[HIGH COURT OF AUSTRALIA.]

THE COMMISSIONER OF STAMP DUTIES (N.S.W.) . . . . . } APPELLANT;

AND

PEARSE AND OTHERS . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

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SYDNEY, *April* 19, 20, 23; *July* 27.

Dixon, McTiernan, Williams, Webb and Fullagar JJ.

Stamp Duties—Assets—Valuation—Shares in company—Probate duty—Going concern—Basis of assessment—Commissioner's discretion—Appeal—Stated case—Court—Powers of review—Solicitor-trustee—Authorized by will to charge profit costs—Liability to duty—Stamp Duties Act 1920-1949 (*N.S.W.*) (*No.* 47 *of* 1920—*No.* 37 *of* 1949), *ss.* 102, 124, 127 (1) (*c*).

Section 127 (1) (c) of the *Stamp Duties Act* 1920-1949 (N.S.W.) provides:—"Notwithstanding anything contained in the foregoing provisions of this subsection the Commissioner may in his discretion adopt as the value of a share of any class in any company the shares of which of that class are not listed on a stock exchange such sum as in the opinion of the Commissioner the holder of that share would have received in respect of that share in the event of the company being voluntarily wound up on the date upon which the value of the share is to be ascertained for the purposes of this Act." Section 124, so far as material, provides that an administrator liable to the payment of death duty, who is dissatisfied with the assessment of the commissioner may require him to state a case for the opinion of the Supreme Court. "On the hearing of the case the court shall determine the question submitted, and shall assess the duty chargeable . . ." (sub-s. (4)).

In a case stated under s. 124 where the issue involved is the value of shares forming part of a deceased estate and where the commissioner has exercised the discretion conferred upon him by s. 127 (1) (c) the Supreme Court is empowered to determine the correct mode of valuation to be adopted.

Commissioner of Stamp Duties (*Q.*) v. *Beak*, (1931) 46 C.L.R. 585, applied.

So *held* by the whole Court.

A will expressly empowered a solicitor, who was a trustee of the will, to charge profit costs for professional work performed by him.

Held, by *McTiernan*, *Williams* and *Webb* JJ. (*Dixon* and *Fullagar* JJ. dissenting), that any moneys that thereby became payable to the solicitor constituted a beneficial gift to him of the same nature as the other beneficial dispositions of the will.

Decision of the Supreme Court of New South Wales (Full Court): *Pearse* v. *Commissioner of Stamp Duties*, (1950) 51 S.R. (N.S.W.) 52; 68 W.N. 45, affirmed.

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APPEAL from the Supreme Court of New South Wales.

At the request of the executrix and executors of the will of Henry Bowen Aylmer Pearse, deceased, the Commissioner of Stamp Duties, pursuant to s. 124 of the *Stamp Duties Act* 1920 (N.S.W.), as amended, stated a case for the opinion of the Supreme Court of New South Wales with respect to an assessment by the Commissioner of probate duty under s. 127 (1) (c) of that Act relating to certain shares in a proprietary company, which shares formed part of the testator's estate.

The case stated was substantially as follows:—

1. Henry Bowen Aylmer Pearse (sometimes known as Henry Aylmer Bowen Pearse) late of Plashett, Jerry's Plains, in the State of New South Wales, company director (hereinafter called the testator), died on 19th February 1946 leaving a will dated 17th February 1946, whereby he appointed Hazel May Pearse, Thomas Archdall Langley and Perpetual Trustee Co. (Ltd.) executrix, executors and trustees thereof (hereinafter referred to as the executors).

2. On 30th May 1946 probate of that will was granted by the Supreme Court of New South Wales in its Probate Jurisdiction to those executors.

3. The estate of the testator comprised, *inter alia*, 800 "A" cumulative preference shares each fully paid to £8 and 2,986 "B" ordinary shares each fully paid to £8 in Plashett Pastoral Co. Pty. Ltd. (hereinafter called the company).

4. The company was incorporated in 1913 under the *Companies Act* 1899 (N.S.W.), under the name Plashett Pastoral Co. Ltd., being formed principally to acquire the station property known as Plashett, then owned by the testator's father, one William Pearse, and to carry on in all its branches the business of a pastoralist, station owner, grazier, farmer, land owner, agriculturist, or any branch or department of such business. The company became a proprietary company on 21st June 1937.

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5. The capital of the company is £72,000, divided into 9,000 shares of £8 each, and shortly after incorporation shares were issued as follows:—On 2nd September 1913:—William Pearse, Kathleen Isabella Pearse, Isabella Jane Crane, Elizabeth Archdall Pearse, Harley Usill Mackenzie, Joseph William Pearse, and Henry Aylmer Bowen Pearse—one ordinary "B" share each; and on 13th December 1913:—William Pearse, 1,200 ordinary "B" shares; Kathleen Isabella Pearse, 800 preference "A" shares; and Joseph William Pearse, Isabella Jane Crane, Elizabeth Archdall Pearse, Sarah Aphra Kathleen Mackenzie, M. Nash and Henry Aylmer Bowen Pearse—1,000 ordinary "B" shares each.

6. The company duly acquired the station property and had ever since run the same as a pastoral business.

7. At the date of the testator's death 8,007 of the company's shares had been issued and no more, namely:—800 "A" cumulative preference shares and 7,207 "B" ordinary shares and were held as follows:—

Pref.	*Ord.*		
800	2,986	H. B. A. Pearse	Brothers and sisters.
	301	J. W. Pearse	
	1,000	Mrs. M. M. Nash	
	1,000	Mrs. I. J. Crane	
	1,000	Mrs. S. A. K. Mackenzie	Husband of S. A. K. Mackenzie.
	1	A. E. Mackenzie	
	111	Mrs. J. A. L. Restall	Daughters of A. E. and S. A. K. Mackenzie.
	111	Mrs. N. A. Birch	
	111	Mrs. B. A. Bayldon	
	114	F. L. Crane	Sons of Mrs. I. J. Crane.
	111	M. L. Crane	
	111	W. L. Crane	
	83	Mrs. H. M. Alexander	Children of Mrs. M. M. Nash.
	83	Reverend L. L. Nash	
	83	Reverend C. J. Nash	
	1	T. A. Langley	

8. William Pearse died on 11th May 1927.

9. At the date of the testator's death the directors of the company were the testator, Frank Leslie Crane, who was appointed by the company in general meeting on 25th August 1927, and Allan Ewer Mackenzie, who was appointed by the company in general meeting on 28th August, 1929.

10. The articles of association provide, *inter alia*, as follows:—

"9. The first issue of shares after providing for the subscribers'

original seven shares shall comprise 800 ' A ' shares and 7,200 ' B ' shares. The ' A ' shares shall be issued as fully paid up and shall entitle the holders thereof for the time being to a preferential cumulative dividend at the rate of and limited to six pounds per centum per annum and in the event of the Company being wound up to a preferential right to be paid in full the nominal paid up value of such ' A ' shares out of the surplus assets of the Company. The ' B ' shares shall also be issued as fully paid up but the holders thereof shall not be entitled to any dividend thereon until a dividend at the rate of six pounds per centum per annum has been paid on the ' A ' shares ".

" 10. The profits or dividends declared by the Company shall be calculated and payable as to the ' A ' and ' B ' shares on their nominal paid up value but as to all other shares only in proportion to so much capital including premiums if any received by the Company as shall for the time being be actually paid up thereon or received in respect thereof by the Company."

" 24. The Directors may refuse to register any transfer of any shares whenever :

(a) It is not proved to their satisfaction that the proposed transferee is a responsible person or

(b) They are of opinion that it is not desirable that the proposed transferee should be admitted as a member or

(c) Upon any other ground which to them shall seem sufficient and they shall not be obliged to assign any reason for their refusal but sub-clauses (a) and (b) of this clause shall not apply where the proposed transferee is already a member nor to a transfer made pursuant to Clause 38 hereof."

" 31. A share may be transferred by a member or other person entitled to transfer to any member selected by the transferror, but save as aforesaid and save as provided by Clause 38 hereof no share shall be transferred to any person who is not a member so long as any member (or any person selected by the Directors as one whom it is desirable in the interests of the Company to admit to membership) is willing to purchase the same at the fair value thereof."

" 32. Except where the transfer is made pursuant to Clauses 31 or 38 hereof the person proposing to transfer any shares shall give notice in writing (hereinafter called the transfer notice) to the Company that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value, and shall constitute the Company his agent for the sale of the share to any member of

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the Company or person/s elected as aforesaid at the price so fixed, or at the option of the purchaser at the fair value to be fixed by the auditor or auditors in accordance with these Articles. The Transfer notice may include several shares and in such case shall operate as if it were a separate notice in respect of each, and shall be accompanied by the Certificates for such shares. The Transfer notice shall not be recoverable except with the sanction of the Directors."

"33. If the Company shall within the space of three months after being served with such notice find a member or person selected as aforesaid willing to purchase the share (both hereinafter referred to as the purchasing member) and shall give notice thereof to the proposing transferror, he shall be bound, upon the payment of the fair value to transfer the share to the purchasing member."

"34. In case any difference arises between the proposing transferror and the purchasing member as to the fair value of a share, the auditor shall, upon the application of either party certify in writing the sum which, in his opinion, is the fair value, and such sum shall be deemed to be the fair value, and in so certifying the auditor shall be considered to be acting as an expert and not as an arbitrator, and accordingly the 'Arbitration Act, 1902' shall not apply. The costs of such valuation shall be paid by the proposing transferror or the purchasing member or partly by each as the auditor shall in his discretion think proper."

"35. If in any case the proposing transferror, after having become bound as aforesaid, makes default in transferring the share, the Company may receive the purchase money; and shall thereupon cause the name of the purchasing member to be entered in the register as the holder of the share, and shall hold the purchase money without interest in trust for the proposing transferror. The receipt by the Company for the purchase money shall be a good discharge to the purchasing member, and after his name has been entered in the register in purported exercise of the aforesaid power, the validity of the proceeding shall not be questioned by any person."

"36. If the Company shall not within the space of three months after being served with the transfer notice find a member or person selected as aforesaid willing to purchase all or any of the shares, and give notice in manner aforesaid the proposing transferror shall at any time within three months afterwards be at liberty subject to Clause 24 hereof to sell and transfer the shares or those not placed to any person at any price."

"37. The Directors may make and from time to time vary rules as to the mode in which any share specified in any transfer notice served upon the Company pursuant to Clause 32 hereof shall be offered to the members or persons selected as aforesaid and as to their or his rights in regard to the purchase thereof, and in particular may give any member or class of members a preferential right to purchase the same. Until otherwise determined every such share shall be offered to the members in such order as shall be determined by lots drawn in regard thereto and the lots shall be drawn in such manner as the Directors think fit."

"38. Any share may be transferred by any member to any other member or to any son, daughter, grandson, granddaughter or other issue, father, mother, brother, sister, nephew, niece, wife or husband of any member or deceased member or to any executor, administrator or trustee for the time being of the will of any deceased member. Clauses 31 to 37 both inclusive of these Articles shall not apply to any transfer authorised by this Clause."

"64. The Directors may, whenever they think fit, and they shall, upon the requisition in writing of at least three members holding in the aggregate not less than one-fifth of the issued capital of the Company upon which all calls or other sums then due (if any) have been paid forthwith proceed to convene an extraordinary general meeting."

"67. If at any such meeting a resolution requiring confirmation at another meeting is passed the Directors shall forthwith convene a further extraordinary general meeting for the purpose of considering the resolution, and if thought fit of confirming it as a special resolution; and if the Directors do not convene the meeting within seven days from the date of the passing of the first resolution, the requisitionists or a majority of them in value may themselves convene the meeting."

"73. The quorum for a general meeting shall be two members present in person or one member present in person and one member present by proxy attorney or agent. No business shall be transacted at any general meeting unless the quorum requisite shall be present at the commencement of the business."

"93. The first Directors shall be William Pearse Henry Aylmer Bowen Pearse and Harley Usill Mackenzie. And each of them shall be entitled subject to Clause 100 hereof to retain office permanently."

"94A. The said William Pearse and after his resignation or death the said Henry Aylmer Bowen Pearse and after his resignation or death the Directors shall have power at any time and from

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time to time to appoint any other person to be a Director but so that the total number of Directors shall not at any time exceed the maximum fixed as above."

"97. Any Managing Director except the said William Pearse and after his resignation or death the said Henry Aylmer Bowen Pearse appointed by the Directors may be removed from such office by the other Directors."

"102. William Pearse shall during his lifetime be entitled to act as Managing Director and Chairman of Directors of the Company and he shall be entitled to receive a salary at the rate of £600 per annum or such larger salary as the Directors may determine."

"102A. And after the death of the said William Pearse the said Henry Aylmer Bowen Pearse shall during his lifetime be entitled to act as Managing Director and Chairman of Directors of the Company and shall be entitled to receive such salary as the Directors may determine."

"105. The said William Pearse and after his resignation or death the said Henry Aylmer Bowen Pearse whether resident in New South Wales or elsewhere may by power of attorney appoint any other member of the Board to be his attorney to sit in his place on the Board and to act as Managing Director or for such purposes and with such powers authorities and discretions as are vested in or exercisable by him hereunder or otherwise as herein provided in the case of a power of attorney given by the Board on behalf of the Company."

"124. Subject to the rights of members entitled to shares issued upon special conditions, the profits of the Company shall be divisible among the members in proportion to the amount paid up on the shares held by them respectively."

"125. The Company in general meeting may declare a dividend to be paid to the members according to their rights and interests in the profits, and may fix the time for payment."

"126. No larger dividend shall be declared than is recommended by the Directors (but the Company in general meeting may declare a smaller dividend)."

"127. No dividends shall be payable except out of the profits of the Company and no dividends shall carry interest as against the Company."

"128. The Declaration of the Directors as to the amount of the net profits of the Company shall be conclusive."

"158. If the Company shall be wound up, and the assets available for distribution among the members as such shall be insufficient

to repay the whole of the paid-up capital, such assets shall be distributed so that, as nearly as may be, the losses shall be borne by the members in proportion to the capital paid up, or which ought to have been paid up, at the commencement of the winding-up, on the shares held by them respectively. And if in a winding-up the assets available for distribution among the members shall be more than sufficient to repay the whole of the capital paid up at the commencement of the winding-up the excess shall be distributed amongst the members in proportion to the capital paid up at the commencement of the winding-up or which ought to have been paid up on the shares held by them respectively. But this clause is to be without prejudice to the rights of the holders of shares issued upon special terms and conditions."

" 159. If the Company shall be wound up, whether voluntarily or otherwise, the liquidator may, with the sanction of an extraordinary resolution, divide among the contributories, in specie or kind, any part of the assets of the Company, and may, with the like sanction, vest any part of the assets of the Company in Trustees upon such trusts for the benefit of the contributories or any of them, as the liquidators, with the like sanction, shall think fit. If thought expedient any such division may be otherwise than in accordance with the legal rights of the contributories (except where unalterably fixed by the Memorandum of Association), and in particular any class may be given preferential or special rights or may be excluded altogether or in part; but in case any division otherwise than in accordance with the legal rights of the contributories shall be determined on, any contributory who would be prejudiced thereby shall have a right to dissent and ancillary rights as if such determination were a special resolution passed pursuant to Section 261 of the *Companies Act*, 1899. In case any of the shares to be divided as aforesaid involve a liability to calls or otherwise, any person entitled under such division to any of the said shares may, within ten days after the passing of the extraordinary resolution, by notice in writing direct the liquidator to sell his proportion, and pay him the nett proceeds, and the liquidator shall, if practicable, act accordingly."

" 160. Mr. Henry Aylmer Bowen Pearse shall be the first Secretary of the Company."

By reason of a number of the articles set out above the shares in the company cannot be listed on the Stock Exchange.

11. The parties herein crave leave to refer to the memorandum and articles of association of the company as if the same were fully set forth herein.

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12. The value of the shares in the company forming part of the testator's estate were set forth in the inventory lodged by the executors as required by s. 117 of the *Stamp Duties Act* 1920-1940 and the regulations made thereunder as being £8 per share for each of the 800 "A" cumulative preference shares and £2 6s. 6d. per share for each of the 2,986 "B" ordinary shares. A valuation of shares made by a firm of chartered accountants showed that in the year ended 30th June 1941 the company made a loss of £2,253 7s. 5d., and that in the years ended 30th June 1942, 30th June 1943, 30th June 1944, and 30th June 1945, respectively, the company made a net profit of £2,304 3s. 9d., £2,761 5s. 11d., £3,638 19s. 5d. and £1,005 3s. 7d., respectively. In the year ended 30th June 1946 a net profit of £5,191 was made.

13. The executors furnished to the commissioner a copy of the balance sheets of the company as at 30th June 1945 and 30th June 1946. The executors also furnished to the commissioner a statement of the taxable income of the company and income taxes assessed thereon or estimated in respect thereof for each of the years ended 30th June, 1941, loss £2,432—ord. tax nil; 1942, taxable income £2,193—ord. tax nil; 1943, taxable income £3,676, less balance 1941, loss £239 = £3,437—ord. tax £428 14s. 0d.—private company tax £326 15s. 0d.; 1944, taxable income £5,046 ord. tax £1,510 16s. 0d.—private company tax not assessed, estimated £65; and 1945, taxable income £7,750—ord. tax £522—private company tax not assessed, estimated nil. A more detailed statement showing adjusted profits or loss as the case may be for the said years, and profit for the year 1946, prepared at the instance of the Commissioner of Stamp Duties, was annexed.

14. The only sales of ordinary shares which have taken place in recent years are as follows:—

24th October 1940	..	1 share at £3 11s. 6d.
30th December 1940	..	83 shares at £5 17s. 6d.
12th May 1947	..	296 shares at £4 17s. 11d.

to nearest penny.

15. On the basis of the facts and documents aforesaid the commissioner determined in respect of the shares in the company forming part of the testator's estate to issue an assessment in accordance with the provisions of s. 127 (1) (c) of the *Stamp Duties Act* 1920-1940 and so informed the executors on 12th October 1947.

16. In computing the final balance of the estate the Commissioner, in exercise of the powers conferred on him by s. 127 (1) (c) of that Act valued the 800 "A" cumulative preference shares

in the company at £8 per share and the 2,986 " B " ordinary shares at £7 16s. 10d. per share. The method by which such values were reached was set out in a document annexed thereto.

17. The commissioner accordingly added to the final balance of the estate as returned by the executors the sum of £16,472 15s. 4d., being the difference between £2 6s. 6d. per share and £7 16s. 10d. per share on the 2,986 " B " ordinary shares in the company held by the testator. After other adjustments, not material to be set out herein, the commissioner fixed the value of the final balance of the estate at £47,333.

18. The will of the testator provides, *inter alia*, as follows :—

" 13. I declare that the said Thomas Archdall Langley or any Trustee for the time being of this my Will being a Solicitor or other person engaged in any profession or business shall be entitled to charge retain and be paid all usual professional or other charges for business or acts done by him or his Firm in relation to the trusts hereof and also his reasonable charges in addition to disbursements for all work and business done and all time spent by him or his Firm in connection with matters arising in the premises including all acts or business which might or should have been attended to in person by a Trustee not being a Solicitor or other professional person but which such Trustee might reasonably require to be done by a Solicitor or other professional person."

19. The said Thomas Archdall Langley is a solicitor of the Supreme Court of New South Wales and is one of the partners in the firm of Fisher and Macansh with J. T. Ralston & Son. Such firm leases offices in Sydney, employs clerks, and has other expenses incidental to the conduct of a solicitor's office.

20. It has been agreed between the executors and the Commissioner for the purposes of the assessment of death duty herein that the legal costs payable by the estate for past and future legal work should be deemed to be of the value of £250.

21. The said Thomas Archdall Langley is not, in relation to the testator, one of the persons or class of persons referred to in the first or second columns of the seventh schedule to the Act.

22. On the final balance of the estate as determined by the Commissioner, namely £47,333, the Commissioner assessed duty in the amount of £7,112 9s. 0d., which amount included £50 being duty at the rate set forth in the fourth column of the seventh schedule to the Act upon the sum of £250 referred to in par. 20 hereof.

23. Notice of such assessment was issued by the Commissioner on 8th July 1948.

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24. Duty in accordance with such assessment was duly paid, but, being dissatisfied with such assessment, the executors did, on the 6th August 1948, deliver to the Commissioner notice in writing requiring him to state a case for the opinion of the Supreme Court.

The Commissioner stated the case for the opinion of the Court upon the following questions, namely :—

1. Whether, in valuing the 2,986 " B " ordinary shares in the company, the Commissioner was justified in exercising the discretion conferred upon him by s. 127 (1) (c) of the *Stamp Duties Act* 1920-1940 to value such shares upon a liquidation basis.

2. If question (1) be answered in the affirmative whether the Commissioner was justified in fixing the value of such shares at £7 16s. 10d. per share as at the date of death of the testator.

3. If question (1) be answered in the affirmative and question (2) in the negative, what was the value of such shares at the date of death of the testator.

4. If question (1) be answered in the negative whether the " B " ordinary shares in the company are of the value of £2 6s. 6d., or if not what was their value as at the date of the testator's death.

5. Whether by reason of cl. 13 of the testator's will duty at the rate set out in the fourth column of the seventh schedule to the Act should be assessed on :—

(a) The full amount of £250.
(b) Such amount less office overhead expenses.
(c) The executor-solicitor's share of such full amount.
(d) The executor-solicitor's share of the full amount less his proportion of overhead expenses, or
(e) No part thereof.

6. Whether the amount of duty chargeable on the estate was £7,112 9s. 0d., or if not what other sum.

7. How the costs of this case should be borne and paid.

The Supreme Court (*Street* C.J., *Maxwell* and *Owen* JJ.) answered the first question " No " ; and the fifth question by saying that duty should be assessed on the full amount of £250. The other questions were stood over (*Pearse* v. *Commissioner of Stamp Duties* (1)).

From that decision the commissioner, by leave, appealed, and the executrix and executors, by special leave, cross-appealed to the High Court.

G. Wallace K.C. (with him *F. J. D. Officer*), for the appellant. The argument on the appeal refers to s. 127 (1) (c) of the *Stamp*

(1) (1950) 51 S.R. (N.S.W.) 52 ; 68 W.N. (N.S.W.) 45.

Duties Act 1920 (N.S.W.), as amended. The Commissioner exercised the discretion given by that section. The Full Court of the Supreme Court has no power to substitute its own opinion for that of the Commissioner. That Court is subject to the general rules of law as to appeals from an exercise of discretion. On the facts stated this was not a proper case for the Court to interfere with the exercise of the Commissioner's discretion. *Commissioner of Stamp Duties (Q.)* v. *Beak* (1) was misinterpreted by the Supreme Court. The genesis of the matter is s. 105. "Value" means the true or real value for revenue purposes to be obtained in any reasonable manner: see s. 125. Section 124 gives an appeal, and s. 125 confers a double discretion. There are twelve instances in the Act where a discretion is conferred upon the Commissioner. That discretion is the same as has been judicially noticed in England and in this country.

[DIXON J. Section 124 indicates, on first reading, that the Supreme Court was not to inquire into the question of value. *Commissioner of Stamp Duties (Q.)* v. *Beak* (1) was not so much a question of the character of discretion as of appeal.]

In that case *Douglas* J. did not interfere with the exercise of the discretionary power.

[WILLIAMS J. Your argument really is that there is not any appeal on the question of discretion under s. 124.]

That is not so. It may be examined to ascertain if an irrelevant matter has been considered by the Commissioner. It was not the intention of the Act that the discretion conferred upon the Commissioner should be examinable except in extreme cases: see *Estate Duty Assessment Act* 1914-1947, s. 16A, and *The Succession and Probate Duties Acts* 1892 *to* 1948 (Q.) (56 Vict. No. 13—12 Geo. VI., No. 23), s. 47A, and see also the discretion conferred in ss. 101A, 102 (2) (ba), 102 (2) (l) and 103A of the *Stamp Duties Act* 1920-1949 (N.S.W.).

[WILLIAMS J. referred to *MacCormick* v. *Federal Commissioner of Taxation* (2).]

The only purpose of the discretion conferred by s. 127 (1) (c) is to arrive at the true value, and even if the Court is satisfied the method adopted by the Commissioner cannot give the true value it cannot interfere unless the case be an extreme one.

The ultimate test is: Has the opinion been formed?: see *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.* (3);

(1) (1931) 46 C.L.R. 585.
(2) (1945) 71 C.L.R. 283.
(3) (1947) A.C. 109, at pp. 119, 120, 122, 123.

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D. R. Fraser & Co. Ltd. v. *Minister of National Revenue* (1); and *Federal Commissioner of Taxation* v. *Sagar* (2). In *Commissioner of Stamp Duties (Q.)* v. *Beak* (3) the shares were valued on a winding-up basis by the Commissioner and that method was accepted by *Douglas* J., who only varied the computations. Section 34 of the *Gift Duty Assessment Act* 1941-1942 covers the same field and confers the same powers as s. 124 (*MacCormick* v. *Federal Commissioner of Taxation* (4)). If the act of discretion is irrational the Court may itself exercise the power, or send it back to be exercised according to law. There is nothing in s. 124 to impel the Court to depart from the principles of examining discretion in other cases (*Denver Chemical Manufacturing Co.* v. *Commissioner of Taxation (N.S.W.)* (5); *Election Importing Co. Pty. Ltd.* v. *Courtice* (6); *Income Tax Assessment Act* 1936-1949, s. 199; *Income Tax Management Act* 1941 (N.S.W.), s. 255).

[WILLIAMS J. An appeal to the Court was not conferred by the regulations in the last-mentioned case and the Court did not sit as an appellate Court.

[DIXON J. referred to *Metropolitan Gas Co.* v. *Federal Commissioner of Taxation* (7) and *R.* v. *Connell*; *Ex parte The Hetton Bellbird Collieries Ltd.* (8).]

On the facts it cannot reasonably be said that the Commissioner adverted to wrong or irrelevant principles. So long as there is some evidence his discretion cannot be disturbed. It was very like a partnership of brother and sister who owned all the shares in a company which owned valuable real estate. Profits had fluctuated violently during the previous five years. It is not a question of what is the market value, it is a question of the real value (*Perpetual Trustee Co. (Ltd.)* v. *Federal Commissioner of Taxation* (9)).

[FULLAGAR J. referred to *Myer* v. *Commissioner of Taxes* (10).]

As to the principles to be adopted in valuing shares see *In re Alfred Louisson* (11); and *In re Crawford (Deceased)*; *Public Trustee* v. *Commissioner of Stamp Duties* (12).

[WILLIAMS J. referred to *Evans* v. *Bartlam* (13).]

(1) (1949) A.C. 24.
(2) (1946) 71 C.L.R. 421, at pp. 427, 428.
(3) (1931) 46 C.L.R. 585.
(4) (1945) 71 C.L.R., at pp. 288, 289, 303, 307.
(5) (1949) 79 C.L.R. 296, at p. 313.
(6) (1949) 80 C.L.R. 664.
(7) (1932) 47 C.L.R. 621, at pp. 632, 633.
(8) (1944) 69 C.L.R. 407, at pp. 430-432.
(9) (1942) 65 C.L.R. 572, at p. 583.
(10) (1937) V.L.R. 106.
(11) (1924) N.Z.L.R. 338.
(12) (1942) N.Z.L.R. 170.
(13) (1937) A.C. 473.

F. G. Myers K.C. (with him *B. P. Macfarlan*), for the respondents. The fallacy in the appellants' argument is that it assumes that a discretion is in all cases governed by the same principles. The consequences which flow from the exercise of a discretion conferred by statute depend on the nature of the discretion and the provisions of the statute. The first type is a simple discretion to do an act. That is this case. If there was not any right of appeal the exercise of the discretion cannot be challenged unless it be capricious. If there is a right of appeal the extent to which the discretion can be challenged depends upon the true construction of that right. It is not then a question of reviewing the discretion but what are the functions conferred by statute on the appellate tribunal. If it is required or authorized to do something which involves the discretionary act, it decides whether it will do it, not as a review of the discretion of the person to whom it was first intrusted but as a necessary step in carrying out its own duties. That is not reviewing or considering the discretion already exercised, but an independent inquiry and an independent decision. Here, therefore, the question turns on s. 124 of the *Stamp Duties Act*. The duty imposed on the Supreme Court is to value, and that can only be carried out by first deciding the method of valuation. In deciding that, the Court is not concerned with what the commissioner has done. His assessment has no probative value and there is not any onus on either party. The Court is simply conducting a fresh inquiry of its own. It is to be observed that if that is not so there is not even an appeal in the present case on the actual value of the assets or the deductions to be made. The discretion is not a discretion to adopt a method of valuation but to make a value. Having formed an opinion of the value on a liquidation basis the commissioner has a discretion to adopt his opinion. If he does and his opinion cannot be challenged, his opinion must stand. If the Court could review the value then the value fixed by the Court would not be the commissioner's opinion of the value and he would not have any right to adopt it.

The second type of discretion is a discretion to determine whether a certain fact exists in a case where specified consequences follow from the existence or non-existence of the fact. Here the legislature may take one of two courses. It may provide that if the fact exists the consequences follow and give to a person a discretion to determine whether it exists. In this case the existence of the fact is the essential thing and an appellate tribunal may decide the question of its existence, the discretion merely being the primary method of determining it: see *Australasian Scale Co. Ltd.* v.

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Commissioner of Taxes (Q.) (1); *Nakkuda Ali* v. *Jayaratne* (2); and *Barripp* v. *Commissioner of Taxation* (3). Secondly, it may provide that if a person in his discretion determines that the fact exists the consequences follow. In this case the essential requisite is the determination of the designated person, who is made the judge of the question, and the existence of the fact cannot be inquired into. It is a question of construction whether a discretion is of one kind or the other. *Minister of National Revenue* v. *Wright's Canadian Ropes Ltd.* (4) was in the second class. The Minister had a right to disallow expenses if in his discretion he determined they were not normal. The Judicial Committee held he was the judge of what was normal. The appellate court was given jurisdiction " to hear and determine all questions that may arise in connection with any assessment ". The question regarding expenses was whether the Minister had determined they were not normal.

There is a third type of discretion, the exercise of which cannot be inquired into at all; for example, *Liversidge* v. *Anderson* (5) and *Nakkuda Ali* v. *Jayaratne* (2). There is not any express provision in the *Stamp Duties Act* authorizing the Commissioner to form an opinion of the value of property generally. Section 125 only refers to the instruments he may use. Therefore values were completely open on appeal before s. 127. The Commissioner's contention is that s. 127 (1) (c) has in effect amended s. 124 in the case of shares. But par. (c) commences " notwithstanding . . . in this sub-section " and was only introduced to avoid the mandatory nature of (a) and (b), that is, to avoid him being in all cases restricted to a profits basis. If we are wrong on the argument submitted we say the exercise here was capricious. Value on an ownership basis can only be justified when ownership of shares is equivalent to ownership of the whole or part of the assets (*Commissioner of Succession Duties* (*S.A.*) v. *Executor Trustee and Agency Co. of South Australia Ltd.* (6)). A hypothetical purchaser only buys on an assets basis if the shares give him a direct and immediate right to the assets of the company. In any other case the method of valuation is on a profit-earning basis. The assets basis is used only on rare occasions (*Federal Commissioner of Taxation* v. *Sagar* (7); *McCathie* v. *Federal Commissioner of Taxation* (8); *Abrahams* v. *Federal Commissioner of Taxation* (9); *Commissioner*

(1) (1935) 53 C.L.R. 534, at pp. 554, 555, 560, 561.
(2) (1951) A.C. 66.
(3) (1940) 41 S.R. (N.S.W.) 16, at p. 18; 58 W.N. 22.
(4) (1947) A.C. 109.
(5) (1942) A.C. 206.
(6) (1947) 74 C.L.R. 358, at pp. 361, 362.
(7) (1946) 71 C.L.R. 421, at p. 428.
(8) (1944) 69 C.L.R. 1, at p. 11.
(9) (1944) 70 C.L.R. 23, at p. 42.

of Succession Duties (S.A.) v. *Executor Trustee and Agency Co. of South Australia Ltd.* (1); *Perpetual Trustee Co. (Ltd.)* v. *Federal Commissioner of Taxation* (2)): for example, where a purchaser acquires sufficient shares to wind up the company, or where by reason of an Act of Parliament the company is to be wound up. As to the cross-appeal duty is payable only on the net value of actual and notional assets: see ss. 101D (1), 105 and the Seventh Schedule. The question therefore is whether any part of the estate passes to the solicitor under the will. Part will so pass if the costs are a true legacy, but not otherwise. If it were a legacy it would be subject to the same rules as general pecuniary legacies. It is not a legacy. The following English cases are *contra*: *In re Barber*; *Burgess* v. *Vinnicome* (3); *In re Pooley* (4), which really restricts the legacy to the right to charge; *In re Thorley* (5), where it was treated as an annuity subject to a condition and is not inconsistent with the proposition that a right to charge costs may be a gift of the right but is not a gift of the costs; *In re White*; *Pennell* v. *Franklin* (6), which is fatal to the present contention, but was wrongly decided although approved on appeal (7); *Re Salmen*; *Salmen* v. *Bernstein* (8). The foregoing cases were referred to in *Baxendale* v. *Murphy* (9) and *Jones* v. *Wright* (10), but the last-mentioned case cannot stand with *In re Thorley* (11) or *In re White* (12): see also *Law Quarterly Review*, vol. 14 (1898), pp. 125, 338. The costs are only dutiable under the *Stamp Duties Act* if they are part of the dutiable estate and pass under the will. If they are treated as a legacy they are payable out of general personalty and therefore are part of the dutiable estate. But they do not pass under the will. Passing under the will involves an actual change in title which takes place by virtue of the will and on the death of the testator the title to the whole beneficial interest in his estate became vested in the pecuniary legatee and the testator's widow and children: cf. *Adamson* v. *Attorney-General* (13). If that view be not correct then the beneficial interest in an unascertainable sum passed to an unascertainable number of solicitors and the residue, which is equally unascertainable, passed to the widow and children. As the estate is settled until the death of the widow and children it would be impossible to administer the estate on that footing. Other consequences of the right being a legacy are: (i) costs

(1) (1947) 74 C.L.R., at p. 362.
(2) (1942) 65 C.L.R. 572.
(3) (1886) 31 Ch. D. 665, at p. 670.
(4) (1888) 40 Ch. D. 1.
(5) (1891) 2 Ch. 613, at pp. 623-626.
(6) (1898) 1 Ch. 297, at p. 299.
(7) (1898) 2 Ch. 217, at p. 218.
(8) (1912) 107 L.T. 108.
(9) (1924) 2 K.B. 494.
(10) (1927) 44 T.L.R. 128.
(11) (1891) 2 Ch. 613.
(12) (1898) 1 Ch. 297; (1898) 2 Ch. 217.
(13) (1933) A.C. 257, at pp. 286, 287.

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would be payable out of a different fund according to whether the solicitor was a trustee or not; (ii) because of the possibility of abatement general pecuniary legacies could not be paid until the estate was finally wound up; and (iii) the right would be void as an infringement of the rule against perpetuities.

G. Wallace K.C., in reply.

Cur. adv. vult.

The following written judgments were delivered:—

DIXON J. For the reasons given in the judgment prepared by *Williams* J. I am of opinion that the appeal should be dismissed.

But I have come to the conclusion that the cross-appeal should be allowed.

The purpose of the cross-appeal is to obtain a decision from this Court on a question which, though it must often arise in the assessment of duty, can never involve a large amount of duty. It depends upon the operation of a provision in a will authorizing the payment to an executor or a trustee who is a solicitor of profit costs for professional work which he may do for the estate.

The Seventh Schedule of the *Stamp Duties Act* 1920-1949 contains four columns each specifying a different rate of duty. The first column imposes a rate of duty on so much of the estate as consists of property which passes under the will or devolves upon the intestacy of the deceased to the widow or lineal issue of the deceased. The second and third columns impose higher rates of duty on property passing to or devolving upon other objects. The fourth column imposes a still higher rate of duty on so much of the estate as consists of property not otherwise provided for in the previous columns. Unless a provision of the kind stated contained in the will brings any part of the estate under the higher duty the provisions of the will are such that the final balance of the estate would all pass to the widow and lineal issue of the testator and so fall under the first column. The Commissioner contends, however, that a clause of such a character operates to impart to the solicitor a beneficial interest in the property and that it is necessary to estimate the value of the interest for the purposes of the assessment of duty, because to that extent the estate cannot "pass" to the beneficiaries mentioned in the first schedule and must fall under the higher duty of the fourth column of the schedule as property not otherwise provided for by the schedule. How you estimate as at the time of the testator's death the amount of costs the solicitor to the estate will earn before it is wound up does not

appear. It would seem impossible except in the simplest cases. But for some reason the Commissioner and the executors agreed in the present case " for the purposes of the assessment of Death Duty that the legal costs payable by the estate for past and future legal work should be deemed to be of the value of £250 ".

The actual clause in the will under consideration names Mr. Langley, who is one of the trustees of the will and is a solicitor and declares that he or any trustee for the time being of the will being a solicitor or other person engaged in any profession or business should be entitled to charge, retain and be paid all usual professional or other charges for business or acts done in relation to the trusts (summarizing the clause) if the work was such that the trustees might reasonably require it to be done by a solicitor or other professional person. But no attempt was made to estimate the amount which might be paid to future hypothetical trustees for hypothetical professional services. Perhaps that was thought too difficult or too absurd. But if the estimated future charges of Mr. Langley are to be treated as part of the final balance of the estate consisting of property not passing to the beneficiaries but to him, so must every other expected payment pursuant to the clause in the will be treated as not passing to the beneficiaries.

If the matter were to be considered apart from authority I should treat it as quite clear that the clause authorizing the payment of costs to Mr. Langley and to other solicitor trustees and of remuneration for their professional or business charges to any other professional or business men who might become trustees could not confer upon him or them such an interest in the estate as to make it possible to say that a part of the estate was not provided for in the earlier column of the schedule—that is to say, that there was part of the estate consisting of property which did not pass either to the widow of the testator or his lineal issue. The purpose of the clause in the will is to relieve professional and business men who become trustees of the operation of the equitable rule which would incapacitate them from receiving remuneration for professional and business services performed for the estate. Its purpose is not dispositive. It does not even provide for their remuneration for executing the duties of the office of trustee. For it is no part of the duty of a trustee to render professional services to the trust. It is not a reward for a service which, by accepting the office of trustee, he becomes bound to perform and so, according to the rule against trustees profiting from the trust, to perform gratuitously ; a solicitor, executor or trustee is entitled to employ another solicitor to do the legal work involved in

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administering the trust. If he acts as solicitor for the estate and charges for his professional services pursuant to a provision in the will authorizing him to do so, his remuneration is limited to what are proper charges for the legal work done. It may be true that as he fills both capacities he cannot as a solicitor be a creditor of himself as a trustee. But in all other respects he occupies the same situation as a creditor of the trust. In other words, his claim upon the assets of the estate is for remuneration for services and not as a beneficiary. What a clause in the trust instrument authorizing him to charge costs does is to enable him to profit by undertaking the work. It does no more than extend over a larger field of work and to cases of a sole trustee the doctrine of *Cradock* v. *Piper* (1). It may confer a benefit upon him by doing so, but it does not follow that any property passed to the solicitor on death. In my opinion clearly none did.

The difficulty about the matter arises altogether from the state of the case law concerning clauses authorizing the payment to trustees of costs, professional fees or business charges for work done in the exercise of their profession or calling. In *In re Barber*; *Burgess* v. *Vinnicome* (2), a will had been witnessed by a solicitor named Harmer who was appointed an executor. The will contained a provision declaring that Harmer should be entitled to charge and receive payment for all professional business to be done by him under the will in the same manner as he might have done had he not been an executor. *Chitty* J. held that this provision was void because Harmer had witnessed the will. His Lordship said of the clause: "It is bounty. It must be a gift to the executor out of the assets of the testatrix which enables him to take what the law does not allow" (3). This decision was followed by *Stirling* J. in *In re Pooley* (4), and his decision was upheld by the Court of Appeal. *Cotton* L.J. declined to give any opinion upon the suggestion that it would follow that legacy duty was payable and said that it might possibly be so, but as regards the solicitor trustee "we have only to consider whether this direction is not in substance a gift to him of so much of the estate as is required to pay the profit costs, and therefore void. It is urged that it is not a gift, for that he has to work for what he receives. That is true, but the clause gives him a right which he would not otherwise have to charge for work if he does do it, and that, in my opinion, is a beneficial gift within the meaning of the section" (5).

(1) (1850) 1 Mac. & G. 664 [41 E.R. 1422].
(2) (1886) 31 Ch. D. 665.
(3) (1886) 31 Ch. D., at p. 670.
(4) (1888) 40 Ch. D. 1.
(5) (1888) 40 Ch. D., at p. 4.

Lindley L.J. said: "I think that under the old law Mr. *Pooley* would have taken by force of this clause such an interest as would have made him incompetent as a witness to the execution of the will. The policy of the Act was to leave the will good and to make void the gift which would have made the witness incompetent" (1). Before 1752 it was necessary under s. 5 of the *Statute of Frauds* that a will of real estate should be in writing and attested in the presence of the testator by three or four credible witnesses. It is to this law apparently that *Lindley* L.J. refers. The courts of common law would not allow any witness as "credible" whose competence was affected by interest, with the result that a witness who took any benefit under the will was disqualified, even a creditor, if the will happened to charge debts on realty. Unless there were a sufficient number of other witnesses to a will of realty who were competent, the will failed altogether as a result of the interest of the witness. To remedy this s. 25 Geo. II, c. 6, was enacted containing a provision in terms which s. 15 of the *Wills Act* 1837 repeats, except that s. 15 includes the husband or wife of the witness and refers to the validity or the invalidity of the will as an issue upon which the witness may testify as well as due execution. The statute 25 Geo. II., c. 6, related only to wills of realty (*Brett* v. *Brett* (2)). Apparently *Lindley* L.J. considered that the kind of interest to which s. 15 applied should be construed widely in light of the strictness of the law as to competency for the purposes of s. 5 of the *Statute of Frauds*. The words of s. 15 are undoubtedly wide. They refer to a witness to the will to whom or to whose wife or husband any beneficial devise legacy estate interest gift or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby (that is, by the will) given or made. What is to be "utterly null and void" is described as "such devise legacy estate interest gift or appointment". The width of the application is not lessened by the express exception of charges of debts which under the old law sufficed to make creditors incompetent as witnesses to the will, rather the contrary, as *Chitty* J. remarked in *In re Barber* (3). But even so these decisions do seem to mean that the provision authorizing professional charges gave a beneficial interest to the trustee. But, supposing the benefit of the clause may properly be so described, that is a long distance from saying that on death part of the net balance of the estate consisted of property which

(1) (1888) 40 Ch. D., at p. 4.
(2) (1826) 3 Add. 210 [162 E.R. 456.]
(3) (1886) 31 Ch. D., at p. 670.

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did not pass to the widow and children because it was disposed of to the solicitor trustee.

Three years after *In re Pooley* (1) was decided it was used in the Court of Appeal in what appears to me to be a case of a somewhat different description, but one which turned upon liability for legacy duty, the matter referred to and reserved by *Cotton* L.J. in *In re Pooley* (1). The case is *In re Thorley*; *Thorley* v. *Massam* (2). What makes it a case of a different description is the character of the provision in the will. The will contained a trust to carry on the testator's business. The trustees were to carry on the business in conjunction with his son W. R. Thorley. The will declared that while the trustees were carrying on the business each of them should receive the annual sum of £250 out of the profits thereof and if the profits exceeded a certain standard in a year £500 in lieu of the £250. The will went on to declare that while W. R. Thorley managed the business in conjunction with the trustees he should be entitled to the said annual sum of £250 more as also to £500 in event of such increase of profit. By s. 4 of 8 & 9 Vict., c. 76, legacy duty was chargeable upon every gift by will which by virtue thereof is payable or has effect or is satisfied out of the personal or movable estate or out of any personal estate which such person had power to dispose of whether the gift is by way of annuity or in any other form: *Halsbury's Laws of England*, 2nd ed., vol. 13, p. 308. A gift by will with a condition annexed is liable to legacy duty without regard to the condition: *ibid.* In *In re Thorley* (2) the direction that the trustees and W. R. Thorley should receive £250 or £500 each while managing the business was held to amount to a gift subject to a condition; the gift was liable to legacy duty. It is to be noticed that where the value of any benefit given by any will can only be ascertained from time to time by the actual fund allotted for the purpose, the duty is to be charged upon the sums or effects applied from time to time as separate and distinct legacies: *Halsbury's Laws of England*, 2nd ed., vol. 13, p. 323. It is not necessary, therefore, to attempt to ascertain the value of the benefit as at the time of death, though if it had been necessary it would have been possible to treat the payments as annuities and compute their present value disregarding the condition, cf. *Halsbury's Laws of England*, 2nd ed., vol. 13, at p. 322. The decision was placed upon the definite ground that there was a gift of an annual sum subject to a condition and that that was a legacy for the purpose of duty. Once the direction was so interpreted none of the difficulties could arise which would

(1) (1888) 40 Ch. D. 1.

(2) (1891) 2 Ch. 613.

exist if it were sought to assess legacy duty upon the benefit conferred by a provision merely authorizing a solicitor trustee to charge profit costs for legal work done for the estate. Both *Green* on *Death Duties*, 2nd ed. (1947) and *Hanson* on *Death Duties*, 9th ed. (1946), at p. 489 say that in practice legacy duty is not claimed in respect of a provision entitling the executor to profit costs or other professional fees.

But *Lindley* L.J. did say (1) that if the trustees had been able to charge the estate of the testator for their services it would alter the question very materially and he referred to *In re Pooley* (2) as standing in the way of a decision in their favour. His Lordship, however, perceived that this observation had no application to W. R. Thorley. The decision of the whole case, therefore, went on grounds independent of the disqualification of the trustees from receiving remuneration and of the effect of the clause in removing the incapacity.

Another aspect of the operation and incidents of a clause authorizing a solicitor trustee to charge profit costs or a trustee to charge remuneration for work done in managing a business formed the subject of three English cases and an Irish case. They are *In re White*; *Pennell* v. *Franklin* (3); *Re Salmen*; *Salmen* v. *Bernstein* (4); *Re Brown*; *Wace* v. *Smith* (5); and *O'Higgins* v. *Walsh* (6). These cases deal with the question of the order in which a claim under such a clause ranks when the assets prove insufficient to pay the creditors of the testator in full and again when the assets are sufficient to pay the creditors but not to pay the legacies in full. The first of these cases, viz., *In re White* (7) related to a claim for profit costs made by a solicitor who was sole proving executor. The estate was being administered by the court and was insolvent. The will contained a clause authorizing him to charge costs notwithstanding his acceptance of the office of executor and trustee. It was decided that the creditors came first. The decision was based upon *In re Barber* (8); *In re Pooley* (2) and *In re Thorley* (9). *Lindley* M.R. said: "It is impossible to get over the authorities and the principles on which they are based" (10) and *Chitty* L.J. said: "The declaration made by the testator is bounty on his part. No one can claim

(1) (1891) 2 Ch., at p. 624.
(2) (1888) 40 Ch. D. 1.
(3) (1898) 1 Ch. 297; (1898) 2 Ch. 217.
(4) (1912) 107 L.T. 108.
(5) (1918) 62 Sol. Jo. 487; (1918) W.N. 118.
(6) (1918) 1 I.R. 126.
(7) (1898) 1 Ch. 297; (1898) 2 Ch. 217.
(8) (1886) 31 Ch. D. 665.
(9) (1891) 2 Ch. 613.
(10) (1898) 2 Ch., at p. 218.

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bounty until the creditors are satisfied" (1). In spite of these observations it will be seen that the question really was whether the costs claimed could be considered costs incurred by the executor in administering the estate and so having priority to creditors of the testator. Apart from the clause they could not have been so considered and it would be difficult on ordinary principles for a provision of the will to operate to the prejudice of creditors of the testator.

The second of these cases, *Re Salmen* (2), turned on a clause authorizing trustees to employ one of their number as a manager of the testator's business and to pay him a salary. They did so employ one of their number at a salary of £300 per annum. An administration order was made in a creditor's suit. It was expected that the estate would prove insolvent and the creditors of the testator objected to the allowance in the accounts of the trustees of the salary, that is, in priority to their debts. The creditors do not appear to have consented to the business being carried on and unless it was being carried on only for the purpose of winding up, it is difficult to see how any claim arising from carrying it on could have priority over creditors. The principles governing such a situation are explained in *Vacuum Oil Co. Pty. Ltd.* v. *Wiltshire* (3). But the decision in *Re Salmen* (2) was put upon *In re White* (4).

The third case, *Re Brown*; *Wace* v. *Smith* (5) was one in which there was enough to pay creditors in full but not legatees. It was held that costs chargeable by a solicitor-executor under a provision in the will must abate *pari passu* with legacies. The Irish case, *O'Higgins* v. *Walsh* (6), presented a similar state of fact and a like decision was given.

Still another aspect of the operation of clauses authorizing solicitor-trustees to charge profit costs was discovered in an attempt to use some of the foregoing cases to establish that the amount received was not to be taxed as part of the annual gains of a profession. In *Jones* v. *Wright* (7) *Rowlatt* J. rejected this contention, which perhaps might have been thought to follow from the view that the clause amounted to a gift. He said that it was the liberation from the rule against profiting from a trust that was the bounty and that the bequest was of remuneration as remuneration

(1) (1898) 2 Ch., at pp. 218, 219.
(2) (1912) 107 L.T. 108.
(3) (1945) 72 C.L.R. 319, at pp. 324, 335, 336.
(4) (1898) 1 Ch. 297; (1898) 2 Ch. 217.
(5) (1918) 62 Sol. Jo. 487; (1918) W.N. 118.
(6) (1918) 1 I.R. 126.
(7) (1927) 44 T.L.R. 128; 13 Tax Cas. 221.

earned and must be so treated for the purposes of the income tax: see further *Watson* v. *Blunden* (1). The view taken by *Rowlatt* J. is not, I think, consistent with an interpretation of the previous authorities which would make them mean that the clause involved a passing of property as at death.

Those authorities have never obtained universal or even very general acceptance. *Hanson* on *Death Duties*, 9th ed. (1946), at p. 488, says that if the effect of the will is merely to authorize the executor to make professional charges for services rendered to the estate by himself in the character of, for instance, a solicitor or a land agent or to receive a salary or commission for doing what he might otherwise employ an agent to do . . . this might be thought not to amount to a legacy but merely to prevent the operation of the rule of equity that an executor or trustee shall not make his office a source of profit and thus enable him to charge for services which, in the absence of such direction, he would be bound to render gratuitously. This passage is followed by a statement of the effect of *In re Barber* (2); *In re Pooley* (3); *In re White* (4) and *Re Brown* (5). Sir *Arthur Underhill* contented himself with a statement that whether these cases can be supported on principle is respectfully questioned: *Underhill's Law of Trusts and Trustees*, 6th ed. (1904), p. 326.

The decision in *In re Brown*; *Wace* v. *Smith* (5) provoked a note by Mr. *A. H. Hastie* in (1919) 35 *Law Quarterly Review* 208, attacking the authorities which bound *Eve* J. to decide that case as he did. The note contains this passage:—"But it often happens that the creator of a trust, or the maker of a will, desires that the professional man or business manager who has theretofore been employed by him for reward shall continue so to be employed by his trustees or executors, and when, by the use of apt words, he authorizes this the charges which are earned differ in no way from the charges of any other professional man—they are not a gift or a bounty or a legacy—they are earned money; all that the testator has done is to declare that a certain rule of restraint shall not apply."

The cases are, in my opinion, very unsatisfactory. Possibly *In re Barber* (2) and *In re Pooley* (3) can be justified on a very wide construction of s. 15 of the *Wills Act* 1837 attributable to the history of the law relating to witnesses of wills of realty. *In re Thorley* (6) is based on an interpretation of the will as giving a legacy on a

(1) (1933) 18 Tax Cas. 402.
(2) (1886) 31 Ch. D. 665.
(3) (1888) 40 Ch. D. 1.
(4) (1898) 1 Ch. 297; (1898) 2 Ch. 217.
(5) (1918) 62 Sol. Jo. 487; (1918) W.N. 118.
(6) (1891) 2 Ch. 613.

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condition and if that construction of the provision of the will be accepted the decision is open to no criticism, but it is then not in point. *In re White* (1), *Re Salmen* (2), *Re Brown* (3) and *O'Higgins* v. *Walsh* (4) may be supported, for the reasons I have given, as correct in principle, whether or not the clause amounts to a legacy or gift.

It would, I think, be a further extension of what was exactly decided in any of the cases discussed to hold that such a clause as that now in question involved a passing of property at death otherwise than to the beneficiaries taking under the dispositive provisions of the will. Whatever else may be said about the decisions clearly their application should not be extended. Indeed I think that it may fairly be said that if the cases discussed require as a logical consequence that such a clause should be considered as involving the passing as at death of property, then it is a *reductio ad absurdum* of the decisions.

For these reasons I think that the cross-appeal should be allowed. For the answer given in the Supreme Court to the fifth question in the case stated there should, in my opinion, be substituted the answer " on no part thereof ".

McTiernan, Williams and Webb JJ. (5). This is an appeal by leave and cross-appeal by special leave from an order of the Full Supreme Court of New South Wales made on 30th October 1950 in a case stated for the opinion of that Court under the provisions of s. 124 of the *Stamp Duties Act* 1920-1949. Apart from a question as to costs, the case stated six questions for the opinion of the court, but only two, Nos. 1 and 5, were answered, and Nos. 2, 3, 4 and 6 were ordered to stand over generally. The case was stated by the Commissioner of Stamp Duties, the appellant in this Court, upon the requisition of the present respondents who are the personal representatives of the estate of H. A. B. Pearse, who died on 19th February 1946.

One of the respondents, T. A. Langley, is a solicitor of the Supreme Court. The will of the deceased, cl. 13, declares that " the said Thomas Archdall Langley or any Trustee for the time being of this my Will being a solicitor or other person engaged in any profession or business shall be entitled to charge retain and be paid all usual professional or other charges for business or acts done by him or his Firm in relation to the trusts hereof and also

(1) (1898) 1 Ch. 247; (1898) 2 Ch. 217.
(2) (1912) 107 L.T. 108.
(3) (1918) 68 Sol. Jo. 487; (1918) W.N. 118.
(4) (1918) 1 I.R. 126.
(5) Prepared by *Williams* J.

his reasonable charges in addition to disbursements for all work and business done and all time spent by him or his Firm in connection with matters arising in the premises including all acts or business which might or should have been attended to in person by a Trustee not being a Solicitor or other professional person but which such Trustee might reasonably require to be done by a Solicitor or other professional person."

Included in the estate of the deceased are 800 " A " cumulative 5 per cent preference shares, each fully paid to £8 and 2,986 " B " ordinary shares each fully paid to £8 in Plashett Pastoral Co. Pty. Ltd. This company was incorporated in 1913 under the *Companies Act* 1899 (N.S.W.), principally to acquire a station property called Plashett, then owned by the father of the deceased. It became a proprietary company on 21st June 1937. As *Street* C.J. said, in his reasons for judgment, " The company was a family company in every sense of the term, the articles placing restrictions and limitations on the right to transfer shares and containing other provisions designed for the purpose of keeping the company in the hands of the various members of the family who were shareholders. It duly acquired the station property in 1913, and ever since has run the same as a pastoral business " (1). The nominal capital of the company is £72,000 divided into 9,000 shares of £8 each. Of this capital £64,056 had been subscribed at the date of the death of the deceased and comprised the 800 fully paid " A " cumulative preference shares already mentioned and 7,207 fully paid " B " ordinary shares. The company is thoroughly solvent. In the year ended 30th June 1942 the company made a net profit of £2,304 3s. 9d. in the year ended 30th June 1943, £2,761 5s. 11d. in the year ended 30th June 1944, £3,638 19s. 5d. in the year ended 30th June 1945, £1,006 3s. 7d., a total for these four years of £9,710 12s. 4d. In the year ended 30th June 1946 the company made a net profit of £5,191. There is no indication whatever that the shareholders have ever desired that the company should go into voluntary liquidation and no shareholder holds sufficient shares to pass a special resolution for that purpose.

The respondents submitted to the Commissioner a valuation of the shares prepared by a firm of chartered accountants in which the average annual profits of the four years ended 30th June 1945 already mentioned, less a loss of £2,253 7s. 5d. made in the year ended 30th June 1941 were capitalized at seven per cent. On this basis the accountants valued the 800 preference shares at their face value and the ordinary shares at £2 6s. 6d. The Commissioner

(1) (1950) 51 S.R. (N.S.W.), at p. 52; 68 W.N. 45.

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accepted the valuation of the preference shares, but refused to accept that of the ordinary shares. He proceeded to value the shares in accordance with s. 127 (1) (c) of the Act. On this basis he estimated the value of the ordinary shares at £7 16s. 10d. per share and added to the final balance of the estate as returned by the respondents the sum of £16,472 15s. 4d., this being the difference between £2 6s. 6d. per share and £7 16s. 10d. per share on the 2,986 " B " ordinary shares in the company held by the deceased.

By his will the deceased left the whole of his estate to his widow and lineal issue. The Seventh Schedule of the Act imposes different rates of duty on so much of the final balance of the estate as consists of property falling within the four columns therein set out. The property left to the widow and lineal issue is comprised in the first column on which the rate of duty is the lowest. The Commissioner assessed the whole of the final balance of the estate at the rate appropriate to property in this column, except the sum of £250, which he assessed at the rate of duty provided for property in the fourth column which attracts the highest rate. The sum of £250 was a pre-estimate agreed upon between the Commissioner and the respondents of the amount of legal costs payable by the estate to the firm of solicitors in which Langley is a partner for past and future legal work performed by Langley for the estate.

The respondents were dissatisfied with the assessment of the estate for duty in two respects: (1) the valuation of the " B " ordinary shares in the company, and (2) the placing of £250 in the fourth column of the Seventh Schedule. It was in respect of these matters that the questions in the case stated were asked. The questions are as follow: (1) Whether in valuing the 2,986 " B " ordinary shares in the company the Commissioner was justified in exercising the discretion conferred upon him by s. 127 (1) (c) of the *Stamp Duties Act* 1920-1940 to value such shares upon a liquidation basis. (2) If question (1) be answered in the affirmative whether the Commissioner was justified in fixing the value of such shares at £7 16s. 10d. per share as at the date of death of the testator. (3) If question (1) be answered in the affirmative and question (2) in the negative what was the value of such shares at the date of death of the testator. (4) If question (1) be answered in the negative whether the " B " ordinary shares in the company are of the value of £2 6s. 6d. or if not what was their value as at the date of the testator's death. (5) Whether by reason of cl. 13 of the testator's will duty at the rate set out in the fourth column of the Seventh Schedule to the Act should be assessed on: (a) the

full amount of £250 ; (b) such amount less office overhead expenses ; (c) the executor-solicitor's share of such full amount ; (d) the executor-solicitor's share of the full amount less his proportion of overhead expenses ; or (e) no part thereof. (6) Whether the amount of duty chargeable on the said estate was £7,112 9s. 0d., or, if not, what other sum. The Supreme Court answered the first question " No ", and the fifth question " the full amount of £250 ".

The first question is so framed as to make it appear that the Commissioner is asking the Court to decide whether it was proper for him to value the shares in accordance with par. (c) of s. 127 (1) of the Act, but it is apparent from the judgments of the Supreme Court, and the same attitude was adopted in this Court, that the real contest between the parties to which the question is directed is whether the Court has jurisdiction to substitute its own discretion for that of the Commissioner as to the mode of valuation to be adopted. It was submitted for the Commissioner here, as it was submitted below, that the Act confers on him a discretion which can only be disturbed by the Court if the Court is of opinion that he has failed to exercise his discretion properly so that it is in law not an exercise of his discretion at all. The approach of the Privy Council in *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* (1) ; *Minister of National Revenue* v. *Wrights' Canadian Ropes Ltd.* (2) ; and *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* (3) ; and of this Court in *MacCormick* v. *Federal Commissioner of Taxation* (4) ; and *Denver Chemical Manufacturing Co.* v. *Commissioner of Taxation* (*N.S.W.*) (5) was particularly relied upon. If those cases are in point they must be followed, but it appears to us, as it appeared to the Supreme Court, that they are distinguishable.

There can be no question that if the statute intends that a discretion shall be exercised by a particular person and not by the Court, the jurisdiction of the Court is confined to supervising its exercise so as to ensure that it is exercised according to law. The statute in such a case makes the particular person the sole judge of the existence or non-existence of the fact or other matter upon which the right or liability of the subject depends and the Court is not at liberty to substitute its own opinion for his. If s. 127 (1) (c) of the *Stamp Duties Act* means that the Commissioner is to be the sole judge of the appropriate method to adopt in

(1) (1940) A.C. 127.
(2) (1947) A.C. 109.
(3) (1949) A.C. 24.
(4) (1945) 71 C.L.R. 283.
(5) (1949) 79 C.L.R. 296.

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valuing shares in a company not listed on a stock exchange, then the Court, in exercizing its powers under s. 124, cannot interfere unless it can be shown that the Commissioner has acted in contravention of some principle of law. For, to be effective, the discretion must be exercised, in the words of Lord *Macmillan* delivering the judgment of the Privy Council in *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* (1), "bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally".

It was not contended for the Commissioner that the Court was bound to accept the amount of the valuation arrived at on the basis of par. (c). It was admitted that the notional sums attributed to the shares by the Commissioner upon the hypothetical winding up were fully examinable. Its hands were tied only to the extent that it could be directed by the Commissioner to adopt the mode of valuation prescribed by the paragraph. This attitude of counsel for the Commissioner seems somewhat inconsistent. The paragraph would seem to protect the opinion of the Commissioner as to the sums the shares would realize on a liquidation to the same extent as his discretion to adopt this mode of valuation. There is no half-way house. Either each and every activity of the Commissioner under the paragraph is subject to complete judicial review under s. 124, or each and every activity can only be reviewed to the same limited extent.

When the wide powers conferred upon the Court by s. 124 are considered it is apparent, we think, that it was intended to make the decision of the Commissioner to adopt the paragraph subject to complete judicial review. Section 124 contains elaborate provisions for ascertaining all the facts necessary to enable the questions submitted to be determined, and sub-s. 4 provides that on the hearing of the case the Court shall determine the question submitted and shall assess the duty chargeable and also decide the question of costs. Duty is payable upon the final balance of the estate, and s. 105 provides that the final balance of the estate of a deceased person shall be computed as being the total value of his dutiable estate after making such allowances as are thereinafter authorized in respect of the debts of the deceased. It also provides that, save as in this Act expressly provided, the value of the property included in his dutiable estate shall be estimated as at the date of the death of the deceased. If the duty is imposed upon the Court of itself assessing the duty chargeable, it seems to us necessarily to follow that the Court must itself value the property included in the dutiable estate. That does not mean of course

(1) (1949) A.C., at p. 36.

that the Court must value every item. It is only concerned with the items of value which are in dispute.

Before the introduction into the Act of s. 127 the Court clearly had this responsibility. The main purpose of introducing s. 127 (1) would appear to have been notionally to standardize the memoranda and articles of association of companies to the extent required by pars. (a) and (b).

Before par. (c) was introduced, shares of companies not listed on the stock exchange had been in rare instances valued on the basis there prescribed. The paragraph may have been added as a safeguard against a suggestion that the mandatory character of pars. (a) and (b) indicated an intention that shares should be valued as shares in a going concern, and it was no longer open to the Commissioner in a proper case to value shares not registered on a stock exchange on the basis of a hypothetical winding up. Be that as it may, it appears to us that there is no sufficient indication in the paragraph of the capricious intention that the Court should remain under the duty of deciding a dispute between the subject and the Commissioner as to the value of such shares, but should be handcuffed to the particular mode chosen by the Commissioner. The essential problem is to ascertain the real value of the shares, and the selection of the mode of valuation is simply one of the elements that enter into the calculation. The Commissioner is not required to adopt the mode prescribed by s. 127 (1) (c). His discretion as to any particular mode is as untrammelled as before. The paragraph does not mention the Court. It is not, like par. (a), stated to be for the purposes of the Act. It relates to the discretion of the Commissioner in performing his administrative duties under the Act. It has no application to the jurisdiction of the Court in performing its judicial functions under s. 124. Adapting the words of this Court in *Commissioner of Stamp Duties* (*Q.*) v. *Beak* (1), clear words would be needed to withdraw from the general power of review given by s. 124 a particular process in making up the assessment essential to the result.

It is therefore unnecessary to consider whether, if the jurisdiction of the Court was confined to inquiring whether the Commissioner had exercised his discretion properly, in view of the express authority conferred by s. 127 (1) (c) it could be said that he had failed to do so. We agree with the Supreme Court that the mode prescribed by this paragraph for valuing the ordinary shares in Plashett Pastoral Co. Pty. Ltd. is not a proper mode. The usual mode of valuing shares in a company which is a going concern has

(1) (1931) 46 C.L.R., at p. 597.

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been established by many judicial decisions, several of which are decisions of this Court. We refer in particular to the decision of the majority of the Full Court in *Commissioner of Succession Duties (S.A.)* v. *Executor Trustee and Agency Co. of South Australia Ltd.* (1). The law has been recently stated in the House of Lords to the same effect. We refer to a passage in the speech of Lord *Simon* in *Gold Coast Selection Trust Ltd.* v. *Humphrey* (2) concurred in by Lords *Thankerton*, *Uthwatt* and *Du Parcq*. To value shares in a company which is a going concern on the basis that the company is in voluntary liquidation at the date of death savours of unreality. The choice of such a mode is not calculated to produce a fair value. It is more likely to produce a false value. Scope for the use of the provision contained in s. 127 (1) (c) may be found in cases where a company's operations do not produce income which can be regarded as affording any measure of the value of the shares, as well may be the case with an assets company or a company whose earning capacity is restricted or diminishes temporarily or by accidental circumstances. Other special cases may be imagined.

The appeal should be dismissed.

The cross-appeal remains for consideration. It raises the question of the legal effect of a provision in a will that a solicitor who is a trustee may nevertheless charge profit costs. It is a maxim of equity that a trustee shall not make a profit out of his trust. But this incapacity can be modified or removed by the creator of the trust or the unanimity of the beneficiaries, provided that they are all *sui juris*. The effect of the provision would therefore appear to be to create a capacity in a trustee to make a profit which would not otherwise exist. To earn the profit the solicitor must still do the necessary work, and it is difficult to see how the fruits of his personal exertion are in any true sense derived from the bounty of the testator. But it has been so decided in several cases, including *In re Barber* (3); *In re Trotter* (4); *Re Brown* (5); *O'Higgins* v. *Walsh* (6); (decisions of single judges); *In re Pooley* (7); *In re Thorley* (8); *In re White* (9); *Re Salmen* (10) (decisions of the Court of Appeal). In *In re Barber* (3) and *In re Pooley* (7) it was held that a solicitor who witnessed a will containing such a clause lost its benefit under s. 15 of the *Wills Act* 1837 (s. 13 of the *Wills, Probate and Administration Act* 1898-1947 (N.S.W.)). In

(1) (1947) 74 C.L.R. 358.
(2) (1948) A.C. 459, at pp. 472, 473.
(3) (1886) 31 Ch. D. 665.
(4) (1899) 1 Ch. 764.
(5) (1918) 62 Sol. Jo. 487; (1918) W.N. 118.
(6) (1918) 1 I.R. 126.
(7) (1888) 40 Ch. D. 1.
(8) (1891) 2 Ch. 613.
(9) (1898) 2 Ch. 217.
(10) (1912) 107 L.T. 108.

In re Barber (1), *Chitty* J. said :—" It is clear, the matter standing in the position I have stated, that the executor could not have charged for his personal services. But, says the executor, there is a clause in the will which enables me to do it. What is that ? It is bounty. It must be a gift to the executor out of the assets of the testatrix which enables him to take that which the law does not allow. I cannot conceive that the case can be put on any other footing " (2). In *In re Pooley* (3) *Cotton* L.J. said :—" As regards the Appellant we have only to consider whether this direction is not in substance a gift to him of so much of the estate as is required to pay the profit costs, and therefore void. It is urged that it is not a gift, for that he has to work for what he receives. That is true, but the clause gives him a right which he would not otherwise have to charge for the work if he does it, and that, in my opinion, is a beneficial gift within the meaning of the section " (4). *Lindley* L.J. said : " Apart from this clause, Mr. *Pooley* could not get anything out of the estate for his services, and I cannot say that a clause which enables him to get something out of the estate is not a gift to him within the meaning of the 15th section " (5). In *In re White* (6), in the Court below, *Kekewich* J. said that the right to charge profit costs is " the same thing as a gift, of, say, £100 : there is no difference whatever between a gift of profit charges and a gift of £100. In my opinion it is a legacy, and chargeable as such with legacy duty " (7). On appeal Lord *Lindley* said " it is impossible to get over the authorities and the principles upon which they are based " (8). In *In re Brown* (9) *Eve* J. said : " The effect of the declaration in the will enabling the solicitor to charge for professional services was a bequest to him of a legacy conditional upon his doing the work ; the amount of the legacy would be ascertained when the work had been done and the profit-costs arrived at. It was nothing more or less than a bequest to the solicitor of that sum, ultimately to be ascertained ".

These authorities and the principles on which they are based all indicate a concluded view in the English Courts, short of the House of Lords, that moneys which become payable to a trustee pursuant to such a declaration in a will are a beneficial gift to him of the same nature as the other beneficial dispositions of the will. The trustee is not a creditor but a beneficiary, so that if the estate is insolvent his gift fails and if the estate is insufficient to pay him

(1) (1886) 31 Ch. D. 665.
(2) (1886) 31 Ch. D., at p. 670.
(3) (1888) 40 Ch. D. 1.
(4) (1888) 40 Ch. D., at p. 4.
(5) (1888) 40 Ch. D., at pp. 4, 5.
(6) (1898) 1 Ch. 297.
(7) (1898) 1 Ch., at p. 299.
(8) (1898) 2 Ch., at p. 218.
(9) (1918) 62 Sol. Jo. 487 ; (1918) W.N., at p. 118.

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and the general pecuniary legacies in full the amount owing to him must abate ratably with these legacies. The benefit is equally a gift whether the amount payable to the trustee for his services is fixed by the will or subsequently ascertained by the doing of the work.

Unless we refuse to follow these cases it necessarily follows that the amount of £250 in dispute is property which falls within the fourth column of the Seventh Schedule of the *Stamp Duties Act.* Although not bound to follow decisions of the Court of Appeal, this Court in general does so in questions of law and equity common to both countries where the decisions of the Court of Appeal appear to have settled the law, so that the law in Australia may be kept in line with the law in England (*Waghorn* v. *Waghorn* (1); *Piro* v. *W. Foster & Co. Ltd.* (2)). In the present case the decisions of the Court of Appeal have stood for a long time and appear to have settled the law. They were applied to income tax appeals in *Baxendale* v. *Murphy* (3) and *Hearn* v. *Morgan* (4). The decision of *Rowlatt* J. in *Jones* v. *Wright* (5) was relied upon as throwing some doubt upon their correctness. In that case his Lordship said that all that a solicitor gets under the clauses which give him power to charge is the removal of a disability which would otherwise prevent him from entering into an ordinary contract of service with the trustees in consideration of remuneration. His Lordship went on to point out that he thought that the solicitor in that case had entered into such a contract, that the remuneration formed part of his income and must be treated as profits and earnings arising from his employment as a solicitor. He said that he did not think the cases meant that a bequest of profit costs is a bequest of a bounty which is not earned. We do not think that these remarks throw any doubt upon the correctness of the decisions in question. His Lordship was dealing with the matter from a different angle. Gifts under wills, although payable out of the capital or partly out of the capital of the estate, may be income for the purposes of income tax. In Australia profit costs earned by a solicitor, although payable out of the capital of the estate, would be income from personal exertion within the meaning of the *Income Tax Assessment Acts.* They would still be taxable to the same extent, whether the solicitor was a trustee of the will or not. But if he was a trustee and was authorized by the will to charge such costs he would, according to the cases, be the recipient of a

(1) (1942) 65 C.L.R. 289.
(2) (1943) 68 C.L.R. 313.
(3) (1924) 2 K.B. 494.
(4) (1945) 2 All E.R. 480.
(5) (1927) 44 T.L.R. 128.

bounty from the testator because, apart from the authority, he would be bound to do the work, if he chose to do it, for nothing.

It was also submitted that a direction such as the present direction applying not only to a named trustee but to any other trustee for the time being of the will would in the case of such other trustee infringe the rule against perpetuities because the bounty might not vest within a period of a life or lives in being and twenty-one years. It is premature to discuss this interesting point while Langley is acting as the solicitor to the estate. As, however, the bounty is in essence a dispensation resulting in the trustee acquiring the capacity to make a profitable contract of employment, and the rule against perpetuities does not apply to contracts, it would not appear to be sound.

Lastly it was submitted that if the amount of profit costs exceeded the original estimate from time to time the Commissioner could re-assess the estate for further duty from time to time under s. 128 of the Act. But the bounty is an interest which is capable of valuation and must, subject to s. 125A of the Act, be actuarily valued as at the date of death. Once this has been done and duty paid on that value, the duty has been fully assessed and paid and there is no room for the operation of s. 128.

The cross-appeal should also be dismissed.

FULLAGAR J. With regard to the appeal in this case, I have read the judgment of *McTiernan*, *Williams* and *Webb* JJ. and am content to say that I agree with it. The cross-appeal raises an entirely distinct question. The amount of duty involved is very small, but the question is of some general importance and may affect duty under State Acts other than that of New South Wales. It turns on the effect of certain words in the Seventh Schedule to the *Stamp Duties Act* 1920-1949 (N.S.W.), but it is necessary to refer first to the will of the testator.

The testator appoints as his executors and trustees the Perpetual Trustee Co. Ltd., his wife (Hazel May Pearse) and Thomas Archdall Langley of Sydney, solicitor. He gives a legacy of £500 to his wife, and devises and bequeaths all the residue of his estate to his trustees upon certain trusts for his widow, children and grandchildren. The trusts for the widow and children are the statutory "protective trusts", and corpus is ultimately distributable to grandchildren *per stirpes*. The will concludes with the following provision:—"I declare that the said Thomas Archdall Langley or any Trustee for the time being of this my Will being a solicitor or other person engaged in any profession or business shall be

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entitled to charge retain and be paid all usual professional or other charges for business or acts done by him or his Firm in relation to the trusts hereof and also his reasonable charges in addition to disbursements for all work and business done and all time spent by him or his Firm in connection with matters arising in the premises including all acts or business which might or should have been attended to in person by a Trustee not being a Solicitor or other professional person but which such Trustee might reasonably require to be done by a Solicitor or other professional person." It is to be observed that this clause applies not only to Mr. Langley, who is a solicitor and who joined with the other two named executors in proving the will, but to any professional person who may at any time become an executor or trustee of the will. It may apply to another solicitor or to a barrister, an accountant, a taxation consultant or a stock-broker—the will, it may be noted, authorizes investment in the shares of public companies.

Section 101D of the Act provides that, in the case of a person domiciled (as this testator was) in New South Wales, duty at the rates mentioned in the Seventh Schedule shall be assessed and paid on the "final balance" of his estate. In this case the final balance was assessed at £47,333. The Seventh Schedule is divided into four columns. The first column deals with "so much of the final balance of the estate as consists of property which passes under the will or devolves upon the intestacy of the deceased to the widow or lineal issue of the deceased", and imposes duty thereon at the rate of fifteen per cent. The contention of the executors in the present case is that the whole of the final balance of the estate falls within the first column, and that duty is payable on the whole at the rate of fifteen per cent. The second column deals with "so much of the final balance of the estate as consists of property which passes under the will or devolves upon the intestacy of the deceased to the widower, lineal ancestor, brother or sister or issue of a brother or sister of the deceased", and imposes duty at the rate of seventeen per cent. This column has, of course, no application to the present case. The third column deals with "so much of the final balance of the estate as consists of property which passes under the will of the deceased to or for the benefit of" certain classes of charitable objects, and imposes duty at the rate of thirteen and three-quarters per cent. This column also, of course, has no application to the present case. The fourth column deals with "so much of the final balance of the estate as consists of property not otherwise provided for in the first, second or third columns of this Schedule," and imposes

duty at the rate of twenty per cent. The contention of the Commissioner is that the effect of cl. 13 of the will, which I have set out above, is to bring *some part* of the final balance of Mr. Pearse's estate within the fourth column of the Seventh Schedule and subject it to duty at the rate of 20 per cent. Faced with the question "*what part*?", the Commissioner might well have felt himself completely baffled, but par. 20 of the case stated under s. 124 of the Act says :—"It has been agreed between the executors and the Commissioner for the purposes of the assessment of Death Duty herein that the legal costs payable by the estate for past and future legal work should be deemed to be of the value of £250". The Commissioner has assessed duty on £47,083 of the final balance at the rate of 15 per cent, and on £250 of the final balance at the rate of 20 per cent. The difference between his view and that of the executors is thus £12 10s. 0d. It may be noted in passing that cl. 13 of the will is not concerned merely with legal costs. It is obviously impossible to place anything remotely resembling a valuation on the professional fees of various kinds which might be earned and allowed under it.

What "passes" under the will to different objects mentioned in the Seventh Schedule has to be determined as at the death of the testator, and the value of what "passes" has also to be determined as at the death of the testator. In my opinion, the entire beneficial interest in the estate in this case passed on death to the widow and lineal issue of the testator, and the case therefore falls entirely within the first column of the Schedule. The actual amount, whether corpus or income, which actually reaches the hands of the beneficiaries, will be affected by various outgoings which will become payable in the course of the administration of the estate. There will be testamentary expenses, there will be death duties to pay, and corpus and income commission will be payable to the trustee company and perhaps to the other trustees. There may be professional charges to pay from time to time out of corpus or out of income. These too will be outgoings in the administration of the estate, and their nature will not differ whether they become payable to a professional man who is, or to a professional man who is not, a trustee of the estate. All these things are to be ignored for the purposes of assessing duty under the statute, which simply takes the net estate or final balance—assets less debts owing by the testator—and asks to what persons the beneficial interest in that net estate passes under the will.

The contention of the Commissioner that something "passes" to somebody under cl. 13 of the will in this case would indeed

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seem to need only to be stated to be seen to be fallacious, if it were not for certain authorities on which he relies, and which it is necessary to consider. The actual decisions in the cases have no bearing on the construction of the New South Wales Act, but what is said in some of them has been put as giving countenance to the argument for the Commissioner.

In *In re Barber*; *Burgess* v. *Vinnicome* (1) the testatrix appointed one Harmer, who was a solicitor, to be one of her executors, and declared that "the said *H. R. Harmer* shall be entitled to charge and to receive payment for all professional business to be done by him under this my will in the same manner as he might have done had he not been an executor" (2). Harmer witnessed the will. *Chitty* J. held that the declaration of the testatrix gave to Harmer what was "in effect bounty on the part of the testatrix", that it gave him "an interest, legacy, gift or appointment" (3) within the meaning of s. 15 of the *Wills Act* 1837, and that it was accordingly avoided by that section. This decision was approved by the Court of Appeal in *In re Pooley* (4).

The next case cited was *In re Thorley* (5), in which the Court of Appeal affirmed the decision of *North* J. A testator directed his trustees to carry on a business in conjunction with his son, and declared that the trustees, while carrying on the business, should receive the annual sum of £250 out of the profits thereof, and that, while the son should be managing the business in conjunction with the trustees, he should receive the sum of £250 "more" (i.e., presumably in addition to the salary at which he was employed by the trustees). The amount was subject to increase according to the profits. It was held that each sum paid was a legacy within the meaning of the Legacy Duty Acts and liable to duty accordingly. I should have thought that this case had no bearing whatever upon the present, if only because the sums paid to the son (who was not a trustee) were held to stand on the same footing as those paid to the trustees. There was previous authority for saying that sums given upon condition or upon a consideration to be performed by the donee were legacies within the meaning of the Act. The case of *In re Pooley* (4) was, however, referred to as bearing on the case of the trustees, though not, of course, on the case of the son. There are other dispositions by will which attract legacy duty in England on payment, although they are clearly not legacies in the ordinary sense, e.g., payments by trustees

(1) (1886) 31 Ch. D. 665.
(2) (1886) 31 Ch. D., at p. 666.
(3) (1886) 31 Ch. D., at p. 670.
(4) (1888) 40 Ch. D. 1.
(5) (1891) 2 Ch. D. 613.

under a discretionary trust to apply moneys for maintenance: see *Attorney-General* v. *Wade* (1).

It has also been held in England that a solicitor-trustee who is authorized by a will to charge profit costs cannot, if the estate is insolvent, compete with creditors, and must, if the estate, though solvent, is insufficient to satisfy in full all gifts to beneficiaries, submit to an abatement of profit costs earned by him *pari passu* with beneficiaries: see *In re White*; *Pennell* v. *Franklin* (2) and *Re Brown*; *Wace* v. *Smith* (3). In *Re Salmen*; *Salmen* v. *Bernstein* (4), where the estate was expected to prove involvent, it was held that a trustee could not prove in competition with creditors for salary earned by him in managing a business and payable to him by virtue of a clause in a will.

In so far, if at all, as the cases cited are to be regarded as authority for a general proposition of law that a provision in a will authorizing a professional trustee to charge for services rendered by him in his professional capacity gives of its own force a legacy or gift or bounty to the professional trustee, they are, in my opinion, obviously unsound in principle. Sir *Arthur Underhill*, on *Law of Trusts and Trustees*, 9th ed. (1939), p. 348, after referring to four of them, says: "But whether these cases can be supported on principle is respectfully questioned." And in *Hanson* on *Death Duties*, 9th ed. (1946), pp. 488, 489, it is justly remarked that a provision of the kind in question "might be thought not to amount to a legacy but merely to prevent the operation of the rule of equity that an executor or trustee shall not make his office a source of profit, and thus to enable him to charge for services which, in the absence of any such direction, he would be bound to render gratuitously".

The true position is very clearly put by *Rowlatt* J. in *Jones* v. *Wright* (5). In an earlier case of *Baxendale* v. *Murphy* (6) *Rowlatt* J. had had to consider a case in which a deed of trust provided (1) that each trustee should be entitled to remuneration for acting as trustee at the rate of £100 per annum payable *out of the income* of the trust fund, and (2) that any professional trustee should be entitled to make the usual professional charges. It is important to note that no question arose as to any charges made under the second provision. The learned Judge held that the remuneration of £100 per annum was an "annual payment" brought into charge to tax within rule 19 of the All Schedules Rules in the *Income Tax*

(1) (1910) 1 K.B. 703, at p. 711.
(2) (1898) 1 Ch. 297; (1898) 2 Ch. 217.
(3) (1918) 62 Sol. Jo. 487; (1918) W.N. 118.
(4) (1912) 107 L.T. 108.
(5) (1927) 44 T.L.R. 128.
(6) (1924) 2 K.B. 494.

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Act 1918, and was not a payment in respect of employment so as to be the subject of direct assessment under Case II. of Schedule D. As to the nature of the payment he referred in his judgment to *In re Thorley* (1). In *Jones* v. *Wright* (2) the same question arose, but this time with regard to professional fees charged by a solicitor-trustee who was empowered by the trust instrument to charge for work done. The Attorney-General in argument suggested that *Baxendale* v. *Murphy* (3) had been wrongly decided, and *Rowlatt* J., in giving judgment (4) said :—" It may be that that is so ". He did not think, however, that *Baxendale* v. *Murphy* (3) covered the case before him. He said : " All that the latter (the trustee) gets under the clause which gives him power to charge is the removal of a disability which would otherwise prevent him from entering into an ordinary contract of service with the trustees in consideration of remuneration ". He did not think that the substance of the position was affected by the fact that the solicitor-trustee could not sue his co-trustees and himself at common law. He said : " The respondent need not act as solicitor to any of these trusts. If he wishes to do so, he finds himself free to enter into a bargain ". The learned Judge then referred at some length to *In re Thorley* (5) ; *In re White* (6) ; and *Re Brown* (7) ; and concluded his judgment by saying :—" I do not think that those cases cover the present matter, because I do not think that they mean that a bequest of profit costs is a bequest of a bounty that is not earned. Profit costs are earned in such a case as the present, and it is right to charge them with income tax under Schedule D, Case II. They remain remuneration, and must be treated as profits and earnings arising from employment " (4). Cf. generally *Watson and Everitt* v. *Blunden* (8). The true nature of the position in such cases is, I think, emphasized when one remembers that (as is pointed out in *Godefroi* on *Trusts*, 5th ed. (1926), p. 215), a solicitor in such cases derives from the trust instrument no *right* to be employed as solicitor to the trust. If his co-trustees or the beneficiaries do not wish him to act, and he seeks the assistance of the Court, the whole matter is in the discretion of the Court, which is extremely unlikely to interfere in his favour.

The vague and cloudy notion that profit costs payable to a professional trustee by virtue of a provision in a trust instrument are matter of " bounty " rather than an authorized outgoing in

(1) (1891) 2 Ch. 613, at p. 624.
(2) (1927) 44 T.L.R. 128.
(3) (1924) 2 K.B. 494.
(4) (1927) 44 T.L.R., at p. 130.
(5) (1891) 2 Ch. 613.
(6) (1898) 2 Ch. 217.
(7) (1918) 62 Sol. Jo. 487 ; (1918) W.N. 118.
(8) (1933) 18 Tax Cas. 402.

administration is possibly traceable (although the case does not seem to be referred to in any of the cases I have mentioned) to language said to have been used by Lord *Hardwicke* in *Ellison* v. *Airey* (1). In that case there was a direction in the will that the trustees should be " paid for their trouble as well as expence ". The validity of such a provision was challenged on the equitable ground that it " might be of general prejudice, because trustees frequently draw wills and settlements themselves ". The report proceeds :—" But *Lord Chancellor* said this was a legacy to the trustees, to whom the testator may give this satisfaction, if he pleases. . . . Let the *master* therefore inquire what they might reasonably deserve for their trouble " (1). Great consequences cannot properly be made to hang on such a passage in a report, and (having regard to the point raised) I should have regarded Lord *Hardwicke* as meaning no more than that there was no substance in the point raised because the testator could authorize what he liked to be done with what was his own.

If I thought that such cases as *In re Pooley* (2) and *In re Thorley* (3) really depended on a supposed legal principle that profit costs payable to a solicitor-trustee by virtue of a provision in a trust instrument are for all purposes matter of " bounty " and not an authorized outgoing in the administration of the trust, I would think that such a principle was unreal and unsound. The view of *Rowlatt* J. and of Sir *Arthur Underhill* seems plainly right. But it would, in my opinion, be wrong to regard the cases on which the Commissioner relies as laying down any such false general principle, and wrong to regard any of them as having any bearing whatever on the present case.

The cases fall into three classes. In the first class are *In re Barber* (4) and *In re Pooley* (2). The old rule of law was that an interested witness was incompetent, and it would probably have been right to regard the solicitor in each of these cases as interested and therefore under the old law incompetent as a witness to the will. The disqualification was removed generally by 6 & 7 Vict. c. 85, but in the case of wills it had been dealt with first by 25 Geo. II., c. 6 (which applied only to wills of realty) and then more broadly by ss. 14 and 15 of the *Wills Act* 1837 (which applied to all wills). The policy adopted was not to validate the will as a whole but to destroy the " interest " by invalidating the benefit given to the witness. The wills in *In re Barber* (4)

(1) (1748) 1 Ves. Sen. 111, at p. 115 [27 E.R. 924, at p. 927].
(2) (1888) 40 Ch. D. 1.
(3) (1891) 2 Ch. 613.
(4) (1886) 31 Ch. D. 665.

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and *In re Pooley* (1) would have come clearly enough within s. 14 of the *Wills Act*, if it had been necessary at those times to invoke that section, and they were therefore valid, but it was by no means so clear that the cases came within the actual language of the complementary section, s. 15. What the courts really did was to regard the policy of ss. 14 and 15 and to give effect to that policy by a possibly somewhat strained interpretation of the latter section. This is made very clear by the short judgment of *Lindley* L.J. in *In re Pooley* (2). His Lordship said :—"I think it is impossible to escape from the words of the section, and the case appears to me to fall within its policy. I think that under the old law Mr. *Pooley* would have taken by force of this clause such an interest as would have made him incompetent as a witness to the execution of the will. The policy of the Act was to leave the will good and to make void the gift which would have made the witness incompetent. Apart from this clause, Mr. *Pooley* could not get anything out of the estate for his services, and I cannot say that a clause which enables him to get something out of the estate is not a gift to him within the meaning of the 15th section." *Bowen* L.J., in the course of argument (3), had asked :—"Is not a disposition of this kind within the policy of s. 15 ?" This is the whole substance of *In re Barber* (4) and *In re Pooley* (1).

In the second class of case is *In re Thorley* (5). Here specific annual sums were directed to be paid out of the profits of a business. It has, in my opinion, no application to a general authority to receive payment for services such as we have in the present case. So Dr. *Harrison*, in his *Practical Epitome of the Death Duties*, at p. 209, says :—"In practice legacy duty is not claimed on remuneration authorized in general terms by the will to be paid to a professional executor or trustee for his services, for which he could not otherwise charge, but the duty is claimed in respect of any *specified benefit* given him by the will in return for his services, e.g., a pecuniary legacy, annuity, or share of income while acting". Cf. *Green* on *Death Duties*, 2nd ed. (1947), p. 267. This view of the effect of *In re Thorley* (5) seems to me to be clearly correct, and, so regarded, it has no relevance to the present question.

The third class of case is exemplified by *In re White* (6). I do not think that there is any justification for regarding these cases as deciding more than that a person who must rely on the will

(1) (1888) 40 Ch. D. 1.
(2) (1888) 40 Ch. D., at pp. 4, 5.
(3) (1888) 40 Ch. D., at p. 3.
(4) (1886) 31 Ch. D. 665.
(5) (1891) 2 Ch. 613.
(6) (1898) 1 Ch. 297; (1898) 2 Ch. 217.

for his right to the payment claimed by him must rank, in the event of an insufficiency of assets, with others who claim under the will and not with outside creditors of the estate. This seems to be a perfectly sound view. It may or may not be legitimate to regard the trustee, for the purposes of the question at issue in such cases as *In re White* (1) as a " recipient " of " bounty ". In my opinion it is not. But, if it is, it is fallacious to say that it follows that he must be so regarded for all purposes.

In the present case the question turns entirely on the effect of the Seventh Schedule to the Act. The fourth column provides for all cases not covered by any of the first three columns. But, in order to bring any part of the estate within the fourth column, it must be found in this case that that part " passes " to some person or persons other than the widow and lineal descendants of the testator. Passing means passing on death. What passes on death under cl. 13 ? The plain answer is—nothing. It is not merely that it is impossible (as, of course, it is) by any means to identify or quantify any part of the estate as passing by virtue of cl. 13. The word " pass " connotes the creation of a beneficial interest in the estate. It is impossible to say that anybody acquires on the death of the testator even a contingent beneficial interest in the estate or any part of it under cl. 13. There is no case which decides that anything passes on the death of the testator under such a clause. If there were such a case, it ought not to be followed except by a court on which it is absolutely binding.

The cross-appeal should be allowed.

Appeal of Commissioner of Stamp Duties dismissed with costs. Cross-appeal of respondent Pearse and others dismissed with costs. Costs to be set off.

Solicitor for the appellant, *F. P. McRae,* Crown Solicitor for New South Wales.

Solicitors for the respondents, *Fisher & Macansh* with *J. T. Ralston & Son.*

J. B.

(1) (1898) 1 Ch. 297 ; (1898) 2 Ch. 217.