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Australian No 4

36, 1953

No. 9 of 1953.

In the Privy Council.

**ON APPEAL**  
FROM THE HIGH COURT OF AUSTRALIA.

UNIVERSITY OF LONDON  
W.C.1.  
-9 OCT 1956  
INSTITUTE OF ADVANCED  
LEGAL STUDIES

44496

BETWEEN—

THE COMMISSIONER OF STAMP DUTIES  
OF THE STATE OF NEW SOUTH WALES  
*Appellant*

— AND —

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HAZEL MAY PEARSE, THOMAS ARCHDALL  
LANGLEY and PERPETUAL TRUSTEE  
COMPANY (LIMITED) *Respondents.*

**CASE FOR THE APPELLANT.**

RECORD.

1. This is an Appeal by special leave from a Judgment of the High Court of Australia dated the 27th July, 1951, affirming a Judgment of the Supreme Court of New South Wales dated the 30th October, 1950. The Appeal arises upon a Case stated by the Appellant under Section 124 of the New South Wales Stamp Duties Act 1920-1940.

p. 33.  
p. 22.

2. The question for decision is whether in valuing for the purposes of the assessment and payment of Death Duty under the said Act, 2,986 "B" Ordinary Shares in a Company called Plashett Pastoral Co. Pty. Limited (hereinafter called "the Company") forming part of the estate of the late Henry Bowen Aylmer Pearse (hereinafter called "the Deceased"), who died on the 19th February, 1946, the Appellant was justified in exercising the discretion conferred upon him by paragraph (c) of Section 127 (1) of the said Act to value such Shares upon a liquidation basis. Although so framed, the said question was treated, both in the Supreme Court of the State of New South Wales, and, on appeal therefrom, in the High Court of Australia, as involving the question whether, in such circumstances, the Court has jurisdiction to

p. 12, l. 12.

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substitute its own discretion for that conferred on the Appellant by the said paragraph as to the mode of valuation.

p. 2, l. 11. 3. The facts, briefly summarised, are as follows. The Company was incorporated in 1913 under the Companies Act, 1899, to acquire the station property known as "Plashett", then owned by the Deceased's father (who died in 1927), and to carry on the business of a pastoralist, station owner, grazier, farmer, land owner, agriculturist, or any branch or department of such business. The Company duly acquired the said station property and has ever since run the same as a pastoral business. It became a proprietary company on the 21st June, 1937. 10

p. 2, l. 19. 4. The capital of the Company is £72,000 divided into 9,000 shares of £8 each, of which, at the date of the death of the Deceased, 8,007 had been issued, and were fully paid, namely: 800 "A" 6% Cumulative Preference Shares (all held by the Deceased, and as to which no question arises for decision in this Appeal), and 7,207 "B" Ordinary Shares, of which 2,986 were held by the Deceased, and are the shares in question, and the remainder were distributed as follows:—

301	J. W. Pearse	}	Brother and sisters of the Deceased.	20
1,000	Mrs. M. M. Nash			
1,000	Mrs. I. J. Crane			
1,000	Mrs. S. A. K. McKenzie			
1	A. E. McKenzie		Husband of S. A. K. McKenzie.	
111	Mrs. J. A. L. Restall	}	Daughters of A. E. and S. A. K. McKenzie.	
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.	30
83	Reverend L. L. Nash			
83	Reverend C. J. Nash			
1	T. A. Langley		Solicitor.	

p. 3, l. 25. 5. The Directors of the Company, at the date of the death of the Deceased, were the Deceased, F. L. Crane and A. E. McKenzie.

p. 3, l. 30. 6. The Articles of Association of the Company contain elaborate provisions restricting transfers of shares not made in favour of any

p. 5, l. 31.

existing member or any issue, parent, brother, sister, nephew, niece, or spouse of any member or deceased member, or of any executor, administrator, or trustee for the time being of the Will of any deceased member; in addition, the Directors may refuse to register any transfer of any shares upon any other ground which to them shall seem sufficient and they are not obliged to assign any reason for their refusal. The Articles *inter alia*, also provide that every question submitted to a meeting shall be decided by a show of hands, unless a poll is demanded; and that on a poll every member shall have one vote for every share held by him.

p. 4, l. 10.

p. 6, l. 35.

- 10 The Articles named the Deceased's father, the Deceased, and one Harley Usill Mackenzie, as the first Directors of the Company, and provided that each of them should be entitled to retain office permanently and could only cease to be a Director if he were found a lunatic or of unsound mind or if he resigned his office in writing; they were not subject to the provisions of the Articles under which other directors could be made to vacate their office. The Articles entitled the Deceased, after the death of his father, to act as Managing Director and Chairman of Directors of the Company during his lifetime, and empowered him at any time and from time to time to appoint any other person to be a
- 20 Director but so that the total number of Directors should not at any time exceed three. The effect of the Articles is that in the event of a surplus of net assets in a winding-up, such surplus shall be applied first in repaying in full the nominal paid-up value of the "A" Cumulative Preference Shares, next in repaying in full the nominal paid-up value of the "B" Ordinary Shares, and that any excess thereafter shall be distributed amongst the members in proportion to the capital paid up on the shares held by them respectively.

p. 7, l. 8.

p. 8, l. 5.

p. 7, l. 12.

p. 3, l. 36.

p. 9, l. 37.

7. The Company has thus at all material times been what, in the Judgments in the Supreme Court of New South Wales and in the High Court of Australia, was described as "a family company in every sense 'of the term'; and the shares of the Company were so held that a very few members of the family could have passed a Resolution for its voluntary liquidation.
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8. By reason of a number of the above-mentioned Articles the shares in the Company cannot be listed on the Stock Exchange. The only sales of "B" Ordinary Shares which have taken place in recent years are as follows:—

p. 10, l. 12.

p. 10, l. 39.

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|----|---------------------|--|--|
| 40 | 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 the nearest penny. |  |

9. The value of the "B" Ordinary Shares in the Company forming part of the Deceased's estate was set forth in the account lodged by the

p. 10, l. 17.

Respondents (who are the Executors of the Deceased) as required by Section 117 of the New South Wales Stamp Duties Act, 1920-1940 as being £2 6s. 6d. each. Attached to the said account was a valuation of such shares by a firm of Chartered Accountants in Sydney, which showed that such value had been reached by averaging the profit and loss of the Company over the five years from the 1st July, 1940, to the 30th June, 1945, and capitalising the balance of it, after deducting the preferential dividend, at 7%. The figures of profit and loss taken for this purpose were:—

p. 19.	Year ended 30th June 1941—Loss	£2,253	10
	” ” ” ” 1942—Profit	£2,304	
	” ” ” ” 1943— ”	£2,761	
	” ” ” ” 1944— ”	£3,639	
	” ” ” ” 1945— ”	£1,006	
		to the nearest £.	

On the basis of a statement of the taxable income of the Company and the income taxes assessed thereon furnished to the Appellant by the Respondents, and of detailed calculations made at the instance of the Appellant, the following adjusted figures of profit and loss for the said five years and the year ended 30th June, 1946 (during which the 20 Deceased died) were obtained:—

	Year ended 30th June 1941—Loss	£2,063
	” ” ” ” 1942—Profit	£2,193
	” ” ” ” 1943— ”	£3,676
	” ” ” ” 1944— ”	£5,046
	” ” ” ” 1945— ”	£1,750
	” ” ” ” 1946— ”	£7,338
		to the nearest £.

- p. 11. 10. The Appellant determined in respect of the shares in the Company forming part of the Deceased's estate to issue an assessment in accordance with the provisions of Section 127 (1) (c) of the New South Wales Stamp Duties Act, 1920-1940, and in so doing he valued the "B" Ordinary Shares at £7 16s. 10d. per share, this being the sum which in the opinion of the Appellant the holder of a "B" Ordinary Share would have received in respect of that share if the Company had been voluntarily wound up on the date of the death of the Deceased (19th February, 1946). The Appellant arrived at this valuation by taking the value of the Company's land and live stock at their Federal Land Tax departmental value, and the value of its other assets at their book value less 10% deducting therefrom the Company's liabilities and such 40 expenses as would be incurred in a voluntary winding-up, and, after deduction of the amount paid-up on the "A" Cumulative Preference Shares, dividing the resulting balance by the number of the issued "B" Ordinary Shares of the Company.
- p. 11, l. 9.

11. Being dissatisfied with such assessment the Respondents on the 6th August, 1948, delivered to the Appellant notice in writing requiring him to state a Case for the opinion of the Supreme Court of New South Wales. The Appellant accordingly stated such Case on the 2nd August, 1950. p. 12, l. 7.

12. Several questions were submitted for the opinion of the Court by the said Case, of which the following only is the subject of this Appeal:— p. 12, l. 10.

10 Whether in valuing the 2,986 "B" Ordinary Shares in the Company the Appellant was justified in exercising the discretion conferred upon him by Section 127 (1) (c) of the Stamp Duties Act, 1920-1940 to value such shares upon a liquidation basis.

13. The relevant provisions of the said Act are, so far as material, as follows:—

#### SECTION 101.

In the case of every person who dies after the passing of this Act, whether in New South Wales or elsewhere, and wherever the deceased was domiciled, duty, hereinafter called "death duty", at the rate mentioned in the Third Schedule to this Act shall be assessed and paid:—

20 (a) upon the final balance of the estate of the deceased, as determined in accordance with this Act. . . . .

#### SECTION 102.

For the purposes of the assessment and payment of death duty but subject as hereinafter provided, the estate of a deceased person shall be deemed to include and consist of the following classes of property:—

(1) (a) All property of the deceased which is situate in New South Wales at his death and in addition where the deceased was domiciled in New South Wales all personal property of the deceased situate outside New South Wales at his death. . . . .

#### 30 SECTION 104.

The estate of a deceased person constituted as provided in sections one hundred and two and one hundred and three is in this Act referred to as his dutiable estate.

#### SECTION 105.

(1) 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 hereinafter authorised in respect of the debts of the deceased.

(2) 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 death of the deceased.

SECTION 117.

(1) No probate or letters or other administration of the estate of any deceased person shall be granted unless the applicant lodges with his application an affidavit of value in the prescribed form verifying an account containing the prescribed particulars with respect to the dutiable estate of the deceased and all allowances claimed in respect of debts owing by the deceased at the time of his death. 10

(2) The Registrar of the Probate Jurisdiction of the Supreme Court shall transmit to the Commissioner (of Stamp Duties of the State of New South Wales) every such affidavit and account. . . .

(3) The applicant shall furnish the Commissioner with such other evidence, including valuations by competent valuers, as may be prescribed or as the Commissioner may in any case require to enable him to ascertain all the property liable to death duty and the value thereof, and all allowances to be made in respect of debts owing by the deceased, and to assess the duty payable.

SECTION 124.

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(1) . . . . any administrator liable to the payment of death duty, who is dissatisfied with the assessment of the Commissioner may, within thirty days after . . . . . notice of the assessment has been given to the administrator . . . . , and on payment of duty in conformity with the assessment, and of the sum of Twenty Pounds as security for costs, deliver to the Commissioner a notice in writing requiring him to state a case for the opinion of the Supreme Court.

(2) The Commissioner shall thereupon state and sign a case accordingly, setting forth the facts before him on making the assessment, the assessment made by him, and the question to be decided, and shall 30 deliver the case so signed to the person by whom the same is required (hereinafter referred to as the appellant).

(3) The appellant shall within seven days after receiving the case cause the same to be set down for hearing before the next sittings of the Full Court at which the same can be heard.

(4) 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.

(5) If it is decided by the court that the assessment of the Commissioner is erroneous, any excess of duty paid in conformity with such 40 erroneous assessment, together with any fine paid in consequence

thereof, and the sum paid as security for costs shall be ordered by the court to be repaid to the appellant.

10 (6) If it appears to the court that the facts necessary to enable the questions submitted to be determined are not sufficiently set forth in the case or that such facts are in dispute, the court may direct all such inquiries to be made or issues to be tried as it deems necessary in order to ascertain such necessary facts, and, if it deems fit, may amend the case. Any such inquiry may be made before a Judge of the court or the Master in Equity and, any such issue may be tried by any such Judge  
or a Judge of any District Court sitting either with or without a jury as the court may direct.

(7) On the hearing of the case the court shall be at liberty to draw from the facts and documents stated in the case any inference whether of fact or law which might have been drawn therefrom if proved at a trial.

#### SECTION 125.

20 (1) In every case in which the Commissioner deems it necessary to ascertain the value of any property for the purpose of assessing duty under this Act he may ascertain such value by such means as he thinks fit, subject in the case of land or any interest therein the value of which exceeds Two Hundred Pounds to the Valuation of Land Act, 1916.

. . . . .

(3) The Commissioner may assess the duty payable on the footing of the value so ascertained as aforesaid, subject to appeal therefrom in accordance with Section one hundred and twenty-four.

#### SECTION 127.

30 (1) (a) For the purposes of this Act, the valuation of shares in any company, whether incorporated in or out of New South Wales, shall be made upon the basis that the memorandum and articles of association or rules of the company satisfy the requirements prescribed by the committee or governing authority of the stock exchange at the place where the share register in which the shares being valued are registered is, to enable that company to be placed on the current official list of such stock exchange at the relevant time.

(b) No provision in the memorandum or articles of association or rules of any company whereby or whereunder the value of the shares of a deceased or other member is to be determined shall be applicable in determining the value of the shares for the purposes of this Act.

40 (c) Notwithstanding anything contained in the foregoing provisions of this sub-section 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 that date upon which the value of the share is to be ascertained for the purposes of this Act . . . . .

p. 22, l. 16.

14. The Case was heard in the Supreme Court of New South Wales on the 5th and 6th October, 1950, before Street C. J. and Maxwell and Owen JJ., who on the 30th October, 1950, answered the said question "No".

p. 23, l. 3.

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15. Reasons for the Judgment were given by the Chief Justice and by Owen J. With these reasons Maxwell J. agreed. The reasons shortly were:—

p. 26, l. 24.

p. 25, l. 43.

(1) That the point as to whether the Court was entitled to substitute its own discretion for that of the Appellant was concluded against the Appellant by the decision in *The Commissioner of Stamp Duties for Queensland v. Beak* (46 C.L.R. 585); for Section 124 of The New South Wales Stamp Duties Act was in terms wider than the language of the Queensland Statute under consideration in *Beak's case*; in the words of the Chief Justice, "Section 124 in itself "does not confine the question to be submitted to one of law, but "the whole matter is committed to the Court to consider from the "point of view of issues of fact as well as questions of law, and the "Court itself is required to assess the duty properly payable either in "accordance with the facts as stated by the Commissioner or in "accordance with the facts as found upon 'investigation by the "Court"; and

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p. 27, l. 20.

p. 27, l. 40.

(2) That, as to the point whether, on the facts as stated in the present case, the Appellant was justified in exercising the discretion conferred upon him by Section 127 (1) (c), the cases of *Abrahams v. Federal Commissioner of Taxation* (70 C.L.R. 23), *McCathie v. Federal Commissioner of Taxation* (69 C.L.R. 1), and *Federal Commissioner of Taxation v. Sagar* (71 C.L.R. 421), decided in relation to the Commonwealth Estate Duty Assessment Act, Section 16A (1) of which closely corresponded to Section 127 (1) (c) of the New South Wales Stamp Duties Act, established that the proper method of valuation in a case of the present kind was to endeavour to ascertain the price which a willing but not anxious vendor could reasonably expect to obtain, and a hypothetical willing but not anxious purchaser could reasonably expect to have to pay, for the shares, if they had got together and agreed on a price in friendly negotiation, having regard to the fact that "a prudent purchaser "does not buy shares in a company which is a going concern with

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“a view to winding it up, so that the more important item is the  
 “determination of the probable profit which the company may be  
 “reasonably expected to make in the future . . .”; it was only in  
 rare cases that it was proper to use the discretion conferred by  
 Section 127 (1)(c) —one instance might be where the deceased held  
 or controlled sufficient shares to enable him to pass a Special  
 Resolution that the company be wound up voluntarily; and in the  
 present case the Appellant was not entitled to approach the question  
 of valuation on the assumption that something would happen which  
 nobody suggested was likely to happen

p. 28, l. 10.

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16. The Appellant filed a Notice of Appeal to the High Court of  
 Australia against the said Judgment of the Supreme Court of New  
 South Wales, and the Appeal was heard on the 19th, 20th and 23rd  
 April, 1951, before Dixon C.J., and McTiernan, Williams, Webb and  
 Fullagar JJ., who on the 27th July, 1951, dismissed the Appeal.

p. 33, l. 20.

17. Only one Judgment (prepared by Williams J.) was delivered on  
 the question which is the subject of the present Appeal; the other  
 members of the Court concurred in it. In that Judgment it was held:—

p. 40, l. 7.

(1) That the decisions cited for the Appellant in support of his  
 contention that the Court had in this case no jurisdiction to substi-  
 tute its discretion for his (namely *Pioneer Laundry and Dry  
 Cleaners Ltd. v. Minister of National Revenue* (1940) A.C. 127,  
*Minister of National Revenue v. Wrights Canadian Ropes Limited*  
 (1947) A.C. 109; *D. R. Fraser & Co. Ltd. v. Minister of National  
 Revenue* (1949) A.C. 24, *MacCormick v. The Federal Commissioner  
 of Taxation* (71 C.L.R. 283) and *Denver Chemical Manufacturing  
 Co. v. Commissioner of Taxation* (79 C.L.R. 296) ) were distinguish-  
 able because of the wide powers conferred upon the Court by  
 Section 124 of the New South Wales Stamp Duties Act; “clear  
 “words”, it was said, “would be needed to withdraw from the  
 “general power of review given by Section 124 a particular process  
 “in making up the assessment essential to the result”; and

p. 42, l. 29.

p. 44, l. 6.

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(2) On the question whether it was proper, in the present case,  
 for the Appellant to exercise his discretion under Section 127 (1) (c),  
 that to value shares in a company which was a going concern on  
 the basis that the company was in liquidation at the date of death  
 savoured of unreality and was not calculated to produce a fair  
 value; it was more likely to produce a false value; scope for the use  
 of the provision contained in Section 127 (1) (c) might be found  
 in cases where a company’s operations did not produce income  
 which could be regarded as affording any measure of the value of  
 the shares, as well might be the case with an asset company or a  
 company whose earning capacity was restricted or diminished

p. 44, l. 24.

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temporarily or by accidental circumstances; and reference was made to the decision in *Commissioner of Succession Duties (S.A.) v. Executor Trustee and Agency Co. of S.A.* (74 C.L.R. 358) and to a passage in the speech of *Lord Simon in Gold Coast Selection Trust Ltd. v. Humphrey* (1948) A.C. 459 at pp. 472-473.

18. The Appellant submits that the Judgments of the Supreme Court of New South Wales and of the High Court of Australia appealed from are wrong and ought to be reversed for the following amongst other

### REASONS.

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1. (1) BECAUSE an exercise by the Appellant of his discretion under Section 127 (1) (c) is not open to review by the Court upon a case stated under Section 124, in the sense that the Court has no jurisdiction to substitute its own discretion for his, unless it is established that he has exercised his discretion on wrong legal principles or *mala fide* or so irrationally that in law it is no exercise of the discretion at all;
- (2) BECAUSE to hold the contrary view is contrary to a line of cases of high authority namely *Pioneer Laundry and Dry Cleaners Ltd. v. Minister of National Revenue*, *Minister of National Revenue v. Wrights Canadian Ropes Ltd.*, *D. R. Fraser & Co. Ltd. v. Minister of National Revenue*, *MacCormick v. The Federal Commissioner of Taxation*, and *Denver Chemical Manufacturing Co. v. Commissioner of Taxation*; 20
- (3) BECAUSE *The Commissioner of Stamp Duties for Queensland v. Beak* is no authority for the contrary view, for, in that case, neither the Supreme Court of Queensland nor the High Court of Australia even considered, far less dealt with, the method of valuation: they merely reviewed 30 the actual valuation, which they were justified in doing because, in that case, the valuation had been made in an irrational manner;
- (4) BECAUSE, if *Beak's Case* is authority for the contrary view, then it ought to be overruled, because (i) it is contrary to the line of cases of high authority already referred to, and (ii), as a matter of construction of Sections 124 and 127 of the New South Wales Stamp Duties Act, such view is erroneous;

- (5) BECAUSE the cases of high authority already referred to are not distinguishable on the ground stated by the High Court of Australia in the present case, or on any other ground; in particular the powers of review given to the Courts by the Statutes which were in question in *MacCormick v. Federal Commissioner of Taxation* and *Minister of National Revenue v. Wrights Canadian Ropes* are at least as wide as those given to the Court by Section 124 of the New South Wales Stamp Duties Act;
- 10      2. BECAUSE in the present case there was no reason to hold that the Appellant had exercised his discretion on wrong legal principles or *mala fide* or so irrationally as aforesaid;
3. BECAUSE, if, contrary to the Appellant's contention, the Court is entitled to substitute its discretion for his, it should in the present case have reached the same conclusion as he did, that is to say that the said 2,986 "B" Ordinary Shares should be valued on a liquidation basis, because:—
- 20      (1) Although there is no evidence that liquidation of the Company was contemplated, the shareholdings of the members were such that the Company could have been put into liquidation by a very few persons all related to each other;
- (2) The Company is a pastoral company owned by a small family group and there is no real difference between the position of a person owning a proportion of the shares in such a company and that of one who is a member of a family partnership owning a similar station property, and it is illogical that there should be different results
- 30      (3) There was a sudden increase in the profits of the Company in the financial year in which the Deceased died, rendering it difficult to value the shares accurately on a profit and loss basis;
- (4) *Abrahams v. Federal Commissioner of Taxation*, *McCathie v. Federal Commissioner of Taxation*, and *Federal Commissioner of Taxation v. Sagar* (the cases, cited by the Supreme Court of New South Wales, which were decided in relation to the Commonwealth Estate Duty Assessment Act) are not authority on the question
- 40      when it is proper for the Appellant to exercise his discretion under Section 127 (1) (c) of the New South Wales Stamp Duties Act, for the first two related to the estates of persons who had died before the corresponding Section of the Commonwealth Estate Duty Assessment

Act (namely Section 16A) was introduced, and in the third the discretion under Section 16A had in fact not been exercised; and in any event, having regard to its wording, Section 16A would necessarily apply in a more restricted class of case;

- (5) If *Abraham's Case*, *McCathie's Case*, and *Sagar's Case*, or any of them, are authority for the view that it is not proper for the Appellant to exercise his discretion under Section 127 (1) (c) in a case such as this, then they, or it, should be overruled, because such view ignores the weight which should be given to an express unqualified statutory authority; 10
- (6) The authorities cited by the High Court of Australia in the present case in support of the view that it was not proper for the Appellant to exercise his discretion under Section 127 (1) (c) are not truly in point, because neither of them was concerned with a statutory provision corresponding to Section 127 (1) (c);
- (7) The express authority of Section 127 (1) (c) would not be needed to deal appropriately with cases where the liquidation of the company was contemplated, or where the deceased held or controlled sufficient shares to enable him to put the company into voluntary liquidation, or where the company's operations did not produce income which could be regarded as affording any measure of the value of the shares; 20

- 4. BECAUSE the Judgments of the Supreme Court of New South Wales and of the High Court of Australia appealed from were wrong and ought to be reversed.

FRANK SOSKICE.

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E. B. STAMP.

In the Privy Council.

**ON APPEAL**

FROM THE HIGH COURT OF AUSTRALIA.

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BETWEEN—

**THE COMMISSIONER OF STAMP  
DUTIES OF THE STATE OF NEW  
SOUTH WALES . . .** *Appellant*

— AND —

**HAZEL MAY PEARSE, THOMAS  
ARCHDALL LANGLEY, and  
PERPETUAL TRUSTEE COMPANY  
(LIMITED) . . .** *Respondents.*

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**CASE FOR THE APPELLANT.**

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