificate of the Respondent deciding that Estate Duty was payable upon the death of Lady Maria Christine Chater in respect of an annuity bequeathed to her by the testator. Lady Maria Christine Chater was the widow of the testator and is hereinafter called "Lady Chater."

RECORD.
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pp. 29-34.
pp. 12-15.
pp. 8, 9.
pp. 5, 6.
2. The testator died on 27th May 1926 and his will dated 17th April 1925 with two codicils thereto were proved in Hongkong on the 9th September 1926 by Sir William Edward Leonard Shenton Reginald Frederick Mattingly and Lady Chater who were the executors and trustees under the said will and codicils.

p. 43.

3. The said Reginald F. Mattingly died on the 29th December 1926 and on 11th March 1927 the Appellant Michael Howard Turner was appointed

p. 3, l. 27.
p. 4, l. 1.

p. 3, l. 28. a trustee of the said will and codicils in his place. Lady Chater died on 11th March 1935. At the date of the said petition and of the said judgments the said Sir W. E. L. Shenton and the Appellant M. H. Turner were the trustees of the said will and codicils. On the 31st December 1935 the said Sir W. E. L. Shenton retired from the trusteeship and the appellant Harold J. Armstrong was appointed trustee in his place jointly with the appellant M. H. Turner. The Appellants are therefore the present trustees of the said will and codicils.

pp. 43-52. 4. The will of the testator provided (so far as material) as follows :
By Clause 5 (A) he bequeathed to his wife Lady Chater during her life an annuity of £10,000 sterling clear of all death duties and income tax. By Clauses 6 and 7 he gave his residuary estate to his trustees upon trust for conversion but with power to postpone conversion. By Clause 8 he directed that subject to the payment of his funeral and testamentary expenses and debts and the legacies bequeathed by him and the duty upon legacies and annuities bequeathed free of duty and subject to making provision for the payment of any annuities bequeathed by him his trustees should invest his residuary estate upon trust to set apart and invest three large settled legacies and to pay the balance to the charity therein named. By Clause 13 he declared that his trustees should be at liberty if they so thought fit to appropriate and set apart out of his residuary estate investments representing such a capital fund as should at the time of appropriation be sufficient to produce the annuities directed to be paid by Clause 5 of his will as in the opinion of his trustees should be sufficient.

p. 4, l. 6. 5. Estate duty was paid on the whole of the testator's estate when probate of his will and codicils was obtained.

p. 4, l. 8. 6. No fund was in fact set aside to meet the said annuity for Lady Chater but the same was paid out of the general income as and when the annuity became due.

7. Lady Chater died as hereinbefore stated on 11th March 1935 and thereupon her said annuity ceased.

pp. 3, 4. 8. On the 4th April 1935 the then trustees of the testator's will and codicils filed an account with the Respondent contending that by virtue of Section 25 of Ordinance No. 3 of 1932 no estate duty became payable upon or by reason of the cesser of the said annuity. But on 20th May 1935 the Respondent notified the said trustees his decision (namely) that their said contention was not accepted and claiming that estate duty did become payable under Section 5 (1) (b) of the said Ordinance in respect

pp. 5, 6.

of the cesser of the said annuity and making an assessment for estate duty and interest to 20th May 1935 at \$153,511 and subsequent interest at the rate of 8 per cent. per annum until payment. p. 6, 1, 13.

9. On 27th May 1935 the said trustees filed a statement of their grounds of appeal maintaining that by virtue of Section 25 aforesaid no estate duty was payable and on 7th June 1935 they presented a petition to the Supreme Court of Hong Kong appealing from the said decision and assessment of the Respondent on the ground aforesaid. The petition also contended in the alternative that if duty was payable, it was impossible to calculate the duty and therefore nothing was payable but this alternative contention is not now maintained. pp. 6-8.
pp. 8, 9.

10. The said petition of appeal was heard on 13th June 1935 by the then Chief Justice (Mr. Justice MacGregor) and by his judgment dated 27th June 1935 he dismissed the appeal. There was no question of fact in dispute and the question argued and decided depended wholly on whether the gift of the said annuity by the testator's will created a settlement within Section 25 of the said Ordinance so as to entitle the trustees to exemption from duty under that section. pp. 10, 11.
pp. 12-15.

10A. The trustees of the testator's will being desirous of appealing from the said judgment to the Supreme Court obtained on 10th December 1935 an order giving leave to appeal. Such appeal was heard by the Supreme Court on 8th and 9th January 1936 before His Honour Mr. Justice Lindsell Chief Justice and His Honour Mr. Justice Hayden. The Court reserved judgment and judgment was delivered on 17th February 1936. The Judges gave separate judgments and dismissed the appeal with costs. p. 16.
pp. 18-26.
pp. 29-33.
pp. 33-34.

11. The said Ordinance provides (so far as material) as follows :—

Section 4. "In the case of every deceased person there shall, save as hereinafter expressly provided, be based and paid upon the principal value ascertained as hereinafter provided of all property passing on the death of such person a stamp duty called estate duty at the graduated rates mentioned in the applicable schedule." 30

Section 5(1). "Property passing on the death of the deceased shall be deemed to include the property following :—

"(a) property of which the deceased was at the time of his death competent to dispose ;

"(b) property in which the deceased or any other person had an interest ceasing on the death of the deceased to the extent to which a benefit accrues or arises by the cesser of such interest." 35

Section 9 (6). "The value of the benefit accruing or arising
" from the cesser of an interest ceasing on the death of the deceased
" shall—

" (a) if the interest extended to the whole income of the
" property be the principal value of that property, and

" (b) if the interest extended to less than the whole income of
" the property be the principal value of an addition to the
" property equal to the income to which the interest extended."

Section 25 (1). "If estate duty has already been paid in
" respect of any settled property since the date of the settlement, 10
" upon the death of one of the parties to a marriage, no estate duty
" shall be payable on the death of the other party to the marriage
" unless such person was at the time of his or her death or had been
" at any time during the continuance of the settlement competent
" to dispose of such property.

" (2) For the purposes of this section, the term settlement
" means any deed, will, agreement for a settlement or other
" instrument, or any number of instruments, whether made
" before or after or partly before and partly after the commence- 20
" ment of this Ordinance, under or by virtue of which instrument
" or instruments any property, or any estate or interest in any
" property, stands for the time being limited to or in trust for any
" persons by way of succession, and the term settled property
" means the property comprised in a settlement."

12. Lady Chater was not at any time competent to dispose of the property out of the income of which her said annuity was payable and such property did not actually pass on her death but the respondent based his claim to estate duty on the contention that a slice of the residuary estate sufficient to produce the said annuity was deemed to pass on Lady Chater's death by reason of the annuity constituting an interest in the residuary 30 estate of the testator out of the income of which the said annuity was payable.

13. The learned Judges in the Courts below rejected the contention on behalf of the Appellants that on the facts of the case the will of the testator constituted a settlement and his residuary estate so far as required for payment of the said annuity constituted settled property within the meaning of Section 25 aforesaid and accordingly decided in favour of the Respondent.

14. By an order dated 9th March 1936 it was ordered that the name of the Appellant Harold John Armstrong be substituted for the 40

name of the said Sir W. E. L. Shenton jointly with the Appellant M. H. Turner as an Appellant and that the proceedings continue in that name and by an order dated 16th April 1936 the Appellants obtained final leave to appeal to His Majesty in Council against the said judgments in the Supreme Court.

15. Having regard to the said decision and assessment of the Respondent the Appellants were obliged to and did pay to the Respondent the duty assessed with interest amounting in all to \$153,511. Further having regard to such assessment and the application of the provisions
10 of the said Ordinance as to aggregation the effect was to increase the rate of estate duty payable on other property passing on the death of Lady Chater and such increased duty was also paid.

16. The Appellants humbly submit that the said judgments were erroneous and ought to be reversed and that (A) it ought to be determined that no estate duty became payable on the death of Lady Chater in respect of the cesser of her said annuity (B) the Appellant's petition of appeal ought to be referred back to the appropriate Court in Hong Kong to make an order for repayment of the estate duty and interest paid together with interest thereon at the proper rate and (C) an order ought to be made that the costs
20 of the Appellants of the said appeal of the trustees of the testator's will from the said assessment in both Courts below and of the Appellants of this Appeal ought to be paid by the Respondent and that the Respondent do repay to the Appellants the costs paid by the trustees of the testator's will under the judgments in both Courts below for the following (among other)—

REASONS.

- (1) BECAUSE the testator's will constituted a settlement under or by virtue of which the portion of his estate required for payment of the said annuity stood for the time being in trust for Lady Chater and the residuary legatees by way of succession and was settled property within the meaning of Section 25 of the said Ordinance and accordingly as (I) the testator and Lady Chater were parties to a marriage being husband and wife (II) Lady Chater was not at any time competent to dispose of any of such residuary estate and (III) estate duty on the whole of the testator's estate had been paid on his death the effect of Section 25 aforesaid was that no estate duty became payable on the cesser of the said annuity upon Lady Chater's death.
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- (2) THE Respondent bases and can only base his claim to estate duty on the cesser of the said annuity upon the contention that by reason of her said annuity Lady Chater
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had, under the testator's will, an interest in his residuary estate or a sufficient portion thereof which ceased on her death and if she had an interest therein which ceased on her death it follows (it is respectfully submitted) that such property or the said portion thereof stood for the time being limited in trust for persons by way of succession.

- (3) BECAUSE the authorities establish that in any case if a fund is set aside to answer an annuity then such fund constitutes settled property, and (as is respectfully submitted) on principle the position is the same where (as here) the trustees had power to set aside such a fund and the residuary legatees were entitled if they had so thought fit to obtain at any time an order to set aside such a fund and for immediate distribution of the rest of the residuary estate and the mere fact that no such fund was actually set aside ought not to affect the position in respect of estate duty especially as the will only gives the residuary estate subject to making provision for payment of the annuities. 10 20
- (4) THE exemption conferred by Section 25 aforesaid ought to be construed liberally and the practice of the Estate Duty Office in England is to treat cases where a surviving spouse is given an annuity simpliciter under the will of the other spouse as causing the property subject to such annuity to be "settled property" and therefore within the corresponding exemption in the Finance Acts (see "Dymond, The Death Duties," 7th ed. 262) and the position under the said Ordinance ought to be the same as its language is based on and similar to that of the English Finance Acts. 30
- (5) BECAUSE the said judgments of Mr. Justice MacGregor and of the Full Court are wrong and ought to be reversed.

GAVIN T. SIMONDS.

WILFRID M. HUNT.

In the Privy Council.

ON APPEAL

*From the Supreme Court of Hong Kong.
(Appellate Jurisdiction).*

BETWEEN

HAROLD JOHN ARMSTRONG

and MICHAEL HOWARD

TURNER - - - - Appellants

AND

THE ESTATE DUTY COM-

MISSIONER - - - Respondent

Case for the Appellants.

GIBSON & WELDON,

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Agents for—

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Hong Kong,

Appellants' Solicitors.