1041/1957

1041/57

G.P.-S.134917—1955-6—1,000. U.D.J. 219.

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(Appellate ~~Provincial~~ Division.)
(~~Provinsiale~~ Afdeling).

Appeal in Civil Case. / Appèl in Siviele Saak.

or X-Appeal.

Comm^r for Inland Revenue *Appellant,*

versus

Exors. Est. late Louis ADLESON, & ORS, *Respondent.*

Appellant's Attorney Van Zyl & N *Respondent's Attorney* C. Auerbach
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate Rochock Q.C. *Respondent's Advocate* Graeme Duncan Q.C.
Advokaat vir Appellant Bachmore *Advokaat vir Respondent* D. Mayerowitz

Set down for hearing on
Op die rol geplaas vir verhoor op MONDAY, 2nd November, 1959.

(C.P.D) (A)

9.45 a.m. — 5.5 p.m.

" " 5.11

C.A.V.

Thursday, 3rd December 1959

Postea:- Appeal dismissed, cross appeal allowed, in both cases with costs in this Court as well as in the Court below.

Steyn C.J.
Botha A.J.A.
Schreiner J.A. } Dissenting.
Hiemstra A.J.A.

J. J. du Plessis
Reg.

estate of the late Louis Adelson, whom I shall refer to as "the deceased", and the second respondents are the two daughters of the deceased and the executors of his son Joseph, who died after these proceedings began. The deceased, who died on the 14th September 1952, left a will in which he bequeathed the residue of his estate to his above-named three children. Included in the residue were three shares in Louis Adelson Trust (Pty) Ltd., which I shall call "the company". The questions in issue between the Commissioner and the respondents relate to the valuation, for death duty purposes, of the three shares or of whatever else, in accordance with the contentions of the parties, passed or was deemed to pass on the death.

The company was registered upon the instructions of the deceased on the 5th June 1946 with a nominal capital of £300 divided into 300 £1 shares. Of these 198 were called "A" shares, 99 "B" shares and 3 "C" shares. In terms of article 4 of the company's articles of association the shares in the company were, on the 25th July 1946, allotted as follows:- 99 "A" shares to each of the deceased's daughters, the 99 "B" shares to his son Joseph and the 3 "C" shares to the deceased himself.

So far as material, clause 5 of the company's memorandum of association, after setting out the

composition/.....

composition of the capital, provides :-

"The respective classes of shares shall be entitled to the rights and privileges and shall be subject to the disabilities as set out hereunder, namely:-

(1) The 'C' shares shall remain 'C' shares so long as LOUIS ADELSON during his lifetime shall continue to be the holder of the said 'C' shares. On the death of LOUIS ADELSON,or if during his lifetime he ceases to be the holder of the said 'C' shares, the said 'C' shares shall in either event ipso facto and automatically be converted as to two (2) of the said 'C' shares into two (2) 'A' shares, and as to the remaining 'C' share in a 'B' share.

(11)So long as the 'C' shares remain 'C' shares,they shall confer upon the holder thereof the exclusive right to notice of and to attend or be represented at meetings of members,whether ordinary or extraordinary,the right to one vote for each such 'C' share at any meeting of members whether ordinary or extraordinary,the sole right to appoint a director or directors of the company,and the sole right to participate in the profits of the company whether distributed or not.

(111)The holders of the 'A' shares and of the 'B' shares shall not, in respect of their said holdings, so long as the 'C' shares remain 'C' shares, be entitled to any of the rights and privileges specified in the preceding sub-paragraph.

(1V)As and when the three (3) 'C' shares become converted into two (2) 'A' shares and one (1) 'B' share,the holders of the 'A' shares and of the 'B' shares shall thereafter be entitled to the following rights, namely :-

To receive notice of or to attend or be represented at meetings of members,whether ordinary or extraordinary; to one vote for each such 'A' share or 'B' share at any such meeting; and to participate pari passu in the profits of the company.

(V) The 'B' shares shall be allotted and issued to JOSEPH ADELSON and shall not,save as hereinafter provided,be capable of being transferred or pledged by the said JOSEPH ADELSON or by any

other/.....

other holder of the said shares,until after the expiry of a period of five years from the date of death of LOUIS ADELSON. If JOSEPH ADELSON predeceases LOUIS ADELSON, or if JOSEPH ADELSON survives LOUIS ADELSON but dies prior to the expiry of the aforementioned period of five years, the said 'B' shares shall in either such event be transferred in equal proportions to the wife and children of JOSEPH ADELSON,but the transferees shall not be entitled to transfer or pledge their respective holdings of 'B' shares until after the expiry of the aforementioned period of five years reckoned from the date of death of LOUIS ADELSON.....

(V1)On a winding up the holders of all classes of shares shall rank pari passu for return of capital.

The capital for the time being of the company may be further divided into several classes, and preferential,deferred,qualified or special rights, privileges or restrictions may be attached to the shares in any class, and the rights attached to the initial or any new shares respectively may be varied or abrogated. "

On the 31st July 1946 the deceased by notarial deed "donated, and settled upon" the company the sum of £60,000, which was duly delivered to it.

At his death the deceased's three shares were still registered as 'C' shares in his name. The first respondents originally brought them up for death duty purposes ~~and~~ at their nominal value of £1 each but thereafter tendered to account for them at £200 each by apportioning the sum of £60,000, which was at all material times the nett value of the assets of the company, equally between the 300 shares. The

Commissioner/.....

Commissioner claimed that in view of the rights attached to the 'C' shares their value for death duty purposes was £20,000 each, being one third of the nett value of the company's assets.

A dispute having arisen the parties concurred in stating a special case for decision by the Supreme Court. So far as material their contentions, as amended, read :-

"18. The first and second plaintiffs" (now first and second respondents) "contend that in terms of the Death Duties Act No. 29 of 1922 as amended the property that passed on the death of the late LOUIS ADELSON was the three aforesaid shares converted into two 'A' shares and one 'B' share, that the said shares are to be valued for estate and succession duty purposes on the same basis as the other 'A' and 'B' shares of the said company, that no other property in respect of the said shares passed or was deemed to be property passing in terms of section 3 (3) (a) of the Act or otherwise, or was property deemed to pass, and that they are entitled to a declaratory order against the defendant" the Commissioner "to that effect, with costs, which they accordingly claim.

19. The first and second plaintiffs aver that the value of the said shares, valued on the basis in paragraph 18 set out is £600 and the defendant admits that if the first and second plaintiffs' aforesaid contentions are correct (which is denied) the value of the said shares is £600.

20. The defendant, however, disputes the aforegoing contention of the first and second plaintiffs (save as is stated in paragraph 19 hereof).

21. The defendant contends, moreover :-

(1) that by reason of the provisions of section 3(3)(a) of the Act the nett assets of the company as at the date of death of the late Louis Adelson (hereinafter referred to as

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the deceased) are property which is deemed to pass on his death and that therefore the estate is liable for estate duty on an amount of £60,000.

(2) Alternatively :

(a)that which passed on the death of the deceased was the three shares owned by him at the date of his death;

(b)that these shares must be valued at their intrinsic value as at the date of the death of the deceased;

(c)that 'intrinsic value as at the date of death of the deceased' means the amount which a notional purchaser would have paid for the shares at a moment before the deceased died on the assumption that he could have obtained equivalent rights to those then held by the deceased and for the average expectation of life of the deceased;

(d)that in valuing the shares the valuer must take into consideration not only the fact that the three shares entitled the holder thereof to all the profits of the company,but also the fact that the three shares together gave to the holder thereof such control of the company as would enable him to issue further shares,and to vary the rights attaching to any class of share in the company.

(3) Alternatively:

~~(a)~~that two separate species of property passed,namely:-

(i)297/300 of the special rights and privileges which until the death of the deceased attached to the class 'C' shares.

(ii)Two class 'A' shares and one class 'B' share into which the three class 'C' shares were automatically converted in terms of clause 5(i) of the Memorandum together with the additional rights which became attached to these classes of shares in terms of clause 5(iv) of the Memorandum.

22. The defendant contends furthermore :-

(a)that the special rights and privileges aforesaid held by

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the deceased as holder of the three 'C' shares was an interest in property;

(b)that the second plaintiffs (the remaining shareholders) became entitled to this interest by reason of the cessation on the death of the deceased of his said interest.

(c)that succession duty is accordingly payable by the second plaintiff in terms of section 10(b) of the Act in respect of the interest they so became entitled to.

23.The plaintiffs dispute all the aforesaid contentions of the defendant. "

The matter came before Van WYK J. and BANKS A.J., who gave judgment for the respondents on the question of estate duty and for the Commissioner on the question of succession duty. The Commissioner now appeals to this Court on the decision regarding estate duty and the respondents cross-appeal in respect of the succession duty.

I shall deal first with the appeal, i.e. with the liability to estate duty. In so far as he relied on section 3 (3) (a) of the Act the Commissioner set up the case that the nett assets of the company constituted property which was deemed to pass and that the value of those assets was £60,000. In his other contentions the Commissioner's case was based on the view that what passed was either the three "C" shares or two "A" shares and one "B" share plus the "special rights and privileges" attached to the "C" shares. In view of the conclusion that I have reached,namely,that the appeal must

succeed/.....

succeed on the basis that the "C" shares passed and must be valued as possessing the characteristics of such shares, it would be unnecessary to deal with the Commissioner's contention based on section 3 (3)(a), if that contention was clearly alternative to the Commissioner's other contentions. If, however, the Commissioner's contention based on section 3 (3) (a) were valid, so that the estate was liable for estate duty on the nett assets of the company, there would be the possibility that this liability would be additional to any liability for duty based on the view that it was the "C" shares or their "special rights and privileges" plus "A" and "B" shares that passed. It is accordingly necessary to deal with the Commissioner's contention based on section 3 (3) (a). This contention is, however, concluded adversely to the Commissioner by the decision of this Court in Commissioner for Inland Revenue v. Estate Isaacs, judgment in which ~~is being given pari passu with this judgment~~ was given on the 16th November 1979. It is accordingly unnecessary to set out the provisions of section 3(3)(a) or to discuss their effect.

I proceed to deal with the Commissioner's first alternative contention, namely, that the "C" shares passed on the deceased's death and must be valued at their intrinsic value at the deceased's death, that value being ascertained by asking what a notional purchaser would give for the shares just before the deceased's death, on the assumption that he could

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have obtained the rights of the deceased for his average expectation of life, and that such rights would include the profits of the company and such control over it as would enable him to issue futher shares and vary the rights attaching to any class of shares. In association with this contention must be taken the Commissioner's traverse of the respondents' contention that what passed on the deceased's death was the three shares converted into two "A" and one "B" shares, which were to be valued on the same basis as the other "A" and "B" shares.

Section 5 of the Act provides that the value of any property passing or deemed to pass on the death of any person shall be -

"(d)in the case of stocks and shares,the middle market price on the date of the death of the deceased person;Provided that if no such middle market price can be ascertained,the value shall be such value as is determined to be fair and reasonable under section six;
(e)in the case of all other property,the fair market value of such property as at the date of death of the deceased person."

Section 6 provides that subject to assessment by the Commissioner,which may be followed by arbitration in case of dispute, "the fair and reasonable value of any "stocks and shares in respect of which no middle market price "can be ascertained and the fair market value of any other pro- "perty shall be determined for the purposes of the last preceding

"section/.....

"section by a sworn appraisement by some impartial person or per-
"sons appointed by the Master."

It will be observed that unquoted shares are not in terms to be valued at the "fair market value" but at their "fair and reasonable value". The difference in lan- guage suggests that in valuing unquoted shares the appraiser might have greater latitude than in the case of other property, so that he might not be bound to seek the price that a notional purchaser would pay in a fair and open market. It was not, how- ever, contended on behalf of the Commissioner that the distinctio would entitle the appraiser to have regard only to the nett as- sets and the profits of the company, without taking into account the rights that a holder of the particular shares would enjoy therein. The argument proceeded on the basis that although the nett assets and the profits may form the ultimate basis of the value it is what a notional reasonable purchaser would give for the shares that provides the fair and reasonable, as it does the fair market, value. I shall return to this aspect of the matter at a later stage.

The problem which the draughtsman of clause 5 of the Memorandum sought to solve was how by some form of agreement to bring it about that what was valuable in the deceased's hands should reach the hands of his executors

shorn of most of its value, while the property of his beneficiaries should at the same time gain a corresponding enhancement of value. The form of agreement adopted was that embodied in the company's Memorandum of Association; it would have made no difference if it had been contained in the articles of association. Such an agreement is in its essential nature akin to those agreements between partners which have sought to achieve the same end or a similar by providing that on the death of one partner the other or others may or must acquire his share at something less than its value as judged from the partnership profits and nett assets.

In Commissioner for Inland Revenue v. Estate Kirsch (1951 (3) S.A.496) three shareholders in certain companies had agreed that if one of them died the other two should be obliged to buy his shares at the value of the nett assets, less 10%. It was held that the value for death duty purposes was unaffected by the agreement. At pages 504 and 505 CENTLIVRES C.J., delivering the judgment of the Court, said that what was ascertained was the "intrinsic", the "real intrinsic" or the "true" value of the shares as at the date of the death of the deceased. The value during the deceased's lifetime was held to be irrelevant nor was the value to be his estate considered to be the test under the Act. The learned Chief Justice was not dealing with a case in which the agreement purported to effect a change of

rights/.....

rights at the moment of death. In terms of the agreement the legal representative of the deceased shareholder was to sell his shares to the other shareholders, though the contract of sale was in fact already embodied in the agreement.

In Kirsh's case the agreement was not part of the memorandum or articles of the companies concerned and its terms could not be said to fix the characteristics of the shares. But at page 505 CENTLIVRES C.J. referred to Commissioner for Inland Revenue v. Estate Whiteaway (1933 T.P.D.486) and said,

"In that case it was, in my view, correctly held that, where a deed of partnership provided that on the death of a partner the surviving partners should purchase the deceased partner's interest in the firm at a valuation prescribed by the deed, the Commissioner was not bound to assess the value of the deceased's share in the partnership by reference to the amount of the purchase price fixed by the deed of partnership. "

In Whiteaway's case GREENBERG J. dealt at pages 498 and 499 with a contention which was, in effect, that because the provision for purchase of a deceased's partner's share appeared in the deed of partnership itself and because the deed fixed the characteristics of each partner's share, including the basis of payment on death, what passed on the death of a partner was his share having those characteristics. GREENBERG J. held that it made no difference whether the provision for purchase of a deceased partner's share appeared in the original deed of partnership or was subsequently

agreed/.....

agreed to. Any later change could not differ in substance from a fresh deed of partnership embodying the change. In neither case was the Commissioner bound by such an agreement.

A similar situation was considered in Perpetual Executors and Trustees Association of Australia Ltd. v. Commissioner of Taxes (1954 A.C. 114), where a deed of partnership gave an option to the surviving parties to take over a deceased partner's share on a basis which required that no amount should be added or taken into account for goodwill. There was a dispute as to which provision of the relative statute was applicable. The Judicial Committee's decision in favour of the applicability of one of the provisions involved the conclusion, stated at page 130, "that the whole of the deceased's interest in the partnership property, including goodwill, was assessable to duty.."

It seems to me to follow from these cases that the fact that the characteristics of a share in a partnership are fixed in the deed which founded the partnership does not have the effect that terms which provide for a reduced valuation to purchasing survivors at the death of a partner are relevant to the claim of the fisc to death duties.

I can see no reason for distinguishing in this respect a clause in the memorandum or an article in the articles of association which provides that on

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the death of a shareholder his shares shall or may be purchased by the surviving shareholders at a fixed or ascertainable price. If that price were less than the fair and reasonable price it would not bind the Commissioner any more than the agreement in Kirsch's case bound him.

But the respondents contend that the present case is different, since here we have not to deal with an agreement as to the price at which surviving partners or shareholders may or must acquire from the deceased's estate, but with an automatic and ipso facto conversion of the "C" shares into "A" and "B" shares upon the death of the deceased. It is argued that such a characteristic of the "C" shares, fixed in the constitution of the company, must be given effect, and if that is done it means that what passes on the death, i.e. what leaves the deceased and goes to his estate with his last breath, is two "A" shares and one "B" share and not three "C" shares.

There is apparently no authority dealing directly with such a device, though it is interesting to note that in Whiteaway's case at page 498 GREENBERG J. mentions the possibility that a provision for "immediate vesting" might have effect on the operation of such partnership provisions as the court was there dealing with, if the system of law to be -

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dealingxwith applied permitted of a transfer of ownership without delivery. But it could not have effect in our law. It is not easy to formulate a principle for rejecting as invalid a provision in a memorandum for the automatic change in character of shares upon the happening of a named event, but it is a most extraordinary provision. It should perhaps be regarded as foreign to the nature of a share in a company that its rights should be subject to changes prescribed in advance and without action taken by the corporators at the time of such changes. Clause 5 (1) of the memorandum provides for the change from "C" to "A" and "B" shares not only on the death of the deceased but also on his ceasing during his lifetime to be the holder of the "C" shares. He could apparently cease to be the holder not only by voluntary transfer but also as a result of execution or insolvency. Though a testator may be able in a measure to shift the benefits of a bequest away from a beneficiary who becomes insolvent the device does not always succeed. (See Mars on Insolvency, Fifth Edition page 180). It would be strange if by donating property to a company like the present one a man could defeat not only the Commissioner on his death but also his creditors during his lifetime.

I am, however, prepared to assume that if clause 5 (1), by appropriate reference to share numbers, had designated which two of the "C" shares were to become "A" shares

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But the respondents contend that the present case is different, since here we have not to deal with an agreement as to the price at which surviving partners or shareholders may or must acquire from the deceased's estate, but with an automatic and ipso facto conversion of the "C" shares into "A" and "B" shares upon the death of the deceased. It is argued that such a characteristic of the "C" shares, fixed in the constitution of the company, must be given effect, and if that is done it means that what passes on the death, i.e. what leaves the deceased and goes to his estate with his last breath, is two "A" shares and one "B" share and not three "C" shares.

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shares/.....

shares are now "A" shares and one "C" share is a "B" share. But this cannot affect the fact which seems to be inescapable that on the deceased's death they passed as "C" shares to his executors.

It is as unconverted "C" shares that they had to be valued. There were apparently two ways of approaching the question of how to value them. The first way was to disregard their liability to be converted into "A" and "B" shares - that would be following the way indicated by Kirsch's case. The other way was to ascertain the price that a notional buyer would be prepared to pay for the "C" shares, if he could get them as such despite the provisions for automatic conversion but would have to hold them subject to be converted at some future date. This way of valuing the shares was propounded for the Commissioner on the basis of the majority judgments in Crossman's case. The future date put forward by the Commissioner was the end of the life of the deceased as calculated on the basis of his normal expectation of life at the time of his death. That this approach has a certain artificiality about it must be conceded but this does not necessarily mean that it must be rejected. For present purposes it is unnecessary to decide whether the arrangement in clause 5 (1) of the memorandum should for valuation purposes be forced into a form similar to that applied in

Crossman's/.....

Crossman's case, or whether the more radical approach used in Kirsch's case should be held to be applicable. In favour of the latter is not only the authority of the case itself, as a decision of this Court, but also the possibility that the language of sections 5 and 6 of the Act, referred to above, may make it unnecessary for the appraiser to invoke the notional purchaser. If the method approved in Crossman's case were applied here, the purchaser would be able to do what he pleased with the shares and assets of the company. The result would therefore be the same as if the "C" shares were valued without regard to their liability to be converted into "A" or "B" shares. On either view the proper valuation figure would be that propounded by the Commissioner, namely, £20,000 for each of the three shares.

In view of the conclusion reached as to the value of the "C" shares it is unnecessary to consider whether the Commissioner's second alternative contention that there were two species of property that passed could be supported. For in the case of this contention there would be no possibility, as there was in the case of the contention based on section 3(3)(a), of a liability additional to that based on the value of the three "C" shares.

In regard to succession duty counsel for the respondents rightly conceded that if what passed on the death of the deceased were unconverted "C" shares the

second respondents would be liable for succession duty because they became entitled to property by reason of the death of the deceased in terms of section 10(a) of the Act, ~~but~~ though not, as held by the Cape Provincial Division, by reason of the cessation of an interest under section 10 (b). Section 11 provides that with exceptions the value of property passing by virtue of any succession is the value of the property for estate duty purposes. The second respondents are accordingly liable to pay succession duty on the three "C" shares taken at a valuation of £20,000 per share.

The order of the Cape Provincial Division upheld the Commissioner's contention that succession duty was payable in terms of section 10(b). This should be altered to make it refer to section 10(a) but subject thereto the cross-appeal fails and the modification should not affect the order for costs.

In the result the appeal is allowed with costs and the order of the Cape Provincial Division is altered to one upholding the first alternative contention of the Commissioner in regard to estate duty. Succession duty is payable under section 10(a) and not under section 10(b)as provided in the order under appeal,but subject thereto the cross-appeal is dismissed with costs.

~~Steyn,C.J.,de Beer,J.A.~~
~~Botha,A.J.A.~~,Holmes,A.J.A. Concurs.

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IN THE SUPREME COURT OF SOUTH AFRICA

(Appellate Division)

In the matter between :-

THE COMMISSIONER FOR INLAND REVENUE. Appellant

and

1.JOEL BERNARD PODLASHUK

2.IAN NELSON

3.JOSEPH MORRIS HENECK

In their capacity as Executors Testamentary in the Estate of the Late LOUIS ADELSON First Respondents

and

1.ERIC HIRSCHMAN, and

LIONEL MESKIN, in the capacity as Executors Testamentary in the Estate of the Late JOSEPH ADELSON

2.FREDAGH PODLASHUK (born Adelson)

3.MIRIAM NELSON(born Adelson) Second Respondents

Coram: Steyn C.J.,Schreiner,Malan,JJ.A.,Botha et Holmes A.JJ.A.

Heard: 2nd. November, 1959. Delivered: 3 — 12 — 1959

JUDGMENT

STEYN C.J. :- The relevant facts, documents and contentions are set out in the judgment of my brother SCHREINER, which I have had the advantage of reading. In regard to the three C shares in question, the memorandum provides that on the death of Louis Adelson, or, if during his lifetime, he ceases to -

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be the holder, they "shall ipso facto and automatically be converted as to two of the said C shares into two A shares, and as to the remaining C share into a B share". If on a literal reading, the word "converted" is taken to imply an act of conversion, the phrase "shall ipso facto and automatically be converted" becomes self-destructive. The more emphatic words "ipso facto and automatically" would find their complete negation in the word "converted". I find it difficult to accept that, despite the repetitive accentuation of the mechanical nature of the change from the one to another kind of share, the framers of the memorandum intended to say that the C shares were to become A and B shares by an act of conversion to be performed after Adelson's death or after he had ceased to be the holder of the C shares.

The memorandum and articles are silent as to the person or persons by whom the conversion is to be effected. It would presumably have to be brought about, either by the new holder of the C shares, whether he be the purchaser or the donee or the executor or curator in Adelson's deceased or insolvent estate, or by the directors appointed by Adelson who, in terms of paragraph 26 of the Articles of the company, would continue to hold office until the conversion has taken place. Whoever may be the right person to effect it, the conversion would entail an interval of time during which a new holder, other than the executor in

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the deceased estate, may be able, by virtue of the complete control of the company which the shares would confer, to denude the company of all its assets to the detriment of the other shareholders, i.e. of Adelson's son and daughters. Had such an act of conversion been contemplated, it is ~~entirely~~ extremely unlikely that Adelson would not by some provision in the memorandum, have sought to guard against this possibility. That has not been done. It should be borne in mind, moreover, that the two A shares and the one B share into which the C shares were to be "converted", would consist of precisely the same rights and obligations. There would, in that regard, be no distinction whatsoever between the two A shares and the B share. The temporary restriction imposed by clause 5(v) of the memorandum upon a transfer or pledge of B shares, refers to the B shares "allotted ~~xx~~ and issued to Joseph Adelson". In the context, these are the 99 B shares mentioned in clause 5 (B). There is no similar provision affecting the "converted" B share and no other provision to distinguish it, as far as rights and liabilities are concerned, from the A shares. Paragraph 4 of the articles of the company provide that of the 198 A shares, 99 are to be allotted to each of ~~Joseph~~ Louis Adelson's daughters Fredagh and Miriam, ~~xii~~ while the 99 B shares are to be allotted to his son Joseph. In these circumstances the designation as "A" and "B" in relation to the three shares in question,

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would serve no purpose other than the attachment of a convenient label, ~~and probably indicates no more than the intention (to which effect was to be given in the will of the deceased) that the two A shares are to go to his daughters and the B share to his son in order to preserve the equality of their holdings in the company.~~ Such a designation has no greater significance than a suitable numbering would have had if the memorandum and articles had provided for denomination by serial numbers instead of denomination as A and B shares. Whether a particular share became an A or a B share, was quite immaterial . Any selection made would be productive of no other result than a difference in name only.

Having regard to these considerations, it seems reasonably clear that what the framers of the memorandum had in mind was that on the happening of one of the events specified, the three C shares were automatically and without any formal act to shed their special characteristics and to undergo a change into three shares having the same qualities, two of them to be called A shares and one a B share. Such a meaning can, I think, be ascribed to this provision without unduly ~~stressing~~ straining the language used. On such a construction the naming of the shares would still require an act to be done, but not as a prerequisite to the change in the nature of the shares. It would

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be an act consequential upon a change which has already taken place. That would reflect the real substance of what was evidently intended, i.e. an automatic transformation of the three special shares into ordinary shares, and that, in my view, is the meaning which should be given to this provision.

It has not been argued and I am not aware of any ground upon which it must be held, that this provision, so interpreted, would be illegal or that it would be legally impossible to give effect to it. If not, it follows that the three C shares passed into the estate of Louis Edelson shorn of their special rights. As they had no middle market price on the date of death their value for estate duty purposes according to section 5 (d) read with section 6(1) of the Act, is their fair and reasonable value, as determined by sworn appraisement by an impartial person or persons appointed by the Master. The determination of that value is the function of the person or persons so appointed. A court cannot make it; but it is contended on behalf of the Commissioner that the court should lay down as a basis to be adopted for the valuation, the purchase price of the shares on a notional sale on the date of death. The submission is that, in referring to a value on the date of death, the legislature had in mind a constant value on one day; that where, as here, there would be widely divergent values im-

them after death. Here the property itself suffered a radical change in character and quality when, at the death of the deceased, the shares shed the extraordinary attributes which practically equated their value with the value of the assets of the company, and as a result thereof declined sharply in real value from/some £60,000 to/about £600. That was not an extraneous incident with little or no influence upon the true worth of the shares. It was a transformation of the thing itself which was to be valued. The cases referred to are therefore not in pari materia.

If such a notional sale provides the proper basis for ascertaining the value of these shares, it can only be by virtue of some precept implied in the phrase "fair and reasonable value", related to a particular date. I am unable to find any such precept. The market value as at the date of death will no doubt be a relevant consideration, but that does not mean that an appraiser who is to determine the fair and reasonable value, can be required, because of something inherent in such a value, to improvise an impossible sale on the assumption not only that the shares are sold before the death of the deceased, but also that they will retain their special qualities for the period of his normal expectation of life, when in fact they can only be sold after his death and would, also during his lifetime, have lost their special qualities immediately upon

acquisition/.....

acquisition by the purchaser. Such a notional sale must in such circumstances of necessity result in an entirely notional value, widely removed from the known realities. The value to be ascertained is a real value, the fair and reasonable value at the date of death. With this difference in value on that date before and after death, a selection of value cannot be avoided. In making the selection regard must be had to the Act as a whole and to the fact that the shares are property actually in the estate. If this is done, it becomes apparent, I think, that the value to be looked at is the value in the estate, i.e. the value as from the moment the property passed on death, rather than the value before death, i.e. before the property could have passed. In my view, therefore, these shares stand to be valued as ordinary shares without the special rights attaching to them immediately before the death of the deceased.

In an alternative submission on behalf of the Commissioner section 3 (2) (f) is invoked. That section includes in property in relation to an estate "any debt recoverable or right of action enforceable in the Courts of the Union." The argument here is that every right comprised in a share is enforceable in the Courts of the Union and therefore in itself property; that the special rights attaching to these shares were so enforceable and that in terms of the memorandum they

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passed pro tanto on the death of the deceased to the holders of the 198 A and the 99 B shares. It may be conceded that these rights were so enforceable and that they did so pass, but that does not concluded the matter. The Act in defining "property" in section 3 (2) (g) and (h) introduces stocks and shares as a separate species of property distinct from debts and rights of action referred to in section 3 (2) (f). That appears inter alia from the fact that the inclusion is subject to the qualification, not that the rights which they represent are to be so enforceable, but in the case of section 3 (2) (g), "if any transfer whereby any change of ownership in such stocks or shares is recorded is required to be registered in the Union, " and in the case of section 3 (2) (h), "provided that the deceased person whose estate is chargeable was ordinarily resident in the Union. " The distinction and the manner in which it is drawn make it difficult to hold that these two items overlap, so that a right included in a share may be property in terms of both items. Had these rights been separated from the shares and had they passed to holders of other shares to be held as rights so separated, there would have been greater force in the contention advanced, although also that would not in itself have disposed of the question whether they formed part of the deceased estate. But in fact they did not pass

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in that manner. Until the date of death, they were included in the three C shares and on that date they were automatically absorbed into the unit of rights integrated in each of the larger number of other shares. At no stage did they have a separate existence as rights of action severed from the shares and they can for that reason not be regarded as property distinct from the shares and as having passed as such property on the death of the deceased.

A further contention raised is that the assets of the company are to be deemed to be property passing in terms of section 3 (3)(a) of the Act. A similar contention was raised in Commissioner for Inland Revenue v. Estate Isaacs in which judgment was given against the Commissioner on the 16th November, 1959 in this Court. In that case, as in this, where a single shareholder had complete control of the company, the company concerned may be described as a one-man company. I can find no distinctive feature in the arrangements affecting the present company of so decisive a character as to lead to a different conclusion in this case.

In the result the Commissioner cannot, in my view, succeed in regard to estate duty on any of the grounds advanced on his behalf.

As to the cross-appeal, the submis-

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-sion is that there has been an accrual of succession as pro-
vided in section 10(b) of the Act, which reads as follows :-

"A succession shall be deemed to have accrued whenever any person has become entitled to, or to any interest in,any property as defined for the purposes of Chapter I -
(b) by reason of the cessation on the death of any such predecessor of any interest held by such predecessor in such property."

For this provision to apply ,there must be an identity of property. "Such property" in paragraph (b), is the property to which or to an interest in which, a person has become entitled. It does not apply, therefore, where the predecessor held an interest in property A until his death, and an interest in property B passed to a successor by reason of the cessation of the predecessor's interest in property A. In so far as the shares are concerned, that is what happened. Assuming the special rights attaching to the C shares to be an interest in those shares for the purposes of this ~~possession~~ provision, they passed on death not as an interest in those shares in the hands of the successors, but as an interest in the A and B shares. In order to bring the passing of these rights within the provision, they would consequently have to be regarded as an interest held in the assets of the company. An interest held in property, for the purposes of this section,is not the equivalent of -

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every benefit or advantage derived from property. The Dutch text speaks of " een recht.....bezeten op zulk eigendom." That presupposes at least a direct relationship between the right and the property. Although the holders of the shares may be said to be entitled to certain benefits derived from the assets of the company, and on a distribution of the assets, also to a share therein, ~~and~~ the assets belong to the company and not to the share-holders, and rights conferred by the shares are rights in personam against the company and other shareholders and not rights in the assets of the company. (Dadoo Ltd. and Others v. Krugersdorp Municipal Council, 1920 A.D. 530 at page 556). It would accordingly seem that also in relation to the assets of the company, there has been no succession to an interest in property deemed to have accrued under section 10(b).

For these reasons I am of opinion that the appeal must be dismissed and that the cross-appeal must be allowed, in both cases with costs in this Court as well as in the court below.

L. Steyn.

Malan J.A. }
Botha A.J.A. } Concur.