

**THE HIGH COURT**

**2009 99 SP**

**IN THE MATTER OF THE ESTATE OF ROBERT HENRY HOLMES, LATE OF NEWCASTLE, CASTLEPOLLARD, COUNTY WESTMEATH,  
FARMER (RETIRED), DECEASED**

**AND**

**IN THE MATTER OF SECTIONS 55 AND 56 OF THE SUCCESSION ACT 1965 AND IN THE MATTER OF SECTION 56(6) OF THE  
SUCCESSION ACT 1965**

**AND**

**IN THE MATTER OF THE ADMINISTRATION OF THE ESTATE OF ROBERT HENRY HOLMES**

**BETWEEN**

**STEPHEN THOMAS STRONG**

**PLAINTIFF**

**AND**

**MAUREEN ELIZABETH HOLMES, RICHARD HOLMES AND MARK HOLMES**

**DEFENDANTS**

**JUDGMENT of Mr. Justice Roderick Murphy delivered the 12th day of March, 2010.**

**1. Special Summons**

1.1 The plaintiff, a retired solicitor, and the Governor and Company of the Bank of Ireland had been appointed by the deceased to be his executor and trustee under his last Will and testament of the 3rd December, 1994 and codicils of the 4th December, 1998 and the 17th June, 1999.

By deed dated the 28th February, 2008 the Governor and Company of the Bank of Ireland retired as trustee.

The deceased died testate on the 12th April, 2007 without issue, leaving him surviving his widow, the first named defendant herein.

The second and third named defendants are grand-nephews of the deceased and are joined in the proceedings as residuary legatees and dividees under the Will.

On the 5th December, 2007 the plaintiff extracted a grant of probate to the estate of the deceased. The gross value of the deceased's estate recited in the Revenue affidavit was €11,425,283.83 while the net value recited therein was €11,402,460.42.

Under the terms of the deceased's Will and codicils the deceased bequeathed a sum of money equal to class threshold (b) under the Capital Acquisitions Tax Act 1976, to each of one named nephew (William Thomas Holmes) and three named nieces (Carol Ann Florence Holmes, Valerie Lillian Mary Ganderton and Irene Francis Witherford). The deceased also bequeathed a sum of money equal to class threshold (c) to one named grand-nephew and four named grand-nieces and a named sister-in-law.

By way of pecuniary legacies, the deceased bequeathed IRE10,000 each to Bridie Mulvey and Rory O'Neill, the sum of IRE5,000 to the Rector and church wardens of Castlepollard parish, the Church of Ireland, to be invested for the upkeep and the maintenance of Castlepollard Church of Ireland and IRE2,000 to the first named defendant.

Thereafter the deceased's last Will and codicil thereto devised all of the deceased's land to his trustees and the deceased gave the first named defendant an exclusive right of residence in the dwelling house at Newcastle together with use of the furniture and contents therein along with the rental income from all of the said lands for lifetime.

The deceased also gave a one-tenth (1/10th) share of the deceased's residuary estate to his trustees to hold the same and pay the income therefrom for life to the first named defendant.

The issue in this case relates to the second element of the "Residuary Estate" whereby the deceased gave, devised and bequeathed the remaining nine-tenths (9/10th) of his residuary estate to his trustees upon a discretionary trust for the benefit of the second and third named defendants with remainder over to whoever of the second and third named defendants should be living at a future date therein.

Those defendants are joined in these proceedings as persons whose interests could be adversely affected by any order that the court would make. The court is satisfied that they are appropriately joined as defendants.

Prior to his death the deceased and the first named defendant ordinarily resided in the dwelling house and at the time of the death of the deceased the first named defendant was ordinarily resident therein as defined by s. 56 of the Succession Act 1965.

On the 18th June, 2007 the first named defendant elected in writing pursuant to s. 115 of the Succession Act 1965, to take her legal

right share to one half (1/2) of the estate of the deceased pursuant to s. 111 of that Act.

In compliance with his duty under the Succession Act 1965, on the 17th December, 2007 the plaintiff served a written notice of right of appropriation upon the first named defendant pursuant to s. 56 of the Act.

On the 3rd June, 2008 the first named defendant's solicitors wrote to the plaintiff stating that they were instructed by their client to formally advise the executor that she wished to appropriate:

- (a) The family home together with the lawns, yard and the avenue,
- (b) The balance of the personal assets remaining after payment of, or provision for, debts, liabilities and pecuniary legacies,
- (c) A sufficient portion of the land absolutely in order to satisfy the balance of her legal right share. In that regard she wished to appropriate approximately fourteen acres immediately surrounding the house and if possible the field known as "the bullock field" which is contiguous to the house and gardens.

#### 1.2 The plaintiff claimed:

- (i) A direction of the court as to the right of the first named defendant to require an appropriation pursuant to s. 56 of the Succession Act 1965 of the dwelling house at Newcastle, Castlepollard in the County of Westmeath forming part of the estate of the deceased and in which she was ordinarily resident at the date of the death of the deceased given that the dwelling is one to which the provisions of s. 56(6) applied;
- (ii) If the court is of the view that an appropriation may proceed, direction as to the extent of the property that might be appropriated and proper compliance with s. 56 of the Succession Act 1965;
- (iii) A direction as to whether the appropriation as sought by the first named defendant is proper and permissible and if an appropriation in such terms would constitute administration of the estate in accordance with law;
- (iv) Such further or other direction in the administration of the estate as seen just and proper.

1.3 On the second day of hearing the parties agreed as to the extent of appropriation of the lands to include the dwelling house, parcels A and C as part of the curtilage of the house and the six parcels of land K1 to K6 situate to the north east of the farmlands which, if not included, would have no direct access to the roadway.

The court is of the view, having regard to the evidence, that such appropriation is proper and permissible.

That appropriation was agreed to take place pursuant to s. 55 of the Succession Act which makes provision for the powers of the personal representatives as to appropriation. Section 55(10) provides as follows:

"(10) For the purposes of such appropriation, the personal representatives may ascertain and fix the values of the respective parts of the estate and the liabilities of the deceased person as they may think fit, and may for that purpose employ a duly qualified valuer in any case where such employment may be necessary; and may make any conveyance which may be requisite for giving effect to the appropriation.

(11) Unless the court on an application made to it under subsection

(3) otherwise directs, an appropriation made pursuant to this section shall bind all persons interested in the property of the deceased whose consent is not hereby made requisite."

The court is of the view, in the light of the appropriation under s. 55 and having regard to the evidence, that such appropriation is proper and permissible.

There remains one further element and that is that the court has to be satisfied that the rights of all beneficiaries has been considered. In this regard the date of valuation is pertinent to the calculation of the first named defendant's legal share.

## 2. Submission of the executor regarding the valuation date

Counsel on behalf of the plaintiff's executor submitted that the valuation date for the calculation of the first named defendant's one half legal right share was the date of distributions which the executor believed to be the logical operative date.

Counsel referred to Williams, Mortimer and Sunnocks on *Executors and Administrators* at para. 67.12 in the analogous context of hotchpot being a general remixing of property in order to secure equal division among heirs of an intestate. In such a case it is a general rule of administration whether in court or out of court, settled by long practice that, in the absence of an express direction to the contrary in the Will, the distributive assets are to be valued at the date of this distribution and not at the date of the testator's death. In such a case advanced beneficiaries are to be debited with interest on the amount of their advances to the date of distribution.

It was submitted that in cases where appropriation is permitted, the date of appropriation is the date of the order of the court which should be as close as possible to the date of distribution. That is the current market value of the estate on that date which is relevant. Williams on *Wills*, (9th Ed.) 2009 at 29.11 states:

"An appropriation must be fairly made at a valuation taken at the date of the appropriation ...".

In *Robinson v. Collins* [1975] 1 All E.R. 321, Pennycuik V-C in the Chancery Division held the date of valuation for the purpose of appropriating an intestate's matrimonial home is the date of appropriation and not the date of the death of the deceased.

All values of all estate assets and shares in the estate must be valued on the same day using the same valuation methods: the first named defendant is not entitled to a fixed monetary amount or to any fixed value of any asset, other than at that date.

### 3. Submissions on behalf of the first named defendant

Counsel on behalf of Mrs. Holmes, the widow of the deceased and first named defendant, submitted that the ability or otherwise of the plaintiff to appropriate the dwelling house and curtilage in partial satisfaction of her legal right share was entirely different to the right of election that a widow has under s. 115 of the Succession Act.

Counsel referred to *H. v. O.* [1978] 1 I.R. 194 where Henchy J. stated:

"In the general context of the Act, it must be assumed that legislative intention was that the legal right (where elected for) is to be discharged in the same manner as if one half or one third of the estate had been expressly given in the Will in priority over all devises and bequests."

In the estate of *Douglas Urquhart*, deceased (1974) 1 I.R. at 197, Walsh J. stated:

"In my opinion, the whole of this structure presupposes and is based on the assumption explicit in the statute, in addition to what is expressly stated in s. 111, that a legal right arises on the moment of the death of the testator, where there is no legacy or device or where there is a legacy or device expressed to be in addition to the legal share, the legal share vests on the death. When a testator in his Will makes a device or bequest to a spouse and it is not expressed to be in addition to the share as a legal right, then the spouse has a statutory right to take the share as a legal right – but that share does not vest until he takes it."

It is submitted that the balance of the decision of Walsh J. points to the valuation date for a legal right share being the date that the legal right share vests.

Counsel submitted that s. 46(6) of the Succession Act is relevant. That sub-section provides as follows:

"(6) A claim to a share with a legal right on intestacy in the estate of a deceased person is a claim against the assets of the estate to a sum equal to the value of that share."

In that context the legal right share in the present case crystallised as on the 11th May, 2007 which was the date when it is accepted that the first named defendant elected to take her legal right. At that date the value of the legal right share was 50% of the estate after the payment of administration costs and expenses. Even assuming a generous level of provision in that context, this would give a figure somewhere in the region of €5 million. At all stages it seems that the dwelling house and the 21.5 acres in the curtilage of A and C were a relatively small portion of the estate and was then agreed to have a valuation of some €775,000. There were sufficient assets in the estate to satisfy the balance of the legal right share of the first named defendant, leaving aside any issue that might arise in the context of an appropriation of the dwelling house and 21 acres. However, no such distribution took place.

Counsel referred to s. 112 of the Succession Act regarding the right of a spouse under s. 111 having priority over other devises, bequests and shares in intestacy. He submitted that the effect of the statutory provisions as outlined in respect of the legal right share are to provide that as from the date of election of the spouse became entitled to a legacy which had priority to the value of the relevant legal right which was therefore fixed at that date given that the value of legacies should not ordinarily fluctuate.

He submitted that the issue of appropriation was separate and in the context of the proceedings. Appropriation related only to a very limited portion of the actual legacy. The value of the legacy was fixed and should not be affected unless there were insufficient assets in the estate to satisfy the same.

A significant distinction between an election under the provisions of s. 115 and a claim under s. 117 was that the exercise of right of election by the spouse effectively crystallised the entitlement which then became in essence a legacy. The claim under s. 117 remained merely a claim until such time as the validity of the same was determined by the court and the amount of proper provision was equally determined by the court.

In that context, clearly it was arguable that the right of election precluded the spouse from taking an advantage of an increase in the value of the estate, but in fairness it has to be seen in the context of the background to the Succession Act, when significant variations in the value of the estate were not contemplated. It should also be seen in the context that once the right of election had been exercised that the personal representative would ordinarily be in a position to satisfy, or significantly satisfy, the entitlement of the spouse.

In that context a delay, as in the present case, of approximately two and a half years between the election and the payment of the same, would be unusual. Counsel referred to the provisions and circumstances of the election of the legal right share provision.

### 4. Submissions on behalf of Richard Holmes and Mark Holmes

The second and third named defendants are grand-nephews of the deceased. They had been joined in these proceedings because of their interest as residuary legatees and devisees under the deceased's Last Will and Testament of 3rd December, 1994 and codicils of 4th December, 1998 and 17th June, 1999.

The testator gave, devised and bequeathed nine tenths of his residuary estate to his trustees upon a discretionary trust for the benefit of the second and third named defendants.

Counsel on their behalf submitted that the date of valuation of the assets was the date of appropriation and not the date of death. There should be fairness. The entitlement of the spouse, the first named defendant, to an appropriation under s. 56 is subject to that defendant discharging the burden of proof required under s. 56(5). Accordingly, the date of the approval of the appropriation by the court is the valuation date.

### 5. Decision of the Court

5.1 In the present case, having proceeded on a notification by the first named defendant pursuant to s. 56, the parties agreed on the second day of the hearing that the plaintiff, as personal representative, would exercise his powers under s. 55 and to appropriate the part of the lands in which the dwelling was situate towards the satisfaction of the first named defendant's share.

Section 55 stipulates that the power of appropriation may be exercised "*subject to the provisions of this section as provided for in sub-sections (2), (3)*".

It is clear that the first named defendant's notification to proceed under s. 56 bound the plaintiff, as personal representative, to deal

with that section. This had the result of delaying the administration of the estate until the court, as is required by s. 56, allows the appropriation to take place having been satisfied that it would not affect the valuation of the remaining lands.

The court held the section was silent as to how the court is to exercise its jurisdiction, which was essentially supervisory and prohibitive.

The personal representatives hold the estate under s. 10(3), as trustees for the persons by law entitled thereto. The exercise of the statutory discretion to appropriate must be viewed as an instance of the trusteeship. It is the court's duty to prohibit the appropriation if it is calculated to operate unjustly or inequitably by unduly benefiting one beneficiary at the expense of another. Where not prohibited by law and where the conditions of the section have been observed and the personal representatives have made a *bona fide* decision to appropriate, the exercise of their discretion to appropriate should not be interfered with.

5.2 The obligation of trusteeship is critical in relation to the valuation date in a fluctuating market and, in particular, in the steep decline in property values from the date of death to the date of the proposed appropriation. It is the court's duty to prohibit the appropriation if it is calculated to operate unjustly or inequitably by unduly benefiting one beneficiary at the expense of another. Where there is no settled law as to the date of valuation, such consideration is paramount.

Under the conditions prevailing in the 1960s when the 1960 Succession Act was debated and passed, markets were not fluctuating. It was incumbent on personal representatives to administer the estate as soon after the death as was reasonably practicable having regard to the nature of the estate, the manner in which it was required to be distributed and all other relevant circumstances referred to in section 62.

While the election of the first named defendant to take her legal right was made promptly, some time passed until notice of appropriation was made under section 56. The effect of such election and appropriation request necessitated an application which, in the court's view, was dealt with promptly by the personal representative once notification was served under that section.

In order to ensure that the appropriation was calculated to operate justly and equitably it cannot unduly benefit one beneficiary at the expense of another. If, for example, the date of valuation were to be the date of death then the half share of the estate then valued at €11 million approximately would almost exhaust its present value of over €6 million.

The exercise of a right to take her legal share overrides other bequests and, to that extent, the wishes of the testator. It is distinct from the trustee obligation to act justly or equitably by not unduly benefiting one beneficiary at the expense of another.

It appeared to be common case that the power of appropriation of the widow is confined to section 56. All parties acknowledge that the dwelling house was held with agricultural lands. The appropriation of the dwelling house in and towards satisfaction of the legal right share is only permissible provided that the spouse could discharge the onus of proof to identify with sufficient particularity what she claims constituted a "dwelling" within the meaning of s. 56 (14). The court has to be satisfied that the exercise of the right to appropriate is unlikely to diminish the value of the assets of the deceased other than the dwelling in question and, further, provided the first defendants can satisfy the court that appropriation by the first defendant of the dwelling would not result in making it more difficult to dispose of the assets of the deceased in the due course of administration of the estate.

Having elected, the widow is entitled to "one half of the estate" of the deceased, within the meaning of s. 111(1) of the Succession Act of 1965.

As to how "one half" could be construed Henchy J. in *H. v. O.* [1978] I.R. 194 held at 204:

"But nowhere in the [Succession] Act is there any specific statement as to how the personal representatives are to discharge the surviving spouse's legal right to one third or one half of the estate, as the case may be. Section 112 gives the legal right priority over other devises, bequests and shares on intestacy.

In the general context of the Act of 1965 it must be assumed that the legislative intention was that the legal right (as elected for) is to be discharged in the same manner as if the one half or one third of the estate had been expressly given in the Will and priority over all devises and bequests."

It cannot have been the intention of the legislature that the executors would be at liberty to construe "one half" in a manner capable of resulting in the spouse receiving a share in absolute terms worth substantially less or substantially more than one half of the net distributable estate.

A half connotes two equal parts into which something is divisible. It suggests a moiety and it connotes equality with its counterpart. Any contention for an evaluation of the share of the widow in a manner that results in a share greater than one-half of the net distributable estate of the deceased being vested in her is inappropriate. A calculation at the date of death where there is a fall in the value of land from the date of death to the date of distribution is equally inappropriate. Equally where there is an increase in the value it would be inappropriate to proceed on a value at the date of death.

The only operative and practical date for valuation is the date of distribution, since it is the only date on which the true nature and extent of half the net estate of the deceased can be determined.

The court must safeguard the definition which could expose surviving spouses to the vicissitudes of a fluctuating market between the date of death and the date of distribution of the estate.

The appropriate date is the date of distribution of the estate when the true and absolute identity of a "half" for the purposes of s. 111(1) can be ascertained when the net proceeds of sale are known.

5.3 A consideration of Irish case law supports this contention.

In relation to the onus of proof of Kenny J. in *H. v. H* [1978] 1 I.R. 138 at 143, emphasised the *exercise* of the right of appropriation:

"When the dwelling is held with agricultural land, the onus of establishing to the satisfaction of the Court that the *exercise of the right* of appropriation is unlikely to diminish the value of the assets, other than the dwelling, and that it will not make it more difficult to dispose of them in the due course of administration, is on the surviving spouse *who wishes to exercise* this right. (italics supplied).

It must be established by the surviving spouse that the exercise of the right (and not the existence of the right) is unlikely to diminish the value of the assets other than the dwelling. Thus the circumstances of each case must be considered to answer this question."

Section 56 (5) (b) was considered in that case. Kenny J. had to decide whether the valuation to be considered under the subsection was the value of *all* the assets of the deceased or of that part of them to which the beneficiaries, other than the surviving spouse had become entitled? The valuation of agricultural land is problematic. Unless and until the right to appropriate is determined it is not possible to properly value the remainder of the land. While Kenny J. held that the value of the assets of the deceased meant the value of the assets other than those to which the surviving spouse became entitled, the Supreme Court held that it was all the assets other than the dwelling.

The judgment of Kenny J. continued at 143-4:

"Section 56 (5)(b) of the Act of 1965 seems to have been drafted on the false assumption that the person exercising the right of appropriation will not be entitled to any other part of the holding of land when the assets of the deceased include agricultural land. But when the surviving spouse who exercises the right of appropriation is entitled to one half of the holding of land, does 'the value of the assets' mean all the assets other than the dwelling or does that phrase mean the assets to which the other beneficiaries become entitled? If it means all the assets other than the dwelling, the right of appropriation can never be exercised when the dwelling is held with agricultural land because a residential holding (particularly a large one) is always more valuable than a non-residential one. But this seems to me to be contrary to the purpose of the section for it would exclude all residential holdings from the right to appropriate. Therefore, it seems to me that 'the value of the assets of the deceased' means the value of the assets to which the beneficiaries other than the surviving spouse become entitled."

The judgment of the Supreme Court in *H. v. H.* was delivered by Parke J. The Supreme Court held that the wording of s. 56(5)(b) refers to all the assets of the deceased "other than the dwelling" and, to that extent, allowed the appeal. The Supreme Court also took issue with Kenny J.'s assertion that a residential holding was always more valuable than a non-residential one. The finding of the High Court in relation to onus of proof was not challenged and appeared to Parke J. to be clearly correct.

The Supreme Court held at 148 that s. 56(5)(b) requires that the court must be satisfied that neither of two specified eventualities was likely to happen, *i.e.* a diminution of the value of the assets or the creation of a difficulty in disposing the assets in the course of administration.

The first defendant in the instant case had declined to identify what portion of the farm holding together with the dwelling would satisfy her legal right share entitlement, pursuant to s. 111(1) of the Succession Act.

In the *Estate of Denis Kennedy, deceased, Thomas Kennedy v. Breda Kennedy and Seamus O'Riordan* (Unreported, High Court, 26th January, 2007) the executor, a beneficiary under the Will of his uncle, the testator, wished to acquire the farmlands and dwelling house. There were no children, the widow had exercised her right of election, pursuant to s. 115 and was entitled to one half of the estate. In the course of his review of the facts of the case O'Neill J. noted that the advice received was to the effect that the correct date was the date of distribution for the purposes of discharging the legal right share.

5.4 The English decision of *Re Collins, deceased, Robinson v. Collins* [1975] 1W.L.R. 309 is authority for the proposition that where the personal representative has power to appropriate a house in part satisfaction of a charge or entitlement of a surviving spouse in the estate, the valuation to be attributed to the property is the valuation at the date that the legal personal representative makes the appropriation and not the valuation at the date of death.

In the instant case it was submitted that, the entitlement of the widow has not been established pursuant to s. 56 until she discharges, to the satisfaction of the court, the burden of proof that rests upon her by virtue of section 56(5).

Accordingly, the appropriation right has not yet arisen. It is the value of the estate at the date of the appropriation that is material. Pennycuik V.C. in *Re: Collins*, p. 313 states:

"There can be no doubt that where a personal representative exercises the statutory power of appropriation under s. 41 of the Act of 1925 he must do so at the value of the property appropriated as at the date of appropriation. 'The value of appropriated security should be taken as at date of appropriation' per Wilson Holm and Cherries Conveyancing Statutes also the case in *Re Chartaris, Swinfen Eady L.J.* at p. 386 recited with approval:

'They raised the point that the value of the securities appropriated should be the value as at the date of appropriation, and not as at the date of the testatrix's death. In my opinion that contention was well founded; and upon that point being raised by the plaintiff's advisors the executors took the opinion of counsel with regard to the appropriation, and, having taken it, they sent a copy of it to the plaintiff's advisors.'"

Pennycuik V.C. also cited in *Re Gollin's Declaration of Trust* with approval as authority for the proposition, going on to state:

"The point is sometimes put by treating the appropriation as a notional sale of the appropriated assets to the beneficiary, the legacy to the beneficiary being applied in discharge of the purchase price on the sale. This is a rule of administration too well established to require further discussion."

5.5 Williams on *Wills*, 29.11 under the heading: "Value for Appropriation", states as follows:

"An appropriation must be fairly made at a valuation taken at the date of the appropriation, and an executor or trustee who makes an appropriation which is not fair according to such valuation of the appropriated property is guilty of a breach of trust. A beneficiary who takes the appropriated property with knowledge of such breach of trust is also liable to make good the breach of trust. Not only must the appropriated property be valued, but where the person to whom the property is appropriated is not entitled to a specific sum of money, the other property of the estate must be valued at the same time to ensure he is receiving a proper share and receiving no more than he is entitled to."

In the instant case having regard to the language of the Succession Act and the manner in which the exercise the legal right share has been construed by the Superior Courts the first named defendant, as surviving spouse, is deemed to have taken a device of one half of the estate. In the approach to be adopted by the executors there must be equality between the spouse on the one hand and

the beneficiaries and legatees, including the residuary legatees on the other hand.

The court may derive some assistance from s. 116(2) of the Succession Act, which is a transitional measure to cover situations where a testator had before the commencement of the Act made provision for a spouse. It is provided that permanent provision made for a spouse, *i.e.* other than periodical maintenance payments was to be off-set against the legal right share of the spouse. Where the value of the provision made equals or exceeds the value of the legal right share, then the legal right share was deemed to be extinguished.

Section 116 (2) provides:

"The value of the property shall be reckoned as at the date of the making of the provision."

It connotes a trend within the legislation that valuations be effected at the date of vesting.

It would be arbitrary and improper to permit a beneficiary to opt for a valuation date of their beneficial share or interest in the estate, how so ever arising, on a selective basis.

5.6 In the present case counsel for the first named defendant, the widow of the deceased, contended that the date of death was the appropriate date. This matter was also dealt with in *Robinson v. Collins* [1975] 1 W.L.R. 309 where the Vice-Chancellor stated:

"Counsel for the widow contended that, notwithstanding that in the ordinary case under s. 41 of the 1925 Act, the value of the appropriated assets must be taken as the date of the appropriation, in this particular case an appropriation under Schedule 2 to the 1952 Act the value must be taken as the date of death. He relied, principally, on the point that under Schedule 2 the widow has a right to insist on an appropriation, and then he equated this position with that in which a beneficiary had an option to purchase an asset at the date of the death of the testator. He relied on *Talbot v. Talbot* [1967] 2 All ER 920, (1968) Ch. 1, in the Court of Appeal which was the case of an option given by a testator to two of his sons to purchase the farms in which they lived together with some land which went with them 'at a reasonable valuation'. And it was held that the relevant date for the valuation was the date of death because it was then that the rights of the option beneficiaries accrued ...

It seems to me, however, that the short answer to that contention is that the 1952 Act did not confer on the surviving spouse an option to purchase. What the 1952 Act does, read in conjunction with the 1925 Act, is to confer a right on the surviving spouse to have the matrimonial home appropriated in or towards satisfaction of a fixed sum charged on the estate, that fixed sum being in the nature of an absolute interest. That being the position, I can see no valid reason for departing from the general rule applicable to appropriation under s. 41 of the 1925 Act. If parliament had intended that the appropriation should take effect retrospectively as at the date of death, one would have expected this result to be achieved by plain words. The words actually used are quite inept to achieve such a result. No injustice is involved in this conclusion. There is no reason that I can see why the widow rather than the other next of kin should benefit from rising house prices or indeed, in the contrary case, less familiar in the circumstances of today, suffer from a fall in house prices.

I conclude that I must answer the question in paragraph 3 of the summons in accordance with alternative (c), *i.e.* the value thereof at the date when the personal representatives appropriate the same."

The authority for the proposition that the valuation date was the date of the exercise of the option, *Talbot v. Talbot* [1967] 2 All E.R. 920, was distinguished by Pennycuik V.C. in *Robinson*. While there are differences in the statutory provisions considered in *Robinson* and under the provisions of the Succession Act 1965, it seems clear, that in the absence of any statutory provision, that the valuation date is the actual date of appropriation.

5.7 While the first named defendant is correct in saying that her legal right under s. 111 of the Succession Act arises on the moment of the death of the testator where there is right of appropriation the valuation date is at the date of the exercise of that appropriation.