[HIGH COURT OF AUSTRALIA.]

THE TRUSTEES EXECUTORS AND AGENCY COMPANY LIMITED . . . . . } APPELLANT;

AND

THE FEDERAL COMMISSIONER OF TAXATION . . . . . } RESPONDENT.

H. C. OF A. 1944.

MELBOURNE, *May* 31.

SYDNEY, *Aug.* 1.

Latham C.J., Rich, Starke, McTiernan and Williams JJ.

Estate Duty (Cth.)—Assessment—Property assessable—"Beneficial interest . . . which by . . . agreement . . . made by" deceased "passed or accrued . . . to, or devolved . . . upon," another person—Partner—Goodwill of partnership business—Option to surviving partners to acquire interest of deceased partner at a valuation, no allowance being made for goodwill—Estate Duty Assessment Act 1914-1940 (*No.* 22 *of* 1914—*No.* 12 *of* 1940), *s.* 8 (3) (*b*), (4) (*d*), (*e*).

A business was carried on in partnership pursuant to an agreement which provided that on the death of any partner the surviving partners might at their option dissolve the partnership or might take over the share of the deceased in the capital of the partnership, paying to his representatives a sum to be determined in manner specified, but that on the death of any partner no allowance should be made to his representatives in respect of the value of the goodwill of the business. On the death of one of the partners the survivors exercised the option to take over his share in the capital of the partnership and paid for it in the manner specified, no allowance being made for goodwill.

Held, by *Rich*, *Starke* and *Williams* JJ. (*Latham* C.J. and *McTiernan* J. dissenting), that, within the meaning of s. 8 (4) (*e*) of the *Estate Duty Assessment Act* 1914-1940, 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.

CASE STATED.

On an appeal to the High Court by The Trustees Executors and Agency Co. Ltd. as executor of the will of James Brown Milne, deceased, against an assessment of estate duty, *Starke* J. stated for the Full Court a case which was substantially as follows :—

(1) John Sanderson, Douglas Stuart Murray, Malcolm McCaul Brodie, James Brown Milne (hereinafter called "the testator"), Hector Vincent Dowling, George David Young, Sydney Joscelyne Clarence, Alfred Ernest Coombe and Oswald Leslie McCoy carried on business in co-partnership as merchants, shipping and commission agents under the style of "John Sanderson & Co." pursuant to and subject to the terms and conditions of an indenture of partnership dated 24th October 1935 which contained the following provisions:—

"4. The capital of the firm and the manner in which it is to be made up shall be as shown from time to time by the books of the firm. All capital shall bear interest at the rate of Five per centum per annum and shall be payable yearly on the Thirty-first day of August and shall be calculated—(*a*) To the date (in the case of death) when a partner's interest in the profits of the business is declared by Clause 18 Subclause C (1) (2) to cease. . . . No partner's capital shall be increased or reduced without the consent in writing of all the partners."

"8. The partners shall be entitled to the net profits for each year from the First day of September One thousand nine hundred and thirty-five in the following proportions—

Name	Proportion.
John Sanderson	10.75
Douglas Stuart Murray	14.00
Malcolm McCaul Brodie	14.00
James Brown Milne	5.00
Hector Vincent Dowling	14.00
George David Young	13.00
Sydney Joscelyne Clarence ..	13.00
Alfred Ernest Coombe	8.25
Oswald Leslie McCoy	8.00
	100.00"

"18. On the death of any partner the surviving partners may at their option to be notified in writing to the representatives of the deceased partner within six calendar months after the deceased partner's death and to take effect on the Thirty-first day of August in the year nearest to the date of death reckoning in months dissolve the said partnership as on such Thirty-first day of August and wind up the affairs thereof or they may as at such Thirty-first day of August take over the share of the partner so dying in the capital of the partnership. In the event of the surviving partners electing to take over the deceased partner's share they shall (subject to any

H. C. OF A. 1944.

TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

adjustment on settlement of accounts) pay to the representatives of the deceased partner—(*a*) Interest on the deceased partner's share in the capital of the partnership as disclosed in the balance-sheet and profit and loss account by which as hereinafter mentioned a deceased partner's share is to be ascertained calculated from the date of the said balance-sheet and profit and loss account referred to to the date of payment of the same such interest to be at the same rate as is for the same period chargeable to the firm by its Bankers on overdraft of which rate a certificate by the firm's Bankers shall be conclusive proof. (*b*) Any profits which have accrued and to a share in which a deceased partner may have been entitled or with which he may have been credited prior to his decease but which have not actually been paid to him. (*c*) His share (if any) of the net profits to be ascertained by a balance-sheet and profit and loss account as follows, that is to say—(1) If he die on or between the First day of September and the last day of February (both days inclusive) by the balance-sheet and profit and loss account of the Thirty-first day of August immediately preceding his death and in this case he shall not be liable for any losses incurred or be entitled to any profits accrued or accruing between the date of such balance-sheet and the date of death. (2) If he die on or between the First day of March and the Thirty-first day of August (both days inclusive) by the balance-sheet and profit and loss account of such last-mentioned Thirty-first day of August and in this case the deceased partner's estate shall be liable for his due proportion of all losses incurred and shall also be entitled to his due proportion of any profits accrued or accruing between the date of death and the date of such balance-sheet. (*d*) His share of the capital of the partnership the value of which shall be ascertained by a balance-sheet and profit and loss account as follows that is to say—(1) If a partner die on or between the First day of September and the last day of February (both days inclusive) by the balance-sheet and profit and loss account of the Thirty-first day of August immediately preceding the deceased partner's death. (2) If a partner die on or between the First day of March and the Thirty-first day of August (both days inclusive) then by the balance-sheet and profit and loss account of such last-mentioned Thirty-first day of August . . . In the case of a deceased partner dying on or between the First day of March and the Thirty-first day of August (both days inclusive) his representatives shall have no voice in the preparation and settlement of the balance-sheet by which such deceased partner's share in the profits or losses of the firm's financial year in which he dies are to be ascertained it being the intention

that the surviving partners only shall have a voice in the preparation and settlement of such balance-sheet and when preparing the same they may take into consideration and make such provision as they may consider prudent for any bad or doubtful debts or for writing down the value of any assets or setting apart any funds for any purpose or otherwise as they may deem necessary or prudent in connection with the firm's business without regard to such deceased partner."

"22. The representatives of any deceased partner shall as between themselves and the surviving partners be bound by the certificate of the auditor of the firm countersigned by the surviving partners both as to interest and share of profits due or owing to him and shall not be entitled to investigate the books or accounts of the firm (except books or accounts showing the capital of the deceased partner)."

"26. On the death retirement or expulsion of any partner no allowance shall be made to him or to his representatives in respect of the value of the goodwill of the said business."

"27. If and when the partnership shall be determined as to all the partners a full and general account of the assets liabilities and transactions of the partnership shall be taken and the assets and property thereof shall be realised and sold with all convenient speed (with liberty to each partner to bid offer or tender) and the debts due to the partnership shall be got in and the proceeds shall be applied in discharge of the liabilities of the partnership and the expense of liquidating the same and realising the assets thereof and in the next place in payment to each partner or his representative of any unpaid interest or profits coming to him and of his share of the capital and the surplus (if any) shall be divided between the partners or their representatives in the shares in which the partners are entitled to the net profits of the business and the partners or their representatives shall execute such instruments for facilitating and effecting the realisation and division of the assets and for their mutual indemnity and release and otherwise as may be requisite or proper Provided that in case the proceeds realised as aforesaid shall not be sufficient to pay in full the respective shares of the partners in the capital the same shall be paid rateably so far as such moneys will extend and no partner or his representatives shall have any claim against the others in respect of such deficiency."

(2) After the execution of the indenture the business of the partnership was carried on in accordance with the terms of the indenture. Eight of the partners survived the testator. The assets of the partnership are situate in the State of Victoria.

H. C. OF A. 1944.

TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

(3) The testator died on 8th March 1941 domiciled in the State of New South Wales and having by his last will appointed the appellant his sole executor and trustee.

(4) Probate of the will was duly granted on 9th July 1941 by the Supreme Court of New South Wales in its Probate Jurisdiction to The Trustees Executors and Agency Co. Ltd. the appellant herein and on 1st October 1941 the probate was duly resealed in the Supreme Court of Victoria.

(5) In pursuance of clause 22 of the indenture the auditors of the firm duly issued on 11th October 1941 a certificate signed by them and countersigned by the surviving partners of the firm as to the interest in and share of profits due or owing to the estate of the testator, the particulars of which were :—

Capital	£6,000 0 0
Balance on capital account	54 12 6
Interest on capital for twelve months ended 31/8/41	300 0 0
Share of profit for twelve months ended 31/8/41	4,169 18 1
	£10,524 10 7

(6) In pursuance of clause 18 of the indenture the surviving partners of the testator duly exercised their option contained in such clause to take over the share of the testator in the partnership and have paid to the appellant as such executor as aforesaid the sum of ten thousand five hundred and twenty-four pounds ten shillings and sevenpence. No allowance was made to the appellant in respect of the goodwill of the said partnership which has a substantial value.

(7) On or about 2nd July 1941 a return under the *Estate Duty Assessment Act* 1914-1940 was duly furnished by the appellant and in such return under the heading " Victorian Estate—Interest in a partnership " the following particulars were given :—James Brown Milne at the date of his death was in partnership with John Sanderson of London and Douglas Stuart Murray, Malcolm McCaul Brodie, Hector Vincent Dowling, George David Young, Alfred Ernest Coombe, all of Melbourne, and Sydney Joscelyne Clarence and Oswald Leslie McCoy of Sydney carrying on business under the firm name of " John Sanderson & Co." at Melbourne (Head Office), Sydney and Perth, and in accordance with the provisions of a deed of partnership dated 24/10/1935 testator was entitled to five per cent of the net profits of the business, and as provided in the deed of partnership as he died after 28th February 1941 his estate is

entitled to five per cent of the net profits for the whole of the year ending 31st August 1941. At the date of his death, testator's share in the partnership was as follows :—

Capital account	£6,000	0	0
Interest thereon from 1/9/1940 to 8/3/1941 at 5% p.a.	156	11	6
Share of net profits—			
5% of net profits for year ending 31/8/1941 to be ascertained upon completion of the firm's financial year	0	0	0
	£6,156	11	6

(8) At the time of furnishing the return the amount of the share of the testator in the net profits of the partnership for the year ended 31st August 1941 had not been ascertained. Subsequently the respondent accepted the sum of £2,159 4s. 2d. as the amount of such share of profits up to the date of the death of the testator.

(9) On 15th February 1943 the respondent issued a notice of assessment of duty together with an alteration sheet showing alterations " made in the assessable value shown in the return lodged " : These included the addition of £7,692 as " interest in partnership understated."

(10) On 17th March 1943 the appellant caused to be written to the respondent a notice stating that the appellant objected to the assessment on grounds of which the following are now material :—

That as regards the interest in the partnership of John Sanderson & Co. the assessment should be made in accordance with the provisions of the deed of partnership dated 24th October 1935, respecting the interest of the late Mr. Milne therein.

That if it is held that the basis of valuation adopted by the Deputy Commissioner of Taxation is correct, the valuation placed on the goodwill of John Sanderson & Co. is excessive.

(11) A notice of amended assessment together with a further alteration sheet was issued by the respondent on 1st October 1943. Such alteration sheet shows that the interest of the estate of the testator in the partnership had been reduced by the sum of £2,238. On 7th October 1943 the appellant caused to be written to the respondent a letter requesting him to furnish the appellant with particulars of the manner in which the reduction of the value of the interest in the partnership had been calculated and on 13th October 1943 the respondent wrote to the appellant a letter giving the required particulars. In the letter the value of the goodwill of

H. C. OF A. 1944.

TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

the partnership is shown by a departmental valuation to be the sum of £54,500.

(12) The appellant, being dissatisfied with the amended assessment, duly requested the Commissioner in writing to treat such objection as an appeal and to forward the same to the High Court of Australia, which was done.

The questions stated for the opinion of the Full Court were :—

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

(2) Whether the dutiable estate of the testator included any beneficial interest held by him immediately prior to his death in a joint tenancy or joint ownership with other persons.

(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.

Menzies K.C. (with him *Spicer*), for the appellant. So far as the event of the death of a partner is concerned, clause 26 of the indenture relates back to clause 18 and is concerned with the event of the exercise by the surviving partners of the option to take over the interest of the deceased partner. Dissolution of the partnership, whether on the death of a partner or at any other time, is dealt with by clause 27. The effect of clause 26 is that, at his death, the testator's interest in the firm did not include any interest in the goodwill, and his estate therefore was not dutiable under s. 8 (3) (*b*) of the *Estate Duty Assessment Act*. Neither par. (*d*) nor (*e*) of s. 8 (4) applies to this case so as to produce the result that an interest in the goodwill is to be deemed to be part of the testator's estate. Before the testator's death each partner had an interest in the goodwill in a certain contingency, that is, upon dissolution of the partnership. As an abstract proposition, the partnership owned the goodwill; it was part of the partnership assets. Milne had rights under the indenture, but he had no beneficial interest in the goodwill " immediately prior to his death " (within s. 8 (4) (*d*)) or " at the time of his decease " (within s. 8 (4) (*e*)) and certainly no beneficial interest which he held " in a joint tenancy or joint ownership with other persons " (within s. 8 (4) (*d*)). [He referred to *Osborne* v. *Federal Commissioner of Taxation* (1) ; *Gellibrand* v. *Murdoch* (2) ; *Commissioner of*

(1) (1921) 29 C.L.R. 169, at p. 175. (2) (1937) 58 C.L.R. 236, at p. 243.

Succession Duties (S.A.) v. *Isbister* (1); *Attorney-General* v. *Boden* (2).] In any case the assessment cannot be supported unless (within s. 8 (4) (*e*)) at the time of his death the testator had a beneficial interest in the goodwill which passed or accrued to, or devolved upon, the other partners. An interest in property does not go over or accrue to anyone else if it is expressed by agreement to come to an end. There is a difference between the legal passing of an interest and the fact that a person benefits by the cesser of an interest; otherwise all cases of tenant for life and remainderman would be covered, because on the death of the tenant for life the remainderman benefits by the acceleration of his interest. In the present case the surviving partners, having elected to take over the testator's share, benefited to the extent that the partnership went on with eight instead of nine partners and the prospective share of each of the eight in the goodwill accordingly increased in value; but this was due simply to the cesser of the testator's interest and not because his interest passed or accrued to, or devolved upon, the surviving partners. Further, if any beneficial interest can be said to have "passed," it was not by virtue of an agreement made by the testator, but by the exercise of the option under clause 18.

Walker, for the respondent. If not within s. 8 (4) (*d*), this case is, at all events, within s. 8 (4) (*e*). It is not contended that clause 18 of the indenture produces that result, although that clause supports the Commissioner's view; clause 26 is the material clause. It is to be noticed that the words of clause 18 relating to the taking over of a deceased partner's share are "take over the share of the partner . . . in the capital of the partnership." Goodwill, although an asset of the partnership, is not "capital": See *McLelland* v. *Hyde* (3). Clause 27 throws no light on the question arising here. On a dissolution the testator or his personal representative would (apart from clause 26) have shared in the assets of the partnership, including the goodwill. At his death the testator had an interest in all the assets, including the goodwill. Clause 26 provides, not that a deceased partner's interest in the goodwill shall cease at his death, but merely that "no allowance shall be made in respect of the value of the goodwill." The surviving partners did not "take over" the testator's interest in the goodwill by exercising the option under clause 18, but when they exercised the option the result of clause 26 necessarily was that the goodwill (including the testator's interest in it) went with the business to the surviving

(1) (1941) 64 C.L.R. 375, at pp. 379, 380.
(2) (1912) 1 K.B. 539.
(3) (1942) N.I.L.R. 1.

H. C. OF A. 1944.

TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Aug. 1.

partners, no allowance being made by them in respect of the testator's interest in the goodwill. That is to say, in the natural meaning of the words of s. 8 (4) (*e*), the testator's interest in the goodwill passed or accrued to, or devolved on, the survivors, and it did so by virtue of the indenture, whether by virtue of clause 26 alone or of that clause read in conjunction with clause 18.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. Case stated under the *Estate Duty Assessment Act* 1914-1942. The question is whether there should be included in the assessment of the estate of the late J. B. Milne to estate duty any amount in respect of the value of the interest of the deceased in the goodwill of the firm of John Sanderson & Co., of which he was a member.

The *Estate Duty Assessment Act* provides in s. 8 that for the purpose of the 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 ; " . . .

Section 8 (4) provides that :—

" Property— . . .

(*d*) being the beneficial interest held by the deceased person, immediately prior to his death, in a joint tenancy or joint ownership with other persons ; or

(*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 to, 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."

The case states that the goodwill of the partnership of John Sanderson & Co. has a substantial value.

It is well established that the goodwill of a partnership firm is part of the assets of the firm. As was said in *Wedderburn* v. *Wedderburn* [*No.* 4] (1), by *Romilly* M.R. :—" Accordingly in reported cases, Lord *Eldon* held that a share of it " (i.e., goodwill) " properly and as of right belonged to the estate of the deceased partner. It

(1) (1856) 22 Beav. 84, at p. 104 [52 E.R., at p. 1047].

does not survive to the remaining partners, unless by express agreement; but it may by agreement, as it may be agreed that any particular portion of the partnership assets shall so survive. Goodwill manifestly forms a portion of the subject matter which produces profits, which constitutes partnership property, and which is to be divided between the surviving partners and the estate of the deceased partner, according to the terms of the contract, and when that is silent, according to their shares in the concern." See also *In re David & Matthews* (1) :—" The goodwill of the business " (of a firm) " would be an asset, and might well be the most valuable asset of the partnership. The executors," (of a deceased partner), " therefore, in the absence of special provisions in the partnership contract, would be entitled to require that the goodwill should be sold together with the other assets for the purposes of division between the executors and the surviving partner."

This rule, however, is, as stated, subject to the provisions of the partnership agreement. The partnership agreement in the present case provides that nine persons should carry on in partnership as merchants, shipping and commission agents. The agreement does not specify the shares of the respective partners in the capital of the firm. Clause 4 provides that the capital of the firm and the manner in which it is made up shall be as shown from time to time by the books of the firm. Clause 8 provides for the right of the partners to share in net profits, the shares varying from fourteen per cent to (in the case of Milne) five per cent. Clause 18 provides that upon the death of any partner the surviving partners may at their option either dissolve the partnership and wind up the affairs thereof or take over the share of the deceased partner in the capital of the partnership upon paying a sum calculated in the manner set out in the clause. Under this clause the amount to be paid to the representatives of a deceased partner would vary according to whether the partner died between 1st September and the last day of February, or between 1st March and 31st August. The amount thus ascertained would not correspond with the value of the partner's interest ascertained upon a dissolution of partnership. After J. B. Milne died the surviving partners exercised the option to take over his share in the partnership under clause 18. Other clauses provide for the retirement or expulsion of a partner.

Clause 26 is as follows :—" On the death retirement or expulsion of any partner no allowance shall be made to him or to his representatives in respect of the value of the goodwill of the said business."

(1) (1899) 1 Ch. 378, at p. 382.

H. C. OF A. 1944.

TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

The Commissioner, in making his assessment, has disregarded this clause as being irrelevant and has treated goodwill in the same way as any other partnership asset, charging the executors upon the basis that Milne died entitled to five per cent of the partnership assets. (The deed provides only that Milne's interest in *profits* shall be five per cent—but the question of the correctness of this basis of assessment does not arise upon this case stated.)

Clause 27 provides that if the partnership shall be determined as to all the partners a full and general account of the assets, liabilities and transactions of the partnership shall be taken, the assets realized, the debts paid, capital repaid and the surplus distributed among the partners in proportion to the shares in which they are entitled to the profits of the business.

In my opinion clause 26 applies in the case of the death of a partner, whether or not his death is followed by a dissolution as between the other partners. It is a provision which excludes the deceased partner and his representatives from any interest in the goodwill in the case of the death of a partner during the partnership. I can see no reason why the clause should not have been applicable if the partners in the present case, instead of exercising their option to purchase the deceased partner's share under clause 18, had exercised their right under that clause to a dissolution. In that case, upon the dissolution, the estate of the deceased partner would not be entitled to any allowance in respect of the value of the goodwill by reason of what I regard as the clear words of clause 26. It is not necessary, however, to decide in the present case whether, if the surviving partners had brought about a dissolution of the firm, the clause would have been applicable, because in fact they exercised their option to buy the share of the deceased partner, and, accordingly, there is no doubt that clause 26 applies in the events which have happened, so that no interest in the goodwill of the firm passed to the executors of J. B. Milne as part of his estate.

The first question submitted in the case is: "Whether the dutiable estate of the testator included any and if any what interest in the goodwill of the said partnership." This question should be answered "No."

The partners did not own the goodwill in joint tenancy or joint ownership. The ordinary rule applies—*inter mercatores jus accrescendi locum non habet.*

The second question submitted in the case is: "Whether the dutiable estate of the testator included any beneficial interest held by him immediately prior to his death in a joint tenancy or joint ownership with other persons." This question should be read as

relating only to an interest in the goodwill of the firm. It also should be answered in the negative.

The third question is: "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."

On the one hand it has been contended for the Commissioner that Milne's interest in the goodwill passed to the surviving partners. His executors owned no interest in the goodwill after he died, and it is argued that his interest in the goodwill must have gone somewhere, and that it can only have gone to the surviving partners. After his death the share in the goodwill of each partner was increased, and this increase could have come only from the interest which had previously been owned by Milne. On the other hand it is submitted that Milne's interest in the goodwill ceased to exist at his death. The result of his death was that the value of the share of the surviving partners in the goodwill was increased. But that increase in value was brought about, it is contended, not by reason of anything passing to those partners from Milne, but by reason of the cesser of his interest in the goodwill. The practical result to the other partners from a financial point of view is the same whichever view is taken, but the decision between the two contentions cannot depend upon identity of result: it must depend upon the construction of s. 8 (4) (*e*). The question, therefore, is whether any beneficial interest in the goodwill which Milne had at the time of his decease passed or accrued to or devolved upon the surviving partners on or after his decease by virtue of the partnership agreement.

The difference between an interest of one person in property passing to another person on the death of the first person and a benefit arising or accruing to another person by reason of the death of a person but without any interest in property passing from that person is a real distinction in law. It is not difficult to give illustrations. A simple case is that of a lease determinable with life. In that case a benefit arises or accrues to the reversioner by reason of the death of the tenant, but the interest of the tenant does not pass to him: it ceases upon the death of the tenant. Where a rent charge ceases on death, a benefit accrues to the person entitled to the property charged, but the interest of the person entitled to the charge does not pass to him: that interest ceases upon the death: See *Hanson, Death Duties*, 8th ed. (1931), pp. 4, 5, 74.

In the English *Finance Act* 1894 the reality of the distinction is emphasized by the separate provisions which are made for the two

H. C. OF A. 1944.

TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

cases. Section 1 of the Act provides that estate duty is payable, with exceptions, upon the principal value of property which "passes on the death" of persons dying after a specified date. Section 2, sub-s. 1, provides that "property passing on the death of the deceased shall be deemed to include . . . (b) Property in which the deceased . . . had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest."

That these provisions relate to quite distinct classes of cases is recognized in the judgment of *Hamilton* J. (afterwards Lord *Sumner*) in *Attorney-General* v. *Boden* (1). In that case a deed of partnership provided that upon the death of a particular partner his share should accrue to two other partners subject to the payment of certain moneys "but without any valuation of or allowance for goodwill, which goodwill shall accrue to the said other persons in equal shares." The question was whether the deceased partner's interest in the goodwill passed to the other partners, or whether it did not pass, but ceased. Upon the former view the whole value of the deceased's interest in the goodwill would have been included in his estate for purposes of duty. Upon the latter view an amount would have been so included only to the extent to which a benefit accrued or arose to the other partners by reason of the cesser of his interest. *Hamilton* J. dealt with the matter by saying :—"In my opinion this case does not fall within s. 1 of the *Finance Act* 1894, but does fall within s. 2, sub-s. 1 (*b*). This goodwill, if any, was property in which the deceased had an interest ceasing on the death of the deceased; and such property to the extent to which a benefit accrues or arises by the cesser of such interest is to be deemed to be that which in fact it is not, namely, property passing on the death of the deceased" (2).

This is a clear decision that where it was provided 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 but ceased upon his death and that to the extent to which the surviving partners thereby received a benefit it was to be deemed, by virtue of a specific provision in the relevant Act "to be that which in fact it is not, namely property passing on the death of the deceased." The *Finance Act* provided that, to the extent stated, the interest should be "deemed" to be "property passing on the death." There is no such corresponding provision in the Commonwealth statute. Section 8 (4) (*e*) provides only that an interest which actually passes accrues or devolves shall be deemed to be part of

(1) (1912) 1 K.B. 539. (2) (1912) 1 K.B., at p. 556.

the estate of the deceased person. The principle of *Boden's Case* (1), if applied to the present case, appears to me to be decisive.

The distinction taken in *Boden's Case* (1) has been emphasized on several occasions in the House of Lords, when attention has been pointedly directed to the distinction between property which passes on death (dealt with by s. 1 of the *Finance Act*) and property which is brought within the Act only by s. 2—" property deemed to pass." These classes have been held to be mutually exclusive: See *Earl Cowley* v. *Inland Revenue Commissioners* (2), where Lord *Macnaghten* says: " Now, if the case falls within s. 1 it cannot also come within s. 2. The two sections are mutually exclusive. Section 1 might properly, I think, be headed, ' With regard to property passing on death, be it enacted as follows.' Section 2 might with equal propriety be headed, ' And with regard to property not passing on death, be it enacted as follows ' " ; *Attorney-General* v. *Milne* (3), where Lord *Haldane* says :—" By s. 1 estate duty is to be levied upon the principal value of property, settled or unsettled, which passes on death. By s. 2 ' property passing on the death of the deceased shall be deemed to include ' certain specified cases of property which does not actually pass on death, like the property to which s. 1 relates " ; *Nevill* v. *Inland Revenue Commissioners* (4), where Lord *Phillimore* explicitly draws the same distinction.

The Commonwealth statute does not contain any provision like s. 2 (1) (b) of the English *Finance Act*. Section 8 (4) (*e*) of the Commonwealth Act relates only to interests which actually pass, and therefore, according to the authorities cited, does not cover a case of cesser of interest, where property does not pass.

I refer to the authorities mentioned only for the purpose of emphasizing the full recognition of the distinction between (1) property passing on death and (2) an interest ceasing on death with the result that the value of another person's interest is increased. The provisions in the English *Finance Act* relating to estate duty are very different from those contained in the Commonwealth Act. The English Act applies to property passing or deemed to pass in all cases, and not to the interest of a deceased person which passes (*Hanson, Death Duties*, 8th ed. (1931), pp. 2, 4, 65, 66). Thus, as Lord *Macnaghten* said of the English Act in *Cowley's Case* (2) :— " What the Act has in view for the purpose of taxation is property passing on death, not the interest of the deceased, which if it be a limited interest can never pass." His Lordship then proceeds to say : " With an interest that ceases on death the Act is not directly

(1) (1912) 1 K.B. 539.
(2) (1899) A.C. 198, at p. 212.
(3) (1914) A.C. 765, at p. 769.
(4) (1924) A.C. 385, at p. 402.

H. C. OF A. 1944.

TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Latham C.J.

concerned, except in the one case where without any passing of property a benefit accrues or arises by reason of the cesser of a determinable interest such as a charge that expires." This "one case" is, as already explained, brought within the Act by s. 2, to which there is no corresponding provision in the Commonwealth Act. Thus, under the English Act, it would be irrelevant to ask whether the interest of a deceased person had passed to another person. But under s. 8 (4) (*e*) of the Commonwealth Act that is the very inquiry which must be made. The section does not refer to "*property* passing" but, in express terms, to "*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 passed or accrued to or devolved upon another person.

In my opinion, for the reasons stated, Milne had no beneficial interest in the goodwill when he died; his beneficial interest ceased upon his death; it did not pass or accrue to or devolve upon any other person; there is no provision in the Commonwealth Act for the taxation of increased value accruing to another person by reason of cesser of interest of a deceased person; such a cesser of interest cannot, upon the authorities, be brought within the category of an interest passing, accruing or devolving. The result of these considerations is that in my opinion the third question in the case should be answered in the negative.

RICH J. The relevant facts are as follow. Several persons entered into a partnership agreement which provided that on the death of any partner the survivors might purchase his share on the footing that nothing was to be paid in respect of the value of the goodwill. One of the partners died, and the survivors purchased his share accordingly, paying nothing in respect of the goodwill. The question is whether estate duty is payable, in respect of the interest of the deceased in the goodwill, under s. 8 (4) (*e*) of the *Estate Duty Assessment Act* 1914-1940, as 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 to, or devolved on or after his decease upon, any other person," and as therefore being deemed to be part of his estate for the purposes of the Act.

Apart from any agreement between the partners, the partnership would have become dissolved upon the death of any of them, and it would have been the right of the personal representative of the deceased to require the sale of the property of the partnership

(including the goodwill to the extent to which it had a sale value and was saleable), and the right of the surviving partners to effect the sale, unless the winding up of the partnership were taken out of their hands by the order of a court. And it would have been the right of the personal representative to receive the deceased's share of the net proceeds of the partnership assets, including the goodwill. In the case now before us, the partnership agreement, upon the death of the propositus, conferred on the surviving partners an option to purchase his share at a price fixed upon the basis that nothing was to be paid in respect of the interest of the deceased in the goodwill, that is to say, to the extent to which the existence of a goodwill increased the net value of the business, the survivors, if they exercised the option, were to get the share of the deceased in this increased value for nothing. "Now the rights of the deceased partner or his legal personal representatives are rights over all the assets of the partnership. He has an unascertained interest in every single asset of the partnership, and it is not right to regard him as being merely entitled to a particular sum of cash ascertained from the balance-sheet of the partnership as drawn up at the date of his death" (*Manley* v. *Sartori* (1); *In re Fuller's Contract* (2); *Gray* v. *Smith* (3)). Further, it is well settled that a binding option to purchase property has not merely a contractual operation, but creates an equitable interest in the property the subject of the option (*Morland* v. *Hales* (4); *Commissioner of Taxes (Q.)* v. *Camphin* (5); *Oppenheimer* v. *Minister of Transport* (6)). Hence, the propositus, at the time of his decease, had a beneficial interest in property, namely the goodwill, and this beneficial interest, to the extent of the interest therein created by the option, passed or accrued on or after his decease to the surviving partners by virtue of an agreement made by him. It has been suggested that the position is affected by clause 26 of the partnership agreement, which provides that on the death, retirement or expulsion of any partner, no allowance shall be made to him or his representatives in respect of the goodwill of the business. The partnership agreement does not, however, provide that a partner is to have only a life interest in the goodwill, which ceases at his death. It treats him as having an interest in it, but one in respect of which he is to receive no allowance at his death, so that his interest therein then accrues gratis to the other partners.

It follows, from the provisions of s. 8 (4) (*e*), that the beneficial interest which so passed or accrued must be deemed to be part of

(1) (1927) 1 Ch. 157, at pp. 163, 164.
(2) (1933) Ch. 652, at p. 656.
(3) (1889) 43 Ch. D. 208.
(4) (1910) 30 N.Z.L.R. 201.
(5) (1937) 57 C.L.R. 127.
(6) (1942) 1 K.B. 242; 166 L.T. 93.

H. C. OF A. 1944.

TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

the estate of the deceased for the purposes of the *Estate Duty Assessment Act*. I therefore answer question 3 in the affirmative and consider that it is unnecessary to answer questions 1 and 2.

STARKE J. Case stated pursuant to the provisions of the *Estate Duty Assessment Act* 1914-1942.

The partnership firm of John Sanderson & Co. carried on business in Melbourne and elsewhere as merchants, shipping and commission agents. James Brown Milne, who was domiciled in Australia, was a partner in the firm, but he died in 1941 and by his will appointed the appellant company his executor. The capital of the partners and their shares in the profits were the subject of stipulations in the partnership agreement. Subject to that agreement, however, the share of each partner was his proportion of the partnership assets after they had been all realized and converted into money, and all the partnership debts and liabilities had been paid. " This it is, and this only, which on the death of a partner passes to his representatives, or to a legatee of his share " (See *Lindley* on *Partnership*, 7th ed. (1905), pp. 377, 378). But the partnership agreement in the present case provided that on the death of any partner the surviving partners might at their option take over the share of the partner so dying on terms to be ascertained in manner specified in the agreement and to be certified by the auditors of the firm.

Clause 26 of the agreement stipulated : " On the death retirement or expulsion of any partner no allowance shall be made to him or to his representatives in respect of the value of the goodwill " of the partnership business.

The surviving partners exercised the option above referred to, and the share of the deceased partner in the partnership assets was ascertained and certified in the manner agreed upon by the deed, excluding any allowance for goodwill in accordance with clause 26 of the partnership agreement. The goodwill, the case states, was of substantial value. Estate duty was assessed by the Commissioner upon the estate of Milne, the deceased partner, and in ascertaining the value of the share of the deceased in the partnership business he included a considerable sum in respect of the value of the goodwill of that business.

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. But then it was said that the goodwill must be deemed to be part of the interest of the deceased in the partnership business by reason of the provisions of s. 8, sub-s. 4 (*d*) or (*e*).

Property shall for the purposes of the Act be deemed to be part of the deceased person's estate :—

"(*d*) being the beneficial interest held by the deceased person, immediately prior to his death, in a joint tenancy or joint ownership with other persons."

Faint, if any, reliance was placed on this provision, for it cannot be said that the deceased held his share in the partnership in joint tenancy or joint ownership with the other partners.

"(*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 to, or devolved on or after his decease upon, any other person."

It was upon this provision that the Commissioner mainly relied. Again it is clear that the deceased had a beneficial interest in property, namely, his share in the partnership business at the time of his death, but the partnership agreement, as already mentioned, provided that no allowance should be made to him in respect of the value of the goodwill of the business. The effect of the agreement was, according to the Commissioner, to pass any right the deceased had to an allowance in respect of the value of the goodwill in the partnership account to his surviving partners or, at all events, that his right to such an allowance accrued to them by force and by virtue of the agreement. The word " passed," I take it, is not " a technical word, but one capable of the widest possible meaning " (*In re Earl Cowley's Estate* (1), per *Rigby* L.J.). And " accrued " suggests that the interest arises by way of an accession to or an advantage bestowed upon some other person.

The argument on the part of the appellant was that the interest of the deceased in the partnership business ceased, so far as any right to an allowance for goodwill was concerned, upon his death and that the benefit of the other partners which arose by the cesser of such interest did not pass or accrue to them by virtue of the partnership agreement or at all : Cf. *Attorney-General* v. *Boden* (2).

On the other hand, the Commissioner insists that the effect of the partnership agreement is to surrender or release the right of

(1) (1898) 1 Q.B. 355, at p. 374. (2) (1912) 1 K.B. 539, at p. 556.

H. C. OF A. 1944.

TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Starke J.

the deceased to an allowance for goodwill to the surviving partners so that it passed or accrued to them.

To me it does not seem to make any real difference whether the clause 26 in the partnership agreement is called a "cesser" or a "surrender" clause. The effect in either case is to deprive the partner dying, retiring or being expelled of what otherwise would have been his right so that it enures for the benefit of the other partners and, in the non-technical words of the Act, passes or accrues to them. At all events they get by force of the agreement that which, but for the provision of the agreement, would have been included in the assets of the estate of the deceased.

The *Estate Duty Assessment Act* 1914-1942 bears a general resemblance to the English legislation on the same subject, but the provisions of the Acts are not identical, and I have not found any of the cases collected in *Hanson* on *Death Duties*, 8th ed. (1931), pp. 64 et seq., decisive of the questions stated in this case.

Those questions should be answered—(1) and (2): No. (3): Yes.

McTIERNAN J. In my opinion all the questions should be answered: No.

The argument in the case was directed mainly to the third question. This question arises under s. 8 (4) (*e*) of the *Estate Duty Assessment Act* 1914-1940.

The assets of the partnership included the goodwill of the business, which was of substantial value.

In the absence of special provisions in the contract between partners, the partnership is determined by the death of a partner and his personal representative is entitled to require that the assets of the partnership be sold for the purpose of division between him and the surviving partners. The goodwill of a partnership business is subject to this rule (*Lindley, Law of Partnership*, 9th ed. (1924), pp. 540, 541; *In re David & Matthews* (1); *Hill* v. *Fearis* (2); *Pollock, Law of Partnership*, 13th ed. (1936), p. 125).

There are special provisions which exclude this rule in the present deed of partnership. Before his death the testator had an interest in the partnership assets, including the goodwill. If the partnership had been determined in his lifetime under clause 27 of the deed "as to all the partners" he would have been entitled to a share in the surplus, if any, obtained after realization of the assets and property of the partnership and the payment of its debts. The partnership was not by reason of the special provisions of the deed determined by the testator's death. The surviving partners elected

(1) (1899) 1 Ch. 378, at p. 382. (2) (1905) 1 Ch. 466.

under the terms of clause 18 to take over the testator's share in the capital of the partnership ; and by reason of clause 26 they were not liable to pay anything to the testator's executor in respect of the value of the goodwill of the business. The result is that the testator's interest in the goodwill ceased upon his death. The surviving partners then became entitled to the whole of the benefit of the goodwill.

Section 8 (4) (*e*) of the above-mentioned Act is different in its effect from s. 2 of the *Finance Act* 1894 (Imp.), which was one of the provisions in question in the case of *Attorney-General* v. *Boden* (1). The latter section provides in part that property passing on the death of the deceased shall be deemed to include property in which the deceased or any other person had an interest ceasing on the death of the deceased " to the extent to which a benefit accrues or arises by the cesser of such interest." There is, it seems to me, a real distinction between the effect of those provisions and s. 8 (4) (*e*) of the Australian Act.

Before the testator's death the goodwill of the partnership belonged to the testator and the other partners. Upon the testator's death it became the property solely of the surviving partners. The reason why the surviving partners became entitled to the whole of the beneficial interest in the goodwill was that the testator's interest in it ceased at his death. What accrued or passed or devolved upon the surviving partners at the testator's death was a benefit equal in value to his beneficial interest in the goodwill. It was not the beneficial interest itself that accrued or passed or devolved upon the surviving partners after the testator's death. That interest then ceased : it did not go over to the surviving partners.

In my opinion the third question should be answered : No.

It would be contrary to well-established rules, especially of equity, to say that a partner holds his beneficial interest in partnership property in a joint tenancy or joint ownership with the other partners. The answer to the second question should be : No.

It follows from what has been said above that the testator's interest in the goodwill is not caught by any of the provisions of s. 8 of the *Estate Duty Assessment Act* 1914-1940 and that the first question should also be answered : No.

WILLIAMS J. The case stated raises the question whether the executors of J. B. Milne, who died on 8th March 1941, are liable to pay Federal estate duty under the provisions of the *Estate Duty*

(1) (1912) 1 K.B. 539.

H. C. OF A. 1944.

TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

Assessment Act 1914-1940 in respect of the value, admittedly considerable, of the goodwill of the partnership carried on under the style of John Sanderson & Co., of which he was a member at the date of his death.

The partnership deed, which was dated 24th October 1935, provided, clause 1, that nine persons, of whom the deceased was one, should carry on in partnership the business of merchants, shipping and commission agents.

Clause 4 of the deed provided that the capital of the firm and the manner in which it was to be made up should be as shown from time to time from the books of the firm and should bear interest at the rate of five per cent per annum.

Clause 12 provided that each partner, except J. Sanderson, should devote his whole time and attention to the business and diligently and faithfully employ himself therein.

Clause 8 provided for the manner in which the net profits of the partnership were to be divided between the partners, the deceased being entitled to five per cent of these profits.

Clause 18 provided, so far as material, that, on the death of a partner, the surviving partners might at their option, to be notified in writing to the representatives of the deceased partner within six months after the deceased partner's death, and to take effect on 31st August in the year nearest to the date of death reckoning in months, dissolve the partnership as on such 31st August, and wind up the affairs thereof; or they might as at 31st August take over the share of the partner so dying in the capital of the partnership; and that, in the event of the surviving partners electing to take over the deceased partner's share, they should (subject to any adjustment on the settlement of accounts) pay to the representatives of the deceased partner the sums therein mentioned. These sums were, briefly stated, (*a*) interest on the deceased partner's share in the capital of the partnership, (*b*) any profits which had accrued and to a share of which the deceased partner was entitled, (*c*) his share of the net profits to be ascertained by a balance-sheet and profit and loss account made up as therein mentioned, and (*d*) his share of the capital of the partnership, the value of which should be ascertained by a balance-sheet and profit and loss account made up as therein mentioned.

Clause 26 provided that on the death, retirement, or expulsion of any partner no allowance should be made to him or his representatives in respect of the value of the goodwill of the business.

Clause 27 provided that if the partnership should be determined as to all the partners a full and general account of the partnership

transactions and assets should be taken and the assets and property thereof should be realized and sold with all convenient speed, and that the partnership assets should be applied firstly in discharge of the liabilities and the expenses of liquidation; and secondly in payment to each partner or his representatives of any unpaid interest or profits coming to him and of his share of capital, and that the surplus, if any, should be divided between the partners or their representatives in the shares in which the partners were entitled to the net profits of the business.

The surviving partners duly exercised their option to purchase the share of the deceased in the partnership in accordance with clause 18 of the deed, so that the purchase money included the amounts therein specified, but, pursuant to clause 26, did not include any sum in respect of the value of the goodwill. The Commissioner claims that, for the purposes of duty, five per cent of this value should be included as an asset in the dutiable estate. He relies upon s. 8 (3) (*b*), or alternatively upon s. 8 (4) (*e*), of the Act.

Section 8 provides, so far as material, that (1) subject to the Act, estate duty shall be levied and paid upon the value, as assessed under the Act, of the estates of persons dying after the commencement of the Act. (3) For the purposes of the Act the estate of a deceased person shall comprise (*b*) his personal property, wherever situate . . . if the deceased was, at the time of his death, domiciled in Australia. (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 to, or devolved on or after his decease upon, any other person, shall for the purposes of the Act be deemed to be part of the estate of the person so deceased.

Mr. *Menzies* contended that, in the event of the death of a partner, clause 26 of the deed only applied where the surviving partners exercised the option to purchase his share, and not where, the option not having been exercised, the partnership was wound up under clause 27. This contention receives some support from the context of the deed as a whole, and of clause 27 in particular, but, since the option was exercised in the present case and the Commissioner does not dispute that the appeal must be decided on that basis, it is unnecessary finally to decide the point. As at present advised clause 26 appears to me to be of general application. Since, therefore, the estate never became entitled to a share in the value of the goodwill, the validity of the assessment cannot be upheld under s. 8 (3) (*b*) but must be upheld, if at all, under s. 8 (4) (*e*) of the

H. C. OF A. 1944.

TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

Act. That sub-section is one of a number of sub-sections which make certain property to which the personal representatives of a deceased person do not become legally or equitably entitled upon his death notional property of the deceased for the purposes of duty.

By virtue of clause 26 of the deed the estate of J. B. Milne deceased was not entitled to any allowance in respect of the value of the goodwill. The effect of that clause was, therefore, to increase the value without payment of the interests of the surviving partners in that goodwill. Mr. *Menzies* contended that, in the events that had happened, the deceased never had more than an interest in the goodwill ceasing upon his death; so that, upon his death, there was no beneficial interest in property belonging to him which was capable of passing or accruing on or after his decease to or upon the surviving partners. But, under the deed, each partner, though in unequal shares, was entitled to the ordinary rights of a partner, including a right to have the goodwill dealt with as an asset of the partnership. The effect of the clause was, therefore, in the case of J. B. Milne, to cause a cesser of this right and an accruer thereof to the surviving partners.

The meaning of property passing on the death of a deceased person has been the subject of frequent judicial decision of the highest authority in England.

The English *Finance Act* 1894 provides, so far as material, that:—

Section 1: "In the case of every person dying after the commencement of this part of this act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned."

Section 2 (1): "Property passing on the death of the deceased shall be deemed to include the property following, that is to say:—

. . .

(b) Property in which the deceased . . . had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest."

In *Earl Cowley* v. *Inland Revenue Commissioners* (1) Lord *Macnaghten* explained the relationship of these two sections to one another. He said: "What the Act has in view for the purpose of taxation is property passing on death, not the interest of the deceased, which if it be a limited interest can never pass. With an interest that ceases on death the Act is not directly concerned,

(1) (1899) A.C. 198, at pp. 211, 212.

except in the one case where without any passing of property a benefit accrues or arises by reason of the cesser of a determinable interest such as a charge that expires. In every case in which property comprised in a settlement passes on death the life estate or other limited interest of the preceding owner must have ceased for good and all." *Earl Cowley's Case* (1) was discussed and explained by Lord *Russell of Killowen* in *De Trafford* v. *Attorney-General* (2).

Explanations of the working of the Act have been given by the House of Lords in many subsequent cases. In *Attorney-General* v. *Mylne* (3) Lord *Dunedin* said: "By ss. 1 and 2 a tax is imposed whenever, to use untechnical language, a death occurs and somebody in consequence gets property which he did not have before; and this tax is imposed upon the property according to *its* value, irrespective of the question of the kind of interest which the new taker gets and of his or her relation to the deceased person." In *Nevill* v. *Inland Revenue Commissioners* (4) Viscount *Haldane* L.C., referring to the general scheme of the Act, said: "That scheme is that a new duty, called estate duty, is to be levied on the principal value of the property, settled or not settled, which 'passes' on death. 'Passes' may be taken as meaning 'changes hands.' The principle is contained in s. 1. Section 2 combines definitions of such property with the extension of the application of the principle laid down in s. 1 to certain cases which are not in reality cases of changing hands on death at all, but are to such an extent in an analogous position that it had been deemed proper in these instances to impose a similar tax. These cases are technically altogether outside s. 1. That section is concerned with all property changing hands, whether under the provisions of an instrument settling by conferring successive rights to the same property, or by virtue of the general law prescribing the succession to property. It is a change of hands into which the property comes that is the occasion of the tax, whether the property is settled or not."

In *Sir S. E. Scott, Bt., and Coutts & Co.* v. *Inland Revenue Commissioners* (5) Lord *Russell of Killowen* said: "The question to be answered was had that fund passed on the death of the settlor. To answer that question a comparison must be made between the persons beneficially interested in that fund the moment before the death, and the persons so interested the moment after the death." The decisions of the House of Lords and the Court of Appeal are all collected in the judgment of the latter Court in *In re Hodson's Settlement*; *Brookes* v. *Attorney-General* (6). In that case the

(1) (1899) A.C. 198.
(2) (1935) A.C. 280, at pp. 289, 290.
(3) (1914) A.C. 765, at p. 776.
(4) (1924) A.C. 385, at p. 389.
(5) (1937) A.C. 174, at p. 183.
(6) (1939) 1 Ch. 343.

H. C. OF A. 1944.

TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

Court said: "Attention must be focussed upon a comparison between the persons beneficially interested in the fund the moment before the relevant death and the persons so interested the moment after the death, and upon the question whether the death effected an alteration in rights as distinguished from merely removing the possibility of an alteration" (1).

A simple form of passing under s. 1 is where the property is settled on trust for a life tenant and remainderman. On the death of the life tenant the property passes to the remainderman, and therefore changes hands, and duty is payable on the whole value of the property. A simple case of the application of s. 2 (1) (b) is where there is an annuity charged on property. On the death of the annuitant nothing changes hands, but the value of the property to its beneficial owner is increased because it is freed from the charge of the annuity, so that the property is deemed to pass from the annuitant to the beneficial owner to the extent to which the beneficial ownership is increased by the cesser of the annuity (*Skinner* v. *Attorney-General* (2)). Other examples of the application of s. 2 (1) (b) will be found in *Green* on *Death Duties*, (1936), pp. 50-55. On the other hand, in the case of property like a pension, there is simply a cesser on the death of the pensioner, and nothing can pass or be deemed to pass, because no benefit accrues to anyone by the death (per *Rigby* L.J. in *In re Earl Cowley's Estate* in the Court of Appeal (3)).

In the present case, on the death of J. B. Milne, there was an alteration in the persons beneficially entitled to the goodwill of the partnership. The goodwill of the partnership was not an asset which, like a charge or a pension, ceased on his death. It was an asset which, like all the other assets of the partnership, continued to exist after that date, but, whereas before his death nine persons were interested in the asset, after his death only eight of these nine persons were still entitled. It is difficult to see, therefore, why there was not a passing within the definitions which I have cited. But it would only be a passing of the interest that the deceased had in the goodwill and not a passing of the entire goodwill (*Christie* v. *The Lord Advocate* (4)).

In *Attorney-General* v. *Boden* (5) a father and his two sons carried on business under a deed of partnership which provided, clause 17, that if Henry Boden the father should die or otherwise cease to be a partner his share should accrue to his two sons in equal shares,

(1) (1939) 1 Ch., at p. 367.
(2) (1940) A.C. 350.
(3) (1898) 1 Q.B. 355, at p. 376.
(4) (1936) A.C. 569.
(5) (1912) 1 K.B. 539.

subject only to their paying out to his representative the value of his share and interest at his death as ascertained by a special general account to be made as on the day of his death with all proper valuations, but without any valuation of or allowance for goodwill, which goodwill should accrue to the two sons in equal shares. *Hamilton* J. (as Lord *Sumner* then was) held that the share and interest of the father in the goodwill of the business was a benefit which accrued or arose to the sons by the cesser of an interest which the father had in property which ceased on his death within the meaning of s. 2, sub-s. 1 (b), of the Act. He said: "As to s. 2, sub-s. 1 (b), Henry Boden died entitled to the ordinary interest of a partner in the partnership assets, including the goodwill, if any. He had no separate interest in the goodwill as distinguished from the other assets. He shared in the assets in common with his partners. It is true that for the purposes of liquidating his share of surplus after satisfying liabilities the assets must be regarded as realized at his death, but that is not to say in any true sense that the property of the partnership with the goodwill, if any, passed on his death. In my opinion this case does not fall within s. 1 of the *Finance Act*, 1894, but does fall within s. 2, sub-s. 1 (b). This goodwill, if any, was property in which the deceased had an interest ceasing on the death of the deceased; and such property to the extent to which a benefit accrues or arises by the cesser of such interest is to be deemed to be that which in fact it is not, namely, property passing on the death of the deceased" (1).

I understand these remarks by His Lordship to refer to: (1) the general position that arises under the law of partnership upon the death of a partner, and (2) the particular effect of clause 17 of the deed. The general position is, of course, that upon the death of a partner the partnership is dissolved, the legal estate in the partnership assets survives to the surviving partners, and the right of the personal representatives of the deceased partner, unless the surviving partners purchase his share, is to have the partnership wound up and the assets sold by the surviving partners, and his share in the proceeds of sale, subject to the payment of the partnership debts and the expenses of winding up, ascertained and paid. It would appear that his Lordship considered that the interest of the father in the partnership assets did not pass in any true sense because no beneficial proprietary interest in these assets changed hands on his death. But the two authorities cited by my brother

(1) (1912) 1 K.B., at pp. 555, 556.

H. C. OF A. 1944. TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION. Williams J.

Rich, namely, *Manley* v. *Sartori* (1) and *In re Fuller's Contract* (2) (to which I will add *Vyse* v. *Foster* (3), *Ashworth* v. *Munn* (4) and *Hugh Stevenson & Sons* v. *Aktiengesellschaft für Cartonnagen-Industrie* (5)), show that the rights of a deceased partner or his legal personal representatives are rights in and over all the assets of the partnership. So that, with great respect to his Lordship, the view that nothing passes under s. 1 of the *Finance Act* on the death of a partner may be open to doubt.

But it is unnecessary to pursue this question further, because the *Estate Duty Assessment Act* is quite different in its structure and operation to that of the *Finance Act*. It is, however, important to note that his Lordship did not place the goodwill in any different position from the other assets of the partnership with respect to passing because the partnership agreement provided that the father's interest should, in effect, cease on his death, but considered that the father had at the date of his death the ordinary interest of a partner in the goodwill and that by the partnership agreement he had disposed of this interest in favour of his sons.

The English decisions make it clear that the word " pass," when used in Acts imposing death duties, is not a technical word like " devise," " grant," " estate in fee " and the like, but an ordinary English word of a comprehensive nature, the true meaning of which must be ascertained by its ordinary and natural grammatical construction in the context of the Act in which it occurs (*Attorney-General* v. *Wendt* (6) ; *Attorney-General* v. *Beech* (7)).

The scheme of the *Estate Duty Assessment Act* is to impose a tax on the beneficial interest in all property owned by a person to which his personal representatives acquire a title on his death, and on certain other property deemed to be part of his estate for the purposes of duty which he has disposed of during his lifetime by dispositions which are regarded as substitutes for wills (*Jackson* v. *Federal Commissioner of Taxation* (8)). The word " pass " only occurs in the Act in two places, each referable to property made notionally part of the estate of a deceased person for the purposes of duty. One place is in s. 8 (4) (*a*) and the other in s. 8 (4) (*e*). Section 8 imposes duty on the value of the estate at the date of death. The assets comprised in the notional estate, like the assets comprised in the actual estate, must, therefore, be valued at that

(1) (1927) 1 Ch. 157.
(2) (1933) 1 Ch. 652.
(3) (1874) L.R. 7 H.L. 318, at p. 329.
(4) (1880) 15 Ch. D. 363, at pp. 369, 370, 374.
(5) (1918) A.C. 239, at pp. 245, 250, 253.
(6) (1895) 73 L.T. 255, at p. 256.
(7) (1898) 79 L.T. 565, at p. 566.
(8) (1920) 27 C.L.R. 503, at pp. 508, 509.

date. In the case of s. 8 (4) (*e*), what has to pass or accrue is the beneficial interest in property which the deceased person had at the date of his death. It must, therefore, be a beneficial interest in property which, but for the settlement or agreement, would be part of his actual estate, and to which, but for the settlement or agreement, his personal representatives would become entitled on his death. It is in that sense that the words " pass " and " accrue " are used in s. 8 (4) (*e*).

If a partner agrees that upon his death he shall cease to have a share in any partnership asset (and goodwill is one of the assets : *In re David & Matthews* (1) ; *Lindley* on *Partnership*, 9th ed. (1924), pp. 539-541), the effect of the agreement is that upon a realization, the proceeds of sale of that asset (subject to any questions that may arise as to whether it should bear any proportion of the partnership liabilities) will belong to the surviving partners. The effect of the clause is to transfer to the surviving partners without payment an interest which the deceased partner had in an asset of the partnership, so that there is no distinction in substance between the operation of clause 26 and that of a clause which provides that upon the death of a partner during the partnership his interest as a partner in the goodwill shall pass or accrue without payment to the surviving partners. In either case the surviving partners will succeed to the share of the goodwill that had previously belonged to the deceased partner. It is a passing analogous to those in *Crossman* v. *The Queen* (2) ; *Attorney-General* v. *Wendt* (3), and *Brown* v. *Attorney-General* (4). In the present case the deceased had a beneficial interest in the goodwill at the time of his decease, and that beneficial interest, by virtue of the partnership agreement, passed or accrued (perhaps accrued is the better word), or, to borrow the word used by Lord *Tomlin* in *Attorney-General* v. *Lloyds Bank Ltd.* (5), " shifted " at his decease to the surviving partners, so that " here, as is seen, Act fits fact like hand and glove " (*Thomson* v. *Commissioner of Stamp Duties* (6)).

Mr. *Menzies* also contended that s. 8 (4) (*e*) only applies to cases where the beneficial interest passes or accrues on the death by virtue of an agreement made by the deceased (the partnership agreement in the present case) ; and that the passing or accruer only took place upon the exercise of the option by the surviving partners after the date of the death of the deceased. As I have said, I am of opinion that the passing or accruer took place under

(1) (1899) 1 Ch. 378, at p. 382.
(2) (1886) 18 Q.B.D. 256.
(3) (1895) 73 L.T. 255.
(4) (1898) 79 L.T. 573.
(5) (1935) A.C. 382, at p. 396.
(6) (1929) A.C. 450, at p. 455.

H. C. OF A. 1944.

TRUSTEES EXECUTORS AND AGENCY CO. LTD. v. FEDERAL COMMISSIONER OF TAXATION.

Williams J.

the partnership agreement upon the happening of the specified event whether the option was exercised or not. But, even assuming that the surviving partners only became entitled to the beneficial interest of the deceased in the goodwill without payment if they exercised the option, an option to purchase property creates an equitable interest in the property (*Oppenheimer* v. *Minister of Transport* (1); *In re Armstrong*; *Gresham* v. *Armstrong* (2); *Commissioner of Taxes (Q.)* v. *Camphin* (3)). The option gave the surviving partners a right to purchase the share of the deceased in the partnership without taking into account the value of the goodwill, so that, in respect of the goodwill, the right which accrued on J. B. Milne's death was a valuable beneficial interest in property (*In re Busby*; *Busby* v. *Busby* (4); *Skelton* v. *Younghouse* (5)).

For these reasons I am of opinion that question 3 should be answered in the affirmative and that it is unnecessary to answer the other questions.

Questions in case answered as follows:—(1) *No.* (2) *No.* (3) *Yes. Case remitted to Starke J. Costs of case to be costs in the appeal.*

Solicitors for the appellant, *Norton, Smith & Co.*, Sydney, by *Blake & Riggall.*

Solicitor for the respondent, *H. F. E. Whitlam*, Crown Solicitor for the Commonwealth.

E. F. H.

(1) (1942) 1 K.B. 242.
(2) (1943) 169 L.T. 268.
(3) (1937) 57 C.L.R. 127.
(4) (1930) 30 S.R. 399, at p. 402.
(5) (1942) A.C. 571, at pp. 580, 582.