

UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
JULY 1971  
25 RUSSELL SQUARE  
LONDON W.C.1

IN THE PRIVY COUNCIL

No. 3 of 1970

O N A P P E A L

FROM THE COURT OF APPEAL OF NEW ZEALAND.

B E T W E E N :

OWEN THOMAS MANGIN

Appellant

- and -

COMMISSIONER OF INLAND REVENUE

Respondent

CASE FOR THE APPELLANT

RECORD

10 1. This is an appeal from a judgment of the  
Court of Appeal of New Zealand dated the 26th  
August 1969 reversing an Order of the Supreme  
Court of New Zealand made by Wilson J. on 4th  
February 1969 whereby it was ordered and  
determined that the Respondent acted incorrectly  
in making amended assessments on 26th January  
1968 of the appellant's income tax in respect  
of the years ended on 31st March 1966 and 31st  
20 March 1967 and that such assessments should be  
amended by assessing the appellant's income tax  
on the income returned by him for those years.

2. The appellant Owen Thomas Mangin (herein-  
after called "the taxpayer") was at all material  
times a farmer and the owner of a farm of 385  
acres at Methven in New Zealand and the  
assessment of income tax the subject matter of  
the Appeal arose in the following circumstances.

p. 55 1.11

30 3. At all material times the taxpayer's farm  
was used for sheep farming and mixed cropping  
with an emphasis on cropping. By Deed dated  
15th April 1965 a trust was created by the  
taxpayer's father for the benefit of the  
taxpayer's children. By an Agreement in

pp. 6 - 15

pp. 16-18

RECORD

- p. 55 l. 30 writing also dated 15th April, 1965, the taxpayer agreed to lease to the trustees of such trust a defined paddock of 25 acres forming part of his farm. The lease was for one year from 15th April 1965 at a rental of £3 per acre, payable on 15th April 1966. The trustees employed the taxpayer to prepare the paddock leased to them and sow the same in wheat.
- pp. 19-29 4. By Deed dated 20th August 1965 the taxpayer's father created another trust for the benefit of the taxpayer's children and the taxpayer's wife. The trustees of this second Deed (hereinafter called "the Trustees") were the same as those of the first trust. By Deed dated 30th August 1965 the Agreement to Lease of 15th April 1965 was assigned by the Trustees of the first trust to themselves as Trustees of the second trust. By a further Deed made 30th August 1965 the Trustees of the first trust terminated the same under the powers reserved to themselves in that behalf by the said Deed. No point is or has been made in the proceedings by the Respondent Commissioner (hereinafter called "the Commissioner") as to the creation of the second trust or the assignment to the Trustees of the Agreement to Lease or the termination of the first trust. 10
- p. 30
- p. 31
- p. 80 5. The wheat crop was harvested and sold on 2nd March 1966. The sale price was £1147.8.7d. (Exhibit 2). The taxpayer rendered to the Trustees an account for his work, goods supplied and rent totalling £401.11. 4d. (Exhibit 1). 30
- p. 79
- pp. 41, 56  
l. 35  
p. 56 l. 36 6. The net income of the Trustees for the income tax year ending 31st March 1966 amounted to £739.11. 3d. Of this income £652 was distributed. £52 was paid to the taxpayer's wife for her own benefit. £600 was paid to the taxpayer's wife being as to £300 each for the benefit of the two children of the taxpayer and his wife. 40
- pp. 32-34 7. By an Agreement in writing dated 16th May 1966 the taxpayer agreed to lease to the Trustees another defined paddock containing 24

RECORD

acres. The term of the agreement was one year from 18th April 1966 at a rental of £4 per acre payable on 18th April 1967.

8. The Trustees employed the taxpayer to prepare and sow the paddock in wheat which was duly harvested and sold. The sale price was £942. 8.10d. The taxpayer rendered to the Trustees an account for his work, goods supplied and rent totalling £292.10. 0d. (Exhibit 5). p. 56 1.4-7  
p. 43  
p. 84
9. The net income of the Trustees for the income tax year ending 31st March 1966 was £631. 0.10d. Of this income £442 was distributed. £52 was paid to the taxpayer's wife for her own benefit and £390 was paid to the taxpayer's wife being as to £195 each for the benefit of the taxpayer's two children. p. 43  
p.56 1.43
10. The taxpayer made a return to the Commissioner of income derived by him during the year ended 31st March 1966. Such return showed an assessable income of £1699. 3. 0d., in accordance with the financial statement accompanying such return. The Trustees made a return of income for the same period showing an assessable income of £739.11. 3d. in accordance with the financial statement accompanying such return. p.2 1.37to  
p.3 1. 2  
p. 36  
p. 3 1.7  
p. 41
11. The taxpayer made a return of income for the year ended 31st March 1967 showing assessable income of £1608 in accordance with the financial statement accompanying such return. The Trustees made a return for the same period showing an assessable income of £631. 0.10d. in accordance with the financial statement accompanying such return. p.2 1.37 to  
p.3 1. 2  
p. 39  
p.3 1.8  
p. 43
12. The Commissioner considered that the transactions between the taxpayer and the Trustees in respect of the lands and the wheat grown thereon and the transactions between the taxpayer, the Trustees and the purchaser of the wheat were void under the provisions of Section 108 of the Land and Income Tax Act 1954 (hereinafter called "the Act"). This section p.3 1.12

RECORD

at all material times provided as follows :-

"Every contract, agreement, or arrangement  
"made or entered into, whether before or  
"after the commencement of this Act, shall  
"be absolutely void in so far as, directly  
"or indirectly, it has or purports to have  
"the purpose or effect of in any way  
"altering the incidence of income tax, or  
"relieving any person from his liability  
"to pay income tax."

10

p. 3 1.21

The Commissioner further considered that the amounts returned by the Trustees as income were received by them under a disposition which applied to such income after it had been derived by the taxpayer. Accordingly the

p. 3 1.26

Commissioner on 26th January 1968 made amended assessments of income tax on the taxpayer. The Commissioner assessed the taxpayer to income tax in each of the years ended 31st March 1966 and 31st March 1967 on an income ascertained by adding to the income returned by the taxpayer in each of those years, the income returned by the Trustees in each of those years.

20

p. 3 1.33

p. 4 1.1

p. 4 1.6

13. The taxpayer objected to the Commissioner against such amended assessments. Upon such objections being disallowed by the Commissioner, the taxpayer required the Commissioner to state a case for the opinion of the Supreme Court of New Zealand. The case so stated is dated 18th October 1968.

30

p. 4 1.12

pp. 1-6

pp. 55-57

p. 57 1.22

14. The case stated was heard in the Supreme Court of New Zealand on 21st November 1968 and judgment was delivered in favour of the taxpayer on 4th February 1969. In his reasons for judgment Wilson J. (after stating the facts) dealt first with the contention made by the Commissioner that the taxpayer and not the Trustees had derived the income returned by the Trustees. His Honour found that such income was derived by the Trustees and not the taxpayer. This point was abandoned by the Commissioner in the Court of Appeal. Wilson J. held that Section 108 was capable of application to the transactions but he did not give detailed reasons for such finding and in particular did

40

p.57 1. 40

p.73 1. 15

p.58

RECORD

not deal with the taxpayer's contention that Section 108 of the Act had no application to a case where the taxpayer does not derive the income. Wilson J. said that the objector did not argue certain questions which he formulated. In this Wilson J. was mistaken. Argument was addressed to the learned judge on such points. The Commissioner agreed in the Court of Appeal that argument as to the application of Section 108 of the Act was addressed to Wilson J. Wilson J. held on the facts for reasons referred to in Para. 38 of this Case that the transactions were not void under Section 108.

p.66 l.1.

p.60 l.34

p.65 l.39

p.59 l.1

15. From this decision the Commissioner appealed to the Court of Appeal on the grounds that it was erroneous in fact and in law. The Appeal was heard on 23rd and 24th July 1969. On the 26th August 1969 the Court of Appeal allowed the Commissioner's appeal and reversed the judgment of Wilson J.

p. 77

16. As the judgment of Wilson J. did not deal with the argument of the taxpayer that Section 108 of the Act could not apply in the circumstances of the present case, it was agreed by the Court of Appeal and the parties that the taxpayer should open on such questions of law; that the Commissioner should reply thereto and open on the matters of fact found by Wilson J.; and that the taxpayer should reply on such questions of fact.

17. The taxpayer submitted to the Court of Appeal: (a) That Section 108 had no fiscal effect and that Elmiger v. Commissioner of Inland Revenue (1967) N.Z.L.R. 161 to the contrary was wrongly decided; (b) That if Section 108 had fiscal effect it was limited to an accrued incidence or liability to tax and that the decision in Elmiger's case to the contrary was wrong; (c) That if Section 108 had fiscal effect it applied only to income derived by the taxpayer and that in the present case the income from the property leased was derived by the Trustees and not by the taxpayer; and (d) (by the taxpayer in reply) that if contrary to the foregoing submissions Section

p.72 l.44 to

p.73.1.10

RECORD

108 was capable of application it did not apply to the circumstances of the present case.

p. 72 1.46  
to p.73.1.6

18. The first two submissions (a) and (b) were not argued as they had been determined against the taxpayer by the Court of Appeal in Elmiger's case. The submissions were made to preserve the taxpayer's right to advance them on this Appeal if necessary. The third submission (c) was fully argued on both sides. The same submission was made on behalf of taxpayers in the two cases of Marx v. Commissioner of Inland Revenue and Carlson v. Commissioner of Inland Revenue which were heard together in the Court of Appeal on 21st and 22nd July 1969 immediately preceding the hearing of the Appeal in the present case. The judgments in the Marx and Carlson cases were delivered the same day as the judgment in the present case but immediately preceding it. Such judgments have not yet been reported but will be made available on the hearing of this Appeal. In the Marx and Carlson cases a majority of the Court of Appeal (comprising North P. and McCarthy J.) found in favour of the Commissioner on the third submission (c) above. Turner J. found in favour of the taxpayer. Accordingly the Court of Appeal found unanimously for the Commissioner in the present case on the third submission. The Court of Appeal unanimously found against the appellant on the fourth submission (d) and accordingly reversed the judgment of Wilson J.

10

20

30

19. The reasons for judgment in the Court of Appeal were therefore confined to the fourth submission made on behalf of the taxpayer which was also that dealt with by Wilson J., namely, that on the footing that Section 108 of the Act was capable of application it did not apply to the present case. These reasons are referred to in para. 37 of this case dealing with the taxpayer's contentions thereon. The costs of the Appeal were awarded to the Commissioner.

40

20. The contentions of the appellant are :-

(a) That Section 108 of the Act has no fiscal

effect and that the decision of the Court of Appeal of New Zealand to the contrary in Elmiger v. Commissioner of Inland Revenue (1967) N.Z.L.R. 161 is erroneous.

- 10 (b) That, if Section 108 of the Act has fiscal effect, it is limited to cases where the incidence of or liability to income tax has already accrued and that the decision of the Court of Appeal to the contrary in Elmiger's case is erroneous.
- (c) That, if submission (b) is not accepted Section 108 of the Act applies only to income derived by the taxpayer.
- (d) That, if none of the foregoing submissions is accepted, Section 108 of the Act does not apply to the facts of the present case.

In the following paragraphs some elaboration of these contentions is made.

20 21. The first submission of the taxpayer.  
The taxpayer submits that Section 108 of the Act renders void arrangements which affect income tax only and that its effect is inter partes and not fiscal. The taxpayer submits that the scope and meaning of Section 108 of the Act is to be considered with reference to the words of the Section and its history and without regard in the first instance to decisions in Australia on statutory provisions containing different words.

30 22. In Charles v. Lysons (1922) N.Z.L.R. 902 the Court of Appeal was concerned with a claim by a vendor to recover from a purchaser an apportioned amount of Land Tax. The purchaser relied on S.162 of the Land and Income Tax Act 1916 (in similar terms to S.108 of the Act but expressly including both land tax and income tax). The purchaser's appeal was allowed. Hosking J. in delivering the judgment of the Court of Appeal said at p.910 :-

40 "The incidence of the tax is by the Act

RECORD

"explicitly cast upon such owner, and but  
"for the contract he would have had to bear  
"the whole of the tax out of his own  
"resources. To ensure this appears to us  
"to be the manifest purpose of the  
"prohibition enacted in S. 162, for we are  
"unable to see any possible mode by which  
"a contract or agreement between an owner  
"and a third person could alter the  
"incidence of the taxation as between such 10  
"owner and the Crown, when the Act  
"expressly casts the incidence on him and  
"affords no means of shifting the incidence.  
"The section must therefore be construed as  
"directed to contracts or agreements  
"altering the incidence as between the  
"owner and third parties. This is the  
"only escape if it is to receive any effect  
"at all."

23. The taxpayer submits that the history of 20  
Section 108 of the Act supports the submission.  
Section 62 of the Land Tax Act 1878 provided :

"Every covenant or agreement heretofore  
"made or hereafter to be made between  
"landlord and tenant, mortgagor and  
"mortgagee, or between any other persons,  
"altering or attempting to alter the nature  
"of the estate in any land so liable to  
"duty for the purpose of defeating or in  
"any other manner evading the payment of 30  
"land-tax imposed by this Act, or which  
"shall be in any manner contrary to the  
"true intent of this Act, or calculated to  
"prevent its operation in any respect,  
"shall, so far as regards any such covenant  
"or agreement, be void and of no effect as  
"between the parties thereto."

The Land Tax Act 1878 was repealed by the  
Property Assessment Act 1879. Section 29 of 40  
that Act provided:

"No contract, covenant, or agreement  
"touching the payment of taxes to be  
"charged on their respective premises  
"heretofore made, or hereafter to be made,



"between any persons which is contrary to  
"the intent and meaning of this Act shall  
"be binding on the parties."

10 This section was repealed by The Property  
Assessment Act 1885 and replaced by Section 35  
of that Act in the same words. The Land and  
Income Assessment Act 1891 (which Act first  
introduced income tax in New Zealand) repealed  
the Property Assessment Act 1885. The  
10 corresponding provision is Section 40 which is  
similar in its wording to the original Section  
62 of the 1878 Act but which refers to tax  
generally and not merely land tax. As in the  
earlier sections it was expressed to render  
void covenants or agreements as between the  
parties thereto.

The Land and Income Assessment Act 1900  
repealed the 1891 Act. Section 82 provided:

20 "Every contract, agreement or arrangement  
"made or entered into, in writing or  
"verbally, either before or after the  
"commencement of this Act, shall be  
"absolutely void in so far as, directly  
"or indirectly altering the incidence of  
"any tax, or relieving any person from  
"liability to pay any tax or make any  
"return, or defeating, evading or  
"avoiding any duty or liability imposed  
"on any person by this Act, or preventing  
30 "the operation of this Act in any respect".

This Section was substantially re-enacted by  
Section 103 of the Land and Income Tax  
Assessment Act 1908 which was a consolidating  
Act. The only alteration made in 1908 was to  
substitute the words "the coming into operation  
of this Act" for the words "the commencement of  
this Act". The 1908 Act was repealed by The  
Land and Income Tax Act 1916. Section 162 of  
that Act provided:

40 "Every contract, agreement, or arrangement  
"made or entered into, either before or  
"after the coming into operation of this  
"Act, shall be absolutely void in so far

RECORD

"as, directly or indirectly, it has or  
"purports to have the purpose or effect of  
"in any way altering the incidence of  
"land-tax or income-tax, or relieving any  
"person from his liability to pay such tax."

This section omits the two limbs, namely,  
"defeating, evading, or avoiding any duty or  
"liability imposed on any person by the Act"  
and "preventing the operation of this Act in any  
respect" contained in Section 82 of the Act of 1900 and Section 103 of the Act of 1908. It also omits the reference to making any return. The omission of the two limbs was referred to in Charles v. Lysons (1922) N.Z.L.R. 902, 911. Judgment in that case was delivered on 26th June, 1923. The 1916 Act was repealed by the Land and Income Tax Act 1923 which was passed on 28th August 1923. Section 170 of the 1923 Act repeats Section 162 of the 1916 Act. 10

Section 12 of the Land and Income Tax Act 1940 omitted the words "Land Tax or" so that thereafter the Section applied only to income tax. 20

The Land and Income Tax Act 1954 is described in its long title as an Act to consolidate and amend the law relating to land tax and income tax. Section 108 of the Act is in similar terms to Section 162 of the 1916 Act and Section 170 of the 1923 Act omitting only the reference to land tax. 30

24. In the New Zealand cases reference has been made to, and emphasis laid upon, Australian decisions. The Australian statutes have at all times contained provisions similar to Section 82 of the Land and Income Assessment Act 1900. The present Commonwealth provision is Section 260 of the Income Tax Assessment Act 1936 - 60 which provides as follows :

"Every contract, agreement, or arrangement  
"made or entered into, orally or in writing, 40  
"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

10 "(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."

20 This section retains the two limbs which were omitted from the New Zealand section in 1916. The first two limbs are similar to but not identical with the two limbs of Section 108. In De Romero v. Read (1932) 48 C.L.R. 649 the issue before the Court was whether the executors of the husband were liable under a covenant in a separation deed to pay to the wife certain sums paid by her for tax. The executors relied on a statutory provision similar to Section 260 of the Income Tax Assessment Act 1936 - 60 (Australia). Gavan  
30 Duffy C.J. and Starke J. said at p.655:

"So, when the Income Tax Act here in question prescribes that a contract shall not directly or indirectly alter the incidence of any income tax, it necessarily means that the burden imposed upon any person by force of the Act shall remain where it falls, and not be thrown by contract, etc. upon, or undertaken by, any other person."

40 Dixon J. at p. 663 referred to the judgment of

RECORD

the Court of Appeal in New Zealand in Charles v. Lysons with apparent approval.

25. In Elmiger v. Commissioner of Inland Revenue (1967) N.Z.L.R. 161 (the facts of which Case are fully set out in (1966) N.Z.L.R. 683) it was argued in the Court of Appeal for the taxpayer that Section 108 of the Act had no fiscal effect. The Court held that the section had fiscal effect. North P. (at p. 181, 1.40) referred to the alteration to the section in 1900 when the words "as between the parties thereto" were omitted and to the reference in Section 108 to the words "absolutely void". He also distinguished Charles v. Lysons as a land tax case (181, 1.5) and said that if the effect of the judgment in that case was that the section had no fiscal effect such a conclusion was not a necessary part of the decision. North P. also referred to Timaru Herald Co. Ltd. v. Commissioner of Taxes (1938) N.Z.L.R. 978. Turner J. distinguished Charles v. Lysons on the grounds that that was not a case in which the Court was concerned on any argument from the Commissioner to hold that the section could not be used for him (p.186. 1.41) and that it was a land tax case (p. 186, 1.43). He said (p.187) that as regards income tax the same reasoning does not apply. McCarthy J. (p.190) referred to the use of the words "absolutely void" in Section 108 of the Act; to the fact that Charles v. Lysons was a land tax case; to the fact that the Commissioner was not a party to the decision in Charles v. Lysons. He held that the observations in Charles v. Lysons were obiter; and had been disregarded in other cases especially in the Timaru Herald Co. Ltd. case.

26. The taxpayer submits that Charles v. Lysons was not referred to in the Timaru Herald case and the point raised now and in Elmiger's case was not adverted to - (1938) N.Z.L.R. 978, 1004, 1006; that the observations in Charles v. Lysons were not obiter but formed part of the reasons for the decision; that the distinction drawn between land tax and income tax is not a valid distinction. The taxpayer submits that the

interpretation of the section in Charles v. Lysons was correct. The submissions made under the taxpayers second contention support this view.

10 27. The second submission of the taxpayer:  
The taxpayer's second submission is that if Section 108 has fiscal effect it is limited to cases where the incidence of or liability to income tax has already accrued. This submission was also made on behalf of the appellant taxpayer and also rejected in Elmiger v. Commissioner of Inland Revenue (1967) N.Z.L.R. 161 and in the Marx and Carlson cases. In Elmiger's case North P.(at p. 182) considered that this construction would stultify the section and referred to Newton v. Commissioner of Taxation (1958) A.C. 450. He then referred to the meaning of the word relief and said (p.182 l.19):

20 "In my opinion, the word "relief" is  
"capable of different shades of meaning.  
"In a legal sense it means "to free or  
"clear (one) from an obligation: to  
"give (one) "relief": see Oxford  
"Dictionary. But I see no reason why  
"the relief should be limited to a  
"liability which has already accrued.  
"In my opinion, it is enough if the  
30 "purpose of the arrangement was to relieve  
"the taxpayer from income tax in respect  
"of income derived by him (see s. 77 of  
"the Land and Income Tax Act 1954)."

Turner J. said in Elmiger's case at p. 184:

40 "... but I am prepared to hold that by  
"virtue of s. 77 liability is imposed  
"upon every taxpayer to pay tax on the  
"income which he derives and that in so  
"far as any arrangement into which he  
"enters has the purpose and effect of  
"relieving him from this liability it  
"will be caught by s.108. I agree in  
"this respect with the conclusion of  
"Woodhouse J. in the Court below that the  
"word "relieve" may as aptly be used in

RECORD

"relation to an anticipated as to an  
"existing burden."

McCarthy J. referred to this point at p.190  
and also in the Marx and Carlson cases at  
pp.10-16.

28. The taxpayer submits that the decision in  
Newton v. Federal Commissioner of Taxation  
(1958) A.C. 450 on this point does not assist  
the Commissioner for it was a decision under  
the third (avoiding) limb of the Australian 10  
section which has no counterpart in New Zealand.  
Section 108 expressly refers to the incidence  
of and liability to income tax. Section 77 of  
the Act imposes income tax in respect of all  
income derived by a taxpayer during the year.  
Returns of income are to be made in each year in  
respect of income derived during the preceding  
year: Section 7 Liability to tax is imposed  
by the Act and the assessment by the Commissioner  
quantifies that liability - sections 7 and 17 20  
of the Act. It is submitted the Act recognises  
and requires that the amount of assessable and  
taxable income must be calculated: Sections 7  
and 111. Section 111 expressly refers to  
calculating the assessable income of a taxpayer.  
It is submitted that there can be no liability  
to tax until the calculation is made and no  
liability can arise until the end of the year  
in respect of which tax is payable.

29. The words "altering the incidence of income 30  
tax" are not apt to describe a situation existing  
before a liability has accrued. So to use them is  
to extend them to the case of an inchoate future  
liability. Under the Act the primary liability to  
the Commissioner, the incidence of the tax, can  
never be altered by arrangement made by the tax-  
payer. The section can operate practically in  
respect of the ultimate burden where that is  
purported to be altered.

30. The words "relieving any person from his 40  
liability to pay income tax" are, it is submitted,  
directed to exemption from the legal consequences  
of an existing state of affairs. That state of  
affairs must exist. The use of the word "relief"  
in other statutory contexts supports this  
interpretation - e. g.,

- (i) relief against forfeiture of a lease.  
Sections 117-121 Property Law Act 1952.

(ii) Relief of trustees: Section 73 Trustee Act 1956.

(iii) Relief of directors: Section 468 Companies Act 1955.

(iv) Mortgagors and Lessees relief: Section 53 Mortgagors and Lessees Rehabilitation Act 1936.

10 It was held in Elmiger's case (1967) N.Z.L.R. 161 that "relieve" may aptly be used in relation to an anticipated as well as to an existing burden (p.184 line 41; p.182 line 19). To this extent Purdie v. Inland Revenue Commissioner (1965) 9 A.I.T.R. 603 was overruled. It is submitted this is not its use in Section 108. The word "avoid" which is present in the Australian section and was present in the New Zealand section between 1900 and 1916 is suitable to meet a possible future obligation. It was held to have this meaning in Newton v. Federal Commissioner of Taxation (1958) A.C. 20 450, 464. In the earlier New Zealand enactments the word "relieve" it is submitted did not mean the same as "avoid". The repeal of the reference to avoidance cannot enlarge the meaning of the word "relieve": A.G. v. Lamplough (1878) 3 Ex. D. 214, 227. The use of the words "his liability" in Section 108 again supports this view.

30 31. The third submission of the taxpayer is that Section 108 applies only in respect of derived income and not to income which a taxpayer might have, but did not, derive. In the present case there has been a reduction in the gross income of the taxpayer. The income which the taxpayer might have derived but did not derive, from the growing and sale of wheat on his own account, has been replaced by other income namely the items shown on Exhibits 1 and 5 which are the accounts rendered by him to the Trustees for (inter alia) work done and services rendered and rent. The transactions are not, and none have ever been contended by the Commissioner to have been, shams. The liability to income tax under the Act has as its

40

pp. 79, 84

RECORD

first condition, its derivation by the taxpayer: Section 77 of the Act. It is submitted that the Trustees and not the taxpayer derived the income in question in the two years.

32. The question whether Section 108 reaches such a situation was left open in Elmiger v. C.I.R. (1967) N.Z.L.R. 161. It was not necessary to determine the point in that case for the appellant taxpayers derived income and by the arrangement introduced a deduction (hire charges) 10 which they sought to set off against such derived income.

33. The contention of the taxpayer has been determined against him in the present case, which follows the decision of the Court of Appeal in the Marx and Carlson cases. In Marx and Carlson North P. and McCarthy J. found against the taxpayer and Turner J. found against the Commissioner. In relation to the argument that Section 108 does not relate to income not 20 derived by a taxpayer North P. said (at p. 10 of the unreported judgment):

"I think the better view then is that those  
"responsible for the drafting of the new  
"section, rightly or wrongly, concluded  
"that the general terms in which the  
"section is now expressed would cover all  
"kinds of tax avoidance arrangements. In  
"my opinion then the question I must now  
"consider is whether that is so." 30

North P. said at pp. 12 - 13:

"Now it is quite true that in the Australian  
"cases in the main the judges have found it  
"convenient to rely on the word "avoid".  
"But in my opinion an examination of the  
"cases contain no suggestion that the word  
"relieving' has a more limited meaning. If  
"then it is accepted that an arrangement may  
"be caught under the Australian section even  
"although the effect of the arrangement 40  
"results in the taxpayer never deriving the  
"income in dispute I find great difficulty  
"in reaching the conclusion that such an



"arrangement is not equally caught by the  
"language of the New Zealand section.  
"Consider the position in the two present  
"cases. Prior to the appellants entering  
"into their arrangement they knew perfectly  
"well that they would be liable to pay  
"income tax on the whole of the net income  
"they derived from their farming  
"operations. What they did was to make  
10 "an arrangement which relieved them of the  
"obligation of maintaining and supporting  
"their wives and the members of their  
"family by diverting part of their income  
"from the farm to trusts in favour of the  
"members of their family, and thus obtain  
"a tax advantage denied to others.  
"Surely, simply as a matter of common sense  
"it is plain that the arrangements were  
"directed to altering the incidence of  
20 "income tax for which they otherwise in due  
"course would become liable and  
"consequently resulted in their being  
"relieved from their liability to pay  
"income tax....."

and (at p. 14):

"In such a case, in my opinion, he is  
"reducing the burden of income tax on what  
"is really in truth his income and thus  
"has not only altered the incidence of  
30 "income tax, but, has relieved himself  
"from his liability to pay income tax."

North P. supported these views by reference to  
the observations of Lord Donovan in Peate v.  
Commissioner of Taxation (1967) A.C. 308, 339.

McCarthy J. said at p. 15:

"I think that any transaction which has  
"resulted in a particular tax year in  
"someone else paying income tax which but  
"for the transaction would have fallen on  
40 "the taxpayer can according to the common  
"usage of the words be said to have  
"altered the incidence, and similarly,  
"every transaction which has resulted in  
"him paying less to relieve him."

RECORD

and at p. 17:

"In saying all this, I am of course  
"influenced by my belief that if you avoid  
"tax you either alter the incidence of or  
"relieve from liability to pay tax. This  
"is the heart of the matter. Such a  
"reading conforms to what I conceive to be  
"a common-sense view of the section, one  
"which takes into account its nature and  
"its purpose. The tide is running  
"strongly these days in favour of a  
"commonsense as opposed to a purely  
"technical reading of income tax  
"legislation."

10

and also relied on the observations of Lord  
Donovan referred to above.

34. The appellant submits that the judgment of  
Turner J. in the Marx and Carlson cases is  
correct. Turner J. referred first to the  
distinction between the New Zealand and the  
Australian sections. He then considered the  
meaning of the expression "altering the incidence  
of income tax."

20

For the reasons given by him Turner J. concluded  
this part of his judgment by saying (at p. 7):

"It seems to me that in cases where the  
"taxpayer does not derive after the  
"arrangement the income which he would or  
"might have derived but for it, but derives  
"different income, the arrangement cannot be  
"said to be one "altering the incidence of  
"income tax". What it alters is the income  
"derived by the person concerned. I am  
"therefore of opinion that the arrangements  
"proved in these cases before us are not  
"caught by the section as arrangements having  
"the effect of "altering the incidence" of  
"the income tax of the taxpayers."

30

Turner J. then considered the meaning of the  
words "relieving against his liability to pay  
income tax" and said at pp. 8-10:

40

10 "Having carefully considered the words  
"relieving any person from his liability  
"to pay income tax' in their ordinary  
"meaning I have come to the conclusion  
"that they do not include what was done in  
"this case. No-one has any liability to  
"pay income tax, until he has derived  
"income. It was argued before us that  
"no such liability accrued until the  
"taxpayer had been assessed; but I am  
"content with the proposition that at  
"least no liability accrues until income  
"has been derived. I said in Elmiger v.  
"Commissioner of Inland Revenue 1967  
"N.Z.L.R. 161 at page 184, and I adhere  
"wholly to the proposition, that no duty  
"is cast upon anyone by the statute to  
"derive any specified amount of income,  
"or indeed any income at all; if he choose  
20 "to derive no income, and to order his life  
"on the standard of living which must  
"result from such a decision, he is in  
"breach of no statutory duty. And, so  
"ordering his life, he will be under no  
"liability to pay income tax.

30 " A person never incurs any liability  
"to pay income tax, in a word, on anything  
"except income which he derives. Does he  
"offend against the section, then, if,  
"though he makes no attempt to alter his  
"liability for tax on income which he  
"derives, he arranges matters so that he  
"may remain free wholly or in part, from  
"liability which in fact he never incurs,  
"but which, but for the arrangement, he  
"would have incurred? It is the  
"submission of the Commissioner that the  
"section should so be read.

40 " The answer to the question which I  
"have posed is to be found, in my opinion,  
"in the words "relieving" and "his  
"liability" where they are used in the  
"section. It is clear, on the authority  
"of Elmiger v. Commissioner of Inland  
"Revenue (supra) that the liability for  
"income-tax of which the Act speaks may be

RECORD

"a future one. In Elmiger's case it was  
"income still to be derived, the liability  
"for tax on which was affected by the  
"arrangement. But the income, nevertheless,  
"as to which liability for tax was affected,  
"was in the event actually derived. In  
"the Australian cases, in a different  
"context, the Australian provision has been  
"held to be applicable to a liability which 10  
"in the event never falls at all upon the  
"taxpayer. Arrangements having the effect  
"of 'avoiding' such a liability altogether  
"have been held to be caught. But the  
"Australian cases, with the exception of  
"some dicta to which I shall presently come  
"back, all turn on the use of the word  
"avoid. Where, as in Australia, the  
"Statute speaks of avoiding liability, it  
"has been held that this phrase is apt to 20  
"include escaping from a liability which  
"in the event never falls upon the taxpayer  
"at all. This is because the word 'avoid'  
"necessarily connotes ultimate lack of  
"contact. If one avoids a collision, one  
"has not collided. If one avoids  
"liability, liability never accrues.  
"Relief' is different. I think that one  
"cannot have "relief" from something from  
"which one never begins to suffer. Relief  
"from pain follows upon first suffering it, 30  
"in greater or less degree; avoidance of  
"pain means never to suffer it at all.  
"So with liability for tax. For these  
"reasons I am of opinion that on the  
"ordinary meaning of the words used one  
"does not obtain relief from liability for  
"income tax, if one so arranges matters  
"that one never incurs liability for that  
"tax at all. One may by taking such a  
"step avoid liability; one does not obtain 40  
"relief from liability. The New Zealand  
"section, as I shall in a moment point out,  
"is not worded, even as to this limb, in  
"terms identical with the Australian, for  
"in this country it is "his liability"  
"which is referred to."

and at pp. 12 - 13:

10 " Not only does the word "relieving",  
"as distinguished from "avoiding", connote  
"the necessity of the liability having  
"actually in the event attached, enabling  
"relief to be obtained from it, but the  
"words "his liability" as distinguished  
"from "any liability" in the corresponding  
"text of the Australian provision may also  
"be of some significance. It is his  
"liability against which the arrangement  
"made by the taxpayer must effect relief.  
"If he earns no income he will never have  
"any liability: this amounts to no more  
"perhaps than has been said already about  
"the word "relieving": but it may give an  
"answer to the proposition, advanced in  
"argument before us, that Income Tax, like  
"the poor, is always with us, and that  
20 "relief against income tax may be read as  
"meaning relief in a general sort of way,  
"without its being necessary to  
"contemplate the particular liability of  
"any particular person. This is not what  
"the statute says; it says "his liability".

Turner J. did not follow the observations of  
Lord Donovan in Peate v. Commissioner of  
Taxation (1967) A.C. 308, 339 for the reasons  
(at pp. 22 - 23):

30 "(1) The question of whether the  
"relieving" limb of the section applies  
"to the transactions proved was never  
"fully argued before the Judicial  
"Committee. Viscount Dilhorne had  
"stopped the argument, intimating that  
"their Lordships were satisfied that the  
"transactions were caught by the "avoiding"  
"limb, (2) Lord Donovan did not dissent  
"from this proposition; the most that  
40 "his dictum can be taken as saying must be  
"that the "relieving" limb was also in his  
"opinion applicable - and this without the  
"matter having been argued, (3) it was not  
"necessary in Lord Donovan's opinion to  
"go even so far as this, and it is by no  
"means clear that he ever distinctly

RECORD

"adverted to the difference between these  
"two particular limbs of the section, at  
"least as a matter of any significance.  
"In fact, he may well be taken as  
"specifically not doing so, and it may be  
"that in alluding, in contrast to the  
""relieving" limb to the "remaining content  
"of section 260" he was referring solely to  
"the"altering the incidence of tax" limb, 10  
"which he immediately afterwards mentioned,  
"with which he may well have been  
"contrasting the "avoiding" and "relieving"  
"limbs regarded as one. (4) the whole  
"argument in Peate's case, as it developed  
"was not one about the difference between  
""relieving" and "avoiding" - this was  
"never mentioned. It was about something  
"quite different - viz. the effect of the  
""annihilation" provision of the section,  
"(5) Lord Donovan's was a dissenting 20  
"opinion, and what he was dissenting about  
"was, and was exclusively, the effect of  
"the annihilating provisions of the section,  
"(6) in any case, the texts of the New  
"Zealand and Australian sections are  
"different. In Australia the words are  
""liability to pay any income tax"; in New  
"Zealand "his liability to pay income tax"-  
"and the difference, on which I have already 30  
"commented, is sufficient to prescribe  
"caution in giving too much weight to a  
"dictum on the Australian section."

35. The taxpayer submits that both the natural  
meaning of the words of Section 108 and the  
authorities on those words support the judgment  
of Turner J. in the Marx and Carlson cases.  
An arrangement to be within the provisions of  
Section 108 must have directly or indirectly the  
purpose or effect of altering the incidence of  
income tax or relieving any person from his  
liability to pay income tax. The taxpayer 40  
further submits:

- (a) The incidence of income tax is laid by the  
Act upon those who derive income. The  
incidence of income tax has been held to  
be the burden of that tax as cast by the

Act: De Romero v. Read (1932) 48 C.L.R.  
649, 657, 660-661.

- 10 (b) The expression "altering the incidence of income tax" means changing the burden of tax from the person on whom that burden is cast by the Act. The transactions in the present case have affected the gross income which the taxpayer might otherwise have derived but have not affected the incidence of tax which still lies where the Act places it, namely on the taxpayer and the trustees respectively.
- 20 (c) The words "relieving any person from his liability to pay income tax" relate only to income derived by a taxpayer for it is only such income which is liable to income tax: Section 77 of the Act. It is liability to income tax which is referred to in Section 108 and it is his, i.e. the taxpayer's, liability which is referred to. If Elmiger's case is correct, this limb of Section 108 may relate to an anticipated burden of tax in respect of derived income, and not merely in respect of an accrued burden of tax in respect of derived income.
- (d) The New Zealand section between 1900 and 1916 contained four separate limbs - namely
- 30 (i) altering the incidence of any tax;
- (ii) relieving any person from liability to pay any tax or make any returns;
- (iii) defeating, evading or avoiding any duty or liability imposed on any person by this Act;
- (iv) preventing the operation of this Act in any respect.

40 In 1916 the third and fourth limbs were not re-enacted: the reference in the second limb to making any returns was omitted; and the reference to liability

RECORD

was expressed to be "his" liability. Section 260 of the Income Tax Assessment Act 1936 - 60 (Australia) has the four limbs. The first two are expressed as:

- (a) altering the incidence of any income tax;
- (b) relieving any person from liability to pay any income tax or make any return.
- (e) The scope and meaning of the third and fourth limbs of the Australian Act have been considered by the Courts. The third limb was referred to in Newton v. Federal Commissioner of Taxation (1958) A.C. 450 at 464 when Lord Denning said:

10

"They (sc. their Lordships) are clearly of opinion that the word "avoid" is used in its ordinary sense - in the sense in which a person is said to avoid something which is about to happen to him. He takes steps to get out of the way of it. It is this meaning of the word "avoid" which gives the clue to the meaning of "liability imposed". To "avoid a liability imposed" on you means to take steps to get out of the reach of a liability which is about to fall on you."

20

The fourth limb was referred to in Hancock v. Federal Commissioner of Taxation (1959 - 1961) 108 C.L.R. 258, 278 where Dixon C.J. said:

30

"The expression "preventing the operation of the Act in any respect" is generally regarded as difficult but I treat it as simply meaning the operation which the Act would have in a given case if it were not for the contract agreement or arrangement made for the purpose (or having the effect) of preventing it."

- (f) Even if the third and fourth limbs of the Australian section might be thought capable on these authorities, of reaching the

40



transactions the subject of this Appeal, nevertheless they are expressed in other words and mean different things from the first two, similar, but not identical limbs in New Zealand. The meaning of the two remaining limbs in New Zealand is not to be extended by the omission of the third and fourth: A.G. v. Lamplough (1878) 3 Ex. D.214.

- 10 (g) Peate v. Commissioner of Taxation (1967) A.C. 308 referred to in the Court of Appeal was, it is submitted, a case on the third (avoiding) limb of the Australian Statute and the observations of Lord Donovan (at p.339) ought not to be followed.

20 36. The taxpayer submits that Section 108 should be strictly construed as was done with a statutory provision in pari materia in Re Gordon's Settlement (1924) 1 Ch 146, 154; that if there are two alternative constructions open that is to be preferred which favours the subject: Inland Revenue Commissioner v. Ross (1948) 1 All E.R. 616, 625, 634 and Vestey v. Inland Revenue Commissioner (1949) 1 All E.R. 1108, 1120. The taxpayer submits that the maxim referred to by Lord Simonds in Russell (Inspector of Taxes) v. Scott (1948) A.C. 422, 433 is applicable namely :

30 "... the subject is not to be taxed  
"unless the words of the taxing statute  
"unambiguously impose the tax upon him."

40 37. The taxpayer's fourth submission: The taxpayer submits that, if none of the foregoing submissions is accepted and Section 108 of the Act is capable of application, on the facts, it does not apply to the present case. This was the view of Wilson J. in the Supreme Court. The Court of Appeal unanimously reversed the order of the Supreme Court. Wilson J. in the Supreme Court and all the Judges in the Court of Appeal adopted the test propounded by Lord Denning in Newton v. Commissioner of Taxation (1958) A.C. 450, 466 that :-

p.59 l.1 )  
p.69 l.46 )  
p.71 l.13 )  
p.75 l.32 )  
p.76 l.1 )

RECORD

"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 10  
"labelled as a means to avoid tax, then the  
"arrangement does not come within the  
"section."

In New Zealand the word "avoid" does not appear  
in Section 108 of the Act and in Elmiger's case  
(1967) N.Z.L.R. 161, 187 Turner J. substituted  
for avoid the words "relieve from liability to  
pay tax".

p.59 l.1. 38. The taxpayer submits that the judgment of  
Wilson J. is correct. The learned judge first 20  
held that the principle applicable was that  
enunciated in Newton v. Commissioner of Taxation  
(1958) A.C. 450, 456 as modified by Turner J. in  
Elmiger v. Commissioner of Inland Revenue (1967)  
N.Z.L.R. 161, 187 to meet the differences in the  
New Zealand section. Wilson J. after referring  
more fully to this principle considered the  
meaning of the expression "ordinary family  
dealing". He then found that what the taxpayer  
did was to make provision for the maintenance and 30  
advancement of his wife and children. He said:-

p.61 l.32-44 "The transactions into which he entered are,  
"therefore, capable of explanation by  
"reference to ordinary family dealing, but  
"can they escape necessarily being labelled  
"as a means to relieve from liability to  
"pay income tax. The answer to that  
"question must be found by examining the  
"overt acts by which the arrangement which 40  
"secured the provision for the objector's  
"wife and family was implemented. The fact  
"that the method adopted is novel does not  
"necessarily attract the label. The whole  
"of the circumstances must be considered."

RECORD

Wilson J. then referred to the facts and submissions made by the Commissioner and held that Section 108 of the Act did not apply.

p.61 1.45 to  
p. 64 1.34

In the Court of Appeal North P. first considered the principles applicable to the determination of this submission. He referred to the principles contained in Newton v. Federal Commissioner of Taxation (1958) A.C. 450 and (after reviewing the facts of the present case) he held that it was impossible to accept the argument for the appellant that the arrangement was capable of explanation as an ordinary family dealing. He said :-

p.69 1.46

p.71 1.24 to  
p.72 1.14

10

20

30

" No sensible farmer would dream of entering into an arrangement of such a nature. Can it be capable of explanation as an ordinary family dealing? In my opinion it certainly cannot. No change occurred in the practical operation of the farm as a whole and all that happened was that a substantial part of the income from the farm was (in the words of Mr. Richardson) "syphoned off to the trust" with the result that the respondent paid considerably less income tax and the trustees probably escaped liability for any income tax. In my opinion, with all respect for the views expressed by Wilson J. this arrangement was obviously an attempt by the respondent to escape payment of income tax on what was really in truth his income. I am accordingly of opinion that if the New Zealand section is to be interpreted in a similar fashion to the Australian section the arrangement made by the respondent in each of the two years in question is caught by S. 108 of the Land and Income Tax Act 1954."

p.72 11.22-43

40

North P. then referred to his judgment in the Marx and Carlson cases and held that Section 108 of the Act was applicable for the reasons he gave in those cases. Turner J. after referring to his dissenting judgment in the Marx and Carlson cases the majority judgments in

p.72 1.44 to  
p.73 1.13

RECORD

p.74 1.24  
p.74 11.28-30

which cases by then bound him, proceeded to consider whether the inferences of fact found by Wilson J. were correct. He concluded they were not. He stressed the short terms of the leases and said :-

p.74 1.32 to  
p.75 1.3

"A disposition of an income-earning asset,  
"if the primary reason for it were to  
"provide income for members of the  
"settlor's family might confidently be  
"expected to be a disposition for a longer 10  
"period than this. It was an essential  
"part of this scheme that while the lease  
"of the wheat paddock was for one year, in  
"the following year another paddock was to  
"be leased - and again another the  
"following year. It was the rotation of  
"crops, of course, which made this kind  
"of thing necessary - but which at the same  
"time made this kind of transaction one 20  
"particularly unfitted to be the basis of a  
"family trust providing assured regular  
"income for its beneficiaries. I cannot  
"think that successive one-year leases of  
"that particular paddock of the farm which  
"by crop rotation happened to be the wheat  
"paddock can be described as an ordinary  
"family dealing, a typical family trust."

p.75.1.3

He then adverted to Wilson J's finding that the rent was realistic. He said:

p.75 11.6-17

"It may well be that the rent calculated 30  
"on a basis of arithmetical average with  
"reference to the area involved and the  
"comparative area of the whole farm may  
"appear justifiable; but it is to be  
"remembered that the paddock leased was  
"always the very paddock which in the  
"particular year under consideration was  
"ready for wheat - a highly profitable crop -  
"and it seems to me that the rent charged  
"for such a paddock in a particular year 40  
"should have been greatly in excess of a  
"mere arithmetical average."

p.75 1.22

He found the scheme was devised for the sole purpose or at least the principal purpose of

RECORD

bringing it about that the taxpayer should escape liability on tax for a substantial part of the income which without it he would have derived. He applied the test he enunciated in Elmiger v. Commissioner of Inland Revenue (1967) N.Z.L.R. 161, 187 and found for the Commissioner.

10 McCarthy J. considered that when the facts were looked at it was manifest that it could be predicated that the arrangement was implemented in the way it was for the purpose of altering the incidence of and relieving the respondent from his liability to pay income tax.

p.76 11.3-10

39. In the Supreme Court Wilson J. held that while avoidance need not be the sole purpose or effect it had never been held sufficient to avoid an arrangement unless it was the predominant purpose or effect. It is submitted this is correct. The section refers to the purpose or effect.

20 40. The purpose or effect is not that of the taxpayer but of the arrangement: Newton v. Federal Commissioner of Taxation (1958) A.C. 450, 465. The word "purpose" means not motive but the effect which it is sought to achieve - the end in view: Newton's case at p.465.

41. With one exception the findings of fact by Wilson J. were not attacked in the Court of Appeal either in argument or by the judgments in that Court.

30 These findings included:

(i) The charges made by the taxpayer for his services were at a proper rate.

p.56 1.13  
p.62 1.23

(ii) The proceeds of the sale of wheat were received by the Trustees who retained the profits subject to the terms of the Trust.

p.56 11.16-49

(iii) The Trustees made distributions of income for the benefit of the taxpayer's wife and family.

p.56 11.35-49

40 (iv) The taxpayer had no control over such moneys.

p.56 1.49

RECORD

p.55 11.  
30-33

(v) The Trustees employed the taxpayer to prepare and sow the paddock in wheat and to harvest and sell the crop.

p.55 1. 30

Wilson J. also found that the rent charged was realistic in the case of each lease. This finding was not accepted by Turner J. in the Court of Appeal. It is submitted that the finding of Wilson J. was justified upon the evidence and is correct.

p.56 1. 3

p.75 1. 2

42. The taxpayer submits that the transactions were capable of explanation as an ordinary family dealing and are not necessarily to be labelled as a means to relieve against liability to pay income tax. Emphasis is laid upon the lack of control by the taxpayer. The importance of this point in this class of case is indicated in Peate v. Federal Commissioner of Taxation (1962 -64) 111 C.L.R. 443, 475 (per Taylor J.) and 480 -481 (per Windeyer J.). It is submitted that it is not enough that the transaction is novel. If the word "ordinary" has a quantitative significance then it was stated at the Bar for the Commissioner that there are some 200 other such cases as the present. 10 20

43. In Deputy Federal Commissioner of Taxes v. Purcell (1921) 29 C.L.R. 464, 473 Gavan Duffy J. and Starke J. in the joint judgment said:

"If a person actually disposed of income producing property to another so as to reduce the burden of taxation, the Act contemplates that the new owner should pay the tax." 30

The case concerned an outright transfer of land. The taxpayer submits that the same principle applies to the case of a lease of land because the right to the income is founded on the right to the land. The term of the lease is, it is submitted, a matter of degree and not of principle. The rights of lessor and lessee are both proprietary rights. 40

44. The effect of the Commissioner's contention and of the judgment of the Court of Appeal is that

10 a person placed as the taxpayer is placed cannot benefit his family through a trust by income. If the right to the income is transferred for full value the benefit to the trust is impaired. If tax paid income were given to Trustees by the taxpayer it would be capital in their hands. It is submitted that the taxpayer had no choice in the method he was to adopt if he was to give the family trust an income. The transactions in the present case were entirely and, it is submitted, exclusively suitable to the class of business intended to be carried on - namely the cropping of wheat with its requirement of crop rotation.

45. The taxpayer submits that the principles referred to in Clarke v. Federal Commissioner of Taxes (1932) 48 C.L.R. 56, 77 and Inland Revenue Commissioners v. Brebner (1967) 2 A.C. 18, 30 are applicable to this case.

20 46. Accordingly it is respectfully submitted that the Appeal should be allowed and the order of Wilson J. should be restored for the following (among other)

R E A S O N S

- 30 (1) BECAUSE Section 108 of the Land and Income Tax Act 1954 has no fiscal effect and applies only inter partes.
- (2) BECAUSE if Section 108 has fiscal effect, it does not operate in respect of income which has not accrued.
- (3) BECAUSE if Section 108 has fiscal effect it does not extend to cases where the income was not derived by the taxpayer.
- (4) BECAUSE if Section 108 is capable in law of application in the circumstances of the present Appeal, the transactions are not in fact such as to fall within the section.
- (5) BECAUSE the decision of Turner J. in

RECORD

Marx and Carlson v. C.I.R. is right and ought to be upheld and the decision of the Court of Appeal of New Zealand in those cases was wrong and ought to be reversed.

- (6) Alternatively to (5) BECAUSE the decision of Wilson J. in the Supreme Court is right and ought to be upheld and the decision of the Court of Appeal of New Zealand was wrong and ought to be reversed.

10

E. J. SOMERS



No. 3 of 1970

IN THE PRIVY COUNCIL

---

O N A P P E A L

FROM THE COURT OF APPEAL OF NEW  
ZEALAND

---

B E T W E E N

OWEN THOMAS MANGIN                      Appellant

- and -

COMMISSIONER OF INLAND  
REVENUE                                      Respondent

---

CASE FOR THE APPELLANT

---

BLYTH DUTTON & CO.  
10 Norfolk Street,  
London, W.C.2.