the pre-emptive rights article by a special resolution; but this entails the risk that such a special resolution would constitute a fraud on the minority.[22]

The device would in any case be accompanied by other hazards. There would, for instance, be a difficulty in assessing damages if the vendors decided to break their contracts by revoking the proxies. It would be impossible to show damage commensurate with the loss actually suffered by the purchaser. For example, if only fifteen percent break their contracts, the purchaser will be deprived of control of the company. How is one to assess the value of such control in awarding damages to the purchaser? It is an almost impossible task. Thus, if the vendors break their contracts the purchaser will not be assured of recovering adequate damages. Moreover, insofar as there would be no agreement to transfer the shares, the vendors would be under no obligation to transfer, and though they have resigned their voting rights, they would still have the dividend rights. This second difficulty indicates the clumsy nature of such a procedure, and also stresses the need for an agreement to transfer. If, however, there is an agreement to transfer, the vendor would have to follow out the procedure prescribed in Article 9, and the device would fail in its objective.

The view of the pre-emptive rights article taken by the House of Lords in the *Lyle & Scott Case* would appear to include any attempt by a takeover bidder to avoid compliance with the requirements of the article. The *Lyle & Scott Case* is of value to the company lawyer and the student of company law, since it affords a detailed analysis by the House of Lords, of a very frequently used article, the pre-emptive rights article. On the analysis afforded by this case, the pre-emptive rights article emerges as an extremely effective way of preserving tight control over the membership of a proprietary company. The principal significance of the case, however, is that it demonstrates that the pre-emptive rights article gives a very strong protection to the directorate of a proprietary company, against the wiles of the voracious takeover bidder.

B. J. TAMBERLIN, Case Editor — Third Year Student.

REMEDIES OF MINORITY SHAREHOLDERS
SCOTTISH CO-OPERATIVE WHOLESALE SOCIETY LTD. v. *MEYER AND ANOR.*

One remedy available to minority shareholders against directors or majority shareholders is the petition for the winding-up of the company on the ground that "oppressive conduct" has made this "just and equitable". This, however, will be cold comfort if the oppressive conduct has depressed the value of the company's shares. Recognizing this, the English legislature has provided an alternative remedy in cases of oppression. Under s.210 of the (English) Companies Act, 1948 (11 & 12 Geo. 6, c.38), the court, if satisfied on petition on grounds of oppression that the facts would justify a winding-up order, but that this would unfairly prejudice the oppressed members, may make such order as it thinks fit. The order may provide for the regulation of the future conduct of the company's affairs, or for the purchase of some members' shares by others, or for other means of bringing the matters complained of to an end.[1]

[22] It is a controversial issue whether or not such a special resolution would constitute a fraud on the minority, due to the Court of Appeal decision in *Greenhalgh* v. *Arderne* (1951) Ch. 286, where the Master of the Rolls said, at 291: "A special resolution of this kind would be impeached if the effect of it were to discriminate between the majority shareholders and the minority shareholders so as to give the former a benefit of which the latter were deprived." In this case the pre-emptive rights clause was *varied* by the majority and not extinguished, and such a variation was held not to constitute a fraud on the minority. A special resolution extinguishing the pre-emption article, however, could be said to be taking away from the minority rights which were vested in them by the articles. Thus it is submitted that a special resolution cancelling such an article altogether would constitute a fraud on the minority.

[1] "S.210: (1) Any member of a company who complains that the affairs of the company

The instant case, the first decision of the House of Lords on s.210, came on appeal from the First Division of the Scottish Court of Session,[2] whose decision was unanimously affirmed.

In 1946 the appellant company, a co-operative wholesale society (referred to hereafter as "the society"), desiring to enter the rayon trade, formed a subsidiary company (referred to hereafter as "the company") to enable it to manufacture and sell rayon materials for which licences were then required. The two respondents, Meyer and Lucas, who were experienced in the trade and had the connections necessary to obtain licences, were appointed managing directors of the company and took up almost half the issued shares. The rest were held by the society, which appointed three nominee directors. The company and the society co-operated under a scheme whereby the society purchased the rayon yarn, wove the cloth and sold it to the company for dyeing and finishing, the company being dependent for its supplies upon the society's mill. Under this arrangement the company prospered for several years. However, in 1951 a serious dispute arose between the society and the respondents concerning a proposed realignment of the company's shareholding. Unhappily for the respondents, at about this time rayon licensing controls were lifted so that the society no longer needed them to get supplies of yarn, and proceeded to form within itself a department capable of carrying out the company's functions. The society then set out to destroy the company by diverting to its own department the material produced by its mill, and refusing to supply the company with material except at higher and non-competitive prices. The nominee directors, although aware of this policy, did not inform the respondents, but maintained a "masterly inactivity". In consequence the company's business came to a standstill and the value of its shares was greatly reduced. In 1953 the respondents presented a petition under s.210, as a result of which the court ordered the society to purchase the respondent's shares at £3/15/0 per share. This order was unanimously affirmed by the House of Lords.

Before considering the two major obstacles to relief under s.210, we should note in passing two general questions as to the operation of the section. The first goes to the *locus standi* of the petitioner. It was decided in the earlier Scottish case of *Elder* v. *Elder and Watson*[3] that relief under the section will only be granted if the petitioner is complaining of oppression towards him *qua* member, and not in the character of director or employee of the company.[4] This requirement caused no problem in the present case, since the oppressive conduct resulted in a depression of the value of the respondents' shareholding in the company and thus injured them as members.

The second question goes to the meaning of the word "oppressive". In *Elder* v. *Elder and Watson*, Lord Cooper had said "the essence of the matter seems to

---

are being conducted in a manner oppressive to some part of the members (including himself) . . . may make application to the court by petition for an order under this section.

(2) If on any such petition the court is of opinion:—

(a) that the company's affairs are being conducted as aforesaid; and

(b) that to wind up the company would unfairly prejudice that part of the members;

but otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound up, the court may, with a view to bringing to an end the matters complained of, make such order as it thinks fit, whether for regulating the conduct of the company's affairs in the future, or for the purchase of the shares of any members of the company by other members of the company, or by the company, and, in the case of a purchase by the company, for the reduction accordingly of the company's capital, or otherwise."

[2] In the House of Lords (1959) A.C. 324; below, *sub. nom. Meyer* v. *Scottish Textile and Manufacturing Co. Ltd.* (1957) S.C. 110; (1957) S.L.T. 250.

[3] (1952) S.C. 49.

[4] Lord Keith, however, qualified this by stating that conduct towards a member in his capacity as a director might be relevant "if it is part and parcel of conduct designed to react on the rights of members as such, or to further a scheme whereby the rights of a section of members may be prejudiced". *Id.* at 58.

be that the conduct complained of should at the lowest involve a visible departure from the standards of fair dealing, and a violation of the conditions of fair play on which every shareholder who entrusts his money to a company is entitled to rely".[5] In the present case Viscount Simonds relied on the dictionary meaning of the word — "burdensome, harsh and wrongful" — and this was adopted and applied by the Court of Appeal in the later case of *re Harmer*.[6] Professor Gower notes on this that "the new remedy is in some respects narrower and in others wider than those available at common law. A persistent and persisting course of unjust conduct must be shown; but such conduct need not involve any actual illegal or improper activity such as would afford grounds for an action by or on behalf of the company."[7]

The first major argument for the appellant was that, since it was common ground that it was just and equitable that the company should be wound up, s.210 was not an appropriate remedy because relief under that section is only available as an alternative to winding up. It was argued that the legislature contemplated a business with a continuing life ahead of it, whereas here the company's business was virtually at an end.

On a literal reading of s.210 this point was arguable. Indeed, in a South African case on a similar section it was decided that an order could be made only if it could effectively enable the company to survive.[8] However, their Lordships decisively rejected this argument and saved the remedy from an unhappy emasculation. As Lord Cooper had pointed out, if the appellants were right, there would be a remedy for slight oppression but not for grave destruction. Lord Keith of Avonholm said:[9]

> . . . it was said that appeal could not be made to s.210 unless the company had a continuing life ahead of it and here it was clear that the company would have to be wound up. But that means that if oppression is carried to the extent of destruction of the business of the company no recourse can be had to the remedies of the section. The present position is due to the oppression and but for the oppression it must be assumed that the company would be an active and presumably flourishing concern. The section is, in my opinion, very apt to meet the situation which has arisen.

Lord Denning expressed himself in similar terms.[10]

The most serious argument raised by the appellant was that a shareholder who invokes s.210 must show "that the affairs of the company are being conducted in a manner oppressive". It was strongly argued that, since the conduct which ruined the company was in fact the conduct by the society of its own affairs (in particular the transferring of the business of rayon processing from the company to a department within its own organization), this requirement was not satisfied. In solving this difficulty their Lordships made important general observations on the relationship between a holding company and its subsidiary.

In holding that the conduct of the society amounted to misconduct of the affairs of the company their Lordships pointed to two elements in the situation; first, the society's policy of forcing the company out of business; and second the concealment of this policy by the society's nominee directors. The silence of the nominee directors in the face of the deterioration of the company's activities while the society was acting positively to destroy the company could, their Lordships felt (although Lord Morton of Henryton expressed some misgivings), fairly be described as oppressive conduct of the company's affairs. But was the second element, the presence and silence of the society's nominee directors on

---

[5] *Id.* at 55.
[6] (1958) 3 All E.R. 689, *per* Jenkins, C.J. at 701 and Romer, C.J. at 706.
[7] *Modern Company Law* (2 ed. 1957) 543.
[8] *Ivine Johnson Ltd.* v. *Oelofse Fisheries Ltd.* (1954) (1) S.A. 231.
[9] At 364.
[10] At 368-369.

the company's board, merely an aggravating circumstance or was it necessary to bring the case within s.210 ?

Lord Denning seems to regard the presence of the nominee directors on the company's board as the vital *nexus* between the society's hostile policy and the company's affairs. This approach provides a straightforward solution to the problem here of showing an "oppressive conduct" of the affairs of the company. The inactivity of the nominee directors was a form of passive misconduct of the company's affairs, and the element of wrongfulness necessary to constitute oppression (oppressive conduct must not only be harsh but also wrongful) was constituted by their breach of their ordinary duty to act *bona fide* for the company's benefit. However, this solution of the immediate problem brings its own difficulties. Could the society have left the respondents without remedy simply by withdrawing its nominees from the company's board? If one purpose of s.210 is to protect an independent minority of shareholders in a subsidiary company, then it would drastically curtail this protection if a holding company can drive a subsidiary out of business with impunity, by resorting to the simple device of removing its nominee directors from the subsidiary's directorate.

On the other hand, it seems impossible to conclude from the judgments of Viscount Simonds and Lord Keith of Avonholm that the only tangible basis for relief was the (passive) misconduct of the nominee directors. Viscount Simonds did point to the duty of disclosure owed by the nominee directors to the company, to their failure to observe this duty, and said "that is how they conducted the affairs of the company".[11] But then he spoke of the reliance of the company upon the society, which was the result of the whole scheme of co-operation between the two and, looking at the "business realities of the situation",[12] he found a power to control the company's commercial operations, abuse of which amounted to misconduct of the company's affairs. Both he and Lord Keith of Avonholm examined the scheme of mutual co-operation on which the company's prosperity depended. Out of this scheme their Lordships spelled a fiduciary duty owed by the society towards the company, which operated to prevent the society from exercising its control of the company's destiny to destroy it, after it had ceased to be necessary to itself.

In holding, on this reasoning, that the society had conducted the affairs of the company oppressively, Viscount Simonds and Lord Keith of Avonholm had to find, first, that the society had a duty to deal fairly with the company, and then that its actions in breach of this duty amounted to conduct of the company's affairs, and not merely external conduct injuring the company. Lord Keith of Avonholm said:[13]

> The truth is that, whenever a subsidiary is formed as in this case with an independent minority of shareholders, the parent company must, if it is engaged in the same class of business, accept as a result of having formed such a subsidiary an obligation so to conduct what are in a sense its own affairs as to deal fairly with this expansion, that conducting what are in a sense its own affairs may amount to misconducting the affairs of the subsidiary.

The statement that conduct of the affairs of a holding company may also amount to conduct to the affairs of its subsidiary, would, it is submitted, be applicable only where the relationship between holding company and subsidiary is of unusual intimacy. In the present case the finding of such a relationship was clearly justified: indeed Lord Keith[14] went so far as to say that "the company was in substance, though not in law, a partnership consisting of the society, Dr. Meyer and Mr. Lucas". But it may be queried whether such an

[11] At 341.
[12] Here he is quoting Lord President Cooper in the Court below.
[13] At 362.
[14] At 361.

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".