36, 1953

No. 9 of 1953.

In the Privy Council.

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

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.*

RECORD OF PROCEEDINGS

LIGHT & FULTON,
24 JOHN STREET,
BEDFORD ROW,
LONDON, W.C.1,
Solicitors for the Appellant.

BURTON, YEATES & HART,
23 SURREY STREET,
LONDON, W.C.2,
Solicitors for the Respondents.

The Solicitors' Law Stationery Society, Limited, Law and Parliamentary Printers, Abbey House, S.W.1. WL3775-56469

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INDEX OF REFERENCE

DOCUMENTS TRANSMITTED WITH THE RECORD BUT NOT PRINTED

DESCRIPTION OF DOCUMENT	DATE
IN THE HIGH COURT OF AUSTRALIA.	
Notice of Appeal	20th December 1950
Notice of Cross-Appeal	19th April 1951 ..

No. 9 of 1953.

In the Privy Council.

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA.

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.*

RECORD OF PROCEEDINGS.

In the Supreme Court of New South Wales.

No. 1. Case Stated, 2nd August 1950.

No. 1.

CASE STATED.

IN THE SUPREME COURT OF NEW SOUTH WALES.

Term No. 223 of 1950.

IN THE MATTER of the ESTATE of HENRY BOWEN AYLMER PEARSE, late of Jerry's Plains in the State of New South Wales, Company Director, deceased

and

IN THE MATTER of the Stamp Duties Act 1920–1940.

Between HAZEL MAY PEARSE, THOMAS ARCHDALL LANGLEY, and PERPETUAL TRUSTEE COMPANY (LIMITED) . . . . Appellants

and

THE COMMISSIONER OF STAMP DUTIES Respondent.

CASE STATED

pursuant to section 124 of the Stamp Duties Act 1920–1940.

1. Henry Bowen Aylmer Pearse (sometimes known as Henry Aylmer Bowen Pearse) late of Plashett, Jerry's Plains, in the State of New South Wales, Company Director (hereinafter called the Testator) died on the nineteenth day of February 1946 leaving a will dated the seventeenth day

In the Supreme Court of New South Wales.

No. 1. Case Stated, 2nd August 1950, *continued.*

of February 1946 whereby he appointed Hazel May Pearse, Thomas Archdall Langley and Perpetual Trustee Company (Limited) executrix, executors and trustees thereof (hereinafter referred to as the executors).

2. On the thirtieth day of May 1946 probate of the said will was granted by this Honourable Court in its Probate Jurisdiction to the said executors.

3. The estate of the testator comprised, *inter alia*, 800 " A " Cumulative Preference Shares each fully paid to £8 and 2,986 " B " ordinary Shares each fully paid to £8 in Plashett Pastoral Co. Pty. Limited (hereinafter called the Company).

4. The Company was incorporated in 1913 under the Companies Act 1899, under the name Plashett Pastoral Co. Limited being formed principally to acquire the station property known as Plashett then owned by the Testator's father, one William Pearse, and to carry on in all its branches the business of a Pastoralist, Station owner, Grazier, Farmer, Land Owner, Agriculturist or any branch or department of such business. The Company became a proprietary company on the twenty-first day of June 1937.

5. The Capital of the company is £72,000 divided into 9,000 shares of £8 each and shortly after incorporation shares were issued as follows :

On the 2nd September 1913

William Pearse	1	Ordinary	" B "	Share
Kathleen Isabella Pearse	1	,,	,,	,,
Isabella Jane Crane	1	,,	,,	,,
Elizabeth Archdall Pearse	1	,,	,,	,,
Harley Usill Mackenzie	1	,,	,,	,,
Joseph William Pearse	1	,,	,,	,,
Henry Aylmer Bowen Pearse ..	1	,,	,,	,,

and on the 13th day of December 1913

William Pearse	1,200	Ordinary	" B "	Shares
Kathleen Isabella Pearse	800	Preference	" A "	,,
Joseph William Pearse	1,000	Ordinary	" B "	,,
Isabella Jane Crane	1,000	,,	,,	,,
Elizabeth Archdall Pearse	1,000	,,	,,	,,
Sarah Aphra Kathleen Mackenzie ..	1,000	,,	,,	,,
M. Nash	1,000	,,	,,	,,
Henry Aylmer Bowen Pearse ..	1,000	,,	,,	,,
	8,007			

6. The Company duly acquired the said station property and has ever since run the same as a pastoral business.

7. At the date of the testator's death 8,007 of the Company's shares had been issued and no more, namely :—

800 " A " Cumulative preference shares and 7,207 " B " ordinary shares and were held as follows :—

Pref.	*Ord.*		
800	2,986	H. B. A. Pearse	
	301	J. W. Pearse	
	1,000	Mrs. M. M. Nash	Brothers and Sisters
	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
	83	Reverend L. L. Nash	
	83	Reverend C. J. Nash	
	1	T. A. Langley	
800	7,207		

8. The said William Pearse died on the eleventh day of May 1927.

9. At the date of the Testator's death the Directors of the Company were the Testator, Frank Leslie Crane, who was appointed by the Company in general meeting on the twenty-fifth day of August 1927 and Allan Ewer Mackenzie who was appointed by the Company in general meeting on the twenty-eighth day of August 1929.

10. The Articles of Association provide, *inter alia*, as follows :—

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

" 10. The profits or dividends declared by the Company shall be calculated and payable as to the ' A ' and ' B ' shares on their nominal paid up value but as to all other shares only in proportion

In the Supreme Court of New South Wales.

No. 1. Case Stated, 2nd August 1950, *continued.*

to so much capital including premiums if any received by the Company as shall for the time being be actually paid up thereon or received in respect thereof by the Company."

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

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

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

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

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

" 32. Except where the transfer is made pursuant to Clauses 31 or 38 hereof the person proposing to transfer any shares shall give notice in writing (hereinafter called the transfer notice) to the Company that he desires to transfer the same. Such notice shall specify the sum he fixes as the fair value, and shall constitute the Company his agent for the sale of the share to any member of the Company or persons elected as aforesaid at the price so fixed, or at the option of the purchaser at the fair value to be fixed by the auditor or auditors in accordance with these Articles. The Transfer notice may include several shares and in such case shall operate as if it were a separate notice in respect of each, and shall be accompanied by the Certificates for such shares. The Transfer notice shall not be recoverable (*sic.* revocable) except with the sanction of the Directors."

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

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

THESE ARE THE ONLY PAPERS AVAILABLE IN THIS APPEAL.

Privy Council Office.

costs of such valuation shall be paid by the proposing transferor or the purchasing member or partly by each as the auditor shall in his discretion think proper."

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

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

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

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

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

" 65. Every such requisition shall specify the object of the meeting required, and shall be signed by the members making the same and deposited at the office. It may consist of several documents in like form each signed by one or more of the

In the Supreme Court of New South Wales.

No. 1. Case Stated, 2nd August 1950, *continued.*

requisitionists. The meeting must be convened for the purposes specified in the requisition and if convened otherwise than by the Directors for those purposes only."

" 66. In case the Directors for fourteen days after such deposit fail or refuse to convene an extraordinary general meeting to be held within 28 days from the date of the requisition being so deposited, the requisitionists, or any other members holding the like proportion of issued capital may convene a meeting to be held within 42 days of such deposit."

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

" 68. Any meeting convened under Clauses 66 or 67 hereof by the requisitionists shall be convened in the same manner as nearly as possible as that in which meetings are to be convened by Directors."

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

" 74. The Chairman of Directors shall be entitled to take the chair at every general meeting, or, if there be no such chairman, or if at any meeting he shall not be present within fifteen minutes after the time appointed for holding such meeting, the members present shall choose one of the other Directors as chairman, or, if at any meeting no Directors shall be present within the same time, or if all the Directors present decline to take the chair, the members present shall then choose one of their number to be chairman."

" 76. Every question submitted to a meeting shall be decided in the first instance by a show of hands, and in case of an equality of votes the chairman shall both on show of hands and at a poll have a casting vote in addition to the vote or votes to which he may be entitled as member."

" 77. At any general meeting, unless a poll is demanded by a member entitled to vote holding at least 500 shares, or by two or more members entitled to vote holding at least 500 shares in the aggregate, a declaration by the chairman that a resolution has been carried or carried by a particular majority, or lost or not carried by a particular majority, and an entry to that effect in the book of proceedings of the Company, shall be conclusive evidence of the fact without proof of the number or proportion of the votes recorded in favour of or against such resolution."

" 82. On a show of hands every member present personally or by proxy or by attorney shall have one vote, and upon a poll every member present in person or by proxy, attorney, or agent shall have one vote for every share held by him. Where a corporation being a member is present by a proxy who is not a member such proxy shall be entitled to vote for such corporation on a show of hands."

" 92A. The number of Directors shall be three."

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

" 94A. The said William Pearse and after his resignation or death the said Henry Aylmer Bowen Pearse and after his resignation or death the Directors shall have power at any time and from time to time to appoint any other person to be a Director but so that the total number of Directors shall not at any time exceed the maximum fixed as above."

" 95. The qualification of a Director shall be the holding of at least one share in the Company. A Director may hold any other office under the Company except that of auditor on such terms as to remuneration or otherwise as the Directors may arrange. A Director shall be repaid all travelling expenses when engaged in the business of the Company."

" 96. The Directors for the time being shall continue to hold office subject only to Clause 100 hereof."

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

" 99. Any vacancy occurring among the Directors may be filled up by the Company in general meeting. The continuing Directors may act notwithstanding any vacancy in their body and notwithstanding that their number may be reduced below the minimum number fixed above."

" 100. The office of Director shall *ipso facto* be vacated :

(A) If he fails to pay any call due by him to the Company for the space of three weeks after the due date thereof.

(B) If he shall become bankrupt or suspend payment or compound with his creditors or have a receiving order made against him or be convicted of a felony or misdemeanor.

(C) If he be found a lunatic or of unsound mind.

(D) If he cease to hold the required qualification.

(E) If he resign his office in writing.

Excepting as to paragraphs (C) and (E) of this Article, this Article shall not apply to the said William Pearse or the said Henry Aylmer Bowen Pearse."

In the Supreme Court of New South Wales.

No. 1. Case Stated, 2nd August 1950, *continued.*

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

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

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

" 106. The Directors may meet together for the despatch of business adjourn and otherwise regulate their meetings as they think fit and may determine the quorum necessary for the transaction of business. Unless otherwise determined two Directors shall be a quorum."

" 107. A Director may at any time and the Secretary upon the request of a Director shall convene a meeting of the Directors. Questions arising at any meeting shall be decided by a majority of votes and in the case of an equality of votes the Chairman shall have a casting vote in addition to the vote to which he is entitled as a member of the Board."

" 108. After the resignation or death of the said William Pearse and the said Henry Aylmer Bowen Pearse the Directors may elect a Chairman of their meeting and determine the period for which he is to hold office. If no such Chairman is elected or if at any meeting the Chairman is not present at the time appointed for holding the same the Directors shall choose some one of their number to be the Chairman of such meeting."

" 109. A meeting of Directors for the time being at which a quorum is present shall be competent to exercise all or any of the authorities powers or discretions by or under the regulations of the Company for the time being vested in or exercisable by the Directors generally."

" 117. The business of the Company shall be managed by the Board for the time being (if any). The Board may in addition to the powers and authorities by these Articles or otherwise, expressly conferred upon them, exercise all such other powers and do all such other acts and things as may be exercised or done by the Company and are not hereby or by Statute expressly directed or required to be exercised or done by the Company in general meeting, but subject

nevertheless to the provisions of the Statutes and these Articles to any regulations from time to time made by the Company in general meeting. Provided that no regulations so made shall invalidate any prior act of the Directors which would have been valid if such regulation had not been made."

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

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

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

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

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

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

" 159. If the Company shall be wound up, whether voluntary or otherwise, the liquidator may, with the sanction of an extraordinary resolution, divide among the contributories, in specie or kind, any part of the assets of the Company, and may, with the like sanction, vest any part of the assets of the Company in Trustees upon such trusts for the benefit of the contributories or any of them, as the liquidators, with the like sanction, shall think fit. (2) If thought expedient any such division may be otherwise than in accordance with the legal rights of the contributories (except where unalterably fixed by the Memorandum of Association), and in particular any class may be given preferential or special rights or may be excluded altogether or in part; but in case any division otherwise than in accordance with the legal rights of the contributories shall be determined on, any contributory who would be

In the Supreme Court of New South Wales.

No. 1. Case Stated, 2nd August 1950, *continued.*

prejudiced thereby shall have a right to dissent and ancillary rights as if such determination were a special resolution passed pursuant to Section 261 of the Companies Act, 1899. (3) In case any of the shares to be divided as aforesaid involve a liability to calls or otherwise, any person entitled under such division to any of the said shares may, within ten days after the passing of the extra-ordinary resolution, by notice in writing direct the liquidator to sell his proportion, and pay him the nett proceeds, and the liquidator shall, if practicable, act accordingly."

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

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

11. The parties herein crave leave to refer to the Memorandum and Articles of Association of the Company as if the same were fully set forth herein.

12. The value of the shares in the Company forming part of the testator's estate were set forth in the inventory lodged by the executors as required by s. 117 of the Stamp Duties Act 1920–1940 and the regulations made thereunder as being £8 per share for each of the 800 " A " Cumulative Preference Shares and £2 6s. 6d. per share for each of the 2,986 " B " Ordinary Shares. Attached to the said inventory was a valuation of such shares by Robertson Crane & Gibbons, Chartered Accountants of 117 Pitt Street, Sydney, together with an annexure setting out the basis upon which such valuation was made. Annexed hereto and marked with the letter " A " is a true copy of such valuation and annexure.

13. The executors have furnished to the Commissioner a copy of the Balance Sheets of the Company as at 30th June 1945 and 30th June 1946. Annexed hereto and marked with the letters " B " and " C " are true copies of such Balance Sheets in the form furnished to the Commissioner. The executors have also furnished to the Commissioner a statement of the taxable income of the Company and income taxes assessed thereon or estimated in respect thereof for each of the years ended 30th June, 1941, 1942, 1943, 1944 and 1945. A copy of the said statement is hereunto annexed and marked " D." Annexed hereto and marked " E " is a more detailed statement showing adjusted profits or loss as the case may be for the said years, and profit for the year 1946, prepared at the instance of the Commissioner of Stamp Duties.

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

24 October 1940	1	share at	£3 11s. 6d.
30 December 1940	83	,, ,,	£5 17s. 6d.
12 May 1947	296	,, ,,	£4 17s. 11d. to nearest penny.

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

16. In computing the final balance of the estate the Commissioner in exercise of the powers conferred on him by s. 127 (1) (*c*) of the said Act valued the 800 " A " Cumulative Preference Shares in the Company at £8 per share and the 2,986 " B " Ordinary Shares at £7 16s. 10d. per share. The method by which such values were reached is set out in the document annexed hereto and marked with the letter " F."

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

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

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

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

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

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

22. On the final balance of the estate as determined by the Commissioner, namely £47,333, the Commissioner assessed duty in the

In the Supreme Court of New South Wales.

No. 1. Case Stated, 2nd August 1950, *continued.*

amount of £7,112 9s. which amount included £50 being duty at the rate set forth in the fourth column of the seventh schedule to the said Act upon the sum of £250 referred to in paragraph 20 hereof.

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

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

25. The Commissioner accordingly states this case for the opinion of this Honourable Court upon the following questions, namely :—

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

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

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

(4) If question (1) be answered in the negative whether the " B " Ordinary Shares in the Company are of the value of £2 6s. 6d. or if not what was their value as at the date of the Testator's death.

(5) Whether by reason of Clause 13 of the Testator's will duty at the rate set out in the fourth column of the seventh schedule to the Act should be assessed on :

(A) The full amount of £250.

(B) Such amount less office overhead expenses.

(C) The executor-solicitor's share of such full amount.

(D) The executor-solicitor's share of the full amount less his proportion of overhead expenses, or

(E) No part thereof.

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

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

Dated this second day of August 1950.

E. T. WOODS,
Commissioner of Stamp Duties.

Annexure " A " to Case Stated.

In the Supreme Court of New South Wales.

No. 1. Case Stated, 2nd August 1950, *continued.*

Annexure " A." Valuation of Shares submitted by the Executors.

VALUATION OF SHARES SUBMITTED BY EXECUTORS.

ROBERTSON CRANE & GIBBONS
Chartered Accountants.

Mercantile Mutual Building,
117 Pitt Street, Sydney.

11th April, 1946.

The Commissioner of Stamp Duties,
Sydney.

Dear Sir,

Plashett Pastoral Co. Pty. Limited.

We hereby certify that the value of the Shares in this Company at 19th February, 1946 was :—

Cumulative Preference Shares of £8 each fully paid.
Face value—Eight pounds £8 per share.

Ordinary Shares.
Two pounds six shillings & sixpence (£2 6s. 6d.) per Share.

This valuation is submitted in accordance with the provisions of Section 127 of the Stamp Duties Act 1920–1940.

Yours faithfully,
ROBERTSON CRANE & GIBBONS.

PLASHETT PASTORAL CO. PTY. LTD.

VALUATION OF SHARES.

Statement of Net Profits for Five Years ended 30th June, 1945.

	£	s.	d.
PROFIT			
Year ended 30th June 1942	2,304	3	9
,, 1943	2,761	5	11
,, 1944	3,638	19	5
,, 1945	1,006	3	7
	9,710	12	8
Less Loss—Year ended 30th June 1941	2,253	7	5
	£7,457	5	3
Average Annual Profit for five years	1,491	9	0
Less Cumulative Preference Dividend—5% ..	320	0	0
	£1,171	9	0
£1,171 9s. capitalised at 7%	£16,735	0	0

In the Supreme Court of New South Wales.

No. 1. Case Stated, 2nd August 1950, *continued.*

Annexure "A." Valuation of Shares submitted by the Executors, *continued.*

SUBSCRIBED CAPITAL

800 " A " Cumulative Preference Shares of £8 each fully paid	£6,400	0	0
7,207 " B " Ordinary Shares of £8 each fully paid ..	57,656	0	0
Total Subscribed Capital ..	£64,056	0	0

Value of Shares on basis as above :—

Cumulative Preference

Face Value—Eight pounds £8 per share.

Ordinary

Two pounds six shillings and sixpence (£2 6s. 6d.) per share.

ROBERTSON CRANE & GIBBONS,
Chartered Accountants (Aust.).

Sydney, *April*, 1946.

Annexure "B" to Case Stated.

Balance Sheet of Plashett Pastoral Company Pty. Limited as at 30th June 1945.

CAPITAL AND LIABILITIES

	£ s. d.	£ s. d.
Authorised Capital:		
9,000 Shares of £8 each	72,000 0 0	
Subscribed Capital:		
800 "A" Cumulative Preference Shares of £8 each fully paid	6,400 0 0	
7,207 "B" Ordinary Shares of £8 each fully paid.. ..	57,656 0 0	
		64,056 0 0
General Reserve (Used in the Business) ..		6,950 0 0
Bank of Australasia (Secured)		5,309 2 1
Bank of New South Wales		678 12 10
Sundry Creditors		222 9 2
Provision For Taxation		525 8 0
Profit and Loss Appropriation Account After providing for Ordinary Income Tax to 30th June, 1945, but before providing for Private Company Tax for two years to 30th June, 1945, and Land Tax for year to 30th June, 1945		3,312 8 11
		£81,054 1 0

ASSETS

	£ s. d.	£ s. d.
Freehold Land and Improvements—At Cost ..		67,866 2 4
Plant—Less Depreciation		644 0 0
Furniture—Less Depreciation		95 0 0
Livestock—As certified by the Managing Director—	£ s. d.	
"Plashett"—		
Cattle 880 @ £7 8 11 ..	6,552 6 8	
Sheep 284 @ 12 0 ..	170 8 0	
Horses 15 @ 8 4 5 ..	123 6 3	
"Oberina"—		
Cattle 690 @ 7 13 4 ..	5,290 0 0	
		12,136 0 11
Sundry Debtors		99 7 9
Shares in Public Companies—		
The Graziers Co-operative Shearing Co. Ltd., 50 Shares of £1 each paid to 5s.	£12 10 0	
The Farmers & Graziers Co-operative Grain Insurance & Agency Co. Ltd., 20 Shares of £1 each fully paid	20 0 0	
The Dairy Farmers Co-operative Milk Co. Ltd., 150 Shares of £1 each, fully paid	150 0 0	
Singleton Central Co-operative Dairy Co. Ltd., 31 Shares of £1 each fully paid	31 0 0	
		213 10 0
		£81,054 1 0

H. B. A. PEARSE
F. L. CRANE
} *Directors*

PLASHETT PASTORAL COMPANY PROPRIETARY LIMITED. BALANCE SHEET AS AT 30TH JUNE, 1946.

CAPITAL AND LIABILITIES

	£ s. d.	£ s. d.
AUTHORISED CAPITAL:		
9,000 Shares of £8 each ..	72,000 0 0	
SUBSCRIBED CAPITAL:		
800 "A" Cumulative Preference Shares of £8 each fully paid	6,400 0 0	
7,207 "B" Ordinary Shares of £8 each fully paid ..	57,656 0 0	
		64,056 0 0
GENERAL RESERVE (Used in the Business) ..		6,950 0 0
BANK OF AUSTRALASIA (Secured)		3,895 11 0
BANK OF NEW SOUTH WALES		778 12 3
SUNDRY CREDITORS		918 17 4
PROVISION FOR TAXATION		2,270 0 0
PROFIT AND LOSS APPROPRIATION ACCOUNT After providing for Ordinary Income Tax to 30th June, 1946, but before providing for Private Company Tax for two years 30th June, 1944, and 1946, and Land Tax for year to 30th June, 1946		6,381 8 2
		£85,250 8 9

ASSETS.

	£ s. d.	£ s. d.
FREEHOLD LAND AND IMPROVEMENTS—At Cost ..		67,866 2 4
PLANT—Less Depreciation		736 0 0
FURNITURE—Less Depreciation		86 0 0
LIVESTOCK—As certified by the Managing Director:—	£ s. d.	
"Plashett"—		
Cattle 1,890 @ £8 6 2 ..	15,789 7 6	
Sheep 219 @ 11 9 ..	128 13 3	
Horses 19 @ 9 0 4 ..	171 6 4	
"Oberina"—		
Cattle 8 @ 7 13 3 ..	61 5 4	
		16,150 12 5
SUNDRY DEBTORS		198 4 0
SHARES IN PUBLIC COMPANIES—		
The Graziers Co-operative Shearing Co. Ltd., 50 Shares of £1 each paid to 5s.	12 10 0	
The Farmers & Graziers Co-operative Grain Insurance & Agency Co. Ltd., 20 Shares of £1 each fully paid	20 0 0	
The Dairy Farmers Co-operative Milk Co., Ltd. 150 Shares of £1 each fully paid	150 0 0	
Singleton Central Co-operative Dairy Co. Ltd., 31 Shares of £1 each fully paid	31 0 0	
		213 10 0
		£85,250 8 9

FRANK L. CRANE
T. A. LANGLEY
} *Directors.*

PLASHETT PASTORAL CO. PTY. LTD.

STATEMENT OF TAXABLE INCOME AND INCOME TAXES ASSESSED THEREON.

Year Ended 30th June	1941	1942	1943	1944	1945
Taxable Income	—	£2,193	£3,676	£5,046	£1,750
Loss	£2,432		Less Balance of 1941 loss 239	—	—
			£3,437		
Income Tax assessed thereon :—					
Ordinary Tax	Nil	Nil	£1,028.14. 0	£1,510.16. 0	£522. 0. 0
Private Company Tax	—	—	£326.15. 0	Not yet assessed (Estimate £65)	Not yet assessed (Estimate Nil).

ROBERTSON, CRANE & GIBBONS,
Chartered Accountants (Aust.),
Auditors to the Company.

Sydney—27*th June*, 1946.

PLASHETT PASTORAL CO. PTY. LTD.

Profit and Loss A/c.	30/6/1941	1942	1943	1944	1945	1946
	£	£	£	£	£	£
Gross Profit from						
Sheep—Plashett	1	50	76	115	54	110
Cattle ,, ...	732	4,968	5,909	7,233	4,043	10,528
Pigs ,, ...	86	121	101	95	43	—
Horses ,, ...	—	—	—	—	—	18
	819	5,139	6,086	7,443	4,140	10,656
Less Losses :						
Horses—Plashett	3	14	—	4	16	—
Cattle—Oberina	139	58	8	70	35	92
Horses ,, ...	1	—	—	4	—	—
	676	5,067	6,078	7,365	4,089	10,564
Add : Income from Wool	24	56	48	40	37	12
Hides & Skins	34	17	29	34	51	94
Dairy	962	1,147	1,415	1,474	1,972	2,472
Rent	25	35	35	39	64	19
Interest	46	—	—	—	—	—
Show Prizes	—	5	—	—	—	5
Dividends	21	10	9	13	13	9
	1,789	6,337	7,614	8,965	6,226	13,175
Less : Expenses (ex. Inc. Tax paid or provided)	3,737	4,033	3,827	3,813	4,368	5,718
	1,948 (Loss)	2,304 (Profit)	3,787	5,152	1,858	7,457
Income Tax paid or provided	305	—	1,026	1,513	852	2,266
Net Profit as per Profit & Loss ..	2,253 (Loss)	2,304 (Profit)	2,761	3,639	1,006	5,191

Annexure "E" to Case Stated—*continued.*

Adjustments for Income Tax Assessment purposes												
Add: Taxes		305		—		1,026		1,513		852		2,266
Donations		11		11		6		15		16		15
Capital Expenditure (Legal)		9		—		10		—		—		4
		1,928		2,315		3,803		5,167		1,874		7,476
Deduct: Depn. Alld. ..	253		239		223		212		206		228	
cld.	118		117		96		91		82		90	
	—	135	—	122	—	127	—	121	—	124	—	138
		2,063 (Loss)		2,193 (Profit)		3,676		5,046		1,750		7,338
Less Ordinary Income Tax		—		—		1,029		1,511		522		2,199
		2,063 (Loss)		2,193 (Profit)		2,647		3,535		1,228		5,139
Minor adjustments ignored in Share value basis		20		11		16		15		16		19
Additional Land Tax ..		23		—		—		—		—		—
Basis of Profit yield		2,106 (Loss)		2,182 (Profit)		2,631		3,520		1,212		5,120
Undist. Profits Tax				on 647 £327 paid on 19/6/1945				on 1,052 £179 due March, '47 Nil.				On 1,831 Est. £1,007 not assessed.
Dividends—Pref.		5%		5%		5%		5%		5%		5%
Ord.		2/– per share		3/– per share		4/– per share		6/– per share		2/– per share 1/– per share (Tax free)		8/– per share
Date paid										17/10/1945 30/9/1946		2/– — 15/5/46 6/– plus 5%

NOTE: Livestock returned at average cost for Income Tax purposes. Shares are fully paid £8

Tax Liability: 30.6.1945 £522 Issued 2.5.1946 paid 19.6.1946
30.6.1946 £2,199 ,, 30.5.1947 ,, 19.6.1947
Div. 7: 1944 179 ,, 5.2.1947 ,, 17.2.1947

Undistributed Profits Tax: 1946 Assessed in June 1949 on £1,831 at £743.

In the Supreme Court of New South Wales.

No. 1.

Case Stated, 2nd August 1950, *continued.*

Annexure "E." Statement showing adjusted Profit or Loss (1941 to 1946), *continued.*

In the Supreme Court of New South Wales.

No. 1. Case Stated, 2nd August 1950, *continued.*

Annexure "F." Statement showing method of valuing and value of Shares adopted by Commissioner.

Annexure "F" to Case Stated.

STATEMENT SHOWING METHOD BY WHICH THE VALUE OF "B" ORDINARY SHARES IN PLASHETT PASTORAL CO. PTY. LTD. WAS REACHED.

Articles 9 and 158 govern the rights of the "A" and "B" shares on winding up and subject to these articles the following liquidation value is arrived at :—

Assets	Value shown in the Company's balance sheet for 1945	Amount expected to realise	
	£	£	
Land and Improvements ..	67,866	54,473	Federal Land Tax Departmental Value
Live Stock	12,136	18,244	,,
Plant	644	580	Book Value less 10%
Furniture	95	85	,,
Debtors	99	89	,,
Shares	213	213	—
	£81,053	£73,684	

		£	£
Deduct :	Cost of Realisations :—		
	Land and Building Scale	695	
	Live Stock 5%	912	
	Advertising etc. ..	250	
			1,857
			71,827
Deduct :	Liabilities :—		
	As per B/Sheet—		
	Banks and Creditors ..	6,210	
	Taxes 1945 Ordinary—		
	Income Tax	522	
	Land Tax	226	
	1944 Sec. 104 Income Tax	158	
	1945 ,, ,, ,,	—	
	Liquidators Remuneration 2½% on £71,827	1,796	
			8,912
			62,915
Less—	"A" Shares (preferred as to Capital 800 @ £8 each) ..		6,400
Available for "B" Shares ..			£56,515

$\frac{56,515}{7,207}$ = £7 16s. 10d. per share.

NOTE :

1. *Live Stock :*

An increase in the value of live stock resulted from an inspection by a valuer of the Federal Land Tax Department.

The live stock was valued in the books of the Company as follows :—

							£	s.	d.
"Plashett"	Cattle	880	@	£7	8	11	6,552	6	8
	Sheep	284	@		12	0	170	8	0
	Horses	15	@	£8	4	5	123	6	3
"Oberina"	Cattle	690	@	£7	13	4	5,290	0	0
							£12,136	0	11

All live stock except the "Oberina" cattle were inspected and the book values of "Oberina" cattle and "Plashett" sheep and horses were considered reasonable. The "Plashett" cattle in the opinion of the valuer were of a value of £12,660 in all at the date of death, an increase over book value of £6,107 13s. 4d. Adjustment of this value makes the total value of live stock to be £18,244.

2. *Taxation Allowance :*

The sum of £226 was the actual amount of land tax (to the nearest £) with which the Company was assessed in respect of land owned by it at the 30th June, 1945.

The sum of £158 was the amount of undistributed profits (Division 7 Tax) estimated to be payable by the Company in respect of profits for the year ending 30th June, 1944. This tax was subsequently assessed at £179.

In the Supreme Court of New South Wales.

No. 2.
Rule of the Full Court, 30th October 1950.

No. 2.

RULE.

IN THE SUPREME COURT OF NEW SOUTH WALES.

Term No. 223 of 1950.

IN THE MATTER of the ESTATE of HENRY BOWEN AYLMER PEARSE late of Jerry's Plains in the State of New South Wales Company Director deceased.

AND IN THE MATTER of the Stamp Duties Act 1920–1940.

Between HAZEL MAY PEARSE, THOMAS ARCHDALL LANGLEY and PERPETUAL TRUSTEE COMPANY (LIMITED) . . . . Appellants

and

THE COMMISSIONER OF STAMP DUTIES Respondent.

Tuesday the thirtieth day of October One thousand nine hundred and fifty.

The Case Stated by the Commissioner of Stamp Duties bearing date the Second day of August last coming on to be heard on the Fifth and Sixth days of October instant WHEREUPON AND UPON READING the said Case Stated AND UPON HEARING what was alleged by Mr. F. G. Myers of King's Counsel with whom was Mr. R. C. Smith of Counsel for the Appellants and by Mr. Gordon Wallace of King's Counsel with whom was Mr. Forbes Officer of Counsel for the Commissioner of Stamp Duties IT WAS ORDERED that the matter stand for Judgment and the matter standing in the list this day for Judgment accordingly IT IS ORDERED that the following of the Questions in the said Case Stated namely :—

(1) Whether in valuing the 2,986 " B " Ordinary Shares in Plashett Pastoral Co. Pty. Limited the Commissioner 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.

(5) Whether by reason of Clause 13 of the Testator's Will duty at the rate set out in the fourth column of the Seventh Schedule to Act should be assessed on—

(A) the full amount of £250 ;

(B) such amount less office overhead expenses ;

(C) the executor-solicitor's share of such full amount ;

(D) the executor-solicitor's share of the full amount less his proportion of overhead expenses ; or

(E) no part thereof.

(7) How the costs of this case should be borne and paid, be answered respectively :—

(1) No.

(5) The full amount of £250.

AND IT IS FURTHER ORDERED that Questions 2, 3, 4 and 6 of the said Case Stated do stand over generally AND IT IS FURTHER ORDERED that the costs of the Appellants up to and inclusive of this Order be taxed by the proper Officer and when so taxed and allowed be paid by the Commissioner of Stamp Duties to the Appellants or to Messieurs Fisher & Macansh with J. T. Ralston & Son, their Attorneys.

By the Court.

For the Prothonotary,

R. T. BYRNE (L.S.)
Chief Clerk.

In the Supreme Court of New South Wales.

No. 3.

No. 3.

REASONS FOR JUDGMENT.

No. 3. Reasons for Judgment, 30th October 1950.

(A) STREET, C.J.:

(A) The Chief Justice, (Street, C.J.).

The testator, Henry Bowen Alymer Pearse, died on 19th February, 1946, his estate at the date of death comprising, *inter alia*, 800 " A " cumulative preference shares each fully paid to £8, and 2,986 " B " ordinary shares also fully paid to £8, in Plashett Pastoral Company Pty. Ltd. This company was incorporated in 1913 with the object of acquiring the station property known as " Plashett " then owned by the testator's father, and to carry on in all its branches the business of a pastoralist and station owner. The company was a family company in every sense of the term, the articles placing restrictions and limitations on the right to transfer shares and containing other provisions designed for the purpose of keeping the company in the hands of the various members of the family who were shareholders. It duly acquired the station property in 1913, and ever since has run the same as a pastoral business.

So far as the " A " cumulative preference shares are concerned, these were set forth in the inventory lodged by the executors as required by section 117 of the Stamp Duties Act, 1920–1940, and were valued by the executors at the face value of £8 per share, this value being accepted by the Commissioner. The " B " ordinary shares, however, were valued at the sum of £2 6s. 6d. per share, this valuation being based upon a calculation as to the average annual profits of the station during the years immediately preceding the testator's death, this sum being then capitalised at 7 per cent. For the year ending 30th June, 1941, the company made a loss of £2,253, but during the years ending 30th June, 1942, 1943, 1944 and 1945 profits were made varying from a maximum of £3,638 in 1944 to a minimum of £1,006 in the year 1945. For the year ending 30th June, 1946 (the testator having died in February of that year) a profit of £5,191 was made. The various balance sheets of the company and statements were furnished to the Commissioner at his request, and he determined to issue an assessment in relation to the ordinary shares of the company in accordance with the provisions of section 127 (1) (*c*) of the Act, which entitles the Commissioner in certain circumstances to value the shares on an assets basis as if the company had gone into liquidation at the date of the death of the testator. On this basis the Commissioner valued these ordinary shares at £7 16s. 10d. per share and accordingly increased the final balance of the estate as returned by the executors by the sum of £16,472, this amount being the difference between the value of the ordinary shares at £2 6s. 6d., as claimed by the executors, and £7 16s. 10d. per share as claimed by the Commissioner. The first question which is stated for the opinion of the Court is " Whether in valuing the 2,986 " B " ordinary shares in the company the Commissioner was justified in exercising the discretion conferred upon him by section 127 (1) (*c*) of the Stamp Duties Act to value such shares upon a liquidation basis."

The first matter which was argued before the Court was the question of the extent of the Court's powers in the matter of reviewing the decision of the Commissioner to assess the value of these shares under section 127 (1) (*c*). For the executors it was contended that the Court

was entitled to review the whole matter and give effect to its own views as to the propriety or otherwise of using the powers conferred by section 127 (1) (*c*), unfettered by the fact that the Commissioner had decided that it was proper so to use them. For the Commissioner, it was submitted that the Court could not interfere with his mode of exercising his discretion and review his decision unless it was satisfied that his discretion had been exercised on wrong grounds or on wrong legal principles, and only if an error of this nature were made would the Court be entitled to assess the value of the shares on proper principles.

Section 124 of the Act is the section which requires the Commissioner to state a case for the opinion of this Court upon the application of any person liable to the payment of duty who is dissatisfied with the Commissioner's assessment. If such application is made, the Commissioner is required to state and sign a case " setting forth the facts before him on making the assessment, the assessment made by him, and the question to be decided," and thereupon the Appellant is required to set the case down for hearing in this Court. Subsection (4) provides that " On the hearing of the case the Court shall determine the question submitted and shall assess the duty chargeable, and also decide the question of costs," and by subsection (5), it may order that any sum which it finds to have been overpaid as duty may be ordered to be repaid to the Appellant. Subsection (6) gives the Court power, if it should appear that the facts necessary to enable the question submitted to be determined are not sufficiently set forth in the case or if any facts are in dispute, to direct all such inquiries to be made and issues to be tried as it may deem necessary in order to ascertain any necessary facts, and such inquiry may be directed to be held before a Judge of the Court or the Master in Equity, and any issue may be tried either by a Judge of this Court or of the District Court sitting with or without a jury as the Court may direct. By subsection (7) it is enacted that : " 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 be drawn therefrom if proved at a trial."

There have been many cases decided by the High Court which lay down the general principle in relation to appeals under the Income Tax Acts, that the Court is limited in its power to review an exercise by the Commissioner of Taxation of a discretion given to him under those Acts, and it is only entitled to interfere with his decision if it considers that he has proceeded upon some wrong principle of law or has exercised his discretion by consideration of irrelevant or extraneous matters. (See, for instance, *Denver Chemical Manufacturing Co.* v. *Commissioner of Taxation*, 49 S.R. 195 ; and on appeal to the High Court in 79 C.L.R. 296.) But appeals under the section now under consideration have been dealt with on a different basis. 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. A similar question arose for consideration in *The Commissioner of Stamp Duties (Q.)* v. *Beak* (46 C.L.R. 585). The Court was concerned there with the question of the

In the Supreme Court of New South Wales.

No. 3. Reasons for Judgment, 30th October 1950.

(A) The Chief Justice, (Street, C.J.), *continued.*

power of the Supreme Court to review an assessment made by the Commissioner under the last paragraph of section 47 of the relevant Queensland Statute, which corresponded substantially in its terms with the provisions of section 127 (1) (*c*) of the Stamp Duties Act. Section 50 of the Queensland Act provided that: " Any accountable party dissatisfied with the assessment of the Commissioner may . . . appeal by petition . . . to the Supreme Court of Queensland." At page 597 the following passage occurs in the unanimous judgment of the Court:

> " The contention of the Commissioner is that the appeal given by section 50 does not extend to enabling the Court to review the value adopted for shares by the Commissioner in the exercise of the discretion conferred by the last paragraph in section 47 . . . Clear words would be needed to withdraw from the general power of review given by section 50 a particular process in making up the assessment essential to the result. A reference to discretion and opinion is not enough for the purpose. The function of valuation is performed by means of discretion and opinion, and it is because as between the Crown and the subject a judgment of an officer of the Revenue should not be conclusive that an appeal is given."

This passage was referred to by Dixon, J., in his judgment in *MacCormick* v. *The Federal Commissioner of Taxation* (71 C.L.R. 283, at 307), where he suggests that *Beak's* case provides a more logical solution of the question, but felt constrained to follow the usage of the Court in regard to income tax appeals. Section 124 giving an aggrieved party a right of appeal is in terms wider than the language of the Queensland Statute under consideration in *Beak's* case, and I think that this authority is conclusive on the question as to this Court's powers of review, and it is entitled to reconsider the matter, unfettered by the manner in which the Commissioner has already exercised his discretion under the terms of section 127 (1) (*c*).

It becomes necessary, therefore, for this Court to consider whether, on the facts as stated in the present case, it was proper for the Commissioner to exercise the discretion conferred upon him by the subsection. So far as is material, this reads as follows:—

> " Notwithstanding anything contained in the foregoing provisions of this subsection the Commissioner may in his discretion adopt as the value of a share of any class in any company, the shares of which of that class are not listed on a Stock Exchange, such sum as in the opinion of the Commissioner the holder of that share would have received in respect of that share in the event of the company being voluntarily wound up on the date on which the value of the share is to be ascertained for the purposes of this Act."

This subsection was introduced into the Act in 1939, and subsection (1) of section 127 corresponds closely with the provisions of subsection (1) of section 16A of the Estate Duty Assessment Act, 1914–1947, which was introduced into the Federal Act in 1942. The Commissioner claimed that this section gave him the right, in any cases in which he thought it appropriate so to do, to use this method of valuation, even though there was no suggestion that the company was likely to go into liquidation, and Counsel

went so far as to suggest in argument that it was the only proper method of valuation where shares of private companies are concerned which are not listed on the Stock Exchange.

The Stamp Duties Act requires the testator's assets to be valued as at the date of his death, and where part of that estate consists of shares in public companies listed on the Stock Exchange no difficulty arises, the market price at which such shares are dealt in being an easy and convenient way of ascertaining the value. In family or proprietary companies which are not listed on the Stock Exchange and where there are restrictions on the right of transfer, the problem is still the same, namely, to ascertain the true value of the shares, and the tests properly applicable in such circumstances have been considered by the High Court in many decisions, of which I find it necessary only to refer to three recent ones, all decided since section 16A was introduced into the Federal Act. In *Abrahams* v. *Federal Commissioner of Taxation* (70 C.L.R. 23, at p. 29) Williams J., in relation to shares held by the deceased in a company upon which by the articles of association restrictions were placed in respect of transfer, said that these shares were properly valued in the same manner as shares which could be sold in the open market, and went on to say that: " The Court should 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 the vendor and purchaser had got together and agreed on a price in friendly negotiation . . ." For the purpose of ascertaining a value on this basis, regard would also have to be paid to the provisions of section 127 (1) (*a*), which require this type of shares to be valued as if the memorandum and articles of association satisfied the requirements prescribed by the Committee of the Stock Exchange so as to enable the company to be placed on the current official list, or in other words, that there was no limitation contained in the articles upon the right of transfer. The general rule, according to this statement of the law, still is that the value of the shares is to be ascertained by deciding upon the amount which they might be expected to realise if sold under the circumstances indicated in the judgment of Williams, J., cited above. A more elaborate statement of the general principles applicable in such cases is contained in the reasons of the same judge in *McCathie* v. *The Federal Commissioner of Taxation* (69 C.L.R. 1, at pp. 10–11), and this statement of general principles was expressly approved by the Full High Court in *Commissioner of Succession Duties (S.A.)* v. *Executor Trustee & Agency Co. of South Australia Limited* (74 C.L.R. 358). At page 362 it is pointed out that: " A prudent purchaser does not buy shares in a company which is a going concern with 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, because dividends can only be paid out of profits, and a prudent purchaser would be interested mainly in the future dividends which he could reasonably expect to receive on his investment." In *McCathie's* case the matter under consideration was the value of shares in a proprietary company which could not be listed on the Stock Exchange, and His Honour in the passage to which I have already referred takes account of the possibility of considering what would be the attitude of such a purchaser in relation to the contingency of a winding up of the Company. Section 16A of the Federal Act was then in operation, but His Honour does not suggest that a mere

In the Supreme Court of New South Wales.

No. 3. Reasons for Judgment, 30th October 1950.

(A) The Chief Justice, (Street, C.J.), *continued.*

reliance upon the method of valuation referred to in subsection (3) of that section furnished the answer as to what was the true value of the shares in question in that case. The test was still applied of considering what the reasonable vendor would expect to receive from a reasonably willing purchaser.

The exact point was considered by Williams, J., in *The Federal Commissioner of Taxation* v. *Sagar* (71 C.L.R. 421), and at pages 427–428 His Honour discussed the provisions of section 16A of the Federal Act. At page 428 His Honour, referring to a subsection practically identical with section 127 (1) (*c*), said : " And where a company is a going concern the instances would appear to be rare in which it would be proper to use paragraph (*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, but even then it would appear to be preferable, where practicable, to use paragraphs (*a*) or (*b*)."

In the present case this company has been carrying on a grazing business for nearly forty years, and there is no suggestion in the case stated that it is contemplated that the company will be wound up in the near future. A prospective purchaser, therefore, could hardly be expected to purchase on the footing that he would be able in the comparatively near future to share in a distribution of the assets, and it seems to me impossible to approach this question of valuation on the assumption that something will happen which nobody suggests is likely to happen. I do not think that there is anything which indicates that this is one of the rare cases referred to by Williams, J., and therefore it is not a case in which the Commissioner would be entitled to exercise the discretion conferred upon him by section 127 (1) (*c*) and I think that he fell into error in so doing.

The first question must, therefore, be answered in the negative ; but this does not enable any answer to be given to the other questions, which ask what is the amount of duty properly chargeable upon the estate. The mere fact that I am of opinion that the Commissioner adopted a wrong method in valuing these shares does not mean that I am of opinion that the method suggested by the executors will necessarily produce the results which they put forward, namely, a value of £2 6s. 6d. for each of the ordinary shares. This value was the result of an arithmetical calculation based on figures which took into account a loss in 1941 and omitted to give any effect to the increase in profits shown in the figures for 1946. This sudden rise would suggest that some factor may have intervened at this stage to cause this appreciation in the profits, but there is nothing to show what it was that caused this rise, or whether it was of a temporary or permanent nature. Or there may have been special factors which depressed the profits in 1941 and 1945, and which either no longer operate or have been counteracted by other factors.

On these and other relevant matters the Court has no information and no facts before it which would enable it to reach any conclusion as to what is the proper value to be put upon these shares, but as the parties at the hearing envisaged this possibility and requested that if the Court should come to the conclusion that the Commissioner had adopted a wrong method, the other questions as to the actual figures to be used might stand over, I think that the proper order for the Court to make at this stage is merely

to answer the first question submitted by the Commissioner in the negative and to allow the matter to stand over so that the parties may consider the position.

One other question was, however, submitted by the Commissioner which requires an answer and which can be dealt with shortly. By his will the testator declared that T. A. Langley, one of his trustees, who was also a solicitor, should be entitled to charge and retain profit costs for any professional work done by him in relation to the trusts of the will. The amount of these profit costs has been agreed upon at the sum of £250, and the Commissioner claims that this amount should be included in the estate for the purpose of the assessment of duty. I think the matter is concluded by the decision in *Pennell* v. *Franklin* (1898 1 Ch. 297). At page 299 Kekewich, J., dealing with an exactly similar problem, said : " It seems to me that the right to charge profit costs must be regarded as a matter of bounty . . . It is a gift by the testator to the solicitor of something the law will not otherwise allow him to take." This decision was approved on appeal in [1898] 2 Ch. 217, and applying the same principle to the present case, I think the answer to the fifth question should be that duty at the appropriate rate should be assessed on the full amount of £250.

(A) The Chief Justice, Street, C.J.), *continued.*

The Commissioner must pay the costs of this appeal so far as they have been incurred to date.

(B) MAXWELL, J. :

(B) Maxwell J.

I agree with the judgment and the reasons of the Chief Justice.

(C) OWEN, J. :

(C) Owen, J.

Henry Bowen Aylmer Pearse (hereinafter called " the deceased ") died in February, 1946. At the date of his death he owned 2,986 " B " ordinary shares each fully paid to £8 in a private company called the Plashett Pastoral Company Pty. Ltd. (hereinafter called " the company ") and it is with the valuation ofthese shares for the purpose of death duty that this case is concerned.

The company owned a station property on which it had carried on a pastoral business since 1937. After the death of the deceased and for the purposes of the assessment of duty, his executors furnished to the Commissioner a copy of the company's balance sheets for the years ending 30th June, 1945, and 30th June, 1946, and a statement of the taxable income of the Company for each of the years ended 30th June, 1941, 1942, 1943, 1944 and 1945, together with a valuation of the shares by a firm of chartered accountants and a statement showing how that valuation was made. The method adopted by the accountants was to take the average annual profit for the five years up to June, 1945, and, after making some minor adjustments, capitalise this figure at 7 per cent., the resultant value per share being £2 6s. 6d. This figure was not acceptable to the Commissioner who proceeded to make a valuation under section 127 (1) (*c*) of the Stamp Duties Act, 1920–1940, which is in these terms :—

> " Notwithstanding anything contained in the foregoing provisions of this subsection the Commissioner may in his discretion

In the Supreme Court of New South Wales.

No. 3. Reasons for Judgment, 30th October 1950.

(c) Owen, J. *continued.*

adopt as the value of a share of any class in any company the shares of which of that class are not listed on a stock exchange such sum as in the opinion of the Commissioner the holder of that share would have received in respect of that share in the event of the company being voluntarily wound up on the date upon which the value of the share is to be ascertained for the purposes of this Act."

In other words, the Commissioner valued the shares on the basis of a notional winding up of the company on the deceased's death, as opposed to a valuation based upon its continued existence as a going concern. By this process he arrived at a value of £7 16s. 10d. per share. The parties are in agreement that, at the present stage of the case, we are not concerned with the correctness or otherwise of the calculations involved in arriving at these two sets of values. They seek a decision on the wider question whether the case is one for the application of section 127 (1) (*c*).

In the course of argument I threw out a suggeston that the subsection might be intended to apply only to cases where a company has issued two or more classes of shares, some being listed while others are not. But neither side appeared to regard this idea as having any merit and, although I am still puzzled by the introduction into the section of the references to classes of shares, I think on further consideration that the parties were right in their polite refusal to pursue this line of thought.

In my opinion the first matter to be determined is whether, in considering the propriety of applying to a particular case the method of valuation to which section 127 (1) (*c*) refers, the Court is entitled to substitute its discretion for that of the Commissioner. If it is not so entitled, then the Commissioner's decision to apply the subsection to the case can be attacked only if it can be seen to have been capricious or based upon some misconception of the relevant law or upon irrelevant and extraneous considerations, so that in contemplation of law he has never exercised a discretion at all. I think the point is concluded against the Commissioner by the decision of the High Court in the *Commissioner of Stamp Duties for Queensland* v. *Beak* (46 C.L.R. 585). The material portion of the section there being considered was in these terms :—

> " The Commissioner may, in his discretion, adopt as the value of any shares or stock in any company or corporation such sum as, in the opinion of the Commissioner, the holder thereof would receive in the event of the company being voluntarily wound up on the date when the succession took effect."

In a joint judgment Gavan Duffy, C.J., and Starke, Dixon and McTiernan, JJ., said :—

> " The contention of the Commissioner is that the appeal given by section 50 does not extend to enabling the Court to review the value adopted for shares by the Commissioner in the exercise of the discretion conferred by the last paragraph in section 47. But this paragraph, although occurring at the end of the section, gives a power to be exercised in making the assessment under the earlier words. That assessment is subject to appeal under section 50. Clear words would be needed to withdraw from the general power of review given by section 50 a particular process in making up the assessment essential to the result. A reference to discretion and opinion is not enough for the purpose. The function of

valuation is performed by means of discretion and opinion, and it is because as between the Crown and the subject a judgment of an officer of the revenue should not be conclusive that an appeal is given."

I can find nothing in section 124, the appeal section of the New South Wales Act, which suggests that the powers and duty of this Court are less wide than were those of the Supreme Court of Queensland. It is true that the person who is dissatisfied with the Commissioner's assessment is called an " appellant," but the proceedings by way of stated case for which section 124 provides is not an appeal in the strict sense of the word (*McCaughey* v. *Stamp Duties Commissioner*, 46 S.R. 192). The Commissioner is directed to set out in the case the facts which he had before him when making his assessment (subsection (2)), and the Court is required to assess the duty chargeable (subsection (4)). To enable it to do so, it is empowered to direct inquiries to be made or issues to be tried by a judicial officer if it appears that the facts necessary to enable it to make an assessment are not sufficiently set forth in the case (subsection (6)), and it is entitled to draw inferences of fact (subsection (7)).

Counsel for the Commissioner relied upon the line of decisions of which the *Denver Chemical Manufacturing Company* v. *Commissioner for Taxation* (79 C.L.R. 296) is a recent example, as establishing that the jurisdiction of the Court is supervisory only and does not include a power to substitute its discretion for that of the Commissioner. But in *MacCormick* v. *Federal Commissioner of Taxation* (71 C.L.R. 283, at page 307), Dixon, J., after referring to the interpretation which had been applied over the years to Federal Income Tax legislation and to State legislation modelled on the Federal pattern, namely, that the Court did not substitute its discretion for that of the Income Tax Commissioner, went on to say that : " a consideration of the reasons briefly given in *Commissioner of Stamp Duties* (*Q.*) v. *Beak* for placing upon a reference to ' discretion ' in a provision dealing with valuation a somewhat different interpretation shows that we have pursued a course in reference to Federal legislation which derives more support from usage than from logic " ; and in the *Denver Chemical Manufacturing Company's* case (*supra*) the same learned judge, after referring to the interpretation which had been given to the Income Tax (Management) Acts over a period of years, said, at page 311 :—

> " I am alive to the fact that it might have been possible to take a very broad view and say that the ascertainment of taxable income must in all respects be dependent upon opinions, judgments and conclusions on the part of the Commissioner and that it was not very material whether the Statute authorising assessments spoke specifically of his opinion on a particular matter or left it generally to him to ascertain the income of the taxpayer and form a conclusion. In either case the appeal from the assessment made by him might have been considered to cover every matter dependent on his opinion or judgment because the whole assessment represents his determination of the taxpayer's liability and of every matter on which it rests. But in reference to the Federal legislation on which the New South Wales Act of 1928 is based a completely contrary view has been taken from the beginning . . ."

In the Supreme Court of New South Wales.

No. 3. Reasons for Judgment, 30th October 1950.

(c) Owen, J. *continued.*

However different the position might have been if we were now considering an Act such as the Income Tax (Management) Act, the line of approach adopted in *Beak's* case applies, in my opinion, to the Act now under consideration, and it therefore becomes the duty of the Court to consider whether this case is one for the application of section 127 (1) (*c*). For this purpose it is necessary to consider the relevant facts as set forth in this case. They are as follows :—

(1) The company was incorporated in 1913 to carry on a pastoral business and became a proprietary company in 1937.

(2) For the year ending 30th June, 1941, it made a loss of £2,253.

(3) In each of the succeeding four years it made profits ranging from £1,006 for the year ending June, 1945, to £3,638 for the year ending June, 1944. For the year ending June, 1946, in the course of which the testator died, the profit rose to £5,191.

(4) It was a proprietary company in which the shareholders were all related to the testator and it is not suggested that in any material respects its Articles of Association depart from the usual pattern.

Those are the whole of the facts set out in the case which seem to me to be relevant to the question whether section 127 (1) (*c*) should be applied for the purpose of ascertaining the value of the testator's shares at the date of his death. I cannot find in them any circumstance which would make it reasonable to conclude that a hypothetical purchaser giving consideration, in February, 1946, to the question of buying these shares and determining what amount it would be reasonable for him to pay for them would work out his price upon the basis that the company was about to be wound up. No doubt a prudent buyer would consider, amongst other matters, the value of the company's assets and the extent of its liabilities in order to see to what extent his outlay would be secured, and, in this sense, would take the winding up value into account. But this company was a profitable going concern which had been functioning for many years, and at the relevant date there was nothing which would suggest to a prospective buyer of its shares that a winding up in the near future was a real prospect. " A purchaser of shares in a company which is a going concern does not usually purchase them with a view to attempting to wind up the company," and the " real value of shares . . . will depend more on the profits which the company has been making and should be capable of making, having regard to the nature of its business, than upon the amounts which the shares would be likely to realise upon a liquidation." (Per Williams, J., in *McCathie* v. *The Federal Commissioner of Taxation*, 69 C.L.R. 1, at p. 11.) In the *Federal Commissioner of Taxation* v. *Sagar* (71 C.L.R. 421, at p. 428) the same learned Judge, who has had a wide experience in cases involving the valuation of shares, expressed the view, with which I respectfully agree, that it is only in rare cases that the value of shares in a going concern can fairly be ascertained merely by enquiring what a shareholder would receive on liquidation.

For those reasons, I am of opinion that Question (1) should be answered " No." Questions (4) and (6) should, at the request of the parties, stand over. In view of the decision in *Re White* ([1898] 2 Ch. 217), Counsel for the appellants asks that we should formally answer Question 5 (A) in the affirmative and Questions 5 (B), (C), (D) and (E) in the negative.

The Commissioner should pay the costs.

No. 4.

ORDER.

In the High Court of Australia.

No. 4.
Order,
27th July
1951.

No. 62 of 1950.

IN THE HIGH COURT OF AUSTRALIA.
New South Wales Registry.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW SOUTH WALES (TERM No. 223 OF 1950).

Between : THE COMMISSIONER OF STAMP DUTIES Appellant

and

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

Before Their Honours Mr. Justice DIXON, Mr. Justice MCTIERNAN, Mr. Justice WILLIAMS, Mr. Justice WEBB and Mr. Justice FULLAGAR. Friday the twenty-seventh day of July One thousand nine hundred and fifty-one.

THE APPEAL instituted by the Appellant by Notice of Appeal dated the Twentieth day of December, 1950 AND THE CROSS APPEAL instituted by the Respondents by Notice of Appeal dated the Nineteenth day of April, 1951 coming on to be heard on the nineteenth, twentieth and twenty-third days of April, 1951 WHEREUPON AND UPON READING the Transcript Record of Proceedings prepared in the Appeal instituted by the Appellant and transmitted to this Court by the Prothonotary of the Supreme Court of New South Wales AND UPON READING the Notice of Appeal dated the nineteenth day of April, 1951 the copy Will of one Henry Bowen Aylmer Pearse and the copy Notice of Assessment of Death Duty and Adjustment Sheet tendered on behalf of the Respondents AND UPON HEARING what was alleged by Mr. Wallace of King's Counsel with whom was Mr. Officer of Counsel for the above-named Appellant and by Mr. Myers of King's Counsel with whom were Mr. Macfarlan of Counsel and Mr. L. W. Street of Counsel for the above-named Respondents THIS COURT DID ORDER that the said Appeal and Cross Appeal should stand for judgment AND the same standing in the list for judgment this day THIS COURT DOTH ORDER that both the said Appeal and Cross-Appeal be and the same are dismissed AND THIS COURT DOTH FURTHER ORDER that it be referred to the proper officer of this Court to tax and certify the costs of the Respondents of and incidental to the said Appeal and the costs of the Appellant of and incidental to the said Cross-Appeal AND THAT when so taxed and certified the costs of the Respondents of the said Appeal be set-off against the costs of the Appellant of the said Cross-Appeal AND THAT any balance so found to be due either to the Appellant or to the Respondents be paid by the party or parties liable to pay such balance of costs to the party or parties entitled to receive such costs or to its or their Attorney or Attorneys as appearing on the record after service of a copy of the Certificate of Taxation.

By the Court,

(Sgd.) F. C. LINDSAY.
District Registrar.

In the High Court of Australia.

No. 5.

JUDGMENTS.

No. 5. Judgments, 27th July 1951.

(A) DIXON, C.J.

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

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

(A) The Chief Justice (Sir Owen Dixon).

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

The Seventh Schedule of the Stamp Duties Act 1920–1940 contains four columns each specifying a different rate of duty. The first column imposes a rate of duty on so much of the estate as consists of property which passes under the will or devolves upon the intestacy of the deceased to the widow or lineal issue of the deceased. The second and third columns impose higher rates of duty on property passing to or devolving upon other objects. The fourth column imposes a still higher rate of duty on so much of the estate as consists of property not otherwise provided for in the previous columns. Unless a provision of the kind stated contained in the will brings any part of the estate under the higher duty the provisions of the will are such that the final balance of the estate would all pass to the widow and lineal issue of the testator and so fall under the first column. The Commissioner contends, however, that a clause of such a character operates to impart to the solicitor a beneficial interest in the property and that it is necessary to estimate the value of the interest for the purposes of the assessment of duty, because to that extent the estate cannot " pass " to the beneficiaries mentioned in the first schedule and must fall under the higher duty of the fourth column of the schedule as property not otherwise provided for by the schedule. How you estimate as at the time of the testator's death the amount of costs the solicitor to the estate will earn before it is wound up does not appear. It would seem impossible except in the simplest cases. But for some reason the Commissioner and the executors agreed in the present case " for the purposes of the assessment of Death Duty that the legal costs payable by the estate for past and future legal work should be deemed to be of the value of £250."

The actual clause in the will under consideration names Mr. Langley who is one of the trustees of the will and is a solicitor and declares that he or any trustee for the time being of the will being a solicitor or other person engaged in any profession or business should be entitled to charge retain and be paid all usual professional or other charges for business or acts done in relation to the trusts (summarising the clause) if the work was such that the trustees might reasonably require it to be done by a solicitor or other professional person. But no attempt was made to estimate the amount which might be paid to future hypothetical trustees for hypothetical professional services. Perhaps that was thought too difficult or too absurd.

But if the estimated future charges of Mr. Langley are to be treated as part of the final balance of the estate consisting of property not passing to the beneficiaries but to him, so must every other expected payment pursuant to the clause in the will be treated as not passing to the beneficiaries.

If the matter were to be considered apart from authority I should treat it as quite clear that the clause authorising the payment of costs to Mr. Langley and to other solicitor trustees and of remuneration for their professional or business charges to any other professional or business men who might become trustees could not confer upon him or them such an interest in the estate as to make it possible to say that a part of the estate was not provided for in the earlier column of the schedule, that is to say that there was part of the estate consisting of property which did not pass either to the widow of the testator or his lineal issue. The purpose of the clause in the will is to relieve professional and business men who become trustees of the operation of the equitable rule which would incapacitate them from receiving remuneration for professional and business services performed for the estate. Its purpose is not dispositive. It does not even provide for their remuneration for executing the duties of the office of trustee. For it is no part of the duty of a trustee to render professional services to the trust. It is not a reward for a service which, by accepting the office of trustee, he becomes bound to perform and so, according to the rule against trustees profiting from the trust, to perform gratuitously ; a solicitor executor or trustee is entitled to employ another solicitor to do the legal work involved in administering the trust. If he acts as solicitor for the estate and charges for his professional services pursuant to a provision in the will authorising him to do so, his remuneration is limited to what are proper charges for the legal work done. It may be true that as he fills both capacities he cannot as a solicitor be a creditor of himself as a trustee. But in all other respects he occupies the same situation as a creditor of the trust. In other words his claim upon the assets of the estate is for remuneration for services and not as a beneficiary. What a clause in the trust instrument authorising him to charge costs does is to enable him to profit by undertaking the work. It does no more than extend over a larger field of work and to cases of a sole trustee the doctrine of *Cradock* v. *Piper* (1850), 1 Mac. & G. 664 ; 41 E.R. 422. It may confer a benefit upon him by doing so, but it does not follow that any property passed to the solicitor on death. In my opinion clearly none did.

The difficulty about the matter arises altogether from the state of the case law concerning clauses authorising the payment to trustees of costs professional fees or business charges for work done in the exercise of their profession or calling. In *re Barber Burgess* v. *Vinnicombe* (1886), 31 Ch.D. 665, a will had been witnessed by a solicitor named Harmer who was appointed an executor. The will contained a provision declaring that Harmer should be entitled to charge and receive payment for all professional business to be done by him under the will in the same manner as he might have done had he not been an executor. Chitty, J., held that this provision was void because Harmer had witnessed the will. His Lordship said of the clause " It is bounty. It must be a gift to the executor out of the assets of the testatrix which enables him to take what

In the High Court of Australia.

No. 5. Judgments, 27th July 1951.

(A) The Chief Justice (Sir Owen Dixon), *continued.*

the law does not allow." This decision was followed by Stirling, J., in *re Pooley* (1888), 40 Ch.D. 1, and his decision was upheld by the Court of Appeal. Cotton, L.J., declined to give any opinion upon the suggestion that it would follow that legacy duty was payable and said that it might possibly be so but as regards the solicitor trustee " we have only to consider whether this direction is not in substance a gift to him of so much of the estate as is required to pay the profit costs and therefore void. It is urged that it is not a gift, for that he has to work for what he receives. That is true, but the clause gives him a right which he would not otherwise have to charge for work if he does do it and that in my opinion is a beneficial gift within the meaning of the section." Lindley, L.J., said " I think that under the old law Mr. Pooley would have taken by force of this clause such an interest as would have made him incompetent as a witness to the execution of the will. The policy of the Act was to leave the will good and to make void the gift which would have made the witness incompetent."

Before 1752 it was necessary under section 5 of the Statute of Frauds that a will of real estate should be in writing and attested in the presence of the testator by three or four credible witnesses. It is to this law apparently that Lindley, L.J., refers. The courts of common law would not allow any witness as " credible " whose competence was affected by interest, with the result that a witness who took any benefit under the will was disqualified, even a creditor if the will happened to charge debts on realty. Unless there were a sufficient number of other witnesses to a will of realty who were competent, the will failed altogether as a result of the interest of the witness. To remedy this section 25 Geo. II c. 6 was enacted containing a provision in terms which section 15 of the Wills Act 1837 repeats, except that section 15 includes the husband or wife of the witness and refers to the validity or the invalidity of the will as an issue upon which the witness may testify as well as due execution. The statute 25 Geo. II c. 6 related only to wills of realty : *Brett* v. *Brett* (1826), 3 Addams 210, 162 E.R. 456. Apparently Lindley, L.J., considered that the kind of interest to which section 15 applied should be construed widely in light of the strictness of the law as to competency for the purposes of section 5 of the Statute of Frauds. The words of section 15 are undoubtedly wide. They refer to a witness to the will to whom or to whose wife or husband any beneficial devise legacy estate interest gift or appointment of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts) shall be thereby (i.e. by the will) given or made. What is to be " utterly null and void " is described as " such devise legacy estate interest gift or appointment." The width of the application is not lessened by the express exception of charges of debts which under the old law sufficed to make creditors incompetent as witnesses to the will, rather the contrary, as Chitty, J., remarked in *Re Barber*, 31 Ch. D. at p. 670. But even so these decisions do seem to mean that the provision authorising professional charges gave a beneficial interest to the trustee. But supposing the benefit of the clause may properly be so described, that is a long distance from saying that on death part of the net balance of the estate consisted of property which did not pass to the widow and children because it was disposed of to the solicitor trustee.

Three years after *Re Pooley*, 40 Ch. D. 1, was decided it was used in the Court of Appeal in what appears to me to be a case of a somewhat different description, but one which turned upon liability for Legacy Duty, the matter referred to and reserved by Cotton, L.J., in *Re Pooley*. The case is *Re Thorley*, *Thorley* v. *Massam* [1891] 2 Ch. 613. What makes it a case of a different description is the character of the provision in the will. The will contained a trust to carry on the testator's business. The trustees were to carry on the business in conjunction with his son W. R. Thorley. The will declared that while the trustees were carrying on the business each of them should receive the annual sum of £250 out of the profits thereof and if the profits exceeded a certain standard in a year £500 in lieu of the £250. The will went on to declare that while W. R. Thorley managed the business in conjunction with the trustees he should be entitled to the said annual sum of £250 more as also to £500 in event of such increase of profit. By section 4 of 8 & 9 Vic. c. 76 legacy duty was chargeable upon every gift by will which by virtue thereof is payable or has effect or is satisfied out of the personal or movable estate or out of any personal estate which such person had power to dispose of whether the gift is by way of annuity or in any other form: Halsbury Laws of England, 2nd ed., vol. 13, p. 308. A gift by will with a condition annexed is liable to legacy duty without regard to the condition: *ibid.* In *Re Thorley* (*supra*) the direction that the trustees and W. R. Thorley should receive £250 or £500 each while managing the business was held to amount to a gift subject to a condition; the gift was liable to legacy duty. It is to be noticed that where the value of any benefit given by any will can only be ascertained from time to time by the actual fund allotted for the purpose, the duty is to be charged upon the sums or effects applied from time to time as separate and distinct legacies: Halsbury, 2nd ed., vol. 13, p. 323. It is not necessary therefore to attempt to ascertain the value of the benefit as at the time of death, though if it had been necessary it would have been possible to treat the payments as annuities and compute their present value disregarding the condition: cf. *ibid.* p. 322. The decision was placed upon the definite ground that there was a gift of an annual sum subject to a condition and that that was a legacy for the purpose of duty. Once the direction was so interpreted none of the difficulties could arise which would exist if it were sought to assess legacy duty upon the benefit conferred by a provision merely authorising a solicitor trustee to charge profit costs for legal work done for the estate. Both Green on Death Duties and Hanson on Death Duties (9th ed. at p. 489) say that in practice legacy duty is not claimed in respect of a provision entitling the executor to profit costs or other professional fees.

But Lindley, L.J., did say (at p. 624) that if the trustees had been able to charge the estate of the testator for their services it would alter the question very materially and he referred to *Re Pooley* as standing in the way of a decision in their favour. His Lordship, however, perceived that this observation had no application to W. R. Thorley. The decision of the whole case, therefore, went on grounds independent of the disqualification of the trustees from receiving remuneration and of the effect of the clause in removing the incapacity.

Another aspect of the operation and incidents of a clause authorising a solicitor trustee to charge profit costs or a trustee to charge remuneration

In the High Court of Australia.

No. 5. Judgments, 27th July 1951.

(A) The Chief Justice (Sir Owen Dixon), *continued.*

for work done in managing a business formed the subject of three English cases and an Irish case. They are *Re White : Pennell* v. *Franklin* [1898] 1 Ch. 297 ; [1898] 2 Ch. 217 (C.A.) ; *Re Salmen : Salmen* v. *Bernstein* [1912] 107 L.T. 108 ; *Re Brown : Wace* v. *Smith* [1918] 62 S.J. 487 ; [1918] W.N. 118 ; and *O'Higgins* v. *Walsh* [1918] 1 Ir. R. 126. These cases deal with the question of the order in which a claim under such a clause ranks when the assets prove insufficient to pay the creditors of the testator in full and again when the assets are sufficient to pay the creditors but not to pay the legacies in full. The first of these cases, viz. *Re White,* related to a claim for profit costs made by a solicitor who was sole proving executor. The estate was being administered by the court and was insolvent. The will contained a clause authorising him to charge costs notwithstanding his acceptance of the office of executor and trustee. It was decided that the creditors came first. The decision was based upon *Re Barber, supra, Re Pooley, supra,* and *Re White, supra.* Lindley, M.R., said " It is impossible to get over the authorities and the principles they contain " and Chitty, L.J., said " The declaration made by the testator is bounty on his part. No one can claim bounty until the creditors are satisfied." In spite of these observations it will be seen that the question really was whether the costs claimed could be considered costs incurred by the executor in administering the estate and so having priority to creditors of the testator. Apart from the clause they could not have been so considered and it would be difficult on ordinary principles for a provision of the will to operate to the prejudice of creditors of the testator.

The second of these cases, *Re Salmen,* turned on a clause authorising trustees to employ one of their number as a manager of the testator's business and to pay him a salary. They did so employ one of their number at a salary of £300 per annum. An administration order was made in a creditor's suit. It was expected that the estate would prove insolvent and the creditors of the testator objected to the allowance in the accounts of the trustees of the salary, that is in priority to their debts. The creditors do not appear to have consented to the business being carried on only for the purpose of winding up. It is difficult to see how any claim arising from carrying it on could have priority over creditors. The principles governing such a situation are explained in *Vacuum Oil Co. Pty. Ltd.* v. *Wiltshire* [1945] 72 C.L.R. 319, at pp. 324 and 335–6. But the decision in *Re Salmen* was put upon *Re White, supra.*

The third case, *Re Brown,* was one in which there was enough to pay creditors in full but not legatees. It was held that costs chargeable by a solicitor executor under a provision in the will must abate *pari passu* with legacies. The Irish case, *O'Higgins* v. *Walsh* [1918] 1 I.R. 126, presented a similar state of fact and a like decision was given.

Still another aspect of the operation of clauses authorising solicitor trustees to charge profit cost was discovered in an attempt to use some of the foregoing cases to establish that the amount received was not to be taxed as part of the annual gains of a profession. In *Jones* v. *Wright* [1927] 13 Tax Cases 221, Rowlatt, J., rejected this contention, which perhaps might have been thought to follow from the view that the clause amounted to a gift. He said that it was the liberation from the rule against profiting from a trust that was the bounty and that the bequest was of remuneration as

remuneration earned and must be so treated for the purposes of the income tax. See further *Watson* v. *Blunden* [1933] 18 T.C. 402. The view taken by Rowlatt, J., is not, I think, consistent with an interpretation of the previous authorities which would make them mean that the clause involved a passing of property as at death.

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

The decision in *Re Brown*, *Wace* v. *Smith*, *supra*, provoked a note by Mr. A. H. Hastie in 35 L.Q.R. 208 attacking the authorities which bound Eve, J., to decide that case as he did. The note contains this passage :—

> " But it often happens that the creator of a trust, or the maker of a will, desires that the professional man or business manager who has theretofore been employed by him for reward shall continue so to be employed by his trustees or executors, and when, by the use of apt words, he authorises this the charges which are earned differ in no way from the charges of any other professional man—they are not a gift or a bounty or a legacy—they are earned money ; all that the testator has done is to declare that a certain rule of restraint shall not apply."

The cases are in my opinion very unsatisfactory. Possibly *Re Barber* and *Re Pooley*, *supra*, can be justified on a very wide construction of section 15 of the Wills Act, 1837, attributable to the history of the law relating to witnesses of wills of realty. *Re Thorley*, *supra*, is based on an interpretation of the will as giving a legacy on a condition and if that construction of the provision of the will be accepted the decision is open to no criticism but it is then not in point. *Re White*, *Re Salmen*, *Re Brown* and *O'Higgins* v. *Walsh* may be supported, for the reasons I have given, as correct in principle whether or not the clause amounts to a legacy or gift.

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

In the High Court of Australia.

No. 5. Judgments, 27th July 1951.

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

(B) McTIERNAN, J., WILLIAMS, J., and WEBB, J.

REASONS PREPARED BY WILLIAMS, J.

(A) The Chief Justice (Sir Owen Dixon), *continued.*

(B) McTiernan, J., Williams, J. and Webb, J.

This is an appeal by leave and cross appeal by special leave from an order of the Full Supreme Court of New South Wales made on 30th, October 1950, in a case stated for the opinion of that Court under the provisions of section 124 of the Stamp Duties Act, 1920–1940. Apart from a question as to costs, the case stated six questions for the opinion of the Court but only two, Nos. 1 and 5, were answered, and Nos. 2, 3, 4 and 6 were ordered to stand over generally. The case was stated by the Commissioner of Stamp Duties, the Appellant in this Court, upon the requisition of the present Respondents who are the personal representatives of the estate of H. A. B. Pearse who died on 19th February, 1946.

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

Included in the estate of the deceased are 800 " A " cumulative 5 per cent. preference shares each fully paid to £8 and 2,986 " B " ordinary shares each fully paid to £8 in Plashett Pastoral Co. Pty. Ltd. This company was incorporated in 1913 under the Companies Act 1899 (N.S.W.), principally to acquire a station property called Plashett then owned by the father of the deceased. It became a proprietary company on 21st June, 1937. As Street, C.J., said in his reasons for judgment : " The company was a family company in every sense of the term, the articles placing restrictions and limitations on the right to transfer shares and containing other provisions designed for the purpose of keeping the company in the hands of the various members of the family who were shareholders. It duly acquired the station property in 1913, and ever since has run the same as a pastoral business." The nominal capital of the company is £72,000, divided into 9,000 shares of £8 each. Of this capital £64,056 had been subscribed at the date of the death of the deceased and comprised the 800 fully paid " A " cumulative preference shares already mentioned and 7,207 fully paid " B " ordinary shares. The company is thoroughly solvent. In the year ending 30th June, 1942, the company made a net profit of £2,304 3s. 9d., in the year ending 30th June, 1943, £2,761 5s. 11d.,

in the year ending 30th June, 1944, £3,638 19s. 5d., in the year ending 30th June, 1945, £1,006 3s. 7d., a total for these four years of £9,710 12s. 4d. In the year ending 30th June, 1946, the company made a net profit of £5,191. There is no indication whatever that the shareholders have ever desired that the company should go into voluntary liquidation and no shareholder holds sufficient shares to pass a special resolution for that purpose.

The Respondents submitted to the Commissioner a valuation of the shares prepared by a firm of chartered accountants in which the average annual profits of the four years ending 30th June, 1945, already mentioned less a loss of £2,253 7s. 5d. made in the year ending 30th June, 1941, were capitalised at 7 per cent. On this basis the accountants valued the 800 preference shares at their face value and the ordinary shares at £2 6s. 6d. The Commissioner accepted the valuation of the preference shares but refused to accept that of the ordinary shares. He proceeded to value the shares in accordance with section 127 (1) (*c*) of the Act. On this basis he estimated the value of the ordinary shares at £7 16s. 10d. per share and added to the final balance of the estate as returned by the Respondents the sum of £16,472 15s. 4d., this being the difference between £2 6s. 6d. per share and £7 16s. 10d. per share on the 2,986 " B " ordinary shares in the company held by the deceased.

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

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

In the High Court of Australia.

No. 5. Judgments, 27th July 1951.

(B) McTiernan, J., Williams, J. and Webb, J., *continued.*

clause 13 of the testator's will duty at the rate set out in the fourth column of the Seventh Schedule to the Act should be assessed on: (A) the full amount of £250; (B) such amount less office overhead expenses; (C) the executor-solicitor's share of such full amount; (D) the executor-solicitor's share of the full amount less his proportion of overhead expenses; or (E) no part thereof. (6) Whether the amount of duty chargeable on the said estate was £7,112 9s. or if not what other sum. The Supreme Court answered the first question "No", and the fifth question "the full amount of £250."

The first question is so framed as to make it appear that the Commissioner is asking the court to decide whether it was proper for him to value the shares in accordance with paragraph (*c*) of section 127 (1) of the Act, but it is apparent from the judgments of the Supreme Court, and the same attitude was adopted in this court, that the real contest between the parties to which the question is directed is whether the court has jurisdiction to substitute its own discretion for that of the Commissioner as to the mode of valuation to be adopted. It was submitted for the Commissioner here, as it was submitted below, that the Act confers on him a discretion which can only be disturbed by the court if the court is of opinion that he has failed to exercise his discretion properly so that it is in law not an exercise of his discretion at all. The approach of the Privy Council in *Pioneer Laundry and Dry Cleaners Ltd.* v. *Minister of National Revenue* [1940] A.C. 127; *Minister of National Revenue* v. *Wrights Canadian Ropes Ltd.* [1947] A.C. 109 and *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue* [1949] A.C. 24; and of this court in *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, was particularly relied upon. If those cases are in point they must be followed, but it appears to us, as it appeared to the Supreme Court, that they are distinguishable.

There can be no question that if the statute intends that a discretion shall be exercised by a particular person and not by the Court, the jurisdiction of the Court is confined to supervising its exercise so as to ensure that it is exercised according to law. The statute in such a case makes the particular person the sole judge of the existence or non-existence of the fact or other matter upon which the right or liability of the subject depends and the Court is not at liberty to substitute its own opinion for his. If section 127 (1) (*c*) of the Stamp Duties Act means that the Commissioner is to be the sole judge of the appropriate method to adopt in valuing shares in a company not listed on a stock exchange, then the Court in exercising its powers under section 124 cannot interfere unless it can be shown that the Commissioner has acted in contravention of some principle of law. For, to be effective, the discretion must be exercised, in the words of Lord Macmillan delivering the judgment of the Privy Council in *D. R. Fraser & Co. Ltd.* v. *Minister of National Revenue*, *supra*, at p. 36, "bona fide, uninfluenced by irrelevant considerations and not arbitrarily or illegally."

It was not contended for the Commissioner that the Court was bound to accept the amount of the valuation arrived at on the basis of paragraph (*c*). It was admitted that the notional sums attributed to the shares by the Commissioner upon the hypothetical winding up were fully

examinable. Its hands were tied only to the extent that it could be directed by the Commissioner to adopt the mode of valuation prescribed by the paragraph. This attitude of counsel for the Commissioner seems somewhat inconsistent. The paragraph would seem to protect the opinion of the Commissioner as to the sums the shares would realise on a liquidation to the same extent as his discretion to adopt this mode of valuation. There is no half-way house. Either each and every activity of the Commissioner under the paragraph is subject to complete judicial review under section 124, or each and every activity can only be reviewed to the same limited extent.

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

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

Before paragraph (*c*) was introduced, shares of companies not listed on the stock exchange had been in rare instances valued on the basis there prescribed. The paragraph may have been added as a safeguard against a suggestion that the mandatory character of paragraphs (*a*) and (*b*) indicated an intention that shares should be valued as shares in a going concern, and it was no longer open to the Commissioner in a proper case to value shares not registered on a stock exchange on the basis of a hypothetical winding up. Be that as it may, it appears to us that there is no sufficient indication in the paragraph of the capricious intention that the Court should remain under the duty of deciding a dispute between the subject and the Commissioner as to value of such shares but should be handcuffed to the particular mode chosen by the Commissioner. The essential problem is to ascertain the real value of the shares and the selection of the mode of valuation is simply one of the elements that enter into the calculation. The Commissioner is not required to adopt the mode prescribed by section 127 (1) (*c*). His discretion as to any particular mode is as untrammelled as before. The paragraph does not mention

In the High Court of Australia.

No. 5. Judgments, 27th July 1951.

(B) McTiernan, J., Williams, J. and Webb, J. *continued.*

the Court. It is not, like paragraph (*a*), stated to be for the purposes of the Act. It relates to the discretion of the Commissioner in performing his administrative duties under the Act. It has no application to the jurisdiction of the Court in performing its judicial functions under section 124. Adapting the words of this Court in *Commissioner of Stamp Duties (Q.)* v. *Beak*, 46 C.L.R. 585 at p. 597, clear words 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.

It is therefore unnecessary to consider whether, if the jurisdiction of the Court was confined to inquiring whether the Commissioner had exercised his discretion properly, in view of the express authority conferred by section 127 (1) (*c*) it could be said that he had failed to do so. We agree with the Supreme Court that the mode prescribed by this paragraph for valuing the ordinary shares in Plashett Pastoral Co. Pty. Ltd. is not a proper mode. The usual mode of valuing shares in a company which is a going concern has been established by many judicial decisions, several of which are decisions of this Court. We refer in particular to the decision of the majority of the Full Court in *Commissioner of Succession Duties (S.A.)* v. *Executor Trustee and Agency Co. of S.A.*, 74 C.L.R. 358. The law has been recently stated in the House of Lords to the same effect. We refer to a passage in the speech of Lord Simon in *Gold Coast Selection Trust Ltd.* v. *Humphrey* [1948] A.C. 459, at pp. 472, 473, concurred in by Lords Thankerton, Uthwatt and Du Parcq. To value shares in a company which is a going concern on the basis that the company is in voluntary liquidation at the date of death savours of unreality. The choice of such a mode is not calculated to produce a fair value. It is more likely to produce a false value. Scope for the use of the provision contained in section 127 (1) (*c*) may be found in cases where a company's operations do not produce income which can be regarded as affording any measure of the value of the shares, as well may be the case with an assets company or a company whose earning capacity is restricted or diminished temporarily or by accidental circumstances. Other special cases may be imagined.

The appeal should be dismissed.

The cross appeal remains for consideration. It raises the question of the legal effect of a provision in a will that a solicitor who is a trustee may nevertheless charge profit costs. It is a maxim of equity that a trustee shall not make a profit out of his trust. But this in capacity can be modified or removed by the creator of the trust or the unanimity of the beneficiaries provided that they are all *sui juris*. The effect of the provision would therefore appear to be to create a capacity in a trustee to make a profit which would not otherwise exist. To earn the profit the solicitor must still do the necessary work, and it is difficult to see how the fruits of his personal exertion are in any true sense derived from the bounty of the testator. But it has been so decided in several cases, including *In re Barber*, 31 Ch. Div. 665 ; *In re Trotter* [1899] 1 Ch. 764 ; *Re Brown* [1918] W.N. 118 ; *O'Higgins* v. *Walsh* [1918] Ir. (1 Ch.) 126 ; (decisions of Single Judges), *Re Pooley*, 40 Ch. Div. 1 ; *In re Thorley* [1891] 2 Ch. 613 ; *In re White* [1898] 2 Ch. 217 ; *Re Salmen*, 107 L.T. 108 (decisions of the

Court of Appeal). In *In re Barber* and *Re Pooley* it was held that a solicitor who witnessed a will containing such a clause lost its benefit under section 15 of the Wills Act (section 13 of the Wills Probate and Administration Act 1898–1932 N.S.W.). In *In re Barber*, Chitty, J., said at p. 670—" It is clear, the matter standing in the position I have stated, that the executor could not have charged for his personal services. But, says the executor, there is a clause in the will which enables me to do it. What is that? It is bounty. It must be a gift to the executor out of the assets of the testatrix which enables him to take that which the law does not allow. I cannot conceive that the case can be put on any other footing." In *Re Pooley*, Cotton, L.J., said at p. 4—" As regards the Appellant we have only to consider whether this direction is not in substance a gift to him of so much of the estate as is required to pay the profit costs, and therefore void. It is urged that it is not a gift, for that he has to work for what he receives. That is true, but the clause gives him a right which he would not otherwise have to charge for the work if he does it, and that, in my opinion, is a beneficial gift within the meaning of the section." Lindley, L.J., said " Apart from this clause, Mr. Pooley could not get anything out of the estate for his services, and I cannot say that a clause which enables him to get something out of the estate is not a gift to him within the meaning of the 15th section." In *In re White*, in the Court below [1898] 1 Ch. 297, Kekewich, J., said at p. 299 that the right to charge profit costs is " the same thing as a gift, of, say, £100: there is no difference whatever between a gift of profit charges and a gift of £100. In my opinion it is a legacy, and chargeable as such with legacy duty." On appeal Lord Lindley said at p. 218 " it is impossible to get over the authorities and the principles upon which they are based." In *In re Brown*, Eve, J., said at p. 118 " The effect of the declaration in the will enabling the solicitor to charge for professional services was a bequest to him of a legacy conditional upon his doing the work; the amount of the legacy would be ascertained when the work had been done and the profit costs arrived at. It was nothing more or less than a bequest to the solicitor of that sum, ultimately to be ascertained."

These authorities and the principles on which they are based all indicate a concluded view in the English Courts, short of the House of Lords, that moneys which become payable to a trustee pursuant to such a declaration in a will are a beneficial gift to him of the same nature as the other beneficial dispositions of the will. The trustee is not a creditor but a beneficiary so that if the estate is insolvent his gift fails and if the estate is insufficient to pay him and the general pecuniary legacies in full the amount owing to him must abate rateably with these legacies. The benefit is equally a gift whether the amount payable to the trustee for his services is fixed by the will or subsequently ascertained by the doing of the work.

Unless we refuse to follow these cases it necessarily follows that the amount of £250 in dispute is property which falls within the fourth column of the Seventh Schedule of the Stamp Duties Act. Although not bound to follow decisions of the Court of Appeal, this Court in general does so in questions of law and equity common to both countries where the decisions of the Court of Appeal appear to have settled the law, so that the

In the High Court of Australia.

No. 5. Judgments, 27th July 1951.

(B) McTiernan, J., Williams, J. and Webb, J., *continued.*

law in Australia may be kept in line with the law in England : *Waghorn* v. *Waghorn*, 65 C.L.R. 289, *Piro* v. *W. Foster & Co. Ltd.*, 68 C.L.R. 313. In the present case the decisions of the Court of Appeal have stood for a long time and appear to have settled the law. They were applied to income tax appeals in *Baxendale* v. *Murphy* [1924] 2 K.B. 494, and *Hearn* v. *Morgan* [1945] 2 A.E.R. 480. The decision of Rowlatt, J., in *Jones* v. *Wright*, 44 T.L.R. 128, was relied upon as throwing some doubt upon their correctness. In that case his Lordship said that all that a solicitor gets under the clauses which give him power to charge is the removal of a disability which would otherwise prevent him from entering into an ordinary contract of service with the trustees in consideration of remuneration. His Lordship went on to point out that he thought that the solicitor in that case had entered into such a contract, that the remuneration formed part of his income and must be treated as profits and earnings arising from his employment as a solicitor. He said that he did not think the cases meant that a bequest of profit costs is a bequest of a bounty which is not earned. We do not think that these remarks throw any doubt upon the correctness of the decisions in question. His Lordship was dealing with the matter from a different angle. Gifts under wills, although payable out of the capital or partly out of the capital of the estate, may be income for the purposes of income tax. In Australia profit costs earned by a solicitor, although payable out of the capital of the estate, would be income from personal exertion within the meaning of the Income Tax Assessment Acts. They would still be taxable to the same extent whether the solicitor was a trustee of the will or not. But if he was a trustee and was authorised by the will to charge such costs he would, according to the cases, be the recipient of a bounty from the testator because apart from the authority he would be bound to do the work, if he chose to do it, for nothing.

It was also submitted that a direction such as the present direction applying not only to a named trustee but to any other trustee for the time being of the will would in the case of such other trustee infringe the rule against perpetuities because the bounty might not vest within a period of a life or lives in being and 21 years. It is premature to discuss this interesting point while Langley is acting as the solicitor to the estate. As, however, the bounty is in essence a dispensation resulting in the trustee acquiring the capacity to make a profitable contract of employment, and the rule against perpetuities does not apply to contracts, it would not appear to be sound.

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

The cross appeal should also be dismissed.

(c) FULLAGAR, J.

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

The testator appoints as his executors and trustees the Perpetual Trustee Co. Ltd., his wife (Hazel May Pearse) and Thomas Archdall Langley of Sydney, Solicitor. He gives a legacy of £500 to his wife, and devises and bequeaths all the residue of his estate to his trustees upon certain trusts for his widow, children and grandchildren. The trusts for the widow and children are the statutory " protective trusts," and corpus is ultimately distributable to grandchildren *per stirpes*. The will concludes with the following provision :—

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

It is to be observed that this clause applies not only to Mr. Langley, who is a solicitor and who joined with the other two named executors in proving the will, but to any professional person who may at any time become an executor or trustee of the will. It may apply to another solicitor or to a barrister, an accountant, a taxation consultant or a stockbroker—the will, it may be noted, authorises investment in the shares of public companies.

Section 101D of the Act provides that, in the case of a person domiciled (as this testator was) in New South Wales, duty at the rates mentioned in the Seventh Schedule shall be assessed and paid on the " final balance " of his estate. In this case the final balance was assessed at £47,333. The Seventh Schedule is divided into four columns. The first column deals with " so much of the final balance of the estate as consists of property which passes under the will or devolves upon the intestacy of the deceased to the widow or lineal issue of the deceased," and imposes duty thereon at the rate of 15 per cent. The contention of the executors in the present case is that the whole of the final balance of the estate falls within the first column, and that duty is payable on the whole at the rate of 15 per cent. The second column deals with " so much of the final balance of the estate as consists of property which passes under the will or devolves upon the intestacy of the deceased to the widower, lineal ancestor, brother or sister or issue of a brother or sister of the deceased," and imposes duty

In the High Court of Australia.

No. 5. Judgments, 27th July 1951.

(c) Fullagar, J., *continued.*

at the rate of 17 per cent. This column has, of course, no application to the present case. The third column deals with " so much of the final balance of the estate as consists of property which passes under the will of the deceased to or for the benefit of " certain classes of charitable objects, and imposes duty at the rate of 13¾ per cent. This column also, of course, has no application to the present case. The fourth column deals with " so much of the final balance of the estate as consists of property not otherwise provided for in the first, second or third columns of this Schedule," and imposes duty at the rate of 20 per cent. The contention of the Commissioner is that the effect of clause 13 of the will, which I have set out above, is to bring *some part* of the final balance of Mr. Pearse's estate within the fourth column of the Seventh Schedule and subject it to duty at the rate of 20 per cent. Faced with the question " *What part?* ", the Commissioner might well have felt himself completely baffled, but paragraph 20 of the case stated under section 124 of the Act says : " It has been agreed between the executors and the Commissioner for the purposes of the assessment of death duty herein that the legal costs payable by the estate for past and future legal work should be deemed to be of the value of £250." The Commissioner has assessed duty on £47,083 of the final balance at the rate of 15 per cent., and on £250 of the final balance at the rate of 20 per cent. The difference between his view and that of the executors is thus £12 10s. It may be noted in passing that clause 13 of the will is not concerned merely with legal costs. It is obviously impossible to place anything remotely resembling a valuation on the professional fees of various kinds which might be earned and allowed under it.

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

The contention of the Commissioner that something " passes " to somebody under Clause 13 of the will in this case would indeed seem to need only to be stated to be seen to be fallacious, if it were not for certain authorities on which he relies, and which it is necessary to consider. The actual decisions in the cases have no bearing on the construction of the New South Wales Act, but what is said in some of them has been put as giving countenance to the argument for the Commissioner.

In *Re Barber: Burgess* v. *Vinnicombe* (1886), 31 Ch. D. 665, the testatrix appointed one Harmer, who was a solicitor, to be one of her executors, and declared that " the said Harmer shall be entitled to charge and to receive payment for all professional business to be done by him under this my will in the same manner as he might have done had he not been an executor." Harmer witnessed the will. Chitty, J., held that the declaration of the testatrix gave to Harmer what was " in effect bounty on the part of the testatrix," that it gave him " an interest, legacy, gift or appointment within the meaning of section 15 of the Wills Act 1837," and that it was accordingly avoided by that section. This decision was approved by the Court of Appeal in *Re Pooley* (1888), 40 Ch. D. 1.

The next case cited was *Re Thorley* [1891] 2 Ch. 613, in which the Court of Appeal affirmed the decision of North, J. A testator directed his trustees to carry on a business in conjunction with his son, and declared that the trustees, while carrying on the business, should receive the annual sum of £250 out of the profits thereof, and that, while the son should be managing the business in conjunction with the trustees, he should receive the sum of £250 " more " (i.e. presumably in addition to the salary at which he was employed by the trustees). The amount was subject to increase according to the profits. It was held that each sum paid was a legacy within the meaning of the Legacy Duty Acts and liable to duty accordingly. I should have thought that this case had no bearing whatever upon the present, if only because the sums paid to the son (who was not a trustee) were held to stand on the same footing as those paid to the trustees. There was previous authority for saying that sums given upon condition or upon a consideration to be performed by the donee were legacies within the meaning of the Act. The case of *Re Pooley* was, however, referred to as bearing on the case of the trustees, though not, of course, on the case of the son. There are other dispositions by will which attract legacy duty in England on payment, although they are clearly not legacies in the ordinary sense, e.g. payments by trustees under a discretionary trust to apply moneys for maintenance: see *Attorney-General* v. *Wade* [1910] 1 K.B. 703, 711.

It has also been held in England that a solicitor-trustee, who is authorised by a will to charge profit costs, cannot, if the estate is insolvent, compete with creditors, and must, if the estate, though solvent, is insufficient to satisfy in full all gifts to beneficiaries, submit to an abatement of profit costs earned by him *pari passu* with beneficiaries. See *Re White: Pennell* v. *Franklin* [1898] 1 Ch. 297; [1898] 2 Ch. 217, and *Re Brown: Wace* v. *Smith* [1918] W.N. 118. In *Re Salmen: Salmen* v. *Bernstein* (1912), 107 L.T. 108, where the estate was expected to prove insolvent, it was held that a trustee could not prove in competition with creditors for salary earned by him in managing a business and payable to him by virtue of a clause in a will.

In so far, if at all, as the cases cited are to be regarded as authority for a general proposition of law that a provision in a will authorising a professional trustee to charge for services rendered by him in his professional capacity gives of its own force a legacy or gift or bounty to the professional trustee, they are, in my opinion, obviously unsound in principle. Sir Arthur Underhill (Trusts, ed. 9, p. 348), after referring to four of them, says: " But whether these cases can be supported on principle is respectfully

In the High Court of Australia.

No. 5. Judgments, 27th July 1951.

(c) Fullagar, J., *continued.*

questioned." And in Hanson on Death Duties (ed. 9, pp. 488–9) it is justly remarked that a provision of the kind in question " might be thought not to amount to a legacy but merely to prevent the operation of the rule of equity that an executor or trustee shall not make his office a source of profit, and thus to enable him to charge for services which, in the absence of any such direction, he would be bound to render gratuitously."

The true position is very clearly put by Rowlatt, J., in *Jones* v. *Wright* (1927), 44 T.L.R. 128. In an earlier case of *Baxendale* v. *Murphy* [1924] 2 K.B. 494 Rowlatt, J., had had to consider a case in which a deed of trust provided (1) that each trustee should be entitled to remuneration for acting as trustee at the rate of £100 per annum payable *out of the income* of the trust fund, and (2) that any professional trustee should be entitled to make the usual professional charges. It is important to note that no question arose as to any charges made under the second provision. The learned Judge held that the remuneration of £100 per annum was an " annual payment " brought into charge to tax within rule 19 of the All Schedules Rules in the Income Tax Act 1918, and was not a payment in respect of employment so as to be the subject of direct assessment under Case II of Schedule D. As to the nature of the payment he referred in his judgment to *Re Thorley* [1891] 2 Ch. 613. In *Jones* v. *Wright* the same question arose, but this time with regard to professional fees charged by a solicitor-trustee who was empowered by the trust instrument to charge for work done. The Attorney-General in argument suggested that *Baxendale* v. *Murphy* had been wrongly decided, and Rowlatt, J., in giving judgment (at page 130) said : " It may be that that is so." He did not think, however, that *Baxendale* v. *Murphy* covered the case before him. He said : " All that the trustee gets under the clause which gives him power to charge is the removal of a disability which would otherwise prevent him from entering into an ordinary contract of service with the trustees in consideration of remuneration." He did not think that the substance of the position was affected by the fact that the solicitor-trustee could not sue his co-trustees and himself at common law. He said : " The respondent need not act as solicitor to any of these trusts. If he wishes to do so, he finds himself free to enter into a bargain." The learned Judge then referred at some length to *Re Thorley* [1891] 2 Ch. 613, *Re White* [1898] 2 Ch. 217 and *Re Brown* (1918), W.N. 118, and concluded his judgment by saying : " I do not think that those cases cover the present matter, because I do not think that they mean that a bequest of profit costs is a bequest of a bounty that is not earned. Profit costs are earned in such a case as the present, and it is right to charge them with income tax under Schedule D, Case II. They remain remuneration, and must be treated as profits and earnings arising from employment." Cf. generally *Watson & Everitt* v. *Blunden* (1933), 18 T.C. 402. The true nature of the position in such cases is, I think, emphasised when one remembers that (as is pointed out in Godefroi on Trusts (Ed. 5, p. 215)) a solicitor in such cases derives from the trust instrument no *right* to be employed as solicitor to the trust. If his co-trustees or the beneficiaries do not wish him to act, and he seeks the assistance of the Court, the whole matter is in the discretion of the Court, which is extremely unlikely to interfere in his favour.

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

rather than an authorised outgoing in administration is possibly traceable (although the case does not seem to be referred to in any of the cases I have mentioned) to language said to have been used by Lord Hardwicke in *Ellison* v. *Airey* (1748), 1 Ves. Sen. 111, at p. 115. In that case there was a direction in the will that the trustees should be " paid for their trouble as well as expence." The validity of such a provision was challenged on the equitable ground that it " might be of general prejudice, because trustees frequently draw wills and settlements themselves." The report proceeds : " But the Lord Chancellor said this was a legacy to the trustees, to whom the testator may give this satisfaction if he pleases. . . . Let the Master therefore inquire what they might reasonably deserve for their trouble." Great consequences cannot properly be made to hang on such a passage in a report, and (having regard to the point raised) I should have regarded Lord Hardwicke as meaning no more than that there was no substance in the point raised because the testator could authorise what he liked to be done with what was his own.

If I thought that such cases as *Re Pooley* (1888), 40 Ch.D. 1 and *Re Thorley* [1891] 2 Ch. 613 really depended on a supposed legal principle that profit costs payable to a solicitor-trustee by virtue of a provision in a trust instrument are for all purposes matter of " bounty " and not an authorised outgoing in the administration of the trust, I would think that such a principle was unreal and unsound. The view of Rowlatt, J., and of Sir Arthur Underhill seems plainly right. But it would, in my opinion, be wrong to regard the cases on which the Commissioner relies as laying down any such false general principle, and wrong to regard any of them as having any bearing whatever on the present case.

The cases fall into three classes. In the first class are *Re Barber* (1886), 31 Ch.D. 665, and *Re Pooley* (1888), 40 Ch.D. 1. The old rule of law was that an interested witness was incompetent, and it would probably have been right to regard the solicitor in each of these cases as interested and therefore under the old law incompetent as a witness to the will. The disqualification was removed generally by 6 & 7 Vict. c. 85, but in the case of wills it had been dealt with first by 25 Geo. II, c. 6 (which applied only to wills of realty) and then more broadly by sections 14 and 15 of the Wills Act 1837 (which applied to all wills). The policy adopted was not to invalidate the will as a whole but to destroy the "interest" by invalidating the benefit given to the witness. The wills in *Re Barber* and *Re Pooley* would have come clearly enough within section 14 of the Wills Act, if it had been necessary at those times to invoke that section, and they were therefore valid, but it was by no means so clear that the cases came within the actual language of the complementary section, section 15. What the Courts really did was to regard the policy of sections 14 and 15 and to give effect to that policy by a possibly somewhat strained interpretation of the latter section. This is made very clear by the short judgment of Lindley, L.J., in *Re Pooley*, 40 Ch.D. at pp. 4–5. His Lordship said : " I think it is impossible to escape from the words of the section, and the case appears to me to fall within its policy. I think that under the old law Mr. Pooley would have taken by force of this clause such an interest as would have made him incompetent as a witness to the execution of the will. The policy of the Act was to leave the will good and to make void the gift which would have made the witness

In the High Court of Australia.

No. 5. Judgments, 27th July 1951.

(c) Fullagar J., *continued.*

incompetent. Apart from this clause, Mr. Pooley could not get anything out of the estate for his services, and I cannot say that a clause which enables him to get something out of the estate is not a gift to him within the meaning of the 15th section." Bowen, L.J., in the course of argument (at p. 3) had asked: "Is not a disposition of this kind within the policy of section 15?" This is the whole substance of *Re Barber* and *Re Pooley*.

In the second class of case is *Re Thorley* [1891] 2 Ch. 613. Here specific annual sums were directed to be paid out of the profits of a business. It has, in my opinion, no application to a general authority to receive payment for services such as we have in the present case. So Dr. Harrison in his Practical Epitome of the Death Duties, at p. 209, says: "In practice legacy duty is not claimed on remuneration authorised in general terms by the will to be paid to a professional executor or trustee for his services, for which he could not otherwise charge, but the duty is claimed in respect of any *specified benefit* given him by the will in return for his services, e.g. a pecuniary legacy, annuity, or share of income while acting." Cf. Green on Death Duties, p. 267. This view of the effect of *Re Thorley* seems to me to be clearly correct, and, so regarded, it has no relevance to the present question.

The third class of case is exemplified by *Re White* [1898] 1 Ch. 297; [1898] 2 Ch. 217. I do not think that there is any justification for regarding these cases as deciding more than that a person who must rely on the will for his right to the payment claimed by him must rank, in the event of an insufficiency of assets, with others who claim under the will and not with outside creditors of the estate. This seems to be a perfectly sound view. It may or may not be legitimate to regard the trustee, for the purposes of the question at issue in such cases as *Re White*, as a "recipient" of "bounty." In my opinion, it is not. But, if it is, it is fallacious to say that it follows that he must be so regarded for all purposes.

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

The cross-appeal should be allowed.

No. 6.

In the Privy Council.

ORDER IN COUNCIL granting Special Leave to Appeal to Her Majesty in Council.

No. 6. Order in Council granting Special Leave to Appeal to Her Majesty in Council, 4th September 1952.

AT THE COURT OF BALMORAL CASTLE.

The 4th day of September 1952.

Present

THE QUEEN'S MOST EXCELLENT MAJESTY.

HIS ROYAL HIGHNESS THE DUKE OF EDINBURGH.

Sir ALAN LASCELLES.

LORD PRESIDENT.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 29th day of July 1952 in the words following, viz. :—

" Whereas by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of The Commissioner of Stamp Duties of the State of New South Wales in the matter of an Appeal from the High Court of Australia between the Petitioner Appellant and (1) Hazel May Pearse (2) Thomas Archdall Langley (3) Perpetual Trustee Company (Limited) Respondents setting forth (amongst other matters): that the Respondents are the Executors of the estate of the late Henry Bowen Aylmer Pearse (thereinafter called " the Deceased ") who died on the 19th February 1946 : that being dissatisfied with an assessment to Death Duty under the New South Wales Stamp Duties Act 1920–1940 made by the Petitioner in respect of the estate of the Deceased they required the Petitioner under section 124 of the Act to state a case for the opinion of the Supreme Court of the State of New South Wales upon a number of questions of which one only is the subject of these present proceedings viz.: whether in valuing certain shares forming part of the estate of the Deceased the Petitioner was justified in exercising the discretion conferred upon him by paragraph (*c*) of section 127 (1) of the Act to value such shares upon a liquidation basis : that although so framed the 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 substitute its own discretion for that conferred on the Petitioner by the paragraph as to the mode of valuation : that it was submitted for the Petitioner both in the Supreme Court and in the High Court :—(1) (A) that an exercise by the Petitioner of his discretion under section 127 (1) (*c*) was not open to review by the Court upon a case stated under section 124 in the sense that the Court had no jurisdiction to substitute its own discretion for his unless it were established by the appellant that the discretion had been exercised on wrong legal principles or *mala fide* or so irrationally that in law it was

In the Privy Council.

No. 6. Order in Council granting Special Leave to Appeal to Her Majesty in Council, 4th September 1952, *continued.*

no real exercise of the discretion at all; (B) that to hold the contrary would be contrary to a line of cases of high authority; (C) that in the present case there was no evidence that the Petitioner had exercised his discretion on wrong legal principles or *mala fide* or so irrationally as aforesaid; and (2) that if contrary to the contention of the Petitioner the Court was entitled to substitute its discretion for his it should in the present case reach the same conclusion as he did: that the Petitioner's submissions were rejected both in the Supreme Court and in the High Court: And humbly praying Your Majesty in Council to grant the Petitioner special leave to appeal from the Judgment of the High Court dated the 27th July 1951 and for such other Order as to Your Majesty in Council may seem fit:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal against the Judgment of the High Court of Australia dated the 27th day of July 1951 upon the following conditions:—(A) that the costs of the proceedings in the Courts in Australia remain as directed in Australia and (B) that the Respondents' costs as between solicitor and client both of this Petition and of the Appeal to Your Majesty in Council shall be paid by the Petitioner in any event.

"AND THEIR LORDSHIPS do further report to Your Majesty that the proper officer of the said High Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor General or Officer administering the Government of the Commonwealth of Australia for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

(Signed) MARTIN CHARTERIS.

No. 9 of 1953.

In the Privy Council.

ON APPEAL
FROM THE HIGH COURT OF AUSTRALIA.

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.*

RECORD OF PROCEEDINGS

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