H. C. OF A. 1952.

ROBERTSON v. FEDERAL COMMISSIONER OF TAXATION.

Taylor J.

of the article. Again, it was argued that there were other articles, and in particular those imposing restrictions upon the sale and transfer of shares, which were repugnant to the local Stock Exchange requirements and which also tended to depress the value of the deceased's shares, and that the existence of these articles justified the application of the section. But I should point out that it is quite clear from the terms of par. 36 of the admitted facts, that the operation or notional exclusion of article 6 is the only factor material to this branch of the case. No doubt the existence of articles which operate to depress the value of shares in a company, and, perhaps, the existence of articles which, in some respects, determine the character of shares, will form an appropriate basis for the application of s. 16A (1) (*a*) (see the observations of *Williams* J. in *Federal Commissioner of Taxation* v. *Sagar* (1)), but such a basis having been found and the section having been applied, the only warrant for excluding or ignoring particular articles is that such a course is necessary in order to assume a form of articles which will satisfy Stock Exchange requirements and render the shares "listable". Accordingly, even if it was proper to apply s. 16A in the present case, the question is whether article 6 was repugnant to such requirements "at" or "upon" the death of the testator. The clear evidence is that the existence of the article at that time no longer precluded the company's listing at the appropriate stock exchange. This being so, I am of the opinion that the assumption which s. 16A requires to be made does not require or authorize the exclusion of article 6 in making a valuation of the shares held by the deceased at the time of his death and, for the reasons which I have given, I think the commissioner was wrong in ignoring or excluding the provisions of article 6 in assessing the value of the deceased's shares for the purposes of the Act.

The second branch of the appeal is concerned with s. 8 (4) (*e*) of the Act which provides that for the purposes of the Act the estate of a deceased person comprises property being a beneficial interest in property which the deceased 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 and after his death upon, any other person.

The submissions which were made on this branch of the appeal conceded that article 6 operated at the moment of the death of the deceased and that the exclusion of the provisions of that article by the application of s. 16A (1) (*a*) was not legally permissible.

(1) (1946) 71 C.L.R. 421.

On this view it was said the article was testamentary in operation and, at one and the same time, brought about a decrease in the value of the shares standing in the name of the deceased at the time of his death and an increase, by a corresponding total amount, in the aggregate value of the somewhat lesser number of shares held at that time by the other shareholders. The value of this increase was said to be a beneficial interest within the meaning of s. 8 (4) (*e*), and it was claimed that the circumstances showed that it fell fairly within the operation of this sub-section. A " settlement ", or rather an " agreement ", it was said, ought to be implied " from the deceased and other shareholders agreeing to become members of MacRobertson Pty. Ltd. upon the terms of its Articles of Association " and the beneficial interest is claimed to have " passed or accrued " on or after the death of the deceased to the other shareholders.

Whilst conceding that the effect of the article at the time of the deceased's death might well have been to increase the value of the shares held by the other shareholders, I would find difficulty in holding that a " settlement " or " agreement " within the meaning of the Act could be implied from the circumstances mentioned, and even greater difficulty in holding that the increase in value to which I have referred should in any way be regarded as property or an interest in property or as a " beneficial " interest in property. The holder of shares in a company acquires his property upon registration and his property does not increase or decrease according to the increase or decrease in the value of his shares from time to time, and this, I think, must be true whether the increase or decrease in the value of the shares springs from fluctuations of the market in normal circumstances or from the effect upon the market value of the shares of some advantage or disadvantage arising from the operation of or amendment of the company's articles. The real ground for asserting that there has been a passing or an accrual of property in this case is, however, not merely that the deceased's shares decreased in value, whilst those of the other shareholders increased, but that article 6 operated to create two distinct classes of shares with different rights. But, whilst conceding that the expression " property " in the context in which it is found in s. 8 (4) (*e*) must be given the widest meaning, I am quite unable to regard as property, in any sense, the extent of the modification of the shareholders' rights accomplished by the operation of article 6. Moreover, even if the correct view be that the article did operate to strip the deceased's shares of some rights, in the nature of property, and to vest rights, in the nature of property, in the other

H. C. OF A. 1952.

ROBERTSON v. FEDERAL COMMISSIONER OF TAXATION.

shareholders, I could not agree that the former rights "passed or accrued" to, or "devolved" on the holders of the No. 1 class shares.

For the reasons given I am of the opinion that the appeal should be allowed and I agree with the terms of the proposed order.

Appeal allowed with costs. Order respondent to amend the assessment under appeal by including the 561,667 *shares which the deceased held in the capital of MacRobertson Pty. Ltd. at the date of his death in his dutiable estate at the value of* 14*s.* 5*d. per share. Liberty to apply.*

Solicitors for the appellants, *Aitken Walker & Strachan.*

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

R. D. B.

[HIGH COURT OF AUSTRALIA.]

BARRINGER . . . . . APPELLANT;
PLAINTIFF,

AND

THE COUNCIL OF THE MUNICIPALITY OF NYNGAN . . . . . } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

H. C. OF A. 1952-1953.

1952.
SYDNEY, *Dec.* 8, 9.

1953.
MELBOURNE, *March* 5.

Dixon C.J., Webb and Taylor JJ.

Buildings—Control and regulation—Dilapidated or unsightly—Alternative remedies—Demolition or re-erection and repair—Choice by council—Owner ordered to demolish building—Non-compliance—Validity of order—Local Government Act 1919-1951 (*No.* 41 *of* 1919—*No.* 18 *of* 1951) (*N.S.W.*), *s.* 317B*.

A council may, acting under the power conferred by s. 317B of the *Local Government Act* 1919-1951 (N.S.W.), order the demolition of a dilapidated or unsightly building *simpliciter* and need not, in such order, give the owner the alternative of re-erecting the building or otherwise putting it into a state of repair and good condition to the satisfaction of the council.

Wauchope v. *Trefle* (1942) 59 W.N. (N.S.W.) 213; 15 L.G.R. 50, distinguished.

Decision of the Supreme Court of New South Wales (*Roper* C.J. in Eq.): *Barringer* v. *Nyngan M.C.* (1952) 69 W.N. (N.S.W.) 343; 18 L.G.R. 212, affirmed.

* Section 317B of the *Local Government Act* 1919-1951 (N.S.W.) provides:—"(1) If any building is in such a dilapidated or unsightly condition as to be prejudicial to the property in or inhabitants of the neighbourhood of such building, the council may order the owner to demolish, or as an alternative, to re-erect such building or any part thereof or otherwise to put the same or any part thereof into a state of repair and good condition to the satisfaction of the council within a reasonable time to be fixed by the order. (2) If the order is not obeyed the council may with all convenient speed enter upon the building and the land upon which it stands and execute the order. (3) Where the order directs the demolition of a building or any part thereof the council, if executing the order, may remove the materials to a convenient place and (unless the expenses of the council under this section in relation to such buildings are paid to it within fourteen days after such removal) sell the same if and as it, in its discretion, thinks fit. (4) All expenses incurred by the council in relation to any such demolition or sale as aforesaid may be deducted by

H. C. OF A. 1952-1953.

BARRINGER v. NYNGAN CORPORATION.

APPEAL from the Supreme Court of New South Wales.

In a suit brought by way of statement of claim in the equitable jurisdiction of the Supreme Court of New South Wales, the plaintiff, Cecil Carl Barringer, stated that he was the owner of a building situate at the corner of Tabratong Street and Pangee Lane in the Municipality of Nyngan, New South Wales, and that the defendant, the Council of the Municipality of Nyngan, purporting to act pursuant to s. 317B of the *Local Government Act* 1919-1951 (N.S.W.), on 20th November 1951, ordered him to demolish that building within ninety days of that date. The building was not so demolished and on 6th March 1952, the plaintiff advertised for and invited tenders for its demolition. The council threatened and intended to enter on the plaintiff's land for the purpose of demolishing the building and the plaintiff alleged that by such entry and demolition he would suffer irreparable loss and damage. On 14th February 1952 the council refused to issue a permit under the *Local Government Act* 1919-1951 for the execution of certain alterations and repairs to the building including the erection of a modern shop front. On 19th March 1952 the council informed the plaintiff that its reasons for that refusal were " that the mere addition of two small brick rooms to the unsightly and dilapidated weatherboard building already the subject of a demolition order would not provide a building suitable for either commercial or residential purposes." The plaintiff said (a) that by the order the council gave him no alternative to the demolition of the building; (b) that the order did not fix a reasonable time for compliance therewith; (c) that the building was not, at the date of the statement of claim, nor at any material time in such a dilapidated or unsightly condition as to be prejudicial to the property in or inhabitants of the neighbourhood of the building, or, alternatively, that upon the execution of the alterations and repairs referred to above the building would not be

the council out of the proceeds of the sale, and the surplus (if any) shall be paid by the council on demand to the owner of the building: and if such building or any part thereof is not demolished and such materials are not sold by the council, or if the proceeds of the sale are not sufficient to defray the said expenses, the council may recover such expenses or the deficiency from the owner of the building together with all costs in respect thereof in a summary manner, but without prejudice to the owner's right to recover the same from any lessee or other person liable for the expenses of repairs. (5) Any owner who has received an order under this section may appeal against the order to a district court judge having jurisdiction within the area.

The provisions of sub-sections two, three and four of section three hundred and forty-one of this Act shall apply to and in respect of any such appeals. For the purposes of such application a reference in any of those sub-sections to the Land and Valuation Court or to the court shall be construed as a reference to the district court or to the district court judge hearing the appeal".

in such a dilapidated or unsightly condition as to be prejudicial to the property in or inhabitants of the neighbourhood of the building ; (d) that the proper and workmanlike execution of the said alterations and repairs would put the building into a state of repair and good condition to the satisfaction of the council ; and (e) that the order was in excess and an abuse of the powers conferred on the council.

The plaintiff asked that, *inter alia*, (1) the order should be declared to be wholly invalid and inoperative ; and (2) that the council, its servants and agents be restrained by injunction (i) from executing the order, (ii) from entering upon the building and the land upon which it stood for any purpose connected with the order including the purpose of executing it, and (iii) from demolishing or attempting to demolish or taking any further step towards the demolition of the building pursuant to or in reliance upon the order.

The council pleaded in its statement of defence that, *inter alia*, it denied or did not know and therefore could not admit the various allegations made by the plaintiff. It craved leave to refer to the said order and advertisement and did not admit that either of them had been sufficiently or correctly set forth. The application for the alteration of the building was not made by the builder or plaintiff or his architect and the council refused to give its approval thereto for the reasons stated by the plaintiff. The council submitted : (a) that there was not any obligation on it to give any alternative to the demolition of the building ; (b) that the order did fix a reasonable time for compliance therewith ; (c) that the Court did not have any jurisdiction to inquire into the reasonableness of the time for compliance with the order ; and (d) that the Court did not have any jurisdiction to inquire into the questions as to whether the building was at any material time in such an unsightly condition as to be prejudicial to the property in or inhabitants of the neighbourhood of such building, or, alternatively, whether upon the execution of the alterations and repairs referred to above the building would not be in such a dilapidated or unsightly condition as to be so prejudicial, or whether the proper and workmanlike execution of those alterations and repairs would put the building into a state of repair and good condition to the satisfaction of the council. The council denied that the order was in excess, or was an abuse, of the powers conferred upon it, and submitted that the plaintiff did not have any equity entitling him to proceed against it in the equitable jurisdiction of the court and that his proper remedy (if any) was at law.

H. C. OF A. 1952-1953.

BARRINGER v. NYNGAN CORPORATION.

Certain interrogatories submitted on behalf of the defendant to the plaintiff were answered by the plaintiff's solicitor, in a letter dated 5th June 1952, as follows: "It is alleged that the said order is in excess of the powers conferred on the defendant in the following respects:—(a) The said building is not and was not at any material time in such a dilapidated or unsightly condition as to be prejudicial to the property in or inhabitants of the neighbourhood of such building. (b) The said order gave the plaintiff no alternative to demolition. (c) The said order did not fix a reasonable time for compliance. It is alleged that the said order is an abuse of the powers conferred on the defendant in respects (a), (b) and (c) above."

By motion on notice the council applied for a decree on admissions made by the plaintiff in the statement of claim and in his solicitor's letter dated 5th June 1952.

Roper C.J. in Eq., dismissed the suit: *Barringer* v. *Nyngan M.C.* (1).

From that decision the plaintiff appealed to the High Court.

A. F. Rath, for the appellant. The object of s. 317B of the *Local Government Act* 1919-1951 (N.S.W.), as found in sub-s. (1), is, firstly, to ensure that that which is unsightly or dilapidated in a certain way shall be no longer so unsightly or dilapidated, and so stated the onus appears to be cast on the owner of bringing about the desired result; and, secondly, that buildings in a certain condition shall be brought into line, in a general way, with the standards prevailing in the neighbourhood. So stated, the placing of the onus is again reasonably plain. The section states its object in a general way, that is to say, it does not aim, at all events directly, at such specific ills as the "nuisance" sections do: see *Public Health Act* 1902-1952 (N.S.W.), ss. 58-63. For that reason it contrasts with the "nuisance" sections which, on the whole, require particularity in the order made. That absence of particularity is marked in the case of repairs. On any view, the order does not direct specific repairs; it simply directs repairs to the satisfaction of the council. Perhaps it would be correct to say, on any likely view—the section is not even as specific as that—that is it directs repairs or otherwise putting into a condition to the satisfaction of the council. The absence of particularity shows that the council has not the burden of saying precisely what shall be done. Put another way, it is for the owner to decide how he shall deal with his building, what he shall do by way of repair. Thus the

(1) (1952) 69 W.N. (N.S.W.) 343; 18 L.G.R. 212.

indication, even in the second alternative, is of a wide discretion in the owner. It is then consistent with those indications that the whole discretion rests with the owner. The same absence of particularity is a marked feature of s. 58 of the *Public Health Act* 1936 (Imp.) (26 Geo. 5 & 1 Edw. 8, c. 49) and was the feature that gave rise to *R.* v. *Recorder of Bolton*; *Ex parte McVittie* (1) and *McVittie* v. *Bolton Corporation* (2). Those cases explain the connection between that absence of particularity, the object of the legislation, and the giving of the choice to the owner, and states, in effect, that those things make one coherent pattern. That submission is supported by the history of the section, which shows a probability that the State legislature was aware of the construction that had previously been given: see *Sydney Corporation Act* 1932-1945 (N.S.W.), s. 373; *The Local Authorities Acts* 1902 *to* 1935 (Q.), s. 171; and *Fraser* v. *Hemming* (3). The appearance of the words "as an alternative" for the first time in the *Sydney Corporation Act* is consistent with an intention to emphasize that construction. If the intention had been to form a contrary construction it is reasonable to suppose that more definite phraseology would have been adopted. The contrary view is dependent on the grammatical form of sub-s. (3). That sub-section is not directed to the form of the order at all—it is more in the nature of a machinery provision. Sub-section (4) shows that not much reliance should be placed on grammar: cf. *The Local Authorities Acts* 1902 *to* 1935 (Q.), s. 171 (4). It does appear that the legislature was contemplating that the only remedy of the council was demolition. The change made in sub-s. (4) when the Queensland section was re-drafted in New South Wales, strongly indicates that. It is fortified too by the fact that demolition is the only act with any particularity attached to it in the section. The consequent injustice of the contrary view is such that it is not likely the legislature intended to cause it. The presence of the right of appeal is of little weight in view of the history of the section—it rather indicates an additional, not alternative, safeguard to the owner.

H. E. Reimer, for the respondent. Subject to the right of appeal in sub-s. (5) the question of whether a building is in such a condition as to call in operation the provisions of s. 317B of the *Local Government Act* 1919-1951 (N.S.W.), is a matter which has been vested in the council: cf. *Sydney Corporation Act* 1932-1945 (N.S.W.), s. 373—no appeal. In any case in which the owner

(1) (1939) 2 K.B. 98; (1940) 1 K.B. 290 (C.A.).
(2) (1945) K.B. 281.
(3) (1911) Q.S.R. 139.

H. C. OF A. 1952-1953.

BARRINGER v. NYNGAN CORPORATION.

considers: (a) that the order for demolition has been issued unreasonably or that no reasonable time to comply therewith has been given, or (b) that he is in any manner prejudiced by the order, he may appeal to the District Court. The decision of that Court on such an appeal is final and is deemed to be the final decision of the council. Therefore, apart from any appeal, the decision of the council under s. 317B is final. Under the section the council—in an appropriate set of circumstances—may order the owner: "To demolish, or as an alternative, to re-erect such building or any part" or otherwise to put it into a "state of repair and good condition to the satisfaction of the council" within a reasonable time. "Reasonable time" is a matter for the opinion and decision of the council, subject to the right of appeal. The whole section must be read together to arrive at its proper interpretation. Section 317B was enacted after the decision in *Wauchope* v. *Trefle* (1). On the assumption that that case was rightly decided the legislature has adapted this section in a manner clearly to distinguish it from the principle or method of construction that had been applied to s. 249 (h). The draftsmanship of s. 317B was therefore clearly to avoid the decision in *Wauchope* v. *Trefle* (1). Any construction other than that adopted by *Roper* C.J. in Eq. would, under sub-s. (2), be impossible in practical application. If the order were—and assuming that the council had power to make such an order under the section—that the owner should either:—(a) demolish, or (b) re-erect, or (c) put in a state of repair and good condition to the satisfaction of the council, and the order was not complied with how would the council execute the order. Sub-section (3) expressly refers to and deals with demolition. It provides for the position of a council demolishing, if the order is not carried out. That clearly indicates that the legislature intended the council could order demolition *simpliciter*. Sub-section (4) expressly relates to the council's expenses in relation to demolition. The council has ample power under other sections of the Act—see ss. 249 (h), 318 (19), and see also ss. 58 et seq. of the *Public Health Act* 1902-1952 (N.S.W.) —to order and direct repairs and renovations. Therefore there was not any necessity to enact the present section, except to give the council express power to order demolition *simpliciter*. That was both the purpose and effect of the section.

A. F. Rath, in reply.

Cur. adv. vult.

(1) (1942) 59 W.N. (N.S.W.) 213; 15 L.G.R. 50.

The following written judgments were delivered :—

DIXON C.J. This appeal is brought by the plaintiff in a suit from a decree of the Chief Judge in Equity dismissing the suit. The decree was made on a motion by the defendant for a decree upon the facts alleged and admitted in the statement of claim, amplified in one respect by a letter passing between the solicitors. The plaintiff is the owner of a building in the Municipality of Nyngan and the defendant is the Council of that Municipality. The purpose of the suit was to obtain relief against an order made by the defendant council for the demolition of the building. In giving the order the defendant council purported to act under s. 317B of the *Local Government Act* 1919-1951 (N.S.W.). The order was given on 20th November 1951 and it ordered the plaintiff to demolish the building within ninety days of that date. The plaintiff attacks the validity of the order as beyond the authority conferred by the provision. The plaintiff says that s. 317B does not authorize a council to make an absolute order for the demolition of a building. The order which, according to the plaintiff, it authorizes is that the owner demolish the building or in the alternative, that is if the owner so chooses, re-erect the building or put the same into a state of repair and good condition to the satisfaction of the council. The policy of the provision, so it is said, is to allow the owner to put the building into proper shape, if he prefers to do that, and otherwise to require him to pull it down and if he makes default to empower the council to execute the order, a policy characteristic of similar legislation not only in New South Wales but in England and in other Australian States.

The question raised by this contention is entirely one of construction, but the text to be construed, like so much of the legislation where it finds a place, is obscure and uncertain. The first subsection confers the power to make an order. It begins by stating the events in which the power is exerciseable, viz., "if any building is in such a dilapidated or unsightly condition as to be prejudicial to the property in or inhabitants of the neighbourhood of such building". In any of those alternative events "the council may order the owner to demolish, or as an alternative, to re-erect such building or any part thereof or otherwise to put the same or any part thereof into a state of repair and good condition to the satisfaction of the council within a reasonable time to be fixed by the order". Does this describe various alternative orders any one (or perhaps any one or more) of which the council may make? Or does it describe one order the council may make which must be expressed in an alternative form? If the latter be its meaning

H. C. OF A. 1952-1953.

BARRINGER v. NYNGAN CORPORATION.

DIXON C.J.

and the owner must be given an alternative to demolishing the building, there is a subsidiary question. Has the council a discretion to select the alternative and say for example " demolish or else re-erect ", " demolish or else put in a state of repair and good condition to our satisfaction "? Or must the council put before the owner all the choices, demolition, re-erection and putting into a state of repair and good condition ? Or again, may it be that one or some of these alternatives cannot be included in an order except in combination with some other alternative, while others need not be so combined ? Thus is it possible that the council cannot order re-erection &c. except as something the owner may choose to do as an alternative when he is ordered to demolish, though the council is not under the necessity of giving him that choice when ordering demolition ? Presumably it is for the council to say whether the order is to apply to the whole building or a part ; though it is to be noticed that the event on which the power arises is that the building, not a part, is in such a dilapidated or unsightly condition as to be &c.

Not much help in answering these questions is given by sub-s. (1) itself. The form of words " to demolish, or as an alternative, to re-erect ", after the verb " order ", perhaps may suggest that it is all a description of the order to be made. But the ensuing words seem to me to look in the opposite direction. For, if it is, as in reason it must be, for the council to say whether the whole or a part of the building is to be re-erected, why, under the same form of alternative, is it not for the council to order, not re-erection, but putting into repair and good condition ? And if the council can choose between re-erection and putting into repair and good condition, why should they not choose between demolition and re-erection or demolition and putting into repair and good condition ? In any case re-erection is an odd alternative to demolition. It might be thought that you could not re-erect the whole without demolishing the whole, though you might re-erect a part without demolishing the whole.

There is of course an obvious grammatical question whether the words " to the satisfaction of the council " govern only the putting into a state of repair and good condition or also the re-erection or finally the demolition too. But the existence of that question does not help to solve the main difficulty of construction.

Mr. *Rath*, for the plaintiff-appellant, said that guidance was to be obtained from legislation *in pari materia* both in New South Wales and elsewhere because it was a general legislative policy to present such choices to the owner and not to leave them to the authority