

13, 1958

No. 6 of 1958.

In the Privy Council.

28 JAN 1959

ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES.

52112

BETWEEN

CLIFFORD JOHN CHICK and JACK WESLEY  
CHICK Executors of the Will of JOHN CHICK  
deceased . . . . . Appellants

AND

10 THE COMMISSIONER OF STAMP DUTIES . Respondent.

Case for the Appellants.

RECORD.

1. This is an appeal by leave of the Supreme Court of New South Wales from a judgment of that Court given on 28th June, 1957, upon a Case Stated by the Respondent under s. 124 of the Stamp Duties Act, 1920-1949 (N.S.W.). The issue raised by the Case is whether or not certain lands, situate in the State of New South Wales, ought, in the circumstances below mentioned, to be included in the estate of the above-named John Chick (hereinafter called "the deceased") for the purpose of assessing the death duty payable in respect of the said estate under the said Act. p. 19. pp. 7-18. pp. 1-6. p. 1.

2. The relevant sections of the Stamp Duties Act, 1920-1949, are in the following terms:—

Section 101.—In the case of every person who dies after the passing of this Act, whether in New South Wales or elsewhere, and wherever the deceased was domiciled, duty, hereinafter called death duty, at the rate mentioned in the Third Schedule to this Act shall be assessed and paid—

(a) upon the final balance of the estate of the deceased, as determined in accordance with this Act.

30 The minimum amount of death duty payable under any assessment shall be two shillings.

p. 8, ll. 10-20.

Section 102.—For the purposes of the assessment and payment of death duty but subject as hereinafter provided, 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 10  
or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died.

p. 8, ll. 22-28.

pp. 1-2, 1-3.

p. 2, ll. 4-12.

pp. 7-18.

3. The lands in question were duly transferred by way of gift by the deceased to his son, Clifford John Chick, on 19th February, 1934, and bona fide possession and enjoyment of the lands was assumed by the said Clifford John Chick immediately upon the gift being made, but the Respondent claims, and the Supreme Court has held, that such possession was not thenceforth retained by the son Clifford John Chick to the exclusion of the deceased or of any benefit to him of whatsoever kind solely because of the fact that on and from 25th July, 1935, until 26th September, 1951, 20  
the said lands were used in common with other lands owned by the deceased and another son, Jack Wesley Chick, for the purposes of carrying on as graziers and stock dealers, a partnership pursuant to an agreement entered into on 25th July, 1935, between the deceased and his said two sons.

p. 2, ll. 16-20.

pp. 7-19.

4. The Respondent accordingly claimed and the Supreme Court held that the said lands should be included in the estate of the deceased by reason of the provisions of s. 102 (2) (d) above. The respondent did not claim that the said lands should be so included under any other provision.

p. 6, ll. 4-10.

5. The deceased died on the 21st April, 1952, and Probate of his Will 30  
was duly granted by the Supreme Court of New South Wales to the Appellants as the executors therein named.

pp. 1-2.

6. Prior to 19th February, 1934, the deceased was the owner of an improved grazing property near Gurley in the State of New South Wales known as "Mia Mia."

p. 8, ll. 22-24.

7. On 19th February, 1934, the deceased duly transferred the said property by way of gift to his son, Clifford John Chick.

p. 8, ll. 25-27.

p. 2, ll. 13-15.

8. At the date of the gift, Clifford John Chick resided in the homestead erected upon the said property, and continued so to reside until the deceased's death. The deceased, at all material times, resided in a 40  
homestead erected upon another grazing property near Gurley, known as "Bulgate."

9. From the time of the making of the gift until July, 1935, Clifford John Chick had exclusive possession of the said property known as "Mia Mia," worked it on his own account, and depastured thereon his own livestock. p. 5, ll. 32-40.  
p. 8, ll. 28-30.

10 10. By an agreement in writing, dated 25th July, 1935, the deceased, the said Clifford John Chick, and another son of the deceased, Jack Wesley Chick, entered into a partnership as graziers and stock dealers under the name and style of John Chick & Sons. The agreement provided that the said partnership should commence or be deemed to have commenced from 1st July, 1935, and that the capital of the said business should consist of the livestock and plant then owned by the respective partners, or thenceforth to be acquired in connection with the said business. It also provided that the said business should be conducted on the respective holdings of the partners at or near Gurley aforesaid (such holdings only to be used for the purposes of depasturing the partnership stock) and/or at such other place or places as the partners might from time to time agree. The net profits of the business were to be divided between the partners in equal proportions and they were in like proportions to bear all losses. p. 2, l. 16-p. 5, l. 29.  
p. 8, l. 43.  
p. 10, l. 3.

11. Clause 13 of the agreement was in the following terms:— pp. 4-46.

20 "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 same and free right to deal with the same as he may see fit."

12. Each of the partners brought into the partnership livestock and plant previously owned by him. p. 2, l. 40.

30 13. Each of the partners at the date of the said agreement owned a property near Gurley aforesaid, which three properties were thenceforth and in accordance with, the said agreement, used for the depasturing of partnership stock. The property owned by Clifford John Chick, and so used, was the said property known as "Mia Mia," and partnership stock were depastured thereon from the date of the said agreement until 26th September, 1951. p. 3, l. 1.  
p. 9, l. 22.

14. It was not a term or condition of the said gift of "Mia Mia" that the said land should be used for the said or any partnership purposes. p. 10, l. 11.

15. The said partnership was entered into quite independently of the gift of the said property "Mia Mia." p. 10, l. 9.

40 16. 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 p. 5, l. 41.

trading as Mia Mia Pastoral Co. certain livestock for a period of twelve months from 26th September, 1951. Such stock so hired were by the hirers depastured on the property known as "Mia Mia."

p. 6, l. 3.

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

p. 6, l. 20.

18. The value of the lands known as "Mia Mia" at the date of death of the deceased was approximately £33,061 8s. 7d.

p. 6, ll. 20-26.

19. The respondent assessed the death duty payable on the death of the deceased on the footing that the estate of the deceased must be deemed to include the said lands known as "Mia Mia" by virtue of s. 102, subs. (2) paragraph (d) of the Stamp Duties Act, 1920-1949, and issued to the Appellants a notice of such assessment. 10

p. 6, l. 29.

p. 6, l. 30.

20. The Appellants paid the duty so assessed by the Respondent, and requested him to State a Case for the opinion of the Supreme Court of New South Wales, pursuant to the provisions of s. 124 of the said Act.

21. Section 124 (1) (2) (3) and (4) is in the following terms:—

124. Appeal to Supreme Court from assessment of Commissioner—

- (1) Any person liable to the payment of duty in respect of any instrument and any administrator or other person liable to the payment of death duty, who is dissatisfied with the assessment of the Commissioner, may within thirty days after the date of the assessment in the case of an instrument and within thirty days after notice of the assessment has been given to the administrator or other person in the case of death duty, and on payment of duty in conformity with the assessment and of the sum of twenty pounds as security for costs, deliver to the Commissioner a notice in writing requiring him to state a case for the opinion of the Supreme Court. 20 30
- (2) The Commissioner shall thereupon state and sign a case accordingly, setting forth the facts before him on making the assessment, the assessment made by him, and the question to be decided, and shall deliver the case so signed to the person by whom the same is required (hereinafter referred to as the Appellant).
- (3) The Appellant shall within seven days after receiving the case cause the same to be set down for hearing before the next sittings of the Full Court at which the same can be heard. 40
- (4) On the hearing of the case the court shall determine the question submitted, and shall assess the duty chargeable and also decide the question of costs.

22. The Respondent duly stated a case, whereby, after setting out the facts, he raised the following questions for the determination of the Court, namely :— p. 1.  
p. 6, l. 34.

(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 estate was :—

- 10 (A) £27,100 11s. 6d. ; or  
(B) £13,590.

(3) Whether the Appellants or the Respondent should pay the costs of this appeal.

23. The Case so Stated by the Respondent came on for hearing before the Full Court of the Supreme Court of New South Wales on 10th and 11th June, 1957, before Street, C.J., Roper, C.J., in Equity, and Walsh, J., who on 28th June, 1957, delivered judgment and answered the questions set out in paragraph 22 above as follows :— p. 7.  
p. 18, ll. 35-38.

(1) Yes.

- 20 (2) £27,100 11s. 6d.

(3) The Appellants should pay the costs of the Respondent of the appeal.

24. The ground of the judgment was that although the donee had assumed bona fide possession and enjoyment of the property " Mia Mia " immediately upon the making of the gift, he had not thenceforth retained it to the entire exclusion of the deceased or of any benefit to him within the meaning of s. 102 (2) (d) of the Stamp Duties Act, 1920-1949. pp. 14-18.

25. The Appellants humbly submit that the judgment of the Supreme Court should be reversed and that the said questions should be answered :  
30 (1) No ; (2) £13,590 ; (3) The Respondents ; for the following among other

## REASONS

(1) BECAUSE bona fide possession of the property " Mia Mia " was at all material times retained by Clifford John Chick as donee to the exclusion of the deceased as donor, or of any benefit to him of whatsoever kind or in any way whatsoever.

40 (2) BECAUSE the said partnership agreement was an independent commercial transaction for full consideration later than, and in no way related to the gift, and was a mode of enjoyment by the donee of his property and an exercise by him of the possession of it.

- (3) BECAUSE the arrangement under which the partners, including the deceased, used the said property, was a commercial arrangement for full consideration and did not constitute a benefit to the deceased within the meaning of s. 102 (2) (d) of the Stamp Duties Act, 1920-1949.
- (4) BECAUSE neither the partnership agreement, nor the use of the property for a period pursuant thereto, constituted—
- (A) a failure by the donee to retain bona fide possession 10 and enjoyment of the said property to the entire exclusion of the donor; or
  - (B) a failure by the donee to retain bona fide possession and enjoyment of the said property to the entire exclusion of any benefit to the deceased.
- (5) BECAUSE neither the partnership agreement nor the use of the property for a period pursuant thereto—
- (A) impaired or detracted from bona fide possession and enjoyment by the donee of the property given; or
  - (B) amounted to a benefit which impaired or detracted 20 from such bona fide possession and enjoyment.
- (6) BECAUSE the benefit (if any) which the deceased obtained in respect of the said property was not referable to the gift thereto, but to the said partnership agreement, nor was it a qualification of the said gift.
- (7) BECAUSE the Supreme Court was in error in holding that the case of *Owens v. The Commissioner of Stamp Duties* ((1953), 88 C.L.R. 67) governed this case and required the questions in the stated case to be answered in the sense in which they were answered by the Supreme 30 Court.
- (8) BECAUSE alternatively to reason (7) the said case of *Owens v. The Commissioner of Stamp Duties* was wrongly decided.

ROBERT ELLICOTT.

**In the Privy Council**

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**ON APPEAL**

*from the Supreme Court of New South Wales.*

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BETWEEN

**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 Appellants**

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