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Taxation, Federal Commissioner of *v.* Broken Hill South Ltd. (Broken Hill South Case) (1941) 511 (1), 512 (1)
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U.

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V.

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W.

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Y.

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REPORTS OF CASES

DETERMINED IN THE

HIGH COURT OF AUSTRALIA

[HIGH COURT OF AUSTRALIA.]

PERPETUAL EXECUTORS & TRUSTEES ASSOCIATION OF AUSTRALIA LIMITED } APPELLANT;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

(THOMAS' CASE) [No. 2.]

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MELBOURNE, *Oct.* 24, 25;

SYDNEY, *Nov.* 29.

Dixon C.J., McTiernan, Fullagar, Kitto and Taylor JJ.

Estate Duty (Cth.)—Assessment—Partner—Options in partnership deed to surviving partners to acquire interest of deceased partner no allowance being made for goodwill—Valuation of interest in partnership property inclusive of goodwill—Relevance to valuation of existence of options and degree of possibility of their exercise—Estate Duty Assessment Act 1914-1942 (*No.* 22 *of* 1914—*No.* 18 *of* 1942), *s.* 8 (1)

At the date of his death T. was engaged in business in partnership with other persons pursuant to the terms of a partnership deed which, *inter alia*, conferred on certain of the partners who survived T. options to purchase his share in the capital of the partnership at his death at a sum to be computed as therein set out without taking into account the value of the goodwill of the partnership. The options were duly exercised and the purchase price ascertained in accordance with the terms of the deed.

Held, by *Dixon* C.J., *Fullagar*, *Kitto* and *Taylor* JJ. (*McTiernan* J. dissenting), (a) that, T.'s interest in the partnership being delimited and described by the provisions of the partnership deed, the existence of the option provisions therein and the degree of possibility of their exercise were material factors for consideration in assessing the value of T.'s interest in the partnership property, including goodwill, for estate duty purposes; and (b) that, it being conceded by the commissioner that at the date of death there was a practical certainty that the options would be exercised, the value of the interest of T. in the partnership property, including goodwill,

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could not be greater than the price obtainable from the surviving partners calculated in accordance with the terms of the partnership deed.

Perpetual Executors & Trustees Association of Australia Ltd. v. *Federal Commissioner of Taxation* (1949) 77 C.L.R. 493 (H.C.); (1954) A.C. 114; 88 C.L.R. 434 (P.C.), considered.

CASE STATED.

Pursuant to the order of the Queen in Council referring the case of *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (1) back to the High Court the case came on for hearing before *Kitto* J. who on 29th March 1955 stated a case substantially as follows for the opinion of a Full Court of the High Court.

1. This matter comes before me pursuant to an Order in Council made 10th February 1954 on Her Majesty's behalf on the advice of her Privy Council whereby it was ordered (*inter alia*) that the matter of an appeal by Perpetual Executors & Trustees Association of Australia Ltd. (as executor of the will and estate of Frederick Charles Henry Thomas deceased) against an assessment to estate duty be and the same was referred back to this Court in the circumstances hereinafter appearing. With the concurrence of the parties and pursuant to s. 28 of the *Estate Duty Assessment Act* 1914-1947 I state the following case for the opinion of a Full Court upon questions of law arising on the appeal.

2. The said Frederick Charles Henry Thomas (hereinafter referred to as " the deceased ") died on 28th January 1944 leaving a will whereby he appointed the appellant executor thereof and probate thereof was duly granted to the appellant.

3. On 20th June 1944 the appellant duly made a return to the commissioner pursuant to the *Estate Duty Assessment Act* 1914-1942.

4. Prior to his death the deceased had carried on business as a furniture warehouseman in partnership with Robert Nathan, Louisa Jones, Lorna Hannan, Lionel Newton, Lauri Joseph Newton and Donald Lamond, under the name and style of " Maples ". The following are the material portions of the deed of partnership dated 22nd November 1939 as modified by a supplementary agreement dated 4th December 1940.

5. The capital of the partnership (hereinafter called the capital) shall consist of the present assets of the partnership including all cash in bank the book debts rights (patent and otherwise) trademarks stock in trade plant fixtures fittings

(1) (1949) 77 C.L.R. 493 (H.C.); (1954) A.C. 114; (1954) 88 C.L.R. 434 (P.C.).

utensils or things owned by the partnership and also all land leases tenancy agreements and buildings owned by the partnership and used in connection with the said business.

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

Robert Nathan	As to 17½% thereof
Frederick Charles Henry Thomas..	As to 19½% thereof
Louisa Jones	As to 16¼% thereof
Lorna Hannan	As to 16¼% thereof
Lionel Newton	As to 14¼% thereof
Lauri Joseph Newton	As to 14¼% thereof
Donald Lamond	As to 2 % thereof

9. The partnership shall not be dissolved by the death or retirement of any of the partners but the following provisions shall apply on the death or retirement of the respective partners referred to therein : (a) On the death or retirement of the said Frederick Charles Henry Thomas the said Frederick Charles Henry Thomas (if alive) at the date of such retirement or the legal personal representatives of the said Frederick Charles Henry Thomas (if the said Frederick Charles Henry Thomas shall have died) as at the date of the death of the said Frederick Charles Henry Thomas (hereinafter called the first option date) shall if the said Frederick Charles Henry Thomas shall have died or retired before the date of the death or retirement (whichever shall first happen) of the said Robert Nathan be deemed to have given the following options :— (i) To each of the said Louisa Jones and Lorna Hannan if both be living at the first option date or to each of the survivor of the said Louisa Jones and Lorna Hannan and the legal personal representative of such of the said Louisa Jones and Lorna Hannan as shall have died before the first option date or to the respective legal personal representatives of each of the said Louisa Jones and Lorna Hannan if both shall have died before the first option date an option to purchase from the said Frederick Charles Henry Thomas or the estate of the said Frederick Charles Henry Thomas (as the case may be) six and one quarter per centum of the capital. (ii) To the surviving or continuing partners at the first option date other than the said Louisa Jones, Lorna Hannan and Donald Lamond in proportion to their respective interests in the capital at the first option date an option to purchase the residue and remainder of the interest at the first option date of the said

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

12. Upon the exercise of the respective options hereinbefore contained the purchase price payable on the exercise of such option shall be the total of the following amounts (namely) :— (a) The proportionate part of the balance of assets over liabilities as disclosed in the balance sheet of the partnership in respect of the accounting year of the partnership prior to the date on which such option shall first be exercisable corresponding to the part of the interest in the partnership being purchased provided always that if in compiling the relevant balance sheet the value of the book debts shall not have been treated as fifteen shillings for each pound of the actual debts owing at the end of the period in respect of which such balance sheet shall have been compiled the said balance of assets over liabilities shown by the relevant balance sheet shall be adjusted by taking the said book debts into the said balance sheet at a value of fifteen shillings for each pound ; and (b) the like proportion of any real estate which shall have been acquired by the partnership between the end of the said period and the date on which the relevant option shall have been first exercisable (hereinafter called the current year) at the price at which the same shall have been acquired plus any amounts expended thereon by the partnership during the current year less any liability existing on such real estate to the vendor thereof or under any mortgage thereover ; (c) the like proportion of the profits of the partnership for the current year ascertained in the manner provided in cl. 13 hereof. Provided

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

13. On the compiling of the next succeeding balance sheet following the death or retirement of any partner the amount of net profit to which the deceased or retiring partner would have been entitled if such partner had been living at or had not retired before the close of the period in respect of which such balance sheet shall have been compiled as if no drawings had been made during the current year by the deceased or retiring partner (as the case may be) shall be ascertained and shall be divided by the number of days in the whole of the said period and the result shall be multiplied by the number of days which elapsed between the commencement of the said period and the date of the death or retirement (as the case may be) of such partner and the result (less any drawings against profits by the deceased or retiring partner during the current year) shall be the full share of the deceased or retiring partner of the profit of the partnership for the current year for the purpose of ascertaining the amount referred to in sub-cl. (c) of cl. 12 hereof.

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

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option shall have been given or deemed to have been given to the person exercising the same. The purchaser shall have the right to pay off at any time the whole of the purchase money.

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

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

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

cl. 14 shall be so payable and the balance thereof with interest shall be payable on the date that the last of the half-yearly instalments payable under cl. 14 shall be so payable.

5. The options conferred by cl. 9 of the deed of partnership were exercised by Robert Nathan, Louisa Jones and Lorna Hannan on 19th April 1944 and by Lionel Newton and Lauri Joseph Newton on 20th April 1944.

6. The total amount payable in respect of the exercise of the said options was £156,253 11s. 3d.

7. By a notice of assessment No. 21917 dated 14th February 1947 the commissioner assessed the estate duty payable in respect of the testator's estate at £61,468 14s. 4d. upon a net value for duty of the estate of £231,477.

8. By a notice of objection dated 14th March 1947 the appellant objected to the said assessment upon (*inter alia*) the following grounds: (a) That the dutiable estate of the deceased did not include any interest in the firm or partnership trading under the name or style of "Maples"; (b) that the dutiable estate of the deceased did not include any interest in the goodwill of the firm or partnership trading under the name or style of "Maples"; (c) that the deceased did not have at the time of his death any beneficial interest in the said goodwill which by virtue of a settlement or agreement made by the deceased passed or accrued on or after his decease to or devolved on or after his decease upon any other person or persons; (d) that the deceased was not at the date of his death entitled to any share or interest in the goodwill of the said firm of "Maples"; (e) that as at the date of his death the interest of the deceased was a right to receive the purchase price payable upon the exercise of the options contained in the articles of partnership in respect of the said firm dated 22nd December 1939 as amended by indenture dated 4th December 1940 made between the partners of the said firm, and on the exercise of the said options no amount was payable in respect of goodwill; (f) that the interest of the deceased in the assets of the partnership ceased at the date of death of deceased conditionally upon the exercise of the said options and payment of the purchase price which options have been exercised and which purchase money has been paid; (g) that the estate of the deceased is not dutiable in respect of any proportion of goodwill of the said firm of "Maples" pursuant to s. 8 (4) (*e*), or any other provision, of the *Estate Duty Assessment Act* 1914-1942.

9. By letter dated 29th January 1948 the commissioner disallowed the said objections.

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10. By a notice in writing dated 4th March 1948 the appellant requested the commissioner to treat the said objection as an appeal and to forward the same to the High Court of Australia and the commissioner duly forwarded the same to the High Court.

11. On 8th March 1949 *Williams* J. gave judgment dismissing the said appeal: *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (*Thomas' Case*) (1).

12. By notice of appeal dated 28th March 1949 the appellant appealed against the said decision to the Full Court of the High Court.

13. The said appeal came on for hearing before the Full Court of the High Court on 16th May 1949 and on that day the Full Court of the High Court dismissed the said appeal: *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (*Thomas' Case*) (1).

14. By an Order in Council made on 24th May 1950 His late Majesty King George VI granted leave to the appellant to appeal against the said judgment of the High Court dated 16th May 1949 to His Majesty in Council.

15. The said appeal to His Majesty in Council came on for hearing before the Judicial Committee of the Privy Council on 7th, 8th December 1953 and the judgment of their Lordships was delivered by Lord *Cohen* on 19th January 1954 (2).

16. The parties hereto have agreed upon the following mutual admissions: (1) No agreement has been made between the parties as to the value of the deceased's share of the goodwill of the partnership insofar as such value is now material in this appeal. (2) The commissioner is not precluded by the assessment or the form of the assessment from now contending that the value under s. 8 (3) of the said Act of the share or interest of the deceased in the partnership business and assets including goodwill was in excess of £156,253 11s. 3d. (3) The value of the deceased's share or interest in the partnership business and assets including goodwill at his death, if cll. 9, 12, 13, 14, 24, 25 and 26 of the partnership deed as amended had not formed part of the agreement between the partners, was £176,253 11s. 3d. (4) The total amount payable to the executor for the deceased's share or interest in the partnership business and assets upon the exercise of the options contained in cll. 9, 12, 13, 14, 24, 25 and 26 of the partnership deed as amended, that is, without including any sum in respect of goodwill, was £156,253 11s. 3d.

(1) (1949) 77 C.L.R. 493.

(2) (1954) A.C. 114; (1954) 88 C.L.R. 434.

17. The parties desire that certain questions of law now arising in the said appeal should be determined by the Full Court of the High Court and I accordingly state the following questions for the opinion of the Court: (1) On the facts appearing from this case and the annexures thereto is it open to me to find that the value as at the death of the deceased of his share and interest in the business and assets of the firm or partnership aforesaid including the goodwill thereof was in excess of £156,253 11s. 3d. ? (2) If so, is it open to me to find that the said value was less than £176,253 11s. 3d. ? (3) If yea to questions 1 and 2 upon what principle should the said value be ascertained ?

J. B. Tait Q.C. (with him *L. Voumard* Q.C. and *K. A. Aickin*), for the appellant. There is nothing in the passage in *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (1) which touches the question whether the existence of the options is to be taken into account in arriving at the value of the interest of the deceased in the partnership, including goodwill. The passage is directed to the question whether the deceased partner's interest in goodwill passes to his personal representatives. The fact that the options had been given would have a depreciating effect on the value of the deceased's interest in the partnership at the time of his death. [He referred to *Robertson* v. *Federal Commissioner of Taxation* (2); *McCathie* v. *Federal Commissioner of Taxation* (3).] In the circumstances it was almost certain that the options would be exercised. It is permissible, in valuing at the time of death, to look for certain purposes at subsequent events.

Dr. *E. G. Coppel* Q.C. (with him *J. A. Nimmo*), for the respondent. It is conceded that if property is subject to a proprietary limitation that must be taken into account in assessing its value. That is not the position here. There could be no binding contract until after the death of the deceased. The other partners are not bound in any way unless and until they exercised their options. The special provisions for ascertaining the value of the share do not alter what is comprised within the share. They are merely contractual provisions between the partners and do not effect the proprietary position. It is a necessary consequence of the decision of the Privy Council in *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (4) that the deceased's

(1) (1954) A.C. 114, at p. 131; (1954) 88 C.L.R. 434, at p. 446.
(2) (1952) 86 C.L.R. 463, at pp. 485, 486, 490-492.
(3) (1944) 69 C.L.R. 1, at p. 10.
(4) (1954) A.C. 114; (1954) 88 C.L.R. 434.

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interest in the assets of the partnership, including the goodwill thereof was part of his estate within s. 8 (3) of the *Estate Duty Assessment Act* 1914-1942 that the value of the interest is unaffected by the existence of the options. [He referred to *Perpetual Executors & Trustees Association Ltd.* v. *Federal Commissioner of Taxation* (1).] A provision in the articles of a proprietary company that on the death of a member his representatives are bound to offer his shares to the remaining members at a certain price does not fix the value of the shares for revenue purposes. [He referred to *Inland Revenue Commissioners* v. *Crossman* (2).]

L. Voumard Q.C., in reply. It was almost certain at the time of the deceased's death that the options would be exercised. The options operated to confer upon the grantees a contingent equitable interest in the assets of the deceased partner during his life. [He referred to *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (3); *Birmingham* v. *Renfrew* (4).] Restrictions on the right to transfer shares are to be taken into account in determining their value. [He referred to *Abrahams* v. *Federal Commissioner of Taxation* (5).]

Cur. adv. vult.

Nov. 29.

The following written judgments were delivered :—

DIXON C.J. This case stated concerns the value at which an interest in a partnership is to be assessed for the purposes of the *Estate Duty Assessment Act* 1914-1942. The deceased person whose estate is under assessment is the late Frederick Charles Henry Thomas who died as long ago as 28th January 1944. At his death he was a member of a firm carrying on business under the name of Maples. The partnership consisted of seven persons and their fractional shares in the capital of the partnership were unequal. Thomas' proportion was nineteen and a half per cent. The deed of partnership contained a provision stating how the death of a partner should affect the partnership. The clause provided that the partnership should not be dissolved by the death of any of the partners, but that certain provisions which followed should apply. They consist of some rather intricate clauses but it is enough to state compendiously their purport so far as they apply in the events that happened. The clauses gave to each of five of the surviving partners options to purchase from the legal personal

(1) (1954) A.C., at pp. 130, 131; (1954) 88 C.L.R., at pp. 445, 446.
(2) (1937) A.C. 26.
(3) (1944) 69 C.L.R. 270, at p. 298.
(4) (1937) 57 C.L.R. 666, at pp. 676, 683.
(5) (1944) 70 C.L.R. 23, at p. 46.

representatives of the deceased a specified fractional proportion of the capital. The fractions were not all identical but together they added up to nineteen and a half per cent. As the deed expressed it, the legal personal representatives should " be deemed to have given " these options " to the five respective surviving partners ". On the exercise of such an option the price was to be computed according to elaborate provisions which took the balance sheet of the partnership as the basis. But it was specifically agreed and declared by the deed that in computing the amount of purchase money payable on the exercise of any option no sum should be added or taken into account for goodwill.

The deed made no express provision for the possibility of all the surviving partners failing to exercise their options. Perhaps it was considered that the implications of law from the clause against dissolution on death are clear enough and suffice. But in any event it would have been needless to provide for the contingency. For it was admitted before us that the assumption had been made by the parties that the options gave the surviving partners the right to purchase the interest of the deceased in the partnership at an under value, so that the options were antecedently certain to be exercised. And exercised they all were. The total amount payable to Thomas' estate by the surviving partners under the options so exercised was £156,254. The agreed case stated tells us that if, in effect, the option clauses had been out of the partnership deed the value of the deceased's share or interest in the business and assets including goodwill was (*sic*) £176,254. This is taken to mean, though perhaps not altogether logically, that if the value of the goodwill were included the value of the deceased's share would be greater by £20,000.

When the commissioner came to make the assessment of the value for estate duty of the deceased's estate, he added £20,000 to the value of the deceased's interest in Maples. He ascribed the addition to the " proportion of goodwill " in the partnership business. There stood in his favour the decision of the majority of this Court (*Rich*, *Starke* and *Williams* JJ., *Latham* C.J. and *McTiernan* J. dissenting) in *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (*Milne's Case*) (1). That case differed materially from the present only in the fact that under the deed to which Milne was a party no allowance in respect of the value of the goodwill of the partnership business was to be made to a partner or his representatives on his death, retirement or expulsion. All five members of the Court had decided that no share in the

(1) (1944) 69 C.L.R. 270.

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goodwill devolved upon the executor or formed part of the deceased's personal property so as to be comprised in his estate under s. 8 (3). But the majority held that the interest in goodwill was caught by s. 8 (4) (*e*) as a beneficial interest of the deceased at death which by virtue of an agreement made by him passed or accrued on or after his decease to other persons, namely the surviving partners. The minority dissented on the ground that there was no "passing or accruing" of the deceased's interest as such to the surviving partners. There was simply a cesser of his interest with a consequential enlargement of theirs. *Latham* C.J. relied upon *Attorney-General* v. *Boden* (1), where *Hamilton* J. held that there was no "passing" of the goodwill to the surviving partners under a partnership deed in even stronger terms. In that deed there was no option; it was an absolute provision that on the partner's death or on his otherwise ceasing to be a partner that particular partner's share should accrue to the two surviving or continuing partners subject only to payment of the value ascertained by an account without valuation or allowance for goodwill, which should accrue to the two survivors in equal shares. Faced with this decision in *Milne's Case* (2) the executors of Thomas determined to challenge it in the Privy Council. As a first step they appealed to this Court where they confessed that they could not succeed unless we would allow the correctness of the decision in *Milne's Case* (2) to be reconsidered; and that we refused to do: *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (*Thomas' Case*) (3). The executors obtained special leave to appeal from the inevitable order upholding the commissioner's assessment. In deciding this appeal the Privy Council adopted a view of s. 8 of the *Estate Duty Assessment Act* and of the situation produced by the deeds in this and in *Milne's Case* (2) which struck at the foundation of alike the view of the majority and the view of the minority in *Milne's Case* (2). Their Lordships construed sub-ss. (3) and (4) of s. 8 as two mutually exclusive provisions. If a case fell within sub-s. (3) it must be excluded from the application of sub-s. (4). The source of this interpretation is doubtless to be found in *Earl Cowley* v. *Inland Revenue Commissioners* (4); cf. *Attorney-General* v. *Milne* (5) and *In re Duke of Norfolk*: *Public Trustee* v. *Inland Revenue Commissioners* (6) though of course the statutory provisions are very different. As to the devolution of the deceased's interest in goodwill, their Lordships drew no distinction between the effect

(1) (1912) 1 K.B. 539.
(2) (1944) 69 C.L.R. 270.
(3) (1949) 77 C.L.R. 493.
(4) (1899) A.C. 198.
(5) (1914) A.C. 765, at p. 769.
(6) (1950) Ch. 467, at pp. 473, 484.

of the provisions of the partnership instruments in *Boden's Case* (1) in *Milne's Case* (2) and in the present case. In all three cases, as their Lordships held, the entire interest of the deceased partner in the assets of the partnership including goodwill vested in the executors on his death. On this footing, as is obvious, sub-s. (3) of s. 8 applied in the two Australian cases and, as the sub-sections are to be regarded as mutually exclusive, sub-s. (4) became inapplicable. As to *Milne's Case* (2), Lord *Cohen*, speaking for the Board said this:—"In their Lordships' opinion the interest of Milne in all the partnership assets, including goodwill, vested in his executors on his death, although his executors would be bound, if the option were exercised, to transfer that interest to the purchaser at the price fixed in accordance with the partnership deed" (3). Referring to the decision of *Hamilton* J. in *Boden's Case* (4) that the interest of the deceased in goodwill was not property which "passed" on his death (*scil* to the surviving partners) within the meaning of s. 1 of the *Finance Act* 1894 but that the goodwill was property in which the deceased had an interest ceasing on the death of the deceased, Lord *Cohen* said: "Their Lordships are unable to agree with this view. In their opinion the deceased partner's interest in goodwill in such a case must pass with his interest in the other assets to his legal personal representative, and the fact that its value is not to be taken into account in calculating the price receivable by the estate for his interest in the partnership is irrelevant" (5). (Irrelevant means of course irrelevant to liability to duty, not to valuation.) The present case is *a fortiori*. For whatever view might be taken of the effect of the provisions of the respective deeds in *Boden's Case* (1) and in *Milne's Case* (2) the deed in the present case contemplates an interval between death and the exercise of the options and immediately on death the entire interest of the deceased in the partnership assets including goodwill must devolve upon the executor of the deceased partner pending the election to exercise or not to exercise the options.

The conclusion that Thomas's interest in the assets of the partnership including goodwill passed to the executors and fell within sub-s. (3) of s. 8 as his personal property at the time of his death, left no question outstanding but the value to be attached to the interest for the purpose of duty. The commissioner does not appear to have contested the view that the price receivable from the surviving partners exercising the option represented the value of

(1) (1912) 1 K.B. 539.
(2) (1944) 69 C.L.R. 270.
(3) (1954) A.C. 114, at p. 130; (1954) 88 C.L.R. 434, at p. 444.
(4) (1912) 1 K.B., at p. 556.
(5) (1954) A.C. at p. 131; (1954) 88 C.L.R., at p. 446.

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the nineteen and a half per cent interest of the deceased in the partnership assets, if the value of the share of goodwill was not to be reflected in the total. According to the report Mr. *J. H. Stamp* put the case for the executors as it resulted from the application of sub-s. (3) of s. 8 as follows :—" There is no justification for attributing to the estate a value greater than it can possibly derive from the assets ; the estate is the aggregation of rights associated with obligations that cannot be severed from it, and those rights and obligations can only bring in in this case, and cases like it, the purchase price. This is quite plainly a s. 8 (3) (*b*) case. The purchase price should be taxed ; that is fair for everyone, is realistic, and conforms with the facts of the case. The purchase price is treated as substituted for the asset sold, which includes the goodwill, and that is all that really comes into the estate of the deceased " (1). Their Lordships, however, did not pronounce upon this argument. One reason it seems for not doing so was that some uncertainty existed as to the scope of an agreement made between the parties at the hearing here in the original jurisdiction whereby the value of goodwill was fixed at £20,000, if it was to be included. It was urged for the commissioner that the agreement covered the case of liability under sub-s. (3) and was not confined to liability under sub-s. (4) or in other words under the decision in *Milne's Case* (2). Unfortunately the uncertainty as to the scope of the agreement could not be resolved at the time, although now the parties concur that no agreement had been made between them as to the value of the deceased's share of the goodwill of the partnership in so far as such value is now material to the appeal.

For this and other reasons their Lordships' report did not go beyond deciding that the appeal to the Queen in Council ought to be allowed and that a declaration ought to be made that the share and interest of Thomas in the assets of the partnership including the goodwill was part of his estate within sub-s. (3) of s. 8 and that no part of such share or interest is to be deemed to be part of his estate under sub-s. (4).

For the rest, the matter was referred back to this Court to reconsider the objection of the executors to the assessment in the light of this declaration and in particular (if, as is the case, the agreement already mentioned is found not to be binding for present purposes) to consider what value ought to be placed upon the share and interest of Thomas including goodwill.

The reference came before *Kitto* J., who stated this case. Neglecting for the moment the form of the specific questions in the case

(1) (1954) A.C., at pp. 118, 119. (2) (1944) 69 C.L.R. 270.

stated, the only question remaining for decision is the value to be placed for the purpose of the *Estate Duty Assessment Act* upon the interest of Thomas in the partnership assets including goodwill on the footing that such interest formed part of his personal property at his death. Once the figures are supplied it seems to me that the difficulty of deciding the issue depends only upon a proper appreciation of the nature of the "property" in question. It is a right in respect of assets but it is a right, or a congeries of rights, growing out of the partnership articles. Thomas's interest was delimited and described by the provisions of the deed of partnership and the "value" of the interest as at his death—or indeed at any other time—must depend upon the measure of enjoyment those provisions allow and the extent to which the share or interest may be expressed in or converted into money. The provisions which control the value of the interest at death are those which confer on the surviving partners a right to take over the whole interest for a sum computed under the terms of the deed. They are provisions which describe and characterize the interest as much as any other. They go to the essential nature of the interest. If at the date of death there were any uncertainty as to the exercise of these rights, no doubt their existence would not be decisive. It would be a factor, a powerful factor no doubt, but not more. But we know that there was never antecedently any such doubt. What the interest was worth to the deceased immediately before his death or to his "estate" or executors immediately after his death therefore depended on calculation only. For it was then certain that the options would be exercised. The result is that for the entire share including goodwill there could not reasonably be any greater value in the interest of Thomas in the partnership at his death than the price obtainable from his partners, that is to say £156,254. That is its value for the purpose of estate duty. This conclusion no doubt expresses a proposition of fact rather than of law. But it seems to me to be so evident a result that in answer to the first question it may safely be said that it is not open to find a larger value.

The argument for the commissioner in support of a claim that the value should be increased by £20,000 was based upon an interpretation which counsel placed on Lord *Cohen's* judgment. All I propose to say about it is that it is an interpretation I do not accept. I see nothing in the judgment incompatible with the conclusion that the price obtained for the whole of Thomas's interest from the surviving partners pursuant to the option clauses affords a criterion by reference to which the value of the whole interest including goodwill may be estimated because it is the

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result of the operation of the clauses which characterize and determine the nature of the interest.

I think that the questions in the case stated should be answered : (1) No ; (2) and (3) : Do not arise.

McTIERNAN J. Pursuant to the judgment of the Judicial Committee the High Court has to determine what value ought to be placed upon the share and interest of the late Frederick Charles Henry Thomas in the business and assets of the partnership of "Maples" including the goodwill thereof. The questions stated in this case for the opinion of the Full Court are directed to the proper way of estimating the value of that share and interest of Thomas in all those assets including the goodwill. The reference of that issue to this Court is to determine the value that ought to be placed upon that share and interest under s. 8 (1) of the *Estate Duty Assessment Act* 1914-1942, "having regard to all the relevant circumstances". The value to be estimated is, I understand, the amount of money for which such share and interest could have been exchanged in open market when Thomas died. The judgment of the Judicial Committee declares that the share and interest of Thomas in the business and partnership assets including goodwill fell within s. 8 (3) of the Act and that no part is to be deemed to be property within s. 8 (4). The Judicial Committee decided that on the death of Thomas, his share in the goodwill or any other partnership assets did not cease or go over to any of the other partners. The decision is that his share and interest in the goodwill and other partnership assets vested in his legal personal representative and came within s. 8 (3). The property consisting of that share and interest was a bundle of rights in the partnership assets. To give effect to the declaration of the Judicial Committee the property must be valued on the basis that it includes the share and interest of Thomas in the goodwill, and this element is not to be severed. The property to be valued existed under the articles of partnership. It must be valued with all the conditions including the restrictions attached to it by the articles.

The controversy in the case is whether the value of the property is controlled by those articles, called in argument the "option clauses", which gave five partners, who survived Thomas, rights of pre-emption over his share and interest in the partnership assets including the goodwill. The pre-emption price was £156,253 11s. 3d. It is said that one of the relevant circumstances is that when Thomas died there was no possibility that these partners would not exercise their options. They did in fact exercise them. The

pre-emption price was fixed by a formula in the partnership articles. But one of the articles expressly provided that in computing the price payable on the exercise of any option no sum should be added or taken into account for goodwill. The Court has to decide whether, notwithstanding the option clauses, the value of the share and interest of Thomas in the partnership assets including the goodwill could exceed £156,253 11s. 3d. or be less than £176,253 11s. 3d. The subject matter to be valued is not the right of the personal representative to receive the pre-emption price if the partners who had the options exercised them. That is not property left by Thomas. The relevant property is his share and interest in the partnership assets including goodwill. The whole of such share and interest was brought into charge by s. 8 (3) and is the subject matter to be valued. Could the sum of £156,253 11s. 3d. be less than the true value of that share and interest? I think so. This amount is computed without adding anything for the interest of Thomas in the goodwill. Admittedly the goodwill was very valuable and when Thomas died he owned nineteen and a half per centum of it as well as of the other assets. How then could £156,253 11s. 3d. be the fair value or a true measure of the value of the piece of taxable estate consisting of that proportion of the goodwill and of the other partnership assets? The reason urged was that the option clauses were a burden on the share and interest of Thomas in the partnership assets including the goodwill and it was of the essence of such share and interest that upon the death of Thomas his personal representative would be obliged to transfer it at the price fixed by the partnership articles if the options were exercised. The rights of Thomas as partner in the partnership assets including goodwill were expressed by the covenants between the partners. This mass of rights was the property that vested in his executor and upon the value of which duty is to be assessed. The property which existed under the partnership articles and no other property has to be valued. I do not agree that the "option clauses" are elements of the property to be valued or measure its extent. Their character is rather collateral to the articles which created and determined the share and interest of Thomas in the partnership assets including the goodwill.

There occurs in the course of the judgment of the Judicial Committee the passage "In their Lordships' opinion the interest of Milne in all the partnership assets, including goodwill, vested in his executors on his death, although his executors would be bound, if the option were exercised, to transfer that interest to the purchaser at the price fixed in accordance with the partnership

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deed " (1). The effect of the option was to restrict the executor's right to dispose of the interest of Milne. It did not affect the substance of the interest which the executor would transfer, whether he sold in the open market or to a purchaser exercising the option to purchase at the price fixed in accordance with the partnership deed. The passage quoted applies to the share and interest of Thomas to which this case relates, the Judicial Committee having said that the effect of the relevant articles of the partnership agreements in the two cases is the same.

The options to purchase the share and interest of Thomas in the partnership assets including the goodwill were by the " option clauses " deemed to be given at his death to his personal representative. He could have no personal representative until he died. Strictly, therefore, the vesting of the share and interest of Thomas in the partnership assets including the goodwill preceded the accrual of the right of any partner to his option. There was no option *in esse* affecting such share and interest at the moment it came within s. 8 (3) : the possibility of its arising resulted, it is true, from the partnership articles. But the option did not come into existence until Thomas died. The option clauses did not affect his possession and enjoyment of his share and interest in the partnership in his lifetime or change it from a share and interest equal to nineteen and a half per centum of the partnership assets including the goodwill into a different or less valuable interest. As already stated, when Thomas died he held that proportion of the goodwill and of the other partnership assets. For these reasons I think that the " option clauses " should be disregarded in determining the issue of value referred back to this Court. I understand that the difference between the amounts in the first and second questions depends upon whether those clauses are considered as having the effect of controlling the value for purpose of estate duty. As I think that these clauses have no such effect, I answer the questions as follows : (1) Yes. (2) No. (3) Unnecessary to answer.

If the measure of value is the price fixed under the partnership articles, the result is that no more duty is payable than if the opinions of the minority in *Milne's Case* (2) could be applied. But the Judicial Committee have not endorsed those opinions.

The words used in enacting s. 8 manifest the intention that the whole estate of a deceased person shall, subject to the exemptions, be charged with duty. Having been instructed that the interest of Mr. Thomas in the goodwill did not cease upon his death, but

(1) (1954) A.C. 114, at p. 130 ; (1954) 88 C.L.R. 434, at p. 444.

(2) (1944) 69 C.L.R. 270.

was an indivisible part of his share and interest in the partnership assets and that the whole of such share and interest, including the interest in the goodwill, was property charged by the Act with duty, I find it too difficult to affirm that the "option clauses" can operate to depreciate the duty payable upon such property. (See observations by Lord *Hanworth* M.R. in the case of *In re Sir William Thomas Paulin*; *In re Crossman* (1) on appeal *sub nom. Inland Revenue Commissioners* v. *Crossman* (2). In my opinion it would be tantamount to affirming that proposition to answer the questions in accordance with the contentions made by the appellant in this case.

FULLAGAR J. I agree with the judgment of the Chief Justice.

KITTO J. This is a case stated in an appeal against an assessment of estate duty. It concerns the valuation for estate duty purposes of an interest which the deceased, Frederick Charles Henry Thomas, had at his death in a partnership. The partnership consisted of seven partners who carried on a business of furniture warehousemen in Victoria and Tasmania under the name "Maples". Their mutual rights and obligations were regulated by a deed of partnership dated 22nd December 1939, which was varied, though not in any material respect, by a deed of 4th December 1940. They were entitled to the capital in unequal shares, the deceased's share being nineteen and a half per cent. Profits were divisible and losses were to be borne in proportion to the shares in capital.

The partnership deed provided (by cl. 9) that the partnership should not be dissolved by the death or retirement of any of the partners, and that on the death or retirement of the respective partners certain provisions should apply. In the event which happened, namely that Frederick Charles Henry Thomas predeceased all the other partners, neither he nor any of them having retired in his lifetime, it was provided that as at the date of his death his legal personal representatives should be deemed to have given options to five of the other partners to purchase from his estate his interest in the partnership in stated proportions. (These five will be referred to as the surviving partners.) Then the deed provided (by cl. 12) that upon the exercise of the respective options the purchase price payable should be the total of certain amounts which may be shortly described as (a) nineteen and a half per cent of the balance of assets over liabilities as disclosed in the balance sheet of the partnership for the accounting year of the partnership

(1) (1935) 1 K.B. 26, at p. 42. (2) (1937) A.C. 26.

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prior to the death (subject to a proviso as to book debts); (b) the like proportion of any real estate acquired between the end of that year and the date of death, at cost price plus any amount since expended thereon less any liability to a vendor or mortgagee; and (c) the like proportion of the profits of the partnership for the current year ascertained in a particular manner. At the end of cl. 12 the following words appeared: "Without affecting the generality of the foregoing provisions it is specifically agreed and declared that in computing the amount of purchase money payable on the exercise of any option no sum shall be added or taken into account for goodwill". Only one other provision of the deed need here be mentioned. It is in cl. 14: "On the exercise of any option the purchaser shall be deemed to have acquired the interest in respect of which such option shall have been exercised as from the date that such option shall have been . . . deemed to have been given to the person exercising the same".

The death of the deceased occurred on 28th January 1944. Each of the five partners who thereupon became entitled under cl. 9 to an option to purchase a share of the deceased's interest in the partnership exercised the option. Some did so on 19th April 1944, and the others on the following day. The purchase money payable by each was calculated in accordance with the deed, and the amounts payable aggregated £156,253 11s. 3d. Had the option provisions not appeared in the partnership deed the value of the deceased's interest in the partnership as at his death would have been £176,253 11s. 3d. The difference of £20,000 is wholly accounted for by the provision against taking into account any amount in respect of goodwill in computing the purchase money payable on the exercise of an option. The *Estate Duty Assessment Act* 1914-1942 provides by s. 8 (1) and (2) for the levying and payment of estate duty on the value of the estates of deceased persons at rates declared by the Parliament. Section 8 (3) (*b*) provides that for the purposes of the Act the estate of a deceased person comprises (*inter alia*) his personal property wherever situate, if he was at the time of his death domiciled in Australia, as the deceased in the present case evidently was. Section 8 (4) provides that property which it describes in six lettered paragraphs shall for the purposes of the Act "be deemed to be" part of the estate of the person so deceased. Examination of each of the six paragraphs shows that the last-mentioned sub-section brings into an estate property which formed no part of the deceased's actual estate at his death but which for various reasons is to be treated as notionally included in his estate. Hence the operative words: "shall be

deemed to be part of the estate". Paragraph (*e*) comprises "property being a beneficial interest in property which the deceased had at the time of his decease, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person".

The appellant as executor of the deceased's estate made a return for estate duty purposes and included the deceased's interest in the partnership as an asset of the estate, attributing to it a value of only £156,217 11s. 3d. This amount was described in the return as the amount at which the executor was obliged to sell the interest pursuant to the partnership deed. It was in fact, as will be seen, thirty-six pounds less than the purchase money which the executor was entitled to receive, and no objection was taken when the commissioner added that sum in his assessment. But the commissioner also added the £20,000 by which the amount payable to the executor fell short of that which would have been payable had the value of goodwill been taken into account in the computation. He drew attention to the addition by including in an "alteration sheet" which he sent to the executor an item reading: "Proportion of goodwill in Maples—s. 8 (4) (*e*) £20,000". To this addition the executor objected, and when an appeal against the assessment came before this Court the only question which called for decision was whether the addition was rightly made.

The appeal came before *Williams* J. As appears from his Honour's judgment, the commissioner, without giving up any other contentions open to him upon the true construction of the Act, contended that the share of the deceased in the goodwill of the partnership at the date of his death formed part of his notional estate within the meaning of s. 8 (4) (*e*) of the *Estate Duty Assessment Act* 1914-1942. It seemed to his Honour to follow from *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (*Milne's Case*) (1) that this contention should succeed, and the appeal was therefore dismissed: *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (*Thomas' Case*) (2). The case was carried to the Full Court, where it was conceded that the appeal must fail unless the Court were prepared to reconsider and overrule *Milne's Case* (1). The Court was not prepared to do so, and accordingly dismissed the appeal: *Perpetual Executors & Trustees Association of Australia Ltd.* v. *Federal Commissioner of Taxation* (*Thomas' Case*) (2).

(1) (1944) 69 C.L.R. 270.

(2) (1949) 77 C.L.R. 493.

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The executor then appealed to the Privy Council by special leave. For reasons which it will be necessary to consider, the appeal was allowed and the orders made in this Court were set aside. A declaration was made that the share and interest of the deceased in the assets of the partnership, including the goodwill thereof, were part of his estate within sub-s. (3) of s. 8 of the Act, and that no part of such share or interest was to be deemed to be part of his estate under sub-s. (4) of s. 8. The case was referred back to this Court to reconsider the executor's objection to the assessment in the light of the declaration made, and in particular, but without prejudice to the generality of the foregoing, to determine (a) whether any binding agreement had been made between the parties which fixed the value of the said share and interest in the business and assets of the firm including the goodwill thereof, and if not (b) what value ought to be placed thereon under s. 8 (1) of the Act having regard to all relevant circumstances. The first of these questions arose because there was some uncertainty as to whether an agreement on value which had originally been announced to *Williams* J. had any application once s. 8 (4) (*e*) had been put on one side. When the matter came on again in the original jurisdiction of this Court the point was disposed of by a mutual admission that no binding agreement fixing the value of the deceased's share and interest in the partnership had been made between the parties. I then stated this case for the opinion of the Full Court on three questions of law: (1) On the facts appearing from this case and the annexures thereto is it open to me to find that the value as at the death of the deceased of his share and interest in the business and assets of the firm or partnership aforesaid including the goodwill thereof was in excess of £156,253 11s. 3d.? (2) If so, is it open to me to find that the said value was less than £176,253 11s. 3d.? (3) If yea to questions 1 and 2, upon what principle should the said value be ascertained?

It will be seen that the Privy Council rejected the view which the commissioner had indicated in his alteration sheet. That was the view that in respect of the deceased's share in the partnership there were two classes of interests to be included in the dutiable estate: on the one hand an interest in each of the assets of the partnership other than goodwill, those interests being part of the property which in fact belonged to the deceased at his death and being caught as such by s. 8 (3) (*b*); and on the other hand an interest in the goodwill, which was not part of the deceased's property at his death but was caught as part of his notional property by s. 8 (4) (*e*). The Privy Council's reasons for holding that the

deceased's interest under the partnership deed in the goodwill as in all the other assets of the partnership was property belonging to him in fact at his death, and therefore dutiable under s. 8 (3) (*b*), must now be carefully considered, because the argument presented on behalf of the commissioner attributes to their Lordships a view which would require an affirmative answer to question (1) and a negative answer to question (2).

Their Lordships went first to *Milne's Case* (1) and in order to understand the view they took of that case some examination of it is necessary. At only one point which need here be mentioned did *Milne's Case* (1) differ from the present. The partnership deed there provided that on the death of a partner the surviving partners might at their option dissolve the partnership and wind up its affairs or take over the share of the deceased partner in the capital of the partnership; and it further provided that on the death, retirement or expulsion of any partner no allowance should be made to him or to his representatives in respect of the value of the goodwill of the business. The effect of the latter provision was taken to be that in whichever way the surviving partners might exercise the choice presented to them upon the death of the deceased, the amount of money which his executors would receive in respect of his share in the partnership would include nothing assessed as the value of the interest which he had had in the goodwill up to the time of his death. The first of the questions submitted to the Court was whether the dutiable estate of the testator included any and if any what interest in the goodwill of the partnership? The answer given by the Court was No. *Latham* C.J. did not state any reason for his answer. *Rich* J. did not find it necessary to give an answer. *Starke* J. said that no doubt the partnership interest of the deceased was part of his estate, yet that interest did not include goodwill since the partnership deed expressly provided that no allowance should be made to the deceased or his representatives in respect of the value of the goodwill of the business. *McTiernan* J. described the result of the provision against allowing for goodwill as being that the testator's interest in the goodwill ceased at his death. *Williams* J. thought that because of that provision the estate never became entitled to a share in the value of the goodwill, and that therefore the validity of the assessment could not be upheld under s. 8 (3) (*b*). The second question asked was whether the dutiable estate of the testator included any beneficial interest held by him immediately prior to his death in a joint tenancy or joint ownership with other persons. This question,

(1) (1944) 69 C.L.R. 270.

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which referred to s. 8 (4) (*d*) of the Act, was unanimously answered No, and nothing more need be said about it. The remaining question gave rise to a difference of opinion. It was whether the testator had at his death any beneficial interest in the goodwill of the partnership which passed or accrued on or after his death to, or devolved on or after his death upon, any of the surviving partners. It will be seen that this question followed the language of s. 8 (4) (*e*). It assumed, however, that the provision in the partnership agreement as to making no allowance in respect of the value of goodwill had the effect of denying to the testator's estate the interest in goodwill which he had enjoyed in his lifetime, and had no effect at all upon his interest in the rest of the partnership property. All the judgments agreed that the interest in goodwill did not pass to the deceased's executors; but they differed as to whether, on the one hand, it accrued to the surviving partners, or, on the other hand, it simply ceased so that the interests of the surviving partners in goodwill became enlarged to a corresponding extent. The members of the Court who took the first view held that the interest fell under s. 8 (4) (*e*). Those who took the second held that it did not form any part of the dutiable estate.

The Privy Council, in considering the matter for the purposes of the present case, concluded that both views were erroneous. Their Lordships' opinion was, in effect, that the first question should have been answered by saying that the testator's actual estate included exactly the same interest in goodwill as in the other assets of the partnership. In truth the share in the capital of the partnership to which Milne was entitled at his death was not and had never been a full five one-hundredths thereof; it had always been a share equal to five one-hundredths subject to the operation of the provisions made for the event of Milne's death, and that it remained when he died. The point insisted upon by the Privy Council may be stated by saying that the effect which the death produced by virtue of the provisions as to goodwill was not to alter the character of the share as conferring an interest in each and every of the partnership assets; it did not sever the goodwill from the other assets, freeing the goodwill from Milne's interest in it while leaving the other assets subject to that interest. Its effect simply was that by reason of a characteristic inherent in the share itself, Milne's interest in the partnership assets was now a fraction being less than five one-hundredths, whereas formerly it was a variable fraction being either five one-hundredths or a lesser fraction according as winding-up should or should not occur before Milne's death. But the point is that the interest was still a fractional

interest in every one of the assets, goodwill amongst them. Unless the surviving partners should exercise their option to take over the share, there would have to be a winding-up, and the executors would then receive only the reduced fraction of the distributable balance of the proceeds of realization; but they would receive it as the estate's share of the proceeds of realization of *all* the assets. Similarly, if the surviving partners exercised their option they would take over an interest in *all* the assets; and although the price to be paid would not include any element calculated by reference to the value of goodwill, it would nevertheless be a price for the interest in goodwill as surely as in the other assets.

It may be pointed out that in *Milne's Case* (1) it might have made no difference, in a practical sense, if the High Court had proceeded on the basis which their Lordships held to be the correct one; for the question would then have arisen: did the reduction in the testator's proportionate interest in the assets which took place on his death mean a passing or accruing to the surviving partners of a beneficial interest which he had at that time? Presumably the judges would have been divided on this question in the same manner and for the same reasons as they were divided on the question which appeared to them to call for decision. Cf. *Commissioner of Stamp Duties* (*N.S.W.*) v. *Bradhurst* (2).

But in the present case the point upheld by the Privy Council makes a difference in practical result as well as in theory, because under the provisions of the partnership deed the deceased's interest was not a proportion reducing on his death or necessarily reducing at any time thereafter. Immediately before he died his interest was nineteen and a half per cent of the capital, subject to the options exercisable on his death by the surviving partners; and immediately after he died it was still the same percentage of the capital, subject to the same options. The time for the exercise of the options had commenced to run, and that is all that had happened. It was not as if the deceased had had an absolute interest in the assets other than goodwill and a life interest in goodwill, and the life interest had come to an end. His interest in all the assets, in goodwill as well as in the others, such as it was, with all its incidents including that which the option clauses supplied, was an interest which was his absolutely and it therefore fell within s. 8 (3) (*b*). Their Lordships held that as a consequence it could not fall within s. 8 (4) (*e*). The reason (the judgment appears to mean) is that the one piece of property cannot be caught both by a provision applying to property which is comprised within the deceased's

(1) (1944) 69 C.L.R. 270.

(2) (1950) 81 C.L.R. 199.

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personal estate at his death and by a provision applying to an interest which, though it did not belong absolutely to the deceased, he "had" at his death under provisions (of a settlement or agreement made by him) which then or thereafter caused it to pass or accrue to or devolve upon some other person. Moreover, their Lordships expressed grave doubt whether s. 8 (4) (*e*) could be applied, considering only its language. Although the partnership interest of the deceased in this case did, in the event, pass to the surviving partners at a date after his death, it did so only because the options were exercised and contracts of sale were thereby brought into being between the legal personal representatives and the option-holders. Such a transaction seemed to their Lordships somewhat remote from a transaction of the kind which s. 8 (4) (*e*) appeared to contemplate.

The case is therefore very different from *Milne's Case* (1), but their Lordships found it necessary to overrule that case, because it stood in the way of the proposition which in their view was crucial. That is the proposition that where a partnership agreement provides that on a partner's death his share in the capital shall be diminished, or may be taken over by the other partners at less than its value, the amount of the diminution or of the subtraction from value being dictated by a provision that the value of the goodwill of the partnership business shall not be taken into account in favour of the share in a winding-up, or in the computation of the purchase price to be paid for the share, the interest in assets which the share confers does not become on the partner's death an interest restricted to the assets other than goodwill; it remains an interest in every one of the assets, including goodwill. For the same reason the case of *Attorney-General* v. *Boden* (2) was disapproved in so far as it was authority for the view that where a partnership deed provides that no allowance for goodwill shall be made to a partner or his estate upon his death his interest in goodwill is not property which passes on his death, but is property in which the partner has an interest which ceases on his death: see the paragraph which begins at the foot of p. 555. Their Lordships dealt with the point in this sentence: "In their opinion the deceased partner's interest in goodwill in such a case must pass with his interest in the other assets to his legal personal representative, and the fact that its value is not to be taken into account in calculating the price receivable by the estate for his interest in the partnership is irrelevant" (3). It is irrelevant, that is to say, to the question

(1) (1944) 69 C.L.R. 270.
(2) (1912) 1 K.B. 539.
(3) (1954) A.C. 114, at p. 131; (1954) 88 C.L.R. 434, at p. 446.

whether an interest in goodwill forms, together with his interest in the other partnership assets, part of the estate which is in fact his at his death.

We were pressed by counsel for the commissioner to read certain passages in the Privy Council's judgment as meaning, not only that the deceased's interest in the partnership assets was caught by s. 8 (3) (*b*), but that in valuing it for duty no account should be taken of the existence of the provision excluding the value of goodwill from consideration in the computation of the price to be paid upon the exercise of the options of purchase. For instance, the word "irrelevant" in the passage which has just been quoted was relied upon as if it meant irrelevant for all purposes in the assessment of estate duty. The context shows that this is not so. The suggestion, put strongly on behalf of the commissioner, was that the Privy Council intended to hold that the option provisions of the partnership deed had no effect upon the extent of the proprietary interest which passed to the deceased's executor on his death. The view which was attributed to their Lordships was that an agreement between partners whereby on the death of one an option to purchase his share at less than its value is given to the survivors is unlike a mortgage or a binding contract of sale, which admittedly would leave the mortgagor or vendor with less than an absolute interest in the property mortgaged or sold, and that such an agreement, though it binds the partners personally, does not affect anyone else, such as the commissioner. It was conceded that a binding option of purchase in respect of a share in a partnership creates an equitable interest in that share, and indeed *Rich* and *Williams* JJ. had so held in *Milne's Case* (1); so that if the options in question here had been given for value to strangers, then (assuming that their exercise would result in contracts enforceable in equity) the effect of granting them would have been that the partner's estate on his death could not include any more in respect of the partnership than his share shorn of the equitable interest vested in the optionees. But the situation was said to be different where the options arise under the provisions of the partnership deed itself. So it is. Such a case is not one in which a person entitled to a share in a partnership has carved an interest out of that share and disposed of it by a dealing which equity will enforce. But neither is it a case in which a share in a partnership exists as something independent of the rights and obligations created by the option provisions, so that those provisions are to be disregarded in ascertaining the extent of the interest of the partner

(1) (1944) 69 C.L.R. 270, at pp. 285, 298.

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in the partnership property. The following passage in the dissenting judgment of *Rich* J. in *Sharp* v. *Union Trustee Co. of Australia Ltd.* (1) accurately states all that need be said on this point: "Business partners own between them the whole of the partnership assets, and each partner has a proprietary interest in each and every item. But his interest is not a fixed proportion of each item, nor is it an immediately ascertainable quantity of the item. It is an indefinite and fluctuating interest, which at any given moment is in proportion to his share in the ultimate surplus coming to him if at that moment the partnership were wound up and its accounts taken (*Ashworth* v. *Munn* (2); *Marshall* v. *Maclure* (3); *Manley* v. *Sartori* (4); *In re Fuller's Contract* (5); *Trustees Executors & Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (6)). No doubt, as between himself and his partners, his interest in individual items is subject to their right to have all the assets of the partnership for the time being dealt with in accordance with the partnership agreement, but his interest in them is none the less real for that (*In re Holland*; *Brethel* v. *Holland* (7))" (8).

Now there is nothing in the Privy Council's judgment in the present case which conflicts in the least with these well-recognized principles. Nowhere did their Lordships say or imply that the deceased at his death had an asset consisting of an interest in goodwill which was unaffected by the existence of the rights conferred on the surviving partners by the option clauses. They did hold that the estate included the same interest in the goodwill as in the other assets, but the estate's interest in the other assets too was subject to the option clauses. The whole point of the judgment is that the existence of the option clauses in the partnership deed meant that the extent of the interest which the deceased and his estate had in all the assets was less than it would otherwise have been, and not that after the death of the deceased it was an interest in less than all the assets. The notion that the reasons given by their Lordships precluded the appellant from contending that in the valuation of the deceased's interest in the partnership that interest should be treated, by reason of the option provisions, as less than a full nineteen and a half per cent interest finds no support in any of the passages upon which reliance was placed, and cannot be reconciled with the express statement that the reference back to this Court would enable the appellant (in the events which have now happened) to allege that "the existence

(1) (1944) 69 C.L.R. 539.
(2) (1880) 15 Ch. D. 363, at pp. 369, 370.
(3) (1885) 10 App. Cas. 325, at p. 334.
(4) (1927) 1 Ch. 157, at pp. 163, 164.
(5) (1933) Ch. 652, at p. 656.
(6) (1944) 69 C.L.R., at p. 285.
(7) (1907) 2 Ch. 88, at p. 91.
(8) (1944) 69 C.L.R., at p. 551.