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4, 1954

In the Privy Council.

No. 25 of 1951.

ON APPEAL FROM THE HIGH COURT OF
AUSTRALIA

BETWEEN

THE PERPETUAL EXECUTORS AND TRUSTEES
ASSOCIATION OF AUSTRALIA LIMITED *Appellant*

AND

THE COMMISSIONER OF TAXATION OF THE
COMMONWEALTH OF AUSTRALIA *Respondent.*

RECORD OF PROCEEDINGS

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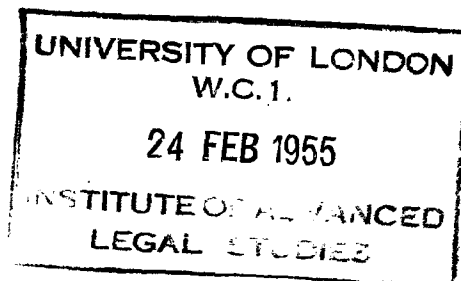
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THESE ARE THE ONLY PAPERS AVAILABLE IN THIS APPEAL.

Privy Council Office.

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No. 25 of 1951.

ON APPEAL FROM THE HIGH COURT OF AUSTRALIA

BETWEEN

THE PERPETUAL EXECUTORS AND TRUSTEES
ASSOCIATION OF AUSTRALIA LIMITED *Appellant*

AND

THE COMMISSIONER OF TAXATION OF THE
COMMONWEALTH OF AUSTRALIA *Respondent.*

RECORD OF PROCEEDINGS

No. 1.

Documents.

Estate Duty Return in the Estate of Frederick Charles Henry Thomas,
deceased (omitting irrelevant supporting schedules).

No. 1.
Estate
Duty
Return.
20th June,
1944.

ESTATE DUTY RETURN IN THE ESTATE OF FREDERICK CHARLES }
HENRY THOMAS, DECEASED. Dated 20th June, 1944 }

States—

Commonwealth of Australia.

ESTATE DUTY ASSESSMENT ACT.

10 In the Estate of FREDERICK CHARLES HENRY THOMAS late of "Koonwarra"
St. Kilda Road Melbourne in the State of Victoria Furniture
Warehouseman deceased testate.

Address for Service of Notices, &c., C/- Messrs. Corr & Corr, 104 Queen
Street, Melbourne.

Documents.
 No. 1.
 Estate
 Duty
 Return.
 20th June,
 1944—
continued.

I, ERIC RUSSELL Manager of THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED of 100-104 Queen Street Melbourne in the State of Victoria do solemnly and sincerely declare:—

1.—I am the person liable under the Estate Duty Assessment Act 1914-1942 to make a return of the Estate of the above-mentioned deceased and to pay the duty thereon under the said Act.

2.—The said deceased died on the 28th day of January 1944 at "Koonwarra" 549 St. Kilda Road Melbourne and was aged 78 years — months. He was at the time of death married and had during life followed the occupation of a Furniture Warehouseman. 10

3.—That the annexed Schedule contains a true statement of all and singular the real and personal estate of or to which the above-mentioned deceased was at the time of death possessed or entitled, or which is deemed to be part of his estate in accordance with the provisions of the Act, and that the values thereof as therein set forth are the true and full values of the several particulars therein mentioned respectively, and that the liabilities therein stated are justly due thereon.

4.—That the deceased did not within three years immediately preceding death make any gift *inter vivos* or settlement of any estate, real or personal.

(NOTE.—*Bona fide* sales to relatives by blood, marriage, or adoption 20 come within the definition of "Gifts *inter vivos*.")

5.—That the deceased had not an interest of any kind for his life in property comprised in a settlement (not being a settlement made by the deceased) which interest he surrendered to any other person within three years before his decease.

6.—That the deceased had not during his lifetime made any settlement under which he had any interest of any kind for his life whether or not such interest had been surrendered by him at any time before his decease.

7.—That the deceased had not immediately prior to his death any beneficial interest either as joint tenant or joint owner with other persons 30 in any real or personal property.

8.—That the deceased had not at any time of the death a beneficial interest in property, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his death to, or devolved on or after his death upon, any other person.

8A.—That, save and except in respect of the policies described and valued in Schedule No. 8, premiums have not been paid either wholly or in part by or on behalf of the deceased in respect of any policy of insurance on

the life of the deceased in favour of the deceased's widow, widower, children, grandchildren, parents, brothers, sisters, nephews or nieces. Documents.

No. 1.
Estate
Duty
Return.
20th June,
1944—
continued.

9.—That the deceased was at the time of death domiciled in Australia.

10.—That the estate of deceased is situated in Victoria.

11.—That the beneficiaries in the estate set out on the fourth page of this statement are the persons or institutions beneficially entitled thereto.

I undertake, in the event of any additional assets, or any excess in any amount claimed as an allowable deduction being discovered which would render further duty payable, to advise the Commissioner of Taxation, and
10 pay any further duty found to be payable by me.

And I make this solemn declaration by virtue of the Statutory Declarations Act 1911–1922 conscientiously believing the statements therein to be true in every particular.

Declared at Melbourne in the State }
of Victoria this 20th day of June } Administrator—E. RUSSELL.
1944.

Before me—A. McALLCHIN.

*A Commissioner of the Supreme Court of the State of Victoria
for taking Affidavits.*



Documents.

STATEMENT OF ASSETS

No. 1.
Estate
Duty
Return.
20th June,
1944—
continued.

This Statement is to include and separately describe any property, real or personal, after the commencement of this Act, within three years before his decease; or property interest of any kind for life, which interest he surrendered to any other person within three years which he had any interest of any kind for his life whether or not that interest was surrendered deceased immediately prior to his death in a joint tenancy or joint ownership with other time of his decease which beneficial interest by virtue of a settlement or agreement made by any other person.

ASSETS.	Total as shown in Schedule £ s. d.	10
REAL ESTATE as per Schedule No. 1 (that in each State to be shown separately. References to Titles and full description should be supplied in respect of each parcel similar to details as furnished for Federal Land Tax purposes in order to facilitate identification and valuations)	39856 0 0	
Particulars of real property being the beneficial interest held by the deceased immediately prior to his death, in a joint tenancy or joint ownership with other persons. The date of creation of the joint tenancy and the amount contributed by each tenant should be stated, as per Schedule No. Nil		20
TOTAL REAL ESTATE	39856 0 0	
PERSONAL ESTATE (that in each State and outside Australia to be shown separately)—		
Leasehold estate of all kinds as per valuations in Schedule No. Nil (Particulars should be supplied of term, rental, building, covenants, and basis of valuation)		
Rents due and/or accrued at date of death, as per Schedule No. 2	164 6 7	
Life Insurance Policies and Bonuses, as per particulars in Schedule No. 3 Nil	3721 8 0	30
Money in hand or house Nil		
Money in Bank on current account including accrued interest (state the Banks)—English Scottish & Aust. Bank South Melbourne, Property Account	1913 1 11	
Money in Bank on fixed deposit (state the Banks) ... Nil		
Accrued interest to date of death on fixed deposits (state dates and periods of deposits and rates of interest) ... Nil		
Mortgages ... } as per Schedule No. ... Nil		
„ accrued interest } as per Schedule No. ... Nil		
Debentures of all kinds, Treasury Bills, or other similar securities, and accrued interest, as per Schedule No. 4	25147 5 4	40
Debts due to the estate, as per Schedule No. 5	2930 9 2	
Shares in Companies } as per Schedule No. 6	32359 14 5	
Dividends on shares in Companies un- } (those in each State to collected at date of death } be shown separately)		
Furniture and household effects, as per Schedule No. 6A	838 3 0	
Watches, Trinkets, Jewellery, Clothing, &c., as per Schedule No. 7	238 15 0	
Motor Cars, Carriages, Harness, and Saddlery—Rolls Royce Sedan Car 1928 Model—Valued by Allcars Pty, Ltd. at	500 0 0	

AND LIABILITIES.

which passed from the deceased by any gift inter vivos or by a settlement made before or comprised in a settlement (not being a settlement made by the deceased) in which he had an years before his decease ; or property comprised in a settlement made by the deceased under by him at any time before his decease ; or property being the beneficial interest held by the persons ; or property being a beneficial interest in property which the deceased had at the him passed or accrued on or after his decease to, or devolved on or after his decease upon

Documents.
 No. 1.
 Estate
 Duty
 Return.
 20th June,
 1944—
continued.

10	LIABILITIES.	Total as shown in Schedule £ s. d.
	SECURED DEBTS (distinguish between mortgages and other secured debts)—	
	UNSECURED DEBTS—(Where space provided is insufficient, debts be set out in separate schedule)—	
	As per Schedule No. 10 	68217 3 9
	PROBATE AND SUCCESSION DUTIES payable under any State Act ... (These items will be ascertained and deducted by the Department)	

LIABILITIES.	Total as shown in Schedule £ s. d.	Documents. — No. 1. Estate Duty Return. 20th June, 1944— <i>continued.</i>
OTHER LAWFUL DEDUCTIONS OR CHARGES		
THE VALUE OF THAT PORTION OF THE ESTATE (if any) devised, bequeathed or passing for purposes which in pursuance of section 8 (5) of the Estate Duty Assessment Act 1914-1940, exempt it from estate duty (see Schedule No.) ...		
TOTAL LIABILITIES AND EXEMPT ESTATE	68217 3 9	
BALANCE FOR DUTY ...	195669 10 11	
TOTAL REAL AND PERSONAL ESTATE ...	263886 14 8	

10

SCHEDULE NO. 9.

INTEREST IN A PARTNERSHIP.

Value of deceased's 19½% interest in the partnership
known as Maples £156217 11 3

(The amount set out is the amount at which the Executor of the deceased is obliged to sell the deceased's interest in the said partnership pursuant to Partnership Deed dated 22nd December 1939 under which all but one of the surviving partners have the option of purchasing the 20 interest of the deceased.)

Documents.

No. 2.

No. 2.
Notice of
Assessment
of Estate
Duty and
Alteration
Sheet.
14th
February,
1947.

Notice of Assessment of Federal Estate Duty and Alteration Sheet, No. 21917.

NOTICE OF ASSESSMENT OF FEDERAL ESTATE DUTY AND } States—
ALTERATION SHEET No. 21917. Dated 14th February 1947 }

Federal Taxation Department.—Official Receipt.

Amount Paid.	Receipt No.	Date.
£61,468-14-4	A VED—CHQ 21917—10181	Mar.14-47.

Received the above-mentioned amount—

K. J. GORMAN,
Receiver. 10

Original. Commonwealth of Australia. E.D. Form 2a.

FEDERAL ESTATE DUTY.—NOTICE OF ASSESSMENT.

File No. VED. 60401 Assessment No. 21917
FL 46/47

To The Administrator of the Estate of the Late
FREDERICK C. H. THOMAS,
Care of Messrs. Corr & Corr, Solicitors,
104 Queen Street, Melbourne.

In accordance with the Estate Duty Assessment Act 1914-1942, Estate Duty has been assessed on the value of the estate as under :— 20

Value of Estate	£231477	
Less Statutory Exemption	£	
Value for Duty of Estate	£231477	
Duty at 26.555% thereon	£61468 14 4	
Less Deduction Section 8 (7) (a)	£	
(b)	£	
Duty	£61468 14 4	
Additional Duty—		
Sec. 47A—(Late return—Omitted assets)	£	
Total amount payable ...	£61468 14 4	30

The last day for payment of this amount is 17/3/47.

After that date additional duty accrues at the rate of 10% per annum.

H. H. TREBILCO,
Deputy Commissioner of Taxation.

Fourth Floor, London Stores Building,
152 Elizabeth Street, Melbourne, C.1.

FEDERAL ESTATE DUTY ALTERATION SHEET.

Estate of Frederick C. H. Thomas, deceased.

File No. VED/60401

No. 2.
Notice of
Assessment
of Estate
Duty and
Alteration
Sheet.
14th
February,
1947—
continued.

In assessing the duty on the above Estate the following Alterations have been made in the Assessable Value shown in the Return lodged :—

	Details of Alterations.	Amount.	Total.
		£	£
	Net Value of Estate as Returned		195670
10	Add on A/c—Shares Melbourne Properties Pty. Ltd. @ 22/9d.) under-valued	301	
	Shares Hotham Estates Pty. Ltd. (@ 15/6) under-valued	3993	
	Shares The Block Pty. Ltd. (@ 26/7) under-valued	610	
	*Interest in partnership of Maples under-valued	36	
	Shares charged in favour of deceased	40399	
	Proportion of Goodwill in Maples—Section 8 (4) (e)	20000	
20	Proportion of Policy Schedules—Sections 8 (4) (f) & (4A)	278	65617
			<hr/> 261287
	Deduct on A/c—Unpresented cheques	15	
	Federal Income Tax	6513	
	Vic. Probate duty	23282	29810
			<hr/> £231477

* Tas. Real Estate increased by £185 to £34700.

No. 3.

Notice of Objection (Omitting irrelevant paragraphs).

30 NOTICE OF OBJECTION. }
Dated 14th Marcy 1947 } States—

IN THE ESTATE OF FREDERICK CHARLES HENRY THOMAS late of "Koonwarra" St. Kilda Road Melbourne in the State of Victoria Furniture Warehouseman deceased.

No. 3.
Notice of
Objection.
14th March,
1947
(Omitting
Irrelevant
Paragraphs)

NOTICE OF OBJECTION TO ASSESSMENT UNDER ESTATE DUTY ASSESSMENT ACT 1914-1942.

TAKE NOTICE that THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED being the Executor of the Will and Codicils and Administrator of the Estate of the above-named Frederick

Documents.
 —
 No. 3.
 Notice of
 Objection.
 14th March,
 1947
 (Omitting
 Irrelevant
 Paragraphs)
 —continued.

Charles Henry Thomas deceased being dissatisfied with the assessment of the Commissioner of Taxation dated the Fourteenth day of February 1947 whereby the sum of £61,468/14/4 was assessed for Estate Duty in respect of the Estate of the said deceased HEREBY LODGES an objection against the said assessment on the following grounds :—

1.—That the shares held by the deceased in Melbourne Properties Proprietary Limited, The Block Proprietary Limited and Hotham Estates Proprietary Limited, and each of the said Companies, are valued by the Commissioner at a sum in excess of the true value thereof.

* * * * *

10

9.—That in assessing the value of the shares in Melbourne Properties Proprietary Limited and The Block Proprietary Limited being the shares the subject of a charge dated the Seventeenth day of July 1926 given by Lena Thomas in favour of the deceased, the Commissioner valued such shares at an amount in excess of the true value thereof.

* * * * *

17.—That at the date of death of the deceased the true value of the shares in each of the said Companies was as follows :—

The Block Proprietary Limited, 9/9d. per share, or alternatively, less than 26/7d. per share. Melbourne Properties Proprietary Limited, 15/- per share, or alternatively less than 22/9d. per share.

Hotham Estates Proprietary, Limited, 13/7d. per share, or alternatively, less than 15/6d. per share.

* * * * *

19.—That the dutiable estate of the deceased did not include any interest in the firm or partnership trading under the name or style of Maples.

20.—That the dutiable estate of the deceased did not include any interest in the goodwill of the firm or partnership trading under the name or style of Maples.

21.—That the deceased did not have at the time of his death any beneficial interest in the said goodwill which by virtue of a settlement or agreement made by the deceased passed or accrued on or after his decease to or devolved on or after his decease upon any other person or persons.

22.—That the deceased was not at the date of his death entitled to any share or interest in the goodwill of the said firm of Maples.

23.—That as at the date of his death the interest of the deceased was a right to receive the purchase price payable upon the exercise of the options contained in the Articles of Partnership in respect of the said firm,

40

dated the Twenty-second day of December 1939 as amended by Indenture dated the Fourth day of December 1940 made between the partners of the said firm, and on the exercise of the said options no amount was payable in respect of goodwill.

Documents.
—
No. 3.
Notice of
Objection.
14th March,
1947
(Omitting
Irrelevant
Paragraphs)
—continued.

24.—That the interest of the deceased in the assets of the partnership ceased at the date of death of deceased conditionally upon the exercise of the said options and payment of the purchase price which options have been exercised and which purchase money has been paid.

25.—That the estate of deceased is not dutiable in respect of any proportion of goodwill of the said firm of Maples pursuant to Section 8 (4) (e), or any other provision, of the Estate Duty Assessment Act.

Dated the Fourteenth day of March 1947.

THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION
OF AUSTRALIA LIMITED,

E. RUSSELL, *Manager*.

Executor of the Will and Codicils of
Frederick Charles Henry Thomas deceased.

No. 4.

Notice of Disallowance of Objection.

20 NOTICE OF DISALLOWANCE OF OBJECTION. } States—
Dated 29th January 1948

No. 4.
Notice of
Dis-
allowance of
Objection.
29th
January,
1948.

Commonwealth of Australia.

Melbourne, 29th January 1948.

The Administrator,
Est. Frederick C. H. Thomas decd.
C/- Messrs. Corr & Corr,
104 Queen Street, Melbourne, C.I.

Dear Sir,

Estate Duty Assessment Act 1914-1947.

30 I desire to inform you that, pursuant to the powers delegated to me by the Commissioner of Taxation under Section 6 of the above Act, I have considered your objection dated 14th March 1947 to the assessment, notice of which was issued on 14th February 1947 in respect of the above-named estate and have allowed the objection to the extent indicated on the attached Notice of Amended Assessment.

FEDERAL ESTATE DUTY ALTERATION SHEET.

Estate of Frederick C. H. Thomas, deceased.

File No. V.E/D/60401

In assessing the duty on the above Estate the following Alterations have been made in the Assessable Value shown in the Return lodged :—

Details of Alterations.	Amount.	Total.
	£	£
Net Value of Estate as Previously assessed		226573
10 Deduct :—Reduced value of Shares in Block Pty. Ltd. ...	16939	
and Melbourne Properties Pty. Ltd. ...	4650	21589
charged in favour of deceased		
Amended value of estate		204984

No. 6.
Notice of
Amended
Assessment
and
Alteration
Sheet.
27th
February,
1948—
continued.

No. 7.

Notice Requiring Objection to be Treated as Appeal.

NOTICE REQUIRING OBJECTION TO BE TREATED AS AN } States—
APPEAL. Dated 4th March 1948

No. 7.
Notice
Requiring
Objection
to be
Treated
as Appeal.
4th March,
1948.

IN THE ESTATE of FREDERICK CHARLES HENRY THOMAS late
of "Koonwarra" St. Kilda Road Melbourne in the State
of Victoria Furniture Warehouseman deceased.

20 THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF
AUSTRALIA LIMITED the executor of the Will of the above-named
Frederick Charles Henry Thomas deceased HEREBY REQUESTS the Commis-
sioner of Taxation to treat the objection dated the Fourteenth day of March
1947 to the assessment by the said Commissioner dated the Fourteenth
day of February 1947 of Estate Duty in the Estate of the said deceased
(in so far as the said objection has not been allowed by the Commissioner)
as an appeal and to forward it to the High Court of Australia.

In the High
Court of
Australia.

No. 8.
Transcript
of Shorthand
Note
of Pro-
ceedings.

No. 8.

Transcript of Shorthand Note of Proceedings including the Evidence of Maurice Albert Webb.

TRANSCRIPT OF PROCEEDINGS INCLUDING THE EVIDENCE } States—
OF MAURICE ALBERT WEBB. Dated 8th March 1949 }

Before His Honour Mr. Justice WILLIAMS.

Melbourne, Tuesday, 8th March 1949, at 12.15 p.m.

Mr. J. B. TAIT K.C., with him Mr. L. VOUMARD (instructed by Messrs. Corr & Corr) appeared for the Plaintiff.

Mr. T. W. SMITH K.C., with him Mr. H. A. WINNEKE (instructed by 10 the Commonwealth Crown Solicitor) appeared for the Defendant.

Mr. TAIT: In this matter, if your Honour pleases, the Plaintiff is the executor and trustee of the will of F. C. H. Thomas deceased and the matter arose under the Federal Estate Duty Assessment Act, the deceased having died on 28th February 1944. At the time of his death, he was a partner in the firm of Maples, and he had at the time of his death four or possibly five other partners.

HIS HONOUR: According to the affidavit with the papers, he died on 28th January, though it does not matter.

Mr. TAIT: I am told that my copy is wrong and that it should be 20 January. The partnership, which had been carried on for many years, was conducted under and pursuant to a written partnership deed which contained a clause and various provisions as to what should happen upon, *inter alia*, the death of any of the partners.

The particular matter which has importance in this case is that, under those provisions of the deed, on the death of a partner there were certain options given to other partners. One set of options was to two partners—Louisa Jones and Lorna Hannan—if they were living, and there was another option to the other surviving partners. Between them, those options entitled those persons to purchase from the deceased's estate his interest 30 in the partnership capital. Then upon the exercise of those options, the purchase price should be calculated without adding or taking into account any sum for goodwill.

HIS HONOUR: What clause is that?

Mr. TAIT: Clause 12, proviso. That says—

“It is specifically agreed and declared that in computing
“the amount of purchase money payable on the exercise of
“any option, . . . taken into account for goodwill.”

HIS HONOUR: This is the only item left in dispute now, is it not?

Mr. TAIT : Yes. The original assessment was objected to on various grounds.

HIS HONOR : There were three companies, apparently.

Mr. TAIT : Yes, the valuation of shares in three companies and some other items, and to that extent the objection was given effect to in an amended assessment, because in that amended assessment the values of those shares were adopted as contended for.

There was one matter still left outstanding, which was the subject of a further amended assessment, and we are concerned with that. Those 10 particular shares were the subject of a charge which was an asset in this estate. The charge was £40,000 and it was more than the value of the shares over which the charge lay. Accordingly, the value of that asset could not be more than the value of the shares.

When those shares were reduced in value for the purpose of valuing to the extent that the shares were owned by the deceased, no alteration was made in the value assigned to the charge. That was adjusted in the further amended assessment. That being cleared up, it left one matter in dispute between the parties, the matter now before the Court. That is the question of goodwill, namely, that in valuing that asset of the deceased 20 which consisted of his interest in the partnership, account should be taken of the value of the goodwill.

The parties have gone further. They have agreed upon what that value would be if it should be included, and the figure is £20,000. This matter was the subject of a decision in this Court in *Milne's* case comparatively recently. *Milne's* case is the *Trustees Executors and Agency Co. Ltd. v. The Commissioner of Taxation*, reported in 69 C.L.R., page 270.

HIS HONOR : Who were the partners in Maples ?

Mr. TAIT : The deceased, Robert Nathan, Louisa Jones and Lorna Hannan (daughters of another Nathan and nieces of Robert Nathan) 30 and three others—Lionel Newton, Laurie Joseph Newton and Donald Lamond.

HIS HONOR : I take it that these options to purchase shares of the deceased were given to some of the surviving partners ?

Mr. TAIT : There were two sets of options, one being to the two women—Louisa Jones and Lorna Hannan. That was an option to take $6\frac{1}{4}\%$ of Thomas's interest in the capital. Then he gave an option as to all the rest of his interest—the difference between 100% and $6\frac{1}{4}\%$ —to all the other partners ; that is, of course, other than himself and the two women, also excluding Lamond. Actually, he gave that option to Robert 40 Nathan and the two Newtons. I am told that the Newtons were in the Nathan family somewhere.

In *Milne's* case, of which Your Honor will no doubt have a recollection—

HIS HONOR : Yes ; I read it before I came into Court.

Mr. TAIT : Your Honor will see that the position which arose was the very thing here. There was a partnership agreement with a provision that, on the death, there might be a taking over, and that no allowance

In the High
Court of
Australia.

No. 8.
Transcript
of Short-
hand Note
of Pro-
ceedings—
continued.

In the High Court of Australia.
 No. 8.
 Transcript of Short-hand Note of Proceedings—
continued.

should be made in respect of the goodwill of the business. That was exercised by the survivors, no allowance being made for goodwill, but the question came up under the Estate Duty Act on the death of that partner, and it was held by the Full High Court, with three Judges forming a majority—Rich J., Starke J. and Your Honor, with Chief Justice Sir John Latham and McTiernan J. dissenting—that within the meaning of Section 8 (4) (e) of the Estate Duty Assessment Act the deceased partner at the time of his death had a beneficial interest in the goodwill—(reads decision).

That was the decision and I am not proposing to attempt to distinguish my case here on the facts. I recognise that Your Honor will feel that it is a binding authority and that you should follow it, and I cannot expect Your Honor to do anything else. Accordingly, I do not propose before Your Honor to re-argue that case, and to argue that the decision of the majority was wrong. I desire to make the formal submission that the decision of the majority was wrong, leaving it open to me, not confining myself to any particular grounds, to adopt the views of the Justices who were in the minority. 10

In this case, we desire to carry the matter further. As information to Your Honor, I may state that it has not been decided at the moment whether we will go by appeal from Your Honor's decision following this case to the Full High Court, or attempt to carry the matter direct to the Privy Council, but my instructions are that the executors here do propose to follow one course or the other. 20

HIS HONOR: I should think it would be the best course to go to the Privy Council. I do not know whether I am advising the executors.

Mr. TAIT: I may add that I have only come into the matter quite recently.

HIS HONOR: You now have two Judges whose views are not known, but it seems rather unlikely that the Full Court would reverse a recent decision. 30

Mr. TAIT: It may well be, but I think that is a matter for the executors after further advice. I am simply informing Your Honour that we have in mind going on somewhere, as we have to do to get anywhere with this matter.

HIS HONOR: At any rate, you want to prove your case?

Mr. TAIT: Yes. In doing that, it is very largely documentary, I have not had the opportunity of discussing this matter with my friend, but we may be able to admit documents. In order to produce the documents, I propose to call Mr. Webb of the Perpetual Trustee Company.

Appellant's Evidence.
 Maurice Albert Webb.
 Examination.

MAURICE ALBERT WEBB, sworn and examined. 40

Mr. TAIT: What is your full name?—Maurice Albert Webb.

Where do you reside?—At No. 3 Amy Street, Camberwell.

You are senior estate officer in the Plaintiff here, the Perpetual Executors & Trustees Association of Australia Limited?—Yes.

Can you state that your company is the executor and trustee of the estate of Frederick Charles Henry Thomas?—Yes, I can do that.

Probate of his will was granted to your company by the Supreme Court of Victoria?—Yes, on 24th June 1944.

Can you tell us the date of the death of the deceased?—The 28th January, 1944.

Do you produce a deed called a partnership deed of the firm of Maples, dated 22nd December 1939, made between Robert Nathan, Frederick Charles Henry Thomas, Louisa Jones, Lorna Hannan, Lionel Newton, Laurie Joseph Newton and Donald Lamond?—Yes.

Mr. TAIT: The deed is signed by each of the persons to whom I referred, is it not?—That is correct.

EXHIBIT "A."—Partnership Deed dated 22/12/39.

Do you produce a deed called a Supplementary Agreement of partnership deed of the firm of Maples dated 4th December, 1940 and made between the same parties as Exhibit "A," and executed by those persons?—Yes.

EXHIBIT "B."—Supplemental Deed of Partnership dated 4/12/40.

Your Honor, this matter comes up by way of objection treated as an appeal and referred to the Court. There are certain papers sent on by the Commissioner to the Court. I think the practice is to put in the return for assessment and the assessments as exhibits. I am not sure whether it is a universal practice.

HIS HONOR: I have always regarded those as sort of quasi pleadings. It can go on the notes that the documents filed in Court in connection with the appeal are treated as being before the Court on the appeal.

Mr. TAIT: Very well. May I just note them for the purpose of the notes to identify things that are there by occasion as in evidence. There is a notice dated 28th September, 1948, signed by the Crown Solicitor and addressed to us. It is headed, "Notice of transmission of objection."

HIS HONOR: The first document here is the ordinary document signed on behalf of the Commissioner of Taxation, dated 28th September, 1948, forwarding to the Court the taxpayer's objection and also the following documents:—

Copy Estate Duty Return of the Estate of Frederick Charles Henry Thomas, deceased;

Copy Notice of Assessment No. 21917 dated 14th February, 1947;

Amendments thereto dated 29th January, 1948 and 27th February, 1948;

Copy Notice of Objection to Assessment No. 21917 dated 14th March, 1947;

Copy Notice of Disallowance of Objection dated 29th January, 1948;

Copy Letter dated 4th March, 1948 from the solicitors to the Appellant to the Commissioner of Taxation requesting that the objection be treated as an appeal and forwarded to the High Court of Australia.

In the High Court of Australia.

No. 8.

Appellant's Evidence.

Maurice

Albert

Webb.

Examina-

tion—

continued.

See page 32

See page 42

In the High
Court of
Australia.

No. 8.
Appellant's
Evidence.
Maurice
Albert
Webb.
Examina-
tion—
continued.

Mr. TAIT: I am obliged to Your Honor. I arranged to have here available a letter that is not mentioned in the documents to which Your Honor has referred. It is dated 17th February 1948 and addressed to the Commissioner, but it deals only with the position as between the first amended assessment and the second, pointing out that the first one was in error in the matter I have mentioned to Your Honor of the valuation of the charge. I have a good deal of doubt whether I ought to put that in.

HIS HONOR: Have you a further amended assessment?

Mr. TAIT: Yes. The further amended assessment is one of the documents Your Honour quoted as being before the Court. It would 10 only be explanatory.

HIS HONOR: Attached to that there is an alteration sheet which shows that there was deducted the reduced value of shares in Block Pty. Ltd., £16,939 and Melbourne Properties Ltd., £4,650 charged in favour of the deceased.

Mr. TAIT: With the explanatory paper, I think it is sufficient.

HIS HONOR: The amended value of the estate is £204,984.

Mr. TAIT: Yes. I think the letter of which I am speaking would not carry the matter further.

HIS HONOR: This seems to be reducing the charge. 20

Mr. TAIT: Yes, the value of the charge; accordingly the value is reduced.

HIS HONOR: Has the supplemental deed anything to do with this point?

Mr. TAIT: I do not think it has. The provisions in the original deed dealing with this point run through it very largely and give us some reference to this same matter in several places. The original deed is not confined to the one sentence I read. Accordingly, any alterations made to the deed conceivably might have some bearing on construction. I personally do not think they have, but I thought it best to put it in. 30

HIS HONOR: If you are going to appeal in this matter, especially if you are going to the Privy Council, it is very advisable to get the point well stated in anything that I say. Of course, I have not read this document yet. I should like to be satisfied, for instance, that it is covered by *Milne's case*.

Mr. TAIT: Yes. May I leave that for the moment?

HIS HONOR: Yes. There is further evidence, is there?

Mr. TAIT: Yes—the documents exercising the options. Strictly speaking, I am not quite sure myself of the relevance of the exercise of the options after death, and may I say that I would be guided by Your Honor's views on the matter. I do not know whether my friend would think they should not go in, as being irrelevant, but I am only anxious to complete the story. I cannot say more than that. They are not very lengthy documents and are all in the same form 40

HIS HONOR: I think it is advisable to put them in.

Mr. SMITH: I thought it might found an argument against Mr. Tait if they were not put in.

Mr. TAIT : I will then adopt that course.

(*To Witness*) : Mr. Webb, do you produce copies of the options or rather the notices directed to you purporting to exercise certain options ? These are the originals.

Three are dated 19th April, 1944, and two are dated 20th April, 1944 ? That is correct.

They are signed in this order—Robert Nathan, Louisa Jones, Lorna Hannan, on 19th April, 1944, and the two of 20th April, 1944 are signed by Lionel Newton and Laurie J. Newton ?—Yes.

10 EXHIBIT " C."—Documents dated 19th April, 1944 and 20th April, 1944, as above described. See page 44

Mr. TAIT : Mr. Webb, pursuant to those options (Exhibit " C "), were certain purchase monies received by your company from the persons who had exercised those options ?—That is correct, on 28th October, 1944.

That is the date on which the money was paid to you ?—That is correct.

HIS HONOR : On all of them ?—Yes.

All were paid on the same date ?—Yes.

20 Mr. TAIT : Can you tell us the amount, or have you details of the different amounts ?—Yes. I have here a statement setting out the method by which the purchase money is calculated and the amounts contributed by each partner.

HIS HONOR : I suppose you want to prove that nothing was paid for goodwill, Mr. Tait ?

Mr. TAIT : Yes. I think this is in a convenient form. This was prepared for us. Without putting it in, I will inform Your Honor what it is. It is headed " Ascertainment of amount owing by partners of Maples."

HIS HONOR : Will it not be sufficient if it is admitted that the purchase monies included nothing for goodwill ?

30 Mr. TAIT : It comes to that. It is not a lengthy document, but that is all I want proved, that the purchase money was paid and nothing was received by the executors for goodwill ; it was calculated without allowing anything for it. The stock and goodwill establish that by reference to balance-sheets. My friend suggests that the document should go in, and I adopt that course.

(*To Witness*) : Do you produce a calculation, Mr. Webb, as to the amount that was owing by partners in connection with the purchase of Mr. Thomas' share in the firm pursuant to the exercise of the option by them and a statement of the individual amounts payable by the partners?

40 —Yes.

EXHIBIT " D."—Statement as above described.

See page 47

Can you state whether anything was included for goodwill in the amount in that statement (Exhibit " D ") worked out as to shares ?—Nothing was included for goodwill.

In the High
Court of
Australia.

Can you also state that the amounts shown in this document, in Item 8, as the individual amounts payable by the partners, were in fact paid to your company?—They were, on 28th October, 1944.

No. 8.
Appellant's
Evidence.
Maurice
Albert
Webb.
Examina-
tion—
continued.

Cross-examined by Mr. SMITH.

Mr. SMITH: Mr. Webb, would you mind looking at the five notices comprising Exhibit "C." Three of those you told us, are dated 19th April, 1944, and two are dated 20th April, 1944. Can you tell me when your company in fact received them?—No. I could verify that but I cannot tell you offhand.

Cross-exam-
ination.

Mr. SMITH: Perhaps you can tell us after lunch?—They were received 10 under cover of a letter from the Estate's solicitors.

Perhaps you could find that out and tell us after lunch?—Yes, I can produce that letter.

HIS HONOR: Who worked out the figures showing what amounts were payable?—The Secretary of Maples, and it was subsequently checked in the office of the company.

Perhaps the best thing to do would be to adjourn now, Mr. Tait.

Mr. TAIT: Yes, I was going to suggest that.

HIS HONOR: Before I finally dispose of the case, I should like to look through the documents in case I considered something should be in. I do 20 not want an incomplete case to go to the Privy Council.

Does that suit you, Mr. Smith?

Mr. SMITH: Entirely, Your Honor.

Sitting suspended from 12.55 p.m. to 2.30 p.m.

Upon resuming at 2.30 p.m.

Transcript
of Short-
hand Note
of Pro-
ceedings—
continued.

HIS HONOR: Yes, Mr. Tait.

Mr. TAIT: There was one matter my learned friend referred to before the adjournment, and that was options in writing being produced.

HIS HONOR: There were only five of them; should there have been 30 six?

Mr. TAIT: No Lamond did not get an option, he was excepted.

HIS HONOR: Where was he excepted?

Mr. TAIT: On the second page, 9 (a) (2), at the bottom of the page.

HIS HONOR: I see, he is listed with the options.

Mr. TAIT: (1) is to the two women and then (2) is to all the others other than the women and Donald Lamond.

HIS HONOR: I am sorry, I did not see that.

Mr. TAIT: I have a letter here, dated the 24th of April, 1944, addressed by the solicitors to the Perpetual Executors Company enclosing the documents which are the exercise of the options which have been put in. 40 It encloses other documents too. I do not know how my friend would like that dealt with. I have shown it to him and perhaps it might be sufficient if we take it as evidence of an admitted fact.

HIS HONOR: Is this the date?

Mr. TAIT : The date of the exercise of the option was received by the Trustee Company. The option had to be in writing. This is merely the date they were delivered, the actual date of the option I think was, some on the 19th and some on the 20th.

HIS HONOR : Two 20, three 19's.

Mr. TAIT : Then on the 24th April, still within the three months of the death, the whole of those documents were sent on to the Trustee Company. I would have thought if I were to show my friend that letter we could mutually admit that those options were forwarded to and received
10 by the Appellant on the 24th April, 1944, and it could be recorded as an admission.

Mr. SMITH : I am prepared to accept that.

HIS HONOR : You are prepared to accept it Mr. Smith.

Mr. SMITH : Yes, Your Honor.

HIS HONOR : These options have to be exercised within a certain time.

Mr. TAIT : Three months.

HIS HONOR : What was that date then ?

Mr. TAIT : The letter was dated 24th April, 1944.

HIS HONOR : Well, it is admitted that the notices exercising the five
20 options were received by the Appellant on or before the 24th April, 1944.

Mr. TAIT : That appears to me to complete the evidence that is necessary for the determination of this question.

HIS HONOR : It is pretty obvious, I think Mr. Robert Nathan had to survive the deceased, had he not ?

Mr. TAIT : Yes.

HIS HONOR : It is pretty obvious, since he exercised the option—if you would like to give formal evidence the other six partners were alive at the date of death there is no reason why you should not.

Mr. TAIT : I will get Mr. Webb to give that evidence.

30 HIS HONOR : I think it just as well to prove that.

MAURICE ALBERT WEBB, already sworn, Recalled.

Mr. TAIT : The deceased in this case, Frederick Charles Henry Thomas died on the 28th January, 1944, as you have told us. Can you tell us whether on that date the following persons were living, viz. the persons who were partners with the deceased in Maples ; Robert Nathan, Louisa Jones, Lorna Hannan, Lionel Newton, Lauri Joseph Newton ?—Yes, I could.

They were alive at the date of the death of the deceased ?—Yes.

What about Donald Lamond ?—He was also alive.

(The Witness withdrew.)

40 Mr. TAIT : I do not know whether Your Honor would like me to assemble the facts to show that it comes within—

HIS HONOR : I think I have the facts, Mr. Tait.

Mr. TAIT : I thought Your Honor would ; it is quite simple, the partnership deed is a long one but the material part is simply this provision,

In the High Court of Australia.

No. 8.
Transcript of Short-hand Note of Proceedings—
continued.

Appellant's Evidence.
Maurice Albert Webb.
Further Examination.

Transcript of Short-hand Note of Proceedings—
continued.

In the High Court of Australia.

No. 8.
Transcript of Short-hand Note of Proceedings—*continued.*

that the goodwill shall not be taken into account in value. I notice in *Milne's* case the corresponding clause there was very similar. It was this, Clause 26 of the deed in that case—(reads) “ On the death requirement . . . “ shall be made to his or his representatives in respect of the value of the “ goodwill of the said business,” so it would correspond I think in terms with the one here.

In that case the assessment, the duty that was challenged was an amended assessment in which the item £7,692 as interest in partnership under State was added and the letter explaining that—it was stated in the letter the value of the goodwill of the partners, could have shown at a departmental valuation to be the sum of £54,500, and that other sum is the deceased's proportion of that. Questions to the Full Court were (3) firstly, whether the dutiable asset of the testator included any, and if any, what interest in the goodwill of the said partnership, so that it does correspond, and it seems to me that that decision while it stands does govern this decision. 10

HIS HONOR : Yes.

Mr. TAIT : Then I submit that on the facts now before Your Honor, the appeal by the Appellant from the assessment should be allowed ; before Your Honor is a disallowance of the objection treated as an appeal within the terms of the Act. 20

Mr. TAIT : I submit that Appeal should be allowed and the assessment dealt with accordingly. I do not think I need make any further submission in regard to costs.

HIS HONOR : No. Mr. Smith do you rely on any other Section of the Act apart from Section 8 (14) ?

Mr. SMITH : Your Honor, I think the Commissioner would not be relying on other sections, but he might be relying, or desiring at some later stage in these proceedings to rely on grounds not precisely in accordance with any of the grounds not precisely in accordance with any of the views of the majority in the case my friend has referred to, alternative views as to the application of that section. As I understand the position that is the section he relies on. He contends that *Milne's* case covers this one and though not restricting himself to the precise grounds in *Milne's* case, that is sufficient clear authority on the facts of this case to apply for the Appeal. 30

Mr. TAIT : I am not sure if there is not one fact I have not clearly stated. That is the people that exercised the option were at the date of his death still partners. I think it is a very natural inference they were partners originally and alive. There was nothing said to the contrary. 40

HIS HONOR : They exercised the option and paid these moneys.

Mr. TAIT : Yes, Your Honor.

HIS HONOR : Probably Mr. Smith would admit the partnership still existed at the death of the deceased.

Mr. SMITH : Yes. I have no hesitation in accepting the assurance that the facts are as stated.

HIS HONOR : It is admitted that the partnership between the deceased and the six other partners still existed at the date of the death of the deceased and that the deceased was survived by the six partners.

Mr. TAIT : I mentioned, I think, the parties had agreed, if the value of this goodwill was to be included, the figures should be £20,000. Perhaps that could be taken as a mutual admission.

Mr. SMITH : That has been agreed to, £20,000 as the value of the share of the goodwill if it be taxable.

HIS HONOR : Very well.

In the High Court of Australia.

No. 8.
Transcript of Short-hand Note of Proceedings—
continued.

10

No. 9.

Reasons for Judgment of Williams, J.

REASONS FOR JUDGMENT OF HIS HONOUR MR. JUSTICE }
WILLIAMS. Dated 8th March 1949 } States—

No. 9.
Reasons for Judgment of Williams, J. 8th March, 1949.

HIS HONOUR. This is an appeal by the executors of the estate of Frederick Charles Henry Thomas who died on the 28th of January, 1944, from the assessment by the respondent of his estate for the purposes of Federal Estate Duty under the provisions of the Estate Duty Assessment Act, 1914-1942. Originally a number of items in the assessment were objected to but the respondent has twice amended the original assessment
20 and has allowed all the objections except one.

The second amended assessment is dated 27th February 1948 and the Appeal is now an appeal from that assessment. The only item still in dispute relates to the interest of the deceased in a partnership business carried on under the name of Maples. There is a partnership agreement governing the rights of the parties dated 22nd December 1939 as amended by a further agreement dated the 4th December, 1940.

In the lifetime of the deceased there were seven partners, viz. the deceased, Robert Nathan, Louisa Jones, Lorna Hannan, Lionel Newton, Lauri Joseph Newton, Donald Lamond, and the deceased was survived by
30 the other six partners. The partnership agreement included options to these surviving parties other than Lamond, to purchase a share of the deceased in the capital of the partnership.

In the events that have happened these options were firstly to Louisa Jones and Lorna Hannan, an option to purchase $6\frac{1}{4}\%$ of the interest of the deceased in the capital of the partnership, and secondly, to the other four partners, except Lamond, the option to purchase the residue of the interest of the deceased in this capital in proportion to their respective interests in the capital of the partnership.

The partnership agreement provided that in computing the amount
40 of the purchase money payable on the exercise of these options no sum should be added or taken into account for goodwill.

In the High Court of Australia.

No. 9.
Reasons for Judgment of Williams, J. 8th March, 1949—
continued.

The five surviving partners have exercised their respective options and the question still at issue between the appellant and the respondent is whether the share of the deceased in the goodwill of the partnership at the date of his death, which the parties have agreed is of the value of £20,000, forms part of his dutiable estate.

The respondent, without giving up any other contentions open to him upon the true construction of the Act, contends that it forms part of his notional estate within the meaning of Section 8 (4) (e) of the Act.

It seems to me necessarily to follow from *Milnes Case*, 69 C.L.R. 270 that this contention must succeed.

I must therefore order that the appeal be dismissed with costs.

No further questions arise, I think.

MR. TAIT : No, Your Honor.

10

No. 10.
Order of Williams, J. 8th March, 1949.

No. 10.

Order of Williams, J.

ORDER OF HIS HONOUR MR. JUSTICE WILLIAMS. Dated } States—
8th March, 1949

THIS APPEAL against the above-mentioned assessment coming on for hearing before this Court at Melbourne this day UPON READING the Notice of Objection herein dated the 14th day of March 1947 and the documents transmitted to this Court AND UPON HEARING the oral evidence of Maurice Albert Webb called on behalf of the above-named Appellant AND UPON READING the exhibits put in evidence AND UPON HEARING Mr. Tait of King's Counsel and Mr. Voumard of counsel for the said Appellant and Mr. Smith of King's Counsel and Mr. Winneke of counsel for the above-named Respondent. THIS COURT DOTH ORDER that the said appeal be and the same is hereby dismissed AND THIS COURT DOTH ALSO ORDER that the costs of the Respondent of this appeal be taxed by the proper officer of this Court and when so taxed and allowed be paid by the Appellant to the Respondent.

20

In the Full Court of the High Court of Australia on Appeal.

No. 11.
Notice of Appeal. 28th March, 1949.

No. 11.

Notice of Appeal.

NOTICE OF APPEAL. } States—
Dated 28th March 1949.

30

TAKE NOTICE that the Full Court of the High Court of Australia will be moved by way of appeal at the first sittings of the Full Court at Melbourne for hearing appeals to be held after the expiration of twenty-one days from the due institution of this appeal (unless the

Respondent consents to take shorter notice) or so soon thereafter as Counsel can be heard on behalf of the above-named Appellant for an order that the whole of the judgment of His Honour Mr. Justice Williams pronounced herein on the eighth day of March 1949 (whereby it was ordered that the appeal of the above-named appellant against the above-mentioned assessment and amended assessments be dismissed with costs to be taxed) be reversed and set aside AND for an order directing that the said appeal be allowed AND that the said amended assessment issued on February 27th 1948 be further amended by reducing by the sum of £20,000 the value for duty of the estate of the above-named Frederick Charles Henry Thomas deceased (which sum of £20,000 was included in the said amended assessment by the Deputy Commissioner of Taxation) AND that the above-named Respondent do pay to the above-named Appellant the costs of the appeal to His Honour Mr. Justice Williams and of this appeal or for such further or other order as this Honourable Court shall deem proper.

In the Full Court of the High Court of Australia on Appeal.

No. 11.
Notice of Appeal.
28th March, 1949—
continued.

AND TAKE FURTHER NOTICE that the grounds upon which the above-named Appellant intends to rely are as follows :—

- 1.—The said judgment of His Honour Mr. Justice Williams was wrong in law.
- 20 2.—The learned Judge applied the decision of the Full Court of the High Court of Australia in *Trustees Executors and Agency Company Limited v. Federal Commissioner of Taxation* (1944) 69 C.L.R. 270, which decision is wrong in law.
- 3.—The dutiable estate of the above-named Frederick Charles Henry Thomas deceased did not include any interest in the goodwill of the partnership which was formerly carried on by the said deceased and others under the name or style of “Maples” pursuant to an indenture of partnership made on December 22nd 1939.
- 30 4.—The said deceased did not at the time of his death have any beneficial interest in the said goodwill which by virtue of the said indenture of partnership or otherwise passed or accrued on or after his death to or devolved on or after his death on any other person.
- 40 5.—That in assessing the value of the estate of the said deceased for the purposes of the Estate Duty Assessment Act 1914–1942 the Deputy Commissioner of Taxation wrongly added to the value thereof as returned by the Appellant the sum of £20,000 as being the value of the beneficial interest in the goodwill of the said partnership which the said deceased had at the time of his death and which (as the Deputy Commissioner claims) is deemed to form part of the estate of the said deceased by reason of the provisions of Section 8 (4) (e) of the said Act.
- 6.—The estate of the said deceased is not dutiable in respect of any part of the goodwill of the said partnership, either under Section 8 (4) (e) or any other provision of the Estate Duty Assessment Act 1914–1942.

No. 12.

Reasons for Judgment.

In the Full Court of the High Court of Australia on Appeal.

No. 12. Reasons for Judgment. 16th May, 1949.

REASONS FOR JUDGMENT OF THE FULL COURT OF THE HIGH COURT OF AUSTRALIA DELIVERED BY HIS HONOUR THE CHIEF JUSTICE on 16th May 1949 } States—

It is conceded that this appeal must fail unless the Court is prepared to reconsider and to overrule the decision in *The Trustees Executors and Agency Company Limited v. The Federal Commissioner of Taxation*, 69 C.L.R. 270. The decisions of a superior court have a double aspect. They determine the controversy between the parties, and in deciding the case they may include a statement of principle which it is the duty of that Court and of all subordinate courts to apply in cases to which that principle is relevant. Continuity and coherence in the law demand that, particularly in this Court, which is the highest court of appeal in Australia, the principle of *stare decisis* should be applied, save in very exceptional cases. 10

The Court is not bound by its previous decisions so as absolutely to preclude reconsideration of a principle approved and applied in a prior case but, as was stated in *Cain v. Malone* 66 C.L.R. 10, the exceptions to the rule are exceptions which should be allowed only with great caution and in clear cases. Barton J. in *The Tramways* case 18 C.L.R. 54 which has been referred to by Mr. Tait, said at page 69 : " I have never thought that it was not open to this Court to review its previous decisions upon good cause. The question is not whether the Court can do so, but whether it will, having due regard to the need for continuity and consistency in judicial decision." His Honour proceeded to say: " Changes in the number of appointed Justices,"—(and I would add, changes in the personnel of the bench which happens to deal with the first case or a second case)—" can, I take it never of themselves furnish a reason for review." His Honour continued : " But the Court can always listen to argument as to whether it ought to review a particular decision, and the strongest reason for an overruling is that a decision is manifestly wrong, and its maintenance is injurious to the public interest." In the present case, there are no circumstances which would justify, in accordance with those principles, an overruling of the decision in *The Trustees, Executors* case. The only circumstance which is really relied upon for the purpose of persuading the Court to reconsider the decision is that it was a majority decision. This is plainly an insufficient ground for asking the Court to overrule a previous considered decision of five justices. It may be that considerations are present in constitutional cases, where Parliament is not in a position to change the law, which do not arise in other cases. In what I have said I make no reference to constitutional cases. The consequence is that, if the Court adheres, as it should, to the decision in *The Trustees, Executors* case the appeal must fail. 30

The appeal should, therefore, be dismissed with costs. 40

No. 13.

Order.

THEIR HONOURS THE CHIEF JUSTICE (SIR JOHN LATHAM), MR. JUSTICE RICH, MR. JUSTICE DIXON, MR. JUSTICE McTIERNAN and MR. JUSTICE WEBB

ORDER OF THE FULL COURT OF THE HIGH COURT } States—
OF AUSTRALIA Dated 16th May 1949 }

In the Full Court of the High Court of Australia on Appeal.

No. 13.
Order.
16th May,
1949.

10 THIS APPEAL from the order and judgment of the High Court of Australia made and given by His Honour Mr. Justice Williams on the 8th day of March, 1949, coming on for hearing before this Court at Melbourne on this day WHEREUPON AND UPON READING the transcript record of the proceedings herein AND UPON HEARING Mr. Tait of King's Counsel and Mr. Voumard of Counsel for the abovenamed Appellant and Mr. Smith of King's Counsel and Mr. Winneke of Counsel for the abovenamed Respondent THIS COURT DOTH ORDER that the said appeal be and the same is hereby dismissed AND THIS COURT DOTH ALSO ORDER that the costs of the Respondent of this appeal be taxed by the proper officer of this Court and when so taxed and allowed be paid by the Appellant to the Respondent.

No. 14.

Order in Council granting Special Leave to Appeal to His Majesty in Council.

AT THE COURT AT BUCKINGHAM PALACE.

The 24th day of May, 1950.

Present

THE KING'S MOST EXCELLENT MAJESTY

LORD PRESIDENT.

MR. SECRETARY HENDERSON.

LORD CHAMBERLAIN.

MR. NOEL-BAKER.

In the Privy Council.

No. 14.
Order in Council Granting Special Leave to Appeal to His Majesty in Council.
24th May, 1950.

30 WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 1st day of May, 1950, in the words following, viz. :—

“ WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Perpetual Executors and Trustees Association of Australia Limited in the matter of an

In the Privy
Council.

No. 14.
Order in
Council
Granting
Special
Leave to
Appeal
His
Majesty in
Council.
24th May,
1950—
continued.

Appeal from the High Court of Australia between the Petitioners Appellants and The Commissioner of Taxes of the Commonwealth of Australia Respondent setting forth (amongst other matters): that the Petitioning Company is the Executor of the estate of the late Frederick Charles Henry Thomas who died on the 28th January 1944 and in that capacity the Petitioning Company lodged an objection under Section 24 of the Commonwealth Estate Duty Assessment Act 1914–1947 against an assessment to estate duty made under that Act by the Commissioner of Taxes in respect of the estate of the deceased on various grounds of which one only became the subject 10 of appeal to the High Court, viz. : that the assessment wrongly treated as included in the assessable estate the value of a share in the goodwill of a partnership of which the deceased was a member : that the share of the deceased in the capital of the partnership was on his death taken over by other partners under an option contained in the Partnership Agreement at a price that was to include and did in fact include nothing in respect of goodwill and the partnership agreement contained no express provision for the devolution of the Deceased's share of goodwill on his death : that the only question for decision in the proceedings is whether in the foregoing circumstances the value 20 of his former share of goodwill enters into the estate of a deceased partner assessable to Estate Duty : that this question arose in substantially identical circumstances in the case of *Trustees Executors & Agency Company Limited v. Federal Commissioner of Taxation* (1944) 69 C.L.R. 270 (thereinafter called the *Milne* case) and was there decided in favour of the Commissioner by the Full Court of the Commonwealth by a Majority of three against two : that the present Petition seeks to obtain a review of the decision in that case : that by virtue of Section 24 of the Estate Duty Assessment Act the objection lodged by the Petitioning Company was treated as an Appeal to the 30 High Court and this Appeal was heard and dismissed without discussion of the merits on the 8th March 1949 : that the Court simply followed the decision in the *Milne* case : that the Petitioning Company appealed to the Full Court which refused to reconsider the decision in the *Milne* case and this Appeal was also on the 16th May 1949 dismissed without consideration of its merits : And humbly praying Your Majesty in Council to grant the Petitioners special leave to appeal from the Judgment of the High Court dated the 16th May 1949 and for such other Order as to Your Majesty in Council may seem fit :

“ THE LORDS OF THE COMMITTEE in obedience to His late Majesty's 40 said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the High Court of Australia dated the 16th day of May 1949 upon depositing

in the Registry of the Privy Council the sum of £400 as security for costs : In the Privy Council.

“ AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioners of the usual fees for the same.” No. 14.
Order in Council
Granting Special
Leave to Appeal
His Majesty in Council.

HIS MAJESTY having taken the said Report into consideration was **10** pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution. 24th May, 1950—
continued.

Whereof the Governor-General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

E. C. E. LEADBITTER.

Exhibits.

A.
Partnership Deed
of the Firm
of Maples.
22nd
December,
1939.

EXHIBITS.

Exhibit "A."—Partnership Deed of the Firm of Maples.

EXHIBIT "A."

PARTNERSHIP DEED OF THE FIRM OF MAPLES.

Dated 22nd December 1939.

THIS INDENTURE made the 22nd day of December One thousand nine hundred and thirty-nine. BETWEEN ROBERT NATHAN of Hotel Windsor Spring Street Melbourne in the State of Victoria Furniture Warehouseman of the first part FREDERICK CHARLES HENRY THOMAS of St. Kilda Road Melbourne in the said State Furniture Warehouseman of the second part LOUISA JONES of "Ripponlea" Hotham Street Elsternwick in the said State Married Woman of the third part LORNA HANNAN of Elizabeth Street Elsternwick aforesaid Married Woman of the fourth part LIONEL NEWTON of 44 Hopetoun Road Toorak in the said State Furniture Warehouseman of the fifth part LAURI JOSEPH NEWTON of Hamilton Road Malvern in the said State Furniture Warehouseman of the sixth part and DONALD LAMOND of Hawthorn Road Caulfield in the said State Furniture Warehouseman of the seventh part WHEREAS the parties hereto of the first second third fourth fifth and sixth parts and one Joseph Nathan have been carrying on business in partnership under the name or style of "MAPLES" for some time under a verbal agreement AND WHEREAS it was a condition (*inter alia*) of the said verbal agreement that if the said Joseph Nathan should retire or die the said partnership should not be dissolved but that the said Joseph Nathan as at the date of such retirement or the legal personal representatives of the said Joseph Nathan (if the said Joseph Nathan should have died) as at the date of death of the said Joseph Nathan should be deemed to have given an option to the said Lionel Newton and Lauri Joseph Newton or the survivor of them to purchase the share of the said Joseph Nathan in the capital and assets of the business AND WHEREAS the said Joseph Nathan died on the twelfth day of July One thousand nine hundred and thirty-nine AND WHEREAS the said Lionel Newton and Lauri Joseph Newton have duly exercised the option deemed to have been vested in them and have purchased from the legal personal representatives of the said Joseph Nathan the share of the said Joseph Nathan in the capital and assets of the partnership AND WHEREAS since the death of the said Joseph Nathan the said Donald Lamond has purchased from the parties hereto (other than the said Donald Lamond) an interest in the capital and assets of the partnership being Two pounds per centum thereof and has been admitted as a partner in the said partnership to the extent of the interest purchased by him as aforesaid (as the parties hereto respectively acknowledge) NOW THIS INDENTURE WITNESSETH as follows:—

1.—The partnership business has been and shall continue to be that of Furniture Warehousemen and shall continue to be carried on at the places

in Victoria and Tasmania at which such business is now being carried on and at such other place or places as the parties hereto shall hereafter determine.

Exhibits.

A.

Partner-
ship Deed
of the Firm
of Maples.
22nd
December,
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continued.

2.—The partnership shall continue until the same shall be terminated under the provisions hereinafter appearing.

3.—The firm name or style has been and shall continue to be “ Maples ” or such other name or style as the parties hereto shall hereafter determine.

4.—The Bankers of the partnership shall be The English Scottish and Australian Bank Limited or such other Bank as the parties hereto may hereafter determine.

5.—The capital of the partnership (hereinafter called the capital) shall consist of the present assets of the partnership including all cash in bank the book debts rights (patent and otherwise) trademarks stock in trade plant fixtures fittings utensils or things owned by the partnership and also all land leases tenancy agreements and buildings owned by the partnership and used in connection with the said business.

6.—The partners are and shall continue (subject as hereinafter provided) to be entitled to the capital in the following proportions :—

20	The said Robert Nathan	As to $17\frac{1}{2}\%$ thereof
	The said Frederick Charles Henry Thomas	As to $19\frac{1}{2}\%$ thereof
	The said Louisa Jones	As to $16\frac{1}{4}\%$ thereof
	The said Lorna Hannan	As to $16\frac{1}{4}\%$ thereof
	The said Lionel Newton	As to $14\frac{1}{4}\%$ thereof
	The said Lauri Joseph Newton	As to $14\frac{1}{4}\%$ thereof
	The said Donald Lamond	As to 2% thereof

7.—Any further monies which any partner shall with the consent of the other partners from time to time contribute for capital purposes shall be credited to the capital account of the partner so contributing the same.

8.—The net profits of the business shall be divided between the partners in proportion to their respective shares from time to time in the capital and they shall in like proportion bear all losses including loss of capital.

9.—The partnership shall not be dissolved by the death or retirement of any of the partners but the following provisions shall apply on the death or retirement of the respective partners referred to therein :

(a) On the death or retirement of the said Frederick Charles Henry Thomas the said Frederick Charles Henry Thomas (if alive) at the date of such retirement or the legal personal representatives of the said Frederick Charles Henry Thomas (if the said Frederick Charles Henry Thomas shall have died) as at the date of the death of the said Frederick Charles Henry Thomas (hereinafter called the first option date) shall if the said Frederick Charles Henry

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Exhibits.
 A.
 Partner-
 ship Deed
 of the Firm
 of Maples.
 22nd
 December,
 1939—
continued.

Thomas shall have died or retired before the date of the death or retirement (whichever shall first happen) of the said Robert Nathan be deemed to have given the following options :—

- (i) To each of the said Louisa Jones and Lorna Hannan if both be living at the first option date or to each of the survivor of the said Louisa Jones and Lorna Hannan and the legal personal representative of such of the said Louisa Jones and Lorna Hannan as shall have died before the first option date or to the respective legal personal representatives of each of the said Louisa Jones and Lorna Hannan if both shall have died before the first option date an option to purchase from the said Frederick Charles Henry Thomas or the Estate of the said Frederick Charles Henry Thomas (as the case may be) $6\frac{1}{4}$ per centum of the capital. 10
- (ii) To the surviving or continuing partners at the first option date other than the said Louisa Jones Lorna Hannan and Donald Lamond in proportion to their respective interests in the capital at the first option date an option to purchase the residue and remainder of the interest at the first option date of the said Frederick Charles Henry Thomas or the Estate of the said Frederick Charles Henry Thomas (as the case may be) in the capital. 20

PROVIDED ALWAYS that if the said Robert Nathan shall have died or retired before the first option date then the said Louisa Jones and Lorna Hannan or the legal personal representatives of such of the said Louisa Jones and Lorna Hannan as shall have died before the first option date (as the case may be) shall be deemed to have an option to purchase between them in equal proportions only four per centum of the capital from the said Frederick Charles Henry Thomas or the estate of the said Frederick Charles Henry Thomas (as the case may be) and the surviving or continuing partner other than the said Louisa Jones Lorna Hannan and Donald Lamond in proportion to their respective interests as aforesaid shall as at the first option date be deemed to have an option to purchase the residue an remainder of the interest of the said Frederick Charles Henry Thomas in the capital. 30

- (b) On the death or retirement of the said Robert Nathan the said Robert Nathan (if alive) at the date of such retirement or the legal personal representatives of the said Robert Nathan (if the said Robert Nathan shall have died) as at the date of the death of the said Robert Nathan (hereinafter called the second option date) shall if the said Robert Nathan shall have died or retired before the date of the death or retirement (whichever shall first happen) of the said Frederick Charles Henry Thomas be deemed to have given the following options :— 40

- Exhibits.
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A.
Partnership Deed
of the Firm
of Maples.
22nd
December,
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continued.
- 10 (i) To each of the said Louisa Jones and Lorna Hannan if both be living at the second option date or to each the survivor of the said Louisa Jones and Lorna Hannan and the legal personal representative of such of the said Louisa Jones and Lorna Hannan as shall have died before the second option date or to the respective legal personal representatives of each of the said Louisa Jones and Lorna Hannan if both have died before the second option date an option to purchase from the said Robert Nathan or the Estate of the said Robert Nathan (as the case may be) $6\frac{1}{4}$ per centum of the capital.
- (ii) To the surviving or continuing partners at the second option date other than the said Louisa Jones Lorna Hannan and Donald Lamond in proportion to their respective interests in capital at the second option date an option to purchase the residue and remainder of the interest at the second option date of the said Robert Nathan or of the estate of the said Robert Nathan (as the case may be) in the capital.
- 20 PROVIDED ALWAYS that if the said Frederick Charles Henry Thomas shall have died or retired before the second option date then the said Louisa Jones and Lorna Hannan or the legal personal representatives of such of the said Louisa Jones and Lorna Hannan as shall have died before the second option date (as the case may be) shall be deemed to have an option to purchase between them in equal proportions only four per centum of the capital of the business from the said Robert Nathan or the estate of the said Robert Nathan (as the case may be) and the surviving or continuing partners other than the
- 30 said Louisa Jones Lorna Hannan and Donald Lamond in proportion to their respective interest as aforesaid shall as at the second option date be deemed to have an option to purchase the residue and remainder of the interest of the said Robert Nathan or the Estate of the said Robert Nathan in the capital.
- (c) On the death of the said Louisa Jones Lorna Hannan Lionel Newton or Lauri Joseph Newton one person nominated in writing by the legal personal representatives of the one so dying (hereinafter called the Testator) or any person or persons being a child, grandchild, sister, brother, nephew or niece of the Testator (and if more than one in the proportions therein set out) to whom the interest in the capital of the Testator and any further share in the capital to which the estate of the Testator might become entitled by reason of the exercise by the legal personal representatives of the Testator of any option or options which such legal personal representatives might be entitled to exercise under the provisions of this agreement (hereinafter
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Exhibits.
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 A.
 Partner-
 ship Deed
 of the Firm
 of Maples.
 22nd
 December,
 1939—
continued.

- called the further share) shall be bequeathed by the Will of the Testator or to whom the interest and further share of the Testator might be transferred by the legal personal representatives of the Testator in distributing the Estate of the Testator (as the case may be) shall be admitted to partnership PROVIDED ALWAYS that for the purpose of voting on any matter relating to the partnership the person or persons so admitted to partnership consequent on the death of the Testator shall only be entitled to exercise (and if more than one between them) the same voting power which the Testator would have been entitled to exercise during his or her life PROVIDED ALWAYS that if the share in the capital of any person being a child, grandchild, sister, brother, nephew or niece of the Testator shall not according to the tenor of the gift thereof vest immediately after the death of the Testator one person nominated in writing by the legal personal representatives of the Testator shall be admitted to partnership in respect of the share which shall not vest as aforesaid until the same shall actually vest but in such event such person nominated by the legal personal representative and any person in whom a share in the capital shall have vested under the same testamentary document shall between them exercise the voting power only which the Testator would have been entitled to exercise during his or her life PROVIDED ALWAYS and it is hereby agreed and declared that notwithstanding anything hereinbefore contained no Testator shall be entitled to direct that the income to arise from the share or further share of the Testator in the capital or from any investment thereof shall be paid or applied to or for the benefit of any person not being a child, grandchild, sister, brother, nephew or niece of the Testator.
- (d) On the retirement of the said Louisa Jones the said Louisa Jones (if the said Louisa Jones shall not exercise the right vested in her by Clause Seventeen hereof) shall be deemed to have given to the said Lorna Hannan or if the said Lorna Hannan shall have died before the date of retirement of the said Louisa Jones the legal personal representatives of the said Lorna Hannan an option to purchase the interest of the said Louisa Jones in the capital.
- (e) On the retirement of the said Lorna Hannan the said Lorna Hannan (if the said Lorna Hannan shall not exercise the right vested in her by Clause Seventeen hereof) shall be deemed to have given to the said Louisa Jones or if the said Louisa Jones shall have died before the date of retirement of the said Lorna Hannan the legal personal representatives of the said Louisa Jones an option to purchase the interest of the said Lorna Hannan in the capital.

- Exhibits.
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A.
Partnership Deed
of the Firm
of Maples.
22nd
December,
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continued.
- (f) On the retirement of the said Lionel Newton the said Lionel Newton (if the said Lionel Newton shall not exercise the right vested in him by Clause Seventeen hereof) shall be deemed to have given to the said Lauri Joseph Newton or if the said Lauri Joseph Newton shall have died before the date of retirement of the said Lionel Newton to the legal personal representatives of the said Lauri Joseph Newton an option to purchase the interest of the said Lionel Newton in the capital.
- 10 (g) On the retirement of the said Lauri Joseph Newton the said Lauri Joseph Newton (if the said Lauri Joseph Newton shall not exercise the right vested in him by Clause Seventeen hereof) shall be deemed to have given to the said Lionel Newton or if the said Lionel Newton shall have died before the date of retirement of the said Lauri Joseph Newton the legal personal representatives of the said Lionel Newton an option to purchase the interest of the said Lauri Joseph Newton in the capital.
- 20 (h) On the death or retirement of the said Donald Lamond the said Donald Lamond (if alive) at the date of such retirement or the legal personal representatives of the said Donald Lamond (if the said Donald Lamond shall have died) as at the date of the death of the said Donald Lamond shall be deemed to have given to the surviving or continuing partners at the date of the death or retirement of the said Donald Lamond (as the case may be) in proportion to their respective interests in the capital at the date of the death or retirement (as the case may be) of the said Donald Lamond an option to purchase the share of the said Donald Lamond or of the estate of the said Donald Lamond (as the case may be) in the capital.
- 30 10.—If partners holding between them not less than seventy per centum of the capital shall determine in writing that the said Donald Lamond shall retire from the partnership the said Donald Lamond shall as at the date of such determination be deemed to have retired and the provisions of the last preceding clause shall immediately operate as if the said Donald Lamond had retired on the date of such determination.
- 11.—The said Donald Lamond shall devote his whole time and attention to the business of the partnership but the other partners shall be bound to devote only such time and attention to the business of the partnership as they may think fit.
- 40 12.—Upon the exercise of the respective options hereinbefore contained the purchase price payable on the exercise of such option shall be the total of the following amounts (namely) :—
- (a) The proportionate part of the balance of assets over liabilities as disclosed in the balance sheet of the partnership in respect of the accounting year of the partnership prior to the date on which such option shall first be exercisable corresponding to

Exhibits.
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 A.
 Partner-
 ship Deed
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continued.

the part of the interest in the partnership being purchased PROVIDED ALWAYS that if in compiling the relevant balance sheet the value of the book debts shall not have been treated as Fifteen shillings for each pound of the actual debts owing at the end of the period in respect of which such balance sheet shall have been compiled the said balance of assets over liabilities shown by the relevant balance sheet shall be adjusted by taking the said book debts into the said balance sheet at a value of Fifteen shillings for each pound ; and

- (b) The like proportion of any real estate which shall have been acquired by the partnership between the end of the said period and the date on which the relevant option shall have been first exercisable (hereinafter called the current year) at the price at which the same shall have been acquired plus any amounts expended thereon by the partnership during the current year less any liability existing on such real estate to the Vendor thereof or under any Mortgage thereover. 10
- (c) The like proportion of the profits of the partnership for the current year ascertained in the manner provided in Clause 13 hereof. 20

PROVIDED ALWAYS and it is hereby agreed and declared that the balance sheet signed by the parties hereto at the time of the execution of these presents shall be deemed to be the balance sheet of the partnership for the accounting year of the partnership ended on the twenty-eighth day of February One thousand nine hundred and thirty-nine. WITHOUT affecting the generality of the foregoing provisions it is specifically agreed and declared that in computing the amount of purchase money payable on the exercise of any option no sum shall be added or taken into account for goodwill.

13.—On the compiling of the next succeeding balance sheet following the death or retirement of any partner the amount of net profit to which the deceased or retiring partner would have been entitled if such partner had been living at or had not retired before the close of the period in respect of which such balance sheet shall have been compiled as if no drawings had been made during the current year by the deceased or retiring partner (as the case may be) shall be ascertained and shall be divided by the number of days in the whole of the said period and the result shall be multiplied by the number of days which elapsed between the commencement of the said period and the date of the death or retirement (as the case may be) of such partner and the result (less any drawings against profits by the deceased or retiring partner during the current year) shall be the full share of the deceased or retiring partner of the profit of the partnership for the current year for the purpose of ascertaining the amount referred to in Sub-Clause (c) of Clause Twelve hereof. 30 40

14.—The purchase money payable by any person exercising any option given hereunder shall be paid (subject to any variation which might be agreed to between the person liable to pay any such purchase money and the person or corporation entitled to receive the same) in four equal half-yearly instalments and shall bear interest at the rate of Five pounds per centum per annum computed on the amount of purchase money from time to time unpaid calculated from the date of such option such interest (excepting as to the first payment) to be payable half-yearly the first of such half-yearly payments of principal and interest to be paid nine months
 10 from the date of the option and the subsequent payments half-yearly thereafter. On the exercise of any option the purchaser shall be deemed to have acquired the interest in respect of which such option shall have been exercised as from the date that such option shall have been given or deemed to have been given to the person exercising the same. The Purchaser shall have the right to pay off at any time the whole of the purchase money.

15.—If any partners shall desire at any time to draw amounts in anticipation of profits such partner shall communicate such desire to all other partners for the time being and if such partners shall be of opinion that the amount so required is not in excess of the share of profits of the
 20 partner requiring such amount for the current year up to the date of such request such partner shall be entitled to draw such amount and each of the other partners shall be entitled to draw an amount which bears towards the respective share of the capital of such other partners the same proportion as the amount drawn by the partner requiring such advance bears towards the share of the capital of the partner making such request and any amounts so drawn shall be deemed to be on account of the share or interest of the persons drawing the same in the net profits of the business.

16.—Notwithstanding anything hereinbefore contained it is hereby agreed and declared that the said Donald Lamond shall be entitled to draw
 30 as and by way of salary such periodical amount plus such an amount by way of bonus as the parties hereto shall from time to time determine. In computing the net profits of the partnership for the purpose of Clause Eight hereof the amount so received by the said Donald Lamond shall be treated as ordinary outgoings by way of wages paid by the partnership and shall not be debited to drawings by the said Donald Lamond against his share of the profits in the partnership.

17.—Subject as hereinbefore and hereinafter provided no partner shall dispose of or assign any share or interest in the capital or the assets or income of the partnership PROVIDED ALWAYS that the respective partners herein-
 40 after in this Clause set out shall have the power of disposal or assignment set out opposite their respective names (viz.):—

- (i) The said Lionel Newton in favour of the said Lauri Joseph Newton ;
- (ii) The said Lauri Joseph Newton in favour of the said Lionel Newton ;

Exhibits.
 —
 A.
 Partner-
 ship Deed
 of the Firm
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 1939—
continued.

Exhibits.

A.

Partnership Deed
of the Firm
of Maples.
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continued.

(iii) The said Louisa Jones in favour of the said Lorna Hannan ;

(iv) The said Lorna Hannan in favour of the said Louisa Jones.

If any partner shall sell dispose of assign or attempt to sell dispose of or assign any share or interest contrary to these presents such partner shall be deemed to have retired and shall by reason thereof be deemed to have given the option hereinbefore mentioned and deemed to be given on the retirement of such partner.

18.—The usual books of account shall be kept properly posted up and shall not be removed from the place of business of the partnership at South Melbourne without the consent of the partners. Each partner shall have free access to them at all times and shall be at liberty to make such extracts therefrom as he or she may think fit. 10

19.—On the last day of February in each year during the continuance of the partnership an account shall be taken of all the capital assets and liabilities of the partnership for the time being and a balance sheet and profit and loss account making due allowance for depreciation bad debts and for recouping any lost capital shall be prepared by the partners and a copy thereof furnished to each of the partners who shall be bound thereby unless some manifest error shall be discovered within three calendar months in which case such error shall be rectified. Immediately after the preparation of the said balance sheet and profit and loss account the net profits (if any) shown by such account shall be divided or otherwise dealt with as the partners entitled thereto shall desire. 20

20.—Each partner shall—

- (a) Punctually pay his separate debts and indemnify the other partners and the assets of the partnership against the same and all expenses on account thereof.
- (b) Forthwith pay all moneys cheques and negotiable instruments received by him or her on account of the partnership into the said Bank to the partnership account. 30
- (c) Be just and faithful to the other of them and at all times give to such other partners full information and truthful explanations of all matters relating to the affairs of the partnership and afford every assistance in his or her power in carrying on the business for their mutual advantage.

21.—If any partner shall :—

- (a) Commit any act of bankruptcy ;
- (b) Be convicted of any felony or misdemeanour ;
- (c) Do or suffer any act which would be a ground for dissolution by the Court ; 40

(d) Assign or attempt to assign his share or interest in the capital of the business or the assets or income thereof (except in pursuance of some power herein contained) ;

then and in any such case such partner shall be deemed to have retired from the partnership and shall be deemed to have given such option in accordance with the provisions herein contained which such partner is deemed to give on the retirement of such partner.

22.—All disputes which shall arise between the partners and whether during the partnership or after the determination thereof and whether in relation to the interpretation of these presents or to any act or omission of either party to the dispute or as to any act which ought to be done by the parties in dispute or either of them or as to the rights of any person or persons hereunder or in relation to any other matter whatsoever touching the partnership affairs shall be referred to arbitration as provided by the Arbitration Act 1928.

23.—Where reference is made in these presents to the survivor or survivors of two or more persons such reference to survivor or survivors shall be a reference in all cases to such persons so referred to as shall at the relative date be partners in the partnership.

24.—If any person or persons by whom an option shall be primarily exercisable shall not within three months after the date that such option shall be first exercisable by such person duly exercise such option the surviving or continuing partners (other than the said Donald Lamond and the person or persons who shall not have exercised the said option) shall in proportion to their respective interests in the capital at the date that the said option shall have first been exercisable have the right for a further period of one month to exercise the said option.

25.—An option vested in or exercisable by any person shall be exercised by notice in writing (within the period that such option shall be exercisable by such person as provided by this agreement) given to the retiring partner or the legal personal representatives of a deceased partner (as the case may be). For the purpose of this Clause only the legal personal representatives of a deceased partner shall be deemed to be the person or persons or corporation appointed by the will of such deceased partner as the Executor Executrix and/or Trustee of such Will and if the person by whom any option is exercisable shall not be cognisant of the name of the person or persons or corporation appointed as Executor Executrix and/or Trustee of any deceased partner within the period during which the relevant option may be exercised or if such person dies intestate or does not appoint any person or persons or corporation to be the Executor Executrix and/or Trustee of his or her Will any option shall be sufficiently exercised if a notice of such exercise is posted addressed to the deceased partner at his or her last known usual place of residence.

Exhibits.

A.

Partnership Deed
of the Firm
of Maples.
22nd
December,
1939—
continued.

Exhibits. **IN WITNESS** whereof the parties hereto have hereunto set their hands and seals the day and year first hereinbefore written.

<p>A.</p> <p>Partnership Deed of the Firm of Maples. 22nd December, 1939— <i>continued.</i></p>	<p>Signed Sealed and Delivered by the said } ROBERT NATHAN in the presence of : } F. E. BUNNY</p> <p>Signed Sealed and Delivered by the said } FREDERICK CHARLES HENRY THOMAS } in the presence of : } F. E. BUNNY</p> <p>Signed Sealed and Delivered by the said } LOUISA JONES in the presence of : } F. E. BUNNY</p> <p>Signed Sealed and Delivered by the said } LORNA HANNAN in the presence of : } F. E. BUNNY</p> <p>Signed Sealed and Delivered by the said } LIONEL NEWTON in the presence of : } F. E. BUNNY</p> <p>Signed Sealed and Delivered by the said } LAURI JOSEPH NEWTON in the presence } of : } F. E. BUNNY</p> <p>Signed Sealed and Delivered by the said } DONALD LAMOND in the presence of : } F. E. BUNNY</p>	<p>ROBERT NATHAN</p> <p>F. THOMAS</p> <p>LOUISA JONES</p> <p>LORNA HANNAN</p> <p>LIONEL NEWTON</p> <p>LAURI J. NEWTON</p> <p>DONALD LAMOND</p>	<p></p> <p></p> <p>10</p> <p></p> <p></p> <p>20</p> <p></p>
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Exhibit " B. "—Supplementary Agreement to Partnership Deed of the Firm of Maples.

<p>B.</p> <p>Supplementary Agreement to Partnership Deed of the Firm of Maples. 4th December, 1940.</p>	<p style="text-align: center;">EXHIBIT " B. "</p> <p style="text-align: center;">SUPPLEMENTARY AGREEMENT TO PARTNERSHIP DEED OF THE FIRM OF MAPLES. Dated 4th December, 1940.</p> <p style="text-align: center;">THIS INDENTURE made the Fourth day of December One thousand nine hundred and forty Between ROBERT NATHAN of Hotel Windsor Spring Street Melbourne in the State of Victoria Furniture Warehouseman of the first part FREDERICK CHARLES HENRY THOMAS of St. Kilda Road Melbourne in the said State Furniture Warehouseman of the second part LOUISA JONES of " Ripponlea " Hotham Street Elsternwick in the said State Married Woman of the third part LORNA HANNAN of Elizabeth</p>	<p style="text-align: right;">30</p>
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Street Elsternwick aforesaid Married Woman of the fourth part LIONEL NEWTON of 44 Hopetoun Road Toorak in the said State Furniture Warehouseman of the fifth part LAURI JOSEPH NEWTON of Hamilton Road Malvern in the said State Furniture Warehouseman of the sixth part and DONALD LAMOND of Hawthorn Road Caulfield in the said State Furniture Warehouseman of the seventh part WHEREAS the parties hereto are the parties of the first, second, third, fourth, fifth, sixth and seventh parts respectively to an Indenture (hereinafter called the Principal Indenture) bearing date the twenty second day of December One thousand nine hundred and thirty-nine made between the parties hereto being a Deed of Partnership relating to the partnership or firm carried on under the name of Maples—AND WHEREAS the parties hereto have mutually agreed that the Principal Indenture should be amended and that the provision hereinafter mentioned should be deemed to be inserted therein and to have been inserted therein as from the date of the Principal Indenture Now THIS INDENTURE WITNESSETH that the parties hereto agree that the following provision should be deemed to be inserted in the Principal Indenture and to have been so inserted therein as from the date of the Principal Indenture (namely):

20 26.—If the proportion of profits referred to in Clause 12 (c) of the Principal Indenture (hereinafter called the proportion of profits) shall not be ascertained before the date that the first instalment payable under Clause 14 of the Principal Indenture shall be so payable such first instalment shall not include any part of the proportion of profits but one half of such proportion of profits with interest thereon at the rate mentioned in Clause 14 shall be payable on the date that the second half-yearly payment shall be payable as provided by Clause 14 and the residue of the proportion of profits shall be payable as to one half thereof on the date that the third half-yearly payment payable under Clause 14 shall be so payable and the balance thereof with interest shall be payable on the date that the last of the half-yearly instalments payable under Clause 14 shall be so payable.

IN WITNESS whereof the parties hereto have hereunto set their hands and seals the day and year first hereinbefore written.

Signed Sealed and Delivered by the said }
 ROBERT NATHAN in the presence of : }
 F. E. BUNNY

ROBERT NATHAN

Signed Sealed and Delivered by the said }
 FREDERICK CHARLES HENRY THOMAS }
 in the presence of : }
 F. E. BUNNY

F. THOMAS

Signed Sealed and Delivered by the said }
 LOUISA JONES in the presence of : }
 HERBERT W. AUSTIN

LOUISA JONES

Exhibits.
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 B.
 Supplementary Agreement to Partnership Deed of the Firm of Maples.
 4th
 December, 1940—
continued.

Exhibits. <hr style="width: 10%; margin: 0;"/> B. Supple- mentary Agreement to Partner- ship Deed of the Firm of Maples. 4th December, 1940— <i>continued.</i>	Signed Sealed and Delivered by the said } LORNA HANNAN in Victoria in the presence of :	} LORNA HANNAN		
	HERBERT W. AUSTIN			
	Signed Sealed and Delivered by the said } LIONEL NEWTON in the presence of :	} L. NEWTON		
	F. E. BUNNY			
	Signed Sealed and Delivered by the said } LAURI JOSEPH NEWTON in the presence of :	} LAURI J. NEWTON		10
	F. E. BUNNY			
	Signed Sealed and Delivered by the said } DONALD LAMOND in the presence of :	} D. LAMOND		
	F. E. BUNNY			

Exhibit " C. "—Notices Exercising Options of Purchase.

C.
 Notices
 Exercising
 Options of
 Purchase.

EXHIBIT " C. "

(1) By
 Robert
 Nathan.
 19th April,
 1944.

COMPRISING NOTICES EXERCISING OPTIONS OF PURCHASE BY—ROBERT NATHAN, dated 19th April, 1944. LOUISA JONES, dated 19th April, 1944. LORNA HANNAN, dated 19th April, 1944. LIONEL NEWTON, dated 20th April, 1944, AND BY LAURI JOSEPH NEWTON, dated 20th April, 1944.

TO THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED the Executor appointed under the Will of FREDERICK CHARLES HENRY THOMAS late of St. Kilda Road Melbourne Furniture Warehouseman deceased.

I ROBERT NATHAN of Hotel Windsor Spring Street Melbourne Furniture Warehouseman being a person entitled pursuant to an Indenture bearing date the Twenty-second day of December 1939 made between Robert Nathan of the first part Frederick Charles Henry Thomas of the second part Louisa Jones of the third part Lorna Hannan of the fourth part Lionel Newton of the fifth part Lauri Joseph Newton of the sixth part and Donald Lamond of the seventh part (being the deed of partnership relating to the firm or undertaking known as " Maples ") to exercise an option to purchase from the estate of the above-named Frederick Charles Henry Thomas deceased a portion of the interest of the said Frederick Charles Henry Thomas in the capital and assets of the said firm or undertaking Do HEREBY GIVE YOU NOTICE that I desire to and now hereby exercise the option vested in me to purchase from the estate of the said Frederick Charles Henry Thomas an interest in the said capital and assets equal to two and sixty-one ninety-seconds per centum of the said capital and assets or such

other percentage of the said capital and assets which I am entitled to purchase under the said Deed. Exhibits.

Dated the 19th day of April, 1944.

Signed by the said ROBERT NATHAN in } ROBERT NATHAN
the presence of :
A. J. HETHERINGTON

C.
Notices
Exercising
Options of
Purchase—
continued.

(1) By
Robert
Nathan.
19th April,
1944.

10 To THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED the Executor appointed under the Will of FREDERICK CHARLES HENRY THOMAS late of St. Kilda Road Melbourne Furniture Warehouseman deceased. (2) By
Louisa
Jones.
19th April,
1944.

20 I LOUISA JONES of "Ripponlea" Hotham Street, Elsternwick Married Woman being a person entitled pursuant to an Indenture bearing date the Twenty-second day of December 1939 made between Robert Nathan of the first part Frederick Charles Henry Thomas of the second part Louisa Jones of the third part Lorna Hannan of the fourth part Lionel Newton of the fifth part Lauri Joseph Newton of the sixth part and Donald Lamond of the seventh part (being the deed of partnership relating to the firm or undertaking known as "Maples") to exercise an option to purchase from the estate of the above-named Frederick Charles Henry Thomas deceased a portion of the interest of the said Frederick Charles Henry Thomas in the capital and assets of the said firm or undertaking Do HEREBY GIVE YOU NOTICE that I desire to and now hereby exercise the option vested in me to purchase from the estate of the said Frederick Charles Henry Thomas an interest in the said capital and assets equal to six and one quarter per centum of the said capital and assets or such other percentage of the said capital and assets which I am entitled to purchase under the said Deed.

Dated the Nineteenth day of April 1944.

30 Signed by the said LOUISA JONES } LOUISA JONES
in the presence of :
HERBERT W. AUSTIN

To THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED the Executor appointed under the Will of FREDERICK CHARLES HENRY THOMAS late of St. Kilda Road Melbourne Furniture Warehouseman deceased. (3) By Lorna
Hannan.
19th April,
1944.

I LORNA HANNAN of Elizabeth Street Elsternwick Married Woman being a person entitled pursuant to an Indenture bearing date

Exhibits.
C.
Notices
Exercising
Options of
Purchase—
continued.

(3) By Lorna Hannan.
19th April,
1944.

the Twenty-second day of December 1939 made between Robert Nathan of the first part Frederick Charles Henry Thomas of the second part Louisa Jones of the third part Lorna Hannan of the fourth part Lionel Newton of the fifth part Lauri Joseph Newton of the sixth part and Donald Lamond of the seventh part (being the deed of partnership relating to the firm or undertaking known as "Maples") to exercise an option to purchase from the estate of the above-named Frederick Charles Henry Thomas deceased a portion of the interest of the said Frederick Charles Henry Thomas in the capital and assets of the said firm or undertaking DO HEREBY GIVE YOU NOTICE that I desire to and now hereby exercise the option vested in me to purchase from the estate of the said Frederick Charles Henry Thomas an interest in the said capital and assets equal to six and one-quarter per centum of the said capital and assets or such other percentage of the said capital and assets which I am entitled to purchase under the said Deed. 10

Dated the Nineteenth day of April 1944.

Signed by the said LORNA HANNAN }
in the presence of : } LORNA HANNAN
HERBERT W. AUSTIN }

(4) By Lionel Newton.
20th April,
1944.

TO THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED the Executor appointed under the Will of 20 FREDERICK CHARLES HENRY THOMAS late of St. Kilda Road Melbourne Furniture Warehouseman deceased.

I LIONEL NEWTON of 44 Hopetoun Road Toorak Furniture Warehouseman being a person entitled pursuant to an Indenture bearing date the Twenty-second day of December 1939 made between Robert Nathan of the first part Frederick Charles Henry Thomas of the second part Louisa Jones of the third part Lorna Hannan of the fourth part Lionel Newton of the fifth part Lauri Joseph Newton of the sixth part and Donald Lamond of the seventh part (being the deed of partnership relating to the firm or undertaking known as "Maples") to exercise an option to purchase from the estate of the above-named Frederick Charles Henry Thomas deceased a portion of the interest of the said Frederick Charles Henry Thomas in the capital and assets of the said firm or undertaking DO HEREBY GIVE YOU NOTICE that I desire to and now hereby exercise the option vested in me to purchase from the estate of the said Frederick Charles Henry Thomas an interest in the said capital and assets equal to two and thirty-one one hundred and eighty-fourths per centum of the said capital and assets or such other percentage of the said capital and assets which I am entitled to purchase under the said Deed. 30

Dated the 20th day of April 1944.

40

Signed by the said LIONEL NEWTON }
in the presence of : } LIONEL NEWTON
W. B. AITCHISON. }

TO THE PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED the Executor appointed under the Will of FREDERICK CHARLES HENRY THOMAS late of St. Kilda Road Melbourne Furniture Warehouseman deceased.

Exhibits.
C.
Notices
Exercising
Options of
Purchase—
continued.

I LAURI JOSEPH NEWTON of 4 Hamilton Road Malvern Furniture Warehouseman being a person entitled pursuant to an Indenture bearing date the Twenty-second day of December 1939 made between Robert Nathan of the first part Frederick Charles Henry Thomas of the second part Louisa Jones of the third part Lorna Hannan of the fourth part Lionel Newton of the fifth part Lauri Joseph Newton of the sixth part and Donald Lamond of the seventh part (being the deed of partnership relating to the firm or undertaking known as "Maples") to exercise an option to purchase from the estate of the above-named Frederick Charles Henry Thomas deceased a portion of the interest of the said Frederick Charles Henry Thomas in the capital and assets of the said firm or undertaking DO HEREBY GIVE YOU NOTICE that I desire to and now exercise the option vested in me to purchase from the estate of the said Frederick Charles Henry Thomas an interest in the said capital and assets equal to two and thirty-one hundred and eighty-fourths per centum in the said capital and assets or such other percentage of the said capital and assets which I am entitled to purchase under the said Deed.

Dated the 20th day of April 1944.

Signed by the said LAURI JOSEPH }
NEWTON in the presence of : } LAURI J. NEWTON
AMY COBB

Exhibit " D. "—Statement of Moneys Payable by Partners in Maples to Estate of Frederick Charles Henry Thomas, deceased.

D.
Statement
of Moneys
Payable by
Partners in
Maples to
Estate of
F. C. H.
Thomas,
deceased.
28th
October,
1944.

EXHIBIT " D. "

STATEMENT OF MONEYS PAYABLE BY PARTNERS IN MAPLES TO ESTATE OF FREDERICK CHARLES HENRY THOMAS, DECEASED. Dated 28th October, 1944.

ASCERTAINMENT OF AMOUNT OWING BY PARTNERS OF MAPLES TO ESTATE OF LATE F. THOMAS FOR PURCHASE OF 19½% SHARE IN THE FIRM.

1. Capital at 28/2/1943 as per Balance Sheet but with Book Debts adjusted to 15/- in the £. (See letter of 2/5/1944 to the Executors)...	£782,182 11 0
2. Add Nett Profit for period 1/3/1943 to 28/1/1944 (Allow the £50,000 Prices Reserve and then Nett Profit for the year £103,361/16/7 x 334/365)	94,583 3 0

In the Privy Council.

No. 25 of 1951.

ON APPEAL FROM THE HIGH COURT OF
AUSTRALIA.

BETWEEN

THE PERPETUAL EXECUTORS
AND TRUSTEES ASSOCIATION
OF AUSTRALIA LIMITED *Appellant*

AND

THE COMMISSIONER OF TAXATION
OF THE COMMONWEALTH OF
AUSTRALIA *Respondent.*

RECORD OF PROCEEDINGS

CROWTHER & GRAY,
5, Lincoln's Inn Fields,
London, W.C.2,
Solicitors for the Appellant.

COWARD CHANCE & CO.,
St. Swithin's House,
Walbrook, E.C.4,
Solicitors for the Respondents.