of such a priest was necessary for the validity at common law of a marriage celebrated in Van Diemen's Land.

The only sin of commission, rather than omission, which this reviewer has noted is the oddly worded footnote 15 on p.594 which reads, *in toto*: "*Re Crook* (1936), 36 S.R.(N.S.W.) 186, following the English case of *Re Cutcliffe's Will Trusts,* [1940] Ch. 565." Since both the citations in the footnote are correct one can only assume that Professor Nygh has inadvertently endowed Long Innes C.J. in Eq. with remarkable powers of foresight!

Despite these minor criticisms Professor Nygh is to be congratulated on if anything improving on the very high standard he set in his first edition. Not only does the book show his breadth of knowledge and erudition but the addition of New Zealand authorities and some previously overlooked Australian cases results in the production of a book which can, with confidence, be described as a comprehensive, lucid and up-to-date statement of the conflict of laws in Australia.

The conclusion reached by this reviewer after reading this second edition, and using it for teaching purposes in 1972, is that Professor Nygh has thereby greatly enhanced the considerable reputation he made for himself by his pioneering work in bringing the first edition to fruition.

D. L. PAPE*

Arrangements for the Avoidance of Taxation, by Dr I. C. F. SPRY, LL.D., Barrister-at-Law, Editor, Australian Tax Review. (The Law Book Company (Australia) Ltd, 1972), pp. i-x, 1-141. $7.50. ISBN: 0 455 16490 8.

This book is a treatise in relatively short compass. It attempts to give a coherent analysis of some 50 Australian and New Zealand cases on section 260 of the Commonwealth Income Tax Assessment Act and, where relevant for comparative purposes, the corresponding New Zealand provision (section 108 of the Land and Income Tax Acts). The case law is often difficult to reconcile and one is given a sense of the tug of war between conflicting approaches. I know of no better or clearer exposition of the trend of judicial decisions in this area. However one regrets that Dr Spry did not also consider some of the articles and commentaries in this area, restricting himself solely to the case law. He also neglects a substantial body of South African case law on the equivalent of section 260 (section 103 of the South African Income Tax Act 1962) which provides some useful comparisons.

Beginning with a history of the origins of section 260, Dr Spry then analyses the subject matter of this section, its general scope in relation to different kinds of transactions, and finally the consequences of applying section 260. The grouping of subject matter is particularly helpful.

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One can readily find the relevant case law under headings such as "The Formation of Public Companies" or "The Creation and Administration of Trusts". The index is likewise comprehensive and helpful, though one finds the occasional omission (such as pages 88 and 101 under the heading "Solicitors, Formation of Companies by"). The book is so written that when reading one subject one does not have to back-track to earlier discussions of related subjects to get a clear exposition. The book concludes with a chapter on the future of section 260. There is clearly room for a difference of view as to the correct reconciliation of the case law so lucidly summarized by Dr Spry. However, I for one do not agree with the weight Dr Spry gives to the *Keighery* "choice offered by the Act" approach, notwithstanding its confirmation in, most recently, *Casuarina*[1] and, though with greater qualification, *Ellers Motors*.[2] In *Newton's* case[3] the Privy Council seemed perhaps deliberately to by-pass the *Keighery* "choice" test without disapproving the actual decision. Perhaps it recognized that the consistent application of the "choice" gateway out of section 260 would in truth leave room for the proverbial cart and horse. Instead, the Privy Council applied the test enunciated below:—

> Is the transaction capable of explanation by reference to ordinary business or family dealing, without necessarily being labelled as a means to avoid tax?

On this "ordinary dealing" test, one wonders, with Dr Spry, whether the actual decision in *Keighery* should have been overruled by the Privy Council rather than approved, since the *Keighery* public company was clearly set up to avoid Division 7 tax. Alternatively *Newton's* case itself could be said on the *Keighery* gateway to have been wrongly decided, since all the taxpayer did was so to arrange his affairs, albeit in a contrived manner, as to take several choices offered him by the Act. If, as has been confirmed in a number of cases, the sale of shares *cum* dividend is legitimate (see *Newton's* case itself)[4] then it is hard to see how this gateway is precluded merely because of the ensuing complexity of the cross-financing transactions which Dr Spry found to be fatal.[5] None of these separately fell outside the rubric of a "choice

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[1] *Casuarina Pty Ltd* v. *F.C. of T.* (1971) 45 A.L.J.R. 213.

[2] *Ellers Motor Sales Pty Ltd* v. *F.C. of T.* (1972) 72 A.T.C. 4033 and earlier in (1969) 44 A.L.J.R. 1 (*per* Menzies J.).

[3] *Newton* v. *F.C. of T.* [1958] A.C. 450. See also *Mangin* v. *I.R.C.* (*N.Z.*) [1971] 2 W.L.R. 39 which turned on the fact that the whole scheme smacked of "business unreality".

[4] *Newton* v. *F.C. of T.* [1958] A.C. 450.

[5] See pages 39 and 40. See generally paper by P. J. Lanigan "Technical Problems Relating to the Objectives and Consequences of Taxation" published by the Taxation Institute of Australia in 1969 at pages 15 and 16 where the comment is made "the significant point to note is that the judgment [in *Newton's* case] does not appear to give the support of the Privy Council to the grounds on which the High Court [in *Keighery's* case] declined to apply section 260 in that case" and Professor Parsons' agreement with this view at page 19 in his commentary.

offered by the Act". Indeed the Privy Council avoided the sale of shares but not these other steps from which it follows they were not tax avoiding steps in themselves. Admittedly Dr Spry's reconciliation of *Newton's* case with the *Keighery* case is an uneasy one. He concedes subsequently (page 40) that the mere fact that a transaction is complex does not cause it to be avoided by section 260 if the state of affairs that is brought about through elaborate steps is nonetheless one which is intended by the Act to be open. Perhaps a bold High Court might yet find *Keighery* and *Newton* in truth incompatible and prefer *Newton.*

If one were to apply *Newton's* case in preference to the *Keighery* choice test then a number of difficulties fall away. These are dealt with below. One can then conclude that there is but one principal gateway out of section 260, namely where a particular transaction is "explicable by ordinary business or family dealing". This is instead of treating this "ordinary dealing" test as an additional and alternative gateway to that of the *Keighery* "choice" test.

If the High Court chooses to go back to the *Newton* ordinary dealing test as the sole gateway, as Gibbs J. seems to have done in *Hollyock* v. *F.C. of T.*[6] then the Court will be able to recognize explicitly that in fact it does have regard to the artificiality and contrivance of an arrangement. These will be recognized as relevant factors in determining whether an arrangement passes this gateway of ordinary dealing. Likewise, highly relevant will be a change in the taxpayers' *modus operandi* to achieve a more favourable tax result since this would rarely be consistent with "ordinary dealing". These latter cases[7] were all difficult for Dr Spry to reconcile with the *Keighery* "choice" test since on that test the taxpayer should not have lost, whereas in fact he did. But on the *Newton* test they were clearly correctly decided.

It is in this context significant that on the facts of *Keighery's* case[8] this company was formed *ab initio* as a (contrived) public company, apart from the initial day or two after the incorporation and before the further redeemable shares were issued. The High Court might, had it in mind to do so, have taken the view that *Casuarina Pty Ltd* differed from Keighery's case in this perhaps crucial fact, since Casuarina Pty Ltd began its life as a proprietary company which was not a subsidiary of a public company. It only later became so when it issued shares to Forum Pty Ltd. However, even in that case Casuarina Pty Ltd may well have been considered not an instance of a change in course to avoid tax since it contrived the status of a subsidiary of a public company before it had any independent commercial life of its own and

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[6] 71 A.T.C. 4202.

[7] *Franklin's Self Serve Pty Ltd* v. *F.C. of T.* (1970) 44 A.L.J.R. 346 (change of shareholding arrangements to retain use of tax losses in terms of changed legislation). *Peate* v. *F.C. of T.* (1964) 111 C.L.R. 443 and (1966) 116 C.L.R. 38 (proceeding from a medical partnership to an interposed company providing medical services). *Jacques* v. *F.C. of T.* (1924) 34 C.L.R. 328 (re arrangements to take advantage of deductions from calls on shares).

[8] (1957) 100 C.L.R. 66.

before it had acquired shares in the private companies which paid the dividends under its umbrella.

In summary where there has been a change in *modus operandi* resulting in a more favourable tax result than that which threatened, one would ordinarily not expect to explain that arrangement, particularly if also artificial and contrived, by ordinary business or family dealing.

However it may be that the *Newton's* ordinary dealing test might itself create problems in its application, as Professor Parsons points out.[9] Thus complexity *per se* should not be elevated into a fatal vice, but it is unlikely that the Courts would fail to recognize "legitimate" complexity. Also "abnormality" should not of itself be the criterion, though again a relevant factor.[10] But when one turns to some of the difficulties of the *Keighery* choice test noted below, these seem far worse.

(i) whether the Act is offering a choice when it fails to deem a particular receipt to be income (such as in the case of a sale of shares *cum* dividend) or when it offers specific exemption or deduction.

(ii) whether the provisions of the Income Tax Assessment Act proscribing various devices to enable the carrying forward of losses with the necessary continuity of shareholding conferred by implication a choice under the Act insofar as the particular arrangement is not covered by the express terms of the proscription.[11]

(iii) whether if the incorporation of a family company to take over a business is a choice offered by the Act, one can fairly distinguish the incorporation of a company to carry out medical services[12] or book making activities[13] merely because this is an abnormal (or illegitimate) way of carrying them out.

(iv) whether one can read down the *Keighery* choice test to exclude from its gateway those who contrive to so order their affairs as to qualify in form but not in substance with the evident purpose of the provisions conferring the relevant choice, such as the definition of "public company" in the Income Tax Assessment Act.

Indeed, as Dr Spry implies, if the *Keighery* test still has a place, it will probably be limited to the case where in the relevant circumstances the Act offers *explicitly* a particular tax advantage to a particular defined category of taxpayer, such as "public companies" or "primary pro-

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[9] *The Control of Tax Avoidance* by Professor R. W. Parsons in Income Tax (Series 2) 1965 Lecture XII published by the University of Sydney.

[10] Compare the wider sweep of the South African section 103 where the test is expressly made "normality", discussed in *Silke on South African Income Tax*, 6th Edition; (1969) pages 902 *et seq.* There is little room for the *Keighery* "choice" test except as an indicia of normality capable of rebuttal where the manner of taking the offered choice is clearly abnormal such as in *Keighery* itself.

[11] *Franklin's Self Serve Pty Ltd* v. *F.C. of T.* (1970) 44 A.L.J.R. 346.

[12] *Peate* v. *F.C. of T.* (1964) 111 C.L.R. 443.

[13] *Millard* v. *F.C. of T.* (1962) 108 C.L.R. 336.

ducers". It will probably not be held applicable where the "choice" is conferred as in (i), (ii) or (iii) above.

One would have been interested to see a greater development by Dr Spry of the implications of section 260 in the use of tax havens. Apart from the early cases on the use of New Guinea,[14] the New Zealand decision on *Europa Oil*,[15] and the then undecided case of *Esquire Nominees*,[16] the case law is as yet undeveloped. However, one may well find a whole new testing ground for the *Keighery* "choice" gateway. It will be interesting to see whether the High Court has regard to the fact that a taxpayer's principal motive may be the avoidance of foreign tax, a point noted by the New Zealand Court of Appeal in *Europa Oil*.

Likewise, an object which even on *Newton's* test might pass muster, could be to obtain funds overseas outside the scope of exchange control restrictions, a feature attendant on the use of tax havens in some cases. However, the mere fact that this may be one of several purposes, which also include avoidance of Australian tax, will not save the transaction from avoidance, as Dr Spry clearly demonstrates.

Dr Spry cogently criticises in both *Peate's* case referred to earlier and *Mangin's* case,[17] the use of section 260 in fact to reconstruct as well as annihilate. He points out how in *Peate's* case the continuance of the *modus operandi* that had been changed by the dissolution of the original medical partnership is assumed. Whilst his criticism of the Privy Council's suggestion for the amendment of section 260 in *Mangin's* case to overcome this difficulty is convincing, this is really only a matter of appropriate drafting of a wider discretion to make adjustments.[18]

In the area of the future of section 260 Dr Spry advances the view that a general tax avoidance measure should be abandoned in the interests of certainty, in favour of a specific and *ad hoc* amendment to each particular provision of the Income Tax Assessment Act which, because of poor drafting on inadequate reach, can be avoided by enterprising taxpayers. One could instance as examples of the approach he prefers, the complex amendments to the Income Tax Assessment Act to deal with what the Act describes with some spleen as "spurious public companies",[19] and "dividend stripping"[20] and also the amendments in regard to tax loss companies.[21]

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[14] *Bell* v. *F.C. of T.* (1953) 87 C.L.R. 548; *War Assets Pty Ltd* v. *F.C. of T.* (1954) 91 C.L.R. 53.

[15] *I.R.C. (N.Z.)* v. *Europa Oil (N.Z.) Ltd* [1971] W.L.R. 55.

[16] *Esquire Nominees Ltd* v. *F.C. of T.* (1972) 72 A.T.C. 4076.

[17] *Mangin* v. *I.R.C. (N.Z.)* [1971] 2 W.L.R. 39.

[18] Under the South African section 103 the authorities are entitled not only to determine the liability to tax "as if the transaction had not been carried out" but may also do so "in such manner as in the circumstances of the case he deems appropriate for the prevention or diminution of such avoidance, postponement or reduction".

[19] Section 103A(4A) to (4E) of the Income Tax Assessment Act.

[20] Section 46A of the Income Tax Assessment Act.

[21] See section 80 and following sections of the Income Tax Assessment Act.

One could well cite each of these provisions as exemplification not of greater certainty, but rather of a complex legislative thicket worthy of comparison to the contrived arrangements sought to be caught. One anticipates that this trend will leave our Income Tax Act in a sorry mess, fit to be construed only by those skilled tax planners who are able to thread their way through these provisions. The ingenious taxpayer will still sometimes escape and the administration of the Income Tax Assessment Act will become more burdensome and more expensive, all this to minimise tax avoidance which itself is a cost to the Revenue.

One wonders why the criticism that was levelled at the Commissioner's discretions first brought into being in 1964 in the area of trusts, partnerships and dividend rebates seems now to have been stilled. Could it be because, despite this criticism, including for instance by Professor Parsons in the article referred to earlier, these discretions have worked reasonably well? The Courts have on occasion interfered where the Commissioner has erred.[22] However, this is not to say that such discretions should not be counter-balanced by safeguards which include the following:

(i) The Commissioner should be required not only to give a decision but to state his reasons.

(ii) The considerations on which the Commissioner exercises his discretion might, as in the past, be required to be outlined in general terms either through public information bulletins or in the statute itself, and departure from them should be admissible in any Board or judicial review of that exercise.

(iii) There should be, in the income tax field no less than in other fields involving administrative discretion, an ombudsman who can represent the taxpayer where he has been unfairly dealt with.

It is in fact necessary to allow the Commissioner to determine through experience how best to administer the general principles embodied in the Act. Provided the legislature does not abdicate entirely in favour of the Commissioner but gives some guidelines as to the considerations which may properly be considered, I think one can rely on the above safeguards.

No one can avoid reading Dr Spry's book without appreciating his invaluable service in analysing section 260 and the rules relating to sham transactions. His book will be of use to all who practise in this area, whether or not one agrees fully with his conclusions in every instance.

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[22] See, for example, *Duggan & Anor* v. *F.C. of T.* (1973) 47 A.L.J.R. 44.

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