[HIGH COURT OF AUSTRALIA.]

BOAN AND ANOTHER . . . . . APPELLANTS;
RESPONDENTS,

AND

THE COMMISSIONER OF STAMPS (W.A.) . RESPONDENT.
APPELLANT,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Sept.* 4, 5.

MELBOURNE, *Oct.* 11.

Latham C.J., Rich and Dixon JJ.

Succession Duty (W.A.)—Shares in proprietary company—Valuation of ordinary and preference shares—Administration Act 1903-1941 (*W.A.*) (*No.* 13 *of* 1903—*No.* 55 *of* 1941), *ss.* 110 (1), 112—*Partnership Act* 1895 (*W.A.*) (59 *Vict. No.* 23), *s.* 33.

Section 110 (1) of the *Administration Act* 1903-1941 (W.A.) provides that in the valuation of the share or interest of any person in any partnership for the purpose of this Act, the share or interest of the partner concerned shall be that sum which bears the same proportion to the total capital of the partnership as his fractional share bears to the whole number of shares in the partnership. In this section total capital means the value of the assets of the partnership less the liabilities of the partnership. Section 112 provides that in the valuation of the shares of a shareholder in any proprietary company such shares shall be valued as if the company were a partnership and the shareholders were partners.

At the time of his death a deceased person owned a number of preference shares and a number of ordinary shares in a company the assets of which, less its external liabilities, exceeded in value its issued share capital.

Held, by *Rich* and *Dixon* JJ. (*Latham* C.J. dissenting), that under s. 110 (1) the share or interest of a deceased partner is to be taken to be that sum which bears the same proportion to the value of the assets of the partnership, less liabilities, as his proportionate or fractional share in such assets less liabilities, bears to the value of such assets less liabilities; that as a result of s. 112 the interests in the proprietary company's assets are notionally transformed into

corresponding interests in the surplus assets of an imaginary partnership, governed by the same definition of interests as the provisions of the memorandum and articles effect, and that accordingly the share of the deceased is to be ascertained by taking his proportion of capital representing preference shares first and then by taking a proportion of surplus assets of the company rateable with his holding of ordinary shares.

Decision of the Supreme Court of Western Australia (Full Court), by majority, affirmed.

APPEAL from the Supreme Court of Western Australia.

The Commissioner of Stamps (W.A.) stated a case under s. 102 of the *Administration Act* 1903-1941 (W.A.) for the opinion of the Supreme Court of Western Australia. The questions arising related to the correct method of valuing preference and ordinary shares in Boans Ltd. owned by the testator Henry Boan.

The special case was substantially as follows :—

1. Henry Boan died on 18th March 1941 having made and duly executed his last will and testament bearing date 30th May 1939 and one codicil thereto bearing date 30th May 1939.

2. On 7th July 1941 probate of the will and codicil was granted by the Supreme Court of Western Australia in its Probate jurisdiction to Frank Thomas Boan and Sir Walter Hartwell James, the executors named in the said will. Sir Walter Hartwell James died on 3rd January 1943. On 12th February 1943 probate of the will and codicil was granted to Ernest Blanckensee, the substituted executor named in the said will.

3. Included in the assets of the deceased were : (i) 30,000 7 per cent cumulative preference shares in Boans Ltd. ; (ii) 50,117 ordinary shares in Boans Ltd.

4. Not more than five persons are entitled to at least two-thirds of the shares in the subscribed capital of Boans Ltd. and consequently the company is a " proprietary company " within the meaning of s. 112 of the *Administration Act* 1903-1941.

5. Under art. 72 of the articles of association of Boans Ltd. preference shareholders were entitled upon a winding-up to the repayment out of the surplus assets of the company in priority to all other claims of all capital paid up on their shares and to any arrears of dividend, but to no further payment. This article also provided that after meeting the claims of preference shareholders the surplus assets should then be devoted to the repayment of capital paid up on employees' shares and other shares, and the further surplus assets, if any then remaining, should be distributed between the holders of ordinary shares in proportion to the capital paid up on the shares.

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6. The capital of the company is £500,000 divided into :—

(*a*) 250,000 7 per cent preference shares of £1 each ..	£250,000
(*b*) 248,500 ordinary shares of £1 each	248,500
(*c*) 30,000 employees' shares of 1s. each	1,500
	£500,000

7. The paid-up capital of the company as at the date of the death of the said deceased was made up of the following shares :—

250,000 7 per cent cumulative preference shares of £1 each	250,000
100,032 ordinary shares of £1 each	100,032
30,000 employees' shares of 1s. each	1,500
	£351,532

8. It has been agreed between the Commissioner of Stamps and the executors of the estate of the deceased that for the purposes of this special case the value of the assets of the company less the liabilities of the company was £582,430 at the date of death of the deceased.

9. In assessing the estate of the deceased for duty the Commissioner of Stamps at first valued : (i) the preference shares at £1 5s. 6d.; (ii) the ordinary shares at £3 13s. 6d., but now contends that the value of the preference shares should be taken at their face value and that the correct method of valuing the ordinary shares of the deceased in Boans Ltd. for the purposes of the *Administration Act* 1903-1941 is :

(*a*) To deduct from the value of the assets of the company less the liabilities (namely £582,430) the face value of the preference and employees' shares (namely £251,500) ;

(*b*) To divide the balance (namely £330,930) by the number of ordinary shares in the company (namely 100,032), and multiply the result by the number of ordinary shares held by the said deceased (namely 50,117). The Commissioner of Stamps contends that the answer so obtained (namely £165,803) is the value of the ordinary shares of the said deceased for the purposes of the *Administration Act* 1903-1941.

The questions stated for the opinion of the Supreme Court were :—

(i) Is the method adopted by the Commissioner of Stamps set out in par. 9 the correct method of valuing the ordinary shares in Boans Ltd. ?

(ii) What is the correct method of valuing the ordinary shares in Boans Ltd. for the purpose of the *Administration Act* 1903-1941 ?

(iii) What is the correct method of valuing the preference shares in Boans Limited for the purpose of the *Administration Act* 1903-1941 ?

The case was heard before *Northmore* C.J., who held that the correct method of valuing the deceased's 30,000 7 per cent preference shares and 50,117 ordinary shares in Boans Ltd. for the purpose of the *Administration Act* 1903-1941 was to multiply his fractional share (namely, $\frac{80,117}{351,532}$) by the value of the assets of the company less the liabilities of the company (namely, £582,430) and that the answer so obtained (namely, £132,740) was the value of the deceased's preference and ordinary shares in Boan's Ltd. for the purpose of the Act.

The Commissioner of Stamps appealed to the Full Court of the Supreme Court from the decision of *Northmore* C.J. The Full Court (*Dwyer* C.J. and *Walker* J.) answered the questions in the case stated as follows :—(i) Yes ; (ii) Not necessary to answer ; (iii) Not necessary to answer.

From that decision the executors of Boan appealed to the High Court.

The relevant statutory provisions are set out in the judgment of *Latham* C.J.

Downing K.C. (with him *Ainslie*) for the appellants. The object of ss. 110 and 112 of the *Administration Act* 1903-1941 is to place an entirely conventional value on shares in proprietary companies and partnerships quite irrespective of the terms of the partnership agreement or of the memorandum or articles of association of the company. The words of s. 110 make this perfectly clear : See " for the purposes of this Act " and sub-s. 2, which would otherwise be meaningless. The Full Court has not attempted to construe these sections and has based its judgment on the value of a share in a partnership under s. 33 of the *Partnership Act* 1895 (W.A.). That section has no application in ascertaining the conventional value of the shares under s. 110. The word " shares " in that section means preference, ordinary, employees' or any other class of shares, and the word " shareholders " has a corresponding meaning and therefore means all the shareholders in all classes of shares. The " fractional share " of the testator within the meaning of s. 110 is the total number of all shares in whatever class held by him in the company, namely 80,117, over the total number of all classes of shares in the company, namely $\frac{80,117}{351,532}$. The " whole number of shares in the partnership " within the meaning of s. 110 is the total number of

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issued shares in the company after the employees' shares have been brought to the same nominal value as the preference and ordinary shares, namely 351,532. The value of the testator's share is then that sum (x) which bears the same proportion to the " total capital of the partnership " (£582,430) as his " fractional share " (80,117) bears to the " whole number of shares in the partnership " as follows : i.e., x is to 582,430 as 80,117 is to 351,532 ; i.e. $x = \frac{80,117}{351,532} \times £582,430$ = £132,740. The legislatures of other States and of England in dealing with the valuation of shares have expressly provided for the position where preference shares have to be valued (*Stamp Duties Act* 1920 (N.S.W.), s. 127 ; *Estate Duty Assessment Act* 1942 (Cth.), s. 6 ; *Finance Act* 1930 (Imp.), s. 37). As the local legislature has not drawn any distinction between preference and other types of shares the legislature must be taken to have intended there should be no distinction between preference and other classes of shares. Alternatively, if s. 33 of the *Partnership Act* (W.A.) has any application then the testator was entitled to a proportion of the assets of the partnership after they have been realized and converted into money and after all the then existing debts and liabilities of the company have been discharged. The amount of £582,430 mentioned as the " capital " of the company within the meaning of s. 110 is not the amount which would be obtained if the company's assets were realized and converted into money and the debts and liabilities paid. The sum of £582,430 is simply the difference between the value of the assets and the amount of the liabilities and from that amount the cost of realization must be deducted and an allowance made for a reasonable profit to the purchaser (*Abrahams* v. *Federal Commissioner of Taxation* (1)). It is true that in the valuation of assets in an estate no allowance is made for the costs of realization (*Elder's Trustee and Executor Co. Ltd.* v. *Deputy Federal Commissioner of Taxation* (2)). That is because duty is assessed on the value of the assets in the hands of the testator not in the hands of the executor (*Elder's Trustee and Executor Co. Ltd.* v. *Deputy Federal Commissioner of Taxation* (3)). So that the testator's share within the meaning of s. 33 of the *Partnership Act* (W.A.) is not a proportion of the difference between the value of the assets and the amount of the liabilities but a proportion of the net proceeds of realization.

Virtue, for the respondent. The *Administration Act*, s. 110, requires (*a*) the ascertainment of the share of the deceased ; (*b*) the

(1) (1944) 70 C.L.R. 23, at p. 35.
(2) (1934) 51 C.L.R. 694.
(3) (1934) 51 C.L.R., at p. 697.

evaluation of the share when ascertained. Section 112 applies similar principles to proprietary companies. The assumption of the appellant that " share " is used in the same sense in ss. 110 and 112 is incorrect. In s. 112, where the word is used in the plural, it means portion of the share capital of a company. In s. 110, which is dealing solely with partnerships, it means share in the assets of a partnership. Shares in the assets of a partnership must be ascertained by reference to the definition in s. 33 of the *Partnership Act*, which, as a codifying enactment, must have been within the contemplation of the legislature in enacting s. 110. In arriving at the fractional share of the deceased under s. 110 the deceased's proportion of the paid-up share capital is not the measure or test; it is necessary to ascertain from the memorandum and articles of association of the company what proportion of the total assets less liabilities the deceased would have been entitled to on a notional winding up : See also *Partnership Act* (W.A.), s. 57. To treat the deceased's fractional share as his proportionate interest in share capital of the company is to treat the company as a joint stock company and not a partnership as required by s. 112. The words used in s. 110 to describe share, i.e., " fractional share " and " whole number of shares " are more apt to describe the normal provision in a partnership deed where the interests of the various partners in both assets and profits are expressed by a simple fraction. The more complicated factors which must enter into consideration in dealing with a corporation on partnership principles do not appear to have been within the contemplation of the legislature in enacting the section. The fact that the calculation of the fractional share of a shareholder in a proprietary company becomes a complicated numerical sum does not support an interpretation which is the negation of s. 112 in requiring partnership principles to be adopted in the assessment of shares in proprietary companies and the negation of s. 110 in requiring partnerships to be valued not in relation to sale value or profits but to the excess of assets over liabilities. The expression " whole number of shares " is the contrapositive of " fractional share " used earlier in the section and means the common denominator to which the fractional shares of all the individual partners can be reduced : See *Oxford Dictionary*, definition of *fraction*, " one or more aliquot parts of a unit or whole number," *aliquot* " mathematically contained in another and dividing it without remainder." If " fractional share " and " whole number of shares " are regarded as one composite expression, " fractional share " is equivalent to the numerator of the fraction, and " whole number of shares " the denominator of the fraction. The fact that anomalies exist in a Finance Act must induce great caution before assenting to

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a construction which supports such anomalies (*Commissioner of Stamp Duties (N.S.W.)* v. *Simpson* (1)). The construction contended for by the appellants results in the following anomalies:—Employee's shares of 1s. nominal value would receive same value as ordinary and preference shares of £1 ; partly paid shares would be paid as equivalent to fully paid shares ; preference shares would always be valued the same as ordinary shares notwithstanding their widely different rights to the surplus assets of the company ; the position of limited partnerships would be most anomalous. No argument in support of the appellant's contention can be drawn from the analogous provisions of the *Finance Act* 1930 (Imp.), s. 37, or the *Stamp Duties Act* 1920 (N.S.W.), s. 127, wherein preference shares are expressly excluded from the statutory method of valuation. In consequence of the language of both these sections the share of the deceased must of necessity be calculated in relation to paid-up share capital and it was therefore necessary to exclude preference shares so that anomalies could be avoided. The general intention of ss. 110 and 112 becomes apparent from a consideration of a previous state of the law. Prior to the passing of the 1934 Act there was no provision dealing specifically with the valuation of shares in private companies, which on the authorities was the value which the shares would fetch in the open market having regard to the restrictions on transfer (*Attorney-General* v. *Jameson* (2) ; *Macarthur Onslow* v. *Commissioner for Stamps* (3) ; *Blackwood's Executors* v. *Commissioner for Stamps* (4)). The object of the legislature was apparently to ignore questions of market value of shares in a private company and base the value exclusively on the shareholder's share in the surplus assets of the company. The commissioner's assessment is based on this general principle whereas the method of valuation contended for by the appellant entirely ignores it.

Ainslie, in reply. The costs of realization must be deducted from £582,430 before assessing the testator's share or interest (*Abrahams* v. *Federal Commissioner of Taxation* (5)). The answers to the questions by the Full Court precluded the appellants from contesting the question of costs of realization (*Elder's Trustee and Executor Co. Ltd.* v. *Deputy Federal Commissioner of Taxation* (6)). It is very anomalous to construe s. 110 as the Full Court construed the section; ordinary shares are not worth 50 per cent of the value, £3 5s.,

(1) (1917) 24 C.L.R. 209, per Isaacs J., at p. 221.
(2) (1905) 2 Ir. R. 218.
(3) (1913) 13 S.R. (N.S.W.) 354.
(4) (1917) 17 S.R. (N.S.W.) 447 ; 34 W.N. 204.
(5) (1944) 70 C.L.R. 23.
(6) (1934) 51 C.L.R. 694, at p. 697.

placed on them by the Full Court. Section 110 completely disregards income produced by shares and therefore cannot possibly put a real value on shares. The value of the employee's shares is not 1s. because a dividend up to 2s. may be paid under the articles of association.

Cur. adv. vult.

The following written judgments were delivered :—

LATHAM C.J. Appeal from a decision of the Full Court of the Supreme Court of Western Australia upon a case stated under s. 102 of the *Administration Act* (W.A.) 1903-1941. The questions submitted by the case relate to the proper method of valuing preference shares and ordinary shares in Boans Ltd. owned by the testator Henry Boan, who died on 18th March 1941. The testator owned 30,000 7 per cent cumulative preference shares and 50,117 ordinary shares. Under Article 72 of the articles of association preference shareholders were entitled upon a winding-up of the company to the repayment out of the surplus assets of the company in priority to all other claims of all capital paid up on their shares and to any arrears of dividend, but to no further payment. This article also provided that after meeting the claims of preference shareholders the surplus assets should then be devoted to the repayment of capital paid up on employee's shares and other shares, and that the further surplus assets, if any then remaining, should be distributed between the holders of ordinary shares in proportion to the capital paid up on the shares.

The issued and paid-up capital of the company at the date of the death of the deceased was made up of the following shares :—

250,000 7 per cent cumulative preference shares of £1 each	£250,000
100,032 ordinary shares of £1 each	100,032
30,000 employee's shares of 1s. each	1,500
	£351,532

Section 112 of the Act provides : " In the valuation of shares of a shareholder in any proprietary company, such shares shall be valued as if the company were a partnership and the shareholders were the constituent partners. In this section proprietary company means any company in which not more than five persons are entitled to at least two-thirds of the shares in the subscribed capital of the company."

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Boans Ltd. is a proprietary company within the meaning of the section. This section requires that the testator's shares in the company shall be valued as if the company were a partnership and the shareholders were partners. It is therefore necessary to ascertain how the interests of partners are to be valued under the Act.

Section 110 contains the provisions dealing with this subject. This section provides as follows: "(1) In the valuation of the share or interest of any person in any partnership for the purpose of this Act, the share or interest of the partner concerned shall be that sum which bears the same proportion to the total capital of the partnership as his fractional share bears to the whole number of shares in the partnership. In this section total capital means the value of the assets of the partnership less the liabilities of the partnership; (2) Provided that any legatee, beneficiary, donee, or other person to whom any share or interest in a partnership passes on the death of any other person shall be liable to pay to the person responsible for the payment of the duty on such share or interest under the provisions of this Act, any increase in duty which may be necessitated by valuing the share or interest of the deceased partner in accordance with this section."

Sub-section 3 of s. 110 gives a right of appeal to a person who under the section is made liable to pay an increase of duty. It was agreed by the parties for the purposes of the case that the value of the assets of the company less the liabilities of the company was £582,430 at the date of the death of the deceased. This amount therefore was the "total capital" of the company for the purposes of s. 110 (1).

The object of these provisions is to secure the payment of duty upon the value of the share of a deceased partner upon a particular prescribed basis. That basis is that the value of his share is a sum determined in accordance with s. 110. That sum is a sum which bears the same proportion to the total capital (i.e. surplus of assets over liabilities) as the partner's fractional share bears to the whole number of shares in the partnership. The section therefore requires the ascertainment of (1) the whole number of shares in the partnership, (2) the fractional share of the deceased partner, (3) the "total capital" of the partnership. If the deceased partner had, for example, one share out of a whole number of three shares in the partnership, then the value of his share or interest in the partnership is a sum representing one-third of the "total capital."

The legislature was not content to allow the courts to estimate the value of a deceased partner's share in the ordinary way. If there had been no express provision such as that contained in s. 110 the

value of the share would ordinarily have been estimated by ascertaining the value of that which the deceased partner's estate was entitled to receive as the proceeds of his share in the partnership. Ordinarily, in the absence of any agreement to the contrary, the provisions of the *Partnership Act* (W.A.) 1895, ss. 33 and 57, would be applied. The value of the share of the partner would be represented by the value of what he would be entitled to receive as upon a dissolution of the partnership. Section 33 of the *Partnership Act* (W.A.) provides as follows : " The share of a partner in the partnership property at any time is the proportion of the then existing partnership assets to which he would be entitled if the whole were realised and converted into money and after all the existing debts and liabilities of the firm had been discharged."

Section 57 provides that upon a dissolution (subject to any agreement between the parties) the assets of the firm are to be applied in replacing losses of capital in the manner specified, paying debts to external creditors, repaying advances by partners and paying back capital. Then s. 57 (*b*) (4) applies :—" The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible." But, on the other hand, it might have been the case that the partnership agreement provided that the other partners were either bound or entitled to purchase the share of a deceased partner at a fixed amount.

Section 110 excludes both these methods of ascertaining for the purposes of the Act the value of the share in the partnership of a deceased partner. It is plainly intended to prevent the avoidance of the payment of duty by special provisions in the partnership agreement fixing as between the partners the value of a share of a partner. Such provisions are to be ignored for the purposes of the Act. The value of the share is to be estimated by taking a fraction of the total capital of the partnership as defined in the section, that fraction being the same fraction as that which represents the partner's share in the partnership. Equally s. 110, in my opinion, excludes the application of the provisions of the *Partnership Act* to which I have referred. None of the provisions of s. 57 of that Act have any relevance for the purposes of s. 110. They result in the ascertainment of a sum of money as representing the value of the share of a deceased partner. Section 110 does not allow these provisions to operate, but instead, takes as representing that value a proportion of the share of the partner in the " total capital " of the partnership. The total capital of the partnership means " the value of the assets of the partnership less the liabilities of the partnership." The liabilities here referred to are liabilities of the firm to external

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creditors. They cannot include liabilities of the partners *inter se*. Accordingly the provisions of s. 57 with respect to losses of capital, repayment of advances and repayment of capital are, in my opinion, to be disregarded for the purpose of applying s. 110. The section gives no authority for any deduction in respect of replacement of losses of capital, repayment of advances or repayment of capital, and the provision in the *Partnership Act* that the ultimate residue is to be distributed in the proportion in which profits are divisible is, in my opinion, also irrelevant.

The application of the provisions of the *Partnership Act* results in the ascertainment of a sum of money which is determined by the provisions of the partnership deed in respect of capital and in respect of sharing the profits, as well as by the financial position of each partner in relation to the firm and the assets and debts of the firm. Section 110 adopts a quite different point of view. In the first place, the "total capital" of the partnership is a sum which may be very different from the ultimate divisible balance under the *Partnership Act*, s. 57, and also from any sum which appears in the course of calculations made for the purpose of applying that section. The final result under the *Partnership Act* would not be reached as a proportion of the "total capital" of the partnership. In the next place, the application of the *Partnership Act* involves the consideration of the rights of the partners to share in capital and their rights to share in profits. These may be quite different. A partner may have a large share in capital and a small share in profits, or *vice versa*. The *Partnership Act* provisions allow for the application of different fractions in the case of capital and in the case of profits. But s. 110 contemplates the ascertainment only of a single fraction : $\frac{\text{deceased partner's share}}{\text{whole number of shares}}$, and the value of the deceased partner's share is simply that same proportion of the total capital.

The sum calculated under the Act may be greater or less than the benefit derived by the estate of the deceased partner. The benefit so derived will depend upon the rights of the partner in respect of capital and of profits. He may (as in the case of a managing partner) have a large share in profits and a small share in capital. The ultimate residue under s. 57 may be much greater than the capital. Other facts also may result in a difference between the value of the share to the estate and the value calculated under s. 110. As already stated, the partnership agreement may require or entitle the surviving partner to purchase the share of the deceased partner for a sum

which bears no relation either to the value as upon a dissolution, or to the value as calculated under s. 110.

Sub-section 2 of s. 110 deals with such cases by providing that "Any legatee beneficiary donee or other person to whom any share or interest in a partnership passes on the death of any other person shall be liable to pay to the person responsible for the payment of the duty on such share or interest" the increase in duty so necessitated. The application of this provision involves the consideration of two methods of valuation and a comparison of the results in respect of amount of duty payable—(*a*) valuation in accordance with the section; (*b*) valuation not in accordance with the section. The latter valuation must be a valuation upon the basis which would have been proper if the section had not been passed—i.e., an ascertainment of the true value of the share of the deceased partner. The ascertainment of such value might be simple enough or it might be complicated; but, however the valuation is made, if the result is that it is lower than the valuation made in accordance with sub-s. (1), the provisions of sub-s. (2) come into operation and the person beneficially taking the interest has to pay the increase of duty.

How can the conceptions of "fractional share" and "whole number of shares" be applied in the case of a partnership? A "share in a partnership" may be either a share in the capital, or a share in the profits, or the share as upon a dissolution, which depends upon both rights in capital and rights in profits. But the "share" in the last sense is not a "fractional" share of a "whole number of shares." It is simply a sum of money. By the application of s. 57 of the *Partnership Act*, the estate of the deceased partner might be required to make good losses of capital to the extent of £1,000, to pay £500 towards repayment of advances by the partners, and might be entitled to receive £5,000 on account of capital and £10,000 on division of ultimate residue. The estate would receive £5,000 plus £10,000 minus £1,500, namely £13,500. But that sum would not be a fractional share of any whole number of shares in the partnership. The estate could not be said, as a result of the adjustment of accounts between the surviving partners and the estate, to have 13,500 or any other number of shares out of some other number representing "the whole number of shares in the partnership." Nor is it possible to say that the sum of £13,500 represents the result of calculating any proportion of the "total capital" of the partnership as defined in s. 110. Thus the value of a share in a partnership as calculated under s. 110 is something quite different

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from the value of the share as calculated under the *Partnership Act*.

If then the share of a deceased partner is not the share as ascertained under the *Partnership Act* (which takes into account all the terms of any agreement between the partners) what can "the fractional share or interest of any partner" in a partnership mean? As already stated, it must be a share represented by a single fraction. Is it a share of capital or a share of profits? It cannot be both, for shares in capital and in profits may be different. It cannot be a share in the "total capital" as defined in the section, for that share is determined as a result of taking a share of the "total capital" corresponding to the proportion of the fractional share to the whole number of shares. The section cannot be interpreted by transferring the definition of "total capital" into its substantive part by regarding all references to shares as references to shares in "total capital." If this were done the section would read as follows:—"The share or interest of the deceased partner in the total capital shall be that sum which bears the same proportion to the total capital of the partnership as his fractional share in the total capital bears to the whole number of shares in the total capital." Such a proposition would simply mean that the share of the partner in the total capital is his share in the total capital—an identical proposition, which is necessarily true, but which is also meaningless.

It was not argued that "fractional share" and "whole number of shares" related to shares in profits, but the respondent would not admit that the terms referred to shares in capital. The court has to choose between the two alternatives. The section deals with the total capital of a partnership as specially defined in the section—the surplus assets. The value of the deceased partner's share is a proportion of those surplus assets determined by his fractional share of the whole number of shares. These words, in their setting, appear to me to be more apt to refer to shares in capital than to shares in profits. This was the view of the section taken by *Northmore* C.J. and, having regard to the many objections to any other view, I think that it is the preferable view to adopt. There is no difficulty in applying the conceptions of "fractional share" and "whole number of shares" to the capital of a partnership. Thus if partner A owns half of the capital, partner B owns one-third and partner C owns one-sixth, the fractional share of partner A is three shares out of six, of partner B two shares out of six, of partner C one share out of six. In such a case the application of the section would mean that if A died the value of his interest would be taken to be three-sixths of the surplus assets; if B died his interest would be taken to be

two-sixths of the surplus assets ; and if C died his interest would be taken to be one-sixth of the surplus assets. The value of the interest of a partner is determined simply by applying the fraction representing his share in the capital of the partnership to the surplus assets of the partnership, that is, the value of the assets less the liabilities.

There are some difficulties in applying s. 110 in the case of a partnership. There are other difficulties in applying it to shares in companies, as required by s. 112. For example, s. 110 does not include any provision distinguishing between preference and ordinary shares. Further, the section does not distinguish between fully paid and partly paid shares. But, if the provision is construed as referring to shares in capital, these difficulties can be overcome. The proportion of the deceased's shareholding to total shares issued can be readily ascertained, and allowance can be made for the difference between fully paid and partly paid shares. In Boans Ltd. there are 30,000 employee's shares, but they are shares only of 1s. each. In order to ascertain fractional shares in the capital of the company, the 30,000 shares have been regarded by both parties, and in my opinion rightly, as representing only £1,500.

It is objected that upon this view the application of the section would sometimes bring about extraordinary results—that, e.g. in the present case it would attribute the same weight in calculation to one preference share of £1, which entitled the holder only to £1 plus any arrears of 7 per cent dividend upon a winding-up, as to one ordinary share of £1, which would entitle the ordinary shareholder, upon the accounts of the company as they at present stand, to repayment of capital of £1, together with a large additional amount representing a share of surplus assets. But upon any view ss. 110 and 112 are artificial provisions for ascertaining value for the purposes of the Act. In the first place, it is plain that they entirely disregard any market value of the shares. In the second place, sub-s. 2 of s. 110 shows that the legislature recognized that the value as ascertained under the section might not correspond with the true value of the shares, so that in some cases the testator's estate would be called upon to bear an unduly high amount of duty, which should therefore be refunded by a beneficiary who received the shares.

When the case came before *Northmore* C.J. it was held that the combined operation of s. 110 and s. 112 when applied to the facts of the case required the ascertainment of the number of shares held by the testator in the company and the ascertainment of the fraction of the whole number of shares in the company which that number of shares represented. The testator owned 30,000 preference shares and 50,117 ordinary shares, a total of 80,117 £1 shares. The total

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number of shares in the company expressed as £1 shares was 351,532. The fractional share of the testator was therefore $\frac{80,117}{351,532}$. *Northmore* C.J. then applied this fraction to the " total capital " of the partnership as defined in s. 110 (1), that is, the amount of £582,430. Thus the value of the share was $\frac{80,117}{351,532}$ of £582,430, i.e. £132,740.

Upon appeal to the Full Court the question was approached in another way. The Full Court began its enquiry by asking what the true value of the testator's interest in the partnership was, and by then asking whether there were any provisions in ss. 110 and 112 which prevented the adoption of that true value as the value for the purposes of duty under the Act. The Full Court applied ss. 33 and 57 of the *Partnership Act* to the interest of the testator in Boans Ltd. in the following manner. In the first place the articles of association of the company were regarded as representing the agreement between the partners. Under the articles of association, upon a winding up of the company, the surplus assets should first be applied in repaying the capital of preference shares. Thus the first element in the value of the interest of the deceased in the company was taken at £30,000, being the amount to which he was entitled as a preference shareholder in priority to the claims of all other shareholders. In the next place, the testator upon a winding up would have been entitled, after repayment of the capital of preference shareholders and of holders of employee's shares, to a rateable proportion of the balance of the surplus assets of the company. The preference share capital was £250,000, the employee's share capital was £1,500, a total of £251,500. When this sum is deducted from £582,230 a balance of £330,930 is left as the sum divisible among ordinary shareholders in accordance with the articles of association. There were 100,032 ordinary shares, of which the testator owned 50,117. He was entitled to $\frac{50,117}{100,032}$ of £330,930, that is, to a sum of £165,800. To this sum the sum of £30,000, representing his interest as a preference shareholder, was added, producing a total of £195,800. It was declared by the Full Court that this sum represented the value of the testator's shares in the company.

The proportion of " the fractional share of a partner " to " the whole number of shares in the partnership " is quite independent of the amount of the total capital of the partnership. That proportion will remain the same whether the total capital of the partnership is £1,000 or £1,000,000. When that proportion has been ascertained, then the sum representing the value of the deceased's share

for the purposes of the Act is simply the same proportion of the total capital. To calculate the value of the interest of the deceased in the assets of the company apart from the section, and then to say that the section has been properly applied because that value can be expressed as a fraction of the " total capital " is, in my opinion, to invert the procedure required by the section. Such a procedure does not ascertain the value of the shares by taking a proportion (namely, $\frac{\text{partner's share}}{\text{whole number of shares}}$) of anything. On the contrary, it ascertains the value of the partner's share in the total capital in the same way as that value would be ascertained if s. 110 did not exist. The operation is then (on this view) complete—the value is represented by the sum so ascertained and that is the end of the matter. That value, of course, is necessarily some fraction of the " total capital." The fraction, however, on this procedure, emerges as a quite meaningless end result and is not used, as s. 110 requires, as the means of reaching the result at which the section is directed, namely the ascertainment of the value of the shares.

Section 110 requires the ascertainment of a sum which bears a particular proportion to the " total capital " of the partnership. That sum is to be ascertained in this case, therefore, by applying some fraction to the sum of £582,430. The words of the section require that one fraction, and one fraction only, is to be applied to a single sum, namely, the " total capital " (or surplus assets) of the partnership. The words of the section do not admit of the adoption of one fraction for the purpose of calculating one part of the value of the share, and another fraction for the purpose of calculating another part of the value of the share. Neither do the words admit of a process of calculating value by first subtracting a sum from the amount representing surplus assets, then taking a proportion of the balance of that amount, and adding together the sum subtracted and the proportion of the balance. Such a process may be a proper method of ascertaining the actual value of each part, and consequently of the whole, of a deceased partner's share, but it is a process which ignores the provisions of s. 110.

The method adopted by the Full Court appears to me to fail to apply s. 110 in any manner. The first element in the total sum of £195,800 is £30,000, representing the amount receivable, as upon a winding up, by a shareholder who owns 30,000 preference shares. This amount is arrived at in this case merely by reference to the capital paid up on the shares. It is quite irrespective of any relation of the shareholding to the total number of shares (preference or

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ordinary) and equally irrespective of the amount of the "total capital" of the company. This amount of £30,000 would be the same whether there were only 30,000 preference shares in the company or ten times that number of preference shares. It is reached without any consideration of the "whole number of shares" and without any consideration of the proportion of the share of the deceased to the whole number of shares. Further, the amount of £30,000 is reached without any reference to the fact that the amount of "total capital" is £582,430. On the method adopted by the Full Court, this amount of £30,000 (no more and no less) would be included as an element in the estimate of value under the section whether the "total capital" was £500,000 or £5,000,000. Thus this method of ascertaining the value of the share pays no attention whatever to the terms of s. 110. It disregards the provision as to the fractional share of the deceased partner (that is the proportion of his shareholding to the total shareholding) and also completely ignores the provision which introduces the "total capital" of the company as an essential element in the calculation required by the section.

The calculation of the value of the ordinary shares is open to similar, though not identical, criticism. In the calculation made under the judgment of the Full Court it is true that the proportion of the testator's ordinary shares to all ordinary shares (though not to all shares) is taken but this fraction is then applied, not to the total capital of the company as defined in the section, but to the balance of the surplus assets of the company which is left after repaying the capital of ordinary shareholders and of holders of employee's shares. I can see no authority in the words of the section for adopting this procedure. Accordingly, in my opinion, the order of the Full Court does not satisfy the requirements of s. 110.

In my opinion, when s. 110 is applied to a proprietary company it is necessary to ascertain the share of the deceased shareholder in the share capital of the company, and to regard the value of his interest for the purposes of the Act as represented by a corresponding share of the total capital of the company as defined in the section. The result is that, in my opinion, the decision of *Northmore* C.J. was right, that the appeal should accordingly be allowed, and that the questions in the case should be answered in favour of the taxpayer, that is, as follows :—

Question 1.—No.

Questions 2 and 3.—As stated in the order of *Northmore* C.J.

RICH J. This matter originated in a special case stated by the appellant under the provisions of s. 102 of the *Administration*

Act 1903-1941 (W.A.). The substantial question submitted in the special case is whether the method adopted by the appellant in par. 9 of the special case is the correct method of valuing the ordinary shares in Boans Ltd. The company's capital consisted of three classes of shares, preference shares, employee's shares and ordinary shares. Of these the deceased held preference shares and ordinary shares. In effect the controversy between the parties is whether the " fractional share " referred to in s. 110 (1) of the Act is founded on the capital held by the partners or upon the shares and interests held by them in the surplus assets of the partnership. The commissioner's valuation in par. 9 of the case is based on the latter principle. When the case came on to be heard the learned primary judge decided against this basis and adopted the former method. On appeal the Full Court of the Supreme Court reversed this decision and adopted the commissioner's method—hence this appeal.

Boan's Ltd. is a company which falls within the provisions of s. 112 of the Act. Accordingly in valuing the shares of such a company the company is deemed to be a partnership of which the shareholders are the constituent partners and all questions of company law are laid aside. The matter is thus relegated to the provisions of partnership law. And the effect of s. 33 of the *Partnership Act* 1895 (W.A.) is that the share of a partner is the proportion of the surplus assets to which he is entitled. Turning to s. 110 of the *Administration Act* (W.A.) express provision is made for the valuation of partnership interests. Sub-section (1) of this section is, as I mentioned during the argument, so far as a partnership is concerned, derived from s. 127 of the *Stamp Duties Act* 1920 (N.S.W.) with the verbal modification of fractional share for aliquot portions. The New South Wales section also states the object of the section thus : " a share in a partnership shall be deemed to represent aliquot portions of the whole value of the business of the . . . partnership notwithstanding anything contained . . . in the partnership agreement or any agreement for a dissolution of the partnership."

By s. 110 what is really being dealt with is the value of the share or interest of a partner in the partnership assets and his share or interest must, I think, be compared with or have relation to the value of the partnership assets less the partnership liabilities.

This according to the section is measured by a method of proportion which, in effect, provides that the value of the partner's share or interest shall be such a sum as bears the same proportion to the surplus assets of the partnership as his share in the partnership bears to all the shares in the partnership. Though the language of the section is difficult to construe the only reasonable meaning that can

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be given to it, in my opinion, is that the partner's share or interest for the purposes of the section must be a share or interest bearing some proportion to some quantity of the same nature, i.e., I think to the surplus assets of the partnership. The denominator refers to the surplus assets of the partnership and the numerator refers to a share of these assets. This interpretation is, I think, suggested and confirmed by the definition of "total capital" which appears in the section. The substitution of the word "fractional" for the word "aliquot" can, I think, make no substantial difference to the interpretation of the section because an aliquot share of anything is obviously a fractional share. Moreover I think "the number of shares" means the total interests of the members in the surplus assets.

The Full Court, in my opinion, came to a correct conclusion in accepting the method of valuation adopted by the commissioner and I can see no reason for not accepting the valuations arrived at in accordance with this method by the commissioner.

In my opinion, the appeal should be dismissed.

DIXON J. The deceased held preference shares and ordinary shares in a proprietary company and the question for our decision is how they should be valued for duty for the purpose of the *Administration Act* 1903-1941 of Western Australia. The company had issued three classes of shares, preference shares, employee's shares and ordinary shares. Under the constating instruments of the company the preference shares bore a fixed cumulative preferential dividend, the employee's shares bore such dividend as, subject to a maximum, might be fixed by the directors and the ordinary shares carried such dividend as might be declared with respect to them out of the profits arising from the business of the company. Upon a liquidation the preference shares would rank first in respect of arrears of dividend and in respect of repayment of capital paid up upon them, the employee's shares would rank next in respect of repayment of capital paid up upon them, and the further surplus assets, if any, then remaining would be distributed among the holders of the ordinary shares in proportion to the capital paid up on the shares held by them.

Section 112 of the *Administration Act* (W.A.) deals with the valuation of shares in a company in which two-thirds of the shares are held by less than five persons. The proprietary company in question fell within this description. The section provides that in such a case the shares shall be valued as if the company were a partnership and the shareholders were the constituent partners.

This appears to mean that the corporate character of the company shall be disregarded and that notionally the interests given to the shareholders respectively by the constating instruments in respect of their various holdings of shares should be considered interests in a partnership of which they are the members. But the valuation of shares or interests in a partnership is dealt with specifically. Section 110 (1) contains a provision the general policy of which is apparent. Its purpose is to ensure that upon the death of a partner the value of his share or interest in the partnership shall, for purposes of duty, be the proportionate share properly attributable to him of the value of the net assets of the partnership. It is directed against the operation upon the value for duty of special provisions in partnership articles dealing with the death of a partner and, for example, requiring the acceptance by his executors of an artificial value for his share, or limiting the value or extent of the transmissible interest of the deceased in the partnership.

The text of s. 110 (1) has caused the controversy in the present case and, therefore, it requires special consideration. What to my mind is its most important feature occurs in a separate sentence at the end of the sub-section. It is a definition of one of the terms that the draftsman employs, viz. "total capital." It says: "In this section total capital means the value of the assets of the partnership less the liabilities of the partnership." Substituting this definition for the expression "total capital," the operative part of the sub-section reads as follows: "In the valuation of the share or interest of any person in any partnership for the purpose of this Act, the share or interest of the partner concerned shall be that sum which bears the same proportion to the value of the assets of the partnership less the liabilities of the partnership as his fractional share bears to the whole number of shares in the partnership."

The direction given by this provision to take a proportion rateable with the deceased partner's fractional share is readily applied when, under the terms of a partnership, the partners are interested in the net assets of the partnership in such definite proportions as, for instance, equally or one third and two thirds. No doubt that is the usual case. But the interests of the partners in the assets may be of a more complicated pattern. It is not difficult to imagine a case in which the several partners contribute definite but unequal amounts of capital, which upon dissolution each respectively under the terms of the partnership is entitled to have repaid out of the assets while the further surplus assets are distributable equally among them. In such a case, if there were no surplus over the capital contributed, or if there were a deficiency in part of such capital, the provision

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would be satisfied if the amount available were notionally shared in the proportions which the contributions of capital bore to one another. But, if there were a surplus over capital contributed, the fraction for the amount of capital contributed and the fraction for the surplus assets would not be the same. Moreover to make up a fraction for the capital contributed would be an unnecessary form. For you know the amount of the deceased's capital contribution and that represents his first claim upon the assets. These considerations have led to the contention that the proportion or fraction must be based on the capital contributions of the partners and not upon their shares or interests in " the assets of the partnership less the liabilities of the partnership." It is an interpretation of the provision which I find myself quite unable to adopt. It appears to me to magnify to undue proportions the difficulties in applying the word " fractional " to one particular case and to allow those difficulties to exclude the interpretation to which all the rest of the language of the sub-section points as well as its general purpose.

It is as well perhaps at this point to pause in order to give an illustration. Suppose that A, B and C are partners who are under the conditions of the partnership entitled in equal shares to the surplus assets after the return of their capital contributions and that they had contributed respectively £1,500, £1,000 and £500 by way of capital. Suppose that A died and that it is found that the value of the assets of the partnership, less liabilities, is £9,000. A's share in the £9,000 is composed of two parts, his share in the amount representing the capital contribution to be returned, an aggregate of £3,000, and his share in the further surplus of £6,000. Of the first he is entitled to £1,500 or one half ; of the second he is entitled to one third or £2,000.

To satisfy the necessity, if it be one, of having a " fraction," it would be enough to add the £1,500 and £2,000 together and to treat the result, £3,500, as the numerator and the £6,000 as the denominator, which gives seven twelfths. But to do so is to go through a formal step only. The alternative, however, to recognizing that A's share is composed of two parts is to treat the proportion of the capital contributions as governing the entire fund and accordingly to divide the £6,000 so as to attribute to A £3,000, to B £2,000 and to C £1,000. To do this is not only to produce a result false in fact, that is a fictional quantification of A's interests in the assets, but to place an unnatural meaning upon the language of the sub-section. It is unnatural because, in the first place, a partner's share or interest in a partnership means, I think, his share in the partnership property. " What is meant by the *share* of a partner is his

proportion of the partnership assets after they have been all realized and converted into money, and all the partnership debts and liabilities have been paid and discharged. This it is, and this only, which on the death of a partner passes to his representatives, or to a legatee of his share." *Lindley* on *Partnership*, 10th ed. (1935), p. 416. This definition was, in substance, adopted by Sir *Frederick Pollock* (*Digest of the Law of Partnership*, 9th ed. (1909), p. 74) and upon it is based s. 33 of the *Partnership Act* 1895 of Western Australia.

In the second place, even if " share in a partnership " might mean " share in the capital contributed," the words " interest in a partnership " cannot bear that meaning.

In the third place, the words " value of the assets of the partnership less the liabilities of the partnership " describe the whole subject matter upon which the sub-section founds its operation. As it seems to me, the prima facie meaning of the expression " whole number of shares in the partnership " is confirmed and put beyond doubt by the fact that the thing to be proportioned is the value of the assets of the partnership less the liabilities of the partnership.

Accordingly, I think that the proportional or fractional share to which the sub-section refers is the partner's share or interest in the excess of assets over liabilities and not the relative amounts of capital contributions.

I interpret the sub-section as meaning that the share or interest of the deceased partner shall be that sum which bears the same proportion to the value of the assets of the partnership, less liabilities, as his proportionate or fractional share in such assets, less liabilities, bears to the whole number of shares in such assets, less liabilities.

If it is objected that this is a curiously periphrastic way of saying that the share of the deceased partner shall be his share in the surplus assets, I would point to three considerations by way of answer. The first is that, if the draftsman had used any such simple expression, he would have exposed the provision to the risk of receiving a construction under which the partnership articles might be taken as defining and determining the extent and nature of the transmissible share or interest of the deceased, the very thing against which the provision is directed. The second is that the draftsman naturally resorted to a formula that fits the most usual and ordinary case, namely that in which the interest of a partner in the surplus assets is described by the terms of the partnership as a proportion or fraction, e.g. a half, a fourth or the like. In the third place, wherever the assets are not enough to repay capital contributions the use of a proportion is necessary. I should perhaps add that I think that upon the interpretation of sub-s. (1) the considerations to be found in

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sub-s. (2) are quite neutral. It is a sub-section which recognizes that sub-s. (1) may or will result in an increase in the value of the estate and a corresponding increase in the rate of duty. On any construction this is true of sub-s. (1).

Once the interpretation of sub-s. (1) of s. 110 is settled, little difficulty remains in applying s. 112. The interests in the company's assets are notionally transformed into corresponding interests in the surplus assets of an imaginary partnership, governed by the same definition or determination of interests as the provisions of the memorandum and articles of the company effect. Accordingly, the share is ascertained by taking the deceased's proportion of capital represented by preference shares first, and excluding next that represented by employee's shares, of which he held none, and then taking his proportion of the further surplus assets.

I shall now turn to the numbers of shares and value of assets in the case and express my view of the matter in terms of those figures. The deceased held 30,000 preference shares of £1 each fully paid ; 250,000 preference shares had been issued. He held 50,117 ordinary shares fully paid ; 100,032 ordinary shares had been issued. He held no employee's shares ; 30,000 employee's shares of 1s. each fully paid had been issued. He is therefore notionally to be regarded as a partner entitled, in the first place, to a return of £30,000 of capital, other partners (i.e. holders of the remaining preference shares and of the employee's shares) being entitled to a return of £221,500 of capital, and, in the second place, to share in the further surplus assets in the proportion of 50,117 to 49,915, that is a fraction of 50,117 over 100,032.

The value of the assets, less the liabilities of the company, was agreed for the purpose of the special case at £582,430.

On the foregoing figures the first step is to distinguish between so much of the assets in excess of liabilities as is needed to return the capital representing the rights of the notional partners corresponding to those given by preference shares. That means that as to £250,000 the deceased was entitled to £30,000, or to express it formally as a fraction, $\frac{3}{25}$ of £250,000. Then, after deducting the £1,500 representing the return of capital in respect of the employee's shares, there remains £330,930 of which the deceased was entitled to $\frac{50,117}{100,032}$

If there were no question about the application of the agreed figure of £582,430 for all purposes, the result would be that adopted by the commissioner and by the Full Court of the Supreme Court of Western Australia. But counsel for the appellant contended that the figure

did not represent the value to the company or hypothetical partnership arrived at after giving appropriate weight to the consideration that an owner must incur some costs of realization. It was said that, however correct this might be in ascertaining the fund to be proportioned, that is the value of the assets of the partnership, it was not correct in estimating the value of the net assets for the purpose of ascertaining the proportions. It seems to me that whatever elements or considerations must be taken into account in ascertaining the value for one purpose must be taken into account for the other. As the figure has been agreed for one purpose, and in the very words of the statute, I think we must use it for all purposes. This final point fails.

Accordingly, for the foregoing reasons, I am of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellants, *Stone, James & Co.*

Solicitor for the respondent, *G. B. d'Arcy*, Crown Solicitor for Western Australia.

E. L. B.