

(1959) 03 CAL CK 0006
In the Calcutta High Court

IN RE TAPP : GONVILLE AND CAIUS COLLEGE CAMBRIDGE

Date of Decision : 16-03-1959

Acts Referred:

Finance Act, 1894 — Section 1

Citation : (1960) 40 ITR 6

Judgement

This is an appeal by the Commissioners of Inland Revenue from a judgment of Danckwerts J. dated July 29, 1958, in proceedings brought against them by the present trustees of the will of William Munro Tapp, deceased, for the determination by the court of a question concerning the estate duty payable on the death of Arthur Gerard Sentance Tapp (hereinafter called "the deceased") in respect of his interest under a trust contained in the testator's will for the payment out of the income of the trust fund thereby constituted of an annuity of pounds 3,000 to three named beneficiaries, including the deceased (who was the second of the three to die), or such one or more of them as should for the time being be living, and if more than one in equal shares.

The question in the appeal is whether, having regard to the terms of this trust, there was, on the death of the deceased, a passing u/s 1 of the Finance Act, 1894, of property, in the shape of the share originally accruing of the annuity to which he was entitled at the time of his death, and which then became payable for life to the last survivor of the three named beneficiaries, to be valued actuarially as at his death; or whether such share constituted an interest ceasing on his death in property in the shape of the trust fund out of the income of which the annuity was payable, so as to give rise to a notional passing u/s 2(1)(b) of a "slice" of the capital of the trust fund to be valued in accordance with section 7(7)(b).

The will is dated June 16, 1933. The testator's wife named in the will died in his lifetime. After her death he married again and in contemplation of such remarriage he made a codicil dated September 23, 1935, by which (so far as material for the present purpose) he confirmed his will. The testator died on January 23, 1936, and his will and codicil were duly proved on May 7, 1936.

The only provisions of the will to which it is necessary to refer for the present purpose are those contained in clause 9. By that clause the testator made a general residuary devise and bequest to his trustees upon trusts for conversion and investment and directed his trustees to hold the resulting investments and the investments from time to time representing the same (thereinafter referred to as his trust fund) upon trust to pay out of the income thereof to his wife Kate Garrett Tapp (who predeceased him) during her life the annual payment therein mentioned "and out of the remainder of such income to pay the following annual payments videlicet (a) the sum of pounds 1,500 per annum during the life of my said wife Kate Garrett Tapp and after her death the sum of pounds 3,000 per annum to my sister Catherine Alway my nephew Arthur Gerard Sentence Tapp" (the deceased) "and my niece Phyllis Fawell or such one or more of them as shall for the time being be living and if more than one of them shall be living to be received by them in equal shares."

Catherine Alway died on June 29, 1937, and it is interesting to note that, in accordance with the official practice then followed, for which support is to be found in *In re Cassel* and *In re Duke of Norfolk* (in the Court of Appeal), estate duty was claimed and paid on her death u/s 1 of the Act upon the actuarial value lives of the deceased and Phyllis Fawell and the survivor of them of the one-third share (namely, pounds 1,000 per annum) of three annuity of pounds 3,000 which then accrued to the deceased and Phyllis Fawell for their joint lives and the life of the survivor of them under clause 9 of the will.

The deceased died on July 31, 1956, and thereupon the Estate Duty Office, reversing their previous practice on the strength of the decisions in *In re Payton* and *In re Weigalls Will Trusts* claimed duty on his death under sections 2(1)(b) and 7(7)(b) of their Act on the "slice" of the capital of the trust fund producing the half-share (namely pounds 1,500) of the annuity which had theretofore been payable to the deceased during his life.

The trustees took the view that the less onerous method of assessment, adopted in the case of Catherine Alway, was right, and should be followed in the case of the deceased. The Estate Duty Office, however, maintained their claim under sections 2(1)(b) and 7(7)(b), and the present proceedings ensued.

The trustees, relying upon *In re Cassel* and *In re Duke of Norfolk*, contend that the trust declared by clause 9 of the will created one single and continuing annuity payable out of the income of the trust fund during the period until the death of the last survivor of the three named beneficiaries, and that, on the death of the deceased, there was a passing, within the meaning of section 1 of the Act, of the share (namely, one-half) of that continuing annuity to which he was entitled at his death from his beneficial enjoyment to that of Phyllis Fawell. If that view is right, then it is common ground that the estate duty payable on the death of the deceased should be charged u/s 1 on the principal value of the property so passing, that is to say, the principal value actuarially ascertained as at the death of the deceased of an annuity of pounds 1,500 per annum for the

life of Phyllis Fawell, as the last survivor of the three named beneficiaries.

The Commissioners of Inland Revenue, on the other hand, relying on *In re Payton* and *In re Weigalls Will Trusts*, contend that there was in this case no passing of property on the death of the deceased within the meaning of section 1. They make this submission on the ground that, having regard to the terms of this particular trust, the annuity was not for estate duty purposes property at all, but a mere chose in action or collection or series of choses in action which could have no existence as property apart from the beneficial interests therein. According to this argument, as we understand it, on the death of Catherine Alway her right to receive one-third (or pounds 1,000 per annum) of the annuity ceased, and a like proportion of the annuity ceased with her right to receive it, leaving nothing which could pass on her death, because her part of the annuity, and her right to receive it, were in truth one and the same thing. The subsequent division, in accordance with the trust, of the part of the annuity which had been payable to Catherine Alway between the deceased and Phyllis Fawell in equal shares is on this view accounted for as due to a new and distinct right, springing up in them on Catherine Always death, to the receipt during their joint lives in equal shares of a yearly sum equal to the yearly sum theretofore payable to Catherine Alway. Similarly, it is claimed that on the death of the deceased his right to receive one-half (or pounds 1,500) of the annuity, and with it a like proportion of the annuity, ceased, and a new and distinct right sprang up in Phyllis Fawell to receive during the remainder of her life a yearly sum equal to the yearly sum theretofore payable to the deceased. It follows, in the commissioners submission, that the relevant provisions of the Act are to be found in sections 2(1)(b) and 7(7)(b). In their submission, the effect of the trust for duty purposes was to confer on the deceased "an interest ceasing on [his] death," in the shape of the trust fund out of the income of which the annuity was payable, and that, accordingly, this property is to be deemed by virtue of section 2(1)(b) to have passed on the death of the deceased "to the extent to which a benefit accrues or arises by the cesser of such interest." It is common ground that, if this view is right, the value for duty purposes of the benefit accruing or arising from the cesser of the deceaseds interest must u/s 7(7)(b) be taken as being "the principal value of an addition to the property" (that is, the trust fund under the will) "equal to the income to which the interest extended."

By the judgment under appeal the judge made a declaration to the effect that duty was, as contended by the trustees, payable u/s 1 of the Act on the value at the death of the deceased of a one-half share in a continuing annuity of pounds 3,000 per annum for the remainder of the life of Phyllis Fawell as the last survivor of the three named beneficiaries.

The judge regarded himself as bound so to hold by the authority of *In re Duke of Norfolk*. The commissioners contend that he ought to have followed *In re Payton*, in preference to *In re Duke of Norfolk*, and by doing so to have reached a contrary conclusion.

We should next refer to the four cases already noticed, beginning with *In re Cassel*. In that case a testator bequeathed "Brook House and contents" and the stables held therewith, the premises being held on leases expiring in 1995, to trustees for successive tenants for life and directed that "the rents outgoings rates and taxes for the time being payable in respect of the premises and keeping the same and the contents thereof insured against fire and burglary and in a proper state of preservation should always be paid by my trustees out of the income of my residuary personal estate." On the death of the first tenant for life, the question arose whether the varying periodical payments falling to be made out of income under the above-stated direction attracted estate duty u/s 1 of the Act, on the ground that there was a passing within the meaning of that section of property in the shape of the benefit of the annual sum payable in accordance with the direction above stated, or u/s 2(1)(b), on the ground that they constituted for the purposes of that section an interest ceasing on the death of the deceased tenant for life. Russell J. considered himself bound by *Earl Cowley v. Inland Revenue Commissioners*, though against his own inclination, that the case before him was one in which there was a passing within the meaning of section 1, with the result that that section must be applied to the exclusion of section 2(1)(b). Having thus reached the conclusion that section 1 was applicable, Russell J. said : "What then is the property which passes on Mrs. Cassels death ? In my opinion the true answer is the benefit of the annual sum payable under the special clause. I have already in my previous judgment indicated the nature of this provision. Its duration is for a terms which must expire in 1995. It may expire earlier if Brook House is sold; but in view of the benefits conferred by the special clauses this event, though possible, is improbable. In substance, the trustees are bound for a period of time to apply an annual sum of varying amount for the benefit of the person for the time being entitle under the will to the enjoyment of Brook House and contents. What passes is the right to enjoy the benefit of that annual sum. That is the property which passed on the death of Mr. Cassel."

In *In re Duke of Norfolk*, there was a devise of freehold hereditaments to the testators wife, as his sole executor and trustee, for a terms of 1,000 years on trust to pay out of the income thereof any annuity or annuities bequeathed by him, followed by a bequest to her as such sole executor and trustee of an annuity of pounds 2,000 to commence from his death and to continue to be payable during the joint lives of two named persons (who were father and son) and the life of the survivor of them, and to be paid to the father during his life and after his death to the son, subject in both cases to certain protective trusts. On the death of the father in the lifetime of the son, a question comparable to the question now in issue arose in regard to the estate duty payable in respect of this annuity.

It is important to observe that in *In re Duke of Norfolk*, it was not in dispute that, on the true construction of the will and codicils in that case, the interest in question was one continuing annuity for the longer of the lives of the two

annuitants, and could not be regarded as comprising two successive annuities : the first ceasing and the second commencing on the death of the father. It is further to be noted that the argument for the Crown was not to the effect that there was no passing of the annuity within the meaning of section 1 in respect of which duty could be claimed, and consequently that recourse must be had to section 2(1)(b). Admittedly, there was a passing of the annuity u/s 1, which, on the principles laid down in Cowleys case, excluded recourse to section 2(1)(b), so far as the annuity itself was concerned. It was, however, argued that it was nevertheless open to the Crown to claim in the alternative that, so far as the property charged with the annuity was concerned, the fathers life interest on the annuity was an interest in that property which ceased on his death within the meaning of section 2(1)(b) and, accordingly, brought about a notional passing on the fathers death to the extent to which a benefit accrued or arose by the cesser of such interest, thus attracting duty on a "slice" of the capital of the property ascertained as provided in section 7(7)(b). These arguments were rejected by the court as contrary to the principles laid down in Cowleys case, and also on the ground that the continuing character of the annuity made sections 2(1)(b) and 7(7)(b) wholly inappropriate. There was a further argument to the effect that, even if duty could only be claimed u/s 1, as on an actual passing of the annuity on the death of the father, the property which passed was not simply the right to receive the annuity during the residue of the life of the son but the proportion of the corpus of the property charged corresponding to the proportion of the income thereof required to produce the annuity. This argument was likewise rejected, and, in the result, it was held that on the death of the father there was an actual passing of the annuity u/s 1 and that the annuity must be valued for duty purposes as consisting of the right to receive pounds 2,000 per annum from the death of the father for the residue of the life of the son.

We have been invited by Sir Lynn Ungoed-Thomas, for the commissioners, to distinguish *In re Duke of Norfolk*, from the present case on the strength of the differences in the terms of the relevant dispositions in the two cases and also to discount its effect as an authority on the ground that it proceeded to a great extent on admissions in regard to matters vital to the question raised in the present case.

We agree that the continuing character of the annuity in *In re Duke of Norfolk*, was not disputed, and, having regard to the terms in which it was given, we think it plainly was a continuing annuity.

We also agree that the elaborate argument for the Crown was not based on the contention that there was no passing of the annuity u/s 1, but on the contention that, given such a passing, duty could nevertheless be exacted on a "slice" of capital either u/s 2(1)(b) or section 7(7)(b) or, by analogy to the case of the cesser by death of a life interest, in an aliquot share of a fund.

Nevertheless we think it was necessary to a proper decision of the case that the court should state the principles governing the liability to duty on the death of a

person entitled during his life to a continuing annuity bequeathed for the benefit of several persons in succession. Accordingly, we think we should accept as binding upon us in any comparable case the conclusions expressed by this court in *In re Duke of Norfolk*.

These conclusions were to the effect that *In re Cassel*, if not actually binding upon this court, was right in principle (see per Lord Evershed M.R., per Somervell L.J. and per Jenkins L.J.), and, accordingly, that where (as in *In re Duke of Norfolk* a continuing annuity is payable out of the income of a trust fund to two or more persons in succession, there is a passing within the meaning of section 1 of the Finance Act, 1894, on the death of each of the persons so entitled (other than the last to die) of property in the shape of the annuity, value of which for estate duty purposes is the value as at the death of the person dying of the annuity for the residue of the period for which it is payable.

We do not think there is any material ground of distinction between the annuity in *In re Duke of Norfolk*, and the annuity in the present case.

On the true construction of clause 9 of the will in the present case, the annuity is, in our judgment, a continuing annuity. The trust, as we construe it, is to make one continuous annual payment of pounds 3,000 out of the income of the trust fund to the three named beneficiaries or such of them as shall for the time being be living during one entire period, namely, the period until the death of the last survivor of the three named beneficiaries. We see no justification in the language used for splitting the annual payment of pounds 3,000 into, first, three annuities of pounds 1,000 each payable to one of the three named beneficiaries for his or her life; secondly, two fresh annuities of pounds 500 each springing up on the death of the first beneficiary to die and the consequent cesser of such beneficiary's annuity, one of such fresh annuities of pounds 500 being payable to each of the two surviving beneficiaries during his or her life; and, thirdly, one fresh annuity of pounds 1,500 springing up on the death of the second beneficiary to die and the consequent cesser of such beneficiary's original and additional annuities of pounds 1,000 and pounds 500, such fresh annuity of pounds 1,500 to be paid to the last surviving beneficiary during his or her life.

We cannot accept the contention, urged on behalf of the commissioners, to the effect that *In re Duke of Norfolk* is distinguishable from the present case on the strength of two features of the gift in *In re Duke of Norfolk* which have no counterpart here, namely : (a) the devise to the trustee of freehold hereditaments for a term of 1,000 years upon trust to pay out of the income thereof any annuity or annuities bequeathed by the testator; and (b) the gift of the pounds 2,000 annuity to the trustee in trust for the persons successively entitled. The device of the freehold hereditaments in question for the term of 1,000 years upon trust as aforesaid was no more than a usual conveyancing method of subjecting the income of freeholds to a trust for payment of an annuity or annuities; and the distinction sought to be drawn between a gift out of income of an annuity to a trustee in trust for persons in succession, as in *In re*

Duke of Norfolk, and a plain trust to pay an annuity out of the income of a fund to persons in succession, as in the present case, is to our minds for the present purpose a distinction without a difference. More significant, in our view, are the points of similarity between the two cases, namely : (a) that the effect of the gift was to subject the income of the freehold hereditaments in *In re Duke of Norfolk* and of the trust fund in the present case, to a trust for payment of an annuity to persons in succession; (b) that the annuity given took the form of one continuous annuity or annual payment of the prescribed amount of pounds 2,000 in *In re Duke of Norfolk* and of pounds 3,000 in the present case; and (c) that the duration of the annuity was measured by the life of the survivor of the father and the son in *In re Duke of Norfolk* and by the life of the last survivor of the three named beneficiaries in the present case. We would add that the intermediate gift of the annuity to the trustee in *In re Duke of Norfolk* may well have been due to the circumstances noticed in the report in the All England Reports, though not in the Law Reports, that the interests of the father and the son in the annuity were made subject to certain protective trusts : see the report of the case before Wynn-Parry J.

Accordingly, subject to the effect of *In re Payton*, to which we should next refer, we are of opinion that this case, Like *In re Duke of Norfolk* is a section 1 case, with the result that duty is payable on the property passing, that is the annuity, which must be actuarially valued as at the death of the deceased as an annuity payable during the residue of the life of Phyllis Fawell.

In re Payton was concerned with two contractual pensions payable under certain group policies effected by the Austin Motor Co. Ltd. for the purpose of providing pensions for their employees. The scheme of benefits enabled an employee to take, in lieu of a pension for his own life only, a pension payable to himself during his life and thereafter to his wife if she survived him during her life. Payton, the employee concerned, exercised, with respect to each of two pensions to which he was entitled, the option of converting them so as to include his wife if she survived him. The policies securing the benefits accruing to employees constituted contracts between the insurers and the company but contained a clause under which the company declared itself to be a trustee of the benefits for the persons entitled thereto. On the death of Payton, leaving his wife him surviving, the Estate Duty Office claimed duty on the footing that his death gave rise to an actual passing of the pensions within the meaning of section 1 of the Act. His widow contended that there was no passing u/s 1 but that the pensions to which she became entitled in possession on the death of Payton fell in each case within section 2(1)(d) as being an annuity or other interest purchased or provided by the deceased, which was accordingly to be deemed to pass "to the extent of the beneficial interest accruing or arising..... on the death of the deceased." That view was greatly to the advantage of the widow, as Payton's estate was very large and a passing u/s 1 would entail aggregation, whereas a notional passing u/s 2(1)(d) would not.

It was held by this court (affirming Wynn-Parry J.) that the case fell within section 2(1)(d) and not section 1. Lord Evershed M. R. (delivering the judgment of the court) said this : "Mr. Pennycuick therefore goes further and says that under this contract there has been created a single and identifiable (and intelligible) item of property, namely, the benefit of the societys covenant with the company to pay what we may call the Payton last survivor pension throughout its terms; which piece of property is enjoyed successively and is enforceable successively by the deceased and the plaintiff. On this case he contends that the case is in *pari materia* with the Duke of Norfolks case. We have been unable to accept the argument. If the societys covenant had been with the company to pay the latter during some period-for example, a fixed period or the life of the longest liver of a number of named persons - a certain annual sum; and if the company had then declared itself a trustee of the annual sum or of the benefit of the covenant for A and B successively, it may well be (though we do not so decide) that the case would have been covered by the Duke of Norfolks case. But the effect of the contract seems to us to be otherwise. Adhering (as enjoined by Mr. Pennycuick to do) to the actual terms of the bargain, there is here no covenant with the company to pay the company anything : there is a covenant with the company to pay the pension, that is, the annual sum of pounds x by monthly instalments, to the deceased during the period from his retirement to his death and then to pay the same pension, that is, the same annual sum by like instalment, to the plaintiff (if she survives the deceased) during the rest of her life. Though the distinction be a fine one, there does not seem to us to be in the latter case, in any real sense of the term, any single and continuing proprietary interest distinct from the beneficial interests, under the contract, of the deceased and the plaintiff respectively, which proprietary interest can be said to pass on the deceaseds death."

Lord Evershed M. R. later said "In the Duke of Norfolks case this court held that the case before them was covered by *In re Cassel* which it though (having regard to late affirmation and notwithstanding certain criticisms made of Russell J.s judgment) binding at least on the Court of Appeal (see the judgment of Lord Evershed M.R.); but it held also that the annuity bequeathed by the first and second codicil, being an item of property separate and distinct from the beneficial interests therein, passed upon the death of the first annuitant within the meaning of section 1 of the Act of 1894. In our judgment the present case is essentially different from the Duke of Norfolks case and also from *In re Cassel*. In each of the latter cases the annuity arose out of the specified trust property - the provisions of the will directed the trustees to raise the amount of the annuity yearly out of the income of the trust funds, for securing which in Duke of Norfolks case a term of years was also created. The annuity so raised was given to the trustees to hold (in the Duke of Norfolks case), or was to be applied by the trustees (*In re Cassel*) on the trust for certain persons successively. In the present case the only rights and interests subsisting or capable of subsisting arise exclusively out of the terms of the contract of insurance. The only right of

property which, according to the suggestion of the Crown, emerges from the respective policies is a chose in action. But a mere chose in action cannot, in our judgment, be considered or comprehended apart and separately from the right to enjoy, by the terms of the contract, the benefit contracted to be given. If there may be any rights or interests in the company, as distinct from the separate and individual rights of the pensioners, they seem accordingly to us altogether too spectral to be fairly analogous to the interests of trustees in the Norfolk or Cassel cases or to be fairly regarded as passing on the death of Mr. Payton within the meaning of section 1 of the Finance Act, 1894."

These passages make it perfectly plain that *In re Payton* was regarded by the court as wholly different case from *In re Duke of Norfolk*, the pensions in the former case being purely contractual and not payable out of the rents of a landed estate (as in *In re Duke of Norfolk*) or out of the income of a trust as in the present case. The interests arising out of the policies of insurance in *In re Payton* could aptly be described as the Master of the Rolls described them, as "mere choses in action"; but we must say we deprecate the application of that description to an annuity payable out of the income of a fund under a trust. So far from casting doubt on *In re Duke of Norfolk*, it appears to us that *In re Payton* reinforces its authority.

In *In re Weigalls Will Trusts*, Harman J. followed *In re Payton* on the ground that, upon the true construction of the gift with which he was concerned, "the two annuities did not constitute one piece of property which came into existence on the death of the testator and which passed from the brother to the widow on his death, but that on his death a new beneficial interest arose which was now vested in the widow...." In other words, in the view taken by the judge of the construction of the gift before him, the case was not one of the continuing annuity. We find ourselves unable to accept that construction of the gift in question, and are accordingly of opinion that *In re Weigalls Will Trusts*, was wrongly decided.

Be that as it may, in the present case, in our judgment, there was a single continuing annuity. On the death of the deceased his life interest in one-half of the annuity no doubt came to an end. But the annuity did not cease. It continued to be payable, with the difference that the half-share thereof which had theretofore been payable to the deceased during his life became payable to Phyllis Fawell as the last survivor of the three named beneficiaries. Accepting, as we must, the principles laid down in *Cowleys case*, with regard to the respective functions of sections 1 and 2 of the Act, that seems to us to be reasonably plain case of "passing" within the meaning of section 1, and we think it would be impossible to hold otherwise consistently with *In re Duke of Norfolk* and *In re Cassel*. Still less is it possible to hold, consistently with these cases, that a continuing annuity payable under a trust out of the income of a fund to two or more persons in succession or (by parity of reasoning) to several persons and the survivors or survivor of them does not constitute property capable of passing

on the death of each successive taker other than the last.

For these reasons we are of opinion that this appeal fails and should be dismissed.

Appeal dismissed.

Leave to appeal to the House of Lords.

Solicitors : Solicitor of Inland Revenue; Charles Russell & Co.