[HIGH COURT OF AUSTRALIA.]

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED } APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION. RESPONDENT.

(THOMAS' CASE.)

High Court—Practice—Reconsidering prior decision.

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, no allowance being made for goodwill—Estate Duty Assessment Act 1914-1942 (*No.* 22 *of* 1914—*No.* 18 *of* 1942), *s.* 8 (3) (*b*), (4) (*d*), (*e*).

H. C. OF A. 1949.

MELBOURNE, *March* 8.

Williams J.

May 18.

Latham C.J., Rich, Dixon, McTiernan and Webb JJ.

The High 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 exceptions to the rule of *stare decisis* should be allowed only with great caution and in clear cases.

T. died while he was carrying on a business in partnership pursuant to an agreement which gave to certain of the partners who survived him options, in proportions specified, to purchase his share in the capital of the partnership. The agreement provided that in computing the amount of the purchase money payable on the exercise of these options no sum should be added or taken into account for goodwill. The partners who had the right to do so exercised their options, and in the calculation of the amounts payable no allowance was made for goodwill.

Held that, within the meaning of s. 8 (4) (*e*) of the *Estate Duty Assessment Act* 1914-1942, T. 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.

Trustees Executors and Agency Co. Ltd. v. *Federal Commissioner of Taxation* (*Milne's Case*), (1944) 69 C.L.R. 270, followed.

Decision of *Williams* J. affirmed.

APPEAL under the *Estate Duty Assessment Act.*

This was an appeal from an assessment to Federal estate duty. The facts appear in the judgment hereunder of *Williams* J., by whom the appeal was heard.

Tait K.C. and *Voumard*, for the appellant.

H. C. OF A. 1949.

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LTD. v. FEDERAL COMMISSIONER OF TAXATION (THOMAS' CASE).

T. W. Smith K.C. and *Winneke*, for the respondent.

WILLIAMS J. delivered the following judgment:—

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

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

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

In the events that have happened these options were firstly to Louisa Jones and Lorna Hannan, an option to purchase six and one quarter per cent of the interest of the deceased in the capital of the partnership, and secondly, to the other four partners, except Lamond, the option to purchase the residue of the interest of the deceased in this capital in proportion to their respective interests in the capital of the partnership.

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

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

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

It seems to me necessarily to follow from *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (*Milne's Case*) (1) that this contention must succeed.

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

From this decision the appellant appealed to the Full Court of the High Court.

Tait K.C. (with him *Voumard*), for the appellant. The appellant's intention, if unsuccessful in this appeal, is to take the matter to the Privy Council, but it was thought advisable to come to this Court rather than to go direct to the Privy Council from the decision of *Williams* J. That, however, does not mean that the appellant is here merely by way of taking a formal step on the way, so to speak, to the Privy Council. The difficulty in the appellant's way is that it must ask this Court to reconsider the decision of the majority in *Milne's Case* (1). It is not suggested that any new argument can be presented, if the matter is reconsidered. All that can be suggested is that that case was decided by a majority of three to two, and that the decision in *Attorney-General* v. *Boden* (2) was wrongly rejected by the majority; and, accordingly, that the matter should be reconsidered. It is recognized that constitutional cases stand on a distinct footing from the point of view of reconsideration. The following may be referred to as cases in which the question of reconsidering prior decisions has been dealt with: *Australian Agricultural Co.* v. *Federated Engine-drivers' and Firemen's Association of Australasia* (3); *R.* v. *Commonwealth Court of Conciliation and Arbitration*; *Ex parte Brisbane Tramways Co. Ltd. and Municipal Tramways Trust, Adelaide* (4); *Sexton* v. *Horton* (5); *Cain* v. *Malone* (6).

T. W. Smith K.C. and *Winneke*, for the respondent, were not called on.

The judgment of THE COURT was delivered by LATHAM C.J. as follows:—

It is conceded that this appeal must fail unless the Court is prepared to reconsider and to overrule the decision in *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (*Milne's Case*) (1). 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

(1) (1944) 69 C.L.R. 270.
(2) (1912) 1 K.B. 539.
(3) (1913) 17 C.L.R. 261.
(4) (1914) 18 C.L.R. 54.
(5) (1926) 38 C.L.R. 240.
(6) (1942) 66 C.L.R. 10.

H. C. OF A. 1949.

PERPETUAL EXECUTORS AND TRUSTEES ASSOCIATION OF AUSTRALIA LTD. v. FEDERAL COMMISSIONER OF TAXATION (THOMAS' CASE).

Latham C.J. Rich J. Dixon J. McTiernan J. Webb J.

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* (1), 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* (2), which has been referred to by Mr. *Tait*, said: "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 *Milne's Case* (3). 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 *Milne's Case* (3), the appeal must fail.

The appeal should, therefore, be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Corr & Corr.*

Solicitor for the respondent: *K. C. Waugh*, Acting Crown Solicitor for the Commonwealth.

E. F. H.

(1) (1942) 66 C.L.R. 10.
(2) (1914) 18 C.L.R. 54, at p. 69.
(3) (1944) 69 C.L.R. 270.