the opportunity to present observations on the New Zealand Request, the French Government stated that it considered that the Court was manifestly not competent in the case, refused to appoint an agent and requested the Court to remove the case from its list. But failure to appear and present formal submissions on the part of France did not constitute a bar to the issuance of provisional measures, since Article 53 of the Statute of the International Court of Justice provides that, in the case of the non-appearance of one of the parties before the Court or failure to defend the case, the other party is entitled to call upon the Court to decide in favour of its claim provided that the Court, before doing so, satisfies itself not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well-founded in fact and in law. In the *Fisheries Jurisdiction Cases* (supra) the Court observed that the non-appearance of one of the states concerned cannot, by itself, constitute an obstacle to the granting of interim measures of protection provided that the parties have been afforded the opportunity of presenting their observations on the subject.

It is with great interest that the decision of the Court on the merits of the case is awaited.

R. Ah Keni.

TAXATION AND ESTATE PLANNING

Assignments of income

Two recent decisions, one in the Supreme Court and one in the Court of Appeal, will have an important effect on tax considerations. For practical purposes the more important decision was that of Cooke J. in *James* v. *Commissioner of Inland Revenue* [1973] 2 N.Z.L.R. 119. Because of its fact situation the case is of special importance: it concerned particularly an interest-free loan, repayable on demand, and the effect of this as a settlement which came within s. 105 (2) Land and Income Tax Act 1954. This section provides in effect that where, by the terms of any settlement (which includes any disposition, trust, covenant, agreement, arrangement or transfer of assets — s. 105 (4)) the income of the settled property is payable to, or applied or accumulated for, the benefit of any person for less than the prescribed period and the settlor remains the beneficial owner of the corpus, or the settlement provides that the corpus shall revert to or remain under the control of the settlor, the income from the settled property shall be deemed to be derived by the settlor. The prescribed period for most cases is seven years, or where infants are involved, the duration of their minority.

The facts, briefly, were these: James, the taxpayer, sold his farm to a company, of which he, his wife and the trustees of a family trust were directors; the family trust was created at the same time as the company. The money from the sale

was then loaned to the trust (which benefited the taxpayer's wife and children) on an interest-free loan repayable on demand. The trust then loaned the money at 6 per cent interest to the company, and took an unregistered mortgage on the farm. The taxpayer then leased the farm from the company at a rent which more than covered the interest payable (by the company) on the mortgage to the trust.

The Commissioner alleged that the interest-free loan by the taxpayer to the trust was a settlement caught by s. 105 (2) and consequently the interest payable on the mortgage by the company to the trust was deemed to be derived by the taxpayer. Prima facie there was some difficulty in the path of the Commissioner. First, all the taxpayer did was to transfer a fund to the trust; it was not a term of that settlement that the income would be derived by the trustee. Secondly, it was argued that a loan without interest could hardly be called a "settlement" in its ordinary sense of some provision whereby property is to be retained for the enjoyment of persons in succession. Thirdly, even if referred to under s. 105 (4) as a disposition or transfer of assets, it was nevertheless still not a term of that disposition or transfer that income was to be applied for persons other than the taxpayer.

Cooke J. surmounted these difficulties by adopting the word "arrangement" in s. 105 (4) which ". . . comprehends both an understanding or plan between two or more persons and also the transactions by which the plan is carried into effect". He went on at p. 123 to find that ". . . the whole series of transactions — the creation of the company and the trust, the sale of the farm, the loans, the mortgage and the lease — took place in pursuance of an integrated plan adopted by the objector on professional advice". It was an integral part of the plan, in fact a term of the arrangement, that the trust would lend the fund to the company at interest and as this right to receive the income was conceded to be for a period less than the prescribed period (because the loan could be called up within seven years) and as the corpus reverted to the settlor (because of the obligation to repay) or remained under his direction or control the Commissioner succeeded.

The fact that on the authority of *Commissioner of Stamp Duties* v. *Card* [1940] N.Z.L.R. 637 an interest-free loan on demand may be said to be given for consideration (the obligation to repay) was irrelevant for the purposes of s. 105. Cooke J. pointed out that the presence or absence of consideration as a relevant factor was removed by s. 18 Land and Income Tax Amendment Act 1951. Moreover, Cooke J. expressed the view that even if the taxpayer had lent the money to the trustees at interest, s. 105 could still possibly apply even though the taxpayer might, as a result, be liable for taxation both on the interest he actually received and the trust income which by application of s. 105 would be deemed to be derived by him.

The loan repayable on demand has become an important instrument in estate planning but it is now clear that it cannot

be used indiscriminately, unless it is used outside a settlement as defined in s. 105.

In *James'* case the Commissioner disclaimed any reliance on s. 108 to upset the arrangement but if he had not done so the question may have arisen whether an arrangement which was designed to escape s. 105 could nevertheless be caught by the wider provisions contained in s. 108. This was in fact one of the issues before the Court of Appeal in *McKay* v. *Commissioner of Inland Revenue* [1973] 1 N.Z.L.R. 592. This again involved a transaction with a family trust, which was able to be disregarded by the Commissioner but this time under s. 108. The transaction involved was the assignment of income from income-producing property to a trust in favour of the taxpayer's family. The assignment of the income was carefully made so as not to offend s. 105. Turner P., looking at the transaction in relation to its background, which showed a history of attempts by the taxpayer to reduce the incidence of taxation and frustrations of those attempts by the Commissioner, held that the assignment was another link in the same chain of events and therefore was an arrangement falling within s. 108 requirements as having "the purpose or effect of in any way altering the incidence of income tax or relieving any person from his liability to pay income tax". Consequently the assignment was able to be set aside by the Commissioner for tax purposes, even though if viewed in isolation from its history it may have been explainable as an ordinary family or business transaction. All members of the Court of Appeal agreed that even though the assignment did not infringe s. 105, that fact did not prevent a transaction in proper cases from being challenged under s. 108:

> The section [s. 105] is silent as to the assessment of income assigned for a period longer than seven years. The effect of this is, simply, that the assessment of such income is left to be governed, like any other assessment, by the general provisions of the Act. Prima facie, no doubt, the taxpayer may rely upon the Commissioner recognising the assignment, and issuing an assessment ignoring, as far as he is concerned, the income assigned; but s. 105 certainly does not prevent the Commissioner, in a proper case, from applying to such assignments the provisions of s. 108 (id., 600).

D. D. Twigg

TORTS

Negligence — general principles

In *Stephenson* v. *Waite Tilemann Ltd.* [1973] 1 N.Z.L.R. 152 the Court of Appeal had to consider the correct application of the decision of the Privy Council in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd. (Wagon Mound* (No. 1)) [1961] 1 A.C. 388. The action arose following an accident involving one of the employees of the respondent company. The appellant cut his hand as the result of a wire rope suddenly breaking loose near where he was working. He was admitted to hospital and although his swelling and feverish condition sub-