Privy Council Appeal No. 64 of 1936

Harold John Armstrong and another - - - - *Appellants*

v.

The Estate Duty Commissioner - - - - - *Respondent*

FROM

THE SUPREME COURT OF HONG KONG (APPELLATE JURISDICTION)

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 27TH MAY, 1937

Present at the Hearing:
LORD MAUGHAM
SIR LANCELOT SANDERSON.
SIR SIDNEY ROWLATT.
[*Delivered by* LORD MAUGHAM.]

This is an appeal from a judgment of the Full Court of the Supreme Court of Hong Kong (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 (called below "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 will be called "Lady Chater".

The testator died on 27th May, 1926, and his will dated 17th April, 1925, with two codicils thereto were proved in Hong Kong 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. The appellants are now the present trustees of the will and the codicils.

The will of the testator provided, so far as is material, as follows:—

> (5) I bequeath the following annuities all clear of death duties and income tax payable to the respective parties hereinafter 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, [and other annuities as therein mentioned].

(8) 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 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 therein authorised].

(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 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 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.

Estate duty was paid on the whole of the estate of the testator when probate was granted in 1926. No fund was set aside by the trustees to meet the annuity to Lady Chater, the widow of the deceased, and the annuity was in fact paid out of general income of the estate as and when the annuity became due.

Lady Chater died on the 11th March, 1935, and thereupon her annuity ceased.

Estate duty is charged in the Colony of Hong Kong according to the Estate Duty Ordinance, 1932. The Ordinance provides, so far as is 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."

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."

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, 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 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."

The respondent claimed that upon the death of Lady Chater estate duty became payable under section 5 (1) of the Ordinance to the extent to which a benefit accrued by the cesser of the annuity, and he made an assessment for estate duty and interest on 20th May, 1935, at $153,511. This assessment was disputed by the appellant trustees. They presented a petition to the Supreme Court of Hong Kong appealing from the adverse decision and assessment of the respondent. The petition of appeal was dismissed by the then Chief Justice (Mr. Justice MacGregor) on the 27th June, 1935, and an appeal from his decision was dismissed on the 17th February, 1936, by Mr. Justice Lindsell, Chief Justice and Mr. Justice Hayden.

The short and apparently simple point which falls for decision is whether, on the facts of the case, there is or is not "a settlement" to use the language of section 25 (2) under or by virtue of which instrument any property or any estate or interest in any property stood, during the life time of Lady Chater, limited to or in trust for any persons by way of succession. Lady Chater was not at any time competent to dispose of the property out of the income of which her annuity was payable, and since estate duty was paid in respect of the property passing under the will upon the death of the testator the exemption given by section 25 (1) would apply on the death of Lady Chater provided there could be shown to be "settled" property within the meaning of section 25. The appellants contended that the testator's will constituted such a settlement, inasmuch as a "slice", as it is called, of the testator's estate must be treated as within the words "any property or estate or interest in any property" and that such slice or portion of the estate stood, for the time being, limited to or in trust for the residuary legatees by way of succession.

Several English cases dealing with succession duty payable under the Finance Act, 1894, and the Amending Acts were relied on. The first of these cases was that of *A.G.* v. *Owen* [1899] 2 Q.B. 253. In that case a testatrix had bequeathed an annuity to a certain person and directed that a portion of her estate should be set aside to provide for the payment of the annuity, and it was held that the property so set apart was property standing limited to or in trust for persons by way of succession within the meaning of section 2 (1) of the Settled Land Act, 1882. Settlement estate duty was accordingly payable in respect of it. It will be remembered that by section 22 of the Finance Act, 1894,

the expression "settlement" was defined by reference to section 2 of the Settled Land Act, 1882. The learned Judges placed much reliance on the then recent decision of Chitty L.J. in *In re Mundy and Roper's Contract* [1899] 1 Ch. 275 as to the meaning of the word "settlement" in the Settled Land Act; and they accordingly held that the phrase "by way of succession" was one which might be treated as equivalent to successively upon death, and that there was a succession in a popular sense in the enjoyment of the portion of the estate of the testatrix which had been set aside to provide the annuity.

In *In re Campbell* [1902] 1 K.B. 113 an almost identical question came before the Court of Appeal. In that case also the trustees in pursuance of directions given by a testator had set aside out of the residuary estate a sum which was invested so as to produce an income sufficient to pay a number of annuities. Collins M.R., following the decision in *A.G.* v. *Owen,* and, relying on the decision in *In re Mundy and Roper's Contract* as to the true construction of the Settled Land Act, 1882, came to the conclusion that the specific fund upon which was imposed a direct trust in favour of the annuitants being a fund which after their death passed to the residuary legatees, was property which stood limited in trust for persons by way of succession. Stirling L.J., came to the same conclusion, but he added this:

> "I only wish to add that it was admitted in argument that this decision does not conclude the case of the simple gift of an annuity in general terms, where there is no such trust for payment of the annuity out of a particular fund as in the present case. I desire, in giving judgment in this case, to leave that case entirely untouched."

In the case of *In re Waller* [1916] 1 Ch. 153, Sargant J., had incidentally to deal with a similar matter; and again the trustees had appropriated an annuity fund. Sargant J., in the course of his judgment observes as follows:

> "The gift of the annuity simpliciter would not, in my opinion, —at any rate I am not aware of any decision to that effect—have rendered any part of the testator's estate a settled fund or have subjected the annuity to the payment of settlement estate duty—that is to say, the principal gift of the annuity would not have rendered it liable to settlement estate duty at all. The liability to settlement estate duty according to the cases to which I have been referred—*Attorney-General* v. *Owen* and *In re Campbell*—would seem to arise from the direction to set aside a portion of the testator's estate for the purpose of paying the annuity."

It is said that this statement was of the nature of a dictum and it may be that it was not strictly necessary for the decision of the case, but in the opinion of their Lordships the observation of so learned a Judge calls for great respect.

The case of *A.G.* v. *Watson* [1917] 2 K.B. 427 was also relied on; but it merely decided that an annuitant whose annuity was to be paid out of a residuary estate, as in the present case without any provision for setting aside a fund to meet the payments, had an interest in the residuary estate within the meaning of the relevant sections of the Finance

Act. In other words, applying the case to the present circumstances, it decided that duty was primâ facie payable to the extent of the interest ceasing on the death of the annuitant within the meaning or within the provisions of section 5 (1).

In the case of *In re Lord Alington and the London County Council's Contract* [1927] 2 Ch. 253, Lord Russell of Killowen, then Russell J., observed as regards *In re Campbell* that

> " when that case is looked at all that it decided was that where a fund was set aside out of a mixed residue to provide by the income thereof certain annuities, upon the cesser of which the persons entitled to residue would be entitled to the fund, settlement estate duty was payable on so much of the residue as had been set aside. It was held that the fund was limited in trust for persons by way of succession. That decision does not justify the proposition that the existence of a jointure charged on the estate vested in an owner in fee made, under the old law, the estate a settled estate."

Two observations fall to be made in regard to these decisions. In the first place they deal with cases in which a fund had been appropriated exclusively for the services of the annuity or annuities, and so far from there being any expression of opinion in favour of the view that a mere gift in a will of an annuity has the result of effecting a settlement within the meaning of the Finance Act, the general opinion seems rather to tend the other way. In the second place it is plain that the learned Judges placed great reliance on the circumstance that the Finance Act, 1894, defines a settlement by reference to the Settled Land Act, a statute which, as held by the House of Lords, required a generous interpretation (see *Bruce* v. *Ailesbury* [1892] A.C. 356). Their Lordships desire to express no opinion on the question whether, according to English law, there is a settlement within the meaning of the Finance Act in a case where there has been a gift of an annuity by will and no appropriation has been made out of which it is to be paid. The case which they have to decide depends upon the true construction of the Ordinance No. 3 of 1932 of Hong Kong.

It is well settled that in interpreting a taxing statute of a dominion or a colony which contains, on its face, no reference to its origin or to previous legislative history, it is not permissible to consider the evolution of any British statute or provision from which the terms or whole sections of the enactment under consideration may have been taken, or to rely on decisions as to the true interpretation in the Courts of Great Britain of those terms or sections. (See *A.G. for Ontario* v. *Perry* [1934] A.C. 477 at p. 487.) Their Lordships are, therefore, bound to determine the present appeal simply on the true construction of the Ordinance. The cases above referred to have been mentioned partly because they may be of use by way of illustration and partly because they were greatly relied on by the appellants. As regards section 5 (1) there can be no doubt as to its applicability in the present case. There was property of the testator

in which Lady Chater had an interest ceasing at her death and to the extent to which a benefit accrued by the cesser of the annuity that property was deemed to be included in property passing upon the death of the deceased. The difficulty arises when we come to consider the true effect of section 25 (2) untrammelled by any authority. Was there under the will of the testator any property or any estate or any interest in any property which before the death of Lady Chater stood limited to or in trust for the residuary legatees by way of succession? It is clearly not enough to show that there was a species of charge upon the property of the testator for the benefit of Lady Chater. It must be shown that substantially the whole of certain property or of the estate or interest in it was held upon trust, in effect, for Lady Chater during her life and so far as benefit was concerned, passed to the residuary legatees upon her death. This it may be noted—again by way of illustration—was the test adopted by Kennedy J. in *A.G.* v. *Owen* and followed by Stirling L.J., in *In re Campbell;* and that, as already pointed out, in cases where there were strong reasons for giving a wide interpretation to the word "settlement". The whole of the income of the estate was not applied in making the annual payments to Lady Chater. Nor can their Lordships hold that a hypothetical slice of the property passing by the will can properly be treated as an interest in that property within the meaning of section 25 (2). The "slice" indeed is an expression employed in this connexion only for the purpose of valuation. Construing the Ordinance as it stands and without reference to the Settled Land Act, their Lordships must come to the conclusion that the phrase "any property or any estate or any interest in any property", coupled with the words "stands limited" (which are by no means equivalent to "passes or is deemed to pass"), refers to definite property or an estate or interest in it which actually exists, and can be precisely defined. It should, perhaps, be added that for the purpose of an exemption such as that given by section 25 (1) the actual facts must be looked at, and that it is impossible to hold that exemption should be granted merely because events which have not taken place might well have taken place since they were clearly within the powers of the trustees. Their Lordships must, therefore, agree with the judgment of the learned Chief Justice on the petition and of the learned Judges on the appeal to the Full Court.

Their Lordships will humbly advise His Majesty that this appeal be dismissed with costs.

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In the Privy Council.

HARAROLD JOHN ARMSTRONG
AND ANOTHER

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THE ESTATE DUTY COMMISSIONER

DELIVERED BY LORD MAUGHAM

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