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.

R. S. THOMSON, Case Editor—Fourth Year Student.

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

[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.

appointment of a legal personal representative, the rest being space for the testator's dispositions. At the top of the second page appeared the words "the Will continued . . .", the rest of it being also blank, save for the addition at the foot of the page of the necessary wording for the insertion of the date and the signature of the testator, a printed attestation clause, and provision for the signatures of attesting witnesses. The top half of the third page set out in print a number of model blank forms of special legacies and bequests, for instance to servants, or certain organizations. After a heavy black line the other half of the third page contained a special short form of will, for a testator wishing to leave everything to his wife. At the foot of the short form of will (that is, at the foot of page three) there was a dotted line, under which was written "Signature to be here", and also a blank attestation clause.

The formal part of the will on the top of the first page was completed, appointing the appellant simply as "execut. . ." and then there had been written by the appellant, in the space provided, and at the testator's request, a disposition by which the testator left all his property to the appellant. The testator then signed his name above the words "Signature to be here" at the foot of the short form of will on the third page; but the two attesting witnesses signed on the second page, that is, in the correct place. The appellant, on the testator's request, signed the second page, where his own signature should have appeared, but did not.

Myers, J. refused to grant probate of the will. The matter was put to his Honour at first instance simply on the basis that the first two pages should be admitted to probate, because the signature at the end of the third page could be regarded as being opposite to the end of the will, which was contained on the first two pages of the will form. Authority for this proposition is s.8(1) of the Wills, Probate and Administration Act (Act No. 13, 1898 (N.S.W.) as amended) which provides that:

> every will shall so far only as regards the position of the signature of the testator be deemed to be valid within the meaning of this part of this Act, if the signature shall be so placed at, or after or following or under or beside or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will.

His Honour agreed that it could be shown that physically the signature was opposite to the foot or end of the will, and thus that the provision of s.8(1) of the Wills, Probate and Administration Act had been complied with. His Honour, however, pointed out the difficulty of showing that the signature of the testator was only referable to pages one and two, and went on to say, "Indeed on its face it (the signature) is clearly intended to authenticate a will leaving the whole of the testator's property to his wife."[2] He was in fact divorced.

No argument was directed to his Honour as to why the signature of the testator should not be dissociated from the printed words on page three and his Honour refused to grant probate. His Honour said, "in any view it is not possible by any manipulation or folding or by any way of reading the document to hold that the signature was placed at the foot or end thereof",[3] that is, at the foot or end of the second page of the will form within s.8(1) of the Wills, Probate and Administration Act. His Honour here adopted the words of Harvey, C.J. in Eq., in the *Will of Moroney*[4] approved by Starke, J. in *Cinnamon* v. *Public Trustee (Tas.)*.[5] These cases, however, were concerned with the incorporation of writing, on pages subsequent to the signature, into the will, whereas in this case it is necessary to examine the effect of the printed provisions on

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[2] *Id.* at 2.
[3] *Ibid.*
[4] (1928) S.R. (N.S.W.) 148.
[5] (1934) 51 C.L.R. 420.

page three, which were, in any event, above the signature of the testator.

On appeal to the Full Court, Counsel relied on the proposition arising from a line of cases which are summarised in *Mortimer on Probate Law and Practice*.[6] It is there stated that "if it can be propounded to the satisfaction of the Court that . . . any clause in the document propounded as a will has been introduced without the knowledge and approval of the testator . . . such clause may be rejected and the remaining portion of the will alone admitted to probate. . . ."

In this instance the difficulty was caused by the presence of the short form of will in favour of the wife. It is submitted that the two parts of page three must be treated as alternatives, because the first part provided for dispositions to various people and institutions, while the second part provided a form of will where one wished to leave everything to one's wife. A second reason for discounting the forms of bequests and legacies on the first part of page three is that they would have to be incorporated into pages one or two of the will, in order that the signature of the testator, if it was to be effective, would be at the foot or end of the will, i.e., in the correct place at the foot of page two. No provision was made after the special forms of bequests and legacies on the first part of page three for a signature, until the signature at the end of the short form of will in favour of the wife. However, the onus remained upon the appellant to show that all the printed matter on page three should be disregarded. The evidence showed that the testator had read through the will form. Mortimer's proposition requires that the testator should have "knowledge" of the writing and have "approved" it, and it is clear that the testator had the necessary knowledge.

It was argued before the Full Court on the evidence that the testator's testamentary intention was limited to what appeared on the first and second pages of the will. It was further argued that the writing on the third page, including the short form of will in favour of the wife, should be ignored and that, therefore, there was no difficulty as to the testator's signature being at the foot or end of the will. The argument, therefore, turns upon whether or not the testator approved the printed words on page three of the will. The Full Court stated that "the question is not merely whether the portion of the will in dispute came to the attention of the testator, but whether it came about in such a way that he must be assumed to have confirmed it by his subsequent signature as being a will".[7] It seems clear from the judgment, that the writing on page three did not comply with this test; the clause whereby the testator left everything to the appellant in fact was adequate to dispose of all his property; he had disposed of all his property as he wished and he had no need for the special legacies and bequests. Further, the testator had no wife, and he could not have signed the document with any intention to benefit a non-existent wife.

There must be in every will testamentary intention and, as shown above, there could not have been any testamentary intention in relation to the printed words on page three. This reasoning provides the correct approach to the interpretation of the word "approval", since it shows that the mind must go with the signature, in order to provide the necessary testamentary intention. The Full Court, therefore, held that the special forms of bequest and legacy would have to be incorporated into the will on pages one or two if they were to be of any effect. If they were not so incorporated, they would follow the testator's signature at the foot of page two and be of no effect. Further, the place for the signature on page three was only in reference to the special short form of will in favour of a wife and in the instant case the Full Court stated that "if he intended to include also the alternative will form, he must be deemed, according to its tenor, almost in the same breath to have appointed a different executrix, namely, a non-existent wife, and then to have made a totally different disposi-

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[6] (1927, 2 ed.), 86.

[7] (1960) 77 W.N. (N.S.W.) 1, at 3.

tion of the whole of his property".[8] "By mistake he put his signature in the wrong place and with no intention of giving testamentary effect to the printed words immediately above it".[9] Hence, the Full Court allowed the appeal and granted probate of the first two pages of the will form and of the signature of the testator appearing on the third page.

The real question raised in this case was not that the signature was not at the foot or end of the will, as was argued at first instance, but rather the effect of any writing intervening between what the testator apparently intended as the dispositions in his will and the signature. The Full Court proceeded upon the ground that there must be testamentary intention or approval in relation to the whole of the will and as it did not find that this existed in respect of the printed form on page three, it was prepared to disregard it and to make the grant of probate as set out above.

This case illustrates one of the many pitfalls open to the layman who tries to draw his own will, and this is a continuing problem. As Harvey, J. said in *Will of Moroney*,[10] "the cases in which the use of printed forms of wills have given rise to points of difficulty are numerous and are constantly recurring".

J. M. N. ROLFE, Case Editor — Third Year Student.

EQUALITY IS EQUITY

DIWELL v. *FARNES*

The problem of determining the basis of division between two parties of property acquired by them at a time when neither of them could be taken to have contemplated any need for such a division, inevitably presents courts with many difficulties. The problem arises quite frequently where spouses both contribute to the purchase of property, title is taken in the name of one only and the matrimonial union subsequently comes to grief. In one such case[1] Sir Raymond Evershed, M.R. observed[2] "that to fall back on what may be called a Solomonesque judgment" in such cases and order that the property be shared out equally "is perhaps to yield to the obvious temptation to shirk more difficult computations". Nevertheless, the Master of the Rolls proceeded to take that course in the case before him, observing that "where the Court is satisfied that both the parties have a substantial beneficial interest and it is not fairly possible or right to assume some more precise calculation of their shares, I think that equality almost necessarily follows".[3]

However, in *Diwell* v. *Farnes*,[4] the Court of Appeal, when asked to extend the application of this principle to a *de facto* matrimonial relationship, did not yield to the "obvious temptation" and it is submitted that, in failing to yield, the Court illustrated how inequitable Equity can be. It is submitted that, in seeking to uphold conventional morality, the majority of the Court, in fact, came to a decision far less pleasing morally than had they chosen to recognise a sort of quasi-matrimonial home and fallen back on the Solomonesque principle applied by the Master of the Rolls.

Before the decision of *Diwell* v. *Farnes*[5] it had seemed that the position as to the joint property of spouses who had come to live apart was comparatively well settled. In *Jones* v. *Maynard*[6] Vaisey, J. had decided that, in the case of a

[8] *Ibid.*
[9] *Ibid.*
[10] *Supra* n. 2.
[1] *Rimmer* v. *Rimmer* (1953) 1 Q.B. 63.
[2] *Id.* at 72.
[3] *Ibid.*
[4] (1959) 1 W.L.R. 624.
[5] *Ibid.*
[6] (1951) 1 Ch. 572.