

This seems to be the correct approach, and it was a view held in 1953 by the Royal Commission on Capital Punishment who 'prefer to limit murder to cases where the act by which death is caused is intended to kill or to "endanger life" or is known to be likely to kill or endanger life'.³⁰ This appears to be the true view of malice.

As a criterion of intention, the maxim that a man is 'deemed to intend the natural and probable consequences of his acts' has been the subject of considerable criticism by academic writers.³¹ In logic its justification as the 'only measure that can be brought to bear in these matters . . .'³² extends only to the rule of evidence. The correct view is rather that expressed recently by Denning L.J. (as he then was) that "There is no "must" about it; it is only "may"'. The presumption of intention is not a proposition of law but a proposition of ordinary good sense.³³ The confusion of thought involved in the admission of objective criteria as a guide to the workings of a man's mind, followed by their exclusive adoption, has been the subject of both judicial³⁴ and academic³⁵ criticism. For it involves a confusion of the evidence of intention with the proposition proved by that evidence. Therefore the objective theory is supported neither by logic nor by legal philosophy.

The decision in *R. v. Ward*³⁶ has received strong academic criticism,³⁷ and in *Smyth v. The Queen*³⁸ the High Court of Australia registered its strong disapproval of the principles there set down. It remains to be seen whether the High Court will continue its support of the subjective view in the face of this decision of the House of Lords. It is submitted that the present attitude of the High Court is the correct one.

D. McL. EMMERSON

RE HAUNSTRUP, DECEASED¹

Probate duty—Valuation of estate—Large block of shares—Market price at date of death—Discount on valuation for quantity—Administration and Probate (Estates) Act 1955 Section 6

In 1957 H died and pursuant to section 152 of the Administration and Probate Act 1928 as amended by section 8 of the Administration and Probate (Estates) Act 1951² the executors of his will and estate filed a statement specifying the particulars and value of his estate.

Part of this estate consisted of 26,338 £1 stock units in Haunstrup Constructions Ltd which had a total issued capital of 170,000 shares. The executors valued this parcel of shares at 16s. *per share* (later amended to 18s. 3d.). The Commissioner of Probate Duties increased this valuation to 18s. 9d. *per share* and under section 157 of the Administration and Probate Act 1928 as amended by section 13 of the Administration and Probate

³⁰ Cmd 8932, 472.

³¹ Salmond, *Jurisprudence*, (1947, 10th ed.), 381; Glanville Williams, *Criminal Law* (1953) §27.

³² *R. v. Ward* [1956] 1 Q.B. 351, 356, *per* Lord Goddard C.J.

³³ *Hosegood v. Hosegood* [1950] 1 T.L.R. 735, 738.

³⁴ *Angus v. Clifford* [1891] 2 Ch. 449, 471, *per* Bowen L.J.

³⁵ Holdsworth, W. S., *History of English Law* (1909) iii, 298. ³⁶ [1956] 1 Q.B. 351.

³⁷ S. Prevezer, 'Murder by Mistake' (1956) *Criminal Law Review* 375; Also (1956) *72 Law Quarterly Review* 166; (1956) *19 Modern Law Review* 414 are relevant.

³⁸ [1957] *Argus* L.R. 441.

¹ [1960] V.R. 302. Supreme Court of Victoria; Sholl J.

² Now Administration and Probate Act 1958, s. 108.

(Estates) Act 1951³ the executors appealed against the Commissioner's valuation.

Sholl J. held that the appellants' case had been made out and that the lower valuation of 18s. 3d. was the one to be placed on the shares.

The central point of argument was the interpretation to be given to section 6 of the Administration and Probate (Estates) Act 1955⁴ and more particularly the meaning to be ascribed to the term 'value'. Section 6 provides:

Save as otherwise expressly provided the Commissioner shall fix the value of any property for the purposes of this Act at the price which such property would fetch if sold in the open market at the date of the death of the deceased.

Provided that where it is proved that the value of the property has been depreciated by reason of the death of the deceased the Commissioner in fixing the price shall take such depreciation into account.

Both parties conceded that the latter proviso had no application to the instant case, but the executors contended that under this section it was permissible to discount the valuation of the shares, arrived at by reference to the relevant stock exchange quotations, owing to the large number of shares involved. This proposition involved a close analysis of the wording and history of section 6.

The criterion of 'value' as expressed in section 6 of the 1955 Act is only a recent incorporation and it has been expressed differently in earlier Acts.

In the relevant provision of the 1928 Act⁵ what was taxed for duty purposes was 'value' *simpliciter* and no criterion was specified. However an amending Act in 1951⁶ provided a criterion of 'value to the deceased as at the date of death' and added a clause prohibiting a reduction being made in the valuation to compensate for a large part of the property being placed on the market at the one time. This provision would have effectively decided this dispute, but it was repealed in 1955 by an Act⁷ which also substituted for the determination of 'value' a new test of 'the price which such property would fetch if sold in the open market at the date of the death of the deceased'.⁸

³ Now Administration and Probate Act 1958, s. 113.

⁴ Now Administration and Probate Act 1958, s. 107.

⁵ Administration and Probate Act 1928, s. 152 (1) (c). 'Every executor and every administrator shall file . . . a statement specifying . . . the value of the property referred to in paragraph (a) or paragraph (b).' For the type of property covered see s. 108 of the 1958 Act.

⁶ Administration and Probate (Estates) Act 1951, s. 7 (1). 'Save as otherwise expressly provided, in estimating the value of any property for the purpose of calculating the value of an estate:

(a) the value to the deceased as at the date of death shall be taken as a basis; and
(b) no reduction shall be made in the estimate on account of the estimate being made on the assumption that the whole or any substantial portion of the property is to be placed on the market at one and the same time . . .'

⁷ Administration and Probate (Estates) Act 1955, s. 6. 'For sub-section (1) of section seven of the Administration and Probate (Estates) Act 1951 there shall be substituted the following sub-section: "(1) Save as otherwise expressly provided the Commissioner shall fix the value of any property for the purposes of the Administration and Probate (Estates) Acts at the price which such property would fetch if sold in the open market at the date of the death of the deceased:

Provided that where it is proved that the value of the property has been depreciated by reason of the death of the deceased the Commissioner in fixing such price shall take such depreciation into account".'

⁸ [1960] V.R. 302, 304. *Expressio unius est exclusio alterius*.

The instant case was therefore governed by a provision which omitted any reference to discount in valuation for quantity, and this omission of a provision previously in force was considered significant by His Honour. For if the Legislature has seen fit to repeal such a provision the inference is that what was previously disallowed is now allowed.

The court was faced with a more basic problem in relation to the interpretation to be given to 'value' and 'open market' in section 6.⁹ In England the comparable provision is couched in almost identical terms but with a provision against discount¹⁰ and has been construed as envisaging a sale according to the most advantageous method available in relation to the nature of the property.¹¹ The term 'open market' means that no-one who desires to purchase the property is to be excluded from making a bid.¹² In relation to shares in a public company which are listed on the stock exchange, the meaning of 'open market' is easily established by reference to the stock exchange quotations on the particular day in question. This principle of an 'open market' sale must also be considered together with the principle that the executors are to act as prudent men and are to realize the holding by the best means possible, for these two principles are both limited in their operation by the wording of both the English¹³ and the Victorian¹⁴ provisions.

If a large parcel of shares is involved, the most prudent way to realize the property is either by selling the parcel by degrees over a period of time or by allowing a discount in the market price of the shares to compensate for the depressing effect such a large parcel would have on the market price. This latter alternative is expressly forbidden in England, but may by inference be valid in Victoria.¹⁵ However the former alternative is inconsistent with the existing wording of section 6 (now section 107 of the 1958 Act) which insists on the disposition of the whole of the property on the date of death.

Thus 'the probable effect on the market price itself of the offer of a large number of shares is seemingly to be ignored'.¹⁶ This is caused by the fact that the executors are compelled to conduct a hypothetical forced sale even though this is not the most prudent method of selling the property. It is stated on good authority¹⁷ that an abortive or forced sale is not a correct means of disposing of the property as provided by what is now section 107 of the Administration and Probate Act 1958 and that

value means the price which the property would have fetched on the death of the deceased in the open market if it had been then sold in

⁹ Administration and Probate (Estates) Act 1955.

¹⁰ Finance Act 1894, s. 7 (5) (U.K.). 'The principal value of any property shall be estimated to be the price which . . . such property would fetch if sold in the open market at the time of the death of the deceased.' This was amended by the Finance Act 1910, s. 60 (2) (U.K.). 'In estimating the principal value of any property under subsection (5) of section seven of the principal Act, . . . the commissioners shall fix the price of the property according to the market price at the time of the death of the deceased, and shall not make any reduction in the estimate on account of the estimate being made on the assumption that the whole property is to be placed on the market at one and the same time: . . .'

¹¹ *Hanson's Death Duties* (10th ed. 1956) 72.

¹² *Inland Revenue Commissioners v. Clay* [1914] 3 K.B. 466, 475.

¹³ Finance Act 1910, s. 60 (2) (U.K.).

¹⁴ Administration and Probate Act 1958, s. 107.

¹⁵ *Supra*.

¹⁶ *Hanson, op. cit.* 403.

¹⁷ *Re Aschrott* [1927] 1 Ch. 313, 322. *Hanson, op. cit.* 72.

such a manner and subject to such conditions as might reasonably be calculated to obtain for the vendor the best price for the property.¹⁸

But

The English authorities do not make clear how the valuer is to assume a sale of the whole property in the open market 'at the time of the death of the deceased', and is yet at the same time in all cases to exclude any possible effects savouring of a forced sale . . .¹⁹

His Honour was of the opinion that this form of valuation does not require the assumption of a forced sale at a 'sacrifice' price for 'I do not see why one should not hypothesize as much proper preparation by way of advertising . . . before the actual date of death, as a prudent seller would have made'.²⁰ But having regard to the economic laws of supply and demand,²¹ it is difficult to see how the existence of such a large parcel could not depress the market price especially as one broker said that he could not possibly hope to dispose of such a holding on the stock market even within six months. The advertising undertaken by a prudent seller would not rectify this situation for information about the large nature of the holding would surely leak out in the open market thus depressing the amount buyers would offer.

The open market price is the determining factor in the valuation of property under section 107, and although the stock exchange quotations represent only part of the open market, they are a fair indication of the market value of the shares which in turn is a pointer to the real value of the shares.²² But stock exchange quotations refer to the price offered or paid *per* stock unit in a marketable parcel which is usually (as here) one hundred units, and as 'the price of shares as of any other commodity is governed by the law of supply and demand',²³ where 260 times a marketable parcel is involved, an alteration in the quotation must, of necessity, result.

Counsel for the Commissioner contested this proposition on the basis that with a hypothetical sale between hypothetical parties there is no room for discount since every hypothetical buyer will have enough money to buy any parcel of shares, however large, at the prevailing market price.

But it is one thing to attribute to such a buyer sufficient means to buy a whole parcel, however large, and quite another thing to attribute to him a lack of appreciation of the law of supply and demand, and if there is an actual market, ignorance of its limitations.²⁴

The hypothesis should not be drawn in such a way as to make the resulting situation unreal.

The section assumes a sale on a particular day according to the most prudent method available which is, according to the evidence of share-brokers, in relation to a block of shares of this size, for a broker to buy the block at a discount and to farm the shares out to his customers at a

¹⁸ *Green's Death Duties* (4th ed. 1958) 343.

¹⁹ [1960] V.R. 302, 307. ²⁰ [1960] V.R. 302, 313.

²¹ Which Sholl J. regards as significant [1960] V.R. 302, 312.

²² Hanson, *op. cit.* 398. *Commissioner of Succession Duties (South Australia) v. Executor Trustee and Agency Company of South Australia Limited* (1947) 74 C.L.R. 358, 361.

²³ *Myer v. Commissioner of Taxes* [1937] V.L.R. 106, 121.

²⁴ [1960] V.R. 302, 314.

reduced price attractive enough to make them willing to buy the shares. This is recognized as the usual practice as regards large holdings.²⁵

For such a parcel . . . the stock exchange could not be regarded as constituting more than a part of the "open market". There was also an actual market amongst stockbrokers outside the exchanges . . .²⁶

On this assumption the stock exchange quotation is only part of the open market and has to be considered together with other methods of sale before a satisfactory valuation can be reached.

The definition of 'value' has been considered in other jurisdictions and under different Acts but the cases in which the matter has arisen are not of much relevance in the interpretation of section 107 of the Administration and Probate Act 1958 as the Acts in question prescribe different criteria for the ascertainment of 'value'.²⁷ The result of these provisions is that the executors can remain prudent men without having the need to discount the value of the shares as the definitions of 'value' leave it open to them to realize on the holdings over a period of time, a situation inconsistent with the terms of section 107 (1958 Act).

In *Myer v. Commissioner of Taxes*²⁸ Martin J. had to value for purposes of Victorian probate duty a large controlling interest in a proprietary limited company which in turn gave control of 59 *per cent* of the shares in the Myer Emporium. His Honour held that the stock exchange quotation did not allow for the depressing effect on the market price of such a large parcel of shares and he reduced the valuation placed on the shares which had initially been determined by reference to the stock exchange quotation.²⁹ However it must be remembered that the relevant provision³⁰ at that time imposed duty on 'value' *simpliciter* which is not as restrictive as the current provision.

Under a statute which makes 'value' *simpliciter* the test, allowance can be made for the fact that the owner, on the day he died, had the right and the opportunity, if he desired, to sell off his holding in small lots over as long a period as he might wish without disclosing to anybody the total which he wished ultimately to dispose of. But under a statute which hypothesizes a sale of the whole property 'at the date of' the death, there is no room to allow for that method of avoiding a possible reduction in price. To imply any such method is to read in against the

²⁵ Green, *op. cit.* 367. 'Stock exchange quotations represent the market prices for the relatively small, easily negotiated, holdings of quoted shares which are involved in day to day market transactions. Even in the case of quoted shares, a sale of a relatively large holding is usually negotiated privately and not through ordinary stock exchange channels.'

²⁶ [1960] V.R. 302, 312. ' . . . prima facie the stock exchange price is the appropriate measure of value though . . . under s. 6 of the Victorian Act of 1955, the stock exchange by no means necessarily embraces the whole of the "open market".' [1960] V.R. 302, 316.

²⁷ *E.g.* There have been many cases arising out of the Commonwealth Estate Duty Assessment Act, a statute which does not direct any particular method of establishing the value of the dutiable assets. Estate Duty Assessment Act 1914-1950 (Cth.), s. 8 (1). 'Subject to this Act, estate duty shall be levied and paid upon the value, as assessed under this Act, of the estates of persons dying after the commencement of this Act.'

²⁸ [1937] V.L.R. 106.

²⁹ Martin J. did not discount the value of the actual shares in the proprietary company which he had to value, but he discounted the realizable value of the ordinary shares to which the proprietary shares gave a right. Being unlisted shares, there was no existing market for the shares of the proprietary company.

³⁰ Administration and Probate Act 1928, s. 157.

taxpayer something inconsistent with the hypothesis required by the Parliament.³¹

Thus having regard to the history of what is now section 107 of the Administration and Probate Act 1958, its definition of 'value' and the effect of the economic laws of supply and demand (which was discussed in *Myer v. Commissioner of Taxes*³²), His Honour concluded that

... for the purposes of s. 7 (1), as substituted by s. 6 of the Administration and Probate (Estates) Act 1955, it is proper, where the evidence warrants it, to allow a discount from ... the ordinary market price by reason of the size of a parcel of listed shares falling to be valued thereunder, just as it would be proper, if the evidence warranted it, to allow a premium or loading, e.g., in a case where the parcel carried control of the company.³³

The valuation of the shares was therefore reduced from 18s. 9d. to 18s. 3d. *per unit*, this latter figure being arrived at on the basis of stock exchange quotations, the probable decrease in value caused by such a parcel of shares and the amount by which a broker would discount the parcel so as to be able to sell the parcel amongst his private clients.

Although other methods of valuation were discussed they were rejected by Sholl J. as not being applicable to the nature of the property in question.³⁴ The court's decision is a reasonable one on the wording of section 6 (now section 107) but it may be regarded as unfair in that it discriminates against small shareholders.³⁵ This may be so but the language of the section is clear and if any change is needed it is for the Legislature to act.

A. H. GOLDBERG

MIZZI v. THE QUEEN¹

Criminal Law—Defence of insanity—Direction to jury—Burden of proof—Crimes Act 1958 Section 569 (4)

The prisoner was charged with the murder of a woman by stabbing her with a knife. After he had committed the act he went to a police station and made a written statement relating what had occurred. Although this showed he clearly understood what had happened, there was much doubt as to his sanity.

³¹ [1960] V.R. 302, 313.

³² [1937] V.L.R. 106.

³³ [1960] V.R. 302, 314.

³⁴ The significance of the assets backing of shares was considered and disregarded as a possible basis of valuation as regards listed shares in a public company since the combination of the evidence that the stock exchange may not value a share anywhere near its assets backing and the willing buyer-willing seller concept made it inapplicable. The method of valuation based on the compulsory acquisition of property was also disregarded as the High Court has only adopted the compensation principle for duty valuation purposes 'where, as in the case of shares not listed on the stock exchange, there is no market value for the property,' *per Latham C.J., Rich and Williams JJ. in Commissioner of Succession Duties (South Australia) v. Executor Trustee and Agency Company of South Australia Limited* (1947) 74 C.L.R. 358, 361.

³⁵ It would seem more practical to leave an estate comprising a large shareholding in one company rather than a number of small shareholdings in a number of different companies, for in many cases the shares are not sold to pay death duties but may in fact be retained and ultimately realized over a period of time.

¹ (1960) 34 A.L.J.R. 307. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Menzies and Windeyer JJ.