gamous marriages.[31] The difficulties in dealing with such marriages in this context are not insuperable—can it not be said that, provided a man confines his sexual activities to his wives, he is not an adulterer? With only relative minor adjustments can it not be said that the law of desertion and cruelty, for example, may still apply to such marriages? Certainly there would be problems associated with the recognition of an institution unknown to Western civilization but these problems need not be incapable of solution, nor need they be any more difficult than other branches of private international law which require difficult investigations into foreign legal systems.

R. SACKVILLE

CECIL BROS PTY LTD v. COMMISSIONER OF TAXATION OF THE COMMONWEALTH OF AUSTRALIA[1]

Income tax—Liability of retailer to tax—Profit made by interposed family company on goods bought from wholesaler and resold to taxpayer—Income Tax and Social Services Contribution. Assessment Act 1936-1960, sections 5 (1), 260.

The judgment of Owen J. in relation to the applicability of section 260 of the Income Tax and Social Services Contribution Assessment Act 1936-1960[1a] to a family company in the recent High Court case of *Cecil Bros Pty Ltd v. Commissioner of Taxation of the Commonwealth of Australia,*[2] could apply equally, it seems, to many other existing family companies, and even to service companies generally. In that case the taxpayer was a family company which carried on business as a retailer of footwear and in its return for the year ended 30 June 1960, claimed a deduction of £804,400 in respect of purchases of footwear. The Commissioner reduced the claim for purchases by £19,777, and it was against this disallowance that the taxpayer appealed.

The facts briefly stated were that of the total purchases of the taxpayer of £804,400, about £230,000 were made from Breckler Pty Ltd, most of the shareholders of which also held shares in the taxpayer company. Breckler Pty Ltd had its registered office at the same address as the taxpayer company and derived a considerable proportion of its income from

[31] See the extract from *Cheni v. Cheni, supra* p. 273, and the comments *supra* p. 274.

[1] (1962) 36 A.L.J.R. 65. High Court of Australia; Owen J.

[1a] '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 if 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.'

[2] (1962) 36 A.L.J.R. 65.

business put through by the taxpayer company. Had the taxpayer bought the goods supplied by Breckler Pty Ltd direct from the manufacturer or wholesaler, it would have been able to do so on the same terms as those on which Breckler Pty Ltd bought, and in fact a large proportion of its total purchases were so bought. The profit made by Breckler Pty Ltd upon the sales to the taxpayer company was £19,777, so that had the taxpayer done all its buying direct from the manufacturer or wholesaler, its total purchases for the year would have been less by £19,777 than the amount actually paid by it. Mr Justice Owen held that the Commissioner was entitled to disallow the full amount shown in the taxpayer's return as its total purchases and to reduce it by £19,777.

This decision was based on section 260 of the Act, for His Honour rejected the Commissioner's first submission that under section 51 (i) the amount of £19,777 should not be regarded as an outgoing incurred in gaining or producing the taxpayer's assessable income. His Honour cited with approval the proposition in the *Ronpibon Tin* case[3] that:

> it is not for the court or the Commissioner to say how much a taxpayer ought to spend in obtaining his income, but only how much he has spent.[4]

His Honour found considerable difficulty in applying section 260, the scope of which has been the subject of considerable legal comment.

In *Commissioner of Taxation v. Purcell*,[5] Knox C.J., speaking in the High Court of an earlier provision[6] which did not differ materially from section 260 said:

> The section, if construed literally, would extend to every transaction whether voluntary or for value which had the effect of reducing the income of any taxpayer. . . .[7]

However, in *Newton's* case,[8] (an authority which is to be regarded as settling the effect of section 260 because it is a decision of the Judicial Committee of the Privy Council), it was accepted that section 260 did not extend to every arrangement which had as one of its consequences an avoidance of liability to taxation. The section, according to Lord Denning:

> is not concerned with the motives of individuals. It is not concerned with their desires to avoid tax, but only with the means which they employ to do it.[9] . . . 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. If you cannot so predicate, but have to acknowledge that the transactions are capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax, then the arrangement does not come within the section.[10]

[3] (1949) 78 C.L.R. 47. [4] *Ibid.* 60. [5] (1921) 29 C.L.R. 464.
[6] Income Tax Assessment Act 1915 (Com.) s. 53.
[7] (1921) 29 C.L.R. 464, 466. [8] [1958] A.C. 450. [9] *Ibid.* 465. [10] *Ibid.* 466.

In *Hancock v. Commissioner of Taxation*[11] the High Court adopted Lord Denning's interpretation of section 260 when it held that the arrangement then in question was one that came within the operation of the section because its obvious purpose—as distinct from the desires of the parties concerned, was the avoidance of taxation liability.

Although the submission in *Cecil's* case[12] that the transactions there were sham was shortly dismissed on the ground that they were genuine transactions and in no way fictitious or unreal, it has been suggested[13] that the judgment in *Newton's* case[14] shows that section 260 is concerned with a transaction which is sham in another sense, that is a transaction which is real in that the parties intend it to take effect but which is carried out by what in the light of ordinary business or family dealing would be characterized as unreal means.

In the recent High Court case of *Millard v. Commissioner of Taxation*[15] a valid agreement whereby a bookmaker transferred his business to a company, was held to fall clearly within the provisions of section 260. His Honour, Mr Justice Taylor said:

> to my mind it is about as plain as it could be that the whole purpose and effect of the agreement was to split the appellant's income into a number of parts in order to minimize the amount of tax which would become payable.[16]

Although this was a genuine transaction in that there was an actual transfer of the business to the company, it was sham or unreal in that apart from the provision of funds and deposit of profits, the bookmaking business was conducted precisely as it had been before the agreement was effected.

On the other hand, in the earlier case of *Deputy Federal Commissioner of Taxation v. Purcell*[17] it was held that no one, on seeing a declaration of trust made by a father in favour of his wife and daughter could predict that it was done to avoid tax. There is nothing unreal about such an arrangement and therefore it cannot be said to fall within the confines of section 260.

Furthermore, it must be remembered that section 260 is only one section in a long Act, and it contains no words expressly giving it a superior operation over other provisions of the Act. Thus it seems that section 260 does not strike at arrangements contemplated elsewhere in the Act even if the means used are such that an observer would predict that the transactions are carried out to avoid tax.

This proposition was recognized by the High Court in *W. P. Keighery Pty Ltd v. Commissioner of Taxation*[18] where it was said that as the Act contemplated that a company had a choice between remaining a private company and converting itself into a non-private company, any arrangement to exercise that choice in favour of conversion into the status of a

[11] [1961] A.L.R. 839. [12] (1962) 36 A.L.J.R. 65, 66.
[13] The British Tax Review, July-August, 1961.
[14] [1958] A.C. 450. [15] (1962) 12 A.T.D. 417.
[16] *Ibid.* 420. [17] (1921) 29 C.L.R. 464. [18] (1958) 100 C.L.R. 66.

non-private company would not be an arrangement within section 260—the Act itself permits avoidance of tax by exercise of that choice.[19]

Cecil's case[20] represents a further step in the authorities revolving round this section for:

> in most, if not all, the cases in which section 260 has been held to apply, the fact has been that moneys have come into the hands of the taxpayer in which the section has enabled the Commissioner to treat as an income receipt. This is the converse case. Section 260 is being called in aid to reduce the amount of the taxpayer's outgoings and thus increase its taxable income.[21]

There has been some doubt as to the effect of the section once it had been held to apply. The section says that an arrangement to which it applies shall be void as against the Commissioner but valid for all other purposes. As a result of this it might be argued that the amount in question could be taxed twice by the Commissioner, that is, in the hands of the taxpayer in relation to whom the agreement is void as between himself and the Commissioner, and also in the hands of the other parties concerned, for in relation to them the arrangement remains valid and subsisting.

The Board of Review expressed their opinion on the matter in a recent decision[22] when they said that 'if section 260 renders void an offending arrangement so as to affect the taxability of one party to it, the other party's taxability must also be affected in like manner'.[23]

This line of decisions should be of special significance to the professional man because it appears from the decision in *Peate v. Commissioner of Taxation* that the courts will be particularly ready to apply section 260 to any attempt to carry on professional practices as corporate entities. In fact, it appears that the more a taxpayer depends on his personal qualifications—whether as a professional man, as in *Peate's* case, or, as the holder of some special licence, as in the case of *Millard*—the less likely the courts will be to regard incorporation as an 'ordinary business or family dealing',[24] so as to prevent the operation of section 260. This attitude of the courts has caused many professional men to form service companies as a compromise measure instead of straight out incorporation of the practice.

Now, however, there seems to be no reason why the principle in *Cecil's* case—that section 260 will be used to disallow deductions claimed by a taxpayer for payments exceeding the market value of goods supplied by an interposed company unless it can be shown that the arrangement is within the ordinary course of business or family dealing—should not be applied equally to services provided to a taxpayer by a service company. Thus, it appears that the efforts of the professional man to reduce the incidence of taxation are further frustrated, whereas his commercial

[19] *Ibid.* 92-94. [20] (1962) 36 A.L.J.R. 65. [21] *Ibid.* 67.
[22] (1962) 10 C.T.B.R. (N.S.) Case 88, 504. [23] *Ibid.* 505.
[24] *Newton v. Commissioner of Taxation of Australia* [1958] A.C. 450, 466.

counterpart remains free to form partnerships, companies and trusts with his wife and children.

This situation could lead to a reconsideration of the whole question of incorporation of professional practices, which would enable the professional man to achieve a spread of income, and to enjoy lower rates of taxation as well as superannuation benefits and organizational advantages. Perhaps it is significant in this regard to recall that the English Royal Commission on the Taxation of Profits and Income decided against special taxation concessions for professional men on the ground that there was no law to prevent professional men from securing taxation advantages by incorporation. They added, however:

> that a number of professions do impose such a ban by internal regulation as a matter of their members' good professional conduct . . .[but] it does not follow that, as times change, such regulations may not have to be adjusted to meet the change; even though the adjustment may mean the abandonment of a conception that seemed unchallengeable in times of less heavy personal taxation.[25]

ANN RIORDAN

THE QUEEN v. AMAD[1]

Criminal Law—Evidence—Voire Dire—Discretion of trial judge to exclude evidence obtained by improper means—Exercise of discretion notwithstanding sworn evidence by accused that admissions were true—Evidence Act 1958 section 149

Lord Brampton once quipped—'After arresting, a constable should keep his mouth shut, but his ears open', and Mr Justice Smith's decision in *Amad's* case certainly lends support to that remark. Amad was indicted for the murder of Reginald Shannon, whom it was alleged he had killed during a fight in December 1961. His counsel applied on *voire dire* to have excluded police evidence of certain admissions Amad had made to them during four interrogations at Russell Street.

It appears that Amad was picked up and taken to police headquarters, where he was subjected to two lengthy interrogations wherein his truthfulness was challenged at every step. Eventually, when he was confronted with evidence of the falsity of his alibi, he broke down and made some damaging admissions. He was then cautioned for the first time and asked whether he wished to make a statement. He did not. However, later in the same evening his sister, having been advised by the police that he had not made a statement, advised him to do so. He then made the admissions obtained during the third and fourth interrogations, the latter resulting in a written statement which he signed. Amad testified on *voire dire* that these admissions were true. They were, in substance, little more than

[25] Para. 627 of the Final Report of the Royal Commission on 'The Taxation of Profits and Income'. (Cmd. 9474.).

[1] [1962] V.R. 545. Supreme Court of Victoria; Smith J.