*Privy Council Appeal No.* 14 *of* 1933.

**Hugh Robert Munro and others** - - - - - *Appellants*

*v.*

**The Commissioner of Stamp Duties** - - - - *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES.

---

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH OCTOBER, 1933.

---

*Present at the Hearing:*

LORD ATKIN.
LORD TOMLIN.
LORD MACMILLAN.
LORD WRIGHT.
SIR GEORGE LOWNDES.

[*Delivered by* LORD TOMLIN.]

---

This appeal arises out of a special case stated by the respondent for the purpose of having it determined whether certain lands in New South Wales at one time the property of Alexander George Forbes Munro, who died on the 4th November, 1929, and who will be hereinafter referred to as the deceased, formed part of the dutiable estate of the deceased under the Stamp Duties Act, 1920–24 as amended by the Stamp Duties (Amendment) Act, 1931.

The Supreme Court of New South Wales have decided that the lands in question form part of the dutiable estate of the deceased and the appellants, who are the legal personal representatives of the deceased, have appealed to His Majesty in Council against this decision.

For some time prior to and at the time of the formation of the partnership to which reference will shortly be made, the deceased

had been and was carrying on the business of a grazier on three pastoral holdings in New South Wales belonging to him and known respectively as " Boonal," " Weebollabolla " and " Tareelaroi." These holdings (which may for convenience be respectively called the B estate, the W estate, and the T estate) contained in all about 33,501 acres.

The deceased had six children, namely, four sons, Donald, Alfred, Charles and Roland, and two daughters, Lilias and Ada.

The youngest of the six children, namely, Roland, attained his majority in April, 1909.

Shortly after this event the deceased entered into a verbal agreement with his six children by which it was agreed that the business of graziers should thenceforward be carried on by the deceased and his six children as partners under a partnership at will.

According to the terms of the verbal agreement of partnership as stated in the special case (1) the deceased was to contribute the whole of the capital which consisted of the livestock and plant then upon the deceased's three holdings ; (2) the partners were to be entitled to the profits to arise from 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 ; (3) the deceased was to be sole manager of the business and his decisions on all questions relating to the purchase or sale of stock or otherwise in connection with the carrying on of the business were to be binding on all parties ; and (4) the business of this partnership was to be carried on on the three holdings of the deceased.

It is found in the special case that from the date of the verbal agreement for partnership the partnership was carried on upon the three holdings and continued to be carried on thereon up to and on the execution of the transfers and settlements next to be mentioned and thereafter up to the date of an indenture of partnership executed in 1919.

On the 1st May, 1913, by four memoranda of transfer in the form prescribed by the Real Property Act, 1900, and duly registered in accordance with that Act, the deceased transferred by way of gift to each of his four sons all his right, title and interest in portions of his three holdings. The particulars of these transfers are as follows :—

(1) 5,818 acres, part of the T estate, were transferred to Donald.

(2) 3,864$\frac{3}{4}$ acres, part of the B estate, were transferred to Alfred.

(3) 3,063 acres 21$\frac{3}{4}$ perches, further part of the B estate, were transferred to Charles.

(4) 3,331 acres 2 roods 32 perches, part of the W estate, were transferred to Roland.

On the same date the deceased by two further memoranda of transfer in the form prescribed by and duly registered in accordance with the Real Property Act, 1900, transferred—

(1) 4,740 acres, part of the T estate, to trustees to be held upon the trusts of a settlement of even date made by the deceased in favour of his daughter Lilias and her children.

(2) 4,665 acres 1 rood, further part of the T estate, to trustees to be held upon the trusts of a settlement of even date made by the deceased in favour of his daughter Ada and her children.

Under each of the two settlements the trustees were directed to utilise the trust premises in connection with 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 result of these transfers was to leave the deceased with about 8,020 acres out of the total of 33,501.

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 is set out in the special case and is now accepted by the respondent as correct, is 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."

On the 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 the 4th November, 1929. No part of the lands comprised in the six transfers was ever withdrawn from the use of the partnership.

The respondent assessed the death duty payable on the death of the deceased upon the footing that the estate of the deceased must be deemed to include the lands comprised in the six transfers made by the deceased in 1913 by virtue of section 102, sub-section (2), paragraph (*d*), of the Stamp Duties Act, 1920–1931.

Sections 101 and part of 102 (so far as material) of the Stamp Duties Act, 1920–1931, are as follows :—

> " 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.

" 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 or in any way whatsoever whether enforceable at law or in equity or not and whenever the deceased died."

The concluding words of paragraph (*d*) viz." whether enforceable at law or in equity or not and whenever the deceased died " were added after the death of the deceased by the Stamp Duties Amendment Act 1931.

In their Lordships' judgment, having regard to the facts found in the special case and to the passage already quoted from the statutory declaration of the deceased's son Donald, the proper conclusions are that the partnership formed in 1909 continued without interruption until 1919, that under the terms of the verbal agreement made in 1909 the partnership was entitled to the use of the three holdings whatever the ownership of the holdings so long as the partnership continued, and that up to 1913 that right could only be determined by the dissolution of the partnership at will, which did not happen, that the transfers made in 1913 were intended to be subject to the partnership right, and that in connection with the transfers no alteration was made in the partnership agreement except that the right of the partnership was diminished by the stipulation that any member of the family might withdraw from the agreement as to the running of stock on his holding upon reasonable notice.

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. In either view what was comprised in the gift was, in the case of each of the gifts to the children and the trustees, the property shorn of the right which belonged to the partnership, and upon this footing it is in their Lordships' opinion plain that the donee in each case assumed bona fide possession and enjoyment of the gift immediately upon the gift and thenceforward retained it to the exclusion of the donor. 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 Section 102 (2) (*d*). Upon this view of the matter the effect of the words added by the Stamp Duties (Amendment) Act, 1931, becomes unimportant and need not be considered.

But it was urged on behalf of the respondent before their Lordships' Board, although this point does not appear to have been raised below, that the matter must be looked at in a different light because of the form of the transfers and the provisions of Section 42 of the Real Property Act, 1900.

That section provides as follows :

> "Notwithstanding the existence in any other person of any estate or interest, whether derived by grant from the Crown or otherwise, which but for this Act might be held to be paramount or to have priority, the registered proprietor of land or of any estate or interest in land under the provisions of the Act shall, except in case of fraud, hold the same subject to such encumbrances, liens, estates, or interests as may be notified on the folium of the register-book constituted by the grant or certificate of title of such land, but absolutely free from all other encumbrances, liens, estates, or interests whatsoever" [with certain exceptions not material to be stated].

Now the transfers in form were expressed to be transfers of the deceased's right, title and interest in the lands comprised in them respectively without reference to any paramount right existing in the partnership and no such right was notified in the folium of the register book.

It may be therefore that the transfers when registered gave a title which overrode in point of law any unnotified right of the partnership. It is not necessary to express any opinion as to the extent of the operation of the words "except in the case of fraud" or how far these words would have had application to any of the transfers in the present case if the donee had insisted upon the absoluteness of the transfer contrary to the terms of the actual bargain.

In their Lordships' opinion it is the substance of the transactions which must be ascertained and if when so ascertained the substance does not fall within the words of the statute it cannot be brought within them merely because the forms employed did not give true effect to the substance.

It is not always sufficiently appreciated that it is for the taxing authority to bring each case within the taxing Act, and that the subject ought not to be taxed upon refinements or otherwise than by clear words.

Their Lordships are satisfied that the respondent has not in the present case succeeded in making good that Section 102 (2) (*d*) of the Stamp Duties Act applies.

The judgment below seems to have proceeded in part upon a misapprehension as to the facts as their Lordships can find nothing to support the statement that in 1913 there was an express stipulation that the partnership should continue, and in part upon a view of the law which their Lordships do not think well founded, namely, that if once it is found that the deceased had some benefit from the land that in itself was sufficient to bring the case within the section irrespective of the question whether the benefit was referable or not referable to the gift.

In their Lordships' opinion the appeal should be allowed, the rule below should be discharged, and the first question of the special case should be answered by declaring that none of the lands in question form part of the dutiable estate of the deceased.

Their Lordships will humbly advise His Majesty accordingly.

The respondent must pay the costs of the appeal.

**In the Privy Council.**

---

HUGH ROBERT MUNRO AND OTHERS.

*v.*

THE COMMISSIONER OF STAMP DUTIES,

---

DELIVERED BY LORD TOMLIN.

Printed by
Harrison & Sons, Ltd., St. Martin's Lane, W.C.2.

1933.