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SCHELLENBERGER v. TRUSTEES EXECUTORS AND AGENCY CO. LTD.

Dixon C.J. McTiernan J. Fullagar J.

Mr. *Voumard's* main argument for the next of kin was founded on a passage in the judgment of the Court of Appeal, delivered by Lord *Greene* M.R., in *Re Strakosch*; *Temperley* v. *Attorney-General* (1). The gift in that case was of an entirely different character from that with which we are now concerned, but, in the course of the judgment, the Master of the Rolls found occasion to refer to the somewhat controversial case of *Re Smith*; *Public Trustee* v. *Smith* (2), in which a gift " unto my country England for —own use and benefit absolutely " (*sic*) was held by the Court of Appeal to be a charitable gift. In the course of the judgments in that case the line of cases cited above was discussed, together with the case in the House of Lords of *Goodman* v. *Saltash Corporation* (3), which is, of course, a leading case on the subject. The cases of *Re Smith* (2) and *Goodman* v. *Saltash Corporation* (3) had also been discussed by Lord *Simonds* in *Williams' Trustees* v. *Inland Revenue Commissioners* (4), in an opinion in which four other learned Lords concurred. In *Re Strakosch* (5) the Master of the Rolls, speaking for the Court, expressed the view that the reasoning which lay behind the cases was " that where general words are used such as to benefit such and such a parish or ' my country ' the law will construe these words as restricted to benefits which are charitable in law " (6). His Lordship concluded :—" If we are right in holding that the principle laid down is that general words that money is to be applied for the benefit of a district or a country are construed as meaning for such purposes as are recognised by the law as charitable purposes, the principle has no application here where the purpose is expressed " (7).

Mr. *Voumard* said that both the word " beautification " and the word " advancement " comprehended purposes which were not charitable as well as purposes which were charitable, and he said that, while the word " advancement " was a general expression which could, in accordance with the passages quoted, be construed as including only such purposes conducive to the advancement of the community of Bunyip as were charitable, the word " beautification " expressed a specific purpose to which that passage could not be applied. By way of example of a " beautifying " project which would not be charitable, he said that the words would authorize the building of fine houses with fine gardens for the councillors of

(1) (1949) Ch. 529, at pp. 539-541,
(2) (1932) 1 Ch. 153.
(3) (1882) 7 App. Cas. 633.
(4) (1947) A.C. 447, at pp. 459, 460.
(5) (1949) Ch. 529.
(6) (1949) Ch., at p. 539.
(7) (1949) Ch., at p. 541.

the local municipality, because these would tend to " beautify " the township.

We are not able to accept this argument, and for two reasons. In the first place, we think that the words " beautification of the township ", construed without the aid of any canon of construction, do not include such an example as that given. The real meaning of the testator is that physical things, having an element of beauty, shall be provided in the township for the edification and enjoyment of the local community as a whole and not for the benefit of private individuals. That appears to us to be a charitable gift. To extend the words used as Mr. *Voumard* suggested would be to take an unreal and far-fetched view. In the second place, if this were not so, we think that the word " beautification " would be just such a general word as the Master of the Rolls may be taken to have had in mind in *Re Strakosch* (1). Cf. the cases already cited of *Howse* v. *Chapman* (2); *Attorney-General* v. *Heelis* (3); and *Faversham Corporation* v. *Ryder* (4).

It is not necessary to consider whether s. 131 of the *Property Law Act* 1928 (Vict.) would apply so as to save the gift if it were otherwise invalid. The gift in question is, in our opinion, a charitable gift.

The originating summons asked that, if the trust were held to be charitable, an order should be made embodying a " scheme " for the administration of the trust. Strictly speaking, the settling of a scheme by or under the authority of the court is only appropriate where a charitable trust has failed or where for some other reason there is to be a *cy-pres* application of the fund. The trustee in the present case, however, may well desire to submit to the court a question as to whether some proposed application of the fund will be within the terms of the trust. The order made by *Coppel* A.J. directed that the question of the settling of a scheme be reserved for further consideration. This order is not open to serious criticism, but it is perhaps preferable to delete par. 3 of the order as it stands, to substitute therefor the words: " It is unnecessary to answer this question ", and then, after the representative order, to provide that the plaintiff and the defendant the Attorney-General have liberty to apply with regard to the mode of application of the residuary estate of the testator under the trusts of the will.

(1) (1949) Ch., at pp. 539-541.
(2) (1799) 4 Ves. 542 [31 E.R. 278].
(3) (1824) 2 S. & S. 67 [57 E.R. 270].
(4) (1854) 5 De G.M. & G. 350 [43 E.R. 905].

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The appeal should be dismissed, and the order varied in the manner we have indicated. We do not think that there is sufficient reason in this case for departing from the prima-facie rule as to the costs of an unsuccessful appeal. The appellant should pay the costs of the appeal.

Appeal dismissed with costs.

Solicitor for the appellant, *F. P. Walsh.*

Solicitor for the respondent, The Trustees Executors and Agency Company Limited, *M. Davine*, Warragul, by *J. W. McClusky.*

Solicitor for the respondent, The Attorney-General of the State of Victoria, *F. G. Menzies*, Crown Solicitor for the State of Victoria.

R. D. B.

[HIGH COURT OF AUSTRALIA.]

ROBERTSON AND OTHERS . . . . APPELLANTS;

AND

FEDERAL COMMISSIONER OF TAXATION RESPONDENT.

H. C. OF A. 1952.

MELBOURNE, *Oct.* 27-29.

SYDNEY, *Dec.* 18,

Williams, Kitto and Taylor JJ.

Estate Duty (Cth.)—Assessment—Shares in company—Valuation—"Beneficial interest in property which . . . by virtue of a settlement or agreement . . . passed or accrued . . . to . . . any other person—Article providing for division of all shares into two classes upon death of deceased—Shares held by deceased and shares held by other persons—Depression in value of shares held by deceased by reason of incidents attached to them and increase in value of shares in other class—Company's shares not eligible for listing on Stock Exchange during deceased's lifetime, but eligible as from and after his death—Estate Duty Assessment Act 1914-1947 (*No.* 22 *of* 1914—*No.* 16 *of* 1947), *ss.* 8 (4) (*e*), 16A (1) (*a*).

Section 16A (1) of the *Estate Duty Assessment Act* 1914-1947 provides: "Where the Commissioner is of the opinion that it is necessary that the following provisions should apply for the purpose of assessing the value for duty of an estate for the purposes of this Act, the following provisions shall apply:—(*a*) the value of shares or stock in any company, whether incorporated in Australia or elsewhere, shall be determined upon the assumption that the memorandum and articles of association or rules of the company, at the date of death, satisfied the requirements prescribed by the Committee or governing authority of the Stock Exchange at the place where the share or stock register is situate for the purpose of enabling that company to be placed on the current official list of that Stock Exchange." Section 8 (4) (*e*) of the same Act provides that property "being a beneficial interest in property which the deceased person had at the time of his decease, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person . . . shall for the purposes of this Act be deemed to be part of the estate of the person so deceased."

A deceased person held shares in a company one of the articles of association of which provided in substance that upon the death of the deceased all shares (which had previously been undifferentiated) should be divided into two classes, No. 1 class, which would be shares held at the date of death of

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the deceased by persons other than the deceased, and No. 2 Class, which would be shares held by deceased at the date of his death other than shares held by him as executor, &c. The inclusion of the article, which was calculated, by reason of the incidents attached to each class of share, to give No. 1 class shares a far higher value than No. 2 class shares, precluded the listing of the company's shares by the Stock Exchange of Melbourne during the deceased's lifetime, but not as from, and after, the death of the deceased. In assessing the value of the shares for the purpose of duty, the Commissioner of Taxation applied s. 16A (1) (*a*) of the Act, and excluded the provisions of this article, treating all the shares in the company as being of one class at the date of the death of the deceased.

Held that the shares must be valued as at the time of death, and that since, on and from the death of the deceased there was nothing in the memorandum and articles of association in the form that this article assumed on the death of the deceased to make it necessary to apply s. 16A (1) (*a*) the shares must be valued on the basis that they were No. 2 class shares.

Held further that the fact that the article effected a rise in value of No. 1 class shares and a fall in value of No. 2 Class shares was not sufficient to make s. 8 (4) (*e*) of the Act applicable.

APPEAL under the *Estate Duty Assessment Act.*

Sir MacPherson Robertson K.B.E. (hereinafter called the deceased) died on 20th August 1945. Probate of his will was granted by the Supreme Court of Victoria in its Probate Jurisdiction on 14th May 1946 to Norman Napoleon Robertson, Eric Francis Robertson, Mervyn MacPherson Brewer, Geoffrey Robertson Brewer, and Leslie Gordon Atkinson, who were the appellants herein. At the date of his death the deceased held in his own name 561,667 shares fully paid up to £1 per share in MacRobertson Pty. Ltd., a company which had been incorporated in Victoria in 1921 for the purpose of acquiring and carrying on the business of a manufacturer theretofore carried on by the deceased. The deceased was at all times governing director of MacRobertson Pty. Ltd. with provision that his powers were to operate to the exclusion of the powers of any other director. Moreover, articles 28-30 of the articles of association of the company provided that during the deceased's lifetime no transfer of shares in the company might be registered without his consent, and he was empowered to purchase at will all or any of the shares held by any other member or members of the company. Article 31 provided that on the death of the deceased, except in the case of a change of trustees, no shares should be transferred except with the consent of the directors of the company to a person who was not a member so long as any member or any person selected by the directors as one

whom it was desirable in the interests of the company to admit to membership was willing to purchase the shares at a fair value. In 1929 the following article was duly inserted in the articles of association of MacRobertson Pty. Ltd. :

" 6 (i) Upon the death of MacPherson Robertson the whole of the then issued shares of the Company shall be divided into and become and thereafter be of two classes to be known respectively as No. 1 class shares and No. 2 class shares.

(ii) The No. 1 class shares shall be all those shares in the Company other than those standing in the register at the date of his death in the name of the said MacPherson Robertson otherwise than as trustee executor or administrator of the estate of a deceased person. The No. 2 class shares shall be all those shares in the Company standing in the register at the date of his death in the name of the said MacPherson Robertson otherwise than as trustee executor or administrator of the estate of a deceased person.

(iii) The rights following shall as from the date aforesaid be attached to such No. 1 class shares and No. 2 class shares inter se that is to say :—

(a) The No. 1 class shares shall confer the right to receive out of the profits of the Company a cumulative preferential dividend at the rate of 10 per centum per annum on the capital for the time being paid up or credited as paid up on such shares respectively.

(b) Whenever the profits of any year shall be more than sufficient to pay the preferential dividend aforesaid with any arrears to the close of such year then the surplus profits after payment of such preferential dividend shall be applied in payment of a dividend for such year at the rate of 5 per centum per annum on the capital for the time being paid up or credited as paid up on the No. 2 class shares and thereafter the holders of the No. 1 class shares and the holders of the No. 2 class shares shall be entitled to participate pari passu in any further sum which may be distributed in dividend for such year according to the capital paid up or credited as paid up on such shares respectively.

(c) In the event of the winding up of the Company the holders of the No. 1 class shares shall be entitled to have the surplus assets applied, first, in paying off the capital paid up or credited as paid up on the No. 1 class shares held by them respectively ; secondly in paying off the arrears (if any) of the preferential dividend aforesaid to the commencement of the winding up and thereafter they shall be entitled to participate pari passu with the holders of the No. 2 class shares in the residue (if any) of such surplus assets

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remaining after paying off the capital paid up or credited as paid up on such No. 2 class shares.

(d) The rights attaching to the shares of the Company aforesaid inter se from and after the death of the said MacPherson Robertson upon and by reason of the operation of this Article shall take the place of and be to the exclusion of the rights theretofore attaching to such shares or any of them by reason of the conditions of issue or otherwise howsoever.

(e) In certifying the price of any share or shares under Article 30 hereof the Auditor shall not in arriving at the price which he proposes to certify pay any regard to the provisions of sub-clauses (a) (b) (c) and (d) of this Article or to the provisions of any previous Article of the Company embodying the provisions now contained in such sub-clauses and shall arrive at the price which he proposes to certify on the assumption that such sub-clauses or any previous Article of the Company as aforesaid is not and never has been incorporated in the Articles of the Company."

For the purpose of the *Estate Duty Assessment Act* 1914-1947 the executors of the deceased valued his shares in MacRobertson Pty. Ltd. at 7s. 6d. per share. This valuation was increased by the Commissioner of Taxation to 21s. 10d. per share on the basis that one or other of the following principles was applicable to the case (a) that he was entitled pursuant to s. 16A of the *Estate Duty Assessment Act* to value the said shares on the assumption that articles 6 and 28-31 were not included in the articles of MacRobertson Pty. Ltd. on which assumption he valued the said shares at 21s. 10d. per share; (b) that he was entitled to include in the assessable estate not only the value of the shares regarded as No. 2 class shares but also the value of the beneficial interest therein which passed or accrued on or after the death of the deceased as being a beneficial interest in property to be brought into account pursuant to s. 8 (4) (*e*) of the *Estate Duty Assessment Act*. For this purpose he valued the shares as No. 2 class shares at 14s. 5d. and the said beneficial interest at 7s. 5d. totalling 21s. 10d. in all.

It was agreed between the parties that for the purposes of the assessment the value of the shares would be accepted by the executors as at 21s. 10d. per share if it should be held that the provisions of s. 16A (1) (*a*) should be applied and that in applying s. 16A (1) (*a*) all the shares in the company should be treated as being of one class for the purpose of such valuation or if it should be held alternatively that the provisions of s. 8 (4) (*e*) were applicable; but that if it should be held that s. 16A (1) (*a*) should not be applied or that in applying s. 16A (1) (*a*) all such shares should

not be treated as being of the one class and that the provisions of s. 8 (4) (*e*) were not applicable the value of the said shares would be assessed and accepted as at 14s. 5d. per share. It was further agreed that article 6 of the articles of association of MacRobertson Pty. Ltd. would not as from and after the death of the deceased have precluded the listing of the company's shares by the Stock Exchange of Melbourne, but its inclusion would have precluded such listing during the lifetime of the deceased.

The appellants gave notice of objection to the assessment pursuant to s. 24 of the *Estate Duty Assessment Act* 1914-1947 and requested the commissioner to treat the objection as an appeal and to forward it to the High Court of Australia. The respondent did so. By consent it was directed that the case be argued before a Full Court of the High Court of Australia.

J. B. Tait Q.C. (with him *R. M. Eggleston* Q.C. and *G. A. Pape*), for the appellants. Section 16A (1) (*a*) of the *Estate Duty Assessment Act* 1914-1947 is only to be applied where the Court is of the opinion that it is necessary that it should apply for the purpose of assessing the value for duty of the estate. In *Federal Commissioner of Taxation* v. *Sagar* (1) *Williams* J. discusses the kind of case in which the section should be applied and the limitations upon its use. The objects of the section, as stated by *Williams* J. do not apply to article 6. There is no difficulty in valuing these shares without applying s. 16A. If, however, it is necessary to apply s. 16A (1) (*a*) the next question is what is the nature of the assumption which the valuer is required to make. The assumption is "that the . . . articles . . . at the date of death, satisfied the requirements". But no test is laid down as to whether or in what way the articles are to be deemed to be altered and the section does not direct the valuer to disregard completely any articles which, or some portion of which, would be a bar to Stock Exchange listing. Moreover, s. 16A (1) (*a*) only requires the assumption that the articles satisfied the requirements of the Stock Exchange, and not that they were listed: see *Federal Commissioner of Taxation* v. *Sagar* (2); *Federal Commissioner of Taxation* v. *Shaw* (3). It is not legitimate to argue that because listing would necessarily follow the alteration of articles by an appreciable interval, the alteration of articles must be deemed to have been an accomplished fact at some time prior to death. If the assumption is to be

(1) (1946) 71 C.L.R. 421, at pp. 427, 428.
(2) (1946) 71 C.L.R. 421.
(3) (1950) 80 C.L.R. 1.

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expressed in concrete terms it is possible to conceive of the alteration of articles being achieved at the exact moment of death. The expression " at the date of death " in s. 16A (1) (*a*) involves the position that, in determining whether the assumption is fulfilled, the death of the deceased must be taken as a fact. If this is so then in the present case, at the moment of death the shares had attached to them all the differential provisions introduced by article 6, and in that condition satisfied the requirements of the Stock Exchange. If this is not so then the question arises as to how the assumption involved in s. 16A (1) (*a*) is to be given effect. There are three possible approaches. (1) That all the section requires is that the disadvantages resulting from non-compliance should be ignored but that in all other respects the valuation should follow normal methods. In the present case the element in article 6 which prevented listing was presumably the fact that the rights attaching to the shares would alter on the happening of an uncertain future event. But at the moment of death the question of future alteration had no effect on value, since death had then actually happened and from then on the value could be determined on the assumption that for the future the rights attaching would be in accordance with those provisions of article 6 which were applicable after death. (2) That only such changes are to be deemed made as are necessary to overcome the obstacle to listing. If at the moment of death the articles had been altered to omit all the words referring to the testator's death and to substitute the relative share numbers of each class the required assumption would be fulfilled, and the valuation would be at the lower figure since the shares would not all be of one class. (3) That any alteration to the articles can be assumed by the Court provided it is appropriate to render the shares capable of being listed, and does not introduce any other element affecting the value. In the present case a possible assumption of alteration required to obtain listing as at the date of death is to assume that the division into classes had been made and had become effective as from some prior date. As the valuation is to be made as at the date of death it is immaterial what prior date is assumed. Such an assumption gets as close as possible to the true facts, whereas any alteration which ignores the division into classes involves a substantial departure from reality. If the Court were free to adopt any alterations in the articles which it likes to choose, providing only that the objection to listing is removed then the application of the section increases rather than diminishes the difficulty of obtaining a valuation. But on none of the possibilities discussed above is the assumption

that the shares are all of one class required, and unless this assumption is made the respondent cannot succeed on the basis of s. 16A (1) (*a*). Section 8 (4) (*e*) of the *Estate Duty Assessment Act* 1914-1947 is not applicable. Here the beneficial interest of the deceased in No. 2 class shares did not pass to the other shareholders and the deceased never had a beneficial interest in the No. 1 class shares. *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (1) is distinguishable on the ground that in that case there was an option to purchase which provided the agreement. The settlement or agreement contemplated must be one made by the testator and not merely one to which he was a party: see *Angus* v. *Commissioner of Stamp Duties* (*N.S.W.*) (2). This means that an agreement to vote in a particular way at a company meeting which agreement if carried out will result in an alteration of rights in the shares is not an agreement by virtue of which the rights in the shares are altered. It is the passing of the resolution by virtue of which the rights in the shares are altered and unless the Act of passing the resolution is a settlement or agreement s. 8 (4) (*e*) is inapplicable. In *Grimwade* v. *Federal Commissioner of Taxation* (3) it was held that the act of a shareholder in voting at a company meeting was not a "disposition of property" within s. 4 of the *Gift Duty Assessment Act* 1941-1942 and, in particular, was not a "transaction" within s. 4 (*f*). It follows that the act of voting at a company meeting is neither a settlement nor an agreement within the meaning of s. 8 (4) (*e*).

D. I. Menzies Q.C. (with him *A. D. G. Adam* Q.C. and *A. H. Mann*), for the respondent. The testator did not at any time hold No. 2 class shares. His shares which were unclassified, became No. 2 class shares only as from the date of death. They should be valued on the footing that they were unaffected by article 6. In *McCathie* v. *Federal Commissioner of Taxation* (4) it is said "The Court has to ascertain the real value of the shares at the date of death". Even so, however, the depreciatory effect of article 6 would have to be taken into account, were it not for s. 16A (1) (*a*) of the *Estate Duty Assessment Act* 1914-1947. The word "necessary", in the context in which it appears, means "required to arrive at a 'proper' or 'true' or 'fair', valuation of the estate". In particular it covers the case where the articles of a company contain provisions which would depress the value of the shares:

(1) (1944) 69 C.L.R. 270.
(2) (1930) 44 C.L.R. 211, at p. 219.
(3) (1949) 78 C.L.R. 199.
(4) (1944) 69 C.L.R. 1, at p. 6.

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see *Federal Commissioner of Taxation* v. *Sagar* (1). The governing purpose of s. 16A (1) (*a*) is not to create an artificial value, but to prevent the creation of one. It is clear that the articles did not satisfy the requirements of the Stock Exchange. Section 16A (1) (*a*) speaks of a time described as " the date of death ". Article 6 operates as from the date of death. There is no doubt that at some time on 20th August 1945 article 6 had still to operate, and that, while that was the case, the shares could not be listed on the Stock Exchange. The only way to apply s. 16A (1) (*a*) is to strike out the articles which would prevent listing on the Stock Exchange : see *Sagar's Case* (1). The result of the application of s. 16A (1) (*a*) is that all shares should be treated as one class and valued accordingly. Alternatively, the assessment was correct by virtue of s. 8 (4) (*e*) of the *Estate Duty Assessment Act* 1914-1947. That section is directed to including in the estate, for taxation purposes, what would have formed part of the estate, had it not been for an agreement to which the testator was a party : see *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation*, per *Williams* J. (2), per *Starke* J. (3), per *McTiernan* J (4), per *Latham* C.J. (5). " Interest " is a word of the widest meaning : see *Craig* v. *Federal Commissioner of Taxation*, per *Latham* C.J. (6), and per *Dixon* J. (7). In applying s. 8 (4) (*e*) it is necessary to consider the nature of a shareholder's interest in a company. [He referred to *Borland's Trustee* v. *Steel Brothers & Co. Ltd.* (8) per *Farwell* J. ; *Binney* v. *Ince Hall Coal & Cannel Co.* (9) ; *Midland Rly. Co.* v. *Taylor* (10).] To assign or charge a right to receive dividends from a company payable in respect of shares is the creation of an equitable right. If such a beneficial interest were to arise only at the death of the assignor, it would be a beneficial interest in property which a deceased person had at the time of his decease which accrued on his decease to some other person, and it would fall within s. 8 (4) (*e*). In the present case the deceased held shares worth 21s. 10d. each which gave him an interest in the company, which included the right to participate with other shareholders in dividends. Although the shares passed to the executors, they did so without all the interest that the deceased had during his life. The deceased's interest in the company was reduced, and the interest of other shareholders was correspondingly

(1) (1946) 71 C.L.R., at p. 425.
(2) (1944) 69 C.L.R., at pp. 292, 296, 297.
(3) (1944) 69 C.L.R., at p. 287.
(4) (1944) 69 C.L.R., at p. 289.
(5) (1944) 69 C.L.R., at p. 284.
(6) (1945) 70 C.L.R. 441, at pp. 446, 447.
(7) (1945) 70 C.L.R., at p. 457.
(8) (1901) 1 Ch. 279, at p. 288.
(9) (1866) 35 L.J. Ch. 363.
(10) (1862) 8 H.L.C. 751 [11 E.R. 624].

increased, and this happened by virtue of the deceased's death. The ground for the decision in *Bakewell* v. *Deputy Federal Commissioner of Taxation* (*S.A.*) (1) was that there the "interest" was held to have arisen when the agreement was made and not upon death. In the present case, however, article 6 does not affect any share until death, and its operation depends entirely upon what shares the testator held at death. Up to death, the deceased could do as he liked. It is this feature which approximates the agreement to a will, which was the only feature lacking in *Bakewell's Case* (1). If the rights to dividends and capital which were attached to the shares do amount to an "interest in property", then there was an "accrual": see *Trustees Executors and Agency Co. Ltd.* v. *Federal Commissioner of Taxation* (2). This happened by virtue of an agreement made by the deceased, which was constituted by the articles of association. [He referred to *The Companies Act* (Vict.) 1938, s. 20; *Palmer's Company Precedents*, 16th ed. (1938), p. 457; *Hickman* v. *Kent or Romney Marsh Sheepbreeders' Association* (3); *Buckley's Companies Acts*, 12th ed. (1949), pp. 52, 53.]

R. M. Eggleston Q.C., in reply.

Cur. adv. vult.

Dec. 18.

The following written judgments were delivered:—

WILLIAMS J. Sir MacPherson Robertson, hereinafter called the deceased, died on 20th August 1945. On that date he held 561,667 shares of £1 each in the capital of MacRobertson Pty. Ltd., hereinafter called the company. For the purposes of Federal estate duty the respondent, the Commissioner of Taxation of the Commonwealth of Australia, valued these shares at 21s. 10d. per share. This is an appeal by the executors of the estate of the deceased from this valuation. They contend that the real value of the shares for the purposes of duty is 14s. 5d. per share. In valuing the shares at 21s. 10d., the respondent made use of s. 16A of the *Estate Duty Assessment Act* 1914-1947. This section has already been discussed to some extent in this Court by *Williams* J. in *Federal Commissioner of Taxation* v. *Sagar* (4) and by *Latham* C.J. in *Federal Commissioner of Taxation* v. *Shaw* (5). The portion of the section relied on by the respondent in the present case is par. (*a*) of sub-s. (1). The text of the section, so far as material, is as follows:—

(1) (1937) 58 C.L.R. 743.
(2) (1944) 69 C.L.R., at pp. 288, 294, 297.
(3) (1915) 1 Ch. 881, at p. 888.
(4) (1946) 71 C.L.R. 421.
(5) (1950) 80 C.L.R. 1.

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Williams J.

"16A—(1) Where the Commissioner is of the opinion that it is necessary that the following provisions should apply for the purpose of assessing the value for duty of an estate for the purposes of this Act, the following provisions shall apply :—(*a*) the value of shares or stock in any company, whether incorporated in Australia or elsewhere, shall be determined upon the assumption that the memorandum and articles of association or rules of the company, at the date of death, satisfied the requirements prescribed by the Committee or governing authority of the Stock Exchange at the place where the share or stock register is situate for the purpose of enabling that company to be placed on the current official list of that Stock Exchange".

Alternatively, the respondent relies upon s. 8 (4) (*e*) of the Act. Paragraph (*e*) is one of the paragraphs of sub-s. 4 of s. 8 which makes certain classes of property part of the notional estate of a deceased person for the purposes of duty. It provides that property "being a beneficial interest in property which the deceased person had at the time of his decease, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon, any other person . . . shall for the purposes of this Act be deemed to be part of the estate of the person so deceased".

The evidence before the Court consists in the main of a document containing admissions of facts and documents. Paragraph 36 of this document is in the following terms :—"On the 4th day of October 1949 it was agreed between the Appellants and the Respondent that for the purpose of the said Assessment the value of the said shares would be accepted by the Appellants as at 21/10d. per share if it should be held that the provisions of s. 16A (1) (*a*) should be applied and that in applying s. 16A (1) (*a*) all the shares in the said Company should be treated as being of one class for the purpose of such valuation or if it should be held alternatively that the provisions of s. 8 (4) (*e*) are applicable ; but that if it should be held that s. 16A (1) (*a*) should not be applied, or that in applying s. 16A (1) (*a*) all such shares should not be treated as being of the one class, and that the provisions of s. 8 (4) (*e*) are not applicable, the value of the said shares would be assessed by the Respondent and accepted by the Appellants as at 14/5d. per share".

Section 16A (1) (*a*) relates to the valuation of shares forming part of the dutiable estate and it is easy to see how the question whether it is necessary to apply its provisions has a material bearing upon the value of the subject shares. Section 8 (4) (*e*) is an enactment making certain property notionally part of the

assets of the deceased for the purposes of duty and it is difficult to see how the application of its provisions could affect the value of these shares. But the parties have so agreed and the agreement presumably means that, while the shares are to be valued at 14s. 5d., the difference in value between 21s. 10d. and 14s. 5d. per share represents the value of the property which should notionally be included in the estate of the deceased if s. 8 (4) (*e*) is applicable, so that the total value of the shares and this notional property is equivalent to 21s. 10d. per share. The effect of the agreement is that the respondent must succeed if he can rely on either s. 16A (1) (*a*) or s. 8 (4) (*e*) of the Act.

Articles 28-30 of the articles of association of the company provided that during the lifetime of the deceased no transfer of the shares in the company should be registered without his consent and that he should have the right to purchase the shares of other members. Article 31 provided that on his death, except in the case of a change of trustees, no shares should be transferred, save with the consent of the directors, to a person who was not a member so long as any member or any person selected by the directors as one whom it was desirable in the interests of the company to admit to membership was willing to purchase the same at a fair value. The respondent relies on these articles in aid of his submission that it was necessary to apply the provisions of s. 16A (1) (*a*). It is difficult to see how articles 28-30, which ceased to operate upon the death of the deceased, could affect the value of the shares as part of his dutiable estate, and the respondent did not contend that the provisions of article 31 had any effect on this value. He could hardly do so in face of the agreement in par. 36 contained in the first alternative, which is very specific. It is that if it should be held that the provisions of s. 16A (1) (*a*) should be applied and that in applying s. 16A (1) (*a*) all the shares in the company should be treated as being of one class for the purposes of such valuation the value of the shares would be accepted by the appellants as at 21s. 10d. per share. The agreement relates to the effect that the notional deletion from the articles of association of article 6 would have upon the value of the shares.

The text of this article must be set out at length. It is as follows :—

" 6 (i) Upon the death of MacPherson Robertson the whole of the then issued shares of the Company shall be divided into and become and thereafter be of two classes to be known respectively as No. 1 class shares and No. 2 class shares.

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(ii) The No. 1 class shares shall be all those shares in the Company other than those standing in the register at the date of his death in the name of the said MacPherson Robertson otherwise than as trustee executor or administrator of the estate of a deceased person. The No. 2 class shares shall be all those shares in the Company standing in the register at the date of his death in the name of the said MacPherson Robertson otherwise than as trustee executor or administrator of the estate of a deceased person.

(iii) The rights following shall as from the date aforesaid be attached to such No. 1 class shares and No. 2 class shares inter se that is to say :—

(a) The No. 1 class shares shall confer the right to receive out of the profits of the Company a cumulative preferential dividend at the rate of 10 per centum per annum on the capital for the time being paid up or credited as paid up on such shares respectively.

(b) Whenever the profits of any year shall be more than sufficient to pay the preferential dividend aforesaid with any arrears to the close of such year then the surplus profits after payment of such preferential dividend shall be applied in payment of a dividend for such year at the rate of 5 per centum per annum on the capital for the time being paid up or credited as paid up on the No. 2 class shares and thereafter the holders of the No. 1 class shares and the holders of the No. 2 class shares shall be entitled to participate pari passu in any further sum which may be distributed in dividend for such year according to the capital paid up or credited as paid up on such shares respectively.

(c) In the event of the winding up of the Company the holders of the No. 1 class shares shall be entitled to have the surplus assets applied, first, in paying off the capital paid up or credited as paid up on the No. 1 class shares held by them respectively ; secondly in paying off the arrears (if any) of the preferential dividend aforesaid to the commencement of the winding up and thereafter they shall be entitled to participate pari passu with the holders of the No. 2 class shares in the residue (if any) of such surplus assets remaining after paying off the capital paid up or credited as paid up on such No. 2 class shares.

(d) The rights attaching to the shares of the Company aforesaid inter se from and after the death of the said MacPherson Robertson upon and by reason of the operation of this Article shall take the place of and be to the exclusion of the rights theretofore attaching to such shares or any of them by reason of the conditions of issue or otherwise howsoever.

(e) In certifying the price of any share or shares under Article 30 hereof the Auditor shall not in arriving at the price which he proposes to certify pay any regard to the provisions of sub-clauses (a) (b) (c) and (d) of this Article or to the provisions of any previous Article of the Company embodying the provisions now contained in such sub-clauses and shall arrive at the price which he proposes to certify on the assumption that such sub-clauses or any previous Article of the Company as aforesaid is not and never has been incorporated in the Articles of the Company."

Section 16A (1) (*a*) requires that the shares shall be valued upon the assumption that the memorandum and articles of association of the company at the date of death satisfied the requirements prescribed by the committee or governing authority of the appropriate Stock Exchange, in the present case the Melbourne Stock Exchange. Article 6 provides for the division of the issued shares of the company into two classes upon the death of the deceased, that is to say at exactly the same moment of time. It was contended that the words in par. (iii) of article 6 that the new rights shall " as from the date aforesaid " be attached to the two classes of shares mean that these rights would only attach from the commencement of the day after the death of the deceased. In some contexts the words " as from " a certain date can have this meaning. But par. (i) of article 6 provides for the division of the shares into two classes upon the death of the deceased, and it is clear that in this context the rights set out in par. (iii) are intended to attach to the two classes of shares at that moment of time. Accordingly, article 6 operated upon the death of the deceased to divide the issued shares of the company into two classes having the respective rights attached thereto by this article. Paragraph 37 of the document of admitted facts and documents states that the inclusion of article 6 (i), (ii), (iii) (a), (b), (c) and (d) of the articles of association of the company would not as from and after the death of the deceased have precluded the listing of the company's shares by the Stock Exchange of Melbourne, but its inclusion would have precluded such listing during the lifetime of the deceased.

Can it be said that in these circumstances it was necessary to apply the provisions of s. 16A (1) (*a*) for the purpose of assessing the value of the shares as part of the dutiable estate of the deceased ? The first person nominated by s. 16A as the person to form the opinion that it is necessary to apply its provisions is the commissioner. But sub-s. (2) of this section provides that any board or court having jurisdiction to determine, for the purposes of this Act, the value of any shares to which the last preceding

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sub-section applies, may substitute its own opinion for any opinion of the commissioner under that sub-section. In the present case the respondent formed the opinion that it was necessary to apply par. (*a*). He did so because article 6 operated to depreciate the value of the shares owned by the deceased upon his death below the value they had in his lifetime. During his lifetime all the shares were of the one class. But for article 6 all the shares would have continued to be of the one class after his death. If the application of the paragraph could effect the notional deletion of this article and authorize the respondent to value the shares on the basis that the whole of the issued shares of the company were of one class, there would be ample justification for the respondent forming the opinion that it was necessary to resort to the paragraph and there would be little doubt that this Court on appeal would not hesitate to form the same opinion.

The crucial question is whether its application could have this effect. In order to comply with the Act it is necessary to ascertain the real value as at the date of death of the assets which form part of the dutiable estate: *McCathie* v. *Federal Commissioner of Taxation* (1); *Abrahams* v. *Federal Commissioner of Taxation* (2). The real value of an asset is its sale value, that is its prospective value. The assets with which we are here concerned are shares held by the deceased in the company at the date of his death. The company was not then listed on a Stock Exchange so that there was no market in which the shares could be sold or bought. Apart from special statutory provisions, the shares would have to be valued in accordance with the principles discussed in *Perpetual Trustee Co. (Ltd.)* v. *Federal Commissioner of Taxation* (3), the two cases just mentioned, and *Commissioner of Succession Duties (S.A.)* v. *Executor Trustee and Agency Co. of South Australia Ltd.* (4). That is to say, the court must estimate as best it may the price which a reasonably willing vendor would have been prepared to accept and a reasonably willing purchaser would have been prepared to pay for the shares in question at the date of death, regard being had to the financial position of the company, the nature of its business, and the rights conferred upon its members by its memorandum and articles of association and the general law. Section 16A provides statutory modifications of this process of valuation. It was said in *Sagar's Case* (5) that the purpose of the section was to eliminate the depressing effect that expert

(1) (1944) 69 C.L.R. 1, at p. 6.
(2) (1944) 70 C.L.R. 23, at p. 29.
(3) (1942) 65 C.L.R. 572.
(4) (1947) 74 C.L.R. 358.
(5) (1946) 71 C.L.R. 421.

witnesses often claim that certain types of articles of association often found in the articles of association of companies not registered on the Stock Exchange have on the value of shares so that the value of unlisted shares should be assessed upon a more real basis and depend principally upon the profits and assets of the company and the probable yield that investors might reasonably expect to receive in the future as consideration for investing their capital in a business of the nature carried on by the company. Paragraph (*a*) of s. 16A (1) requires that for the purposes of the valuation the shares must be assumed to be shares in a company having a memorandum and articles of association in a form which satisfy the requirements of the Stock Exchange. There is nothing in the paragraph to alter the general principle that the shares must be valued at the date of death, and the value of shares on a particular date, apart from any assistance that can be derived from comparable sales, must necessarily depend upon the opinion that is formed as to the future prospects of the company. The only alteration made by par. (*a*) is to substitute a notional memorandum and articles of association for the memorandum and articles of association of the company to the extent to which its actual memorandum and articles of association do not satisfy the requirements of the Stock Exchange on the crucial date.

The constitution of the company prior to the date of death is immaterial. It is the constitution of the company on that date that matters. It can only be necessary to apply the paragraph where the memorandum and articles of association of the company do not then comply with the requirements of the Stock Exchange. In the present case the articles of association of the company were not in the lifetime of the deceased in a form which satisfied these requirements. In particular, article 6 provided that upon his death the whole of the then issued shares of the company, which during his lifetime had been of the one class, should be divided into two classes to be known respectively as No. 1 class shares and No. 2 class shares. The No. 1 class shares were all the issued shares in the company other than those standing in the register in the name of the deceased at the date of his death. The No. 2 class shares were all the shares standing in the register in his name on that date other than shares registered in his name as trustee, executor or administrator of the estate of a deceased person. The rights attached to the No. 1 and No. 2 shares at and from the date of death were those set out in the article. They were rights calculated to give the No. 1 shares a far higher value than the No. 2 shares. But there is nothing in the requirements of the

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Stock Exchange to prevent a company issuing shares conferring different rights and therefore having different values. Only the No. 2 shares became part of the estate of the deceased, and there was nothing in article 6 which detrimentally affected the prospective value of these shares after this division based on the value of the profits and assets of the company and the yield that investors who purchased the No. 2 shares might reasonably expect to receive having regard to the nature of the business carried on by the company. There was therefore nothing in the memorandum and articles of association of the company in the form that article 6 assumed on the death of the deceased that made it necessary to apply par. (*a*). No advantage was to be gained from its application, because on and from the death of the deceased article 6 was no longer an article which failed to satisfy the requirements of the Stock Exchange.

As to s. 8 (4) (*e*) of the Act: the relevant beneficial interest in property which the deceased had at the date of his death was the beneficial interest in the shares he then owned in the company. Article 6 operated upon his death to make these shares less valuable and the shares owned by other shareholders more valuable. But this circumstance is not sufficient to satisfy the provisions of par. (*e*). To satisfy these provisions, the beneficial interest in the shares owned by the deceased must, by virtue of some settlement or agreement made by him, have passed or accrued or devolved on or after his decease to or upon some other person. The subject property in the present case is the shares which the deceased owned at his death. These shares formed part of his estate after his death. No part of the beneficial interest in these shares passed or accrued or devolved on or after his death to any other person. They simply became shares of less value than they were before. No one acquired any beneficial interest in them except as part of his estate. The No. 1 shares increased in value but they were not the shares of the deceased. They were not his property at the date of his death. He had no beneficial interest in them. Consequently no beneficial interest in these shares could pass or accrue or devolve on or after his death to or upon any other person. He was not in a position to make a settlement or agreement about them because they were not his to settle or agree about.

It was submitted, however, that there was an agreement with the company created by the memorandum and articles of association. The company is a company incorporated in Victoria and s. 20 (1) of the *Companies Act* 1938 (Vict.) contains the usual provisions found in Companies Acts that the memorandum and

articles shall bind the company and the members thereof to the same extent as if they respectively had been signed and sealed by each member and contained covenants on the part of each member to observe all the provisions of the memorandum and of the articles. The meaning of this enactment has been the subject of considerable judicial controversy. In *Beattie* v. *E. & F. Beattie, Ltd.* (1) Sir *Wilfrid Greene* said that it is at least good law "that the contractual force given to the articles of association by the section is limited to such provisions of the articles as apply to the relationship of the members in their capacity as members". In *Welton* v. *Saffery* (2) Lord *Herschell* said:—"It is quite true that the articles constitute a contract between each member and the company, and that there is no contract in terms between the individual members of the company; but the articles do not any the less, in my opinion, regulate their rights *inter se*. Such rights can only be enforced by or against a member through the company, or through the liquidator representing the company; but I think that no member has, as between himself and another member, any right beyond that which the contract with the company gives". In *Borland's Trustee* v. *Steel Brothers & Co. Ltd.* (3) *Farwell* J. said that "A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second, but also consisting of a series of mutual covenants entered into by all the shareholders inter se in accordance with s. 16 of the Companies Act, 1862. The contract contained in the articles of association is one of the original incidents of the share". In *Inland Revenue Commissioners* v. *Crossman* (4) Lord *Russell of Killowen* said that "A share in a limited company is a property the nature of which has been accurately expounded by Farwell J. in *Borland's Trustee* v. *Steel*" (5). His Lordship added:—"It is the interest of a person in the Company, that interest being composed of rights and obligations which are defined by the Companies Act and by the memorandum and articles of association of the company". But all these rights and obligations are contractual rights and obligations. It is quite clear that a shareholder has no proprietary rights either at law or in equity in the property of the company. In *Short* v. *Treasury Commissioners* (6) Lord *Porter* said that "a shareholder has no direct share in the assets of a company, he has such rights as the memorandum and articles give him and nothing more".

(1) (1938) Ch. 708, at p. 721.
(2) (1897) A.C. 299, at p. 315.
(3) (1901) 1 Ch. 279, at p. 288.
(4) (1937) A.C. 26, at p. 66.
(5) (1901) 1 Ch. 279.
(6) (1948) A.C. 534, at p. 545.

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The contract between the company and its members created by s. 20 of the *Companies Act* or the contract thereby created between the members *inter se*, if there be any such contract, could not cause the beneficial interest in the shares of one member to pass or accrue to or devolve upon the shares of another member (perhaps "accrue" is the most apt word for present purposes). The property in shares is the property that exists in the shares themselves. Shares do not give an aliquot proprietary right in the property of the company. The whole effect of article 6 upon the death of the deceased was to alter the existing contractual rights of the shareholders against the company and *inter se*. The article did not cause any beneficial interest in any property owned by one person to accrue to any other person. It merely altered contractual rights upon the death of the deceased. It did not alter any proprietary rights. But par. (*e*) only operates where the settlement or agreement causes a beneficial interest in property which the deceased had at the date of his death to accrue on or after his death to any other person.

For these reasons the appeal should be allowed with costs and the respondent ordered to amend the assessment under appeal by including the 561,667 shares in the dutiable estate of the deceased at the value of 14s. 5d. per share.

KITTO J. Sir MacPherson Robertson died on 20th August 1945, and his estate at his death included a parcel of 561,667 shares in the capital of MacRobertson Pty. Ltd. That company, whose share register was in Melbourne, was not listed on the Melbourne Stock Exchange, and its articles of association as they stood at the death of the deceased contained a number of provisions which did not conform with the requirements prescribed by the committee of the Stock Exchange for the purpose of enabling the company to be so listed. The Commissioner of Taxation and the deceased's executors disagreed as to the value which should be attributed to the shares for the purposes of the assessment of estate duty under the provisions of the *Estate Duty Assessment Act* 1914-1947, and the disagreement has led to this appeal.

The relevant facts are set out in the form of mutual admissions, and from par. 36 of the admissions it appears, as a matter of necessary inference, that the difference between the figure which the executors are willing to accept and the figure for which the commissioner contends represents the difference between the value which ought to be placed on the shares if allowance is to be made for the presence in the articles of a particular set of provisions

contained in article 6 and the value which ought to be placed upon them if the articles are to be considered as altered by the deletion of article 6. The shares must, of course, be valued as at the death of the deceased, and article 6 was then in the articles and had been there since 1929. If, then, article 6 is to be treated as non-existent, it must be because it should be so treated by reason of some provision of the Act.

Before turning to the Act, it is convenient to describe article 6. It is lengthy and its terms need not be set out in full. It is expressed to take effect upon the death of the deceased, and what it does on the happening of that event is to divide the issued shares of the company (which until then are all of one class) into two classes according as they are or are not at that date standing in the name of the deceased on the share register. If they are in his name they become known as No. 2 class shares, and if not they are to be known as No. 1 class shares. Thenceforth the No. 2 class shares carry, with respect both to dividend and to winding-up, rights much less advantageous than those of the No. 1 class shares. The article produces the result that the shares which the deceased chose to retain in his own name until his death, although they continued until then to be saleable by him so as to enjoy the advantages, instead of being subject to the detriment, which the operation of article 6 was designed to produce, would by his death automatically lose a substantial portion of their value, and the value of the shares of other persons would be correspondingly and simultaneously increased. One may surmise that the scheme was devised in order to reduce the liability of the deceased's estate for estate duty, and if the Act had remained as it stood in 1929 the scheme would undoubtedly have succeeded. The commissioner, indeed, contended that par. (*e*) of s. 8 (4), which was added by the amending Act of 1928, had an operation in this case to prevent that result, but I agree with the reasons which have been given by my learned brethren for rejecting the contention.

The only question to be considered, then, is whether the Act in the circumstances of the case provides for the valuing of the shares as if article 6 were not in the articles. That question must depend upon the true construction of par. (*a*) of sub-s. (1) of s. 16A, which came into the Act in 1942 and relates to the determination of the value of shares or stock in any company. The sub-section applies only where the commissioner (or any board or court determining the value of shares or stock for the purposes of the Act: sub-s. (2)), is of opinion that it is necessary that the provisions of the various paragraphs of the sub-section should apply "for the purpose of

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assessing the value for duty of an estate for the purposes of this Act ". The purpose by reference to which it must be decided whether it is or is not necessary in a given case to apply these provisions is, therefore, the purpose of ascertaining the true money equivalent of the shares or stock of the estate as at the death of the deceased.

The statement frequently made that a valuation for purposes of estate duty is to be made as at the date of the death is not precise, but it is only in an exceptional case that the lack of precision matters. It is natural enough, and sufficiently accurate in the ordinary run of cases, to speak of " the date of death " in this connection, because it is usually true, and one tends to assume, that the circumstances existing at the death remain constant throughout that day. The tendency is doubtless fostered by the refusal of the law, for many purposes, to pay regard to fractions of a day. A good example of the common tendency to use the expressions " the date of death ", " the time of death " and " the death " as if they were interchangeable is provided by article 6 itself: see " upon the death " in par. (i); " at the date of his death " in par. (ii) (twice); " from the date aforesaid " in par. (iii); and " from and after the death " in par. (iv). Section 16A (1) (*a*) appears to make the very assumption I have mentioned. It directs attention to the question whether the memorandum and articles of association " at the date of death " satisfied the requirements prescribed by the committee of the relevant Stock Exchange for the purpose of enabling the company to be placed on the current official list of that Stock Exchange; and the question whether it is necessary that the provisions should apply in a given case thus becomes a question whether it is possible, without resort to an assumption that the memorandum and articles " at the date of death " satisfied the Stock Exchange requirements, to assess what the shares were really worth at the moment of death.

The executors in this case contend that the question should be answered by saying that there is no necessity to make the assumption, because " at the date of death " the articles, with article 6 in them, in fact satisfied the requirements of the Stock Exchange. The assertion that this was so is based upon a statement in par. 37 of the mutual admissions, that the inclusion of article 6 " would not as from and after the death of (the deceased) have precluded the listing of the company's shares by the Stock Exchange of Melbourne, but its inclusion would have precluded such listing during the lifetime of the deceased ". The parties have treated the reference in this admission to precluding the listing of the

shares as references to failing to satisfy the requirements prescribed by the committee of the Stock Exchange within the meaning of s. 16A (1) (*a*); and clearly enough the trouble about article 6 from the stock exchange point of view is that, in the language of the Official List of Requirements which is in evidence, it is "unreasonable in the case of a public company" that the rights which shares confer as regards dividends and winding-up should be dependent upon the uncertain future event of the shares happening to be or not to be registered in the name of a specified living person when he dies. The admission therefore must mean, as indeed is obvious, that the death of the deceased was a condition precedent which had to be fulfilled before the articles, with article 6 in them, could satisfy the requirements of the Stock Exchange. Clearly, it was not until the deceased had died and article 6 had done its work that the company was in a position to go to the committee of the Stock Exchange with an acceptable set of articles. One way in which the executors put their argument is that, that condition being fulfilled by the death, the articles satisfied the Stock Exchange requirements throughout so much of the day of the death as remained after the moment of death, and that therefore they satisfied the requirements "at the date of death". This, however, is not true unless "at the date of death" means at any time on the day of the death; and once it is recognized that the topic to which s. 16A relates is the valuing of shares as at the death, and as at no other time than the death, to give so wide a meaning to the phrase in the section becomes impossible. The intention of the section cannot be that the critical time as at which the necessity for notionally altering the articles must be decided shall be a point of time other than that as at which the valuation has to be made.

But the executors put an alternative argument. They say, in effect, if the expression "at the date of death" does not mean at any time on that date, it must mean either throughout the day of the death or throughout so much of it as is not subsequent to the moment of death; and on either of these interpretations, there cannot be a necessity to make any false assumption in order that the articles may be treated as having satisfied the requirements of the Stock Exchange for the purpose of valuing the shares as at the death, unless it is first found that the articles did not satisfy those requirements at the death. In the present case, the argument proceeds, it was at the moment of death that the transformation provided for by article 6 took place, and therefore it cannot be

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said that the articles did not at that time satisfy the Stock Exchange requirements.

The answer which the commissioner offers to this contention may be stated as follows. He says: here are shares which at the moment of death answered the description in article 6 of shares standing in the name of the deceased. The parties are agreed that if the valuation is to be made bearing in mind that this was so and also that, as a consequence of the death (an automatic and instantaneous consequence, but still a consequence), these shares suffered a diminution in the rights attached to them, the value of the shares was 14s. 5d. per share. They are also agreed that if the valuation is to be made on the assumption, by the application of s. 16A (1) (*a*), that article 6 would not produce this result upon the death of the deceased, that is to say that at the moment of death they were not subject to the consequence referred to but were still alienable, as they had always been in the hands of the deceased, for what they would fetch as shares carrying the same rights as the rest of the shares in the company, then their value was 21s. 10d. per share. If the death be regarded, as it must logically be regarded, as having preceded the operation of article 6 to which it was the condition precedent, and therefore to have preceded the achievement of conformity between the articles and the Stock Exchange requirements, then, in order to place upon the shares the value they represented at the death, that is to say, immediately before the consequences of the death had ensued, it is necessary to apply s. 16A (1) (*a*) and notionally to satisfy the Stock Exchange requirements by deleting article 6. So, the commissioner says, at the death of the deceased his shares were not yet, but they were about to become, No. 2 class shares with diminished rights; that this was so because article 6 had not yet operated, but was about to operate, to effect the radical change which it was designed to produce; and that therefore the discordance between the articles and the requirements of the Stock Exchange (so far as article 6 was concerned) still existed though it was about to disappear. Consequently, the commissioner concludes, the true value which the shares contained until, in consequence of the death of the deceased, they were converted into No. 2 class shares by the operation of article 6, cannot be ascertained without invoking the authority of s. 16A (1) (*a*) to disregard the existence of article 6, that is to say, to disregard the effect which the impending operation of article 6 had upon the value.

In my opinion the commissioner is quite right in insisting that the conversion of the deceased's shares into No. 2 class shares

by the operation of article 6 should be considered as if it were an event subsequent to the death, for the death was a condition precedent to the conversion. On this type of question it is useful to refer to the judgment delivered by *Palles* C.B., with the concurrence of *Kenny* J., in *In re Augusta Magan* (1). The case was decided in 1908, though not reported until 1922. Under the *Finance Act* 1894 (Imp.) (57 & 58 Vict. c. 30) the question arose whether certain property was, on the death of Augusta Magan, settled property in the sense that it was "for the time being limited to or in trust for any persons by way of succession". Up to the moment of Augusta Magan's death the property was settled on her for life and then for her issue, but at the moment of her death the possibility of issue ceased, and (under the relevant limitations) no one could take but herself, so that at the moment of her death it ceased to be settled. The question for decision in the case was whether the property should or should not be aggregated with her individual property for duty purposes, and the answer to that question depended upon the further question whether the property should or should not be regarded as having ceased at her death to be settled property. The Court held that the property, though it was settled until Augusta Magan's death, was no longer settled when it passed from her on her death. *Palles* C.B. said (2):—"Thus arises a question of some nicety: was the property 'settled' when it passed from Miss Magan at the moment of her death? I am of opinion that it was not. The two events—death and the passing of property—took place, in point of time, at the moment; but in nature one preceded the other. The passing of the property was the effect of the death; the death was the event upon which it passed, and in nature the event must precede the effect which is to ensue upon it. This is so, not only metaphysically, but it is a recognised principle of our law". After quoting a passage from *Viner's Abridgement*, and one from *Littleton* with *Coke's* comment upon it, his Lordship went on (3):—"Considering the instant of the death of Miss Magan upon this principle, the instant so far as it was an end of her life must precede in contemplation of law the same instant so far as it was the time at which the estate passed on her death. I am, therefore, of opinion that although the death and the passing of the estate must be regarded as having taken place at the same instant, which for some purposes must be considered in law as 'unum indivisibile in tempore', still that indivisibility must be

(1) (1922) 2 I.R. 208.
(2) (1922) 2 I.R., at p. 210.
(3) (1922) 2 I.R., at pp. 211, 212.

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considered to be sub modo only, or, I should prefer to say, is subject to an exception, and at all events is not inconsistent with the termination of her estate preceding the passing of that estate upon her death; that on the termination of her life, and before the passing of the estate upon her death, the possibility of her having issue, and consequently of there being anyone to take in succession to her under the will of her mother, ceased: that the property at the termination of her life ceased to be 'settled property' within the meaning of the Finance Act, and consequently was not 'settled property' at the time, which must be regarded as subsequent when it passed on her death".

On this principle I am of opinion that the question whether it is necessary in the present case to assume an alteration of the articles of MacRobertson Pty. Ltd. must be approached on the footing that it was not until after the deceased had died that the articles (so far as article 6 was concerned) were satisfactory to the Stock Exchange. This is in precise accordance with the statement in par. 37 of the mutual admissions that it was "as from and after the death" that the inclusion of article 6 would no longer have precluded the listing of the company's shares on the Melbourne Stock Exchange; and it treats the further statement that the inclusion of article 6 would have precluded such listing "during the lifetime of the deceased" as necessarily meaning "until he had died".

But to say this is not to say that the commissioner must succeed. It only makes it essential to decide whether the valuation to be made, which is of course a valuation as at the instant of death, must be made as if the instantaneous consequence of the death in relation to the shares had yet to take place. If it is to be so made, there may indeed be a necessity to invoke s. 16A (1) (*a*), in order to justify attributing to the shares the full value which they had as shares capable of alienation so as to escape conversion into No. 2 class shares, and taking no account of the depressing effect of their imminent conversion by the operation of article 6. The answer, I think, is that the very method of reasoning which *Magan's Case* (1) supports requires the conclusion that the application of the *Estate Duty Assessment Act* itself to the particular case is a consequence of, and therefore is logically to be treated as subsequent to, the death of the deceased. It is not until there is an estate of a deceased person that the Act speaks. It follows that in the present case the estate must be valued as at the death, but on the hypothesis that the deceased has died. In valuing the

(1) (1922) 2 I.R. 208.

shares on that hypothesis there cannot be a necessity to apply s. 16A (1) (*a*) in order notionally to alter the articles in relation to article 6, for it is involved in the hypothesis itself that article 6 no longer presents any obstacle to listing. At no time while article 6 prevented listing did the Act require the shares to be valued. It was only when they had acquired the character of assets of a deceased person's estate that it became necessary to value them. As such, they were shares in a company whose articles no longer contained anything, so far as article 6 was concerned, which precluded listing; and as such they were No. 2 class shares worth 7s. 5d. each less than the amount they would have been worth if all the shares of the company had still been of one class, viz., 21s. 10d. If, therefore, the shares were to be valued as at the death on the assumption that in all respects the articles conformed with Stock Exchange requirements, the assumption would involve no alteration of article 6, and no notional restoration of the No. 2 class shares to a position of equality with the No. 1 class shares, and accordingly the answer would still be that the shares were worth 14s. 5d. In the circumstances it cannot be said that there is any necessity to apply s. 16A (1) (*a*) in order to value the shares as at the death of the deceased.

I agree that the appeal should be allowed.

TAYLOR J. This is an appeal pursuant to the *Estate Duty Assessment Act* 1914-1947 with respect to the assessment of estate duty payable by the executors of Sir MacPherson Robertson deceased.

As appears from the very full admissions of facts agreed upon by the parties, the deceased at the time of his death on 20th August 1945 was the holder of 561,667 shares in the capital of MacRobertson Pty. Ltd. At this time a number of other persons were the holders of the balance of the shares in the company, namely, 465,536 shares.

Before the death of the deceased all of the shares in the company were of the one class and were considered by the commissioner to be of the same value, but the deceased, pursuant to the articles of association, had during his lifetime wide and exclusive powers of management and control and, indeed, was invested by article 30 with the right at will to purchase all or any of the shares held by any other member or members of the company.

Article 6, however, contained special provisions designed to create two classes of shares upon the death of the deceased. This article was in the following terms:—6 (i) "Upon the death of MacPherson Robertson the whole of the then issued shares of the

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Company shall be divided into and become and thereafter be of two classes to be known respectively as No. 1 class shares and No. 2 class shares. (ii) The No. 1 class shares shall be all those shares in the Company other than those standing in the register at the date of his death in the name of the said MacPherson Robertson otherwise than as trustee executor or administrator of the estate of a deceased person. The No. 2 class shares shall be all those shares in the Company standing in the register at the date of his death in the name of the said MacPherson Robertson otherwise than as trustee executor or administrator of the estate of a deceased person. (iii) The rights following shall as from the date aforesaid be attached to such No. 1 class shares and No. 2 class shares inter se that is to say—

(a) The No. 1 class shares shall confer the right to receive out of the profits of the Company a cumulative preferential dividend at the rate of 10 per centum per annum on the capital for the time being paid up or credited as paid up on such shares respectively.

(b) Whenever the profits of any year shall be more than sufficient to pay the preferential dividend aforesaid with any arrears to the close of such year then the surplus profits after payment of such preferential dividend shall be applied in payment of a dividend for such year at the rate of 5 per centum per annum on the capital for the time being paid up or credited as paid up on the No. 2 class shares and thereafter the holders of the No. 2 class shares shall be entitled to participate pari passu in any further sum which may be distributed in dividend for such year according to the capital paid up or credited as paid up on such shares respectively.

(c) In the event of the winding up of the Company the holders of the No. 1 class shares shall be entitled to have the surplus assets applied, first, in paying off the capital paid up or credited as paid up on the No. 1 class shares held by them respectively; secondly in paying off the arrears (if any) of the preferential dividend aforesaid to the commencement of the winding up and thereafter they shall be entitled to participate pari passu with the holders of the No. 2 class shares in the residue (if any) of such surplus assets remaining after paying off the capital paid up or credited as paid up on such No. 2 class shares.

(d) The rights attaching to the shares of the Company aforesaid inter se from and after the death of the said MacPherson Robertson upon and by reason of the operation of this Article shall take the place of and be to the exclusion of the rights theretofore attaching to such shares or any of them by reason of the conditions of issue or otherwise howsoever.

(e) In certifying the price of any share or shares under Article 30 hereof the Auditor shall not in arriving at the price which he proposes to certify pay any regard to the provisions of sub-clauses (a) (b) (c) and (d) of this Article or to the provisions of any previous Article of the Company embodying the provisions now contained in such sub-clauses and shall arrive at the price which he proposes to certify on the assumption that such sub-clause or any previous Article of the Company as aforesaid is not and has never been incorporated in the Articles of the Company ".

In assessing the estate of the deceased for duty the commissioner took the view that it was necessary to apply s. 16A (1) (*a*) of the Act in valuing the deceased's shares and, by virtue of its application, to ignore article 6 and treat all the shares in the company as being of one class " at the date of death ". On this basis he valued the shares at 21s. 10d. each, but he agrees with the appellants that if s. 16A (1) (*a*) should not be applied or that, if upon its application, there is no warrant for ignoring article 6 completely and treating all the shares as being of one class, the shares should be valued at 14s. 5d. each. Alternatively, the commissioner takes the view that any benefit, by way of increased value, to the holders of No. 1 class shares resulting from the operation of article 6 constituted pursuant to s. 8 (4) (*e*), " a beneficial interest in property which the deceased person had at the time of his decease, which beneficial interest, by virtue of a settlement or agreement made by him, passed or accrued on or after his decease to, or devolved on or after his decease upon " the other shareholders.

Apparently the commissioner did not endeavour to make any independent valuation of any such " beneficial interest " and assumed that if his view was right on either point the assessment of duty would be affected to precisely the same extent. The appellants have formally agreed to this proposition and the agreement of the parties is recorded in par. 36 of the admitted facts in the following terms :—" 36. On the 4th day of October 1949 it was agreed between the Appellants and the Respondent that for the purpose of the said Assessment the value of the said shares would be accepted by the Appellants as at 21/10d. per share if it should be held that the provisions of s. 16A (1) (*a*) should be applied and that in applying s. 16A (1) (*a*) all the shares in the said Company should be treated as being of one class for the purpose of such valuation or if it should be held alternatively that the provisions of s. 8 (4) (*e*) are applicable ; but that if it should be held that s. 16A (1) (*a*) should not be applied, or that in applying

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s. 16A (1) (*a*) all such shares should not be treated as being of the one class, and that the provisions of s. 8 (4) (*e*) are not applicable, the value of the said shares would be assessed by the respondent and accepted by the appellants as at 14s. 5d. per share.

In dealing with the questions which arise in this matter in relation to s. 16A (1) (*a*), it is convenient, first of all, to consider some of the preliminary difficulties which present themselves upon a reading of the section. First of all, it was contended on behalf of the appellant—though the point was not unduly stressed—that the section upon being applied in a particular case, merely requires the assumption to be made that the articles of the company, *in their existing form*, in fact, satisfy the requirements of the relevant exchange authority. Such an assumption would in no way deal with the difficulties with which the section is so obviously designed to deal. I am in no doubt that this is not the true meaning of the section, but the mere statement of the proposition indicates the very real difficulties to which the language of the section gives rise. Although it may be asserted emphatically that the section requires an assumption that the articles are in some form other than that in which they actually exist, it is difficult to state exhaustively what may be involved in the making of this assumption. But upon the application of the section, it is left to the commissioner, and ultimately to the Court, to assume the existence of a form of articles which would, in fact, satisfy Stock Exchange requirements. This is not a simple task, nor one necessarily capable of a single solution. It is an easy matter notionally to delete a complete article where the article wholly offends against such requirements, but in some cases compliance with Stock Exchange requirements might be achieved by the making of minor amendments. Again, it may be necessary to assume a variation by the insertion of additional articles on particular matters. The problem, of course, is one which must be solved in each individual case, but from what I have said it is, I think, clear that s. 16A (1) (*a*) does not authorize the commissioner to ignore the existence of any article unless its exclusion is necessary to satisfy the requirements referred to in the section.

In the present case a further difficulty is presented by the use in the section of the expression " at the date of death ". Counsel for the commissioner submitted that it was clear that until the death of the deceased article 6 was inconsistent with the Stock Exchange requirements and that, therefore, on the date of and until the death of the deceased on that date the article was so inconsistent. Accordingly, he contended, the article was inconsistent with those

requirements " *at the date of death* ". On the contrary, the appellant claimed, the presence of this article was not inconsistent with those requirements on that date, i.e., on and after the death of the deceased. I do not, however, think that either of these propositions resolve this particular difficulty. It is, I think, to be resolved upon a consideration of a number of the provisions of the Act. By s. 8 (1) estate duty is levied and paid upon the value, as assessed under the Act, of the estates of persons dying after the commencement of the Act. To my mind, this section contemplates a valuation being made as at death and not at any other time, though, obviously, a valuation made on this basis may in many cases coincide with a valuation made before or after death, either upon the day of death or upon an earlier or later day. Further, as far as notional property pursuant to s. 8 (4) is concerned, this is deemed *for the purposes of the Act* to be part of the estate of the deceased person and this means part of the estate *at the time of death*. Accordingly, such property can be valued only at that time. Other provisions of the Act, and notably those relating to the deduction of debts, leave no doubt that the value of the estate *at death* is the vital factor in assessing estate duty. Section 16A (1) (*a*) was not intended to create any notional estate or impose any new liabilities; its function is to prescribe the manner in which the value of estate assets, in some circumstances, may be assessed. Accordingly, it is also concerned with the assessment of value at death and at no other time. This being so, I am of the opinion that if the articles of association of a company, in which a deceased person held shares, satisfy the relevant stock exchange requirements *at the death* of such person, then in the words of the section they satisfy such requirements " at the date of death ".

Again, it was contended that the article did not become operative until the day after the death of the deceased. This contention was based on the language of article 6 (ii) and (iii), but I think it ignores the plain words of article 6 (i) which provides that " *Upon the death of MacPherson Robertson* " the whole of the then issued shares of the company shall be divided into two classes and become and thereafter be of two classes to be known respectively as No. 1 class shares and No. 2 class shares.

With these observations in mind, I proceed to a consideration of article 6. It was pressed upon us on behalf of the commissioner that the effect of this article was to depress the value of the shares standing in the name of the deceased at the time of his death and that this, taking place on the death of the deceased, entitled the commissioner to apply s. 16A (1) (*a*) and to ignore the provisions