

60, 1937

No. 64 of 1936.

# In the Privy Council.

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## ON APPEAL

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

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BETWEEN

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

AND

10 THE ESTATE DUTY COMMISSIONER - - - *Respondent.*

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## Case for the Respondent.

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RECORD.

1. This is an appeal from a judgment of the Full Court of the Supreme Court of Hong Kong (R. E. Lindsell, Acting C.J., and Hayden, J.) dated the 17th February 1936 dismissing an appeal by the trustees of the Will of the late Sir Catchick Paul Chater deceased from a judgment of the Supreme Court (Macgregor, C.J.) dated the 27th June 1935 whereby an appeal of the trustees from a decision of the Estate Duty Commissioner was dismissed and the decision of the Commissioner was affirmed. pp. 29-34. pp. 12-15. p. 5, l. 1. p. 8, l. 8.

20 2. The Appellants are the present trustees of the Will of the late Sir Catchick Paul Chater (hereinafter called "the Testator"). The Testator died in Hong Kong on the 27th May 1926 and was at the time of his death domiciled in Hong Kong. His Will dated the 17th April 1925 was duly proved on the 9th September 1926 in the Supreme Court of Hong Kong in its Probate Jurisdiction. p. 35, l. 32. p. 3, l. 3. p. 43, l. 26. p. 43, l. 4.

Estate Duty was paid on the whole of the Testator's estate when the Probate was obtained. p. 7, l. 12.

RESPONDENT'S CASE

p. 7, l. 16.  
p. 45, l. 13.  
p. 12, l. 32.

3. The question arising in this case is whether further Estate Duty is payable upon the death of the Testator's widow, the late Lady Maria C. Chater, who died on the 11th March 1935 by reason of the cesser of an annuity bequeathed to her by Clause 5 of the said Will, or whether section 25 of the Estate Duty Ordinance (No. 3 of 1932) operates so as to relieve the estate of the payment of any such further duty.

p. 45, l. 13.

4. The relevant portion of Clause 5 of the Testator's Will is as follows :—

“ I bequeath the following annuities all clear of death duties  
“ and income tax payable to the respective persons hereinafter 10  
“ enumerated commencing from my death by equal quarterly  
“ payments the first payment in each case to be made at the  
“ expiration of three months from my death :—

“ (A) To my wife during her life the annual sum of Ten  
“ thousand pounds sterling . . . ”

p. 46, l. 24.

The following is an extract from Clause 8 of the Will with regard to investments :—

“ Subject to the payment of my funeral and testamentary  
“ expenses and debts and any legacies bequeathed by this my Will  
“ or by any Codicil hereto and the duty (if any) upon legacies 20  
“ and annuities bequeathed free of duty and subject to making  
“ provision for the payment of any annuities bequeathed by this  
“ my Will or by any Codicil hereto my Trustees shall invest in  
“ manner hereinafter authorised the proceeds of the said sale  
“ calling in and conversion and stand possessed of such investments  
“ and of such parts of my residuary estate as shall at my death  
“ consist of such investments as are hereinafter authorised (which  
“ said net proceeds and investments and any investments  
“ substituted therefor are herein collectively referred to as ‘ my  
“ residuary estate ’) upon the following trusts viz. :— . . . ” 30

p. 49, l. 1.

Clause 13 of the Will is as follows :—

“ 13. I declare that my Trustees shall be at liberty if they  
“ so think fit to appropriate and set apart out of my residuary  
“ estate investments representing such a capital fund as shall at  
“ the time of appropriation be sufficient to produce the annual  
“ sums directed to be paid by Clause Five of this my Will with  
“ such a liberal margin for contingencies as in the opinion of my  
“ Trustees shall be sufficient And I declare that when such  
“ appropriation has been made the said annual sums shall be

10 “wholly charged on the investments so appropriated in exoneration of the rest of my estate but that the capital of such appropriated investments may be resorted to in case at any time the income thereof is insufficient to pay any such annual sum or sums. And I further declare that on the cesser of any such annual sums such part of the appropriated investments as shall not in the opinion of my Trustees be required for the payment of the other annual sum or sums for the time being payable under the trusts of this my Will shall revert to and form part of my residuary estate and that any surplus income arising from the appropriated investments shall be applied as income of my residuary estate.”

5. No fund was in fact set aside by the Trustees of the Will to meet the annuity bequeathed to the Testator's widow and it was paid out of the general income of the estate in the hands of the Trustees as and when it became due. p. 4, l. 8.

20 6. Upon the death of the Testator's widow, as above stated upon the 11th March 1935, the Estate Duty Commissioner claimed further Estate Duty in respect of the value of the benefit arising from the cesser of the widow's interest in the estate under section 5 (1) of the Estate Duty Ordinance, the calculation to be made in accordance with section 9 (6) (b) thereof. p. 7, l. 16.  
p. 5, l. 1.  
p. 5, l. 14.

It was agreed between the Trustees of the Will and the Commissioner that if Estate Duty was so payable the capital sum necessary to provide £10,000 per annum calculated at the rate of Eight per cent. per annum (being the Court rate of interest) amounts to £125,000, £125,000 converted into Hong Kong dollars at the rate of 1s. 11½d. being the rate prevailing on the 11th day of March 1935 amounts to \$1,263,157.90. p. 4, ll. 14-19.  
p. 5, l. 14.

30 Upon this sum the Commissioner decided that Duty was payable and an assessment at the rate of 12 per cent. (being the appropriate rate) was in due course made claiming duty amounting (with interest) to \$153,511.00. p. 5, l. 12.  
p. 5, l. 17.  
p. 5, l. 28.

40 The Trustees of the Will in due course appealed to the Supreme Court under section 17 of the Estate Duty Ordinance against the decision of the Commissioner that the above-mentioned amount of Estate Duty was payable. The only ground of appeal now relevant was that by virtue of section 25 of the Estate Duty Ordinance no Estate Duty was payable. (Another ground of appeal based upon the provisions of the Ordinance with regard to the calculation of duty was abandoned by the Appellants at the hearing before the Full Court.) p. 6, l. 20.  
p. 7, l. 37.  
p. 7, l. 20.  
p. 7, l. 22.  
p. 24, l. 34.

p. 12, l. 32.

Section 25 of the Estate Duty Ordinance is as follows :—

“ 25. (1) If estate duty has already been paid in respect of  
 “ any settled property since the date of the settlement, 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 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 10  
 “ instrument, or any number of instruments, whether made before  
 “ or after or partly before and partly after the commencement  
 “ 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.”

p. 10, l. 13.

p. 12, l. 1.

7. The appeal came on for hearing in the Supreme Court on the  
 13th June 1935 before the Chief Justice Sir A. D. A. Macgregor and the  
 Court having taken time to consider judgment was delivered on the 27th 20  
 June 1935 dismissing the appeal with costs and affirming the decision of  
 the Estate Duty Commissioner as to the amount of Estate Duty payable.

In his judgment, which is printed in full in the Record, the learned  
 Chief Justice examined a number of English authorities decided upon the  
 provisions of the Finance Act 1894 and amending enactments, or the Settled  
 Land Act 1882. The effect of his judgment, summarised, is that, though  
 in the case of annuity given by Will property might, if the Trustees had set  
 aside a fund to meet the annuity, be said to be settled within the meaning of  
 section 25 of the Estate Duty Ordinance a simple gift of an annuity did  
 not by itself create such a settlement. 30

p. 16, l. 15.

p. 18, l. 1.

p. 23, l. 16.

p. 26, l. 28.

8. The Trustees of the Will having obtained leave to appeal to the  
 Full Court against the judgment of the Chief Justice the appeal came on for  
 hearing before the Full Court (Lindsell, Acting C.J., and Hayden, J.) on the  
 8th and 9th January 1936. The Court took time to consider.

p. 27, l. 1.

p. 32, l. 32.

On the 6th February 1936 the Trustees by agreement with the  
 Respondent submitted a further authority (In Re Booth, 1916 1 Ch. 349)  
 for the consideration of the Court, and both sides made their submissions  
 in writing with respect thereto.

On the 17th February 1936 the Full Court gave judgment dismissing the appeal and affirming the decision of the Court below and of the Estate Duty Commissioner. pp. 29-34.  
p. 23, l. 21.  
p. 26, l. 37.

The Court concurred with the view of the Chief Justice in the Court below and considered that the mere gift of an annuity charged generally upon the residue of an estate was not a settlement within the meaning of section 25 of the Estate Duty Ordinance. The Court also dealt with a contention for the Appellants to the effect that though the Trustees had not appropriated and set aside any portion of the estate to secure the annuity to the widow they should on general principles of equity be treated as having done so. The Court considered that the principle that Equity treats that as done which ought to have been done did not apply in a case such as the present where the Trustees were under no imperative duty but merely had a discretion to make an appropriation if they thought fit to do so. p. 31, l. 20.  
p. 34, l. 15.  
p. 30, l. 13.  
p. 30, l. 38.  
p. 33, l. 18.

9. The following authorities were cited to the Courts below as bearing upon the question as to what constituted a settlement within the meaning of section 25 of the Estate Duty Ordinance :— pp. 10-11.  
pp. 18-26.  
pp. 27-28.

20 Carmichael v. Gee 5 A.C. 588.  
A.G. v. Robertson 1893 1 Q.B. 293.  
A.G. v. Owen 1899 2 Q.B. 253  
In re Campbell 1902 1 K.B. 113.  
Re Trafford's Settled Estates 1915 1 Ch. 9.  
Re Waller 1916 1 Ch. 158.  
Re Booth 1916 1 Ch. 349.  
A.G. v. Watson 1917 2 K.B. 427.  
Re Earl of Carnarvon's Estates 1927 1 Ch. 139.  
Re Lord Alington's Estates 1927 2 Ch. 253.  
Hanson's Death Duties 8th Edition 105.  
30 Harman's Finance Act 1894 4th Edition 79.  
13 Halsbury First Edition page 229 section 304.

The following were similarly cited as bearing on the question as to whether an appropriation of property to meet the annuity though not made in fact ought on equitable principles to be treated as having been made :—

40 Harbin v. Masterman 1896 1 Ch. 351.  
Twopenny's Settlement 1924 1 Ch. 522.  
Ashburner's Equity 252.  
Snell 19th Edition 186.  
13 Halsbury First Edition 73.

10. The Appellants in due course obtained leave to appeal to His Majesty in Council. p. 39, l. 15.

11. The Respondent humbly submits that the judgment of the Supreme Court herein is right and should be affirmed and that this appeal should be dismissed for the following amongst other

### REASONS.

- (1) BECAUSE Estate Duty has been rightly charged under section 5 (1) (b) of the Estate Duty Ordinance No. 3 of 1932 in respect of the value of the benefit arising from the cesser of the annuity payable under the Will of the deceased to his widow and no relief in respect of such Duty is provided by section 25 of the said Ordinance. 10
- (2) BECAUSE the gift of the said annuity to the widow under Clause 5 of the Will of the Testator did not constitute a settlement within the meaning of section 25 of the said Ordinance.
- (3) BECAUSE a bequest of an annuity in a Will does not of itself and in the absence of any appropriation by the Trustees of property to meet it as it falls due constitute a settlement within the meaning of section 25 of the said Ordinance "by virtue of which any property or any estate or interest in any property stands for the time 20 being limited to or in trust for any person by way of succession."
- (4) BECAUSE the Trustees of the Will were under no duty to appropriate any property to meet the widow's annuity, and the rule of equity that that which ought to have been done shall be treated as having been done does not apply.
- (5) FOR reasons given in the judgments in the Courts below.

A. M. LATTEK.

REGINALD HILLS.

**In the Privy Council.**

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**ON APPEAL**

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

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**BETWEEN**

**HAROLD JOHN ARMSTRONG**

**and MICHAEL HOWARD**

**TURNER - - - - Appellants**

**AND**

**THE ESTATE DUTY**

**COMMISSIONER - - Respondent.**

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**Case for the Respondent.**

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**BURCHELLS,**

**5 The Sanctuary,**

**Westminster, S.W.1,**

*Respondent's Solicitors.*