HIGH COURT OF AUSTRALIA

Commissioner of Stamp Duties (N.S.W.)

Vs.

Owens

Dixon C.J.(1), Williams(2), Webb(3), Kitto(1) and Taylor(4) JJ.

16 June 1953

CATCHWORDS

Death Duty (N.S.W.) - Dutiable property - Assets notionally included in estate of deceased - Voluntary disposition reserving interest - Two properties worked in partnership by father and son - Gift of one property by father to son - Continuance of partnership - Death of father - Stated case - Facts - Sufficiency - Power of court - Stamp Duties Act 1920-1949 (No. 47 of 1920 - No. 37 of 1949), s. 102 (2) (d), 124.

HEARING

Sydney, 1953, March 31, April 2;
Melbourne, 1953, June 16. 16:6:1953
APPEAL from the Supreme Court of New South Wales.

DECISION

June 16.
The following written judgments were delivered: -
DIXON C.J. AND KITTO J. This is an appeal from an order of the Supreme Court case stated by the Commissioner of Stamp Duties. The questions were, first, whether the value of a grazing property known as "Wallaroi" was included in the dutiable estate of one Henry Owens deceased, and, secondly, what was the amount of the death duty payable in respect of that estate. The Supreme Court by a majority (Street C.J. and Herron J., Owen J. dissenting) gave a decision in favour of the executors of the estate, answering the first question: No, and the second question: 2,373 pounds 11s. 1d. The commissioner appeals, and it is common ground that if he succeeds in reversing the answer to the first question the answer to the second question should be 2,981 pounds 12s. 8d. (at p80)

2. The case was stated pursuant to s. 124 of the Stamp Duties Act 1920-1949 (N.S.W.). The duty of the commissioner under that section is to state and sign a case, setting forth the facts before him on making the assessment, the assessment made by him, and the question to be decided. On the hearing of the case, the court is at liberty to draw from the facts and documents stated in the case any inference whether of fact or law which might have been drawn therefrom if proved at a trial: (sub-s. (7)); but if it appears to the court that the facts necessary to enable the questions submitted to be determined are not sufficiently set forth in the case or that such facts are in dispute, the court may direct all such inquiries to be made or issues to be tried as it deems necessary in order to ascertain such necessary facts, and, if it deems fit, may amend the case: (sub-s. (6)). (at p81)

3. The case which the commissioner stated in this matter set forth some facts, though not sufficient to enable the questions submitted to be decided. But it also stated that prior to the making of the assessment the appellants, the executors, supplied to the commissioner seven statutory declarations and an unverified statement, copies of which were annexed. What the section requires is a statement of facts, and not a mere collection of evidence upon which differing views of the facts may be formed. However, in the documents annexed to the case there is no conflict as to the facts in any significant respect, and it is to be inferred that the commissioner when making his assessment accepted the view that the relevant facts were in accordance with the statements in the documents. We were informed that the stated case was agreed to by the respondent executors before it was filed, so that it is proper to adhere to the course which was followed in the Supreme Court, and to consider the stated case as if there were set forth in it all the facts which may fairly be gathered from the documents annexed. (at p81)

4. The commissioner's contention that the grazing property Wallaroi forms part of the dutiable estate of the deceased rests upon the provisions of s. 102 (2) (d) of the Stamp Duties Act. Section 102 provides that for the purposes of the assessment and payment of death duty, but subject as thereinafter provided, the estate of a deceased person shall be deemed to include and consist of certain classes of property, which are described in the several sub-paragraphs of pars. (1) and (2). Sub-paragraph (d) of par. (2), in the form in which it stood at the death of the deceased, was as follows: - "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". (at p81)

5. It is common ground in the present case that the deceased made a gift to his son L. H. Owens, that the property comprised in the gift was an estate or interest in the grazing property Wallaroi, and that after the gift the deceased had a benefit with respect to Wallaroi in that that property was used, as also was a property belonging to the deceased called "Ningear", for the purpose of conducting a grazing business in which the deceased and L.H. Owens were partners. The critical question therefore is whether the estate or interest which was the subject of the gift was an estate or interest entitling L.H. Owens 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. (at p82)

6. Wallaroi consisted of land which was under the provisions of the Real Property Act 1900-1940 (N.S.W.), and immediately before the gift the deceased was the registered proprietor under that Act of an estate in fee simple in that land, free from encumbrances. The gift was effected by means of a memorandum of transfer executed by the deceased in favour of L. H. Owens, which was registered on 9th August, 1935. The memorandum must necessarily have been expressed to transfer to L. H. Owens all the deceased's estate or interest, as registered proprietor, in the land: see the form in the fifth schedule to the Act; and upon registration of the transfer that estate or interest passed to L. H. Owens by virtue of s. 41. Prima facie, therefore, the subject of the gift was a vested legal estate in fee simple in possession. But it is said that this was not really the case, because the transfer was given subject to an outstanding interest in the land which the deceased had created by an antecedent agreement, and that therefore what L. H. Owens got by the gift was only a limited estate or interest, of such a character that exclusive possession and enjoyment of it by L. H. Owens could not prevent the deceased from enjoying the benefits which came to him through the use of Wallaroi for the purposes of the partnership grazing business. (at p82)

7. It is to the question whether the gift was subject to an outstanding interest of this nature that the seven statutory declarations and the one unverified statement are relevant in these proceedings. Before examining the contents of these documents we may mention that the stated case sets forth in the body of it that Wallaroi, which "prior to the said gift was vested in the testator for an estate in fee simple" (par. 7), was "transferred by the testator to his son (L. H. Owens) by way of gift in the year 1935" (pars. 5 and 6), and "at the date of the death of the testator was still vested in the said (L. H. Owens) for an estate in fee simple" (par. 8). While these statements remain in the case without qualification, it would seem not to be open to the Court to decide the appeal on the footing that the property comprised in the gift was less than an estate in fee simple in possession. However, the parties unite in asking the Court to consider the facts disclosed by the documents annexed to the case, and we proceed to do so. (at p83)

8. Four of the statutory declarations and the unverified statement were made by the donee, L. H. Owens, himself. Two declarations were made by the widow of the deceased, I. M. Owens, and one by a son of the deceased, H. H. Owens. There is complete unanimity amongst these persons as to the situation which existed with respect to Wallaroi immediately before the gift. Wallaroi and Ningear were both being managed and worked by L. H. Owens, as they had been since 1930, under an oral arrangement between the deceased and himself. The arrangement was, in brief, that the parties should share, in the proportions of two-thirds to the deceased and one-third to L. H. Owens, the livestock depasturing on the properties when the arrangement was entered into, any livestock purchased while the arrangement was in force, the cost of any livestock so purchased, the proceeds of all livestock sold, and all profits from and losses sustained in the working of the two properties. Beyond this there is not a scrap of information relating to the state of affairs which existed when the deceased came to make his gift. There is a complete absence of anything to suggest that before the date of the gift the deceased and L. H. Owens together made any tenancy agreement with the deceased, or otherwise acquired from him any estate or interest, legal or equitable, in the land comprised in Wallaroi. On the mterials before us we cannot discover any ground for concluding that the gift, which purported to be a gift of a fee simple, was really a gift of something less. (at p83)

9. That the deceased had a fee simple estate immediately before the gift is freely acknowledged in the statutory declarations and is not denied or questioned by a single word to be found in them. Nowhere is it suggested that the gift was of anything but Wallaroi itself, or that Wallaroi was given subject to any pre-existing right with respect to it. But it is stated in the documents annexed to the case that the arrangement which was in force from 1930 to the date of the gift was continued, subject to a variation, after the gift had been made; and because of this fact the majority of the learned judges of the Supreme Court regarded the case as indistinguishable from Munro v. Commissioner of Stamp Duties [1933] UKPC 1[1933] UKPC 1; ; (1934) AC 61 . It is accordingly necessary to consider that decision closely. (at p83)

10. In 1913 Munro purported to transfer an estate in fee simple in certain land under the provisions of the Real Property Act to each of his six children by way of gift. Since 1909 these lands, of which Munro was the registered proprietor, had been used for the carrying on of a grazing business by a partnership consisting of Munro and the six children. After the making of the gifts, the lands, together with certain other land which Munro retained, continued to be used by the same partnership for the same purposes. There had never been a written partnership agreement, but in 1919 a formal deed of partnership was executed, departing in some respects from the verbal agreement by which the partnership had been formed in 1909 and by which it had been governed ever since. The partnership continued to carry on its business on the land referred to, until the death of Munro in 1929. Now, if that had been all there was in Munro's Case [1933] UKPC 1; (1934) AC 61 , we

apprehend that there would have been no possible ground upon which it could be held that the case was not within s. 102 (2) (d). The ground upon which the Privy Council rested its decision would certainly not have been available. But there was another element in the case. The agreement of 1909, as interpreted by their Lordships (1934) AC, at pp 66, 67 , went beyond the constitution of the partnership, and contained terms which "entitled" the partnership to "the use of the three holdings" (which comprised the lands given and the land retained) "whatever the ownership of the holdings so long as the partnership continued". That "right", their Lordships said, could only be determined by the dissolution of the partnership at will, which did not happen. Moreover, the transfers made in 1913 were intended to be subject to the partnership "right", no alteration to the partnership agreement being made at that time except that the "right" of the partnership was diminished by a stipulation that any member of the family might withdraw from the agreement as to the running of the stock on his holding, upon reasonable notice. It is of crucial importance to observe that their Lordships conceived themselves to be dealing with a case in which an agreement with respect to land had created an interest in the land; so that a gift of the land, if it was a gift subject to the right of the partnership, was necessarily a gift, not of a fee simple, but of a fee simple "shorn" (to quote their Lordships' expression) "of the right which belonged to the partnership". This right their Lordships described as either a tenancy during the term of the partnership or a licence coupled with an interest, but they regarded it as unnecessary to determine the precise nature of the right. To whatever legal category it ought to have been assigned, the point is that it was considered by their Lordships to be an interest which left Munro with something less than a fee simple; and the whole burden of the judgment is that the true effect of the transaction of gift was to pass to the donees, not the fee simple which the transfers by themselves appeared to make the subject of gift, but the fee simple less the interest which was outstanding in the partnership. (at p85)

11. This was the footing upon which their Lordships expressly based their opinion that the donee in each case assumed bona fide possession and enjoyment "of the gift" (i.e. of the true subject of the gift) immediately upon the gift, and thenceforth retained it to the entire exclusion of the donor. But because their Lordships, having stated this opinion, commenced their next sentence with the word "Further", the Court was invited by counsel for the executors to read the judgment as stating two independent and alternative grounds for the decision that was given, and to read the statement of the second ground as not depending upon the fact that the gift was of a fee simple shorn of a pre-existing right vested in the partnership. The relevant passage in the judgment is this: "Further, the benefit which the donor had as a member of the partnership in the right to which the gift was subject was not in their Lordships' opinion a benefit referable in any way to the gift. It was referable to the agreement of 1909 and nothing else, and was not therefore such a benefit as is contemplated by s. 102, sub-s. 2 (d)" (1). Clearly their Lordships were not stating in these words an alternative ground of decision. They had dealt with the exclusion of the donor, but that covered only half the ground which it was necessary to traverse under s. 102 (2) (d). The question remained, whether the assumption and retention of possession and enjoyment by the donees had been to the entire exclusion of every benefit to the donor. And the answer which their Lordships gave to this question was contained in the two sentences we have quoted. It may be expressed in slightly expanded form as follows. The benefit which the deceased had as a member of the partnership was a benefit "in (scil. in the enjoyment of) the right to which the gift was subject" (1934) AC, at p 67 . That is to say, it was not part of the possession and enjoyment to which the gift entitled the donees and from which the gift enabled them to exclude the donor; it was, therefore, not referable in any way to the gift. On the contrary, it was part of the possession and enjoyment to which the partners became entitled by the creation of an interest in the land in their favour by the agreement of 1909; it was therefore referable to the agreement of 1909 and nothing else. Reading the passage in this sense, it

becomes clear that what their Lordships said as to the exclusion of the donor, and what they said as to the exclusion of any benefit to him, both proceeded on the stated footing, that the property comprised in the gifts was "the property shorn of the right which belonged to the partnership". It follows that it is not enough to enable the decision in Munro's Case [1933] UKPC 1; (1934) AC 61 to be regarded as decisive of another case that that other case is also one in which partnership activities conducted on the land in question prior to the gift were continued on that land after the gift. It must be found that the gift was subject to a right which had been carved out of the fee simple in favour of the partnership by an earlier transaction, the right being such that "the partnership was entitled to the use of" (the land) "whatever the ownership of" (the land) "so long as the partnership continued" (1934) AC, at p 67 . (at p86)

12. The decision of the Supreme Court in the present case depended, as we have said, upon the view that because the partnership activities were continued on Wallaroi after the making of the gift to L.H. Owens, the case must be regarded as concluded against the commissioner by the authority of Munro's Case [1933] UKPC 1; (1934) AC 61 . With respect, we think, for the reason we have given, that this view was erroneous. We are also of opinion that there is in this case no material to justify the finding without which the principle of Munro's Case [1933] UKPC 1[1933] UKPC 1; ; (1934) AC 61 is inapplicable, that immediately before the gift of Wallaroi the fee simple of that property was subject to an overriding right previously created in favour of the deceased and L. H. Owens. The most that might be said is that from the statement of the verbal arrangement under which the parties worked from 1930 to 1935 it may be inferred that the deceased was bound by an obligation of a purely contractual nature to allow L. H. Owens to do on Wallaroi all such things as might be incidental to the carrying out of the arrangement and to its winding-up when it should cease. Even this would be an artificial inference to draw, for it is improbable that the parties in fact contemplated any such obligation. But however this may be, it seems quite impossible to infer a tenancy, for there is no evidence of an agreement for exclusive occupation; and there is a total absence of anything which would enable the arrangement to be construed as entitling the partnership, as the agreement of 1909 entitled the partnership in Munro's Case [1933] UKPC 1; (1934) AC 61 , to an interest in the land conferring a right to use it for the duration of the partnership whatever the ownership of the land might be: cf. Cowell v. Rosehill Racecourse Co. Ltd. [1937] HCA 17; (1937) 56 CLR 605 . And even if the fact had been that a tenancy or other interest in the land had been created before the gift, the case would still have differed fundamentally from Munro's Case [1933] UKPC 1; (1934) AC 61 , because the deceased and his donee, being the only persons concerned, would have been competent to determine by their own agreement whether the gift should comprise the fee simple subject to the outstanding right or the fee simple freed from that right, and the declarations make it very clear that the fee simple, undiminished by anything at all, was what they joined in making the subject of their transaction. (at p87)

13. The story which is told with consistency and emphasis by the persons whose statements are before us is that the gift was an absolute gift of Wallaroi, and was such that L. H. Owens might at his pleasure have sold the property or carried on a separate business of his own upon it. It was he who made the decision, the choice being left entirely to him, to continue working Wallaroi together with Ningear; and he states in par. 7 of his declaration of 19th August 1948 what his reason was: "I was of the opinion that it would be to my advantage to do so rather than carry on grazing pursuits on my own behalf solely on Wallaroi aforesaid". So, as he says in par. 6 of the same declaration: "After my father had made the gift to me . . . I informed him that I was agreeable to continue working the said two properties Ningear and Wallaroi aforesaid on the basis that my father and I shared the profits and losses therefrom equally". And all that happened may be described in his own words, as they appear in par. 3 of his declaration of 24th September 1948: "We continued on the

said arrangement (the arrangement under which they had worked since 1930) with the exception that from the date of the gift my share of one-third was increased to one-half share and my father's share of two-thirds as abovementioned was reduced to a one-half share". Thus the case is in truth the converse of Munro's Case [1933] UKPC 1; (1934) AC 61 . As if to make this clear beyond possibility of doubt, the son H. H. Owens, in pars. 7 and 8 of his declaration, says this: "At the time of making the said gift my father discussed the matter with me and stated that he was making an absolute gift to the said (L. H. Owens) of Wallaroi aforesaid and that his reason for doing so was that (L. H. Owens) had been very good to him in many ways in addition to managing and working the grazing properties beforementioned and in looking after his interests and that he desired to show his appreciation thereof and also start (L. H. Owens) off in grazing pursuits on his own behalf. My father made it clear at the time of the discussion I had with him regarding the gift to the said (L. H. Owens) that such gift was not subject to the said (L. H. Owens) continuing on under any arrangement regarding the working of the said two grazing properties on a share profit basis nor did he desire to impose any conditions or stipulations in connection therewith". And the widow of the deceased said the same in par. 5 of her statutory declaration. (at p88)

14. If ever there was a gift of an estate in fee simple, carrying the fullest right known to the 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. (at p88)

15. In the result we find ourselves in agreement with Owen J. in the reasons which he gave for differing from his learned brethren in the Supreme Court. In our opinion the appeal should be allowed, the answers given by the Supreme Court to the questions asked in the stated case should be set aside, and the questions should be answered: (1) Yes. (2) 2,981 pounds 12s. 8d. (at p88)

WILLIAMS J. Henry Owens, hereinafter called the deceased, died on 27th November, 1946, domiciled in New South Wales. The appellant commissioner included in his estate for the purposes of New South Wales death duty a grazing property known as "Wallaroi" situate near Bathurst in that State. The commissioner relies upon the provisions of s. 102 (2) (d) of the Stamp Duties Act 1920-1940 (N.S.W.) to justify this inclusion. This paragraph includes in the notional estate of a deceased person for the purposes of duty: "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 meaning of this paragraph has been recently considered by the Privy Council in Munro v. Commissioner of Stamp Duties [1933] UKPC 1; (1934) AC 61 and Commissioner of Stamp Duties (N.S.W.) v. Perpetual Trustee Co. Ltd. [1941] HCA 15; (1943) AC 425; (1941) 64 CLR 492 ; and the meaning of the equivalent English provision has been the subject of an even more recent decision of the House of Lords, St. Aubyn v. Attorney-General [1951] UKHL 3 [1951] UKHL 3; ; (1952) AC 15 . These decisions were discussed in this Court in Oakes v. Commissioner of Stamp Duties (N.S.W.) [1952] HCA 22; (1952) 85 CLR 386 (now under appeal in the Privy Council) and I shall not repeat the citations which appear in the report (1952) 85 CLR, at pp 406, 407 . I shall merely extract a few words from the passage in the speech of Lord Radcliffe: "All these decisions proceed upon a common principle, namely, that it is the possession and enjoyment of the actual property given that has to be taken account of, and that if that property is, as it may be, . . . an interest in property subject to an interest that is retained, it is of no consequence for this purpose that the retained

interest remains in the beneficial enjoyment of the person who provides the gift" (1952) AC, at p 49 . The "interest that is retained" to which his lordship refers is illustrated, I think, by Munro's Case [1933] UKPC 1; (1934) AC 61 . The majority of the Supreme Court were unable to distinguish the present case from that case. I am also unable to distinguish it. (at p89)

2. It is difficult from the somewhat confused and contradictory statements in the declarations before us to ascertain the precise facts. But these facts appear to emerge. Wallaroi is land held under the provisions of the Real Property Act 1900-1940 (N.S.W.). Prior to 6th July, 1935, it belonged to the deceased for an estate in fee simple. On that day the deceased transferred it to his son Laurie Hilton Owens as a gift for an estate in fee simple and the memorandum of transfer was duly registered under the Real Property Act on 9th August, 1935. The deceased also owned another grazing property in the same district known as "Ningear". In 1930 he gave Laurie a one-third share in the livestock depasturing on the two properties and a partnership was entered into between them on the terms that the deceased allowed the partnership to use the two properties for grazing purposes and other purposes incidental thereto, that Laurie managed the partnership business, that the deceased was to be entitled to two-thirds of the profits and had to bear two-thirds of the outgoings (including the purchase of one-third of the profits and had to bear one-third of the outgoings and losses. The partnership was a partnership at will terminable at any time by either partner. It was still on foot when the deceased gave Wallaroi to Laurie. He told Laurie that the gift was unconditional and that he could either continue the partnership on the two properties or terminate it and in the latter event work or otherwise dispose of Wallaroi for his own benefit. If Laurie chose to continue the partnership, its terms would be varied so that the partners would each be entitled to one-half of the profits and have to bear one-half of the outgoings and losses. Laurie chose to continue the partnership on these terms. Section 19 of the Partnership Act 1892 (N.S.W.) provides that the mutual rights and duties of partners, whether ascertained by agreement or defined by this Act, may be varied by the consent of all the partners, and such consent may be either expressed or inferred from a course of dealing. In the present case the variation was express, and subject thereto the partnership which had commenced in 1930 continued unbroken until the death of the deceased. (at p90)

3. In Munro's Case [1933] UKPC 1; (1934) AC 61 the donor was the owner of three large areas of grazing land in New South Wales comprising 35,000 acres held under the provisions of the Real Property Act on which he carried on the business of a grazier. In 1909 he verbally agreed with his six children, four sons and two daughters, that thereafter the business should be carried on by him and them as partners under a partnership at will. The deceased was to contribute the whole of the capital which consisted of the livestock and plant then upon the three holdings and the partners were to be entitled to the profits of the business in the following shares, namely, one-fourth was to belong to the deceased and one-eighth was to belong to each of the six children. On May 1st, 1913, by four memoranda of transfer in the form prescribed by the Real Property Act 1900, duly registered in accordance with the Act, the deceased transferred by way of gift portions of his three holdings to each of his four sons in fee simple. On the same date by two further memoranda of transfer he transferred further portions to trustees to be held upon the trusts of two settlements in favour of his two daughters and their children. The trustees of the settlements were directed to utilize the trust premises in connection with the carrying on of farming or grazing pursuits either by themselves or in conjunction with any other person or persons for such time and under such conditions as they might deem advisable. The circumstances in which the transfers and settlements were executed were stated in a passage contained in a statutory declaration made by the deceased's son Donald. This passage, which was set out in the special case and accepted by the respondent commissioner as correct, was as follows: "At the time the said transfers were executed the stock in which the partners

were interested were in accordance with the agreement between them running on the land so transferred and the transfers were taken subject to such agreement on the understanding that if any member of the family were desirous of so doing he could withdraw from the agreement as to the running of stock in which the partnership was interested on his holding and work his property with his own stock provided a reasonable time was allowed for the removal of the stock therefrom in which stock the partnership was interested" (1934) AC, at p 65 . (at p91)

4. On 23rd June 1919, a formal partnership deed was entered into between the deceased and his children. This deed departed in some respects from the original verbal agreement of partnership, as it provided that no parties should have the right to retire from the partnership during the lifetime of the deceased. The business continued to be carried on under the deed of partnership until the deceased's death on 4th November 1929. No part of the lands comprised in the six transfers was ever withdrawn from the use of the partnership. (at p91)

5. In the present case there is no corresponding statement in the case that the transfer of Wallaroi to Laurie was made subject to the partnership agreement then in force between his father and himself. But s. 124 of the Stamp Duties Act provides that on the hearing of the case the Court shall be at liberty to draw from the facts and documents stated in the case any inference whether of fact or law which might have been drawn therefrom if proved at a trial, and no other inference could reasonably be drawn from the present facts. The partnership right to use the two properties at the time of the gift of Wallaroi to Laurie was of the same legal quality as the partnership right in Munro's Case [1933] UKPC 1[1933] UKPC 1; ; (1934) AC 61 . Of this right Lord Tomlin said: "It is unnecessary to determine the precise nature of the right of the partnership at the time of the transfers. It was either a tenancy during the term of the partnership or a licence coupled with an interest" (1934) AC, at p 67 . The licence coupled with an interest to which his Lordship referred was presumably the right of the partnership to depasture its livestock on the 35,000 acres. Such an interest if conferred by deed would be a profit a prendre. Johnson v. Barnes (1873) LR 8 CP 527 ; White v. Williams (1922) 1 KB 727 ; Halsbury's Laws of England, 2nd ed., vol. 11, p. 383. But similar rights can arise from an agreement for valuable consideration and give an equitable interest in land which is enforceable in equity. James Jones & Sons Ltd. v. Tankerville (Earl) (1909) 2 Ch 440 ; Cowell v. Rosehill Racecourse Co. Ltd. [1937] HCA 17; (1937) 56 CLR 605, at pp 626, 627, 630, 631 . It would make no difference in the present case whether the right of the partnership was a tenancy during the term of the partnership or a licence coupled with an interest. If the partnership right was a tenancy the transfer of Wallaroi would have been subject to this tenancy, Real Property Act s. 42 (d), and the tenancy would have continued until the partnership was dissolved and the assets disposed of (Pocock v. Carter (1912) 1 Ch 663). If it was a licence coupled with an interest the licence would be irrevocable while the partnership lasted and when the partnership was dissolved either the partners would be entitled to a reasonable period to dispose of the livestock if the licence was then immediately revocable or the licence would be revocable only upon reasonable notice which would give them sufficient time for this purpose. Which of these two views is correct has not finally been decided: Canadian Pacific Railway Co. v. The King (1931) AC 414, at p 432 ; Winter Garden Theatre (London) Ltd. v. Millennium Productions Ltd. (1948) AC 173, at pp 196, 200, 204-206 . If at the date of the gift Laurie had chosen to terminate the partnership the partners would then have been entitled to depasture the livestock on Wallaroi for this period. The gift to Laurie was subject to this right. It had to be for partnerships must be dissolved and wound up and the partnership assets disposed of, and that takes time however simple the disposition may be. The possession and enjoyment of Wallaroi which Laurie was bound to assume immediately upon the gift and thereafter retain to the entire exclusion of the deceased must, at least, have been subject to this partnership right and the retention of the occupation of Wallaroi by the partnership for this period

would not have made the property part of the estate of the deceased under the provisions of s. 102 (2) (d). But Laurie chose to continue the partnership so that the gift of Wallaroi continued to be subject to the right of the partnership which existed at the date of the gift to use it to depasture the partnership livestock thereon. In these circumstances I fail to see how, consistently with Munro's Case [1933] UKPC 1; (1934) AC 61 , it can be contended that the gift of Wallaroi to Laurie was not, to use Lord Tomlin's topical words, a gift "shorn of the right which belonged to the partnership" (1934) AC, at p 67 , to continue to use Wallaroi either for a reasonable period to wind up the partnership if it was wound up or to continue to use it for partnership purposes if the partnership was not wound up. In these circumstances any possession, enjoyment or benefit the deceased derived from Wallaroi after the date of the gift to Laurie was referable to the partnership and not to the gift. There was no possession or enjoyment by the deceased of the actual property given; the property given to Laurie was an interest in property subject to an interest that was retained, and in the words of Lord Radcliffe: "It is of no consequence for this purpose that the retained interest remains in the beneficial enjoyment of the person who provides the gift" (1952) AC, at p 49 (at p92)

6. For these reasons I would dismiss the appeal. (at p92)

WEBB J. This is an appeal by the Commissioner of Stamp Duties of New South Wales from a judgment of the Full Court of New South Wales against the commissioner given on an appeal by way of case stated under s. 124 of the Stamp Duties Act 1920-1949 (N.S.W.). Section 102 (2) (d) of that Act provides inter alia that for the purposes of assessment of death duty the estate of a deceased person shall be deemed to include any property comprised in any gift made by the deceased 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. (at p93)

2. In Munro v. Commissioner of Stamp Duties [1933] UKPC 1; (1934) AC 61 the Privy Council held that where a testator had transferred by way of gifts lands under the Real Property Act 1900 (N.S.W.) without an indorsement on any transfer or folium of the register preserving any grazing rights, but subject nevertheless to existing grazing rights of a partnership already formed by the testator and the donees, the gifts were of the lands shorn of such rights, and that the testator's interest in the lands after the transfers was referable to the partnership and not to the gifts; so that s. 102 (2) (d) did not apply. It is claimed by the commissioner that this decision is not applicable here because, as he contends, the gift in question was of the land absolutely and unconditionally and was not subject to any grazing rights, and therefore that the benefits of the testator in the land after the gift was referable to the gift and not to the partnership's rights in the land. (at p93)

3. In this case as in Munro's Case [1933] UKPC 1; (1934) AC 61 the facts are not fully stated in the case but are to be sought in declarations annexed to the case. (at p93)

4. Although the onus rested on the commissioner to show that s. 102 (2) (d) applied, I think that, as it was common ground that the testator still had an interest in the land after transfer to the donee, and as the facts upon which the respondents relied were peculiarly within their knowledge, the onus of proof shifted to them, and that if in an attempt to discharge it they produced inconsistent or equivocal statements to the commissioner he was at liberty to act on the statements, or construction of the statements, favourable to the claim for duty. Now I think that the statements produced to him were either inconsistent with the respondents' contention or were equivocal, and as they were all the evidence that the respondents were able to produce over a period exceeding a year I think after giving the matter full consideration that better evidence would not likely to become available if

issues of fact were, in pursuance of s. 124 (6) of the Act, directed to be tried, as I thought for a time might be done. (at p94)

5. The statements produced to the commissioner are in six statutory declarations and one non-statutory declaration made between July 1947 and September 1948. The following is a summary of those declarations so far as material: -
1. On 17th July 1947 the donee, a son of the testator, declared that from 1930 to 1935 he was managing and working the testator's two properties Ningear and Wallaroi under an arrangement with the testator that the donee should receive one-third of the profits; that in 1935 the testator made a gift to the donee of Wallaroi; and that for some years prior to the testator's death the donee managed and worked both properties under an arrangement that the testator and the donee should share the profits equally and contribute in equal shares the money required for carrying on the properties;
2. On 20th August 1947 the donee declared that there was no written agreement evidencing the arrangement;
3. On 24th March 1948 the donee declared, in the non-statutory declaration, that Wallaroi was transferred to him by way of gift; that no stipulation was imposed as a condition of the gift; that it became the donee's absolute property; that should it have become necessary or expedient he could have sold such property; and that the testator and the donee agreed to carry on farming and grazing pursuits as hitherto, with the exception that they shared equally the profits and the outgoings. (at p94)

6. Pausing here, I think that the above three declarations are equivocal on the question whether the lands were transferred subject to the grazing rights of the partnership. (at p94)

7. But the statements in the remaining declarations, except the final declaration by the donee, appear to me to indicate that the lands were not transferred subject to those grazing rights. These further declarations may be summarized as follows: - 4. On 19th August 1948 the donee declared that when the testator made to him an "absolute" gift of Wallaroi he informed the donee that it would not be necessary for the donee to work under any arrangement with the testator; that if the donee so desired he could commence grazing pursuits on his own behalf; and that he was making the gift free of conditions. The donee proceeded to declare that after the gift was made he informed the testator that he was agreeable to continue working the two properties on the terms that they shared profits and losses equally.
5. and 6. On 19th August 1948 the donee's mother declared that prior to making the gift of Wallaroi the testator told her that it was his intention to make an absolute gift and that he did not intend to make it a condition that the donee should continue to work the properties on the share basis. She proceeded to declare that after the testator had made the gift the donee informed her that it was his desire to continue working the properties in conjunction. On the same day the donee's brother made a declaration to the same effect.
7. On 24th September 1948 the donee made a further declaration to the effect that when the gift was made the testator and the donee "continued on" the arrangement with the modification already referred to. (at p95)

8. This final declaration is, I think, equivocal. (at p95)

9. Such being the evidence I am unable to say that the gift was of the land subject to the grazing rights of the partnership; in other words, that the gift was of the land shorn of those rights. On the contrary the evidence so far as it can be said to be definite indicates that the gift was absolute; but

that after it was made the donee intimated that he was agreeable that the partnership should continue to work the property the subject of the gift, as well as the other property. Then as the gift was absolute and not subject to the grazing rights the existence of those rights after the gift was made was necessarily the result of the desire and determination of the donee following the gift; in other words, the benefit of the testator in the land after the gift was referable to the gift. (at p95)

10. I think that Munro's Case [1933] UKPC 1; (1934) AC 61 is distinguishable and that s. 102 (2) (d) applies. (at p95)

11. I would allow the appeal and answer the questions as proposed by the Chief Justice and Kitto J. (at p95)

TAYLOR J. This is an appeal from the decision of the Supreme Court of New South Wales, the Full Court of which held that the appellant acted wrongly in including in the estate of Henry Owens deceased, for death duty purposes the value of a pastoral property known as "Wallaroi". (at p95)

2. The deceased died on 27th November 1946, domiciled in New South Wales and at that time and since 9th August, 1935, his son, Laurie Hilton Owens, was the registered proprietor of Wallaroi for an estate in fee simple. In including the value of this property in the estate of the deceased for the purposes of assessment and payment of death duty, the appellant acted pursuant to s. 102 (2) (d) of the Stamp Duties Act 1920-1940, claiming that the property had been the subject of a gift by the deceased to his son in 1935 and that the son had not immediately assumed bona fide possession and enjoyment of the property and thenceforth retained enjoyment and possession thereof to the entire exclusion of his father and of any benefit to him of whatsoever kind or in any way whatsoever whether enforceable at law or in equity or not. (at p96)

3. In view of the decision in Munro v. Commissioner of Stamp Duties [1933] UKPC 1; (1934) AC 61 the first inquiry which must be made in order to determine whether the appellant's contention is right is an inquiry as to the precise facts of the case. From the documents annexed to the case stated, it appears that the deceased and his son were for a number of years jointly interested in a pastoral business conducted on the property in question, and upon another property, belonging to the deceased, known as "Ningear". The arrangement under which this business relationship commenced was made orally in 1930 and continued, at least, till 1935. I say "at least" till 1935 because in that year the father decided to make a gift to his son of Wallaroi and it was argued on behalf of the appellant that the arrangement terminated when the gift was made. Prior to the making of the gift the profits of the business venture were shared unequally - two-thirds to the father and one-third to the son - and the stock depasturing on the properties were owned in the same shares. But after the gift the profits of the business were shared equally. The appellant maintains that this was by virtue of a new arrangement which was substituted for the earlier one and, it is said, the new arrangement was made upon or after the gift of Wallaroi. Consequently, it is said, the son did not assume bona fide possession of the property and thereafter retain possession and enjoyment thereof to the entire exclusion of his father, or of any benefit to him of the nature above referred to. (at p96)

4. The contest between the parties in this matter is really as to the precise subject matter of the gift. The respondent, seeking to rely on Munro's Case [1933] UKPC 1; (1934) AC 61 claims that he was given the freehold property subject to the rights, whatever they may have been, of the subsisting so-called partnership, whilst the appellant maintains that the facts show that what was actually given was the fee simple free of any outstanding right or interest. In some respects the evidence appears to support the appellant's case. The son who, in previous declarations had deposed generally to the

circumstances in which the gift was made, stated in his declaration of 24th March 1948: "In the year 1935 the property known as 'Wallaroi' was conveyed to me by way of gift and no stipulation either in writing or verbally was imposed as a condition of such gift. Wallaroi became my absolute property and should it have become necessary or deemed expedient I could have sold such property. However my Father and I agreed to carry on farming and grazing pursuits as hitherto, with the exception that we then shared the profits equally. All stock for the property and other outgoings were borne by us in equal shares". (at p97)

5. These statements appear to have been made for the purpose of establishing in the words of Davidson J. in Rudd v. Commissioner of Stamp Duties (1937) 37 SR (NSW), at p 373; 54 WN 117 , that no "string of any kind attached to the gift, directly or indirectly". In these circumstances it would, I think, be wrong to regard the statements as intending to convey that the deceased and his son terminated their existing business arrangement priot to the making of the gift or, indeed, that they intended that this should occur. It is consistently clear upon the whole of the evidence contained in the various declarations annexed to the case that the arrangement subsisted for some years prior to the gift, that this arrangement was still on foot when the gift was proposed and that the deceased had no intention that it should terminate unless his son should so wish. The son did not so wish and neither party did anything to terminate their then existing relationship. On the contrary the son thought it was to his advantage that the business should continue and that he should continue to work both properties in their joint interests. The fact that their respective shares were varied does not mean that the original agreement came to an end and that a new agreement was substituted for the old one, for the clear intention of the parties was to the contrary (cf. Morris v. Baron & Co. (1918) AC 1). It may be that if the variation had had the effect of conferring some additional benefit upon the deceased this would be sufficient to bring the case within s. 102 (2) (d) but this was not so; on the contrary his pre-existing rights were diminished. (at p97)

6. Concluding, therefore that the parties intended that their existing arrangement should continue, what was the precise subject of the gift? The question is by no means answered by the son's statement that Wallaroi was conveyed to him by way of gift and no stipulation either in writing or verbally was imposed as a condition of such gift or by the statement that Wallaroi became his absolute property and, should it have become necessary or deemed expedient, he could have sold such property. The first statement is quite consistent with the continuance of the arrangement, the son, as well as the father, being free to terminate it at will and not being under any obligation, as a condition of the gift to refrain from terminating it, whilst the second statement is merely an assertion of the son's view of the effect of the gift. There is little doubt that he was free to sell the property and that by terminating the arrangement with his father he could have given possession to a purchaser. These statements do not, in my opinion, assist in the solution of the problem once it appears, that the common intention at the time of the gift was that the pre-existing arrangement should be continued, at least, indefinitely. Necessarily involved in this statement is, I think, the proposition that it was the father's intention to give the property subject to the rights of both parties under the existing arrangement for no other intention could in the circumstances of this case be consistent. (at p98)

7. In these circumstances I feel constrained by the decision in Munro's Case [1933] UKPC 1; (1934) AC 61 to hold that the appeal should be dismissed. It is nothing to the point to say, as the appellant contended, that the circumstances of that case disclosed a gift to each of the children of property "shorn of the right which belonged to the partnership", for that definition of the subject matter of each gift was merely employed by their Lordships in that case to describe the legal consequence of the facts before them. Six gifts were under consideration in that case - four to sons of the deceased

and two to daughters. The former were effected by formal transfers to the sons and the latter by transfers to trustees for the daughters. Ascertainment of the precise subject matter of the gifts to the sons depended upon oral evidence which established that: "At the time the said transfers were executed the stock in which the partners were interested were in accordance with the agreement between them running on the land so transferred and the transfers were taken subject to such agreement on the understanding that if any member of the family were desirous of so doing he could withdraw from the agreement as to the running of stock in which the partnership was interested on his holding and work his property with his own stock provided a reasonable time was allowed for the removal of the stock therefrom in which stock the partnership was interested" (1934) AC, at p 65 . The extent of the gift made to the daughters was not, in reality, left to be spelt out of the oral evidence for formal settlements were executed contemporaneously with the transfers to the daughters and under each settlement the trustees were permitted to utilize the trust premises "in connection with carrying on all farming or grazing pursuits either by themselves or in conjunction with any other person or persons for such time and under such conditions as they might deem advisable" (1934) AC, at p 65 . There can be little doubt that both sons and daughters were, as was the deceased's son in the present case, entitled to terminate the partnership and sell the lands or work them for their own benefit if they so desired, but their Lordships did not regard the circumstances that they refrained from such a course as conferring a fresh benefit upon the deceased. Indeed, they said that the benefit to the deceased continuing as it did at the will of the parties for four years after the making of the gifts, was referable to the original partnership agreement "and nothing else". (at p99)

8. It is true that in the present case the evidence does not show that the gift was, in express terms, "subject to the agreement" between the deceased and his son. But it is clear that an anterior agreement of the kind under consideration in Munro's Case (2) existed, that at the time the gift was proposed and made both parties to that agreement contemplated its continuance, that nothing was done to bring it to an end and that both parties proceeded on the basis that at all material times it still subsisted. It is not to the point that the son was told that he need not allow it to continue or that he allowed it to do so. The fact that he had a right to terminate it, that he was told that he might do so if he desired and that he refrained from doing so added nothing to the efficacy of the existing arrangement, nor did it substitute a new agreement in its place. In these circumstances I fail to see how in any material feature the facts of this case can be distinguished from those in Munro's Case [1933] UKPC 1; (1934) AC 61 or how, upon the authority of that case, the gift could be regarded otherwise than as a gift subject to the existing arrangement. Accordingly I am of opinion that the appeal should be dismissed. (at p99)

ORDER

Appeal allowed with costs. Rule of the Supreme Court set aside. In lieu thereof order that the questions in the case stated be answered (1) Yes, (2) 2,981 pounds 12s. 8d. Respondents to pay costs of the proceedings in the Supreme Court. Order that security of 50 pounds paid into Court be paid out to appellant.

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