

13, 1958

IN THE PRIVY COUNCIL

No. 6 of 1958

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

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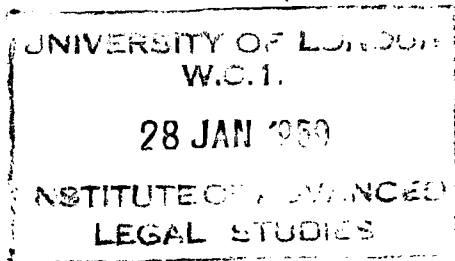
B E T W E E N :      CLIFFORD JOHN CHICK and  
                         JACK WESLEY CHICK Executors  
                         of the Will of John Chick  
                         deceased      ...      Appellants

- and -

THE COMMISSIONER OF STAMP  
DUTIES      ...      Respondent

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CASE FOR THE RESPONDENT



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WALTONS & CO.,  
101, Leadenhall Street,  
E.C.3.  
Solicitors for Appellants.

LIGHT & FULTON,  
24, John Street,  
Bedford Row,  
W.C.1.  
Solicitors for Respondent.

ON APPEAL  
FROM THE SUPREME COURT OF NEW SOUTH WALES

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B E T W E E N : CLIFFORD JOHN CHICK and JACK  
WESLEY CHICK Executors of the  
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CASE FOR THE RESPONDENT

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1. This is an appeal from a judgment and orders of the Supreme Court of New South Wales dated the twenty-eighth day of June 1957. The appeal arises upon a case stated by the Commissioner of Stamp Duties of New South Wales (the Respondent herein) under Section 124 of the New South Wales Stamp Duties Act, 1920-1956, and depends upon the construction and effect of Section 102(2)(d) of that Act (in the form in which that paragraph stood as at the twenty-first day of April 1952, the date upon which John Chick (hereinafter referred to as the deceased) died) 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 (Section 102(2)(d) being set out as it stood as at the date of the death of deceased and prior to the Stamp Duties (Amendment) Act, 1952) impose death duty, upon the death of the donor, in respect of certain gifts made by him inter vivos.

pp. 7, 19.

p.1

2. The question for decision in this appeal is whether, in the circumstances set out below, the pastoral property known as "Mia Mia" which, at the date of death of the donor, the said deceased, was the property of his son, Clifford John Chick, should be included in the dutiable estate of the deceased, in accordance with the provisions of the

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said Act.

- p. 1 3. The deceased, who was at all times material to the questions involved herein, a grazier, on the 19th of February, 1934, gave to his son, Clifford John Chick, the grazing property known as "Mia Mia" which is situate near Gurley in the State of New South Wales. The gift was of the land and of the improvements thereon.
- p. 2 4. At the time of the making of the gift the donee, Clifford John Chick, was residing on the property and, as from the date of the gift and up to the 1st of July, 1935, the donee had exclusive possession and enjoyment of the property, working it wholly on his own account. The deceased at no time material to this appeal, resided on the property given, he having another grazing property near Gurley known as "Bulgate" upon which he resided. 10
- p. 2 5. On the 25th of July, 1935, the deceased, the donee and another son named Jack Wesley Chick entered into a partnership agreement as graziers and stock dealers. The partnership agreement, which was in writing provided that the partnership should be deemed to have commenced from the 1st of July, 1935 and, subject to the conditions later appearing in it, would continue until dissolved in the manner later set forth in such agreement. 20
- p. 3 6. By clause numbered 5 of the agreement it was provided that the partnership business should be conducted on the respective holdings of the partners at or near Gurley and that these holdings should be used for the purpose of partnership stock only. The said clause also provided that the partnership business should be conducted at such other place or places as the partners might from time to time agree upon. 30
- p. 3 7. By clause 7 of the agreement the net profits of the business, after providing for the expenses of management, became divisible between the partners in equal shares and they were to bear losses likewise. 40
- pp. 3, 4 8. By clause 10 of the partnership agreement it was provided that each partner should be just and faithful to the others in all transactions relating to the partnership and should devote proper attention to the business of the partnership and diligently and faithfully employ himself therein and use his best endeavours and skill to

carry out the same for the utmost benefit of the partnership.

p. 4

9. By clause 12 of the agreement it was provided that in the case of any partner wishing to terminate the partnership he might do so by six months notice in writing to the other partners to determine the partnership whereupon it should determine accordingly.

10. By clause 13 of the partnership agreement all lands held by the partners at the date of the agreement, or subsequently acquired, should remain the sole property of any such partner and should not, under any consideration, be taken into account as or deemed to be an asset of the partnership and any such partner should have and retain the sole and free right to deal with his lands as he might see fit.

pp. 4, 5

11. Each of the partners brought into the partnership certain livestock and plant previously owned by them and, with regard to lands, they each allowed the partnership thenceforth to use a property owned by them. With regard to the donee, Clifford John Chick, the property which was in this manner and thenceforth used by the partnership was the given property "Mia Mia", which was used for the depasturing of partnership stock up to the 26th of September, 1951.

p. 5

12. On such last mentioned date the partnership aforesaid hired for consideration to the donee and one Muriel Alice Chick, trading as a separate partnership, certain livestock for a period of twelve months. Such livestock were depastured on the given property and were so depastured at the date of the death of the deceased on the 21st of April, 1952. The partnership formed by the deceased, the donee and the said Jack Wesley Chick, continued until the death of the deceased.

pp. 5, 6

13. After the death of the deceased Probate of his Will was duly granted by the Supreme Court of New South Wales in its Probate Jurisdiction to the donee, the said Clifford John Chick, and the other partner, the said Jack Wesley Chick, who were the executors named in such Will.

p. 6

14. The executors made a return of property for purposes of assessment under the Stamp Duties Act aforesaid. The respondent in computing the final

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balance of the estate for purposes of duty, included the value of "Mia Mia" as at the date of death of the deceased, subject to certain minor deductions not in issue between the parties.

pp. 6, 7

15. The executors duly requested the respondent to state a case for the opinion of the Supreme Court under the provisions of the Stamp Duties Act aforesaid. The respondent accordingly submitted for the decision of the Supreme Court the following questions: 10

(1) Was the value of the property known as "Mia Mia" properly included in the dutiable estate of the said deceased for the purposes of assessment and payment of Death Duty on his estate.

(2) Whether the amount of duty properly chargeable upon the said estate was -

(a) £27,100:11: 6; or

(b) £13,590: 0: 0. 20

(3) Whether the appellants or the respondent should pay the costs of this appeal.

The figures referred to in Question (2) depended upon the inclusion or exclusion of the property "Mia Mia". If it was included, then the amount of duty would be that stated in Question (2)(a); if it was excluded, the amount of duty payable would be that indicated in Question (2)(b).

16. The directly relevant provisions of the Stamp Duties Act, 1920-1949 (as the Act was cited at the date of the death of the deceased) are contained in Part IV of the Act and were, so far as material, in the following terms:- 30

Section 100:

In this Part....unless the context or subject matter otherwise indicates or requires.... "disposition of property" means - (a) any conveyance, transfer, assignment or other alienation of property whether at law or in equity; 40  
"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;.....

Section 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 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.

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17. The case was heard in the Supreme Court of New South Wales on the 10th 11th and 28th days of June, 1957, before Street C.J., Roper C.J. in Eq., and Walsh J., and a single judgment only was delivered. The first question raised in the said case was answered yes; the second question was answered: £27,100.11.6, and the Court ordered that the appellants should pay the costs of the respondent of the appeal.

pp. 7, 8, 9, 10,  
11, 12, 13, 14, 15,  
16, 17, 18.  
p. 18

18. It was accepted by the Court as being conceded, and in any event as being beyond argument, that what was given was the property "Mia Mia" for an estate in fee simple in possession, and that the case was in no sense one in which, at the time of the gift, there was any arrangement, stipulated or even contemplated, under which the donor, the deceased, would retain or thereafter acquire any interest in or right with respect to the property.

pp. 10, 14

19. It was further accepted as being beyond argument that the donee had, after the making of the gift, assumed exclusive possession and enjoyment of the property until the formation of the partnership in 1935, that is to say, for a period of some sixteen months.

p. 8

20. The question in the case was whether the donee, after the making of the gift, thenceforth

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p.8

retained bona fide possession and enjoyment of the property comprised in the gift 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.

pp. 14. 15

21. The Court held that the donor had not been so excluded, and reached this conclusion by reason of the terms of the partnership agreement and of the manner in which, in fact, the property had been used after the formation of the partnership in 1935. The Court held that the donor received benefit from the use of the given property by the partnership of which he was a member and that this benefit was incompatible with the exclusive retention by the donee of the possession and enjoyment of the property given, that is to say, that the donee had not retained possession and enjoyment to the exclusion of the donor and had not retained possession and enjoyment to the exclusion of any benefit to the donor which impaired the possession and enjoyment by the donee. 10 20

p. 15

22. It was further held by the Court that the fact that the donee received benefits from the partnership agreement equivalent to those received by the donor and that the donee decided to enter into the partnership agreement as a suitable and profitable way in which to use and enjoy his rights as beneficial owner of the land did not take the case out of the section. If the donor, in fact, received a benefit which impaired the possession and enjoyment of the donee, the fact that such benefit was procured for consideration did not, the Court held, prevent it from being a benefit which would attract the section. 30

p. 16

23. The Court further held that the fact that the partnership agreement was an independent transaction subsequent in time to the gift and not connected with it by any stipulation or understanding, prior to or contemporaneous with the gift, did not prevent any benefit arising from the transaction being a benefit within the meaning of the section. In this regard, the Court relied upon the decision of the High Court in O'Connor v. Commissioner of Stamp Duties, 47 C.L.R. 601, and the decision of the Judicial Committee of the Privy Council in Commissioner of Stamp Duties v. Permanent Trustee Co. Ltd. (1956) A.C. 512. 40 50

24. The Court further held that it was unnecessary, in order that duty be attracted by the section, that the benefits which were derived by the deceased from the partnership agreement be referable to the gift, in the sense that they were motivated or induced thereby, and in this regard referred to the explanation in the reasons of Dixon C.J. and Kitto J. in Commissioner of Stamp Duties v. Owens, 88 C.L.R. 67, of a passage in the judgment of the Judicial Committee in Munro v. Commissioner of Stamp Duties (1934) A.C.61.

pp. 10, 16, 17

25. The Court next held that there was no material difference between the considerations which apply when the question is whether immediate assumption of exclusive possession and enjoyment had taken place, and those which are applicable when the question is whether exclusive possession and enjoyment of the property had, after its assumption been thenceforth retained.

p. 18

26. The Court finally held that it was not necessary, on the view taken by it, to determine the question as to the proper construction of the partnership agreement, namely, as to whether, under clause 5 of the partnership agreement, the donee was bound, so long as the partnership continued, to allow it to use the given land or whether, under clause 13, he was at liberty, without terminating the partnership, to exclude the partnership from use of the land. In this regard the Court relied upon the fact that the land had been used and that, under the section in question, it was not material to decide whether or not there was an enforceable contractual right to continue to use the land during the duration of the partnership.

p. 18

27. The respondent submits that the judgment and orders of the Supreme Court of New South Wales appealed from are correct and should be affirmed for the following amongst other

### R E A S O N S

- (1) BECAUSE possession and enjoyment of the property given was not, after the making of the gift, thenceforth retained to the entire exclusion of the deceased. By the partnership agreement the deceased, in common with the other partners, acquired



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a right, during the currency of the partnership, to have the property given used exclusively for partnership purposes and a right to possession and enjoyment to effect this object.

- (2) BECAUSE possession and enjoyment of the property given was not, after the date of the gift, retained to the entire exclusion of any benefit to the deceased, since, by the partnership agreement, the deceased, in common with the other partners, acquired the right, during the currency of the partnership, to have the property used exclusively for partnership purposes. 10
- (3) BECAUSE, during the currency of the partnership agreement, the donor acquired, in common with the other partners, a licence to use the property, coupled with an interest, and, therefore, not terminable at will; in the alternative, because during the currency of the partnership agreement the donor acquired a licence to use the given property. 20
- (4) BECAUSE, between the date of the making of the partnership agreement and the date of his death, or at least between the date of the partnership agreement and September, 1951, the deceased in common with the other partners whether as of right or otherwise, in fact obtained the use of the property given for partnership purposes, which constituted a benefit within the meaning of the section. 30
- (5) BECAUSE the benefits obtained by the donor, either as of right or otherwise, in fact trenched upon the interest of the donee to use the property given in any way wished by the donee.
- (6) BECAUSE, if the donor in fact obtained possession and enjoyment, or obtained a benefit which trenched upon the possession and enjoyment by the donee, the section is attracted, even though the possession and enjoyment or benefit so referred to arose subsequently to the making of the gift by a transaction in all respects independent thereof. 40
- (7) BECAUSE, if possession and enjoyment was

in fact acquired by the donor, or if a benefit trenching upon possession and enjoyment by the donee was procured, it is quite immaterial whether such possession and enjoyment or benefit were procured for consideration whether full or partial given by the donor.

- 10 (8) BECAUSE the relevant enquiry under the section is as to whether a transaction of the type which occurred gives rise to possession and enjoyment in the parties other than the donee, or gives rise to a benefit in the parties other than the donee, which benefit impairs the donee's possession and enjoyment of the land. If this question be answered in the affirmative, and the other parties include the donor, then it is nothing to the point that the donee has voluntarily chosen to enter into such a transaction as an ordinary method of using the land owned by him. The section permits such transactions without penalty if the donor be not a party acquiring possession and enjoyment or such a benefit, but penalises such transactions if the donor be such a party.
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- 30 (9) BECAUSE if the section be otherwise attracted it is not a further condition of liability that the gift be the motive or reason for the transaction giving rise to the benefit to the donor.
- 40 (10) BECAUSE if it be found that the donor has after the gift received a benefit from or having any relation to the property given, it is respectfully submitted that the section applies whether such benefit impairs the donee's possession and enjoyment or not. It is respectfully requested in this regard that the statement to the contrary in the judgment in Oakes v. Commissioner of Stamp Duties ((1954) A.C.57) be re-considered.
- 50 (11) BECAUSE bona fide possession of the property comprised in the gift was not after the making of the gift thenceforth retained to the entire exclusion of the donor or of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not.

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(12) BECAUSE the judgment of the Supreme Court of New South Wales was right and ought to be followed.

GORDON WALLACE

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LIGHT & FULTON,  
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