

The Perpetual Executors & Trustees Association of
Australia Limited - - - - - Appellant

v.

The Commissioner of Taxes of the Commonwealth of
Australia - - - - - Respondent

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 19TH JANUARY, 1954

Present at the Hearing:

LORD OAKSEY
LORD MORTON OF HENRYTON
LORD REID
LORD ASQUITH OF BISHOPSTONE
LORD COHEN

[Delivered by LORD COHEN]

This appeal relates to an assessment made by the respondent under the Estate Duty Assessment Act 1914-42 in respect of the estate of the late Frederick Charles Henry Thomas (hereinafter called Mr. Thomas) who died on the 28th January, 1944. The appellant is the executor of his will.

The principal asset of the testator was his interest in a firm carrying on business as Furniture Warehouseman under the name and style of "Maples" pursuant to a deed of partnership made the 22nd December, 1939, as modified by a supplementary agreement dated the 4th December, 1940, the other partners being Robert Nathan, Mrs. Louisa Jones, Mrs. Lorna Hannon, Lionel Newton, Lauri Joseph Newton and Donald Lamond.

Clause 5 of the Deed provided that the capital of the Partnership (thereinafter called the capital) should consist of the then existing assets of the Partnership. Their Lordships pause here to observe that the parties agreed that despite this definition the expression "the capital", so far as the question now at issue is concerned, meant the capital as at the date of the death of Mr. Thomas.

Clause 6 defined the interests of each partner in the capital and allotted to Mr. Thomas 19½ per cent. thereof. Clause 8 provided that the net profits of the business should be divided between the partners in proportion to their respective shares from time to time in the capital.

Clause 9 provided that the partnership should not be dissolved by the death or retirement of any of the partners and contained provisions defining as regards each partner what was to happen in the event of his or her death or retirement. So far as Mr. Thomas was concerned the clause conferred options on the surviving or continuing partners other than Donald Lamond to purchase Mr. Thomas' share in the capital in specified proportions the details of which are not material to the issues their Lordships have to decide.

Clause 12 defines how the purchase price is to be ascertained in the event of any of the options being exercised, and is in the following terms :—

“ 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 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.

(c) The like proportion of the profits of the partnership for the current year ascertained in the manner provided in Clause 13 hereof.

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.”

Clause 14 gave a person exercising an option the right to pay the purchase money by instalments and provided for interest at the rate of £5 per cent. per annum on any balance for the time being unpaid. It also provided that on the exercise of any option the purchaser should be deemed to have acquired the interest in respect of which the option had been exercised as from the date that such option shall have been given or deemed to have been given—in the present case in the events which happened as from the date of the death of Mr. Thomas.

Clause 19 fixed the end of each accounting year of the partnership as the 28th February.

The terms of the Supplementary Agreement are not material to any issue their Lordships have to decide.

Mr. Thomas having died on the 28th January, 1944, the partners who survived him duly exercised the options conferred on them. The purchase price was ascertained in accordance with the provisions of clause 12 of the Partnership Deed and was fixed at £156,217 11s. 3d. In accordance with the last sentence of that clause no sum was added or taken into account for goodwill. The purchase price was duly paid.

It will be convenient at this stage to refer to the relevant provisions of the Estate Duty Assessment Act 1914-42.

Section 8 so far as is material is in the following terms :—

“S. 8. (1) Subject to this Act Estate Duty shall be levied and paid upon the value as assessed under this Act of the estates of persons dying after the commencement of this Act.

(3) For the purposes of this Act the estate of a deceased person comprises :—

(a)

(b) His personal property wherever situate (including personal property over which he had a general power of appointment exercised by his Will) if the deceased was at the time of his death domiciled in Australia.

(c)

(4) Property

(e) being a beneficial interest in property which the deceased person had at the time of his decease which beneficial interest by virtue of a Settlement or Agreement made by him passed or accrued on or after his decease or devolved on or after his decease upon any other person

shall for the purposes of this Act be deemed to be part of the estate of the person so deceased.”

Settlement is defined by s. 3 as follows :—

“Settlement means a Conveyance Transfer Appointment under power Declaration of Trust or other non testamentary disposition of property made by any person either before or after the commencement of this Act containing trusts or dispositions to take effect after the death of the Settlor or any other person dying after the commencement of this Act.”

S. 10 imposes on the administrator of a deceased person the duty of preparing and furnishing in the prescribed form a statement setting forth a full and complete return of all the estate in Australia of the deceased person.

S. 15 imposes on the respondent the duty of making an assessment for the purpose of ascertaining the duty payable.

S. 24 entitles an administrator who is dissatisfied with an assessment so made to lodge with the respondent notice of objection within 30 days after service of the notice of assessment. If the administrator is dissatisfied with the decision of the respondent on his objection, he has alternative remedies, the remedy relevant to the present case being a right to request the respondent to treat his objection as an appeal and to forward it to the High Court. S. 27 (1) provides that the appeal shall be heard by a single Justice. By s. 27 (3) it is provided that the objector shall be limited, on the hearing of an appeal, to the grounds stated in his objection.

The appellant duly made a return pursuant to s. 10 on the 20th June, 1944. In the statement of assets annexed thereto there appears the following entry “Interest in a partnership as per balance sheet and valuations as per Schedule 9 “£156,217 11s. 3d.”. Schedule 9 is in the following terms :—

“Interest in a Partnership

Value of deceased's 19½% interest in the	
partnership known as Maples	... £156,217 11s. 3d.”

(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 interest of the deceased.)

On the 14th February, 1947, the respondent served notice of assessment on the appellant together with a Federal Estate Duty alteration sheet which showed the alterations made in the assessable value shown in the return lodged. These included the following additions:—

“Interest in partnership of Maples undervalued £36

Proportion of goodwill in Maples, s. 8 (4) (e) £20,000.”

The last addition was, their Lordships think, made in this form as the result of the decision of the Full Court of the High Court in *Trustees Executors and Agency Company Limited v. The Federal Commissioner of Taxation* 69 C.L.R. 270. The judgment in that case was given on the 1st August, 1944, in a matter relating to the estate of James Brown Milne deceased and their Lordships will refer to the case hereafter as “*Milne's case*”. Milne was a partner in the firm of John Sanderson & Co. and the partnership deed was similar in every material respect to the partnership deed in the present case. On Milne's death his partners exercised their option to take over his share in the partnership capital at a price ascertained in accordance with the provisions of the deed which included a provision that on the death, retirement or expulsion of a partner no allowance should be made to him or his representatives in respect of the value of the goodwill of the business. The Court by a majority (Rich, Starke and Williams, JJ.), Latham, C.J., and McTiernan J., dissenting, held that within the meaning of s. 8 (4) (e) of the Act the deceased partner at the time of his death had a beneficial interest in the goodwill which, on or after his death, by virtue of the partnership agreement passed or accrued to, or devolved on, the surviving partners. Their Lordships will have to return later to *Milne's case* but they pause here to observe that it was not argued in that case that Milne's interest in the goodwill fell to be assessed under s. 8 (3). It seems to have been common ground between the parties and to have been accepted by both majority and minority of the Court that while Milne's interest in the other assets of the partnership was assessable under s. 8 (3) (b) his interest in goodwill was assessable if at all only under s. 8 (4) (e). The majority held that it was so assessable but the minority were of opinion that having regard to the terms of the Partnership deed it ceased on the death of a partner and therefore could not fall within s. 8 (4) (e).

On the 14th March, 1947, the appellant lodged notice of objection pursuant to s. 24 of the Act. It is clear from the terms of that notice that it was primarily directed to supporting the view of the minority in *Milne's case* but having in mind a submission that was made by Mr. Pascoe Hayward for the respondent their Lordships would call attention to paras. 23, 24 and 25 of the Notice of Objection which were in the following terms:—

“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, 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.

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.

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.”

On the 29th January, 1948, the respondent disallowed the objection. On the 4th March, 1948, the appellant required the respondent to treat the objection as an appeal and to forward it to the High Court.

The appeal came before Williams, J., on the 8th March, 1949, Mr. Tait, K.C., appearing for the appellant and Mr. T. W. Smith, K.C., appearing for the respondent. In the transcript of the proceedings there appears the following passage from Mr. Tait's opening speech:—

“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 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.

Mr. Smith for the respondent said that the respondent would not be relying on any other provisions of the Act apart from s. 8 (4) though he might wish at some later stage to rely on grounds not precisely in accordance with the views of the majority in *Milne's* case. At the conclusion of the argument the transcript records the following observations:—

“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 Honour: Very well.”

On the same day Williams, J., delivered judgment dismissing the appeal. The material portion of his judgment was in the following terms:—

“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 [the testator's] notional estate within the meaning of Section 8 (4) (e) of the Act.

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

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

The appellant appealed to the Full Court who dismissed the appeal saying:—

“It is conceded that this appeal must fail unless the Court is prepared to reconsider and to overrule the decision in *The Trustee 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.

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."

Their Lordships have thought it desirable to set out in full the judgment of the Full Court in order to make it clear that neither in *Milne's* case nor in the present case was any argument addressed to the High Court in support of the proposition advanced before their Lordships that the deceased's interest in goodwill was part of his estate as being personal property within s. 8 (3) (b) and could not therefore be property not actually forming part of the estate but only deemed to be part of the estate under s. 8 (4).

From this decision the appellant appeals to this Board pursuant to special leave granted by His late Majesty on the 24th May, 1950. The Reasons given by the appellant in this case for inviting your Lordships to reverse the decision of the High Court were directed in the main to supporting the views of the minority in *Milne's* case but Reason 3 was in the following terms:—

"BECAUSE under the Partnership Agreement in the events which happened the Deceased had no interest in the specific assets of the Partnership after his death but only the right to receive the purchase price payable by the survivors."

The Reasons advanced by the respondent in support of the judgment in the Court below were intended primarily to support the judgment of the majority in *Milne's* case but in para. 25 of his case the respondent intimated his intention of advancing in the alternative the following contention:—

"(i) That the Deceased had at his death an undivided share in all the assets of the Partnership.

(ii) That the concluding words of the proviso to clause 12 of the Partnership Deed did not have the effect of divesting the Deceased on his death of his share in the goodwill as one of those partnership assets.

(iii) That, consequently, the Deceased's said undivided share of the goodwill was as much part of his personal property within the meaning of section 8 (3) (b) of the Act as was his undivided share in any other asset of the partnership, and, on the subsequent purchase of his share in the partnership, his undivided share in the goodwill passed to the purchasers in the same way as did his undivided share in all the other assets of the partnership.

(iv) That in assessing, pursuant to section 8 (1) of the Act, the value of such part of the estate of the Deceased as consisted of

the Deceased's share in the partnership, the Respondent was not bound to accept as such value the price paid by the other partners when they subsequently purchased that share.

(v) That such purchase was in effect, and to the extent of £20,000, made at an undervalue, such £20,000 being the agreed value of the Deceased's share in the goodwill.

(vi) That, in consequence, the assessment is right."

When the case came before their Lordships, Mr. Cross attacked the reasoning of the majority in *Milne's* case but he did not seek to defend the reasoning of the minority. He argued that Mr. Thomas's interest in the goodwill was only part of his interest in the partnership assets and that the whole of such interest was part of the personal property forming part of Mr. Thomas's estate and fell within s. 8 (3) (b). Mr. Pascoe Hayward for the respondent did not seek to support that part of the judgments of the majority in *Milne's* case which was based on a severance between the deceased's interest in goodwill and his interest in the other partnership assets. See e.g. 69 C.L.R. at p. 286 where Starke, J., said:—

"The question whether the Commissioner was right in so including the value of the goodwill in his assessment depends upon several provisions of the Estate Duty Assessment Act. By s. 8 (3) (b) the estate of a deceased person comprises *inter alia* his personal property if the deceased was at the time of his death domiciled in Australia. No doubt the partnership interest of the deceased was part of his estate, yet that interest did not include goodwill, for the partnership deed itself expressly provided that no allowance should be made to the deceased or his representatives in respect of the value of the goodwill of the business."

Mr. Pascoe Hayward argued that the whole of the deceased's interest in the partnership assets including goodwill fell to be assessed under s. 8 (4) (e). Their Lordships' reasons for rejecting this argument will appear sufficiently from the reasons which their Lordships will now proceed to give for thinking that *Milne's* case was wrongly decided.

In *Milne's* case three questions were submitted for the opinion of the Full Court, the first and third of which were as follows:—

"(1) Whether the dutiable estate of the testator included any and if any what interest in the goodwill of the said partnership ;

(3) Whether the testator had at the time of his death any beneficial interest in the said goodwill which by virtue of the said indenture of partnership passed or accrued on or after his death or devolved on or after his death on any of the said surviving partners of the said firm of Sanderson & Co."

It is clear from the judgments that the Full Court treated the first question as asking whether the interest of the deceased in goodwill was dutiable under s. 8 (3). All the Judges answered Q. 1. in the negative except Rich J. who found it unnecessary to answer the question. The majority answered question 3 in the affirmative. It is clear from their judgments that all the Judges with the possible exception of Rich J. proceeded on the basis that the deceased's estate never became entitled to a share in the value of the goodwill and that the majority regarded the deceased's share in goodwill as something severable from his interest in the other assets of the partnerships and passing or accruing to another person under s. 8 (4) (e). Their Lordships are unable to accept either of these propositions. In their Lordships' opinion the interest of *Milne* in all the partnership assets including goodwill vested in his executors on his death although his executors would be bound if the option were exercised to transfer that interest to the purchaser at the price fixed in accordance with the partnership deed. For this reason their Lordships accept the alternative proposition advanced by Mr. Pascoe Hayward with which Mr. Cross did not quarrel that the whole of the deceased's interest in the partnership property including goodwill was assessable to duty

under s. 8 (3) (b). Being so assessable it necessarily follows that that interest cannot be assessable under s. 8 (4) which deals only with property not actually assessable as part of the estate falling within s. 8 (3) but which is to be deemed to form a part of the estate.

This conclusion is sufficient to dispose of the matter so far as the respondent's case rests on s. 8 (4) (e), but their Lordships feel bound to add that they feel grave doubt whether considering only the language of s. 8 (4) (e) the respondent can bring the facts of this case within it. To do so he must rely on the exercise of the option for it is plain that if it is not exercised, s. 8 (4) (e) will have no application. That option under cl. 9 of the partnership deed is to be deemed to have been given by the legal personal representatives of Mr. Thomas and on its being exercised there comes into being a contract of sale between them and the option holders. Such a transaction seems to their Lordships somewhat remote from a transaction of the kind which the language of s. 8 (4) (e) appears to contemplate.

In *Milne's* case Latham C.J. (see p. 282) one of the minority relied on the decision of *Hamilton J.* as he then was in *A.G. v. Boden* (1912) 1 K.B. 539 for the proposition that where a partnership deed provides that no allowance for goodwill should be made to a partner or his estate upon his death his interest in the goodwill did not pass upon his death.

In *A.G. v. Boden* the deceased had carried on business in partnership with his sons under a deed which contained a provision that on his death his share was to accrue to his sons in equal shares subject only to their paying out to his representatives the value of his share as at the date of his death ascertained by proper valuation without any valuation of or allowance for goodwill. The Crown claimed duty under s. 2 (1) (b) of the Finance Act, 1894, on the footing that the deceased's interest in goodwill was property in which the deceased had an interest ceasing on the death of the deceased. The defendant claimed that the share in goodwill passed on the death of the deceased under s. 1 of the Finance Act, 1894, and therefore could not fall within the ambit of s. 2 in view of the decision of the House of Lords in *Earl Cowley v. I.R. Commissioners* (1899) A.C. 198. They submitted however that it was really unnecessary to decide this point since the transaction between the father and his sons fell within the ambit of s. 3 (1) of the Act which exempts from duty property passing on the death of a deceased by reason only of a *bona fide* purchase from the person under whose disposition the property passes where such purchase was made for full consideration in money or money's worth paid to the vendor for his own use and benefit. *Hamilton J.* upheld this submission. His decision on this point would have been sufficient to dispose of the case but he also dealt with the other point which he described (see p. 555) as a minor point. On this he came to the conclusion (see p. 556) that the case fell within s. 2 (1) (b) and not within s. 1. Their Lordships are unable to agree with this view. In their opinion the deceased partner's interest in goodwill in such a case must pass with his interest in the other assets to his legal personal representative and the fact that its value is not to be taken into account in calculating the price receivable by the estate for his interest in the partnership is irrelevant.

Mr. Pascoe Hayward, however, submitted that even if their Lordships came to the conclusion they have indicated, their Lordships ought to dismiss the appeal either

(a) on the ground that the record of the hearing before *Williams J.* indicated an agreement that if the share in goodwill formed part of the assessable estate (and their Lordships have indicated that it is assessable property under s. 8 (3)), its value was agreed at £20,000; and

(b) on the ground that the contention advanced by Mr. Cross which their Lordships consider well founded, viz.: that the share in goodwill was assessable only under s. 8 (3), was not open to the appellant as

it was not to be found either in the Reasons in their case or in their notice of objection.

So far as the first of these points is concerned, Mr. Pascoe Hayward himself said that there are three possible views as to the ambit of the agreement:—

(1) that the parties were envisaging that Mr. Thomas's share in the goodwill was assessable under s. 8 (4) but his interest in the other assets was assessable under s. 8 (3) in which event the agreed value would not apply if his share in all the assets were assessable under s. 8 (3).

(2) that the agreed value was to apply if the deceased's share in all the assets including goodwill fell within s. 8 (4) (e).

(3) that the agreed value was binding no matter under which subsection the deceased's share in the assets fell to be assessed.

Seeing that the parties were obviously dealing with the matter on the footing that the issue would depend on whether the majority or the minority view in *Milne's case* was to prevail, the first of these alternatives seems the most probable, but their Lordships were informed that there was some correspondence relating to the agreement which was not available to their Lordships. In these circumstances their Lordships are not prepared to say more than that it would obviously be improper for them to hold that the appellants are precluded by the agreement from succeeding on this appeal.

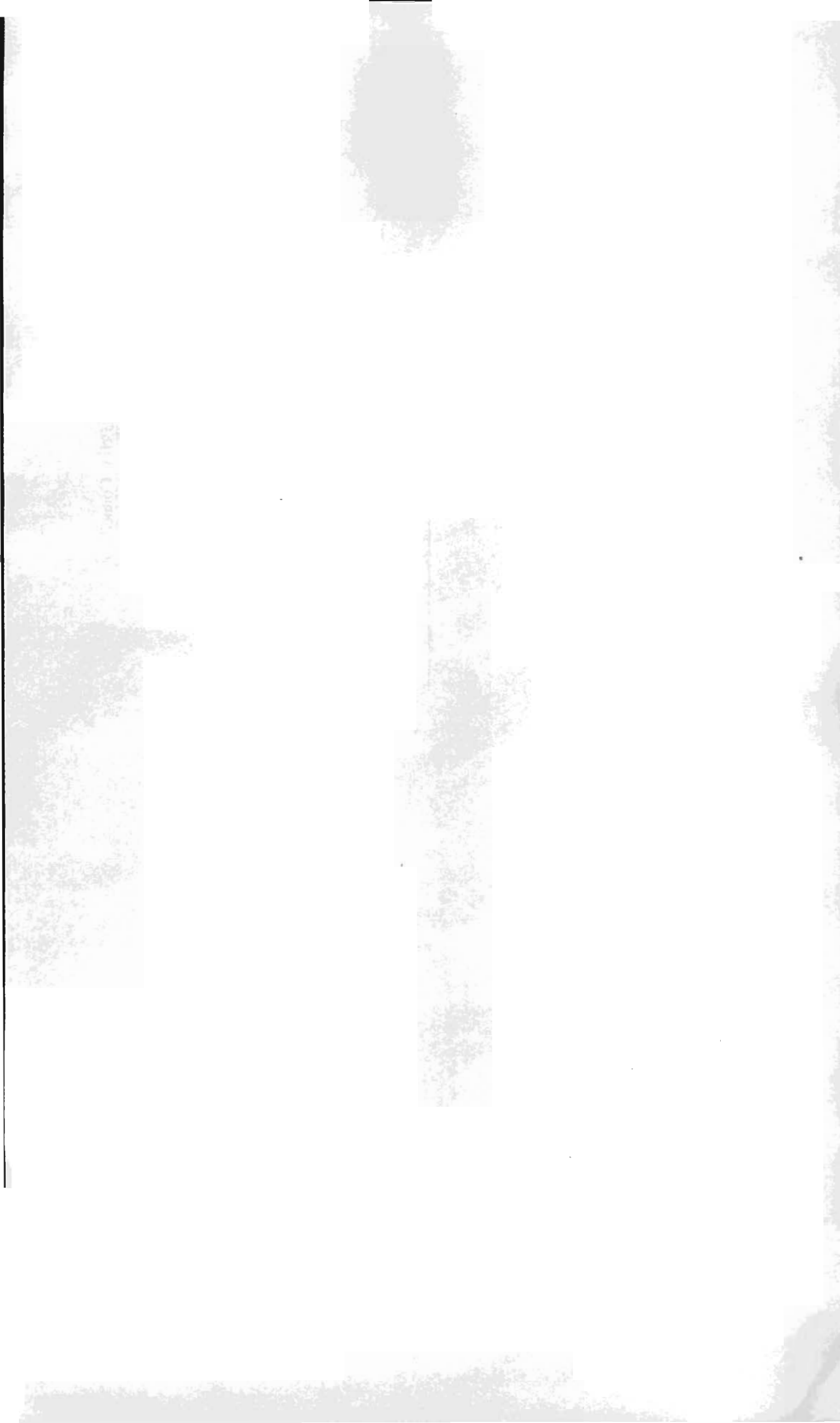
On the second point their Lordships need not spend any time in examining the appellant's Case, for their Lordships are satisfied that if the contention advanced by Mr. Cross was within the ambit of the notice of objection, it is sufficiently covered by their third Reason to which their Lordships have already referred. If, however, it was not within this notice of objection a question of jurisdiction would arise since s. 27 (3) of the Estate Duty Assessment Act, 1914-42, limits the objector to grounds stated in his objection. Had the appellant confined his notice of objection to stating as his ground that (see paragraph 25 of the notice of objection), "the estate of deceased is not dutiable in respect of any proportion of goodwill of the said firm of Maples pursuant to s. 8 (4) (e)" there could have been no doubt but that the appellant was entitled to argue that it could not be deemed to be part of the estate under s. 8 (4) (e) because it was actually part of the estate under s. 8 (3). Mr. Pascoe Hayward submits that the appellant is deprived of his right to present this argument because, as he says, the preceding paragraphs show that para. 25 was not directed to this point. Their Lordships, however, think that the necessary foundation for the argument is to be found in paras. 23, 24 and 25 when read together and must therefore refuse to dismiss the appeal on the ground that the argument falls outside the grounds stated in the objection.

Mr. Cross invited their Lordships if they reached this conclusion, to allow the appeal and amend the assessment by striking out the £20,000 added under s. 8 (4) (e) in respect of the deceased's proportion of the goodwill of Maples. Their Lordships are not prepared to adopt this course, which would mean that the respondent could only claim duty in respect of this item under s. 8 (3) if he could make a new assessment. Their Lordships do not know whether this would be possible or not and do not find it necessary to investigate the possibility. The appellant has succeeded only on a ground which was not argued either before Williams J. or before the Full Court. In these circumstances their Lordships consider that the proper course to adopt is to declare that the deceased's interest in the goodwill as in the other assets of the partnership is part of the testator's estate within s. 8 (3) and is not to be deemed to be part thereof under s. 8 (4) and to remit the matter to the High Court to make such order as the High Court may think fit on the footing of this declaration. This order will enable the parties to advance before the High Court such arguments as they may think proper having regard to that declaration. In particular, but without restricting in any way the generality of the

arguments, (1) it will enable the respondent to allege that the agreement referred to on p. 17 of the Record binds the appellant to accept the figure of £20,000 as the value of the deceased's interest in the goodwill under whatever sub-section it is held to form part of the assessable estate ; (2) it will enable the appellant to allege (a) that the respondent is bound by the valuation made pursuant to the partnership deed which represents the utmost the estate can ever receive ; alternatively (b) that if it is open to the respondent to go behind the figure thus ascertained, the existence of the option must be taken into account in arriving at the value of Mr. Thomas's interest in the partnership assets. Both these points were raised before their Lordships, but in view of the advice which their Lordships propose to tender to Her Majesty, their Lordships express no opinion thereon.

For these reasons their Lordships will humbly advise Her Majesty to allow the appeal and set aside the orders of Williams J. and of the Full Court and to declare that the share and interest of the late Frederick Charles Henry Thomas in the assets of the firm or partnership carried on under the name or style of "Maples" including the goodwill thereof was part of his estate within sub-section 3 of section 8 of the Estate Duty Assessment Act, 1914-1942, and that no part of such share or interest is to be deemed to be part of his said estate under sub-section 4 of the said section, and to refer this matter back to the High Court of Australia to reconsider the objection of the appellant to the assessment made by the respondent in the light of the declaration aforesaid and in particular but without prejudice to the generality of the foregoing to determine (a) whether any binding agreement has been made between the appellant and the respondent which fixed the value of the said share and interest of the said Frederick Charles Henry Thomas in the business and assets of the said firm including the goodwill thereof and if not (b) what value ought to be placed thereon under s. 8 (1) of the said Act having regard to all relevant circumstances.

If upon such reconsideration by the High Court the appellant secures a reduction in the assessed value of the said estate, the respondent shall pay the appellant's costs of the appeal to this Board. If the appellant fails to secure such reduction each party shall pay his own costs of such appeal. The costs of all the proceedings in the High Court of Australia are to be in the discretion of that Court.



In the Privy Council

THE PERPETUAL EXECUTORS &
TRUSTEES ASSOCIATION OF AUSTRALIA
LIMITED

v.

THE COMMISSIONER OF TAXES OF THE
COMMONWEALTH OF AUSTRALIA

DELIVERED BY LORD COHEN

Printed by Her Majesty's Stationery Office Press,
DRURY LANE, W.C.2.

1954