Support for the decision in this case appears widespread among textbook writers,[11] a notable exception being Mr Fox in his textbook on the Transfer of Land Act 1954.[12] But it is submitted that Mr Fox's objections are more than sufficiently answered by the judgment in this case. It does not seem harsh that someone who takes by way of gift should take subject to prior equities. The volunteer will still become the registered proprietor, and anyone who deals with him, giving valuable consideration, will gain indefeasible title, freed from unregistered equities. This gap in the legislation, if gap it be, was surely the intention of the draftsmen of the system.

S. P. CHARLES

NEWTON v. COMMISSIONER OF TAXATION[1]

Income Tax—Arrangements to avoid tax—Companies liable to Division 7 tax unless sufficient distribution

Three private companies with interlocking boards of directors, L., M., and N. Motors, were engaged in the sale of motor vehicles. All had extremely large profits available for distribution, but it was intended that much of these would be reinvested. The problem confronting the directors was how to carry out this distribution and reinvestment whilst attracting the least possible taxation liability, which would have been fifteen shillings in the pound of taxable income. Thus an involved course was decided upon designed to alter the character of the profits concerned, so that they should not fall within the taxable income of the companies or the shareholders. Since, apart from some minor variations not producing any different consequences, this course was identical for each company, it will be necessary to state the position with regard to one only, L. Motors Pty Ltd.

In December 1949 the appellants (or persons for whom they were representatives) held 237,321 ordinary shares in the company. This constituted the entire share capital except for a comparatively small block of preference shares immaterial for the purposes of this note. Available for distribution were profits of approximately £460,000. In order to accomplish their ends, it would have been possible for the shareholders to have effected a conversion of the company into a public one and thereby to have avoided Division 7 tax, but this did not find favour. Accordingly the existing shares were divided into two classes. One third of each shareholder's holding became A ordinary shares to which special dividend rights were attached. The remainder became B ordinary shares and the unissued shares became B preference shares. Next the articles of associa-

[11] Hogg, *Australian Torrens System* (1905) 832-833; Hogg, *Registration of Title* (1920) 106-109; Wiseman, *The Transfer of Land* (2nd ed. 1931) 316; Baalman, *Commentary on the Torrens System in New South Wales* (1951) 149-150; Kerr, *The Principles of the Australian Lands Titles (Torrens) System* (1927) 195.

[12] *Transfer of Land Act 1954* (1957) 43.

[1] [1958] 3 W.L.R. 195; [1958] Argus L.R. 833. Judicial Committee of the Privy Council; Viscount Simonds, Lord Tucker, Lord Keith of Avonholm, Lord Somervell of Harrow, and Lord Denning. The opinion of the Board was delivered by Lord Denning.

tion were amended so that the holders of the A ordinary shares became entitled to the whole of the dividends declared by the company from that time until the dividends should reach a total of not less than £5 15s. 10d. in respect of each share and to a 5 *per cent per annum* cumulative preferential dividend from the beginning of the next month. The special dividend would amount to nearly £460,000. These shares were then sold to another private company, P. Ltd, at a price which was almost equal to the anticipated special dividend, and was intended from the financial position of this company to be paid from the dividend. P. Ltd also applied to the motor company for 402,000 newly issued 5 *per cent* preference shares and on the next day sold them to the original shareholders without profit. Thus at the end of the month L. Motors had distributed its special dividend which had found its way to the shareholders (the appellants) and £400,000 of which was reinvested by their taking up of the preference shares. P. Ltd had the still quite valuable A ordinary shares and a cash profit in addition as a reward for its part in the arrangement.

The Commissioner of Taxation was unaffected by this exercise of considerable ingenuity and assessed the dividend in the hands of the shareholders, imposing a fine as well. It was from this assessment that the matter went before Kitto J. and thence to the Full Court of the High Court, which found for the Commissioner. Finally by special leave the case came to be considered by the Judicial Committee of the Privy Council, which affirmed the judgment of the High Court.

The basis of the respondent's case was that this conduct offended against section 260 of the Income Tax and Social Services Contribution Assessment Act 1936-1951 (Cth.) and constituted an 'arrangement' which was void as against him and thus the dividends should be taxed in the hands of the shareholders. It is clear from the very terms of section 260[2] and the vast differences of view which underly the approaches of the judges to taxation problems that this was not simply a matter of statutory interpretation but contained some very delicate assessment by the courts of the moral and legal duties of the taxpayer. This is particularly clear when one compares the majority and minority views in the High Court. These difficulties may be seen quite easily in a statement of Knox C.J., who said:[3]

> The sections, if construed literally, would extend to every transaction whether voluntary or for value which had the effect of reducing the income of any taxpayer; but in my opinion, its provisions are intended

[2] 'Every contract, agreement, or arrangement made or entered into, orally or in writing, whether before or after the commencement of this Act, shall so far as it has or purports to have the purpose or effect of in any way, directly or indirectly
(a) altering the incidence of any income tax;
(b) relieving any person from liability to pay any income tax or make any return;
(c) defeating, evading, or avoiding any duty or liability imposed on any person by this Act; or
(d) preventing the operation of this Act in any respect,
be absolutely void, as against the Commissioner, or in regard to any proceeding under this Act, but without prejudice to such validity as it may have in any other respect or for any other purpose.'

[3] *Deputy Federal Commissioner of Taxation v. Purcell* (1921) 29 C.L.R. 464, 466.

> to and do extend to cover cases in which the transaction in question, if recognized as valid, would enable the taxpayer to avoid payment of income tax on what is really and in truth *his* income.

Though this *dictum* does not set any clear limits on the operation of the section, it does show that some limits are needed if the provision is to make any sense at all. The real issues involved are concerned with where those limits are to be placed and it is here that the differences of view previously mentioned become important. They may be illustrated by reference to two quotations used in the High Court in the instant case, the first by McTiernan J.[4] and the second by Taylor J.[5] in his dissent.

In *Latilla v. Inland Revenue Commissioners*[6] may be found

> My Lords, of recent years much ingenuity has been expended in certain quarters in attempting to devise methods of disposition of income by which those who were prepared to adopt them might enjoy the benefits of residence in this country while receiving the equivalent of such income without sharing in the appropriate burden of British taxation. Judicial dicta may be cited which point out that, however elaborate and artificial such methods may be, those who adopt them are 'entitled' to do so. There is, of course, no doubt that they are within their legal rights, but that is no reason why their efforts, or those of the professional gentlemen who assist them in the matter, should be regarded as a commendable exercise of ingenuity or as a discharge of the duties of good citizenship.

How very different is this from the view of Taylor J. and that of Jordan C.J.[7] (to whom he refers), who expresses disdain for this sort of moral consideration saying that its logical culmination is a 'timely suicide'.

Though the view finally adopted by the courts was wider than that which the minority of the High Court would approve, it seems that the section has a restricted meaning and will not become the basis for an ever developing fiscal tyranny. *Newton's* case did not produce any essentially different tests or standards, but at most made clearer much that had been implicit in the previous cases on the section.

In order that the Commissioner might succeed, it first had to be shown that there was an 'arrangement' and the approach adopted to this term was in no sense new, but merely added the authority of the Privy Council. The term included the individual acts done in pursuance of the scheme as well as the final result and it seems that such had to be the case if the section was not to be nullified. Counsel did contend that the section was meaningless, but this argument was given short shrift by the Board.[8]

Then it had to be shown that the 'purpose or effect' was the avoidance of taxation liability and here the court took the view that motive was irrelevant. It was important therefore to consider not what was intended to be done, but rather what was done. This also involved the further con-

[4] *Federal Commissioner of Taxation v. Newton* (1956) 96 C.L.R. 577, 620, quoting Viscount Simon L.C. in *Latilla v. Inland Revenue Commissioners* [1943] A.C. 377, 381.
[5] Quoting Knox C.J. in *Deputy Federal Commissioner of Taxation v. Purcell* (1921) 29 C.L.R. 464, 466, *supra*.
[6] [1943] A.C. 377, 381, *per* Viscount Simon L.C.
[7] *In the Estate of William Vicars* (1945) 45 S.R. (N.S.W.) 85.
[8] [1958] 3 W.L.R. 195, 201.

sequence that the section did not depend for its operation upon the arrangement being a 'sham', though if it were such then it was to be disregarded without section 260.[9]

It appears from the case that it would be possible to 'avoid' taxation with respect to future income within the meaning of the section, but it has not been necessary up to the present time for the courts to consider the situations in which this might arise. It would not seem in view of other statements of Lord Denning that this section would apply in very many cases. He said, 'In order to bring the arrangement within the section you must be able to predicate—by looking at the overt acts by which it was implemented—that it was implemented in that particular way so as to avoid tax.'[10] In the case of future income it would probably be more difficult to do this and even if it could be done, there is still real doubt as to whether the section would apply. Lord Denning makes a rather curious statement about *W. P. Keighrey Pty Ltd v. Commissioner of Taxation:*[11] 'Nor can anyone, by seeing a private company turned into a non-private company, predicate that it was done to avoid Division 7 tax.'[12] In view of the facts in that case, this statement would either represent a restrictive approach to the circumstances in which such predication could be made or else it is a recognition that the section was not intended to prevent the exercise of powers of choice given by the other parts of the Act.[13]

Finally there remains to be considered the issue of the importance of the 'purpose' of avoiding taxation in the arrangement. It seems to have been generally accepted that there may be other purposes while section 260 applies, but the limits are in doubt. In the instant case the existence of such other purposes has been over-emphasized as there is little doubt that the avoidance of tax was a condition precedent to the complete fulfilment of the other aims. The shareholders did not wish to bring in outside capital and so their conduct was centred around the problem of tax avoidance. Thus, it is submitted, it is quite reconcilable with the case to say that the 'purpose' or 'effect' of avoiding tax must be at least the dominant purpose or perhaps even a condition precedent to the satisfaction of other aims, as it appears to have been here.

F. H. VINCENT

THE QUEEN v. HOWE[1]

Criminal Law—Homicide—Murder or Manslaughter—Self-Defence—Excessive Force

The respondent was charged with and convicted of the murder of one M, but the Court of Criminal Appeal of South Australia quashed the con-

[9] This approach had been previously adopted by the High Court in *Jacques v. Federal Commissioner of Taxation* (1924) 34 C.L.R. 328. [10] [1958] 3 W.L.R. 195, 202.
[11] [1958] Argus L.R. 97. [12] [1958] 3 W.L.R. 195, 202.
[13] N.E. Challoner, 'Arrangements to Avoid Income Tax: A Consideration of the Effect of Newton's Case' (1958) 32 *Australian Law Journal* 109.
[1] [1958] Argus L.R. 753. High Court of Australia; Dixon C.J., McTiernan, Fullagar, Taylor and Menzies JJ. *Cf.* succeeding case note.