THE INCOME TAX JUDGMENTS OF SIR GARFIELD BARWICK: A STUDY IN THE FAILURE OF THE NEW LEGALISM

GEOFFREY LEHMANN*

INTRODUCTION

The income tax judgments of Sir Garfield Barwick claim implicitly to occupy the foreground of literalism.[1] His critics and supporters appear to have accepted this claim.[2] The contention of this article is that the tax judgments of Barwick C.J. are not a development of traditional literalism. Rather they are anti-literalist and policy-directed.

Considerable liberties were taken by him in his interpretation of sections of the *Income Tax Assessment Act (Cth) 1936*,[3] and breaking with long-established case-law does not seem to have concerned him either.[4]

An underlying jurisprudential error was the belief that the provisions of tax legislation can and should be made certain in their application. Barwick C.J. said:

> "It is for the Parliament to specify, and to do so, in my opinion, as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax."[5]

This contention is superficially attractive, but fails to take into account the numerous basic issues of income tax law which cannot be defined with unambiguous clarity. These issues include differentiating revenue and capital items, determining source, distinguishing tax avoidance from legitimate dealing, and a number of accounting issues.

The pragmatic flexibility which is necessary for revenue courts is implicit in the following dictum of Dixon C.J. regarding the former anti-avoidance provision of the *Income Tax Assessment Act*, section 260:

> "The resource of ingenious minds to avoid revenue laws has always provided inexhaustible and for that reason it is neither possible nor safe to say in advance what must be found, after a scheme is struck down under s. 260, before a consequential assessment can be justified."[6]

Dixon C.J. appears to have taken the view that in this case it was undesirable to limit the legislative provision and make it certain.

* B.A., LL.B. Lecturer, Department Legal Studies, University of N.S.W.

1 See for instance *Mullens* v. *F.C.T.* (1976) A.T.R. at 507, 509.

2 Murphy J. in *F.C.T.* v. *Westraders Pty Ltd* (1980) 54 A.L.J.R. at 469 apparently accepting this claim speaks of the dangers flowing from "strictly literal interpretation".

3 See the subsequent discussion of his treatment of sections 26(a), 190 and 260.

4 See the subsequent discussion regarding *Fairway Estates Pty Ltd* v. *F.C.T.* (1970) 123 C.L.R. 153.

5 *F.C.T.* v. *Westraders Pty Ltd* (1980) 54 A.L.J.R. at 461.

6 *F.C.T.* v. *Hancock* (1961) 8 A.I.T.R. 328 at 333.

The desire on the part of Barwick C.J. for certainty in tax laws was combined with a reluctance to address himself to the determination of issues of fact. The solution adopted by him was to create new legal rules in substitution for factual determinations. These sometimes surprising rules took the taxpayer outside the reach of section 190 which placed the onus on the taxpayer (so far as factual issues were concerned) to prove the assessment was excessive. The new legalism which he established embraced the *Duke of Westminster* principle with doctrinaire simplicity as basic in all tax decisions.[7]

The result was a pattern of decision-making which was widely divergent from the practice of British and New Zealand courts, and the High Court itself under Dixon C.J. A number of majority decisions in which Barwick C.J. participated produced results which practitioners and the public regarded as bizarre. Among the most notorious were *Curran* v. *F.C.T.*[8] and *Cridland* v. *F.C.T.*[9] In *Curran* not only did Barwick C.J. fail to apply his own decision in an earlier case, but the decision of the court amounts to a misunderstanding of basic rules of accountancy. In *Cridland* thousands of university students became primary producers for tax purposes by participating in a mass trust (many without even paying the one dollar fee requested by the organizers).

Decisions such as these damaged the standing of the High Court and raised doubts regarding its ability to apply standands of equity.[10] They represented a withdrawal from pragmatic reality equivalent to the physical removal of the court itself from the commercial centres of Sydney and Melbourne to the seclusion of its new Canberra premises. Barwick C.J. was, of course, the primary sponsor of this move.

The High Court since the retirement of Barwick C.J. has adopted a different position in tax matters and regained much of the public confidence lost during the Barwick era. However some of the effects flowing from tax decisions of the Barwick court will be harder to erase. A tax avoidance boom and lowered standards of commercial morality resulted from these decisions. Government energy was diverted from tax reform to plugging gaps in the Act which were opened up by the Barwick court. Revenue lost through tax avoidance and estimated at hundreds of millions of dollars each year[11] made it difficult for the government to implement tax indexation to benefit taxpayers as a whole. The greatly increased complication of the Act and harsher penalties it now imposes were the legislative response to the Barwick court's decisions. Pragmatically, as well as jurisprudentially, the new legalism has been a failure.

During his judicial career Barwick C.J. delivered or participated in one

[7] Cases in which he referred to this principle include *Westraders* (supra), *Mullens* v. *F.C.T.* (supra), *Slutzkin* v. *F.C.T.* (1977) 7 A.T.R. 166, *Brambles* v. *F.C.T.* (1977) 8 A.T.R. 108.
[8] (1974) 131 C.L.R. 409.
[9] (1977) 52 A.L.J.R. 96.
[10] See *Australian Financial Review* editorial, 2/4/1982, at 13.
[11] See *National Times*, 7/3/1982.

Privy Council decision and 67 High Court judgments where the principal issue was the correctness of an income tax assessment. In an article such as this it will only be possible to discuss selected cases.

I shall discuss a number of tax avoidance cases not involving section 260 of the Act, where the court sanctioned contrived schemes and produced decisions which did not accord with commercial reality. There will then be a discussion of cases involving deductibility. The appropriateness of a "legal rights" test which excluded the consideration of many factual issues relevant to the taxpayer incurring the expense will be discussed. I will then deal with the effective nullification of section 260 achieved by Barwick C.J., and the manner in which his judgments on section 26(a) reduced the ambit of the section and threatened to reverse the statutory onus imposed by section 190 in a wide range of cases. Finally this article will present a mathematical analysis of income tax judgments of the High Court for the period 1950 to 1980. This analysis shows a consistently anti-Commissioner trend on the part of Barwick C.J. which was widely divergent from all of his brother judges with the exception of Aickin J.

CURRAN AND OTHER AVOIDANCE CASES NOT INVOLVING SECTION 260

The High Court judgments to be discussed in this section have a common theme: the Barwick court in finding for the taxpayer deliberately excluded the commercial context in which the relevant transactions occurred. Such a foreclosure of its own right of inquiry struck right at the heart of the court's ability to apply and enforce taxation legislation. It is essential for courts determining tax matters to make fine discriminations of fact, to apportion where appropriate and to retain conceptual flexibility so that the assessment of tax will accord with the commercial reality in so far as legal concepts will permit. But under Barwick C.J. in the area of income tax law there was a progressive ossification of concepts and a withdrawal from commercial reality which produced absurd results such as *Curran's* case.

This widely criticized decision concerned a sharetrader claiming a handsome deduction which arose from the "cost" of the issue to himself of bonus shares. This "cost" was produced by a notation in his share trading account of a *par value* beside an entry recording the issue of the bonus shares. The appropriate accounting procedure was to record a *nil value* because the bonus issue cost the share trader nothing and the effect of the notation adopted by the taxpayer was to understate the profit (or to overstate the loss) shown in the sharetrading account. There was nothing in the *Income Tax Assessment Act* which sanctioned this departure from normal accounting principles or obliged the High Court to accept the ludicrous proposition put to it by the taxpayer. The majority, comprising Barwick C.J., Menzies and Gibbs JJ. found in his favour.

Only Stephen J. dissented and pointed out that the High Court in *Gibb*

v. *F.C.T.*[12] and *McRae* v. *F.C.T.*[13] had previously rejected the contentions now put forward by the taxpayer. Stephen J. also relied on the fact that the accounting methods adopted by the taxpayer did not give an accurate reflection of the taxpayer's true income in accordance with recognized business practices.[14]

The points raised by Stephen J. were very telling. A comparison of the majority judgments of Barwick C.J. and Gibbs J. is interesting. Gibbs J. in his judgment did attempt to deal with the contentious issues. He distinguished the decision in *Gibb* v. *F.C.T.* on the ground that here the taxpayer was a sharetrader.[15] The logic of this distinction was based on an erroneous view of his Honour that items brought into a trading account must be given a value otherwise "the appellant's trading account would not reveal the real situation".[16] If his Honour's view is correct then the currently accepted procedures for preparing livestock accounts are wrong. At present natural increase is brought in at a nil value (to avoid understatement of the profit) and deaths and missing are also returned at a nil value (to avoid overstatement of profits). If Gibbs J. is correct a value must be assigned to these items. However the two leading Australian income tax manuals provide otherwise.[17] Clearly the "cost" of the issue of the bonus shares is the exact analogue of the "cost" of natural increase and the resort by Gibbs J. in *Curran* to accounting principles misfired. Gibbs J. may have been mistaken in his judgment, however he did attempt to look at the accounting reality of the transaction and deal with opposing case law.

Barwick C.J. in a judgment extending over several pages attempted neither of these tasks. The fact that Barwick C.J. apparently now resiled from the principles set out in his judgment for the taxpayer in *Gibb* v. *F.C.T.* was not mentioned in his judgment, as he made no reference to this earlier decision, nor was any attempt made to justify the result in *Curran* on the basis of accounting realities. The judgment of Barwick C.J. rested on an exposition of the combined operation of sections 6 and 44 (2)(b) (iii) of the Act. The gist of his argument was the receipt of the bonus shares was not in itself income, however the crediting to the shareholder of the sum of profits by the issuing company to effect payment was statutory income because of the provisions of section 6 of the Act and case law dealing with similar statutory provisions. Although it became statutory income under section 6, it was nevertheless exempt under section 44 (2)(b)(iii). As the taxpayer, Curran, was in receipt of deemed statutory income, he

[12] (1966) 118 C.L.R. 628.
[13] (1969) 121 C.L.R. 266.
[14] 131 C.L.R. at 428.
[15] Ibid. at 422.
[16] Ibid. at 421.
[17] E. F. Mannix & D. W. Harris, *Australian Income Tax Law and Practice*, (Sydney, Butterworths), para. 26/11; *Australian Federal Tax Reporter*, (North Ryde, C.C.H.), para. 17, 930.

was entitled, according to his Honour, to deduct that statutory income as a "cost" of the shares.

There are two logical flaws in this argument. Firstly, statutory income does not exist outside the provisions of the statute. It is dependent entirely for its existence on those provisions. There was no provision in the statute authorizing the deduction of this statutory income in a share trading account. The statute made no provision that this statutory income should also be a statutory deduction. Secondly, in determining the "cost" of stock in a trading stock account it is irrelevant whether the cost of the stock has been funded out of income or capital. The sole consideration is whether there has been, in a commercial sense, an actual cost.

The decision in *F.C.T.* v. *Westraders Pty Ltd*[18] is more defensible than *Curran* as black letter law. As in *Curran* the High Court sanctioned a scheme involving paper losses. A sharetrading company had readily realisable paper losses attributable to dividend stripping operations. For a "fee" it entered into share trading partnerships with other taxpayers. By the exploitation of sections 36 and 36A the benefit of those paper losses was made available to the partnerships when they disposed of shares in stripped companies brought into the trading stock of the partnership by the share trading company. The technical exposition of the effect of these statutory provisions by the High Court and Federal Court majorities cannot be faulted, although in the High Court Murphy and Wilson JJ. dissented, and Brennan J. dissented in the Federal Court.

The judgment of Barwick C.J. in this case was unusually passionate and was his penultimate tax judgment. In a spirited defence of his views he stated that the principle embodied in *I.R.C.* v. *Duke of Westminster*[19] was "basic to the maintenance of a free society."[20] This was an amplification of his claim in *Mullens* v. *F.C.T.* that it was a "general principle" which "must always be kept in mind".[21]

This claim warrants critical attention. Taxing statutes may create two types of uncertainty. The less common type of uncertainty arises where there is a gap in the Act. The *Duke of Westminster* principle applies appropriately there to assist the taxpayer. Arguably in *Westraders* the taxpayer had uncovered a similar gap.

The more common type of uncertainty arises from the difficulty of classifying facts. For example, in determining source or whether a receipt is in revenue or capital account. The *Duke of Westminster* principle has no relevance in such a determination, notwithstanding Privy Council authority to the contrary.[22]

It is doubtful whether, on the basis of its very unusual facts, *I.R.C.* v.

[18] 80 A.T.C. 4357.
[19] [1936] A.C. 1.
[20] 80 A.T.C. at 4359.
[21] 135 C.L.R. at 298.
[22] *Europa Oil (NZ) Ltd* v. *I.R.C.* (1976) 5 A.T.R. 744. But see later discussion.

Duke of Westminster should be treated as the source of a general principle with the wide application claimed for it by Barwick C.J. It involved a scheme under which the Duke of Westminster paid his personal servants annuities in lieu of wages because the *Finance Act* 1922 (U.K.) provided that annuities were deductible, but the wages (being a private expenditure) were not. The employees signed an undertaking not to look to the duke for payment of the wages due to them. It was also specified between the parties that the undertaking was not legally binding on the employees.

The *Duke of Westminster* case and the *dicta* it contains have been seen as exemplifying the supremacy of legal form over substance in tax matters. A different view may be taken of its facts. The tax avoidance scheme employed in it was of a primitive nature compared with contemporary tax avoidance schemes based on complex accounting entries and mutually cancelling transactions between a number of entities. Such schemes usually involve payment of a fee to a promoter with minimal commercial risk or exposure on the part of the taxpayer. Unlike contemporary schemes the duke was at all times liable to pay his servants their unpaid wages (until the obligation expired under the relevant statute of limitations) and he remained *commercially at risk* for every penny of the deductions he obtained. What he paid were actual annuities and his servants' wages were still owing. The outcome of the *Duke of Westminster* case is therefore compatible with a substance approach and with the House of Lords' decision in *W.T. Ramsay Ltd* v. *I.R.C.*[23] In that case a capital gain was offset by a capital loss on paper. The House of Lords held that it was entitled to take an overall view of the complex series of transactions entered into by the taxpayer, and, taking this overall view, the capital loss was illusory.

Lord Wilberforce in *Ramsay* upheld the *Duke of Westminster* principle as "a cardinal principle, but it must not be overstated or over-extended. While obliging the court to accept documents or transactions found to be genuine, as such, it does not compel the court to look at a document or a transaction in blinkers, isolated from any context to which it properly belongs."[24] If Lord Wilberforce's view of the *Duke of Westminster* principle had been foreshadowed by the High Court in *Westraders* the outcome may well have been different.

An important case in which the Barwick High Court adopted the "blinkered" approach rejected by Lord Wilberforce and viewed a transaction in isolation, detached from its commercial context, was *Esquire Nominees Ltd* v. *F.C.T.*[25] This case involved the interposition of two Norfolk Island company structures between Australian sourced income and its recipients to make the income exempt. This decision is particularly important as it

[23] [1981] 2 W.L.R. 685.
[24] Ibid. at 871.
[25] (1973) 4 A.T.R. 75.

relaxed the principle established in *Nathan* v. *F.C.T.*[26] and confirmed in three later High Court decisions[27] that the determination of source is "a practical, hard matter of fact". In a detailed exposition of relevant case law Gibbs J. found for the Commissioner. Discussing the "business operations" of the two interposed Norfolk Island companies Gibbs J. at first instance, said:

> "The only business operations which yielded the production of any income took place in Australia. Nothing that was done at the office of Mitchell Credits Ltd. or the office of Pharmaceutical Investments Ltd. in Norfolk Island produced one cent of the profits out of which the dividend received by the appellant was paid. Notwithstanding the devices adopted to give the facts a specious appearance, the reality is that the source, and the only source, of the income derived was in Australia."[28]

On appeal to the Full Court a majority consisting of Barwick C.J., Menzies and Stephen JJ., with McTiernan J. dissenting, reversed this decision. Barwick C.J. quite correctly distinguished income from trading activities and income from an investment.[29] However the business of neither of the Norfolk Island companies was investment, rather it was, as Gibbs J. implied, to provide a tax exempt conduit pipe for income from a pharmaceutical business conducted in Australia. Barwick C.J. himself had no difficulty in making this type of distinction in *F.C.T.* v. *Bidencope*.[30]

Arguably by looking to the proximate source rather than attempting to trace through a potentially infinite regression of corporate entities the High Court in *Esquire Nominees* opted for a rule of practical convenience. However inconvenience and difficulty have been rejected as a consideration by Dixon C.J.[31] Equivalent logical problems confronted courts in determining whether income from dividends distributed by trustees to beneficiaries still retained its character as income from dividends, but it has been held that it does.[32] The High Court did not discuss whether the two Norfolk Island companies were under a fiduciary duty not to dispose of their "investment" in the pharmaceutical business without the consent of their Australian principals. If so, and it was a reasonable inference from the facts, they may have been constructive trustees. The court's treatment of the possible legal and equitable implications was inadequate.

A New Zealand court in a more recent decision has adopted a very different approach where taxpayers deliberately constructed a factually opaque situation. In *Buckley & Young Ltd* v. *C. of I.R.*[33] the taxpayer

[26] (1918) 25 C.L.R. 183 at 189-190.
[27] *F.C.T.* v. *Mitchum* (1965) 113 C.L.R. 401 at 407, *Tariff Reinsurances Ltd* v. *C. of T. (Vic)* (1938) 59 C.L.R. 194 at 208, and *F.C.T.* v. *United Aircraft Corporation* (1943) 68 C.L.R. 525 at 538.
[28] (1972) 3 A.T.R. 105 at 122, 123.
[29] 4 A.T.R. at 79.
[30] 140 C.L.R. 533 at 541.
[31] *Parke Davis & Co.* v. *F.C.T.* (1959) 101 C.L.R. 521 at 533.
[32] *Barker* v. *Archer Shee* [1927] A.C. 844 and *F.C.T.* v. *Tadcaster Pty Ltd*, 82 A.T.C. 4316.
[33] 78 A.T.C. 6019.

entered into a deed with a retiring director under which he would be paid certain recurrent amounts for his services as a tax consultant. This aspect of the deed was held to be a facade as there was no intention that he would provide these services. The real object of the payments was to provide retirement benefits (deductible) in consideration of a covenant by the retiring director not to compete (not deductible). A unanimous full bench of the New Zealand Supreme Court held that none of the payments were deductible. Apportionment was not possible because no apportionment was made in the documents and no evidence had been provided by the taxpayer to provide a basis for apportionment. The onus placed on the taxpayer by the New Zealand equivalent of section 190 of proving that the assessment was excessive had not been discharged.

Buckley & Young is in direct conflict with a much earlier decision of the Barwick High Court in *Allsop* v. *F.C.T.* [34] A compromise settlement of 37,500 pounds was paid by the N.S.W. Commissioner for Motor Transport to a road haulier in settlement of his claims for a refund of 54,869 pounds for permit fees illegally collected from him and for unlawful interference with his business. The taxpayer had obtained a deduction in respect of these fees. Barwick C.J. and Taylor J. in a joint judgment, with which Windeyer J. concurred, held that none of the sum of 37,500 pounds was assessable as no part could be attributed solely to a refund of fees. United Kingdom courts have not shirked the task of applying a complex apportionment formula in assessing part of a taxpayer's lump sum compromise settlement.[35] In *Allsop* the dissection of the sum of 37,500 pounds into a revenue component (refund of permit fees) and a capital component (the satisfaction of the claim for unliquidated damages) was an issue of fact. Stress was placed in the joint judgment on the unliquidated component of the taxpayer's claims (arising from unlawful interference). Although this was an element of the deed of release between the taxpayer and the N.S.W. authorities, the proceedings instituted by the taxpayer made no claim for unlawful interference and merely claimed a refund of fees. In the absence of evidence from the taxpayer of a basis for dissection the Commissioner's assessment should have been upheld because of the operation of section 190, and the High Court's decision was almost certainly in error. It should be pointed out that the decision in *Allsop* was in conformity with an earlier High Court decision in *McLaurin* v. *F.C.T.*,[36] which antedated Barwick C.J. Neither this decision, nor any other authority was given for the central proposition of law in *Allsop* which seems to overlook the operation of section 190. The reasoning adopted by the New Zealand court in *Buckley & Young* is preferable, and no significance can attach to the fact that one case involved a deduction and the other a receipt.

[34] (1965) 39 A.L.J.R. 201.
[35] *Carter* v. *Wadman* (1946) 28 T.C. 41.
[36] (1961) 104 C.L.R. 381.

Investment & Merchant Finance Corp. Ltd v. *F.C.T.*[37] was a decision of Barwick C.J., Menzies and Walsh JJ., McTiernan J. dissenting, and again the High Court's decision on the facts for the taxpayer was simplistic. These facts involved a sharetrader claiming a loss in respect of the disposal of shares acquired for dividend stripping. The taxpayer's profit came from the dividend which the shares produced. At all times it was expected that their sale price would realize a loss and the dealing in these shares should not have been included with the normal share trading activities of the taxpayer. However the High Court held that it did. It is a commercial commonplace that sharetraders may hold shares outside their share trading portfolio for other purposes, for example, long term investment. This basic distinction was not, apparently, understood by the High Court. In the following year the House of Lords, in two decisions,[38] came to the opposite conclusion and that such shares did not form part of a sharetrader's trading stock. The House of Lords held that a transaction to secure a tax advantage could be distinguished from normal trading activities. Subsequently the High Court rejected the Commissioner's invitation to reconsider the decision in *I.M.F.C.*[39] and the benefit of *I.M.F.C.* flowed through to the taxpayers in *Westraders* and was exploited in the scheme which they adopted.

While the Barwick court's decisions on issues of fact were often simplistic, the legal logic employed in tax decisions was often convoluted and tortuous. The cases involving alienation of income (as well as the section 26(a) cases discussed later in the article) provide examples of the elaborate legal logic which he employed. *Shepherd* v. *F.C.T.*[40] involved the owner of a patent assigning by voluntary deed for a period of three years to five named persons "all my right title and interest in and to an amount equal to ninety per centum of the income which may accrue . . . from royalties" payable by a particular manufacturer under a deed giving the manufacturer the right to exploit the patent. The Commissioner assessed Shepherd, the owner of the patent, in respect of all the royalties including the amounts assigned. The chief obstacle for the taxpayer was the decision of the High Court in *Norman* v. *F.C.T.*[41] which held that the assignment of a mere possibility without consideration was not effective. At the time of the deed the royalties were a mere expectancy or possibility as there was no certainty that the manufacturer would manufacture the furniture castors which were the subject of the patent. Barwick C.J. held however that in this case there was not an assignment of a mere possibility, but the "right" to that possibility. Consequently, here there was a present gift, not one

[37] (1971) 125 C.L.R. 249.
[38] *F.A. & A.B. Ltd* v. *Lupton* [1972] A.C. 634, *Thompson* v. *Gurneville Securities Ltd* [1972] A.C. 661.
[39] *Patcorp Investments Ltd* v. *F.C.T.* (1976) 6 A.T.R. 420. Barwick C.J. did not participate in this particular bench.
[40] (1965) 9 A.I.T.R. 739.
[41] (1963) 9 A.I.T.R. 85.

which was ineffective because it was merely intended to take place in the future. Barwick C.J. distinguished *Norman* on the basis that "the promise to pay interest in that case inhered in the existence of a principal sum upon which the interest was to be calculated and payable. Consequently, there was no promise to pay interest, if no principal remained due".[42] Kitto J. also pursued this distinction and pointed out that in *Norman* the principal was repayable at will by the debtor, whereas here the manufacturer could not terminate the agreement at will, even if he did not exercise his right to manufacture castors. Consequently, the taxpayer had not attempted merely to assign future income (the fruit), but in the memorable phrase of Kitto J. "he assigned 90 per cent of the tree".[43] The views of Kitto J. and Barwick C.J. seem to be essentially the same in this case. Some may find the distinction they draw narrow and lacking in substance. Others may see it as permissible legal magic in an area of law already saturated with that type of magic.

A further obstacle for the taxpayer was the fact that he did not assign his right to 90 per cent of the royalties, but his right to "an amount equal to ninety per centum of the income . . .". Prima facie this was not a right to royalties, but a right to an amount calculated by refence to the royalty payments received by the taxpayer. Owen J. in his dissenting judgment, adopted this view. Barwick C.J. dealt with this difficulty, what he referred to as "awkward words", and preferred to look at the deed "as a whole".[44] It is arguable that if courts sanction the use of magical formulae, at least those formulae should spell out the results they are claimed to produce. In this case the formula did not.

F.C.T. v. *Everett*[45] was another case in which very elaborate logic was employed to uphold the effectiveness of the taxpayer's alienation. The majority judgment was a joint judgment of Barwick C.J., Stephen, Mason and Wilson JJ. Murphy J. dissented. The wellknown facts of this case involved the assignment by a solicitor, for a consideration, of a proportion of his share in a legal partnership to his wife. The Commissioner's arguments may be simplified to two basic propositions. The first of these was that the partner's right to income and capital were separate from each other. As a result when he assigned a part of this income to his wife, he was merely dealing with his own income for the purposes of section 19. This proposition, which I have simplified, was rejected by the majority because "a partner's entitlement to participate in profits is not separate and severable from the interest of the partner".[46] Earlier their Honours stated:

"We do not doubt that a partner may enter into a contract or otherwise

[42] 9 A.I.T.R. at 743.
[43] Ibid. at 746.
[44] Ibid. at 742.
[45] 80 A.T.C. 4076.
[46] Ibid. at 4081.

> bind himself to deal with his future profits from the partnership so that others may acquire enforceable rights to those profits as and when they are derived. Whether he can sever his entitlement to receive future profits from his interest in the partnership so as to confer an immediate entitlement on an assignee with respect to those profits if and when they arise, is another matter."[47]

Taken together the two quotations seem to suggest that what the taxpayer assigned to his wife was a "tree", and its "fruit" could not be severed to permit the operation of section 19. Considerable difficulties flow from these *dicta*. It is not unusual for a partner's proportionate entitlement to income to be different from his proportionate entitlement to capital, for example, an older, less active partner may be entitled to one half of the capital and merely one third of the profits. The two quotations suggest that such an arrangement is ineffective to create a present right on the part of the junior partner to a larger proportion of the income. This view of the effect of *Everett* seems to have been accepted by Mr Hogan of the Board of Review in *Case P73*[48] and rejected by Dr Beck in the same case, who commented that other than in the context of an assignment the words of the High Court "make strange reading".[49] The words of the High Court read strangely in any context, as they do not accord with the commercial reality that partners may quantify capital and income in differing proportions. The income of a professional partnership is not in any meaningful way the product of the capital.

The second proposition of the Commissioner was that the taxpayer's income was income from personal exertion and a number of earlier authorities had held this could not be effectively assigned for tax purposes. This argument was rejected by the High Court majority which held that the taxpayer's income from the partnership was not income from personal exertion, in the sense in which that term was employed in those cases, because what he received was his entitlement under the partnership agreement "however much or however little energy he devoted to the practice, so long as the partnership remained on foot".[50] This type of logic almost certainly misconstrued the spirit of the earlier decisions, even if it did not breach their letter. It is not an argument of substance. It may be simply refuted by an equally insubstantial argument. In *Everett* the High Court seemed to accept the view that salary or wages are income from personal exertion, but it can be argued that this is not the case; rather it is the product of the contract of employment, as a salary is payable irrespective of the energy an employee devotes to his work, so long as his contract remains on foot.

The decisions of the Barwick court discussed in this section have not all been tax avoidance cases in the strict sense of that term. As a group

[47] Ibid. at 4080.
[48] 82 A.T.C. 346 at 350.
[49] Ibid. at 353.
[50] 80 A.T.C. at 4083.

they demonstrate that court's ability to fashion and create complicated law which had little connection with the reality it was meant to govern.

DEDUCTION CASES

Fairway Estates Pty Ltd v. *F.C.T.*[51] is one of the two tax decisions heard by Barwick C.J., sitting alone. He allowed the taxpayer a deduction under section 63 of a bad debt owed by a tin mining company totalling $53,879.22 comprising an initial advance of $40,000, additional advances and interest. A company associated with the taxpayer actively conducted a registered money lending business at that time from the same address. At about the time of the loan the taxpayer became registered as a moneylender. The taxpayer was not entitled to a deduction under section 63 for the bad debt unless it was advanced "in the ordinary course of the business of the lending of money by a taxpayer who carries on that business". In fact the loan to the proposing tin mining company was the only advance made by the taxpayer at that time, 1959, although *after* the failure of the tin mining company in the following year, 1960, it did make further loans to the public.

Barwick C.J. formed the view that the advance to the tin mining company was the first step in a business of money lending and therefore came within section 63, notwithstanding the absence of other money lending transactions until after the debtor's failure. He was impressed by the taxpayer's association with a registered and active money-lender, the inclusion of money-lending in the objects of the taxpayer, an apparent policy decision by the taxpayer's directors that the associated company should handle numerous small money-lending transactions and that the taxpayer should be the vehicle for larger advances. The initial advance of $40,000 by the taxpayer to the tin miner was funded by the associated company which lent this sum to the taxpayer at an interest rate of 15% per annum, and the taxpayer on-lent the moneys to the tin miner at 10% per annum and, in addition, obtained a quarter share in the capital of the tin miner. Barwick C.J. accepted evidence that it was usual business practice for money-lenders to take up a financial interest in a project when lending funds to a venture involving risk, and he held that "the stipulation by the appellant for participation in the equity was part of the return it required for advancing the money at the agreed rate".

This would be a perfectly acceptable viewpoint, were it not for the fact that the loan involved the money-lender on-lending at a fairly substantial loss (5% per annum). This is hardly "in the ordinary course" of a money-lender's business. It seems a more plausible explanation that the taxpayer's loan was not the taxpayer's first step towards becoming a money-lender, as his Honour held, but was ancillary to an investment in the tin miner. This view is supported by the acknowledgment in the minutes of

[51] (1970) 123 C.L.R. 153.

a meeting of the directors of the taxpayer that the rate of 10% was a "low rate of interest".[52] That is, by implication this was not a normal money-lending transaction. There was no suggestion in the judgment that the taxpayer's subscription for shares in the tin miner (530 five shilling shares out of a total issued capital of 2,000) was a deductible revenue loss. Consequently, if the tin miner had prospered, in all probability the increase in the value of the shares would not have been assessable. *Fairway Estates* suggests an ingenious route by which investors in high risk ventures may make the major part of any losses deductible, while ensuring that gains will be tax-free. The chief difficulty they must face is that although *Fairway Estates* is treated by tax commentaries as good authority, the current generation of Australian courts would not be likely to reproduce the result obtained by the taxpayer in *Fairway Estates*.

Fairway Estates is, it is submitted, unsatisfactory. To borrow moneys with the intention of lending them at a substantially lower rate of interest is not a normal incident of a money-lender's business. To quote Barwick C.J. in a different context: "a business in the relevant sense of necessity involves the earning of or the intention to earn profits."[53] In *Fairway Estates* the intended profit was from the investment (not the loan transaction) and this fact indicates that the loan was ancillary to the investment. That is, it was an investment, not a normal money-lending transaction.

A further objection may be made in respect of his Honour's reasoning. This objection was raised by his Honour, but he then dismissed it. His Honour stated:

> "In cases upon the application of legislation to control moneylenders it has been usually said that to carry on the activity as a business, repetition and continuity is necessary, and on occasions the requisites have been described as involving a plan or scheme of activity. See for example *Kirkwood* v. *Gadd* [1910] AC 422; *Rabone* v. *Deane* (1915) 20 CLR 636; *Schnelle* v. *Dent* (1925) 35 CLR 494; *Lapin* v. *Heavener* (1929) 29 SR(NSW) 514; *Lapin* v. *Abigail* (1930) 44 CLR 166; *Blockey* v. *F.C.T.* (1923) 31 CLR 503; *Newton* v. *Pyke* (1908) 25 CLR 127; *Gabb* v. *Loan & Deposit Co. Ltd.* [1934] NZLR 198. On the other hand in the application of a taxing statute a somewhat different approach was made by the Privy Council (sic) in *South Behar Railway Co. Ltd* v. *Commissioners of Inland Revenue* [1925] AC 476."[54]

The *South Behar Railway Co.* case to which his Honour referred was a decision of the House of Lords which interpreted the word "business" in a very different context, namely the *Finance Act* (U.K.) 1920. Section 52 of that Act imposed corporation profits tax on, *inter alia*, "the profits of a British company carrying on any trade or business, or any undertaking of a similar character". The word "business" in this statutory context

[52] 123 C.L.R. 153 at 158.
[53] *White* v. *F.C.T.* (1969) 43 A.L.J.R. at 26. Note that in *I.M.F.C.* he denied that proposition (2 A.T.R. at 363).
[54] 123 C.L.R. at 163-164.

was clearly intended to have a broad operation. The words "or any undertaking of a similar character" indicated this. The sole business of the taxpayer had been to finance the construction of a railway and afterwards to receive an annual payment from the Secretary of State. After the financing had been completed, it claimed that it was an annuitant and this was not a "business". This was rejected by the House of Lords. Lord Sumner in fact found there was in the taxpayer's receipt of its annuity "that 'repetition of acts' which . . . is implied in 'carrying on business'".[55]

The *South Behar Railway Co.* case therefore does little to assist his Honour's contention. The only other case referred to by his Honour supporting his view was *Re Griffin; ex parte the Board of Trade*.[56] This case involved the failure by a civil engineer and road contractor to keep adequate business records for the purposes of the *Bankruptcy Act* (U.K.) 1883 in respect of a speculative building venture. A block of land had been purchased and £1,600 expended on commencing the erection of seven freehold cottages. Lord Esher M.R. held (with Lopes L.J. and Kay L.J. concurring) that:

> "If, therefore, I were satisfied that this building contract was undertaken with the intent that it should be the first of as many contracts of the kind as the bankrupt could get, I should hold that he was carrying on business as a builder, and that he ought to have kept books in respect of the first transaction . . . I think the case here fails, because it is not satisfactorily proved that it was the first of an intended series of transactions."[57]

In *Griffin's case* there was no evidence of intention. In *Fairway Estates* there was such evidence. Nevetheless, Lord Esher's finding of fact that building operations on seven cottages was not a business contrasts strikingly with the finding of Barwick C.J. that one loan was a money-lending business and was "in the ordinary course" of that business. No "ordinary course" of the taxpayer's money-lending business was established, only the "ordinary course" of other money-lenders' businesses. In addition, no evidence appears to have been given that it was "ordinary" for such lenders to incur a deliberate loss in respect of interest.

In fairness to his Honour, courts for the purpose of taxing statutes have tended to give an expansive meaning to phrases such as "carrying on business" or "an adventure in the nature of trade" so as to include isolated transactions. *Edwards* v. *Bairstow*[58] concerned the phrase "an adventure . . . in the nature of trade" and is, perhaps, the leading case in this area.

The moot point is whether such an expanded meaning was intended by section 63. This seems very unlikely. As his Honour admitted there is a very long line of authority as to what constitutes a money-lending business

[55] [1925] A.C. at 487.
[56] (1890) 60 L.J. Q.B. 235.
[57] Ibid. at 237.
[58] (1955) 36 T.C. 207.

for the purpose of various money-lending Acts throughout common law countries. The term is perhaps a term of art, and, if not, it verges on this status. The interpretation adopted by his Honour diverged, as he admitted, from this sanctioned use. An activity such as building a house for profit suggests a business from its very nature. But many more people lend money than build houses, and the tests for determining whether someone is in the business of lending money must, of necessity, be more stringent. Williams J. in *Modern Permanent Building and Investment Society (in liq.)* v. *F.C.T.* adopted these more stringent traditional tests in determining whether for the purposes of the *Income Tax Assessment Act* a building society was "carrying on the business of a money-lender in the *ordinary acceptation* of that term".[59] (Emphasis added.) His Honour held that the society was not carrying on such a business. It is notable that in *Fairway Estates* Barwick C.J. did not refer to this decision which related to the same Act (but not to section 63).

Bad debts of money-lenders are, it is submitted, deductible under the general provision of the Act for deductions (viz. section 51) being losses in respect of circulating capital. The additional operation of section 63 is probably for the purpose of permitting bad debts to be deducted where the amount of the debt is so gross that it is arguably a loss in respect of fixed capital, and therefore not deductible under the general provision. Such a view would give section 63 a very restricted operation outside section 51. The effect of the *Fairway Estates* decision is however to give the section a more extensive operation by widening the traditional concept of money-lending business to include a broader range of taxpayers and transactions and enable deduction of what would otherwise be capital losses. There is nothing in the section, or the policy of the Act as a whole, which suggests the departure from traditional usage adopted by Barwick C.J., and this enlarged operation of the section to find for the taxpayer contrasts with other decisions in which he strictly adhered to traditional usage.[60] To depart from an authorised usage which Williams J. also regarded as "the ordinary acceptation of that term" would require strong evidence of the legislature's intention, strong policy considerations.[61] These policy considerations are unfortunately not articulated by Barwick C.J. and one can only make assumptions. Did he believe that the section was directed at a wide range of capital losses not otherwise deductible? In other decisions by him regarding sections of the Act which include capital gains within assessable income, his approach has been very restrictive, so that there is a lack of consistency in the expansionary approach adopted by him in respect of section 63.

As a decision, *Fairway Estates* shows a number of characteristics which

[59] 98 C.L.R. 187 at 191.
[60] *Quadramain Pty Ltd* v. *Sevastapol Investments Pty Ltd* 133 C.L.R. 390.
[61] See *Halsbury's Laws of England*, 3rd edition, Volume 36, para 588.

are common to other tax judgments of Barwick C.J. discussed in this article. These are:

(1) There is departure from traditional literalism; in this case there was a very long and well-known line of authority which almost certainly directed the draftsman's choice of words. In substitution for this long line of authority two fairly inappropriate authorities were cited. In so doing, he ignored an actual decision relating to the Act itself. The effect of the decision is to give a much wider and less predictable operation to a section which previously appeared restricted but certain.

(2) This departure from traditional literalism could only be justified by strong policy considerations. This policy was not articulated by his Honour; if one attempts to articulate it, a lack of consistency with other judgments of his Honour appears.

(3) The decision opened up a new avenue for tax minimisation. (Admittedly the type of situation dealt with in the case is specialized and would probably only be of use to a few taxpayers presented with analogous high risk investments.)

Perhaps the most significant deduction judgment in which Sir Garfield Barwick participated was *Europa Oil (N.Z.) Ltd* v. *I.R.C. (N.Z.) (No. 2)*.[62] This was a Privy Council decision and the majority judgment was delivered by Lord Diplock. Its judicial style is reminiscent of Sir Garfield Barwick, and there were many references to Australian case law. The two main issues, namely apportionment of deductions and the applicability of a general anti-avoidance provision involved sections in the New Zealand legislation which were analogous to the Australian provisions. Sir Garfield's greater exposure to these legal issues probably enabled him to exercise considerable influence over the law lords who participated in the majority judgment. This judgment however referred to *Newton's* case.[63] In that case Sir Garfield Barwick appeared for the taxpayer before the Privy Council, and the taxpayer was spectacularly defeated by the revenue authorities. *Newton* and the principle it espoused is not adverted to in any of the other 67 income tax judgments of Barwick C.J. The majority judgment would therefore seem to be a composite effort, with Sir Garfield's contribution being major if not dominant.

The facts involved the payment by the taxpayer of an inflated price for trading stock. The inflated price benefitted a company located in the Bahamas of which it was the part owner. The New Zealand Commissioner disallowed part of the trading stock purchase price referable to providing the Bahamas company with a benefit. The Privy Council reversing the decision of the New Zealand court held the whole of the purchase price was deductible and the New Zealand analogue of section 260 was not

[62] (1976) 5 A.T.R. 744.
[63] [1958] A.C. 450.

applicable. The rejection of the Commissioner's apportionment was based on the view that it was not

> ". . . the economic results sought to be obtained by making the expenditure that is determinative of whether the expenditure is deductibe or not; it is the legal rights enforceable by the taxpayer that he acquires in return for making it."[64]

In *Europa Oil (No. 2)* the taxpayer had no legal right to enforce the flow-on to the Bahamas company of the benefit from the inflated price. Consequently as merely an economic result this was an irrelevant consideration in determining the purpose of the taxpayer's payments for trading stock.

The decision in *Europa Oil (No. 2)* has been referred to favourably by Barwick C.J. in *Mullens* v. *F.C.T.*[65] and the deliberate exclusion of factors other than "legal rights" is typical of his judicial style. As a test for determining deductibility it is completely unworkable. Employers who pay bonuses to employees are under no legal obligation to do so and obtain no legal rights as a result of such payments. There are many voluntary and commercially expedient payments which do not result in the acquisition of legal rights. Applied literally, the *Europa Oil (No. 2)* test would result in many payments being a nullity for tax purposes (if economic results cannot be determinative). If the courts were to take *Europa Oil (No. 2)* seriously, many expenses usually regarded as revenue expenses would not be deductible. In *F.C.T.* v. *South Australian Battery Makers Pty Ltd*[66] a High Court majority comprising Gibbs A.C.J., Stephen and Aickin JJ., (Barwick C.J. was absent), admitted that "legal rights" would not always be determined for deductibility under section 51 and then proceeded to apply the *Europa Oil (No. 2)* test with no explanation given as to when a factual inquiry will take into account legal rights only, and when it will also take into account other factors. The result in *South Australian Battery Makers* therefore vindicated the views of the absent Chief Justice. But the dicta prepared the way for the abandonment of that position. It is curious that even in his absence his views overruled the admitted misgivings of his brother judges.

With his retirement Australian courts have adopted much broader criteria for determining deductibility than were available to the Barwick Court, and the full commercial context of the transaction has been examined in a number of cases.[67]

Ilbery[68] was a deductibility case which may well have succeeded before the High Court a few years ago, as the taxpayer had fulfilled various legal

[64] 5 A.T.R. 744 at 750.
[65] (1976) 135 C.L.R. 210 at 301.
[66] 78 A.T.C. 4, 412.
[67] *Ure* v. *F.C.T.* 81 A.T.C. 4100, *F.C.T.* v. *Ilbery* 81 A.T.C. 4661, *Magna Alloys & Research Pty Ltd* v. *F.C.T.* 80 A.T.C. 4542, *F.C.T.* v. *Groser* 82 A.T.C. 4478, *Deane & Crocker* v. *F.C.T.* 82 A.T.C. 4112.
[68] 81 A.T.C. 4661.

tests. The Gibbs High Court rejected the taxpayer out of hand, by refusing leave to appeal.

THE DESTRUCTION OF SECTION 260

In his unofficial biography "*Barwick*", David Marr wrote:

> "Few monuments will remain in the law reports to Barwick's years as Chief Justice . . . In the bleak forensic landscape of those years, the only undisputed monument to Barwick's work within the court was the destruction of section 260."[69]

This section is of course the notorious provision which made tax avoidance transactions void as against the Commissioner. The section presented courts with a number of difficulties. These difficulties included, firstly, the generality of its wording which potentially avoided many innocent transactions, and secondly, it was not clear from the wording of the section whether it prevailed against other sections of the Act.

By the time of the appointment of Barwick C.J. the first difficulty had largely been resolved. In *Newton* v. *F.C.T.*[70] the Privy Council judgment delivered by Denning L.J. had announced the celebrated "ordinary business or family dealing" test which limited the generality of the sections so that it did not apply to such dealings. However, the second difficulty had not been resolved by the Privy Council in *Newton* which had undercut its own "ordinary business or family dealing" test from the outset by endorsing the High Court decision in *Keighery's* case.[71]

In *W.P. Keighery Pty Ltd* v. *F.C.T.*[72] what was in essence a private company attained public company status for tax purposes by artificial procedures which were clearly not "ordinary business or family dealing" but which satisfied the very specific requirements of Division 7. The High Court had in *Keighery* failed to apply section 260 to these procedures because "the section intends only to protect the general provisions of the Act from frustration, and not to deny any right of choice which the Act itself lays open to them".[73] Sir Garfield Barwick represented the taxpayer in *Keighery* and was credited by Marr with persuading the High Court to accept his "brilliant argument" for the choice principle.[74]

Unfortunately, the Dixon High Court in *Keighery* did not define what it meant by the words "the section intends only to protect the *general* provisions of the Act . . ." Whether a section is "general" or "specific" is a relative and not an absolute matter. For example section 44 of the Act is specific as to income from dividends, while section 25(1) is the general provision in regard to assessable income as a whole. But section 44 itself stands as a "general" provision in relationship to section 47 which

[69] David Marr, *Barwick* (Australia, Allen & Unwin, 1980), pp. 293-294.
[70] (1958) 98 C.L.R. 2.
[71] Ibid. at 9.
[72] (1957) 7 A.I.T.R. 107.
[73] Ibid. at 124.
[74] David Marr, op. cit. at 228.

brings certain distributions of a liquidator within the ambit of section 44. Even section 25(1) has been characterized as a "specific provision".[75]

It is most unlikely that the Dixon court envisaged a broad operation for the choice principle because Dixon C.J. in a long line of decisions beginning with *Clarke* v. *F.C.T.*[76] had actively participated in a judicial process which had removed most of the difficulties in section 260[77] and built up a largely coherent line of authority which had applied section 260 on a number of occasions. It was most unlikely that he intended in his joint judgment in *Keighery* to undo that line of authority (although this is how it was employed by later courts).

The following passage in the *Keighery* joint judgment gives some clue as to what was intended by the Dixon court:

> "The very purpose or policy of Division 7 is to present the choice to a company between incurring the liability it provides and taking measures to enlarge the number capable of controlling its affairs. To choose the latter course cannot be to evade or avoid a liability imposed on any person by the Act or to prevent the operation of the Act."[78]

Division 7 at the time of the facts in *Keighery* contained an elaborate code setting out the requirements for obtaining public company status for tax purposes. This code was itself an anti-avoidance provision and was more "specific" in this regard than section 260. Consequently section 260 failed to operate.

A corollary flows from this view of *Keighery*: where particular provisions of the Act did not take account of tax avoidance and the provisions did not constitute a code, then section 260 operated to prevent exploitation of those provisions as section 260 was more specific than they were. One provision is only more specific than another where both provisions are dealing with like subject matter. Where they deal with disparate subject matter neither can be more specific than the other. Section 260 was not a "general provision" which was subject to almost every other provision in the Act, as the Barwick court later appeared to hold was the case. It was specific in its own type of subject matter, tax avoidance, an event that was relatively unusual prior to the 1970s.

The decision in *F.C.T.* v. *Casuarina Pty Ltd*[79] resurrected the *Keighery* choice principle after more than ten years of neglect, but did not enlarge it. Barwick C.J. in a one paragraph judgment concurred with the majority view that section 260 did not apply.

The limited view of the application of the choice principle in *Keighery*

[75] See *Commercial and General Acceptance Ltd* v. *F.C.T.* (1977) 51 A.L.J.R. 842 at 845 per Mason J.
[76] (1932) 48 C.L.R. 56.
[77] The comment of Fullagar J. in *F.C.T.* v. *Newton* (1957) 96 C.L.R. 577 at 646 is revealing. He expressed relief that "these difficulties (with s.260) have not now to be faced for the first time".
[78] 7 A.I.T.R. at 125.
[79] (1971) 127 C.L.R. 62.

suggested here is in conflict, however, with the next High Court decision on section 260, *Mullens* v. *F.C.T.*[80]

Mullens involved taxpayers obtaining deductions under section 77A in respect of payments by them on the issue of petroleum exploration shares. The shares were beneficially owned by the taxpayers, but were held in the name of a Mr Close who had originally been given rights to their issue (with limitations on transfer of the rights). Close also held an option to acquire the interest of the taxpayer after the issue of the shares, and this option was exercised. Close apparently had no wish to obtain a section 77A deduction himself.

Stephen J. held that the taxpayers were entitled to a deduction under section 77A and this section was not affected by section 260. Stephen J. relied on the choice principle and held that "Section 260 of the Act, in performing its task of 'protecting the general provisions of the Act', cannot be allowed to negative the Act's specific and particular provisions of which section 77A is one".[81]

The enlargement of the choice principle set out in this quotation threatened the total extinction of section 260. Every section of the Act, even section 25, for reasons already stated can be designated a "specific" section in the loose sense in which his Honour used the word. Consequently section 260 would fail where the taxpayer chose to bring himself within any other section of the Act or has taken himself outside the Act, as Aickin J. was to hold in *Slutzkin* v. *F.C.T.*[82] Stephen J. in *Slutzkin* found similarly to Aickin J. The ultimate enlargement of the choice principle commenced by Stephen J. in *Mullens* and completed by Aickin J. in *Slutzkin* would have rendered section 260 *totally* inoperative. However, an interpretation which made the section a nullity could not have survived indefinitely, as it would have been contrary to basic principles of statutory interpretation.[83] In addition, the *dictum* of Stephen J. conflicted with an earlier unanimous High Court decision in *Jaques* v. *F.C.T.*[84] In that case the predecessor of section 260 had avoided a deduction available for subscriptions to mining shares under a "specific" section of the Act.

Perhaps with this realisation in mind Barwick C.J. in *Mullens* created the "antecedent transaction" doctrine. This doctrine was not referred to by Stephen J. in *Mullens* or *Slutzkin*, but it was accepted by Aickin J. in *Slutzkin*.[85]

The judgment of Barwick C.J. in *Mullens* is perhaps the pinnacle of his income tax judgments. It is altogether masterly in its perception of the issues. In finding for the taxpayers his Honour applied the choice principle

[80] (1976) 135 C.L.R. 290.
[81] Ibid. at 319.
[82] (1977) 140 C.L.R. at 326-7.
[83] See *Halsbury*, 3rd edition, Vol. 36, para. 582.
[84] (1924) 34 C.L.R. 328.
[85] 140 C.L.R. at 326.

of *Keighery*[86] but not in quite the sweeping terms employed by Stephen J. He stated that section 260 applied where there was an antecedent transaction.[87] By impliedly limiting the choice principle in this way his Honour ensured that section 260 retained some operative effect. His Honour cited as an example of an antecedent transaction the facts of *Jaques* v. *F.C.T.* The facts of *Jaques* were that a company with mining and cement interests decided to reconstruct into two separate companies: one company to take over the mining, and the other to take over the cement interests. The shareholders in the new companies were to be the shareholders of the old companies and no new capital was to be subscribed. The reconstruction was partially completed when it was realised that the opportunity to obtain a tax deduction in respect of the subscription of capital to a mining company had not been taken advantage of. New resolutions to unscramble the existing transaction and take advantage of this deduction provision were passed. The taxpayer's claim to the deduction was rejected by the High Court.

The facts of *Jaques* did involve an antecedent transaction, but it is not clear from the judgments of the court in *Jaques* whether the antecedent transaction was critical to the decision. In the case of one judge, Knox C.J., the antecedent transaction was critical. Knox C.J. was of the view that the subsequent transaction was a sham and consequently fell within the predecessor of section 260.[88] This view of the transaction was not accepted by Rich J. at first instance, nor any of the other High Court judges on the appeal, namely Isaacs and Starke JJ. All of these justices held that the second transaction was not a sham,[89] and Isaacs J. pointed out that the section was not directed at shams, because a sham was of no effect in any event.

Rich, Isaacs and Starke JJ., in language which foreshadowed the Privy Council judgment in *Newton*, were all concerned with issues such as whether the deduction was "legitimate",[90] whether the transaction was "simply to manufacture a situation"[91] or a "misuse of legal expedients"[92] and held it was "in no true sense a business operation"[93] and was not "ordinary"[94] and "did not in any business sense, alter the position of the shareholders . . ."[95] Barwick C.J. was of the view that:

> "It would follow, in my opinion, from the reasoning of all these justices, that had there been no antecedent agreement and the companies had from the outset agreed in terms of the new or substituted agreement,

[86] See 135 C.L.R. at 298 and 307.
[87] See 135 C.L.R. at 302.
[88] See 34 C.L.R. at 355.
[89] See Rich J. 34 C.L.R. at 338, Isaacs J. at 358, Starke J. at 361.
[90] 34 C.L.R. at 338.
[91] 34 C.L.R. at 360.
[92] Id.
[93] Id.
[94] Ibid. at 361.
[95] Ibid. at 362.

> the shareholders would have been entitled to a deduction of the amount paid as calls on the mining shares. The choice of the second form of reconstruction, if originally taken, though chosen so as to obtain the benefit of the statutory deduction could not have been struck down by s. 53 of the 1915 Act, the forerunner of s. 260."[96]

The view of Barwick C.J. ignores the *dicta* of the court itself in *Jaques*. Even if there had been no antecedent transaction, it is likely the court would have held the transaction was void. There was in no "business sense" a new injection of capital into mining. A former mining company was simply restructuring itself, no "new" funds were being injected. If a deduction were permitted every time a mining company re-structured itself, the entire policy of the provision permitting the deduction would have been frustrated. On this view of the decision the fact that there was an antecedent transaction merely emphasised the lack of legitimacy on the part of the taxpayer, but it was not the cause of it. The judges in their *dicta* were concerned primarily with this lack of business legitimacy.

If Barwick C.J. were correct regarding the reason for *Jaques* (and his Honour's view is a possible view regarding the ratio as Rich, Isaacs and Starke JJ. were not clear on this point), Rich, Isaacs and Starke JJ. decided against the taxpayer because the parties to the transaction were ill-advised when they entered into the antecedent transaction (that is, no deduction was obtained because the parties managing the transaction had blundered). It follows from the view of Barwick C.J. that the policy of section 260 was not to protect other provisions of the Act, but to penalise taxpayers with faulty or no legal advice. Such a view of the function of section 260 is patently absurd. In fact, when his Honour was presented with a taxpayer who had brought himself within the reach of section 26(a) because of faulty professional advice his Honour refused to uphold the assessment.[97] The "antecedent transaction" doctrine was not specifically stated by either Rich, Isaacs or Starke JJ. in *Jaques*, and if it were correct, trivialized the operation of section 260. It would not appear to have been viewed by contemporaries as the basis for the decision in *Jaques* as there is no record of subsequent attempts to exploit the section.[98]

What did his Honour mean by an "antecedent transaction"? Discussing section 260 his Honour held:

> "Though the section speaks of the purpose in entering into the transaction, it can have no relevance if, being effective, the transaction does not alter the incidence of tax, as that expression has come to be understood. As I have already pointed out, there will be no relevant alteration of the incidence of tax if the transaction, being the actual transaction between the parties, conforms to and satisfies a provision of the Act

[96] 135 C.L.R. at 306.
[97] *F.C.T.* v. *Bidencope* (1978) 140 C.L.R. 533.
[98] Various amendments to the section at certain times would have complicated such attempts. But if the view of Barwick C.J. is correct the section (and its successors) were available for exploitation through company construction over several decades.

> even if it has taken the form in which it was entered into by the parties in order to obtain the benefit of that provision of the Act. It would be otherwise if there had been some antecedent transaction between the parties, for which the transaction under attack was substituted in order to obtain the benefit of the particular provision of the Act. Section 260 is not directed to tax on income to which the taxpayer is entitled only by reason of the actual transaction into which the parties have entered."[99]

The phrase "antecedent transaction" could have a broad meaning so as to embrace many situations. Any prior transaction in time is antecedent to a later transaction. In the facts of *Mullens* for instance if section 260 destroyed the deduction under section 77A, an antecedent transaction or situation in a broad sense would be revealed, namely the taxpayer's liability, if any, to pay tax on his correspondingly increased income. Earlier case law spoke of the section's leaving "exposed a set of actual facts from which that liability does arise."[100]

But this broad sense of "antecedent transaction" was not, in *Mullens*, what Barwick C.J. seems to have intended. Barwick C.J. suggested that the taxpayer must "*already* be subject to tax in respect of an income which that antecedent transaction or situation produced or would produce"[101] and there must be "an endeavour to cast what had already been *agreed* into a form which avoided . . . tax".[102]

Although his Honour used language reminiscent of *Clarke's* case and the various dividend stripping cases which succeeded *Clarke*, what his Honour intended by "antecedent transaction" was something very limited. The key word is perhaps the word "agreed". An antecedent transaction included only transactions which were abandoned and replaced by new transactions with a view to lessening tax, there must be something equivalent to a variation or novation of contract.

Apart from *Jaques* no case in which section 260 applied involved an antecedent transaction in this limited sense. Not even *Peate* v. *F.C.T.*[103] involved an antecedent transaction in this sense. Although, in that case, the doctors abandoned their partnership to set up a complex structure of companies, this subsequent transaction only dealt with new sources of income, that is, treatment of patients in the future. In the dividend stripping cases no antecedent transaction in the sense apparently intended by Barwick C.J. is discernable. The antecedent transaction doctrine announced by Barwick C.J. therefore represented the rejection of the High Court decisions in *Bell* v. *F.C.T.*,[104] *Hancock* v. *F.C.T.*,[105] *Mayfield* v. *F.C.T.*,[106]

[99] 135 C.L.R. at 302.
[100] *Clarke* v. *F.C.T.* (1932) 48 C.L.R. at 77.
[101] 135 C.L.R. at 302 (emphasis added).
[102] Ibid. at 303 (emphasis added).
[103] (1966) 116 C.L.R. 38.
[104] (1953) 87 C.L.R. 548.
[105] (1961) 108 C.L.R. 258.
[106] (1961) 108 C.L.R. 303.

Millard v. *F.C.T.*,[107] *Hollyock* v. *F.C.T.*[108] and *Ellers Motor Sales Pty Ltd* v. *F.C.T.*,[109] and a number of Privy Council decisions.

One of the curious aspects of the judgment of Barwick C.J. in *Mullens* is that his Honour cast his discussion of the section in terms of its avoiding transactions which "alter in any relevant sense the incidence of tax".[110] His Honour was referring to section 260(a) which reads "altering the incidence of any income tax;". In *D.F.C.T.* v. *Purcell* Gavin Duffy and Starke JJ. stated in respect of the predecessor to section 260 that "Its office is to avoid contracts &c., which place the incidence of the tax or the burden of tax upon some person or body other than the person or body contemplated by the Act."[111] Although their Honours referred to the section as a whole they appear to have been referring to the operation of subsection (a) in their remark. Section 260(a) it seems, applied to transactions which *shift* the burden of tax from one taxpayer to another (or alter the *incidence*). A relevant alteration for subsection (a) may involve an increase as well as a decrease for a particular taxpayer. On this view subsection (a) was not relevant for the situation in *Jaques* or *Mullens* as there was no shift in the incidence of tax from one taxpayer to another, merely an avoidance. In fact most of the case law has concentrated on subsection (c) which deals with transactions "defeating, evading or avoiding any duty or liability . . .". There was, however, a possible reason why Barwick C.J. seized on the arguably irrelevant section 260(a) rather than the central provision of section 260, viz. subsection (c). This reason is that, the antecedent transaction doctrine was, in effect, the revival of an argument he had submitted to the Privy Council in *Newton*. His submission in *Newton* related to section 260(c) and was summarized by Denning L.J. and rejected in the following passage:

> "Next, Sir Garfield Barwick submitted that in s.260(c), the words 'liability imposed on any person' meant a liability which had already accrued: and that 'avoid' meant displace. He said that, in order that an arrangement should be avoided, it must be an arrangement which sought to displace a liability which had already come home to a taxpayer — in respect of income which had already been derived by him. Their Lordships cannot accept this submission. They 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. . . . If the submission of Sir Garfield Barwick were accepted, it would deprive the words of any effect. . . . their Lordships notice that, although this point was not raised in the High Court, Taylor J. did consider it, and they find themselves in agreement with what he said upon it."[112]

[107] (1962) 108 CLR 336.
[108] (1971) 125 C.L.R. 647.
[109] (1972) 128 C.L.R. 602.
[110] 135 C.L.R. at 298, also at 302.
[111] 29 C.L.R. at 473.
[112] 98 C.L.R. 1 at 7.

In *Mullens* Barwick C.J. by relying on section 260(a) rather than section 260(c) possibly forestalled criticism that his antecedent transaction doctrine was the revival in slightly altered form of his rejected submission in *Newton*.[113] In *Newton*, Taylor J. rejected the subsequent submission by Sir Garfield Barwick on section 260(c) because such a reading would subvert the purpose of the section and did not accord with previous case law.[114]

There was, however, a very simple fallacy in Sir Garfield Barwick's argument based on a misunderstanding of grammar, not referred to by either Taylor J. or the Privy Council. Section 260 reads (with emphasis added): "defeating, evading or avoiding any duty or liability *imposed* on any person by this Act . . .". The critical word on which Sir Garfield Barwick relied for his contention that the subsection only concerned "a liability which had already accrued" was the word "imposed" which seems through its apparent use of the past tense to imply that only accrued liabilities fall within this subsection. The word "imposed" is not in fact in the past tense. In its syntactical context it is merely a participle employed in the passive voice. The "-ed" suffix may convey either past tense or the passive voice. Here the latter was intended. Translated into the active voice the subsection reads: "defeating, evading or avoiding any duty of liability which this Act imposes on any person . . .". When translated into the active voice it is clear that Sir Garfield's contention regarding the past tense was incorrect. If the past tense view is correct, section 260(c) translated into the active voice would read: "defeating, evading or avoiding any duty or liability which this Act imposed on any person . . .". Such a reading would give section 260(c) no prospective operation at all and it would have only a retrospective effect. Applied in its full logical rigour the past tense view therefore offends one of the most elementary rules of statutory interperetation, that is, legislation is prospective not retrospective.[115]

The main argument of Barwick C.J. in *Mullens* therefore involved a rejection of most of the previous case law on section 260 and revived in slightly altered form a submission already rejected by the Privy Council in *Newton* and based on a misunderstanding of grammar. It should be stressed that the judgment in *Mullens* did not itself incorporate the grammatical misunderstanding on which the Barwick submission in *Newton* was based. The exposition of Barwick C.J. in *Mullens* was masterly in that it skirted around these difficulties, employed the language of previous decisions while rejecting their substance, and permitted the choice principle a greatly enlarged operation but stopped short of a complete judicial annulment of section 260. All of this showed a formidable grasp of the

[113] The view that the antecedent transaction doctrine is a revival of the rejected submission in *Newton* is not unique to the writer. See David Marr, op. cit. at 293.
[114] (1951) 96 C.L.R. 578 at 664-665.
[115] See *Halsbury*, 3rd edition, Volume 36, paras 643-645.

issues. Elsewhere in his decision this grasp was also demonstrated. At first instance Sheppard J. had found in *Mullens* that the policy of section 77A had been frustrated, as the policy of the section was to encourage a "real investment".[116] Barwick C.J. was of the view that the policy of the section was "the encouragement of capital contribution to petroleum exploration companies . . . once the money is paid on the shares, the company having made the requisite declaration, that policy is satisfied . . . There is in my opinion, no warrant in the section for the view expressed by the Supreme Court that the section required the taxpayer in paying an amount on the shares to 'have been making a real investment in such a venture'".[117] The view of Barwick C.J. regarding the policy of the section is clearly preferable.

Arguably *Mullens* was a correct decision on its facts. Unlike *Jaques* there was not a financial round-robin. New, actual monies were subscribed by the taxpayers. The taxpayers were the actual beneficial owners of the shares as there was no undertaking by Mr Close to exercise his option to re-purchase them. As in the *Duke of Westminster* the taxpayers were commercially at risk (that is, the share price might drop).

In *Mullens* Barwick C.J. stressed the importance of legal formalism and said: "Also the general principle established by *Inland Revenue Comrs.* v. *Duke of Westminster* must always be kept in mind."[118] Later in his judgment this message was re-iterated and referring to the two *Europa Oil* decisions he said: "There is no room in this connexion for any doctrine of economic equivalence."[119]

In *Slutzkin* v. *F.C.T.*[120] Barwick C.J. (together with Stephen and Aickin JJ.) found for the taxpayer. The essential facts of this famous dividend stripping case are indistinguishable from *Bell* v. *F.C.T.*[121] In both cases the target company had accumulated profits and no immediate tax liability was imminent. In *Bell* a unanimous joint judgment of Dixon C.J., Williams, Webb, Fullagher and Kitto JJ. found for the Commissioner. Surprisingly, in *Slutzkin* neither Barwick C.J. nor the other judges referred to *Bell*, although C.V. Cullinan Q.C. relied heavily on it in his submission to the court. The result may be characterized as overruling by silence. Barwick C.J. dismissed previous authorities in the following words:

> "This case is, in my opinion, so clearly not a case where s.260 could have any operation that I find it quite unnecessary to discuss the various decisions which upon other and different facts have brought that section into play. This is not to pretend that the reasoning in all these cases is either consistent or clear."[122]

[116] *K.W.A. Bridges* v. *F.C.T.* 5 A.T.R. 120 at 162.
[117] 135 C.L.R. 290 at 299-300.
[118] Ibid. at 298.
[119] Ibid. at 301.
[120] (1977) 140 C.L.R. 314.
[121] (1953) 87 C.L.R. 548.
[122] (1977) 140 C.L.R. 314 at 321.

Once more endorsing the choice principle, his Honour again stressed the *Duke of Westminster*. He stated ". . . a taxpayer . . . is quite entitled to choose that form of transaction which will not subject him to tax . . . *Inland Revenue Comrs* v. *Duke of Westminster*[123] too easily forgotten, is still basic in this area of law. There is no room in that area for any doctrine of economic equivalence. To the legal form and consequence of the taxpayer's transaction, which in fact has taken place, effect must be given . . ."[124]

Absent from this claim that the *Duke of Westminster* is basic to tax law is any acknowledgement of the continuing validity of the "ordinary business or family dealing test".[125] Barwick C.J. in none of his Australian income tax judgments ever referred directly to the decision in *Newton*. His implicit rejection of *Newton* may be seen as the rejection of a test which is uncertain in its operation. But his rejection of it may also be seen as foreclosing the judgmental capacity of the court in tax matters, a right to judge which is not questioned in other areas of law such as crime and torts.

Although Barwick C.J. claimed that legal formalism was basic in the area, he did not hesitate to abandon form for substance to find for the taxpayer in *Hamblin Equipment Pty Ltd* v. *F.C.T.*,[126] *F.C.T.* v. *Bidencope*[127] and *Cliffs International Inc.* v. *F.C.T.*[128]

In addition, his own combined choice principle and antecedent transaction doctrine was ineffective to prevent the rogue operation of section 260 unless an unformalistic test such as the Privy Council test in *Newton* was imported into it. This requires explanation.

Barwick C.J. has held that section 260 *did* apply where there was an antecedent transaction (that is, the choice principle did not help the taxpayer in such a situation). Such an antecedent transaction could include any contract which had been amended, novated or cancelled with the effect of shifting the incidence of income tax or avoiding it. Potentially therefore the antecedent transaction doctrine exposed a multitude of situations to the operation of section 260. They were only saved from its operation by the ordinary family or business dealing test.

The judgments of Barwick C.J. on section 260, although brilliant and attractive at one level, must be regarded as proceeding on a juristically unsound basis. There was, in them, an attempt to set up formal tests which operated independently of the subjectivity of the court, which avoided the awkward value judgments implied in words such as "ordinary". Ultimately these tests stultified the section, as Mason J. acknow-

[123] [1936] A.C. 1.
[124] 140 C.L.R. 314 at 319.
[125] It is to be noted that Aickin J. in *Slutzkin* referred to *Newton* twice.
[126] (1974) 131 C.L.R. 570 at 576-577.
[127] (1978) 140 C.L.R. 533 at 543-544.
[128] (1979) 53 A.L.J.R. at 321.

ledged in *Cridland* v. *F.C.T.*,[129] yet were still fatally dependent for their efficiency on the more subjective tests which they were intended to replace (or limit). The section 260 judgments of Barwick C.J. created an elaborate exegesis of the section which seems so remote from the actual words of the section itself and from earlier case law that policy, rather than literalism seems to have determined the result.

SECTION 26(a) CASES

The reader will find that Table 4 of the jurimetrical analysis contained in this article allocated 11 decisions of Barwick C.J. to the category of section 26(a) decisions, and only one of those was in favour of the Commissioner.[130] Section 26(a) of the Act is, of course, the well-known section which includes in assessable income profits from the sale of property acquired for resale at a profit (being the first limb of the section) or from any profit making undertaking or scheme (being the second limb).

The section depends for its efficacy on determining the taxpayer's intention; in essence it imposes tax on a state of mind. Consequently, the section often requires very difficult determinations of fact. The type of subjective assessment which is anathema to the line of reasoning of Barwick C.J. on tax matters. As a result section 26(a) cases have given rise to some of his most emotive tax judgments.

The summation of his section 26(a) judgments was his decision in *F.C.T.* v. *Bidencope*.[131]

After the section was enacted there had been uncertainty as to whether the second limb of the section applied to bring what would otherwise be capital profits within assessable income (that is, did the second limb have any real function?) These doubts were apparently resolved in *Official Receiver* v. *F.C.T.* (*Fox's* case),[132] when a unanimous bench of the High Court held that certain capital profits were assessable under the second limb. However the Privy Council in *McClelland* v. *F.C.T.*,[133] in finding for the appellant taxpayer, reversed a High Court decision (but not Barwick C.J. who had dissented) and held that "notion of business is implicit in the words 'undertaking or scheme'" and consequently for the second limb to operate a transaction must ". . . at any rate where the transaction is one of acquisition and resale — exhibit features which give it the character of a business deal".[134] As a business deal would normally produce income for the purposes of section 25, there was some doubt after *McClelland*, whether the second limb had any operation independently of section 25.

[129] (1977) 140 C.L.R. 330 at 337.
[130] Viz. *Smith* v. *F.C.T.* (1973) 47 A.L.J.R. 232. In *Steinberg* v. *F.C.T.* (1975) 134 C.L.R. 640 Barwick C.J. also applied section 26(a) to one of four transactions but this failed to rate within my statistical framework.
[131] (1978) 140 C.L.R. 533.
[132] (1956) 96 C.L.R. 370.
[133] (1970) 120 C.L.R. 487.
[134] Ibid. at 495.

One possible solution (and this is the approach which is indicated by the High Court decision in *F.C.T.* v. *Whitfords Beach Pty Ltd*[135]) was to uphold the view expressed in *Fox's* case (on the basis that the Privy Council *dicta* were more appropriate to United Kingdom tax law concepts). The other solution was to reject *Fox* and apply *McClelland*. In *Bidencope* Barwick C.J. produced an ingenious compromise; he adopted both of the apparently incompatible lines of authority,[136] but concluded that the application of the second limb "must of necessity in practice be rare".[137] This result was a cross-hybridization of ideas which on his Honour's own admission had very little application in the real world.

Bidencope is an interesting decision because his Honour also took into account the "reality" of the situation.[138] The taxpayer owned land which he wished to subdivide and sell. He had not acquired it with a section 26(a) purpose and would not have been assessable on the profits if he had done just this. His accountant persuaded him that in order to minimize tax the land should be acquired by one or more loss companies which would subdivide and sell the land. The outstanding debts of the loss companies were to be acquired at a discount from the various creditors by the taxpayer. The profits of the loss companies from the land sales would not be taxable because of accumulated losses and the companies would then be enabled to repay the face value of their debts to the taxpayer. In this way he would be able to receive the profits from the subdivision in a tax free form. Unfortunately the mechanics of the scheme fell within a decision of Gibbs J. in *XCO Pty Limited* v. *F.C.T.*[139] who, in finding for the Commissioner, held that the excess of the face value of the debts over the discounted price paid for them when received was a profit under the second limb of section 26(a). Mr Bidencope had therefore been inadvertently exposed to a liability which would not otherwise have attached to him.

Barwick C.J. overruled *XCO Pty Ltd* and found for the taxpayer. In overruling *XCO Pty Ltd* his Honour made a puzzling observation:

> "I would have thought that the taxpayer company could scarce have been a party to a scheme which must have antedated its formation. For the relevant scheme to have been that of the taxpayer company, surely it must have had its origin after the company came into being. I do not understand how the taxpayer could be infected by the scheme of its promoters . . ."[140]

This passage requires analysis at two levels: (1) as a general statement of law; (2) as a statement in relation to the second limb of section 26(a).

[135] 82 A.T.C. 4031.
[136] Ibid. at 543.
[137] Ibid. at 540.
[138] 1978 140 C.L.R. 533.

[139] (1971) 124 C.L.R. 343.
[140] 140 C.L.R. at 541.

As a general statement of law, what his Honour says does not make sense. To say that one party cannot adopt another party's scheme and make it his own is clearly incorrect — the additional fact that the party who adopts the scheme was not incorporated at the time of its formulation is irrelevant.

Analysed subject to the second limb of section 26(a), his Honour's proposition does not emerge more favourably. The section itself contains nothing which supports his Honour's view. In *Clowes* v. *F.C.T.*,[141] the court held that a passive beneficiary of another party's scheme will not come within the second limb because it is not his scheme. These observations hardly apply to the facts of *XCO Pty Ltd* where the shelf company purposely acquired debts at a discount price with a view to obtaining a profit when the debts were repaid. In such a scheme the shelf company is the active party, the scheme originated by its promoters becomes its scheme.

In overruling *XCO Pty Ltd* Barwick C.J. made further interesting comments:

> "The scheme of (the taxpayer company's) promoters . . . could scarce be called a profit-making scheme by and for themselves. It was a scheme to reduce the amount of tax which might have been payable if the profit made by the loss company had been made in some manner other than that which in fact occurred. That, though a matter of business, is not, in my opinion, a profit-making scheme."[142]

These remarks would appear to be *per incuriam*, for if the proceeds of the scheme were "a matter of business" they would be assessable under section 25 (even if they did not fall within the second limb of section 26(a)). In addition, his Honour was here willing to make the type of factual discrimination — a transaction was undertaken to reduce tax, not to produce a profit — which the House of Lords made in *FA & AB Ltd* and *Gurneville Securities Ltd* but which his Honour was unable to make in the *I.M.F.C.* case in a not dissimilar situation.

Even more significantly, in *XCO Pty Ltd* the purpose of the company in obtaining the profitable repayment of a debt was clearly distinguishable from the purpose of its promoters in reducing their tax. This latter benefit in no way accrued to the taxpayer company and on the authority of his Honour's own judgment in *Esquire Nominees* should not have been a matter for consideration by the court. In the fact circumstances of *XCO Pty Ltd*, Barwick C.J. was therefore of the view that Gibbs J. should have lifted the corporate veil to the extent of seeing the shelf company's profit on the debt repayment as part of a larger transaction in which the purpose of the promoters was relevant.

The final conclusions of Barwick C.J. on the facts of *Bidencope* are yet

[141] (1954) 91 C.L.R. 209.
[142] 140 C.L.R. at 541.

more directly in conflict with his decision in *Esquire Nominees*. In *Bidencope* he held regarding Mr Bidencope himself:

> "Looking at the matter overall, he did not in reality gain anything by the fact that the companies could resort to the tax deductible losses. . . . So far as the taxpayer is concerned, I do not see that, on balance, if one takes into account his prior situation, the taxpayer profited by the elaboration of transferring the land to the companies . . . Other reasons apart, it would indeed be odd in these circumstances that he should be assessed to tax on the realization of the value of the debts transferred to him.
>
> Consequently I would dismiss the appeal."[143]

In *Bidencope* his Honour, therefore, in effect suggested that it was in order to look beyond the immediate source of a receipt (in this case the profitable realization of a debt) to the ultimate source (in this case the non-assessable realization of land), where the immediate source could be viewed merely as an "elaboration" of an overall transaction. In *Bidencope* the original owner enlisted financial assistance from investors who joined with him in the loss company venture and subdivision. This factor would have complicated the adoption of a "tracing" approach. In *Esquire Nominees* there was no equivalent complication and such an approach was even more appropriate.

Another section 26(a) case in which Barwick C.J. took cognizance of the "reality" of the situation was *A.L. Hamblin Equipment Pty Ltd* v. *F.C.T.*[144] In this case the taxpayers had hired and leased equipment. The taxpayers wished to terminate these arrangements in order to obtain other equipment. The taxpayers therefore paid out the residual value in respect of the existing contracts to obtain full ownership of the equipment which was then disposed of at an enhanced price by way of a trade-in on new equipment. This trade-in price meant there was a profit in respect of the acquisition and disposal of the old equipment. Barwick C.J. held this was not assessable and included the following statement in his reasoning:

> "Lastly, it seems to me that it is not proper to analyse the trade-in allowance as a price obtained on resale. In this respect I would not wish to add anything to what my brother Jacobs has written in his reasons for concluding that 'the trade-in is not a sale at the price allowed on the trade-in'. The reality of the situation is that the trade-in is a device to obtain a reduction in the effective price of the article to be acquired or hired."[145]

While one may sympathise with the "realism" of this view, it did not lead to an accurate reflex of the taxpayers' overall position. Barwick C.J., in stating that there was merely a reduction in the effective price of the new equipment, did not suggest that the taxpayer should suffer a corresponding reduction in the depreciation or leasing payments to be allowed

[143] Ibid. at 543-544.
[144] (1974) 131 C.L.R. 570.
[145] Ibid. at 576-577.

as deductions in respect of the new equipment. Consequently, the taxpayers were allowed all of the benefits of a substance approach and none of the detriments. Such lack of consistency, it is submitted, is undesirable and the decision is unsatisfactory. In its reliance on economic equivalence, it is directly contrary to what Barwick C.J. himself said in *Steinberg* v. *F.C.T.*[146] in the context of section 26(a) that: "There is, in my opinion, no doctrine of economic equivalence to be used in the administration of the Act."

His judgment in *Steinberg* is perhaps his most fully argued section 26(a) judgment. It contains a number of major observations which, it is submitted, are incorrect. The unsustainable view expressed in *Bidencope* that one party cannot adopt another party's scheme or undertaking has already been discussed. In *Steinberg* his Honour had already formulated similarly restrictive rules regarding the operation of the same provision, that is, the second limb of section 26(a). For the second limb to operate:

> "there must be a plan . . . and it must exist, in my opinion, at the time of the acquisition of the property. . . . Whilst it need not be fully conceived in all its details at the time of acquisition it must exist as a scheme which in principle embraces all the details yet to be worked out. . . . the scheme, if there be one, must be more specific than an intention to turn to profitable account what is acquired."[147]

In formulating these views Barwick C.J. specifically rejected the views of Windeyer J. in *Buckland* v. *F.C.T.*[148] and Dixon J. in *Premier Automatic Ticket Issuers Ltd* v. *F.C.T.*[149]

There is nothing in the words of section 26(a) which supports his Honour's view. The first limb, of course, to come into effect, requires that a purpose of profit-making by resale be present at the time of acquisition, but there is no principle of statutory interpretation which would import a parallel concept into the second limb. His Honour, in postulating this quite radical view, offered no specific case-law in support of his argument, other than a general reference to previous case law that the advantageous realization of a capital asset did not invoke the section. The gist of these cases is that such a realisation does not amount to an undertaking or scheme in the first place.

The practical effect of these observations, if they had been followed (and this does not seem to be the case), would have been to stultify the operation of the second limb. The only concession made by his Honour to the revenue viewpoint was that "a scheme, entertained at the point of acquisition, may contemplate alternatives in its execution . . .".[150]

Another radical view was postulated in *Steinberg*. It was accepted by

[146] (1975) 134 C.L.R. 640 at 683, 5 A.T.R. 565 at 568.
[147] 134 C.L.R. at 687-688, 5 A.T.R. at 572.
[148] (1960) 34 A.L.J.R. at 60.
[149] (1933) 50 C.L.R. 268.
[150] 134 C.L.R. at 688, 5 A.T.R. at 572.

a High Court majority in *Gauci* v. *F.C.T.*[151] But was overruled in *McCormack* v. *F.C.T.*[152] and *McMine* v. *F.C.T.*[153] His Honour formed the view that:

> "When the facts relating to the acquisition of the property are evidenced before the Court, the question is whether on those facts the necessary inference of purpose can be drawn. The evidencing of the facts and the inability to draw that inference from them in my opinion, satisfies in this case the onus on the taxpayer. . . . The taxpayer will have discharged the onus on him whether or not the Court accepts his evidence of some purpose of acquisition outside the scope of 26(a)."[154]

The facts to which this *dictum* applied involved a profitable sale by the taxpayer to a statutory authority under threat of resumption. His Honour's *dictum* suggested that in such situations the onus lay with the Commissioner to justify his assessment notwithstanding section 190 which placed the onus of proving an assessment was excessive on the taxpayer. An onus of proof (such as section 190 imposes) can only exist in respect of issues of fact. There is no onus of proof in matters of law. Once the facts on which an assessment is based have been ascertained, the application of the provision of the Act to those facts will follow as a matter of law. The proposition Barwick C.J. appeared to be putting forward was that the circumstances of the taxpayer's original acquisition and subsequent sale and any admissions by him will be *the facts* on which an assessment is made under section 26(a). The taxpayer's inferred section 26(a) purpose will not be a finding of fact by the Commissioner, so that the onus which section 190 places on the taxpayer will apply to the "facts" and not any inferred purposes. If this was his Honour's view, it is patently wrong because to apply the first limb of section 26(a) the Commissioner must make a finding of fact that the taxpayer at the time of acquisition had a dominant purpose of reselling at a profit. Even if there were no initial facts on which the Commissioner could reasonably have made this finding of fact, it is nevertheless a finding of fact and section 190 requires the taxpayer to establish on the balance of probability that he lacked this purpose.

In *Gauci* v. *F.C.T.*, Barwick C.J. again reversed the statutory onus under section 190 in the case of taxpayers assessed in respect of the profit from a compulsory sale to a statutory authority. His Honour held:

> "Whilst a compulsory sale of property may yield a profit by resale for the purposes of s.26(a) of the Act, if the property were purchased with an intention which satisfies the requirements of that section, evidence of that intention being otherwise absent, it cannot be inferred, in my opinion from the fact of the compulsory sale . . . No doubt s.190 of the

[151] (1975) 5 A.T.R. 672.
[152] (1979) 53 A.L.J.R. 436.
[153] (1979) 53 A.L.J.R. 362 at 366.
[154] 5 A.T.R. at 571.

> Act requires the appellant to show that the assessment is excessive. But the relevant facts being known, if there is no material upon which it may properly be concluded that the property was acquired with the relevant purpose, the assessment is thereby shown to be excessive."[155]

In this *dictum*, Barwick C.J. repeated the error of his *dictum* in *Steinberg* and implied that the inference of a section 26(a) purpose was not a fact on which the assessment was based. Clearly, it was such a fact, and these *dicta* in *Steinberg* and *Gauci* are further illustrations of the confusion between factual and legal issues in his Honour's tax judgments.

Surprisingly, Jacobs J. concurred with Barwick C.J. in *Gauci* on this issue. Mason J., however, dissented and held that:

> "I am unable to discern any basis for declining to give effect to s.190(b). . . . there is nothing inherently unfair in a provision which places the onus on a taxpayer to prove his case when the purpose for which an asset was acquired depends so much on his intentions and on circumstances of which he, rather than the Commissioner has comprehensive knowledge."[156]

The dissent of Mason J. has, of course, subsequently been upheld. If the view of Barwick C.J. had been followed, it could have represented a serious reversal of the statutory policy embodied in section 190. Any extensive delay between acquisition and a voluntary sale possibly falling within section 26(a) would have equally created an "inability to draw that inference . . .". His Honour's views could have extended to an assessment under any section of the Act where the Commissioner drew an inference regarding the purpose of the taxpayer in order to make an assessment. The view of Barwick C.J. expressed in *Steinberg* and *Gauci* may have seriously limited the operation of section 190 if it had been accepted.

The Chief Justice's judgment in *Gauci* contained another very surprising *dictum*. In the course of discussing the first limb, his Honour said:

> "The question is whether he was then intending to sell it at a profit, doing so as a matter of 'business'."[157]

A similar view was expressed by him in *Steinberg* and *Hamblin* and was based on a confusing *obiter dictum* towards the conclusion of the Privy Council majority judgment in *McLelland*.[158] If this view had been accepted by other judges, and it was not, with the possible exception of a concurring judgment by McTiernan J. in *Hamblin*, the operation of the first limb would have been severely restricted. There is nothing in the limb itself which suggests the judicial interpolation.

Yet a further novel view of his Honour regarding the operation of section 26(a), was his suggestion in *Steinberg* that the word "acquired" in the

[155] 5 A.T.R. at 675.
[156] 5 A.T.R. at 677.
[157] Ibid. at 675.
[158] 2 A.T.R. at 27 (last paragraph).

first limb only referred to purchases.[159] This suggestion was not pressed by him and other members of the court found otherwise.

Viewed as a whole the judgments of Barwick C.J. on section 26(a) represent an attempt to restrict and complicate the operation of the section with judicial interpolations and amendments of the section which go far beyond the court's traditional role of statutory interpretation.

A JURIMETRICAL ANALYSIS

This article has concentrated on some of the more controversial income tax decisions of Barwick C.J. It should not be imagined that he invariably found for taxpayers. An example is *Bray* v. *F.C.T.*,[160] which involved a tax avoidance scheme employing "gifts" to a "public" fund pursuant to section 78(1)(a) of the Act. Barwick C.J. disallowed the scheme because the fund was not public, but he concurred with a judgment of Jacobs J. which looked beyond the objects of the fund's trust deed and examined the trust's actual operations. Aickin J. dissented.

In an attempt to give some broader view of the income tax judgments of Barwick C.J. and enable a comparison with previous courts, I conducted a jurimetrical analysis of the income tax decisions of the High Court from the beginning of 1950 until the end of 1980. The following tables are extracted from decisions relating only to disputed assessments of federal income tax and related taxes on income.[161]

TABLE 1

HIGH COURT INCOME TAX DECISIONS (1950-1980)

JUDGE	VERDICTS FOR COMMISSIONER	VERDICTS FOR TAXPAYER
Latham	1½	4½
Williams	18½	19½
Webb	27	15
Fullagar	31	24
Dixon	33½	37½
Taylor	44½	33½
Kitto	63	42
Owen	37	14
Windeyer	34½	24½
Walsh	12½	8½

[159] 5 A.T.R. at 569.
[160] 78 A.T.C. 4179.
[161] Contested recovery or procedural disputes regarding items such as the production of documents were not included. Only individual verdicts of judges were recorded. Where there were findings for and against each party an order for payment of part of the costs of a party was counted as a full verdict for that party. Where no order for costs was made, one half was recorded for each party. Judges were listed in order of retirement.

Table 1 (cont.)

JUDGE	VERDICTS FOR COMMISSIONER	VERDICTS FOR TAXPAYER
Menzies	52	26
McTiernan	48½	30½
Jacobs	10	14
Barwick[162]	20½	45½
Gibbs	24½	19½
Stephen	19	20
Mason	21	11
Murphy	12	5
Aickin	1	12
Wilson	1	2
	512½	408½

I also decided to compare the decision record of the court from 1950 until 1964, being a period largely dominated by the chief justiceship of Sir Owen Dixon, and from 1965, being the year of the first income tax decision of Barwick C.J., until 1980.

TABLE 2

ALL JUDGES	COMMISSIONER	TAXPAYER
1950-1964	257½	199½
1965-1980	255	209
1950-1980	512½	408½

These tables demonstate a trend during both periods for High Court judges to favour the Commissioner in about five cases out of nine. A superficial view of these results would be that the overall attitude of High Court judges to disputes between the revenue authorities and the taxpayer has not altered significantly in thirty years. Such a view however would fail to take into account that legal contexts are dynamic, rather than static.

Assuming that taxpayers and the Revenue are involved in a tactical battle, it will be seen that there are certain costs to both parties in contesting an issue in the courts, and certain advantages to be gained in the event of success. An appeal will normally only proceed after the parties have made some estimate of the probabilities of success and the financial advantages to be gained. In many cases the taxpayer will be aware that

[162] These tables do not include the last income tax decision of Barwick C.J. in 1981 being a verdict for the commissioner, or his Privy Council decision in *Europa Oil (No. 2)* for the taxpayer.

his chances of success are less than even, but will contest where the tax saving will exceed the court costs and the probability ratio makes it economic. The tilt towards the Commissioner is explicable in terms of the behaviour of the parties; an explanation based on pro-Commissioner judicial bias fails to take into account the dynamics of the situation. In addition during a period of changing judicial attitudes, as in the 1970s when the court became heavily pro-taxpayer in terms of the reasons for decisions, such a change will encourage taxpayers to contest matters, which previously they may not have contested. Inevitably many such challenges will fail so that the statistical profile may be relatively unaltered. In the period 1976 to 1980 judgments for the Commissioner totalled 50, and against, 77. This pattern may have been affected by the fact that from 1975 no appeal in respect of a contested assessment was heard by a single judge of the High Court, and much of the High Court's work load in respect of tax cases was shifted to the Federal and Supreme Courts. The very much greater cost of taking a matter to the High Court after 1975 and the reduced flow of tax cases after 1975 to the High Court level would have contributed to this result.

Perhaps the most striking feature of these tables is the exceptionally strong tendency of Barwick C.J. to find for the taxpayer. Out of the other 19 judges in the survey only Aickin J. shows a similar tendency to find against the Commissioner. Various factors affect the result in respect of Aickin J.

Firstly, the statistical sample for Aickin J. is very small. Secondly, his appointment occurred in 1976 at a time when the pro-taxpayer stance of the High Court was at its height. As a judge with a very traditional view of precedent, his pro-taxpayer findings would have been heavily influenced by earlier precedents of the Barwick Court to which he was not a party. Nevertheless he endorsed what might be called the Barwick line on tax matters with great consistency, perhaps even more consistently than Barwick C.J. himself. An example is his decision in *Bray's* case.

The verdict record of Barwick C.J. on tax matters is therefore unusual, but not unique. His deviation from the judicial norm of a 5/4 ratio in favour of the Commissioner is greater than the deviation of the most extreme pro-commissioner judges, for instance, Owen, Menzies and Murphy JJ. The more extreme deviation from that norm by Barwick C.J. and Aickin J. would suggest that in their tax judgments they adopted a more consistent policy line than their brother justices of the High Court.

In order to obtain an overall view of the income tax judgments of Barwick C.J. it is useful to break down the judgments into categories. As some decisions involve several legal issues the allocation of a decision to a particular category may be subjective.

TABLE 3

INCOME TAX JUDGMENTS OF BARWICK C.J.

	COMMISSIONER	TAXPAYER
Category 1 Miscellaneous tax avoidance schemes	1	6
Category 2 Avoidance schemes involving source	½	1½
Category 3 Avoidance schemes involving alienation of income	0	2
Category 4 Avoidance schemes exploiting public or private company status	2	4
Category 5 Avoidance schemes exploiting loss companies	1	2
Category 6 Deductibility of expenditure	8	9
Category 7 Assessability of receipt as income under section 25	1	3
Category 8 Assessability under section 26(a) of the Act[163]	1	10
Category 9 Claims for exemption	3	3
Category 10 Miscellaneous issues	3	5
	20½	45½

The first five categories relate to tax avoidance and show an overall score of 4½ for the Commissioner and 15½ for the taxpayer. This result is strikingly anti-revenue.

Category 6, being the next category, involves the deductibility of expenditure either under section 51 or other more specific sections, and shows eight verdicts for the Commissioner and nine verdicts for the taxpayer. Bearing in mind the general anti-revenue trend of his decisions as a whole, this is an intriguing result. Category 6 chiefly comprises normal run-of-the-mill deductibility issues, situations in which the taxpayer would probably have incurred the expenditure irrespective of any tax advantage which would accrue.

Many of these cases do not seem to have interested Barwick C.J. greatly, and he entered brief concurring judgments. A typical example is *F.C.T.* v. *Maddelena*,[164] which dealt with the expenses of an employed footballer changing clubs. By way of contrast Dixon C.J. was interested in these more mundane issues and fact situations, and in *F.C.T.* v. *Finn*[165] devoted several pages to considering the deductibility of the overseas travelling expenses of an employed architect. While Dixon C.J. was intensely interested in defining the basic issue of income tax law, that is, the distinction

[163] Barwick C.J. in *Steinberg* found for the Commissioner under section 26(a) in respect of one of the four items (i.e. the Innaloo land). This did not rate in my statistical framework. If *Steinberg* is treated as 4 decisions category 8 becomes 2 for the Commissioner and 12 for the taxpayer.

[164] (1971) 2A.T.R. 541.

[165] (1961) 8 A.I.T.R. 406.

between revenue and capital items, Barwick C.J. in his tax judgments appeared remote from the concerns of the ordinary taxpayer and did not engage in the intellectual pursuit of juristic concepts characteristic of Dixon C.J. The extended tax judgments of Barwick C.J. were usually contentious in nature and dealt with controversial issues such as tax avoidance and section 26(a).[166]

CONCLUSION

The tax judgments of Barwick C.J. are a fertile source of concepts. Few judges have been as innovative in their tax decisions as he has been, and the often startling propositions revealed in them are couched in language of such persuasive complexity, criticism is disarmed.

Marr in his biography of the Chief Justice quotes this comment from an interview with an anonymous judge regarding Sir Garfield Barwick's role as an advocate before the High Court:

> "They sat there with furrowed brows as he addressed them, sensing there was something wrong with Barwick's attractive argument but unable to put their finger on the flaw. They were cautious of questioning him in case it was clear from their questions that he had lost them. They were afraid he would turn their questions back on them and make fun of them."[167]

Marr commented: "Barwick had no such ascendency over Dixon . . . Dixon, otherwise a model of courtesy on the court, interrupted Barwick's arguments with rude and bitter remarks. 'Why Sir Garfield? Just because you say so doesn't make it true.' As lawyers they were antipathetic. Dixon liked to engage counsel in philosophical reflection; he had a notion of judges and counsel being there together in the pursuit of judicial truth. Barwick was there only to win."[168]

The tax judgments of Sir Garfield Barwick are the product and maturation of his style as an advocate. They are brilliant and inventive. His observations in *Mullens* and *Steinberg* are densely packed with new law; too densely packed in fact. The purposive drive in his tax judgments for a new legalism, to replace factual uncertainty with new legal rules, overshot the limits of traditional legalism and created as many problems as it solved. The implication of *Curran* is that accountants prepare livestock accounts incorrectly. *Bidencope* lifted the corporate veil to determine the true character of income in a way that was foreclosed for courts in *Esquire Nominees*. The decision in *Europa Oil (No. 2)* replaced a rule of factual uncertainty with a rule of legal certainty, which is quite uncertain in its operation, as the High Court judges in *South Australian Battery Makers* inferred.

Another disturbing aspect of the new legalism has been its selective

[166] I Have not done a page count, but his pro-commissioner judgments tend to be much shorter than his pro-taxpayer judgments.
[167] Marr, op. cit.,at 125.
[168] Id.

operation. Barwick C.J. did not apply it in *Bidencope* and *Hamblin Equipment* where it would have benefitted the Commissioner. It seems to apply primarily to benefit taxpayers.

In his tax decisions, his Honour undertook a major overhaul of existing concepts regarding sections 260, 26(a) and 190, the nature of source and the considerations for determining deductibility under section 51 (if one assumes his role in *Europa Oil (No. 2)* was important). All of these redefinitions favoured the taxpayer against the revenue and involved the elaboration of concepts which were not inherent in the statutory provisions themselves. In addition, although suitable legal precedents were employed where they were available, many of his tax decisions ignored the mainstream of authority. *Fairway Estates* is an example of this.

His Honour's role as judicial iconoclast combined oddly with his role as legalist and was foreshadowed in his address given at the Hebrew University at Jerusalem early in his Chief Justiceship. His address was entitled "Precedent in the Southern Hemisphere" and contained this statement:

> "We have been through a period when the virtues (and they are no doubt virtues) of stability and predictability in the law have been paramount considerations in the decision of cases, and particularly in the consideration of earlier decisions. Today many are not so enamoured of the perpetuation of error or of inappropriateness to current times of old decisions, and favour their review in proper cases by final courts of appeal. Also the obligations of the judge to the law itself, rather than to the decisions upon it, is properly given prominence."[169]

By 1980 the fruits of the new legalism were becoming apparent and there was considerable public disquiet at the results. The judgment of Murphy J. in *Westraders* is an example of this disquiet:

> "It has been suggested, in the present case, that insistence on a strictly literal interpretation is basic to the maintenance of a free society. In tax cases, the prevailing trend in Australia is now so absolutely literalistic that it has become a disquieting phenomenon. Because of it, scorn for tax decisions is being expressed constantly, not only by legislators who consider that their Acts are being mocked, but even by those who benefit. . . . If strict literalism continues to prevail, the legislature may have no practical alternative but to vest tax officials with more and more discretion. This may well lead to tax laws capable, if unchecked of great oppression.[170]

The claim of Murphy J. that strict literalism is responsible for the decay of our tax laws is not correct. Strict literalism should take into account *all* the precedents and achieve a balanced outcome. Barwick C.J. did not do this and was primarily policy-oriented. His judicial style has more in common with Murphy J. than it has with, say, Sir Owen Dixon. The primary difference between Murphy J. and Barwick C.J. has been that

[169] 5 *Israel Law Review* 1 at 21-2. Quoted by Marr, op. cit., at 218.
[170] Per Murphy J. 54 A.L.J.R. at 469.

with Murphy J. the policy inherent in a judgment is usually articulated. By articulating his policy (in cases where policy determines the outcome) a judge exposes his policy to public scrutiny and criticism. By presenting policy as literalism, which was the habit of Barwick C.J., a judge reduces his public accountability.

In *Westraders,* Barwick C.J. passionately defended his own role and (by implication) laid the blame at Parliament's door. He said:

> "Because of the employment of the provisions of the Act to produce a very large diminution of tax, the case affords an occasion to point out the respective functions of the Parliament and of the courts in relation to the imposition of taxation. It is for the Parliament to specify, and to do so, in my opinion, as far as language will permit, with unambiguous clarity, the circumstances which will attract an obligation on the part of the citizen to pay tax. The function of the court is to interpret and apply the language in which the Parliament has specified those circumstances."[171]

His Honour then went on to say, regarding the *Duke of Westminster*: "[That] principle . . . is basic to the maintenance of a free society".[172]

While blaming Parliament (by implication) Barwick C.J. made no mention in *Westraders* of the fact that his own decision (in concert with the other majority judges) in *I.M.F.C.* had been instrumental in permitting the tax avoidance scheme employed in *Westraders*. The House of Lords had in later authorities been able to distinguish between a normal trading transaction and a transaction for reducing tax. But in *I.M.F.C.* his Honour did not, although later, in *Bidencope*, he distinguished a scheme to save tax from a profit-making scheme.

Several other aspects of this *dictum* from *Westraders* require comment. Some of his own tax decisions go beyond the role of mere interpretation. *Mullens, Steinberg, Gauci* and *Bidencope* are examples of this. Several of his observations in those cases prompt the classic retort of Sir Owen Dixon, already quoted.[173]

In addition, although Barwick C.J. in his *dictum* acknowledged the limitations of language, the record of his tax decisions does not acknowledge this. His identification of the *Duke of Westminster* principle as a basic civil liberty underlines the fundamenal significance of this principle in his tax decisions. His use of the *Duke of Westminster* is an excessive extension of a principle which orginated in the interstices of drafting defects. Reference to old volumes of tax reports will show that the *Duke of Westminster* was only rarely referred to in the High Court before the appointment of Sir Garfield Barwick as Chief Justice.

The policy of his decision-making has not resulted in legal clarity. Too many of his principles have logical flaws. In many cases Parliament has

[171] (1980) 54 A.L.J.R. at 461.
[172] Ibid. at 461.
[173] Vide, p. 153.

responded with draconian provisions giving the Commissioner extensive discretions and limiting the supervisory role of the court. The new legalism must be regarded as a failure.

Barwick C.J. had, during his Chief Justiceship, an ascendancy in tax matters, which he lacked in other issues.[174] Why was Barwick C.J. ascendent in tax matters, yet not in other more traditional fields, such as constitutional law? The answer may lie with social factors. That Barwick C.J. was a tax radical advocating legalism, and not a legalist in the traditional sense was a distinction which could only be grasped by an educated public. Lawyers as a whole have only recently been taught tax in law schools; accountants have been taught tax over a longer period but are not qualified to comment on legal aspects. Those professionals who had tax expertise were largely involved in the tax avoidance industry to some degree. It was a commonplace of professional experience to hear lawyers and accountants disapprove of the tax decision of the 1970s High Court. But these decisions have been presented as inevitable developments of black letter law and many professional people who have disapproved, lacked the specialised knowledge to refute these claims. This article has attempted to show these developments were not an inevitable outcome of black letter law. The record of United Kingdom and New Zealand courts has been very different.

This lack of academic training in tax may have affected the ability of brother judges in the High Court to withstand the definitive and apparently logical policy of the Chief Justice in tax matters. Only Aickin J. consistently supported this policy. In various judgments Gibbs, Mason and Stephen JJ. (as well as McTiernan and Murphy JJ.) indicated considerable divergence from this line. But Barwick C.J. was usually in the majority and his policy was so consistently anti-revenue that his decisions had a cumulative effect. Murphy J. has attacked the "literalism" of these decisions but has not substantially challenged their legal correctness, and one notable academic critic Yuri Grbich has concentrated his attack principally on the policy and philosophy of the Barwick Courts tax decisions.[175]

The most vulnerable area of these decisions is where they claim to be strong, as expressions of black letter law. This article has attempted to point out some of the logical flaws inherent in the new legalism, its lack of legal consistency, and the major rejection of authority which it entailed.

The new legalism has attempted to foreclose the court's capacity to make a full factual assessment, and the result has been impoverished law. Ludicrous decisions such as *Curran* and *Cridland* have been the product of this new ideology. Recent High Court and Federal Court decisions indicate its supremacy has already ended.

[174] Vide Marr, op. cit., at 294.
[175] Vide "Section 260 re-examined: Posing Critical Questions About Tax Avoidance", (1975-6) 1 *U.N.S.W.L.J.* 211 and "The Duke of Westminster's Graven Idol on Extending Property Authority into Tax and Back Again" (1978) 9 *Fed. L. Rev.* 185.