Judgment 13, 1958

PC

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IN THE PRIVY COUNCIL No. 6 of 1958

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N CLIFFORD JOHN CHICK and JACK WESLEY CHICK Appellants

- and -

THE COMMISSIONER OF STAMP DUTIES ... Respondent

RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL No. 6 of 1958

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES

B E T W E E N CLIFFORD JOHN CHICK and JACK WESLEY CHICK Appellants

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RECORD OF PROCEEDINGS

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IN THE PRIVY COUNCIL No. 6 of 1958

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES
IN TERM No. 254 of 1956

B E T W E E N CLIFFORD JOHN CHICK and JACK WESLEY CHICK Appellants

- and -

THE COMMISSIONER OF STAMP DUTIES ... Respondent

10 RECORD OF PROCEEDINGS

No. 1.

CASE STATED

In the Supreme Court of New South Wales

No. 1.

Case Stated 11th June 1956

IN THE SUPREME COURT OF NEW SOUTH WALES) Term No. 254 of 1956

IN THE MATTER of the Estate of JOHN CHICK late of Gurley in the State of New South Wales Grazier deceased

AND IN THE MATTER of the Stamp Duties Act, 1920-1949

20 B E T W E E N CLIFFORD JOHN CHICK and JACK WESLEY CHICK ... Appellants

- and -

THE COMMISSIONER OF STAMP DUTIES ... Respondent

CASE STATED PURSUANT TO SECTION 124 OF THE STAMP DUTIES ACT, 1920-1949

1. On the 19th day of February 1934 John Chick (hereinafter called "the deceased") transferred by

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way of gift to his son Clifford John Chick a grazing property near Gurley known as "Mia Mia" together with the improvements thereon.

2. At the date of the said gift the said Clifford John Chick resided in the homestead erected upon the said property and continued to reside thereon up to the date of death of the deceased namely the 21st April 1952.

3. From the time of the making of the gift up to 1st July 1935 Clifford John Chick had exclusive possession of the said property worked it on his own account and depastured thereon his own livestock.

4. The deceased at all material times resided in a homestead erected upon a grazing property near Gurley belonging to him and known as "Bulgate".

5. By an agreement in writing dated 25th July 1935 the deceased the said Clifford John Chick and another son Jack Wesley Chick entered into partnership as graziers and stock dealers under the name or style of John Chick & Sons.

6. The said partnership agreement so far as material provides as follows:

> Clause (1) The partnership shall commence or be deemed to have commenced from the 1st July 1935 and subject to the conditions hereof shall continue until dissolved in manner hereinafter appearing.
>
> Clause (2) The name or style of the partnership shall be John Chick & Sons and the said John Chick shall be the manager of the said business and his decision shall be final and conclusive in connection with all matters relating to the conduct of the business.
>
> Clause (3) The Bankers of the said partnership shall be the Moree Branch of the Bank of New South Wales or such other Bank as the partners may from time to time agree upon. All cheques upon such account shall be drawn in the firm name and may be so drawn by any partner.
>
> Clause (4) The capital of the said business shall consist of the livestock and plant now owned by the respective partners or henceforth to be acquired in connection with the said business.

Clause (5) The said business shall be conducted on the respective holdings of the partners at or near Gurley aforesaid and such holdings shall be used for the purposes of the partnership stock only and/or at such other place or places as the partners may from time to time agree upon.

Clause (6) The usual books of account of the partnership shall be kept by Messrs. Cummins and Wallace of Moree Chartered Accountants and/or such other firm of Accountants as the partners may from time to time agree upon and each partner shall be at liberty to at all times inspect such books of account and to make such extracts therefrom as he may think fit.

Clause (7) The net profits of the said business after providing for the expenses of management shall be divided between the partners in equal proportions and they shall in the like proportion bear all losses and at the end of each yearly period the books of the partnership shall be fully checked and the net profits divided between the partners in the respective shares hereinbefore mentioned.

Clause (8) Each partner shall at all times punctually and duly pay and discharge his separate debts and engagements whether present or future and keep indemnified therefrom and from all actions proceedings costs claims and demands whatsoever in respect thereof the partnership property and the other partners or their representatives.

Clause (9) All rates taxes charges and all other costs expenses and outgoings which shall happen in respect of the partnership business shall be paid out of the income of the business and in case of deficiency thereof by the partners in the proportions hereinbefore mentioned.

Clause (10) Each partner shall be just and faithful to the others in all transactions relating to the partnership and at all times give to the others a just and faithful account of the same and upon every reasonable request furnish a full and correct explanation thereof to the others and devote proper attention to

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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.

Clause (11) No partner shall without the written consent of the others enter into any bond bail or security with or for any person (other than any partner hereunder) or do or knowingly cause to be done or suffer to be done anything whereby the partnership property or any part thereof may be seized extended or taken in execution assign mortgage or charge his share in the partnership or any part of any such share or make any other person a partner therein compromise or compound or (except upon payment in full) release or discharge any debt due to the partnership.

Clause (12) In the case of any partner wishing to terminate the partnership at any time or if any partner shall assign or encumber his share in the partnership or any part thereof or shall suffer same to be charged for his separate debt under the Partnership Act or shall become bankrupt or insolvent or lunatic or otherwise permanently incapable of attending to the partnership business or shall act in any manner inconsistent with the good faith observable between the partners or shall be guilty of any conduct which shall be a ground for the dissolution of the partnership by the Court or in the case of any partner absenting himself from the partnership business for any period more than thirty days consecutively or otherwise in any one period of twelve months without the consent of the other partners then and in every other such case it shall be lawful for the other partners by notice in writing in the case of a desire to terminate the partnership by six months' notice and in every other case by one month's notice in writing to the offending or incapacitated partner or his trustee or committee to determine the partnership whereupon the partnership shall determine accordingly.

.....

Clause (13) Any and all lands held by any of the partners herein as at the date of this agreement or acquired by any such partner

subsequently thereto shall be and remain the sole property of any such partner and shall not under any consideration be taken into account as or deemed to be an asset of the partnership and any such partner so holding any such land shall have and retain the sole and free right to deal with the same as he may see fit.

Clause (14) All disputes and questions whatsoever which shall arise during the partnership or afterwards between the partners or their respective representatives touching these presents or the application thereof or construction thereof or any clause or thing contained or any amount valuation or division of assets or liabilities to be made hereunder as to any deed act or omission of any partner or as to any matter in any way relating to the partnership business or the affairs thereof or the rights and duties and liabilities of any person under these presents shall be referred to a single arbitrator in case the partners agree upon one otherwise to three arbitrators one to be appointed by each partner in accordance with and subject to the provisions of the Arbitration Act in force in this State or any Statutory modification thereof for the time being in force.

7. Each of the said partners brought into the partnership livestock and plant previously owned by them.

8. Each of the said partners at the date of the said agreement owned a property near Gurley aforesaid which three properties were thenceforth and in accordance with the partnership agreement used for the depasturing of partnership stock. The property owned by Clifford John Chick and so used was the property known as "Mia Mia" and partnership stock continued to be depastured thereon up to the 26th September, 1951.

9. On the 26th September, 1951 the deceased Clifford John Chick and Jack Wesley Chick trading as John Chick & Sons hired for consideration to the said Clifford John Chick and one Muriel Alice Chick trading as Mia Mia Pastoral Co. certain livestock for a period of twelve months from the 26th September 1951. Such stock so hired were by the

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hirers depastured on the property known as "Mia Mia".

10. The partnership of John Chick & Sons continued until the death of the deceased.

11. On the 21st April 1952 the said deceased died and Probate of his Will was duly granted by this Honourable Court in its Probate Jurisdiction to Clifford John Chick and Jack Wesley Chick the executors therein named who are the appellants herein.

12. The said executors for the purposes of the Stamp Duties Act 1920-1949 made a return of property dutiable under such Act in the estate of the said deceased. The respondent herein in computing the final balance of the estate for the purposes of the said Act included therein the value of "Mia Mia" as at the date of death subject to two minor deductions not in issue and thereby increased the final balance of the said estate by the sum of £33,061. 8. 7 and on the final balance so calculated assessed duty payable by the appellants in the sum of £27,100.11. 6 together with certain sums due for interest which are not here in issue. If the property "Mia Mia" should not be included in the said dutiable estate the amount of duty payable would be the sum of £13,590

13. Notice of the assessment as above calculated was issued by the Commissioner and duty in accordance with such assessment was paid but being dissatisfied with such assessment the executors did duly deliver to the Commissioner notice in writing requiring him to state a case for the opinion of this Honourable Court.

14. The Commissioner accordingly states this case for the opinion of this Honourable Court upon the following questions, namely :

(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

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

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DATED this 11th day of June 1956.

Sgd. E.T. Woods

Commissioner of Stamp Duties.

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No. 2.

Reasons, 28th June 1957

REASONS OF THE SUPREME COURT OF NEW SOUTH WALES

IN THE SUPREME COURT)
)
of NEW SOUTH WALES)

CORAM: STREET, C.J.
ROPER, C.J. in Eq.
WALSH, J.

Friday, 28th June, 1957.

CHICK v. COMMISSIONER OF STAMP DUTIES

JUDGMENT

STREET, C.J.)
ROPER, C.J. in Eq.) This is a case stated by the
WALSH, J.) Commissioner of Stamp Duties under s.124 of the Stamp Duties Act, 1920, (as amended) for the opinion of this Court as to the assessment by the Commissioner of death duty payable in the estate of John Chick who died on 21st April, 1952. The appellants, Clifford John Chick and Jack Wesley Chick, are the executors of the Will of the said John Chick.

The only question in dispute as to the correctness of the assessment arises from the fact that the Commissioner included in the final balance

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of the estate, for the purposes of such assessment, the value of a grazing property known as "Mia Mia". The Commissioner claims that that property was properly included under the provision contained in s.102(2)(d) of the Act and this is disputed by the appellants. Since the deceased died before the amending Act No.41 of 1952 came into operation paragraph (d) must be considered according to the terms in which it was phrased prior to the amendment introduced by that Act. These terms were as follows:-

> "102.(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."

The property called "Mia Mia", on 19th February, 1934, transferred by the deceased to his son, Clifford John Chick (one of the appellants) by way of gift. At that date the son was already residing in the homestead on the property and he continued to do so up to the date of the deceased's death. From the date of the gift until 1st July, 1935, that is, for some sixteen months after the gift, the son had exclusive possession of the property, working it as a grazing property with his own livestock and for his own benefit. There is therefore no contest in this case as to whether bona fide possession and enjoyment of the property given was assumed immediately by the donee. It is clear that it was so assumed. The contest turns upon the effect of what took place in 1935 and thereafter, the contention of the Commissioner being that the donee did not retain bona fide possession and enjoyment of the property to the entire exclusion of the deceased or of any benefit to the deceased.

What took place in July, 1935, was that a partnership agreement came into operation. The terms of that agreement are contained in an agreement in writing dated 25th July, 1935, but operative as from 1st July, 1935, which was made between the deceased, his said son Clifford and another son Jack Wesley Chick. It provided that the partnership

was to continue until dissolved in the manner and circumstances set forth in Clause 12. That clause included provisions that any partner wishing to terminate the partnership might do so by six months' notice in writing. It also provided that in certain events, such as the death, incapacity or misconduct of a partner, the other partners might terminate the partnership by one month's notice in writing. In fact, however, it was not terminated in the lifetime of the deceased, but continued until his death.

At the time of this agreement each partner owned a grazing property, the property owned by the donee Clifford Chick being the property Mia Mia. Each of them also owned livestock and plant.

By the terms of the agreement the livestock and plant then owned by the partners became partnership assets (Clause 4) but the lands owned by them respectively remained the sole property of the owner and did not become assets of the partnership, and it was provided that any partner holding such land should hold and retain "the sole and free right to deal with the same as he may see fit" (Clause 13). It was also provided however, by Clause 5, as follows:-

> "The said business shall be conducted on the respective holdings of the partners at or near Gurley aforesaid and such holdings shall be used for the purposes of the partnership stock only and or at such other place or places as the partners may from time to time agree upon".

In fact the holdings of the three partners were used for the depasturing of stock owned by the partnership from the date of the agreement up to the date of death of the deceased except insofar as that arrangement was altered by a transaction which took place in September, 1951. This transaction was that the partnership already mentioned made a hiring agreement with another partnership which consisted of the donee Clifford Chick and his wife. By this agreement the latter partnership hired certain livestock owned by the former partnership for a period of twelve months and such stock was depastured on the property Mia Mia. Neither party has contended before us that this hiring agreement has any importance in the decision of this case, which has been argued upon the footing that it turns upon a consideration of the

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rights and obligations created by the partnership agreement of 1935 and of the facts as to the user of the Mia Mia property pursuant to that agreement.

This is not a case in which any difficulty arises, as it has in many cases, in determining what was the subject matter of the gift. It is not and could not be suggested that what was given was anything less than an estate in fee simple in possession. It is not suggested that prior to or at the time of the gift any interest or right in the donor or in any partnership of which he was or might become a member, relating to the user of the land, had already been created or was stipulated or was contemplated, or that what was given might have to be regarded as being given subject to such an interest or right. As already stated, after the making of the gift the donee had exclusive possession and use of the property, working it on his own account with his own stock. When the partnership agreement was subsequently made it was made between three parties, each of whom was a grazier with his own property and his own stock and plant and (so far as appears from the case stated) having no prior arrangement with the others for the depasturing of stock on land belonging to either of the others.

Such being the facts, we are of the opinion that this case cannot be determined otherwise than in accordance with an application to those facts of the decision of the majority of the High Court in Commissioner of Stamp Duties v. Owens (88 C.L.R. 67) and of the reasons contained in the joint judgment of Dixon C.J., and Kitto, J., in that case. It is true that there is a difference between the facts in the two cases, upon which difference reliance is placed by the appellants. For reasons which will appear later, we think that this difference is not material to the determination of the case before us. It is true also that Webb, J., who agreed in the decision of the majority, gave separate reasons, from which the appellants seek to gain some support for their contentions in a manner to be mentioned later. But, as stated, we have come to the conclusion that the case mentioned governs this case in principle and that an application to the facts of this case of the reasoning of Dixon C.J. and Kitto, J., appears to us to require us to determine this case in favour of the respondent Commissioner. That reasoning we think,

with respect, should be accepted by us as correct, particularly as it appears to us that nothing inconsistent with it is to be found in the judgments of the dissenting Justices, Williams, J., and Taylor, J.

In order to explain our views as to the effect and applicability of the case of Commissioner of Stamp Duties v. Owens, it is desirable to examine that case in some detail.

A father, who owned two grazing properties, made a verbal agreement with his son that they should work and manage the two properties in common and should share the profits and losses of such business in unequal shares, the share of the father being two-thirds and that of the son being one-third. This arrangement operated for some years. The father then made a gift to his son of one of the properties, retaining the other in his ownership. The son thereupon became the registered proprietor of the property given him for an estate in fee simple. Thereafter the two properties were worked upon the same basis as before, except that profits and losses were then to be divided equally, and this arrangement was carried on until the father's death.

The arrangements originally made for the working of the properties and those made at or about the time of the gift were all verbal. A number of statutory declarations and one unverified statement had been supplied by the executors to the Commissioner and were annexed to the stated case. The stated case was considered on the footing that it should be treated as if there were set forth in it all the facts which might be fairly gathered from these documents. These documents gave details as to the conversations which the donor had had with the donee and with other members of the family concerning the transaction. In this Court the majority (Street, C.J. and Herron, J.) took the view that the facts were not distinguishable in any material respect from those in Munro v. Commissioner of Stamp Duties (1934 A.C. 61) and accordingly decided the case in favour of the executors: Owens v. Commissioner of Stamp Duties (53 S.R. 379). Owen, J., who dissented regarded the facts as different from those in Munro's case. At p.384 he said:

> "I am of opinion that the proper conclusion is that the gift was an absolute and unconditional gift of the land in fee and was not a gift

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of it subject to or shorn of whatever rights of user of the land the partnership may then have had."

Upon that view of the facts Owen, J., was of opinion that s.102(2)(d) applied. He went on to say:

> "After the gift was made the land given was used by a partnership of which the testator was a member, for the purpose of carrying on a farming and grazing business thereon, and it is impossible in my opinion, to say that the Testator was entirely excluded from the possession and enjoyment of the property given or entirely excluded from any benefit arising from the subject matter of the gift. In this respect the case seems to me to be identical with Nicol's case." (1931 N.Z.L.R. 718).

Later, after referring to Lang v. Webb (13 C.L.R. 503) and other cases which he regarded as establishing that s.102(2)(d) would be attracted if, after receiving an absolute and unconditional and immediate gift of the fee, a donee granted a lease of the land to a partnership of which the donor was a member, he said:

> "I can see no distinction in this respect between such a case and one where the donee, after or simultaneously with the making of the gift, licenses the donor to occupy or use the property given for business purposes. In either case the donor has not been entirely excluded from possession of the gift or from any benefit so connected therewith as to detract from the donee's possession or enjoyment."

On an appeal from that decision to the High Court Dixon, C.J., and Kitto, J., took a view of the facts similar to that taken by Owen J., and agreed with the reasons which he had given for differing from the majority of this Court. On the other hand Williams, J., and Taylor, J., took a view of the facts which made applicable the decision in Munro's case. But they did not indicate any opinion that, if the contrary view were accepted, namely that the gift was an absolute and unconditional one and completely free from any agreement or arrangement for the use by the partnership of the land given. the property might nevertheless escape duty. They did not advert to doubts which had been expressed by

Herron, J., (53 S.R. 389-390) as to whether or not if Munro's case were held to have no application the property would fall within the paragraph. Of course it was not necessary in the circumstances for them to consider such questions as were mentioned by Herron, J. Nevertheless, there appears to be nothing in what was said in the dissenting judgments which is contrary to the views taken by Owen, J., and by Dixon, C.J., and Kitto, J., as to the principles applicable to what those learned judges considered to be the facts of the case. In the joint judgment of Dixon, C.J., and Kitto, J., the use of the property given for the purpose of conducting a grazing business in which the deceased and the donee were partners was described as a benefit which the deceased had with respect to the property. They then stated that the critical question was whether the estate or interest which was the subject of the gift was an estate or interest entitling the donee to a possession and enjoyment "the exclusive assumption and retention of which would have meant the denial to the deceased of the benefit which in fact he derived." (88 C.L.R. at p.82) From this it appears clear to us that in the opinion of their Honours the benefit to which they referred, namely the use of the property for a grazing business in which the donor had a partnership interest, was a benefit of the kind to which the paragraph is applicable. It also appears clear that they considered that the receiving of such a benefit in fact by the donor is incompatible with the exclusive assumption and retention by the donee of possession and enjoyment of the estate or interest given when that which has been given is an absolute and untrammelled estate in fee simple.

Their Honours went on to discuss the facts in order to determine the question whether or not such was the estate given. They considered in some detail the facts and the grounds of the decision in Munro's case. We shall revert later to their analysis of the sense in which should be read a passage in the opinion of Their Lordships in Munro's case which relates to the question whether a benefit received is to be regarded as a benefit "referable" to the gift. Their Honours, having reviewed the facts and reached the conclusions already indicated, said this:

> "If ever there was a gift of an estate in fee simple, carrying the fullest right known to the

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law of exclusive possession and enjoyment, surely this was such a gift. The benefits which the donee allowed the deceased to derive, the benefits, indeed, which by his own efforts he assisted him to derive, were incompatible with an exclusive assumption and retention by the donee of the possession and enjoyment of the property given."

(88 C.L.R. at p.88).

In the present case it is not disputed that the gift was one of an absolute and untrammelled estate in fee simple. Therefore Munro's case is not applicable. The benefits which the deceased derived were of precisely the same kind as those obtained by the donor in Owens' case. It appears to follow, from an acceptance of the reasons of Their Honours, that the receiving by the deceased of such benefits was incompatible with the exclusive retention by the donee of the possession and enjoyment of the property given. Therefore it does not appear to be possible for us to hold, consistently with the decision in Owens' case that the property there in question was dutiable, that in this case duty is not attracted. But a number of arguments were submitted by the appellants in support of the proposition that we might so hold without any inconsistency with Owens' case and it is proper to make some reference to these arguments.

It was said that in the interpretation of the paragraph one must look to what happened from the point of view of the donee rather than from that of the donor. If it be found that the donee begins immediately and continues to exercise his full rights of possession and enjoyment of what is given without any impairment of those rights so far as he is concerned, it is not to the point that by a dealing made by him in the exercise of such rights the donor gets some benefit. It was correctly pointed out that certain types of possession might be found in the donor without the paragraph being attracted, e.g. possession as a trustee. It was argued that if there was nothing which detracts from, impairs or cuts down the possession and enjoyment of the donee, the paragraph does not apply. It was said that this is such a case.

The principle that the entire exclusion which the paragraph requires is exclusion from possession and enjoyment of the beneficial interests which the

donee acquires, that is, it requires that there must not be any impairment or detraction from or trenching upon the full possession and enjoyment of the beneficial interests given, is of course accepted by us. The contrary was formally submitted by counsel for the Commissioner, but it was acknowledged that what counsel called the "impairment principle" was not open to challenge in this Court. This is clearly so: see for example Oakes v. Commissioner of Stamp Duties (85 C.L.R. 386 at pp.398-9); and on appeal to the Privy Council (1954 A.C. 57 at pp.73-4).

But we do not think that this principle is of any assistance to the appellants in this case. It was argued for the executors in Owens' case (88 C.L.R. at p.79) that the benefit of a partner in a partnership voluntarily entered into by the donee is not a benefit which "trenches upon" his possession of the land. But it is a necessary conclusion from the decision in that case that this argument was rejected.

Not unconnected with the foregoing argument and yet separate from it, was the submission that it was important to consider that the rights and benefits permitted by the donee to the donor were not gratuitous but were for value, and it should be assumed for full value. The donee received equivalent benefits from the partnership agreement. He decided upon this transaction as a suitable and profitable way in which to use and enjoy his rights as beneficial owner of the land. The facts just stated may be taken as correct, but do not, in our opinion, affect the liability of the property to duty. In Owens' case, as in this, the partners both received corresponding benefits from the partnership. Yet duty was held to be payable. In Oakes v. Commissioner of Stamp Duties (1954 A.C. 57) the remuneration received by the settlor was assumed by their Lordships to be reasonable and to be no more than would have been appropriate for any other manager. Yet it was held to be a benefit within the paragraph.

The next argument submitted was that this was an independent transaction which was subsequent in time to the gift and was in no way connected with it by any stipulation or arrangement or understanding prior to or contemporaneous with the gift. Further, it was not connected with the gift in the sense that the gift might be regarded as a motive

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or reason for the donee deciding to enter into such a transaction. In such circumstances, it was contended, the paragraph does not apply. The transaction is not "referable to the gift" as (so the argument runs) it is required to be in order to attract duty.

Upon this aspect the authorities contain conflicting opinions which we think it is unnecessary to review in detail. The relevant authorities as they stood at that time were considered at length in Rudd v. Commissioner of Stamp Duties (37 S.R. at 385-393) by Owen, J., who regarded them as not supporting any such interpretation of the paragraph. On the other hand, the judgments of Davidson,J., in the same case, in which Maxwell, J., concurred, and of this Court in Perpetual Trustee Co.Ltd. v. Commissioner of Stamp Duties (Sargood's case) (36 S.R. 160) lend support to the opposing view, as do those of Higgins, J., and Powers, J., in Commissioner of Stamp Duties v. Thomson (40 C.L.R. 394).

In the present state of the authorities we are unable to accept the submission that for the reasons now under consideration the present case is one in which duty does not attach to the property. In the first place we think it is established by the authorities that the mere facts that the transaction is subsequent to the gift and is independent of any prior stipulation or arrangement do not suffice to prevent duty attaching: see O'Connor v. Commissioner of Stamp Duties (47 C.L.R. 601): Commissioner of Stamp Duties v. Permanent Trustee Co. (Davies' Case) (1956 A.C. 512). Upon the further argument that in this case duty is not attracted because the partnership agreement and the benefits which the deceased got from it were not referable to the gift in the sense that they were not motivated or induced by the gift, we are of opinion that there need not be any such connections between the transaction of gift and the rights or benefits which the donor obtains in order that the paragraph may operate. It is true that in Owens' case (88 C.L.R. 67 at p.95) Webb, J., appears to indicate that dutiability may depend upon the benefit being referable to the gift in the sense just mentioned. But in the reasons of Dixon, C.J., and Kitto, J., an explanation is given of that part of the judgment in Munro's case from which this concept of "referability" appears to derive. As so explained, what was said in Munro's case has no application to the question now under

consideration. A substantially similar view of that passage in Munro's case had been taken by Owen, J., in Rudd's case (37 S.R. at p.393). Accepting as we do the reasons of Dixon, C.J., and Kitto, J., on this point as being correct, statements to be found in other cases which are based upon a different view of the meaning of what their Lordships said in Munro's case cannot be regarded by us as authority for importing into the words of the paragraph a meaning which excludes any rights or benefits not referable to the gift in the sense for which the appellants contend.

It was submitted that to decide this case against the appellants would be contrary to the decision in Thomson's case (40 C.L.R. 394). We do not think that this is so. As already stated, the argument for the appellants gains support from what was said in the judgments of Higgins, J., and Powers, J., in Thomson's case. That case was, however, decided upon an enactment which was in a different form from the provision now under consideration. Moreover, the four Justices who held that duty was not attracted by the corresponding provision did so for different reasons, and the reasons of Knox, C.J., and Gavan Duffy, J., do not assist the appellants. Knox, C.J., adopted the view which had been taken in the Supreme Court as to what was in reality the subject matter of the gift, namely that it was a reversion expectant upon a lease and not an estate in possession. Upon that view the reason why duty was not attracted was that the benefits derived by the deceased were benefits derived from a right or interest in the property which had never been given at all but had been retained. The principle applicable in those circumstances is the same as that upon which Munro's case was later decided. The reasons of Gavan Duffy, J., do not appear, except that it is stated that he did not adopt all the reasons relied on by the Supreme Court. The actual decision of the High Court was that the property was dutiable for a different reason. In these circumstances we cannot regard the case as a binding authority upon the question now under consideration.

In relation to Owens' case, the appellants submitted that the High Court was directing its attention rather to an immediate assumption of exclusive possession and enjoyment than to the question of its retention thenceforth. It was said that different considerations apply when the sole question is

In the Supreme Court of New South Wales

No. 2.

Reasons, 28th June 1957 - continued.

whether exclusive possession and enjoyment was retained. We are unable to see that this distinction makes any material difference, either to the problem as it arises upon the actual words of s.102(2)(d) or to the applicability of the observations already mentioned of Dixon, C.J., and Kitto, J., as to the incompatibility of the benefits taken with exclusive possession and enjoyment by the donee. They refer to both assumption and retention of possession and enjoyment, but there is nothing to suggest that what they said would not apply with equal force to the one considered separately from the other. If benefits are incompatible with the assumption of possession and enjoyment by the donee to the entire exclusion of the donor or of any benefit to him, it is difficult to see that benefits of precisely the same kind can be compatible with the exclusive retention of such possession and enjoyment.

Upon the view of the matter which we have taken it is not necessary to decide a question which was raised as to the proper construction of the partnership agreement. The question was whether the donee was bound, so long as the partnership continued, to allow it to use his land, as Clause 5 indicated, or whether he could, because of the concluding part of Clause 13, exclude the partnership from using it without first terminating the partnership. The partnership continued in fact to use the land and we think it immaterial to decide whether or not it had an enforceable contractual right to continue to do so throughout the duration of the partnership.

For the reasons stated, we are of opinion that the questions submitted by the case stated should be answered:

(1) Yes.

(2) £27,100.11. 6

(3) The appellants should pay the costs of the respondent of the appeal.

No. 3.

RULE OF SUPREME COURT OF NEW SOUTH WALES ON STATED CASE

In the Supreme Court of New South Wales

No. 3.

Rule on Stated Case, 28th June 1957

IN THE SUPREME COURT OF NEW SOUTH WALES

TERM No. 254 of 1956

IN THE MATTER of the ESTATE of JOHN CHICK Late of Gurley in the State of New South Wales Grazier deceased

AND IN THE MATTER of the Stamp Duties Act 1920 - 1949.

B E T W E E N

CLIFFORD JOHN CHICK and JACK WESLEY CHICK ... Appellants

- and -

THE COMMISSIONER OF STAMP DUTIES Respondent

Friday the twenty-eighth day of June One thousand nine hundred and fifty-seven

THIS MATTER coming on to be heard before the Honourable Sir Kenneth Whistler Street K.C.M.G. Chief Justice The Honourable Ernest David Roper Chief Judge in Equity and the Honourable Cyril Ambrose Walsh Justices of the Supreme Court of New South Wales on the tenth and eleventh days of June instant WHEREUPON AND UPON READING the Case Stated by the Commissioner of Stamp Duties pursuant to Section 124 of the Stamp Duties Act 1920 - 1949 filed herein on the twenty-second day of June One thousand nine hundred and fifty-six AND UPON HEARING what was alleged by Mr. N.H. Bowen of Queens Counsel with whom was Mr. R.J. Ellicott of Counsel on behalf of the above named Appellants Clifford John Chick and Jack Wesley Chick and by Mr. G. Wallace of Queen's Counsel on behalf of the said Commissioner of Stamp Duties IT WAS ORDERED on the Eleventh day of June instant that the matter stand for Judgment And the same standing in the list for Judgment this day THIS COURT DOTH DETERMINE that the question (1) of the

In the Supreme Court of New South Wales

No. 3.

Rule on Stated Case, 28th June 1957 - continued.

said Stated Case that is to say "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" be answered "Yes" and that the question (2) of the said case that is to say "Whether the amount of duty properly chargeable upon the said estate was (a) £27,100.11. 6 or (b) £13,590. 0. 0" be answered "£27.100.11. 6" and that the question (3) of the said case that is to say "Whether the appellants or the respondent should pay the costs of this appeal" be answered "the appellants should pay the costs of the respondent of the appeal".

AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper Officer of this Court to tax the costs of the said Commissioner of Stamp Duties of and incidental to this case And that such costs when so taxed and allowed be paid by the said Clifford John Chick and Jack Wesley Chick to the said Commissioner of Stamp Duties or to F.P.MacRae Crown Solicitor for the State of New South Wales.

By the Court
For the Prothonotary,
(Sgd.) E.F. Lennan
Chief Clerk.

No. 4.

RULE GRANTING FINAL LEAVE TO APPEAL TO HER MAJESTY IN COUNCIL

In the Supreme Court of New South Wales

No. 4.

Rule granting Final Leave to Appeal to Her Majesty in Council, 23rd September 1957.

IN THE SUPREME COURT OF NEW SOUTH WALES) Term No. 254 of 1956

IN THE MATTER of the Estate of JOHN CHICK late of Gurley in the State of New South Wales Grazier deceased

AND IN THE MATTER of the Stamp Duties Act 1920-1949

B E T W E E N CLIFFORD JOHN CHICK and JACK WESLEY CHICK ... Appellants

- and -

THE COMMISSIONER OF STAMP DUTIES Respondent

The Twenty-third day of September, 1957.

UPON MOTION made this day pursuant to the Notice of Motion filed herein on the fourth day of September, 1957 WHEREUPON AND UPON READING the said Notice of Motion the affidavit of Graham Murray Cole sworn on the third day of September, 1957, and the Prothonotary's Certificate of Compliance AND UPON HEARING what is alleged by Mr. R.J. Ellicott of Counsel for the Appellants and Mr. Henchman of Counsel for the Respondent IT IS ORDERED that final leave to appeal to Her Majesty in Council from the judgment of the Court given and made herein on the twenty-eighth day of June, 1957, be and the same is hereby granted to the Appellants AND IT IS FURTHER ORDERED that upon payment by the Appellants of the costs of preparation of the Transcript Record and despatch thereof to England the sum of Twenty-five pounds (£25. 0.0) deposited in Court by the Appellants as security for and towards the costs thereof be paid out of Court to the Appellants.

By the Court,

For the Prothonotary

(Sgd.) E.F. Lennon

Chief Clerk L.S.

No. 6 of 1958

IN THE PRIVY COUNCIL

ON APPEAL
FROM THE SUPREME COURT OF
NEW SOUTH WALES

B E T W E E N

CLIFFORD JOHN CHICK and JACK WESLEY CHICK ... Appellants

- and -

THE COMMISSIONER OF STAMP DUTIES ... ... Respondent

RECORD OF PROCEEDINGS

WALTONS & CO.,
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E.C.3.
Solicitors for Appellants.

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