

## [HIGH COURT OF AUSTRALIA.]

A. L. CAMPBELL AND COMPANY PRO- }  
PRIETARY LIMITED . . . . . } APPELLANT ;

AND

FEDERAL COMMISSIONER OF TAXATION . RESPONDENT.

H. C. OF A. *Company* — “ *Member* ” — “ *Shareholder* ” — *Deceased shareholder* — *No personal*  
1951. *representative registered in respect of deceased's shareholding.*

MEILBOURNE, *Income Tax (Cth.)—Assessment—Private company—Undistributed income—Com-*  
*pany taxable as on suppositious distribution by way of dividend—Deceased*  
*shareholder—No personal representative registered in respect of shareholding—*  
*Grounds of objection to assessment—Income Tax Assessment Act 1936-1946*  
*(No. 27 of 1936—No. 6 of 1946), ss. 104,\* 185, 190.*

When statutory provisions and articles of association attaching rights or privileges and liabilities or duties to shares in a company employ for the purpose the expression “ *member* ” or “ *shareholder* ”, the expression is not to be construed as excluding the shares of a deceased registered member because there is no personal representative who is on the register.

It is not an essential condition of the application of s. 104 of the *Income Tax Assessment Act 1936-1946* to a particular shareholding that a person shall exist who is entitled to immediate and actual payment of a dividend.

*Re Agriculturist Cattle Insurance Co. (Baird's Case)*, (1870) 23 L.T. 424 ; 5 Ch. App. 725, *New Zealand Gold Extraction Co. (Newbery-Vautin Process) Ltd. v. Peacock*, (1894) 1 Q.B. 622, *Bombay Burmah Trading Corporation Ltd. v. Smith*, (1894) L.R. 21 Ind. App. 139, at p. 146, *James v. Buena Ventura Nitrate Grounds Syndicate Ltd.*, (1896) 1 Ch. 456, at pp. 466, 602, and *Llewellyn v. Kasintoe Rubber Estates Ltd.*, (1914) 2 Ch. 670, at p. 683, applied.

\* The *Income Tax Assessment Act 1936-1946* provides, by s. 104 (1): “ Where a private company has not, before the expiration of six months after the close of the year of income . . . made a sufficient distribution of its income of the year, the commissioner may assess the aggregate additional amount of tax which

would have been payable by its shareholders if the company had, on the last day of the year of income, paid the undistributed amount as a dividend to the shareholders who would have been entitled to receive it, and the company shall be liable to pay the tax so assessed.”



*In re Bowling & Welby's Contract*, (1895) 1 Ch. 663, and *Allen v. Gold Reefs of West Africa Ltd.*, (1899) 2 Ch. 40; (1900) 1 Ch. 656, considered.

Observations on grounds of objection to an assessment to Federal income tax.

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APPEAL under *Income Tax Assessment Act*.

This was an appeal from the decision of a Board of Review upholding an assessment to Federal income tax. The facts appear in the judgment hereunder.

*L. Voumard* K.C. and *C. A. Sweeney*, for the appellant.

*A. D. G. Adam* K.C. and *D. M. Little*, for the respondent.

*Cur. adv. vult.*

DIXON J. delivered the following written judgment:—

July 6.

This is an appeal by a taxpayer from a decision of a Board of Review. The decision confirmed the assessment. The taxpayer is a proprietary company incorporated under the law of the State of Victoria which falls within the definition of private company for the purposes of Div. 7 of Part II. of the *Income Tax Assessment Act* 1936-1946. The assessment was made upon the company pursuant to that division for additional tax in respect of the undistributed amount of its distributable income for the year of income ended 30th June 1946. Section 104 (1), which gives the power of assessment under Div. 7, provides that where a private company has not, before the times specified, made a sufficient distribution of its income the commissioner may assess the aggregate additional amount of tax which would have been payable by its shareholders if the company had, on the last day of the year of income, paid the undistributed amount as a dividend to the shareholders who would have been entitled to receive it and the company shall be liable to pay the tax so assessed. The question of substance in the case is whether when a shareholder in whose name shares stand in the share register at the last day of the year of income has died before that date there is any shareholder in respect of such shares who can be taken into the calculation of additional tax prescribed by s. 104 (1). Besides the question of substance there is a question as to the sufficiency of the notice of objection to raise or cover the point of substance.

The relevant facts are few but the situation to which they give rise is not very usual. The principal shareholder in the company



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was a lady who died, as it ultimately appeared, intestate, but for some time after her death it was not known whether she had left a will and, on some supposed testamentary scripts being produced, the validity of one and the authenticity of the other was contested. An order for the appointment of an administrator *pendente lite* was made on 23rd May 1946, but conditionally upon the administrator giving the usual bond, and letters of administration did not issue until 31st July 1946.

The deceased, whose name was Ida Marie Pearson, was at the time of her death on 7th November 1945 the registered holder of 4,747 of the 5,000 £1 shares which formed the issued capital of the company. Her husband was the registered holder of 250 shares, but he held them as her nominee.

After the making of the order for administration *pendente lite* but before the issue of letters of administration *pendente lite*, namely, on 24th June 1946, the administrator transferred into his own name 250 shares to qualify himself to be a director. The transfer, which was duly registered, did not describe the transferee by his representative capacity. Thus at 30th June 1946 the share register showed the deceased as holding 4,497 shares, her husband as holding 250 shares and her administrator as holding 250 shares. It showed that three other persons held one share each. Apparently the assessment is based on the view that the deceased or her estate should be treated as beneficially entitled to 4,997 shares, applying s. 105 in respect of the 500 held by her husband and the administrator *pendente lite*.

The foregoing are the facts material to the correctness of the assessment but for the purpose of explaining the form which the grounds of objection take it is necessary to state the outcome of the litigation concerning the testamentary scripts. The parties effected a compromise which was embodied in an agreement dated 24th February 1947. By this agreement the surplus of the deceased's estate after the discharge of liabilities was to be divided between her son Frederick R. Pearson and her daughter Mrs. Spradbery in the proportion of forty-eight hundredth parts to the former and fifty-two hundredth parts to the latter. Letters of administration were then granted to a trustee company.

It is both more satisfactory and more convenient to put aside the point made by the commissioner against the grounds of objection until I have dealt with the substantial argument advanced on behalf of the appellant company in support of its appeal. That argument may be simply stated as depending upon the propositions that no-one but a person on the register can be a shareholder within



s. 104 and that a shareholder must be an existing person. The death of the person on the register caused a transmission of interest. The dead person ceased to be a shareholder because she no longer existed. The transmittee, be he the Public Trustee in virtue of s. 15 of the *Administration and Probate Act*, substituted by s. 9 (1) of Act No. 5286, or be he the administrator *pendente lite* in virtue of the order of 23rd May 1946 appointing him or in virtue of the relation back of the letters issued on 31st July 1946, could not be a shareholder because he was not on the register. Ergo there was nobody who on 30th June 1946 could fill the description in s. 104 "shareholder who would have been entitled to receive it" (*scil.* the hypothetical dividend).

No doubt in this provision the word "shareholder" should receive the same meaning and application as it has in company law. It may be conceded that for the purpose of the company law the person whose name is entered on the register in respect of any shares is the shareholder: see s. 25 (2) of the Victorian *Companies Act* 1938 and *Avon Downs Pty. Ltd. v. Commissioner of Taxation* (1). But the case of the registered shareholder who dies has caused a difficulty which company law has not found it possible to solve by adopting the simple position that there is no shareholder in respect of the shares, no shareholder because the person who is registered is dead and the transmittee is not yet registered. One aspect of the difficulty was dealt with in a case arising even before the Act of 1862. In *Baird's Case* (2) the Lords Justices had before them a question of the liability of the estate of a deceased shareholder in the winding up under the *Joint Stock Companies Winding Up Act* 1848 (11 & 12 Vict. c. 108) of a company established under the *Joint Stock Companies Act* 1844 (7 & 8 Vict. c. 110), a winding up that had been commenced in 1861. The executrix of a deceased shareholder had been placed on the list of contributories, but only in respect of debts contracted by the company before his death. The deed of settlement provided that the executors or administrators of deceased shareholders should not in that capacity be the holders of any shares or be entitled to receive dividends. The dividends were to remain in suspense till the executor or administrator became a shareholder. The Lords Justices held that it was wrong to restrict the measure of liability to debts incurred before the death of the shareholder. There was no analogy in partnership. "The dead shareholder", said James L.J., "remains—that is, his estate remains—a member,

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(1) (1949) 78 C.L.R. 353, at pp. 363, 364. (2) (1870) 23 L.T. 424; 5 Ch. App. 725.



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but the association would of course like something more than a dead man or an estate". His Lordship then described the provisions of the deed of settlement designed to secure its execution by executors and administrators of deceased members as a condition of recognition.

In *New Zealand Gold Extraction Company (Newbery-Vautin Process), Ltd. v. Peacock* (1) the question concerned the service of a notice of call in respect of the shares of a deceased member. The articles of association said that a notice might be served upon "any member" by sending it through the post in a prepaid letter addressed to him at his registered place of address. It was decided that notice under this rule was enough to impose liability upon the estate. *Davey L.J.* said that he was prepared to hold that a deceased member or his estate remains a member for the purpose of the articles so long as his name remains on the register without notice to the company of his death.

In *Re Bowling and Welby's Contract* (2) the question arose whether the interest of three deceased members of an unincorporated building society might be included for the purpose of determining whether the society was a partnership, association or company consisting of more than seven members so that it might under the *Companies Act* be wound up by the county court as an unregistered company. There were four living members and three deceased members. Under the rules of the society the legal personal representative of a deceased member was required within one month of death to give notice in order that the shares should be registered in his name, and provision was made for paying over the share (if not over £20) to relatives in the event of probate or letters of administration not being produced within two months. The Court of Appeal decided that the winding-up provisions made it necessary that there should be seven actual members and as no personal representatives had been registered for any of the three deceased members there were only four actual members. *Lindley L.J.* said (3): "You cannot look upon the executors and administrators of a deceased member as being 'members' unless they become such. They may be sued in their representative character in respect of the obligations of the deceased; but executors and administrators will not become members of such a society without doing something to make them members". Membership of a building society is very different from membership of a company limited by shares and this decision is not necessarily applicable

(1) (1894) 1 Q.B. 622.

(2) (1895) 1 Ch. 663.

(3) (1895) 1 Ch., at p. 670.



with respect either to membership of or shareholding in a company. If it were so applicable it would seem somewhat out of line with the authorities as to the position when a shareholder dies. In *James v. Buena Ventura Nitrate Grounds Syndicate, Ltd.* (1) it was necessary to apply to the case of a deceased shareholder on the register an article of association providing that on the increase of the capital of the company the new shares should be offered to the members in proportion to their existing shares. The Court of Appeal decided that the deceased member must still be regarded as a member for the purposes of the article. *Rigby L.J.* said (2):—"Speaking generally, the executors of a deceased member of a limited company as representing his estate are entitled to all the profits and advantages attaching to the shares belonging to their testator, and subject to all the incidental liabilities, although in terms such profits, advantages, and liabilities would seem to attach to members only. Thus, under art. 72 of Table A, which provides that the directors may, with the sanction of the company in general meeting, declare a dividend to be paid to the members in proportion to their shares, it would be difficult to hold that the estate of a deceased member, and his executors as representing his estate, are not entitled to a proper proportion of dividend, though the executors may not be themselves registered members. So it could hardly be contended that under art. 4, providing that the directors may make calls upon the members, the estate of the deceased member, and his executors as representing that estate, are not liable to bear calls made after his death, so long as his share remains untransferred."

He explained the result thus:—"In all these cases the result is arrived at by treating the word 'member' as including a deceased member, so long as his name is on the register; or, what comes to the same thing, treating the estate of the deceased member as being a member for the purpose both of profit and of liability: *Baird's Case* (3)."

In the course of the argument of this case Lord *Herschell* referred to *Bombay. Burmah Trading Corporation, Ltd. v. Smith* (4) as raising a similar point. There, under the terms of an agreement in pursuance of which an allotment was made to a shareholder named Wallace of one hundred shares, he, his executors or administrators were entitled so long as he or they should hold the shares to an extra dividend calculated on profits. The shareholder died and, though the grant of letters of administration *c.t.a.* was noted in

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(1) (1896) 1 Ch. 456.

(2) (1896) 1 Ch., at p. 466.

(3) (1870) L.R. 5 Ch. App. 725.

(4) (1894) L.R. 21 Ind. App. 139.



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the share register, the administrators did not become registered as shareholders. The Privy Council held that nevertheless they “held” the shares and were entitled to the extra dividend. Lord *Macnaghten*, who delivered the reasons of the Board, said (1):— “The only question, if there be a question, is whether in these circumstances the extra dividend still continues to be payable. The appellants contend that the extra dividend is not payable now because there is nobody who can be said to hold Mr. Wallace’s shares. Mr. Wallace, they say, does not hold them, because he is dead; his executors do not hold them, because their names are not on the register. But then who does hold them? Certainly, no one else. And why are the shares not held by Mr. Wallace or his executors or administrators? There is no magic in the word ‘hold’. Mr. Wallace’s name is on the register. The company cannot remove it. As long as it is there the company are bound to credit the proper dividends to his holding, and to recognize the title of his legal personal representatives to receive any dividends which may be carried to his credit.”

In *Allen v. Gold Reefs of West Africa Ltd.* (2) the name of a deceased person stood in the share register in respect of both paid-up shares and contributing shares. The company proceeded to make calls in respect of the latter and by an alteration of the articles to subject the former to a lien in respect of the liabilities to the company of the shareholder. The executors of the deceased had not placed themselves upon the register but the company was aware of their existence and of the death of the shareholder. Nevertheless the company served (1) the notice of the meeting for the alteration of the articles, (2) the notice requiring payment of the call and stating that in default the shares would be liable to forfeiture, by posting them to the registered address of the shareholder who had died. *Kekewich J.* held that the notice with reference to the call was bad because first it claimed more than was due and second because with knowledge of his death the company had served it at the address on the register of the deceased shareholder. His Lordship held that the resolution for the alteration of the articles was bad because the notice of the meeting had been similarly served. The Court of Appeal (3) reversed his decision upon the resolution because the notice came to the knowledge of the executors, and in any case there was no need to serve them inasmuch as a specific article provided that notices of meetings need not be served on an executor who had not become a member

(1) (1894) L.R. 21 Ind. App., at p. 146.

(3) (1900) 1 Ch. 656.

(2) (1899) 2 Ch. 40.



himself in respect of the shares. The Court of Appeal, however, affirmed the decision of *Kekewich J.* in respect of the notice preliminary to the call, but apparently on the ground of the mistakes in the notice. *Kekewich J.*, in deciding that the notice was bad for the additional reason that it was not served, did so upon the ground that the company knew of the death of the shareholder. This tacitly implies that a notice was necessary and that means that the company could not treat the situation as one in which there was no shareholder. But it is not clear that the Court of Appeal would have been prepared to act on the insufficiency of the service of the notice, assuming that the notice came to the knowledge of the executors. This case does not appear to me to support the view that upon death there ceased to be any shareholder for all the purposes of the company law.

In *Llewellyn v. Kasintoe Rubber Estates Ltd.* (1) the question was whether executors who were not on the register could effectually dissent in respect of their testator's shares from a reconstruction and claim that the interest of the testator should be purchased. The provision providing for such a claim by dissentients used the expression "member". It was held that under this provision the executors could exercise the right it confers notwithstanding that an article of association said that a person entitled to a share on death should not be entitled to exercise any rights or privileges of a member until he became registered as the holder of the share. *Swinfen Eady L.J.* said (2):—"It is beyond dispute that the word 'member' used in the statute . . . (the *Companies Act*) and in the articles of association of this company is used sometimes as referring to a member on the register and also sometimes as including and extending to a deceased member and the estate of a deceased member". In *James v. Buena Ventura Nitrate Grounds Syndicate, Ltd.* (3) Lord *Herschell*, referring to *Baird's Case* (4), said: "In a somewhat similar case the late Lord Justice *James* said 'The estate is the member'. This is, of course, a metaphorical expression, but it sufficiently indicates the legal situation of the parties".

I have dealt at length with the foregoing cases because they show, as it appears to me, that when statutory provisions and articles attaching rights or privileges and liabilities or duties to shares employ for the purpose the expressions "member" or "shareholder" they are not to be construed as excluding the shares of a deceased registered member because there is no personal

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(1) (1914) 2 Ch. 670.

(2) (1914) 2 Ch., at p. 683.

(3) (1896) 1 Ch., at p. 602.

(4) (1870) L.R. 5 Ch. App. 735.



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representative who is on the register. If the appellant company had declared a dividend as on 30th June 1946 it would have been bound to include the shares of the deceased and to appropriate a sum representing the dividend on those shares for payment to a properly constituted representative of her estate. Article 86 of the articles of association enables the directors to declare a dividend to be paid to the members in proportion to amounts paid up on the shares held by them respectively. But the authorities to which I have referred show that the use of the word "member" would not exclude her estate from the dividend. Article 27 says that the executors or administrators of a deceased member shall be the only person(s) recognized by the company as having any title to the shares registered in the name of such member. It may be that this article would have made it necessary for the company to hold the money until the constitution of an administrator was complete. That possibly means until 31st July 1946, when letters of administration *pendente lite* were actually issued, though the Public Trustee may perhaps have been able theoretically to give a discharge for the dividend: cf. *Smith v. Mather* (1) and *Fred Long & Sons v. Burgess* (2). But his powers and duties under s. 15 of the *Administration and Probate Act* are obscure. In my opinion, however, it is not necessary to pursue that question. Section 104 (1) requires an assumption, namely, that the company on the last day of the year of income paid the undistributed amount as a dividend to the shareholders who would have been entitled to receive it. Even if on 30th June 1946 there was no actual person who could on that day have enforced a right to be presently paid the money in respect of the particular shares, that would not make the use of the assumption impossible and so destroy the application of the sub-section. The words quoted do not mean to make it an essential condition of the application of s. 104 to a particular shareholding that a person shall exist who is entitled to immediate and actual payment of the dividend. The purpose of the phrase is to take as a measure of the tax the pecuniary consequences to the revenue which would have ensued had a dividend payable at that time been declared. The authorities cited show that the "estate" of the deceased shareholder must have participated in the dividend. As soon as an administrator of the estate was duly constituted he would become at once entitled to receive actual payment. Section 104 (1) ought, in conformity with the principles established by the authorities, to receive an interpretation which covers such a situation. It is within the plain intent of s. 104 (1)

(1) (1948) 2 K.B. 212.

(2) (1950) 1 K.B. 115.



and within the meaning which the language of the sub-section would receive in company law.

For these reasons I think that the ground of substance upon which the appellant company relies fails.

It is perhaps not necessary in view of this conclusion for me to express an opinion upon the commissioner's contention that the notice of objection does not cover the point of substance. But I think that it is desirable that I should do so. The question turns on the third and fourth of the grounds stated in the notice. They are as follows:—“(3) The only shareholders (if any) entitled to receive dividends if they had been declared by the Company were Frederick Randall Pearson Junior who was entitled to 2400 shares and Ida Marie Caroline Spradbery who was entitled to 2600 shares of the allotted share capital of the Company. (4) Alternatively to ground 3 the only shareholders (if any) entitled to receive dividends if they had been declared by the Company were Frederick Randall Pearson Senior, Frederick Randall Pearson Junior and Ida Marie Caroline Spradbery each of whom were entitled to one equal undivided third part or share of the allotted share capital of the Company.”

It is apparent on a mere reading of these paragraphs that they do not state in express terms the point taken in support of the appeal, the point with which I have dealt. Section 185 requires that a notice of objection shall state fully and in detail the grounds on which the taxpayer relies and s. 190 says that he shall be limited to the grounds stated in his objection. At first sight it is not easy to see how the point that there was no shareholder because the registered shareholder was dead is stated fully and in detail or at all. But it is said to be implied or contained in the use of the words “only” and “if any”.

I think that courts should not interpret grounds of objection technically, narrowly or with rigidity, but at the same time I cannot escape the conviction that the grounds were not intended to cover the point that has been made and that they would not convey it to the commissioner. The grounds are, in my opinion, clearly enough directed to show that the persons mentioned were the only beneficial owners of the shares if any beneficial owners existed on 30th June 1946. The grounds are pretty plainly based on the assumption that the test is beneficial ownership not registration. There was, I think, no intention of objecting that, because the shareholder registered was dead and there was no personal representative upon the register or no personal representative completely constituted, there was no shareholder.

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Under s. 105 the 250 shares standing in the name of the administrator *pendente lite* and the 250 shares standing in the name of the deceased's husband were properly added to the 4,497 standing in the name of the deceased. The commissioner was therefore right in aggregating the 4,997 shares and there was no argument to the contrary.

*Appeal dismissed with costs.*

Solicitor for the appellant, *F. L. Birch*.

Solicitor for the respondent, *D. D. Bell*, Crown Solicitor for the Commonwealth.

E. F. H.