

[HIGH COURT OF AUSTRALIA.]

COMMISSIONER OF SUCCESSION DUTIES } APPELLANT ;
(SOUTH AUSTRALIA) }

RESPONDENT,

AND

EXECUTOR TRUSTEE AND AGENCY COM- }
PANY OF SOUTH AUSTRALIA LIMITED } RESPONDENTS.
AND OTHERS }

APPELLANTS,

ON APPEAL FROM THE SUPREME COURT OF
SOUTH AUSTRALIA.

H. C. OF A. *Succession Duty (S.A.)—Assessment—Valuation of shares in company—Shares not
1947. listed on stock exchange—Matters for consideration—Succession Duties Act 1929-
1942 (S.A.) (No. 1898—No. 23 of 1942).*

MELBOURNE,
Feb. 25, 26.

SYDNEY,
May 8.

Latham C.J.,
Rich, Starke,
Dixon and
Williams JJ.

A deceased person's estate, which was subject to duty under the *Succession Duties Act 1929-1942* (S.A.), included shares in the T. company, which carried on business in South Australia. The shares were not listed on a stock exchange and the articles of association contained no restrictions upon the transfer of its fully paid shares. A large number of shares in the T. company were held by the I. company in which the deceased held a life-governor's share. This share gave the deceased and his executors the right to three-fourths of the votes in the I. company.

Held, (1) by Latham C.J., Rich, Dixon and Williams JJ. (Starke J. dissenting), that the test to be applied in valuing the shares was substantially the same as that applied in determining the compensation to be paid for the compulsory acquisition of property under statutory powers.

McCathie v. Federal Commissioner of Taxation (1944) 69 C.L.R. 1, applied.

Held (2), by the whole Court that, in valuing the shares in the T. company, the life-governor's share in the I. company being a share in a different company and therefore a different asset, should not be taken into consideration, notwithstanding the voting rights attaching to it.

Decision of the Supreme Court of South Australia (*Mayo J.*) reversed.

APPEAL from the Supreme Court of South Australia.

The estate of Daniel Clifford, who died on 10th December 1942, included 28,150 shares of £1 each in D. Clifford Theatres Ltd., a company which was incorporated in South Australia and which carried on a motion-picture business in various theatres owned or leased by it. The deceased also had one share (described as the life-governor's share) in Clifford's Investments Ltd., a company which held shares in D. Clifford Theatres Ltd. The rights attached to this life-governor's share by virtue of the company's memorandum of association were such as to give the deceased and his executors control of Clifford's Investments Ltd., so that it would have been possible for the executors, by offering for sale in one lot the deceased's shares in D. Clifford Theatres Ltd. and the shares in that company which were held by Clifford's Investments Ltd., to enable a purchaser to acquire a controlling interest in the former company. The shares in D. Clifford Theatres Ltd. were not listed on a stock exchange, but the company's articles of association did not restrict the transfer of fully paid shares. In assessing the estate of the deceased to duty under the *Succession Duties Act* 1929-1942 (S.A.) the Commissioner of Succession Duties assessed the value of the shares in D. Clifford Theatres Ltd. at £1 17s. each. The deceased's executors, the Executor Trustee and Agency Co. of South Australia Ltd., Charles Lempriere Abbott and Mary Gordon, appealed against the assessment to the Supreme Court of South Australia, and the valuation of the shares was reduced by *Mayo J.* to 17s. 6d. each.

From this decision the Commissioner appealed to the High Court. Further facts appear in the judgments hereunder.

Hannan K.C. (with him *K. J. Healy*), for the appellant. The judgment appealed from is wrong in principle. Although *Spencer v. The Commonwealth* (1) is cited in the judgment, the valuation of *Mayo J.* is not such as could be arrived at by the application of the principles laid down in that case and accepted in later cases. Taking the view most favourable to the respondents of the evidence of the valuers, the shares were clearly of a much higher value than that attributed by *Mayo J.*, and there is nothing to warrant the conclusion that the Commissioner's valuation was erroneous. To obtain the best price procurable, the deceased's executors could and should use the rights attaching to his life-governor's share in Clifford Investments Ltd. in order to put on the market sufficient shares in D. Clifford Theatres Ltd. to offer a prospective purchaser a controlling interest in the latter company. [He referred to *McCathie v. Federal*

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Brebner (with him *Bright*), for the respondents. *Mayo J.* correctly applied the principle of *Spencer's Case* (4). The judgment is not founded on any error of law. The question determined was one of fact, and the judgment should not be disturbed. The most critical factor in estimating the value of the shares was the prospective earning capacity of the company. The business is a hazardous one, the future prospects of which can only be the subject of conjecture. A prudent purchaser could not reasonably be expected to make an offer based on any very optimistic view of the uncertain factors involved. There was considerable conflict in the evidence of the valuers called as witnesses, and it cannot be said that the judgment appealed from was against the evidence. The business of the company seems to have been built up largely through the business acumen of the deceased, and there is no certainty that it will continue to prosper. It would not be proper for the executors to make use of the life-governor's share in *Clifford Investments Ltd.* in the manner suggested by the appellant, and, in any event, it is not at all clear that this would enhance the value of the shares in question here. [He referred to *Peters American Delicacy Co. v. Heath* (5); *Cook v. Deeks* (6).]

Hannan K.C., in reply.

Cur. adv. vult.

May 8.

The following written judgments were delivered:—

LATHAM C.J., RICH and WILLIAMS JJ. These reasons for judgment were prepared by *Williams J.* This is an appeal by the Commissioner of Succession Duties from a valuation by the Supreme Court of South Australia of 28,150 fully paid ordinary shares of £1 each in a South Australian company, *D. Clifford Theatres Ltd.* The shares are part of the estate of *Daniel Clifford*, who died on 10th December 1942. The appellant assessed the shares at the value of 37s. each for the purposes of succession duty under the *Succession Duties Act* 1929-1942 (S.A.). The executors of the will of the deceased, the respondents in this court, being dissatisfied with this value, appealed to the Supreme Court of South Australia under s. 61 of the *Succession Duties Act*, and *Mayo J.*, who heard the appeal, ordered that the valuation should be reduced to 17s. 6d. per share.

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

(2) (1934) 51 C.L.R. 568.

(3) (1874) 9 Ch. App. 350.

(4) (1907) 5 C.L.R. 418.

(5) (1939) 61 C.L.R. 457.

(6) (1916) 1 A.C. 554.

Section 59 of the *Succession Duties Act* 1929-1942 provides that :—
 “ In estimating the net present value of any property for the purpose of ascertaining the amount of duty, no reduction shall be made in the estimate on account of the estimate being made on the assumption that the whole property is to be placed on the market at one and the same time : Provided that where it is proved to the commissioner that the value of the property has been depreciated by reason of the death of the deceased any such depreciation shall be taken into account.”

Otherwise the Act, like many other Acts imposing death duties, does not prescribe any criterion by which the value of dutiable property is to be determined. Where property is being bought and sold in a market, there is usually no difficulty in determining its value. The value is almost invariably the market value. Therefore the valuation of shares which are listed on a stock exchange seldom presents any difficulty. The value is the price at which the shares are being bought and sold on the stock exchange at the date of death. But the shares in D. Clifford Theatres Ltd. have never been listed on a stock exchange. There is no evidence of any private sales of the shares. In these circumstances it is a problem of considerable difficulty to estimate their true value. But the courts have often been confronted with a similar problem before, and have adopted an approach which has been discussed in this court in three recent cases : *Perpetual Trustee Co. (Ltd.) v. Federal Commissioner of Taxation* (1); *McCathie v. Federal Commissioner of Taxation* (2), and *Abrahams v. Federal Commissioner of Taxation* (3).

This approach is summarized in the first five propositions which appear in *McCathie's Case* (4). Broadly speaking, the courts have adopted the same test as that applied in determining what would be the proper amount of compensation to be paid for the compulsory acquisition of property, where, as in the case of shares not listed on the stock exchange, there is no market value for the property. But this test must be applied with caution in order to determine the value of an asset in the estate of a deceased person because there is not as in the case of compulsory acquisition any actual transfer of ownership at the date of death ; and the shares still remain part of the estate and in many instances are not sold at all, but after payment of the funeral and testamentary expenses, debts and duties, are transferred to the beneficiaries to whom the shares are bequeathed by the will. In estimating the price at which a reasonably willing vendor would sell and a reasonably willing purchaser would buy the

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(1) (1942) 65 C.L.R. 572.

(2) (1944) 69 C.L.R. 1.

(3) (1944) 70 C.L.R. 23.

(4) (1944) 69 C.L.R., at pp. 10, 11.

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shares if they entered into friendly negotiations for that purpose on the date of death, the price must represent the full value of the shares to the vendor, so that slightly to adapt the words used by Lord *Moulton* in delivering the judgment of the Privy Council in *Pastoral Finance Association Ltd. v. The Minister* (1), probably the most practical form in which the matter can be put is that the vendor is entitled to that which a prudent purchaser would have been willing to give for the shares sooner than fail to obtain them.

The main items to be taken into account in estimating the value of shares are the earning power of the company and the value of the capital assets in which the shareholder's money is invested. But 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. Further, a prudent purchaser would reasonably expect to receive dividends which would be commensurate with the risk, so that the more speculative the class of business in which the company is engaged the greater the rate of dividend he would reasonably require. In order to estimate the probable future profits of a company it is necessary to examine its past history, particularly the accounts of those years which are most likely to afford a guide for this purpose. In order to estimate the rate of dividend that a prudent purchaser could reasonably require on his investment it is necessary to examine the nature of the business and the risks involved and to seek the evidence of business men, particularly members of the stock exchange and experienced accountants, who can testify to the appropriate rate from the prices paid for shares in companies carrying on a similar business listed on the stock exchange or from private sales of shares in such companies or from their general business experience.

D. Clifford Theatres Ltd. owns or leases a number of motion-picture theatres in the suburbs of Adelaide, where it exhibits hired motion pictures. It is common ground amongst the expert witnesses that in the case of companies engaged in the motion-picture business listed on the stock exchange a prudent investor would require a dividend of eleven per cent to thirteen per cent upon his investment.

D. Clifford Theatres Ltd. is not a company whose shares are listed on the stock exchange. But it is not a company the articles of association of which contain restrictions upon the transfer of its

(1) (1914) A.C. 1083, at p. 1088.

fully paid shares. The only disability suffered by shareholders who wish to sell their shares is that shares in companies not listed on the stock exchange cannot be so readily disposed of as listed shares. We think that a sufficient allowance will be made for this disability if we estimate that the rate of dividend which a prudent purchaser of shares in D. Clifford Theatres Ltd. could reasonably expect to receive on his investment would be fourteen per cent.

The next task is to select the past years the profits of which are most appropriate for the purpose of estimating the probable future success of the company. This requires a short examination of the history of the company. The company was incorporated on 17th October 1922 under the name of Star Pictures Ltd. It changed its name to D. Clifford Theatres Ltd. on 10th October 1923. Its nominal capital is £70,000 divided into 70,000 shares of £1 each. On 10th December 1942 its issued capital was 40,000 ordinary shares and 22,408 eight per cent cumulative preference shares all of £1 and fully paid. No dividend had been paid on the ordinary shares since 1927 and the arrears of preference dividends on 30th June 1942 were £15,171. In addition to the 28,150 ordinary shares, the deceased held 535 preference shares in the company. He was also the holder of one share numbered 1, and called "The Life Governor's Share" in an associated company, Clifford's Investments Ltd. The memorandum of association of Clifford's Investments Ltd. provides that:—"The Life Governor's Share shall confer on the said Daniel Clifford or his personal representatives so long as he or they shall be the registered holder or holders thereof the right either in person or by attorney or by proxy at every general meeting or any poll of the Company to three-fourths of the votes in the Company that is to say to three votes as against every one vote conferred on all the other issued shares for the time being in the capital of the Company, provided always that the said special rights attaching to the Life Governor's Share if and when the said personal representatives of the said Daniel Clifford shall be registered as the holders thereof shall only be exercisable by such personal representatives for a period expiring on the 30th day of June 1963 and after such period the said Daniel Clifford being then dead the Life Governor's Share shall become in all respects an ordinary share in the company without any special rights."

Clifford's Investments Ltd. held 10,000 ordinary shares and 10,000 preference shares in D. Clifford Theatres Ltd. Under the articles of association of D. Clifford Theatres Ltd. the shareholders, whether holders of preference or ordinary shares, in general meeting have on

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a poll one vote for each share. The shareholders in Clifford's Investments Ltd. were all close relatives of the deceased. Most of them were employed by D. Clifford Theatres Ltd. It is not suggested that their salaries were more than adequate remuneration for the work they were doing, but it probably explains why they made no complaint that Clifford's Investments Ltd. was not receiving dividends from D. Clifford Theatres Ltd. When it commenced business D. Clifford Theatres Ltd. operated seven theatres. By 1928 this number had increased to fourteen theatres, and by 1937 to nineteen theatres, and the company still had nineteen theatres on 10th December 1942.

In its early days the company suffered many vicissitudes. It was necessary to change from silent to talking films and to carry out extensive alterations and repairs to its theatres. The motion-picture business suffered severely during the depression. Losses were sustained in the years 1929-1932 inclusive. For these and other reasons the early existence of the company was precarious. But the company survived its early difficulties. From 1933 onwards it made profits and at the end of 1942 was in a strong financial position. Its policy had been to husband its resources and to use its profits in the business. In consequence it never paid a dividend on its ordinary shares out of these profits and there were the arrears of dividends on the preference shares already mentioned.

The company was a private company within the meaning of Part III., Div. 7, of the *Income Tax Assessment Act* 1936-1942, and therefore had to pay the special tax on its undistributed income. Prior to 14th December 1940, when s. 7 (c) of the *Income Tax Assessment Act* (No. 2) 1940 came into force and applied to all assessments for the financial year beginning 1st July 1940 and subsequent years, this tax was payable on two thirds of the distributable income, but after this date it was payable on the whole of the distributable income. As a result the net profits shown in the company's accounts are net profits arrived at after deducting not only ordinary company tax but also this special tax. As a further result the company had a balance to profit and loss account and reserves amounting to £57,286 which under s. 107 of the *Income Tax Assessment Act* when distributed to shareholders would be free of Federal income tax in their hands.

There was, as is usual in these cases, a conflict of expert evidence as to the past years of the company's business which afforded the best guide to its probable future course. We think that those years should be selected in which the volume of the company's business approximated as nearly as possible to that which it was likely to be in the future. In other words, we think that the most appropriate

years are those in which the company had surmounted its initial difficulties and had acquired the number of theatres in which it was likely to continue to operate in the future. We think that the five years 1938-1942 inclusive should be chosen. By 1938 the business had reached the extent which it was likely to retain in the future. During this period the gross profits rose from £42,000 in 1938 to £78,000 in 1942, and in the subsequent years remained at about £78,000. The net profits of these five years, after adjusting the accounts by substituting taxes payable for taxes paid, amount to £45,229. These were the net profits after deducting undistributed profits tax under s. 104. But once the company commenced to distribute its net profits by way of dividend this tax would disappear. Further, preference shareholders could not expect to be paid a preference dividend free of tax, and in estimating the dividend of eleven per cent to thirteen per cent as the return which shareholders would require in comparable companies listed on the stock exchange the witnesses have referred to shares in companies in which the shareholders would receive a dividend subject to tax and not a tax-free dividend. Therefore, in order to estimate from the net profits of the five years in question the sums likely to be available for dividends in the future, it is necessary to add to the net profits the taxation payable by the company under s. 104 on the undistributed profits of the five years. This amounts to £35,616. If this amount is added to £45,229 the total of net profits available for dividends is, in round figures, £81,000, or approximately £16,200 per annum. This amount is reached after allowing for ordinary company tax, heavy depreciation and setting aside £1,000 in 1938 and £2,000 per annum thereafter as part of a general reserve. This general reserve as at 30th June 1942 was £26,000. After allowing, in round figures, £1,900 to pay the preference dividend, there is left a sum of £14,300 per annum for distribution amongst the ordinary shareholders, or in other words, a sum sufficient to pay a dividend of thirty-six per cent on the ordinary shares. If the return that a prudent investor could reasonably expect to receive on shares in the company is, as we have said, fixed at fourteen per cent, this would give the shares, when capitalized on a basis of fourteen per cent, a value of £2 11s. 6d. But there was on 30th June 1942 £15,171 arrears on preference shares to be paid off, and for this and other reasons we think that it would be proper to allow some period before the company would be in a position to pay dividends of thirty-six per cent on the ordinary shares. If a period of three years is allowed a prudent purchaser could only be reasonably expected to pay a sum which, with compound interest at ordinary bank overdraft rates, say five per cent, on the

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money he might have to borrow to buy the shares, would at the end of that period amount to £2 11s. 6d., or, in other words, £2 4s. 3d. per share.

The next question is whether the sum of £2 4s. 3d. is reasonably secured by the value of the tangible assets of the company. The balance sheet of the company at 30th June 1942 disclosed these assets to be as follows:—freehold properties £153,700; leasehold £20; furniture, plant, vehicles &c. £35,315; advances, debtors &c. £1,844, investments and cash £22,828: Total £213,707. The liabilities to creditors were £76,846. There was therefore a balance of assets over liabilities of £136,861. If the contingent liability of £15,171 for arrears of preference dividends is deducted there still remained a balance of £121,690. No evidence was given to show the extent to which the book values corresponded with the real values of the assets, but there is no suggestion that the book values were not conservative, and it is stated in the report of the directors of 5th September 1945 that substantial depreciation in excess of normal requirements had been provided in past years. On the basis of book values the ordinary shares were represented on 30th June 1942 by tangible assets of £2 9s. 7d. a share, so that there was a satisfactory asset backing for a purchase price of £2 4s. 3d. From an examination, therefore, of the affairs of the company as a going concern we estimate that £2 4s. per share would be the sum which, apart from special considerations, a prudent purchaser would have had to pay for the shares on 10th December 1942 sooner than fail to obtain them.

We have reached this value without taking into consideration a contention based on the voting rights attached to the life-governor's share by the memorandum of association of Clifford's Investments Ltd. This contention was that the executors of the will of the deceased could become the registered holders of this share and by the exercise of its voting power could convene a general meeting of this company and pass a special resolution that the shares held by this company in D. Clifford Theatres Ltd. should be sold to a purchaser at the same time as the shares of the deceased and that in this way a purchaser would acquire 48,685 shares in D. Clifford Theatres Ltd. and thereby obtain control of this company. *Mayo J.* rejected this contention and we agree with him. One asset to be valued for the purposes of duty is the shares held by the deceased in D. Clifford Theatres Ltd. The share held by the deceased in Clifford's Investments Ltd. is a share in a different company and therefore a separate asset. It is no more permissible to amalgamate the two lots of shares than it would be to amalgamate two separate parcels of land

for the purpose of giving an additional value to each. We need not consider, therefore, a number of difficulties which might stand in the way of the executors using the power conferred by the life-governor's share to sell the shares in D. Clifford Theatres Ltd. held by Clifford's Investments Ltd. possibly against the wishes of the other shareholders in the latter company.

But we cannot agree with his Honour that the ordinary shares of the deceased in D. Clifford Theatres Ltd. considered as a separate parcel of shares were of the value of 17s. 6d. It would not be proper for this court on an appeal of this nature to substitute its own opinion for that of the court below unless it were satisfied that the court below acted on some wrong principle of law, or that the value was entirely erroneous (*Rook v. Fairrie* (1); *Lee Transport Co. Ltd. v. Watson* (2); *Federal Commissioner of Taxation v. Sagar* (3)): Cf. *Charan Das v. Amir Khan* (4), where Lord Buckmaster, delivering the judgment of the Privy Council in an Indian appeal said:—"Now this Board will not interfere with any question of valuation unless it can be shown that some item has improperly been made the subject of valuation or excluded therefrom, or that there is some fundamental principle affecting the valuation which renders it unsound." The Privy Council recently affirmed this principle in *Narayanan Chettiar v. Kaliappa Chettiar* (5).

His Honour applied the principles stated in *Spencer v. The Commonwealth* (6) and based his valuation upon an estimate of the price which would have been agreed upon in a voluntary bargain between a vendor and purchaser each willing to trade but neither of whom was so anxious to do so that he would overlook any ordinary business considerations. His Honour therefore acted on the right principle of law, but we are forced to the conclusion that in applying this principle he reached a value that was unreasonably low. We cannot agree with his Honour that a prudent purchaser would have been "tempted to try to secure the shares at a price in the region of 7/6 each as a price that would protect himself against contingencies and have something in hand" or that the vendor would have been "glad to receive his original capital to invest or use" so that an offer by a purchaser of 17s. 6d., that is 10s. more than he thought the shares were really worth, would have been accepted by the vendor. This meant, as his Honour said, that the vendor would have agreed to abandon part of his original capital, and it also meant that the vendor would have given up the prospect of receiving

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(1) (1941) 1 K.B. 507.

(2) (1940) 64 C.L.R. 1.

(3) (1946) 71 C.L.R. 421.

(4) (1920) L.R. 47 Ind. App. 255, at p. 264.

(5) (1946) A.C. 116.

(6) (1907) 5 C.L.R. 418.

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anything in respect of the undistributed profits. His Honour thought that both purchaser and vendor would consider that it was useless for a company to make profits unless they matured into dividends, and assumed it was unlikely that the company would commence to pay dividends on the ordinary shares for another ten years. With all respect to his Honour we can find nothing in the condition of the company's finances to justify such an assumption. Nor can we agree that the fact that the company had paid no dividends on its ordinary shares since 1927 would necessarily be a reason for a purchaser placing a low value on the shares or for a vendor desiring to sell them at an undervalue. It all depends on the reason why a company fails to pay dividends. During the depression the company made losses. But after 1933 it made profits but used them to increase its future profit-making capacity. As one expert witness said, "The figures show that from June 1937 to June 1942, the company financed some £90,000 of capital expenditure and wrote off £35,315 depreciation of which only £9,000 came from the increase in liabilities over the increase in other assets." The non-payment of dividends since 1927 would therefore benefit a purchaser once the arrears of preference dividends had been paid. It would not be a reason for the vendor being induced to sell the shares for 17s. 6d. when he knew that as a result of this use of the company's profits his purchase money and his share in a fund of £57,000 of tax-free profits was well secured by tangible assets and that the effect of the non-payment of dividends had been to enhance the company's future prospects. It is true that this sum of £57,000 was buried in the business and it was therefore unlikely that it could be detached to pay a dividend in cash. But it was a fund out of which a bonus dividend could be declared to be satisfied by the issue of fully paid shares. If the company were to decide to sell its assets and wind up it would be a fund which would not be taxable under s. 47 of the *Income Tax Assessment Act*.

We think that perhaps his Honour reached a value which is unreasonably low because he failed to base his valuation principally upon the two main items to which we have referred. Prima facie the value of shares in companies having similar issued capital carrying on comparable businesses with comparable assets and making similar profits should be the same. Estimates of the value of shares in such companies made in the manner already mentioned would lead to this result. It then remains to consider the extent to which the initial valuation would be affected by differences between such companies, such as one being listed and the other not listed on the stock exchange; and in the case of companies not listed on the stock exchange by the presence of articles of association compelling

shareholders or their executors who desire to sell the shares to offer them to the other shareholders at a sum which is below their real value, or placing the management and control of their affairs in the hands of certain shareholders to the exclusion of others. But too much emphasis should not be placed on such matters. The essence of the valuation is the examination of the worth of the company's business. We refer in this connection to the passage from the judgment of Lord *Hanworth* in the Court of Appeal in *Inland Revenue Commissioners v. Crossman* (1), cited in *Abrahams' Case* (2).

The articles of association of D. Clifford Theatres Ltd., as we have said, do not contain any such provisions. The deceased was, however, in his lifetime in complete control of the business of the company and also of the business of Clifford Amusements (Mount Gambier) Ltd., a company with an issued capital of 5,005 ordinary shares and 8,105 eight and one-half per cent cumulative preference shares in which D. Clifford Theatres Ltd. held 5,735 of the preference shares. It was contended that the deceased had an uncanny instinct for sensing the public taste in motion pictures so that his death was a serious blow to the future prospects of both companies. No doubt outstanding business capacity may be shown in the motion-picture business as in most other businesses, but we find it difficult to believe that it is a business in which any particular individual is irreplaceable. Other considerations adverted to in the evidence deserve attention. For instance, the motion-picture business may have been more prosperous during the war than it would be in peace-time in some of the five selected years and in the post-war years from the prevailing full employment and high wages and lack of competition from other amusements. If we had to place an exact value on the shares these considerations might lead us finally to value the shares below £2 4s. But we need not pursue this question because the appellant only asks that the assessment should be restored. Our examination of the evidence has satisfied us that the shares were at least worth 37s., that his Honour's valuation cannot stand, and that the assessment was not excessive.

For these reasons we are of opinion that the appeal should be allowed with costs, that the order of the Supreme Court should be set aside, and in lieu thereof an order made that the appeal to the Supreme Court be dismissed with costs.

STARKE J. This is an appeal from a judgment of the Supreme Court of South Australia which ordered the variation of an assessment to succession duty under the *Succession Duties Act* 1929-1942 and

(1) (1937) A.C. 26.

(2) (1944) 70 C.L.R., at p. 46.

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(S.A.)

v.
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TRUSTEE
AND
AGENCY
CO. OF
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Latham C.J.
Rich J.
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determined that 28,150 ordinary shares in D. Clifford Theatres Ltd. were of a value of £24,631 5s. or 17s. 6d. per share and not £52,077 10s. or 37s. per share as assessed by the Commissioner.

The determination of this value was necessary for the purpose of arriving at the total of the net present value of all property derived from Daniel Clifford, deceased, pursuant to the *Succession Duties Act* 1929-1942.

The Act provides no method or measure of value or what has been called a statutory value (*Inland Revenue Commissioners v. Crossman* (1)). It is the monetary worth of the shares that must be ascertained—an imputed price—the price that a buyer would have to pay to procure the shares. As *Griffith C.J.* said in *Spencer v. The Commonwealth* (2), “In order that any article may have an exchange value, there must be presupposed a person willing to give the article in exchange for money and another willing to give money in exchange for the article.”

Ordinarily the price at which shares are selling in the open market will determine their value. Sometimes, however, the market price will not represent what *Lord Russell of Killowen* calls the actual true or intrinsic value of the shares (See *Inland Revenue Commissioners v. Crossman* (3)) or there is no market price. But it is the true actual or intrinsic value of the shares that must be ascertained and if there be no market price then the value or worth of the shares must be ascertained by some other method.

The general principles applicable to the case of lands compulsorily acquired under statutory powers afford, I think, no measure of value in such cases. The value to be ascertained in those cases is the value of the land to the vendor with all its potentialities and with all the use made of it by the vendor and not the value to the purchaser (See *Cripps on Compensation*, 8th ed., 174; *South Eastern Railway v. London County Council* (4); *Spencer v. The Commonwealth* (5)). Nor do I think that statements in the compensation cases, to the effect that the basis of valuation is the price that a willing purchaser would at the relevant date have to pay to a vendor not unwilling, but not anxious, to sell, that is, the value to the owner (*MacDermott v. Corrie* (6)), afford much assistance in any valuation.

If the actual and true value of the shares be ascertained after consideration of all the matters that affect value the hypothetical buyer is assumed.

The *Succession Duties Act* 1929-1942 requires that the net present value of the property of a deceased person shall be ascertained and

(1) (1937) A.C. 26, at p. 63. (4) (1915) 2 Ch. 252.
(2) (1907) 5 C.L.R. 418, at p. 431. (5) (1907) 5 C.L.R. 418.
(3) (1937) A.C. 26. (6) (1913) 17 C.L.R. 223, at p. 233.

assumes that the property has a value which can by some means be ascertained. The shares in D. Clifford Theatres Ltd. were not upon the open market. Consequently their value must be ascertained by some other method. The methods and practices of business men afford real assistance in ascertaining that value. They would examine the organization of the company, its accounts, assets, backing and its earning capacity.

On 10th December 1942, when D. Clifford died, the D. Clifford Theatres Ltd. had issued 40,000 ordinary shares and 22,408 cumulative preference shares all of £1 fully paid. The holders of the preference shares were entitled to cumulative preference dividends at eight and one-half per cent per annum. These dividends were £15,171 in arrears at the time of the death of the deceased. The deceased held, as already appears, 28,150 ordinary shares of £1 fully paid. The memorandum and articles of association of the company do not restrict the sale or transfer of its shares.

It appears from the accounts of the company that its ordinary shares of £1 were covered by net tangible assets (less preference capital and arrears of preference dividend) of the value of £2 9s. 7d. per ordinary share.

The earning capacity of the company can also be ascertained from its accounts. The years 1938-1942, both inclusive, give, I think, a fair basis for estimating the earning capacity of the company. The total shareholders' funds used in the business during this period averaged £117,545 and less the preference capital £22,408 the ordinary shareholders' funds averaged £95,137.

The adjusted net profit of the company for the same period averaged £12,847, and less provision for the preference dividend, the average profit available for ordinary shareholders amounted to £10,955 per annum.

On the average of the ordinary shareholders' funds used in the business £95,137, the average profit £10,955 per annum is equal to eleven point five one per centum.

One of the objects of D. Clifford Theatres Ltd. is to provide public entertainment of any nature whatsoever and it has in fact conducted more than a dozen picture theatres. The business is somewhat speculative in character and subject to various fluctuations and risks. And there is evidence that may be accepted that anyone investing in the ordinary shares of a company carrying on such a business would look for more than eleven point five one per cent upon his investment and might reasonably require from twelve and one-half to fourteen per cent return upon it. I shall assume the higher rate, fourteen per cent. But the company averages only

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eleven point five one per cent on the average funds of ordinary shareholders used in the business, £95,137, which is two point four nine per cent less than fourteen per cent on those average funds or £2,369 per annum. The present value of that sum £2,369 at fourteen per cent for ten years is £12,357. The assumed interest rate is the same as that which would be required by anyone investing in ordinary shares in the company but the period of ten years is a conjectural estimate of the period that it would take the company to earn the full interest rate of fourteen per cent. On this basis the value of the 40,000 ordinary shares in the company would amount approximately to £82,780 or slightly more than £2 per share.

But there are some other matters affecting the value of the shares that must be considered. It appears that the company accumulated profits amounting to £57,286 upon which it paid income tax. During the years 1938-1942 the company paid dividends on undistributed profits amounting to a sum of £35,616, and if these profits are distributed the shareholders will be entitled to a rebate of taxation pursuant to the provisions of s. 107 of the *Income Tax Assessment Act* 1936-1942. And it is suggested in evidence that this renders the shares of the company especially attractive because it would save shareholders taxation from 5s. to 14s. per share. These profits are employed in the business of the company, which is undercapitalized, and must in the end be capitalized or moneys provided or borrowed to release them. But any dividends declared in the course of capitalization in respect of these undistributed profits would seem to be excluded from taxation imposed by reason of the provisions of ss. 44 and 46 of the *Income Tax Assessment Act* 1936-1942. The benefit that would flow from this possible rebate of taxation is conjectural and incapable, I think, of close estimation. It is a circumstance, however, that must be considered in any estimation of value because it makes the shares more attractive.

Further it was said that the deceased was the governing-director of a company known as Clifford's Investments Ltd. which held 10,000 ordinary shares or thereabouts in D. Clifford Theatres Ltd. and that this gave him and his executors complete control of D. Clifford Theatres Ltd. Such a control would enhance the value of the ordinary shares in D. Clifford Theatres Ltd. All that need be said is that the argument is untenable, for the shares in D. Clifford Theatres Ltd. belonging to Clifford's Investments Ltd. were not the property of the deceased and gave him and his executors no right to use them for his own benefit.

Further still there is a sum of £15,171 arrears of cumulative preference dividends. But this sum is allowed in account in ascertaining

the average of the ordinary shareholders' funds used in the business, £95,137.

And it was said that the value of the assets of the company appearing in the balance sheets is excessive and the provisions for obsolescence, depreciation and so forth, insufficient. But there is no definite evidence on the subject and the profit and loss accounts show that considerable amounts have been written off for depreciation, some £35,000 during the period 1938-1942.

And it was also said that the deceased, D. Clifford, was the brains of the company and that his death must adversely affect its business operations and render the business less attractive for investors. The fact may have some influence on the value of the shares of the company but how far, if at all, the value of the shares would be affected is conjectural and incapable of estimation.

Let the sum of £10,000, however, be allowed for all these imponderables and the value of the shares would be reduced from £82,780 to £72,780. And £70,000 for 40,000 ordinary shares or 35s. per share at fourteen per cent would require dividends amounting to £9,800. And the average adjusted profits per annum on the ordinary shares amounted, as we have seen, to £10,955 per annum.

In my opinion, therefore, the value of 12s. 6d. attributed to the shares by the respondents to this appeal and 17s. 6d. by the learned trial judge is too low.

And bearing in mind the benefits that might flow from the possible rebate of taxation on the sums already mentioned it is, in my opinion, by no means established that the assessment of the appellant, the Commissioner of Succession Duties, of 37s. per share is not correct.

The assessment of the Commissioner should therefore stand especially in view of ss. 61 and 71 of the *Succession Duties Act* 1929-1942.

Consequently this appeal should be allowed, the judgment of the Supreme Court set aside, and the assessment of the Commissioner restored.

DIXON J. I have had the advantage of reading the judgment prepared by Williams J. and agree in it. I should like, however, to add for myself that there is some difference of purpose in valuing property for revenue cases and in compensation cases. In the second the purpose is to ensure that the person to be compensated is given a full money equivalent of his loss, while in the first it is to ascertain what money value is plainly contained in the asset so as to afford a proper measure of liability to tax. While this difference cannot change the test of value, it is not without effect upon a

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court's attitude in the application of the test. In a case of compensation doubts are resolved in favour of a more liberal estimate, in a revenue case, of a more conservative estimate. But even so I cannot find ground for estimating the value of the shares below thirty-seven shillings each.

Appeal allowed with costs. Order of Supreme Court set aside. In lieu thereof order that appeal to Supreme Court be dismissed with costs.

Solicitor for the appellant: *A. J. Hannan*, Crown Solicitor for South Australia.
Solicitors for the respondents: *Pickering & Cornish*, Adelaide.

E. F. H.