intimate relationship exists as a general rule, especially in cases where one finds a holding company with a network of subsidiaries pursuing fairly distinct functions and having policies which must occasionally conflict.

This conflict of interest raises problems as to the duty of a holding company to look after the interests of its subsidiary. The statement of Lord Keith, quoted above, refers only to cases where the subsidiary has an independent minority of shareholders, and is "engaged in the same class of business" as the parent company. Although doubts must arise as to what constitutes "the same class of business", it is submitted that such restriction is most significant, for a holding company and its subsidiary remain separate legal entities, and if their interests conflict, then the directors and majority shareholders of the holding company could surely not be penalised for carrying out their duty to act for its benefit. Nevertheless, the *dicta* in the present case remain as a warning, for example, to a take-over bidder which seeks to gain control of a competitor company without purchasing all of its shares, or to a company which establishes a subsidiary (with an independent minority of shareholders) which could in the future become a competitor or could outlive its usefulness.

A. M. GLEESON, Case Editor—Third Year Student.

RECOVERY BY ADMINISTRATOR OF DEATH DUTY ASSESSED ON NOTIONAL ESTATE

DOBELL v. *PARKER*

The recent decision of the New South Wales Full Court in *Dobell* v. *Parker*,[1] which determines certain important incidents of the statutory right of the administrator of a deceased person's estate to recover death duty assessed on notional estate,[2] is the most comprehensive treament to date of s.120(1) of the Stamp Duties Act, 1920-1958 (N.S.W.), (Act No. 47, 1920 as amended).

Section 120 (1) provides:

> Where any property which is or the value of which is included in the dutiable estate of a deceased person is vested in any person other than the administrator[3] the duty payable in respect thereof (other than death duty separately assessed in respect of non-aggregated property) shall be paid by the persons entitled thereto, according to the value of their respective interests therein, to the administrator.

This provision, which is the sole reference in the Act to this subject, simply gives an administrator a bare right to recover duty assessed in respect of notional estate without prescribing how, where, when and when not, it may be recovered. Essentially the section provides that when certain contingencies occur (i.e., the value of any property is included in the dutiable estate and the property is not vested in the administrator) the notional estate duty shall be paid to the administrator by the persons entitled to such property. No method of recovery is specified; the administrator is merely given a bare statutory right to "be paid by the persons entitled thereto". Does this mean he may bring a common law action for debt? Or does it mean he must use the statutory method of recovery provided elsewhere in the Act? Or again does it mean that he may have to go to a court of equity to seek his redress? No particular tribunal or tribunals in which the notional duty may be recovered is prescribed. There is also no mention

[1] The Full Court's decision was not reported at the time of writing. The decision at first instance is reported in 76 W.N. (N.S.W.) 356. (The Full Court's decision is now in (1960) 77 W.N. 526 (N.S.W.)—*Ed.)*

[2] That is, estate for death duty purposes only, not in the hands or under the control of the administrator as part of the actual estate of the deceased. What comprises notional estate is set out in s.102(2) of the Stamp Duties Act, 1920-1958 (N.S.W.).

[3] "Administrator" for the purposes of the Act, and also where used in this article is a general term for the legal personal representative and includes "executor".

of the relevant time when the "persons entitled" to the notional property become liable to pay duty in respect of such property. Is it to become payable at the date of death of the deceased, or at the time of assessment, or at the time of the issue of the writ of recovery? The answers to all these queries were left by the legislature to be supplied by the judiciary.

These incidents of recovery are of major practical importance to an administrator, as it is the usual practice in New South Wales for the Commissioner to assess an administrator for the total duty payable on both notional and actual estate; and it is suggested by the writer that the legislature in one of its frequent amendments of the Act should direct its attention towards expansion of s.120 and legislate to remedy its present inadequacies. It is submitted that a sound basis for such an amendment can now be found in the judgment of Owen, J. (affirming the decision of Stephen, D.C.J. at first instance) in *Dobell* v. *Parker*.[4]

The facts in this case were briefly as follows: The plaintiff was the executrix and sole beneficiary of the estate of M who died in 1954. The total value of the estate in the hands of the executrix was £373 and death duty on this amount was assessed at £20/14/10. In 1939, however, the deceased had sold certain land. The contract of sale provided that a lump sum payment of £1615 was to be made on completion, and that in addition the purchaser was to pay to the vendor and his wife, or the survivor of them, a sum amounting to at least £13 per month. The deceased's interest in the land was duly transferred and appropriate security documents securing the monthly payments executed.

> Under s.102(2)(c) of the Stamp Duties Act, 1920-1958:
> For the purposes of the assessment and payment of death duty . . . the estate of a deceased person shall be deemed to include and consist of . . . any property passing under settlement, trust or other disposition of property . . . which is accompanied by the reservation or assurance of, or a contract for, any benefit to the deceased for the term of his life or of the life of any other person, or for any period determined by reference to the death of the deceased or any other person.

"Disposition of property" is defined by s.100 to mean *(inter alia)* "any conveyance, transfer, assignment, mortgage, delivery payment or other alienation of property whether at law or in equity".

The Commissioner claimed that the transaction in question fell within the provisions of s.102(c), and included in the assessable estate of the deceased the sum of £8795 representing the difference between the value of the land at the death of the deceased, and the £1615 lump sum payment made by the defendant under the 1939 contract.[5] The duty assessed in respect of this figure amounted to £923/9/6. The defendant, who was still the owner of the notional estate at the death of the deceased, although he had disposed of it subsequently, was sued by the administrator for recovery of this sum. The action was commenced by default summons in the District Court. The amount of duty in question was not at any time paid by the plaintiff to the Commissioner.

In the District Court before Stephen, D.C.J., counsel for the plaintiff based his case squarely on the provisions of s.120(1), claiming that under this section the administrator was entitled to recover the duty assessed in respect of the

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[4] (1959) 76 W.N. (N.S.W.) 356.

[5] In referring to the deduction of this sum Hardie, J. stated that for such action "there would appear to be no warrant or justification under the Act". This would seem an admonition of the Commissioner for his "benevolent" administration of what surely is one of the most stringent provisions of the Act. In times of economic inflation, particularly in respect to rising land values, an assessment under s.102(2)(c) can be an onerous burden, *a fortiori* because it is usually unexpected.

It appears harsh that no provision is made in the Act allowing the deduction of any moneys paid or of consideration passing between parties to a transaction caught by s.102(2)(c), which fact the Commissioner has apparently appreciated by subtracting moneys paid by way of deposit or part payment from the value of the property at the date of death.

notional estate. Counsel for the defendant contended that the action could not be maintained on the following grounds: (a) that the subject transaction was not a "disposition of property" within the meaning of s.102(2)(c); (b) that s.102(2)(c) did not apply to a disposition for which full commercial consideration was given; (c) that the land had ceased to be vested in the defendant before the date of assessment; (d) that no relationship of debtor and creditor was created between the parties by s.102(2)(c); and (e) that the plaintiff had not first paid the duty to the Commissioner. Stephen, D.C.J., whose decision was substantially affirmed by Owen, J. (with whom Collins, J. agreed), rejected the defendant's claims and held that the plaintiff was entitled to recover the duty claimed.[6]

The Full Court had no difficulty in rejecting the appellant defendant's first and second submissions ((a) and (b) above). The Privy Council in *Ward* v. *Commissioner of Inland Revenue*[7] had dealt with similar New Zealand legislation and decided that "disposition" is "not a technical word, but an ordinary English word of very wide meaning". This, together with the definition of "disposition of property" in s.100, was fatal to the appellant's claim. The appellant's third submission ((c) above) involved the question of the time at which the holder of the notional estate became liable to pay the duty assessed. If the time was the date of assessment, or the date of the issue of the summons, the defendant in this case would not have been liable as he would not have been the "person entitled thereto" within the meaning of s.120(1).[8] The Full Court agreed with the trial judge's ruling that the relevant time was the date of death of the deceased. Stephen, D.C.J. had reached this conclusion on a "proper reading" of the various provisions in s.102(2)(c), wherein a general emphasis is placed on the time of death, and on the authority of *Ex Parte the Commissioner re Morrison*[9] and *Bell* v. *The Master in Equity*.[10]

Perhaps the most important issues for consideration in the present case, and indeed the most significant to administrators generally, arose out of the defendant's submissions that firstly, the relationship between the plaintiff and defendant was not that of debtor and creditor, and therefore that the plaintiff could not sue for the duty as a debt at common law, and secondly that the payment of the duty by the plaintiff to the Commissioner was a condition precedent to the bringing of an action at law ((d) and (e) above).

The former submission was rejected by the judge at first instance and also by Owen, J. mainly on the ground that in the absence of any express provision in s.120(1) dealing with the method of enforcing an administrator's claim, there was no good reason why the obligation of the owner of the notional estate to pay duty assessed thereon should not be enforced by an action at law. Their

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[6] It is to be noted that the plaintiff's claim for interest was rejected mainly on the basis that it was not covered by the terms of s.120(1).

[7] (1956) A.C. 391.

[8] He had disposed of the property shortly after the death of the deceased and was not its owner at the date of the issue of the assessment by the Commissioner.

An interesting problem would have arisen if the defendant had transferred the property to a third party prior to the death of the deceased. It seems that if the third party transferee were a *bona fide* purchaser for value without notice he would be protected by s.115(2) and the administrator would be liable to pay the duty assessed in respect of the property. In the present case the Commissioner would lose, as by s.114(3) the administrator is only liable to the extent of the estate assets she has received as administrator. The administrator of course would also lose the whole of the £373 which was the total value of the estate in her hands. *Union Trustee Co. of Australia Ltd.* v. *Maslin & Ors.* ((1941) 41 S.R. 26) decided that the application of s.120(1) is confined to existing property which is actually vested in some person or persons at or after the death of the deceased. It did not, however, deal with the position where existing property had been transferred to a *bona fide* purchaser. *Semble* if the third party transferee in the above hypothetical case had notice (and what is to be regarded as notice in such a case could be a controversial issue) the charge on the property constituted by s.115(2) would be enforceable against him.

[9] (1936) 36 S.R. (N.S.W.) 137.

[10] (1877) 2 A.C. 560.

Honours considered that the only method of collection prescribed by s.120, namely that contained in subs. (5), which allows "the Commissioner or any person interested" to apply to the Supreme Court for an order that such property or part of it be sold, did not limit the right of recovery given by subs. (1). Originally s.120(1) provided that duty payable "shall be paid *thereout* by the persons entitled thereto". In 1923 in *Perpetual Trustee Co. Limited* v. *Adams*[11] it was held that the subsection imposed no personal obligation on the donee. However, an amendment in 1931 eliminated "thereout" from the subsection; the effect of the alteration being to create "a personal liability in certain persons to recoup duty to the administrator instead of restricting him to his recourse against the property itself".[12] Subsection (5) was not affected, and the writer suggests that this particular subsection, referring as it does to selling property, is by virtue of the 1931 amendment no longer relevant to subsection (1).

Hardie, J., however, entertained considerable doubt as to the right of an administrator under s.120(1) to recover the notional estate duty by means of an action at law. His Honour (at p.536) considered that this right—

> . . . depending as it often must on the interpretation of a trust instrument and on the valuation of a number of beneficial interests in the subject property, has qualities and characteristics of a kind usually associated with equitable rights and claims rather than legal ones; further, the right can be excluded or modified by the provisions of the will of the deceased and, as already indicated, the extent of the right can, in cases such as the present one, depend upon the value of the assets—the actual estate.

It follows that "the right may well be only enforceable by appropriate proceedings in Equity and not by an action at Law". His Honour went on to say that it was not necessary in the circumstances to resolve this question, as the District Court proceedings related to an estate of the value of less than £500, and the Court would have jurisdiction to entertain the claim even if it were an equitable claim and not a legal one. With respect, it is submitted that the correctness of this view is open to doubt in that it confuses recovery of duty determined by an undisputed assessment, and recovery determined by a disputed assessment. Further, the acceptance of this view would involve for administrators serious procedural difficulties. The writer considers that the right given to the administrator by s.120(1) is a simple right to recover the duty assessed on notional estate by the Commissioner; that is, a right to recover a sum certain. As such this does not involve interpretation of trust instruments or equitable characteristics or qualities requiring equitable methods of enforcement. The administrator simply has a right to sue for a certain sum of money which he is required to pay by the Commissioner. It is submitted that if the owner of the notional property desires to dispute the assessment, he should use the usual procedure allowed by s.124 of the Act and request the Commissioner to state a case for the opinion of the Supreme Court.

The second submission of the defendant, that payment of the total duty assessed is a condition precedent to recovery, was based on the widely held belief that an administrator had first to pay all duty assessed before he could recover under s.120(1). This belief stemmed mainly from inferences drawn from certain provisions of the Act,[13] and from certain *dicta* of Street, C.J. in Eq. in *Perpetual Trustee Co. Limited* v. *Adams*,[14] and *Ex Parte Union Trustee Co. of Australia Limited*,[15] of Jordan, C.J. in *Union Trustee Co. of Australia Limited* v. *Maslin and Ors.*,[16] and of Rich and McTiernan, JJ. in *Hill* v. *Hill*.[17] The Full Court,

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[11] (1924) 24 S.R. (N.S.W.) 87. [12] (1941) 41 S.R. (N.S.W.) 26, 30, *per* Jordan, C.J.
[13] See e.g. s.114(3), (4), and s.120.
[14] (1924) 24 S.R. (N.S.W.) 87, 100.
[15] (1930) 30 S.R. (N.S.W.) 431, 436.
[16] (1941) 41 S.R. (N.S.W.) 26, 30.
[17] (1933) 49 C.L.R. 411, 418.

however, held that in all these cases the courts were not concerned directly with the question arising in the present case, namely whether an administrator can resort to s.120(1) without first paying the duty levied upon the notional estate. It therefore treated the *dicta* as being confined to the usual situation where the administrator has paid all the duty before commencing an action against the owner of the notional estate. The Court considered that there was nothing in s.120(1) requiring the administrator to pay all duty as a condition precedent to his bringing an action against the notional estate holder. In the words of Owen, J. (at p.531):

> So to construe the subsection would produce strange results in cases such as the present in which the value of the actual estate in the administrator's hands is insufficient to meet the duty levied on the notional estate.

If the administrator here were obliged to pay the duty prior to commencing such action she would have had to have paid it out of her own pocket, and then to have commenced proceedings against the notional estate holder. The element of risk arising in any legal action might well make her think carefully before following this course, *a fortiori* because of the reticence of s.120(1). And assuming she lost the action, would she be entitled to a refund of the extra duty paid from the Commissioner pursuant to s.114(3)? (This section prescribes that the administrator shall not be liable for any duty in excess of the assets he has received as administrator.) *Semble* that she would at best lose the costs of the action.

From the foregoing the following points of major significance to an administrator arise:

(1) An administrator may sue for notional estate duty without first having to pay the Commissioner the total death duty assessed.

(2) The obligation on the holder of the notional estate to pay duty in respect thereof to the administrator may be enforced by an action for debt at law.

(3) The relevant time at which the holder of the notional estate becomes liable to pay such duty is at the date of death of the deceased, not at the date of assessment.

The first two points, which had not been previously decided, represent an important benefit to administrators generally, and particularly to administrators in a similar position to that of the executrix in *Dobell* v. *Parker*,[18] where the notional estate duty exceeds the total value of the estate assets. It is certainly more advantageous and convenient in many instances for an administrator to sue for recovery of the notional estate duty rather than to realize actual estate assets to pay such duty. To be able to sue in debt in a court of law allows a convenient method of recovery. The administrator has open to him the simpler procedure of suing by default summons in the District Court, or by specially endorsed writ in the Supreme Court. However, this second aspect of the case is blurred by the disparity of the view of Hardie, J., compared with the clear statement of Owen, J. on the subject. A cautious administrator might well pause to consider which method of recovery he should resort to in a difficult case. On the basis of the *dictum* of Hardie, J., he might be obliged to proceed in a court of equity. This *dictum* could also be seized upon as a basis for later judicial attempts to confine the wider view expressed by Owen and Collins, JJ., that an administrator may recover notional duty assessed in the same manner as one may recover a debt at law. Added to this doubt is the feeling, based on *dicta* in *Hill* v. *Hill*,[19] that the High Court may not give such a wide construction to the section as that given by the Full Court.

For these reasons, and in the interest of clarity and certainty it is submitted

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[18] (1959) 76 W.N. (N.S.W.) 356.
[19] (1933) 49 C.L.R. 411.

by the writer that the legislature should consider the difficulties placed upon an administrator by its fiscal legislation, and should adopt proper provisions for recovery of notional estate duty by laying down the incidents of the right of recovery given by s.120(1). It is submitted that a suitable subsection should be inserted establishing: (a) the right to recover notional estate duty before paying the total death duty assessed; (b) the right to recover such duty by an action of debt at common law; (c) the courts in which such action could be brought; (d) the relevant time when liability to pay notional estate duty arises; (e) a time limit within which an administrator could bring such action before intervention by the Commissioner.[20] Although it might seem that any such legislation would only by making statutory what has already been decided in *Dobell* v. *Parker*[21] and other cases, it is submitted that for the above reasons legislative intervention is necessary to settle finally the position.

It is suggested by the writer that whilst essaying such a task the legislature could also consider the position of an administrator where the notional property assessed for duty has ceased to exist or has been transferred to a *bona fide* purchaser for value without notice. *Union Trustee Co. of Australia Limited* v. *Maslin and Ors.*[22] indicates that in the former situation (and it is submitted the same can be inferred in the latter) the administrator cannot recover the notional estate duty from a prior holder of such estate and is liable, subject to s.114(3), to pay the total assessment on both notional and actual estate. This position works undue hardship on the administrator and, it is submitted, is in need of legislative review. The writer is aware that the existence of this situation has been well known since *Adams' Case*[23] in 1923, and also that a plea for amendment which would result in some loss of revenue (however slight) has little appeal to legislators. As witnessed by the terse words of Jordan, C.J. in *Maslin's Case*:[24]

> The legislature had received with equanimity the decision of 1923 affecting, as it did, only the right of an administrator to impose on someone else the burden of a tax which had to be paid in any event; but the prospect of new means of enlarging the field of taxation . . . appears to have helped at length to galvanise it into action.

In relation to the present law of death duty in New South Wales the decision in *Dobell* v. *Parker*[25] is perhaps the most important single case which deals with s.120(1) of the Stamp Duties Act, 1924-1958. It considerably alleviates the task of an administrator saddled with the burden of collecting death duty on property in which he usually has no interest. Its practical importance to the administrator cannot be over-estimated.

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PRINTED WILL FORM: SIGNATURE WRONGLY PLACED *IN THE WILL OF HEMPEL*

The appellant was applicant for probate of the will of Edward Charles Hempel,[1] under which she was appointed "execut. . .", and also the sole beneficiary. The will was made on a printed will form, of which the first three pages are here relevant. The first page, after the usual heading, provided for the

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[20] This incident might be worthy of insertion as Hardie, J. indicates the anomalous situation in which the holder of the notional estate finds himself as he is liable to be sued by either the administrator or the Commissioner at the same time.

[21] (1959) 76 W.N. (N.S.W.) 356.
[22] (1941) 41 S.R. (N.S.W.) 26.
[23] (1924) 24 S.R. (N.S.W.) 87.
[24] (1941) 41 S.R. (N.S.W.) 26, 29.
[25] (1959) 76 W.N. (N.S.W.) 356.
[1] (1960) 77 W.N. (N.S.W.) 1.