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UNIVERSITY OF LONDON  
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No. 36 of 1952.  
10 FEB 1954  
INSTITUTE  
LEGAL  
33590

In the Privy Council.

ON APPEAL  
FROM THE HIGH COURT OF AUSTRALIA.

BETWEEN—

NORMAN CLYDE OAKES *Appellant*

— AND —

COMMISSIONER OF STAMP DUTIES OF THE  
STATE OF NEW SOUTH WALES *Respondent.*

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CASE FOR THE RESPONDENT.

RECORD.

1. This is an Appeal from a Judgment and Order of the High Court of Australia dated the 8th May, 1952, affirming a Judgment and Order of the Supreme Court of New South Wales dated the 13th September, 1951. The Appeal arises upon a Case stated by the Commissioner of Stamp Duties of New South Wales (the Respondent herein) under the New South Wales Stamp Duties Act, 1920-1940, and depends upon the construction and effect of Section 102(2)(d) of the same Act read in conjunction with the definitions of the expression "disposition of property" and of the word "gift" in Section 100 of the same Act. These Sections (which are set out below) impose Death Duty in respect of certain *inter vivos* gifts upon the death of the donor. pp. 14-35.  
pp. 8-12.  
p. 1.

2. The question for decision in this Appeal is whether, in the circumstances set out below, the whole of the property which was at the date of the death of Leslie William Friend (hereinafter called "the Deceased") subject to the trusts of a Deed Poll made by him on the 1st September, 1924, should be included in his estate for the purposes of the assessment and payment of such Death Duty, or whether one-fifth p. 4.

only or some other and if so what proportion of the net value of the said property should be so included.

p. 2, l. 9. 3. The Deceased, who was a grazier, was at the date of the said Deed Poll the owner in fee simple of certain lands constituting a grazing property known as "Ellerston" near Scone in the State of New South Wales which had been purchased by him early in the year 1924 with his own moneys and up to the date of the Deed had been used by him for his own benefit.

4. By the said Deed Poll the Deceased declared, so far as material for the purposes of this Appeal:— 10

p. 4, l. 13. (i) that as from the 1st July, 1924, he had held and thenceforth would hold the said lands (subject to certain incumbrances mentioned in the Schedule to the said Deed Poll) and the rents, issues and profits thereof upon trust that he or other the trustee or trustees for the time being of the said Deed (thereinafter and hereinafter called "the Trustee") should either retain and use the said lands or at the Trustee's absolute discretion at any time or from time to time sell and convert into money the same or any part thereof and invest the proceeds of such sale and conversion upon such securities real or personal and whether authorised by law for the investment of trust funds or not (and with liberty from time to time to vary and transpose the investments) as the Trustee should in his uncontrolled discretion think fit; 20

p. 4, l. 31. (ii) that the said lands and proceeds of sale thereof and the securities upon which the same might from time to time be invested (by the said Deed and hereinafter called "the Trust Fund") and the income of the Trust Fund should be held by the Trustee upon trust for the Deceased and his children Henry James Friend, Donald Stuart Friend, Terence Maxwell Friend, and Gwynneth Ailsa Friend as tenants in common in equal shares; but subject to a provision for accruer of the shares of any children who died under 25 years without leaving a child; 30

p. 4, l. 40. (iii) that without limiting the generality of the Trustee's discretion to invest upon such securities as he should think fit the Trustee might at any time or times lay out the Trust Fund in the purchase of land in the Commonwealth of Australia and of stock, plant or other personal property situate there and of any value whether exceeding the amount of the Trust Fund or not, upon such terms as regards the payment of the purchase money and conditions of sale as the Trustee might in his discretion think fit and with liberty to allow the purchase money to remain secured on mortgage from the Trustee to the vendor for such period at such rate of interest 40

and with such powers of sale in favour of the mortgagee and provisions as the Trustee might think fit and as the mortgagee should reasonably require, and that the mortgagee should be under no responsibility to enquire into the purpose for which the mortgage was being given or whether the same was within the powers conferred by the said Deed, and that the Trustee should stand possessed of any property to be purchased as aforesaid upon trust that he should resell the same or any part thereof when or as he might think fit and should hold the money to arise from such resale after payment thereof of any mortgage or other debt that might be owing in respect thereof and of the expenses of sale upon the same trusts and with the same powers as were in the said Deed declared and contained concerning the Trust Fund including the aforesaid power of purchasing property and should in the meantime and until such resale pay and apply the rent or income arising from the property to be purchased as aforesaid to the person or persons and in the manner to whom and in which the income of the money laid out in the purchase of such property would for the time being be payable under the trusts of the said Deed if such purchase had not been made with liberty from time to time to pay or apply the whole or such part as the Trustee might think fit of the said rent or income in or towards reduction or discharge of any mortgage or other debt for the time being owing in respect of the premises or any part thereof;

(iv) and that the Trustee should have the following further powers and discretions (*inter alia*):— p. 5, l. 30.

(a) to manage any real and personal property the subject of the trust and to employ such servants or agents and at such remuneration as the Trustee might think fit and to erect, construct, pull down, repair, alter or improve such buildings, fences, dams, tanks, plant, machinery or works or improvements of any kind whatsoever upon any such property as the Trustee in his uncontrolled discretion and as if he were the absolute owner thereof might consider proper and to make any outlay from capital or income for any of the purposes aforesaid; p. 5, l. 32.

(e) to raise on mortgage of the premises or any part thereof such moneys as the Trustee might consider advisable for any of the purposes mentioned in sub-paragraph (a) above or for discharging any mortgage or encumbrance on the premises or any part thereof or otherwise at the Trustee's discretion for the protection or benefit of the trust property and to secure the repayment of any moneys so raised with interest at such rate as the Trustee might think proper by mortgage of the premises or any part thereof and upon such terms in all respects as the Trustee might deem expedient; p. 6, l. 9.

p. 6, l. 30.

(h) to appropriate and partition any real or personal property forming part of the Trust Fund to or towards the share of any person or persons therein under the trusts thereinbefore in the said Deed contained and for that purpose to fix the value of such real or personal property so appropriated as the Trustee should think fit and to charge any share with such sums by way of equality of partition as he might think fit and so that every such appropriation, valuation and partition should be binding upon all persons interested in the Trust Fund provided always that as regards any share of the Trust Fund not absolutely vested any such appropriation should be without prejudice to the exercise of any powers expressly or impliedly given to the Trustee by the said Deed; 10

p. 6, l. 42.

(i) to raise any part or parts not exceeding one-half of the share of capital of any child of the Deceased in the Trust Fund notwithstanding that the same might be liable to be divested under the provisions of the said Deed and apply the same for his or her benefit or advantage;

p. 7, l. 1.

(j) in addition to reimbursing himself all expenses incurred by him in the administration of the trust the Trustee should be entitled to remuneration for all work done by him in managing and controlling any property forming part of the Trust Fund or carrying on the business of a grazier or pastoralist or other business in the course of his administration of the said fund in the same manner and as fully in all respects as if he were not a Trustee of the said Deed; 20

p. 7, l. 9.

(k) to purchase notwithstanding that he was a Trustee of the said Deed all or any property comprising the Trust Fund or any part thereof by public auction or by private contract provided in the latter case that the sale should be conducted by Goldbrough Mort and Company Limited or be made at a price and upon terms and conditions approved by that Company or by a valuer or other nominee appointed by the said Company; 30

p. 7, l. 16.

(l) to carry on or join in carrying on in all its branches every class of business relating to grazing, farming or pastoral pursuits and for this purpose to breed, raise, fatten, purchase, sell, lease, use and otherwise deal in all kinds of live and dead stock, wool, hides, skins, tallow or any other pastoral or agricultural produce and to purchase, take on lease or in exchange, hire or otherwise acquire any real or personal property with power to retain and employ in any such business the capital of the Trust Fund or any part thereof and to introduce any person as a partner therein and to engage or employ any person or persons at such remuneration as the Trustee should think 40

proper and generally to act or concur in acting in all matters relating to any such business as if the Trustee were absolutely entitled thereto and to delegate all or any of the powers vested in the Trustee in relation to any such business to any person or persons whom the Trustee might think fit and with power for the Trustee to form or join with any partner in any such business in forming a company with liability limited by shares to take over any such business and to accept payment of the purchase money either in cash or fully paid shares or partly in one way and partly in another and so that the Trustee should be free from all responsibility and be fully indemnified out of the Trust Fund in respect of any loss arising in relation to any such business.

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5. The Deceased as Trustee under the said Deed managed and controlled the said lands and conducted thereon the business of a grazier until in the year 1928 he sold the said lands and discharged the encumbrances thereon. The net proceeds of the sale of the said lands were invested by the Deceased as Trustee under the said Deed (a) in a grazing property known as "Glendon" and (b) in certain mortgages.

p. 2, l. 14.

6. At the date of the said Deed the children of the Deceased named as beneficiaries therein were infants under the age of 21 years. The Deceased died on the 17th October, 1947. At that date all but one of the said children had attained the age of 25 years and that one has since attained that age.

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p. 3, l. 21.

p. 1, l. 12.

7. From the date of the said Deed until his death the Deceased was at all times the sole Trustee thereof and managed the properties and funds which were from time to time subject to the trusts thereof. He resided on the grazing property. He received out of the income of the Trust Fund amounts which he fixed from time to time as being the amounts which he should receive, pursuant to the power in that behalf in the said Deed contained, as remuneration for the work done by him in managing and controlling the said properties and in carrying on the business of a grazier or pastoralist in the course of his administration of the said fund. The income of the said fund after deducting therefrom all outgoings and expenses, including such remuneration as aforesaid, was divided by the Deceased into five equal shares and the Deceased credited each of his said children with one such equal share crediting the fifth share to himself pursuant to the trusts of the said Deed. The amounts credited to each such child were paid or applied by the Deceased for or towards the maintenance and education of such child or were paid to the mother of such child for or towards his or her maintenance and education or were paid to such child after he or she had come of age.

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p. 2, l. 26.

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p. 1, l. 12.

8. The Deceased died domiciled within the State of New South Wales. Probate of his last Will was duly granted on the 5th April, 1948, by the Supreme Court of New South Wales to Walter Goldsmith Lumby (who has since died) and the Appellant Norman Clyde Oakes the executors named therein.

p. 3, l. 36.

9. The questions submitted for the decision of the Court by the Case stated were:—

(1) Should the whole of the property which was at the date of the death of the Deceased subject to the trusts of the said Deed be included in his estate for the purposes of the assessment and payment of Death Duty? 10

(2) How should the costs of this case be borne and paid?

10. The directly relevant provisions of the New South Wales Stamp Duties Act 1920–1940 are contained in Part IV of the Act, and are, so far as material, in the following terms:—

S.100: In this Part . . . unless the context or subject-matter otherwise indicates or requires—

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“Disposition of property” means—

- (a) any conveyance, transfer, assignment . . . or other alienation of property whether at law or in equity;
  - (b) the creation of any trust;
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“Gift” means any disposition of property made otherwise than by will whether with or without an instrument in writing without full consideration in money or money’s worth;

\* \* \* \* \*

S.102: For the purposes of the assessment and payment of death duty . . . the estate of a deceased person shall be deemed to include and consist of the following classes of property:—

\* \* \* \* \*

- (2)(d) Any property comprised in any gift made by the deceased at any time, whether before or after the
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passing of this Act, of which *bona fide* possession and enjoyment has not been assumed by the donee immediately upon the gift and thenceforth retained to the entire exclusion of the deceased, or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died.

11. The Case was heard in the Supreme Court of New South Wales on the 28th June and 10th July, 1951, before Street C.J. and Maxwell and Owen JJ., who, on the 13th September, 1951, answered the first question submitted by the said Case 'Yes' and ordered that the costs of the Respondent of and incidental to the Case be taxed by the proper officer of that Court and that such costs when so taxed and allowed be paid by the Appellant to the Respondent or to the Crown Solicitor.

12. The reasons for the Judgment were given by the Chief Justice and Owen J. In these reasons Maxwell J. concurred. The reasons shortly were that the fact that the grazing property, the subject of the trust, was at all times worked as one composite income producing asset, meant that each undivided share obtained a very real advantage from its unbroken association with the others so that (apart from the fact that the Deceased retained the right to fix and in fact paid himself his remuneration) it could in no real sense be said that the children of the Deceased assumed and retained possession of their respective interests to the entire exclusion of any benefit to him.

13. The Appellant filed a Notice of Appeal to the High Court of Australia against the said Judgment and Order of the Supreme Court of New South Wales, and the Appeal was heard on the 27th and 28th November, 1951, before Dixon C.J. and Williams, Fullagar, Kitto, and Webb JJ. The High Court gave judgment on the 8th May, 1952, by a majority (Dixon C.J., and Williams and Fullagar JJ.) dismissing the Appeal. Kitto and Webb JJ. were of the opinion that the Appeal should be allowed.

14. It was accepted by all the Judges of the High Court that, in the language of Kitto J., "the crucial question in this case must be whether "each of the donees, the four children, assumed and retained *bona fide* "possession and enjoyment, to the entire exclusion of the Deceased and "of any benefit to him, of the beneficial interest which he or she took by "the operation of the Deed". They also agreed that "the possession and "enjoyment" which must be assumed was, in the words of the Chief Justice, "to be understood as that kind of possession and enjoyment of "which the interest given is susceptible or capable according to its "character or incidents".

p. 21, l. 19. 15. The majority of the Court held that the gift to the Deceased's children consisted in the creation of an equitable tenancy in common under which he and they were entitled in equal shares and that it followed that Duty was payable on the whole of the property because it could not be said of the undivided shares of the children that possession and enjoyment of the kind of which the interests admitted were assumed and retained by them to the entire exclusion of the Deceased or of any benefit to him. The full possession of the station property, coupled with residence in the homestead, by the Deceased, and a preliminary salary from the returns before the ascertainment of divisible net profits, were benefits to the Deceased which trespassed upon the possession and enjoyment by the children of their undivided equitable interests as tenants in common. 10

p. 20, l. 38. The Chief Justice also held that the Deceased's course of dealing represented what might be called a total indivisible situation which ought not to be broken up into component parts to be separately examined. The fact was that the Deceased placed himself in a position in which he enjoyed almost all the advantages and amenities that ordinarily flow from carrying on a sheep or cattle station from a homestead on the property where the owner dwells with his family. 20

p. 35, l. 15. 16. Webb and Kitto JJ.'s reason for dissenting was that in their opinion by the Deed the children of the Deceased were given only residues. They got interests which were limited *ab initio* by the terms of their creation; and the limits were such that the interests were inherently insusceptible of being so possessed and enjoyed as to preclude the Deceased from deriving those benefits which in fact he derived. Kitto J. would have agreed that if the property comprised in the gift had consisted of four one-fifths of the fee simple of the trust property (whether legal and equitable or only equitable), the case would have fallen clearly enough within Section 102(2)(d). 30

17. The Respondent submits that the Judgments and Orders of the Supreme Court of New South Wales and of the High Court of Australia appealed from are correct and should be affirmed for the following amongst other

### REASONS.

1. BECAUSE the true effect of the said Deed was to create an equitable tenancy in common between the Deceased and his four children, whereunder the said children did not immediately assume *bona fide* possession and enjoyment of their interests and thenceforth retain the same to the entire exclusion of the Deceased or of any benefit to him. 40



2. BECAUSE it was a benefit to the Deceased trenching on the interests of his children under the said Deed to reside on the trust property.
3. BECAUSE it was a benefit to the Deceased trenching on the interests of his children under the said Deed to have remunerative employment at the cost of the trust property.
4. BECAUSE it was a benefit to the Deceased trenching on the interests of his children under the said Deed to have what was in effect a right of pre-emption over the trust property and each part thereof.
- 10 5. BECAUSE the provisions of the Deed of the 1st September, 1924, and the manner of carrying those provisions into effect adopted by the Deceased represented a total indivisible situation whereunder the Deceased retained all the benefits that ordinarily flow from the absolute ownership of a grazing property.
- 20 6. BECAUSE it is the clear intention of the Act that property should not be withdrawn from the taxable estate of its owner by a gift unless the gift and exclusion of the owner from possession and enjoyment of the subject-matter of it for the rest of his life are immediate and absolute.
7. BECAUSE the Judgments of the Supreme Court of New South Wales and of the majority of the High Court of Australia were right and ought to be affirmed.
8. BECAUSE *bona fide* possession of the property comprised in the gift was not assumed by the donees immediately upon the gift or thenceforth retained to the entire exclusion of the Deceased or of any benefit to him.

FRANK SOSKICE.

E. B. STAMP.

No. 36 of 1952.

In the Privy Council.

**ON APPEAL**  
FROM THE HIGH COURT OF AUSTRALIA.

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BETWEEN  
**NORMAN CLYDE OAKES - Appellant**

— AND —

**COMMISSIONER OF STAMP DUTIES  
OF THE STATE OF NEW SOUTH  
WALES - - - - Respondent.**

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**CASE FOR THE RESPONDENT.**

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