

“AS IF...” – THE WONDERLAND OF STATUORY HYPOTHESES

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Before I embark on my prepared text, may I say how pleased and proud I am to be giving this year's lecture in honour of the memory of David Renton. He was a founder-member of the society and he died eight years ago, shortly before his 99th birthday, after a long life of public service.

Before the Second World War he had 15 years in practice at the bar. Throughout the war he was away on military service in Egypt and Libya. In 1945 he was elected as a National Liberal (now an extinct species) for Huntingdon, a seat which he held continuously for 34 years until his elevation to the House of Lords. The most senior position that he held in government was Minister of State at the Home Office when R A Butler was Home Secretary. He lost that office in Macmillan's "long knives" reshuffle of 1962, and retired to the backbenches.

On the backbenches he did year so devoted work on the sort of legal and constitutional issues that he knew best. In particular, he produced the Renton Report, in 1975, on the preparation of legislation. It is for that work, and his commitment to the Statute Law Society from its earliest years, that we particularly remember him. But we can remember also that years before that, in and before 1950, he was one of the British lawyers directly involved in the drafting of the European Convention on Human Rights. He was a clever, hard-working, caring man with a strong commitment to the public interest, and it is good that we are keeping his memory green.

Turning to my chosen topic, I would say that this is an area in which the terminology is not particularly uniform or informative. The expression “legal fiction” is usually reserved for the ancient general fictions by which the common law developed, such as ejectment, assumpsit and lost modern grant (which in the leading case of *Angus v Dalton*¹ was called “a revolting fiction”). “Statutory fiction” gets closer to my subject-matter, and the expression “deeming provision” is still often used, for instance in Francis Bennion’s monumental work on Statutory Interpretation.²

But in statutes the use of the verb “deem” (invariably in the passive voice) seems to be on the way out, and few will shed many tears at its passing. I have identified only one instance in a 21st century statute³. It is not simply that the word is archaic. It is also highly ambiguous. Lord Radcliffe put it clearly in *St Aubyn v Attorney General*⁴, an estate duty case decided in 1951:

“The word ‘deemed’ is used a great deal in modern legislation. Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description which includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible.”

The last sentence of this passage was cited by Viscount Simonds in *Public Trustee v Inland Revenue Commissioners*⁵, decided by the House of Lords in 1959. Although estate duty was abolished forty years ago the *Public Trustee* case is still of interest, at least as part of the history of revenue law. It

¹ (1877) 3 QBD 83, 94 (Lush J); but cf (1878) 4 QBD 162, 201 (Brett LJ)

² Bennion, *Statutory Interpretation* 6th ed (2013) section 304

³ Commonhold and Leasehold Reform Act 2002 s 3(2)

⁴ [1952] AC 15, 53

⁵ [1960] AC 398, 407

shows that for about sixty years of its eighty-year lifespan, estate duty was administered on a fundamentally false construction of the principal charging sections. That fundamental error related to the meaning of the word “deemed”.

I would like to go into this point in some detail, even though it involves exhuming some long-buried statutory provisions. In 1899, only a few years after the coming into force of the estate duty legislation, the House of Lords decided the case of *Cowley v Inland Revenue Commissioners*⁶, and Lord Macnaghten set out his understanding of the relationship between sections 1 and 2 of the Finance Act 1894. Please note that “pass” is an ordinary English word which had not previously been a term of art. Section 1 imposed estate duty on all property, whether or not settled, which “passes on death”. Section 2 stated that the property “passing on the death of the deceased” should be “deemed to include” four categories of property (which might be said to have ranged, in Lord Radcliffe’s words, from the obvious through the uncertain to the impossible).

Lord Macnaghten felt no doubt about the construction of these sections. He declared forthrightly⁷:

“Now, if the case falls within s.1 it cannot also come within s. 2. The two sections are mutually exclusive. Section 1 might properly, I think, be headed, ‘With regard to property passing on death, be it enacted as follows.’ Section 2 might with equal propriety be headed, ‘And with regard to property not passing on death, be it enacted as follows.’”

This controversial pronouncement was not concurred in by the other members of the House, and was not necessary to the decision. Yet such was Lord

⁶ [1899] AC 198

⁷ [1899] AC 198, 212

Macnaghten's eminence that it was taken as a canonical truth for sixty years – that is, until the speech of Viscount Simonds in the *Public Trustee* case.

Having started by acknowledging Lord Macnaghten as a “truly *clarum et venerabile nomen*” Viscount Simonds proceeds with a demolition job covering six closely reasoned pages⁸. It contains some comments so dry that you have to read them two or three times to be sure that you have got the point, such as his comment on Lord Dunedin's speech in *Cowley*:

“... perhaps his statement that it mattered little whether Lord Macnaghten was strictly correct or not meant that he thought that he was clearly wrong.”

By the end the polished syntax of Viscount Simonds' Ciceronean periods has lapsed into a sort of breathless parataxis⁹:

“What, then, my Lords, is the proper course to be taken? I believe that I yield to no one in the importance that I attach to the rule of precedent. But this case stands alone in my experience. Observations so patently wrong (may I be forgiven for saying so) that they leave only a sense of wonderment – unnecessary to the decision, for, as Lord Davey point out, the same result could be reached by another route – by Lord Davey himself accepted and dissented from in the same breath – flatly contradicted in 1924 by Lord Haldane who in 1914 had adopted them – the source of endless doubt and confusion to all who have been concerned in the examination or administration of this branch of law – all these factors lead me to the conclusion that I can properly invite your Lordships to say that sections 1 and 2 are not mutually exclusive...”

⁸ [1899] AC 398, 409-416;

⁹ pp 415-416

With one dissentient, his colleagues (including Lord Radcliffe) accepted this invitation.

This episode from the history of estate duty is a striking example of the dangers which attend the ambiguous phrase “shall be deemed”. Modern statutes generally use a more accessible phrase such as “shall be taken as” or “shall be treated as” when introducing a statutory hypothesis. However it is phrased, a statutory hypothesis typically identifies a set of circumstances and provides that in those circumstances the legal consequences are to be the same as they would be in some other circumstances or on the occurrence of some other event (where those other circumstances do not actually obtain, or the other event does not actually occur).

The statute may or may not spell out some limit to the operation of these legal consequences. If it does not the court may have to fix a limit as a matter of purposive construction. I will mention three well-known examples.

In *ex parte Walton*¹⁰, a case on section 23 of the Bankruptcy Act 1869, the relevant circumstances were that the head lessee of a house had been made bankrupt, and his trustee in bankruptcy disclaimed the lease, with the legal consequence that the lease was to “be deemed to have been surrendered” on the date of the bankruptcy order. The issue was whether this notional surrender affected the rights of the underlessee, and the Court of Appeal had little hesitation in holding that it did not, despite the generality of the language of the statute. James LJ made an observation which has often been cited in later cases:

¹⁰ (1881) 17 Ch D 746, 756

“When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the Court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to.”

In the *East End Dwellings* case in 1951¹¹, the relevant circumstances were that some blocks of flats let on rent-controlled tenancies had been demolished by wartime bombing in 1944. The site was still vacant when the freehold owner was served by the local authority with a compulsory purchase order. Under the War Damage Act 1943 the freeholder was entitled to what was called a “cost of works” payment. Section 53 of the Town and Country Planning Act 1947 provided (in a more modern style of statutory drafting) that in those circumstances the value of the property on compulsory purchase should “be taken to be the value which it would have if the whole of the damage had been made good before the date of the notice to treat.” The issue was whether the buildings assumed to have been erected on the site, but not actually in existence, must be supposed to be subject to rent control. If so, the value would have been reduced by about 40 per cent. The freeholder would not in any event receive a “cost of works” payment. Instead the local authority would receive from the War Damage Commission a smaller “value” payment based on pre-war values. It was a rather muddled situation to which there was no obvious purposive solution, and the House of Lords decided the case in favour of the freeholder largely on the precise words of the statute. This was the case in which Lord Asquith made some much-cited observations¹²:

“If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real

¹¹ *East End Dwellings Co Ltd v Finsbury BC* [1952] AC 109

¹² [1952] AC 109, 132-133

the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it. One of these in this case is emancipation from the 1939 level of rents. The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs.”

The third well-known case is *Murphy v Ingram*¹³. The circumstances were that at the beginning of the 1969-70 year of assessment Mr Murphy’s daughter Eileen was aged 22, unmarried, and a full-time university student. At the end of the year of assessment she was a married woman living with her husband and in employment. She had earned more than the maximum sum permitted if her father was to receive a child allowance on the basis of her having been in full-time education at the beginning of the year of assessment. Section 354(1) of the Income Tax Act 1952 enacted that “a woman’s income chargeable to income tax shall, so far as it is income for ...part of a year of assessment during which she is a married woman living with her husband, be deemed for income tax purposes to be his income and not to be her income.” This was followed by a proviso limiting the effect of what had gone before. The issue was whether Mr Murphy was entitled to child allowance for 1969-70 on the ground that his daughter’s earnings were to be treated as income of her husband. Mr Murphy failed. The case turned on how far the wide words “for income tax purposes” were limited by the proviso. The Court of Appeal held that they were limited, and that their effect was, in the words of Russell LJ¹⁴:

¹³ [1974] AC 363

¹⁴ [1974] Ch 363, 372

“confined in its meaning to the triangular relationship of Crown, husband and wife – a fiscal ménage à trois.”

Questions of valuation, whether for the purposes of compulsory acquisition of land, or tax, or rating, or leasehold enfranchisement, are an area in which Parliament is particularly inclined to resort to hypotheses, sometimes of an elaborate nature.

The simplest statutory hypothesis, in the field of valuation, is that of a sale of property (a house, say, or a piece of land with development potential) on the open market. In that simple case

“It cannot be too strongly emphasised that although the sale is hypothetical, there is nothing hypothetical about the open market in which it is supposed to take place. The concept of the open market involves assuming that the whole world was free to bid, and then forming a view about what in those circumstances would in real life have been the best price reasonably obtainable.”

This citation is from Hoffmann LJ in a case about capital transfer tax¹⁵. He also painted engaging word-pictures of the willing seller and the willing buyer.

But even a hypothetical sale in the open market is, at the top end of the market, not without its problems. The tenth Duke of Devonshire died in 1950 and the property passing on his death for estate duty purposes included the entire assets of the Chatsworth Estate Company. Its assets included 119,000 acres – about 186 square miles - of land in ten different parts of England. The principal valuation provision referred to “the price...which such property would

¹⁵ *Gray v IRC* [1994] STC 360, 372

fetch if sold on the open market at the time of the death of the deceased.” A subsidiary provision prohibited “any reduction in the estimate on account of the estimate being made on the assumption that the whole property is to be placed on the market at one and the same time.” The trustees contended for valuing the land in ten lots, arguing that it would have been impossible to survey, catalogue and sell the land in hundreds or thousands of lots within a reasonable time. But the House of Lords held¹⁶ that the Lands Tribunal had not erred in treating the Hardwick estate of about 20,000 acres (which received detailed study as a representative part) as divisible into 532 separate units, each of which was supposed to be sold, without flooding the market, on the day of the tenth Duke’s death. But some of the law lords (especially Lord Wilberforce)¹⁷ expressed disquiet about the paucity of fact-finding and argument in the Lands Tribunal.

Greater complications can arise if the hypothetical sale is to take place in a hypothetical market. The most striking illustration of this is a case in which the Inner House of the Court of Session interpreted and applied section 42 of the Rent (Scotland) Act 1971 in a way that not merely failed to give effect to the parliamentary intention, but (as the House of Lords¹⁸ pointed out) produced a result precisely opposite to the true intention. Section 42(1) provided for regulated tenancies of dwellings in Scotland to be at fair rents, to be determined with regard to all relevant circumstances, except personal circumstances. Subsection (2) was as follows:

“For the purposes of the determination it shall be assumed that the number of persons seeking to become tenants of similar dwelling-houses in the locality on the terms (other than those relating to rent) of the regulated tenancy is not substantially greater than the

¹⁶ *Duke of Buccleuch v IRC* [1967] 1 AC 506

¹⁷ [1967] 1 AC 506, 550-551; see also the dissenting judgment of Winn LJ in the Court of Appeal [1966] 1 QB 851, 873

¹⁸ *Western Heritable Investment Co Ltd v Husband* [1983] 2 AC 849

number of such dwelling-houses in the locality which are available for letting as such terms.”

It was reasonably clear – certainly it was clear to the House of Lords – that the intended effect of this subsection was that in areas of scarcity in the supply of housing, the rent to be determined should be adjusted downwards so as to eliminate the scarcity factor. But the majority of the Inner House of the Court of Session interpreted it (in the words of Lord Fraser of Tullybelton¹⁹) “as creating an irrebuttable presumption of fact that there is no scarcity, whatever the true facts may be”. Parliament could, no doubt, have used other language that left no possible doubt that the assumption called for by subsection (2) was an assumption as to the state of a hypothetical market (which almost certainly did not exist in most parts of Glasgow) rather than an assumption (or irrebuttable presumption) about there being no scarcity of supply in the real market. But the Inner House does seem to have misunderstood the evident statutory purpose.

In the field of rating law there are many authorities, some very venerable, about the hypothetical tenant who takes a rateable hereditament on a hypothetical annual tenancy. The rent payable under this hypothetical tenancy determines the rateable value of the hereditament, even if it consists of buildings and infrastructure (such as a power station²⁰ or a railway station) which would never (at any rate before the introduction of statutory security of tenure for business tenancies) have been let on an annual tenancy in the real world. I am

¹⁹ [1983] 2 AC 849, 854; see also Lord Brightman at p 860

²⁰ In *Hong Kong Electric Co Ltd v Commissioner of Rating and Valuation* (2011) 14 HKCFAR 579, 618, Lord Millett NPJ considered the buildings and infrastructure of the power station on an 84-hectare site on Lamma Island which supplies power to Hong Kong Island.

not going to go far into those authorities beyond noting the observation of Schiemann LJ in a modern rating case²¹

“The statutory hypothesis is only a mechanism for enabling one to arrive at a value for a particular hereditament for rating purposes. It does not entitle the valuer to depart from the real world further than the hypothesis demands.”

In practice, the court’s insistence that these are valuation issues, which depend on the expert evidence of valuers, has led to the simple statutory hypothesis used for rating purposes being used in a very flexible way.

There is nothing simple, however, about the ever-increasing complexity and difficulty of successive rounds of legislation concerned with leasehold enfranchisement of houses and flats. The best introduction to the complexities and difficulties is the judgment of Lord Neuberger in five linked appeals reported as *Cadogan v Sportelli*²². Lord Neuberger’s judgment is a masterpiece of exposition. He explains how the right of enfranchisement was originally conferred by the Leasehold Reform Act 1967 only on qualifying tenants of relatively low-value houses (as opposed to flats); and how the original simple formula of a hypothetical open-market sale was amended in 1969 to exclude the tenant and his family from the class of potential buyers. Then in 1974, when more valuable houses were brought within the scope of the legislation, the actual tenant was readmitted, as it were, to the hypothetical class of potential buyers. So the special value of the freehold to an occupying tenant was recognised at the top end, but disregarded at the bottom end, of the market. That special value was generally referred to as the marriage value, and that

²¹ *Hoare v National Trust* (1998) 77 P&CR 366, 370

²² [2010] 1 AC 226, 279, on appeal from another group on linked appeals reported at [2008] 1 WLR 2142

expression received statutory recognition in amendments made by the Commonhold and Leasehold Reform Act 2002. The amended section 9 (1D) of the Leasehold Reform Act 1967 provided that where-

“there falls to be taken into account any marriage value arising by virtue of the coalescence of the freehold and leasehold interests, the share of the marriage value to which the tenant is to be regarded as being entitled shall be one half of it.”

“Hope value” is not a statutory term, but it is well understood among valuers. Whereas marriage value (in the original statutory sense) represents the actual coalescence of the freehold and leasehold interests – the consummation, so to speak, of the marriage – hope value represents the possibility of their coalescence at some future time. Where on the enfranchisement of a higher-value house the freehold owner receives half of the statutory marriage value, it is hard to see how he can also justify being paid “both for the hope and for its fulfilment”.²³ But hope value was sometimes relied on as a reason for increasing the investment value of the freehold interest (of which the owner received 100%) and correspondingly decreasing the marriage value (of which he received only 50%). In two of the five appeals the House of Lords, upholding the Court of Appeal and the Lands Tribunal, put an end to that line of argument.

We have so far considered two forms of enfranchisement: lower-value houses and higher-value houses. Further complications arrived with the Leasehold Reform, Housing and Urban Development Act 1993.

²³ *Cadogan v Sportelli* in the Court of Appeal: [2008] 1 WLR 2142, 2159

This Act granted two new rights to tenants of flats. It has had a profound effect on the housing market, particularly in London, and it has produced a huge volume of litigation. I shall take the simple case of a purpose-built block of flats with no business premises and no intermediate leasehold interests. One right is collective enfranchisement by purchase of the freehold of the whole block of flats under Part 1, Chapter 1 of the Act. Collective enfranchisement requires at least half the qualifying tenants to decide to be “participating tenants”, and they can secure that a nominee company acquires the freehold of the block (including the reversion to the flats of non-participating tenants) for an amount calculated on a complex (and twice amended) hypothesis set out in Schedule 6 to the Act. The other right is for a single qualifying tenant to obtain a new long lease of his flat for an amount calculated on a complex (and twice amended) hypothesis set out in Schedule 13 to the Act.

Both these hypotheses refer to “marriage value”, and contain different definitions of it. Neither definition describes a true coalescence of freehold and leasehold interest. In a Schedule 6 case the freehold ends up in a nominee company in which the participating tenants have a stake, and in a Schedule 13 case it stays with the freehold owner, but subject to a new long lease of the flat in question. In each case there is at best a sort of virtual coalescence which realizes a good deal of the locked-in value. But it leaves room for argument about whether in valuing the landlord’s interest account should be taken of hope value in respect of the flats of non-participating tenants (in a Schedule 6 case) or (more simply) the other flats (in a Schedule 13 case).

Cadogan v Sportelli was a Schedule 13 case (that is, a long lease case). The House of Lords unanimously upheld the Court of Appeal’s decision that hope value was not to be taken into account under Schedule 13. But (with

Lord Hoffmann as a powerful dissenting voice) it allowed in part the appeals in the other two cases, which were concerned with collective enfranchisement under Schedule 6. The majority held that²⁴ “the landlord is entitled to claim hope value under paragraph 3 of Schedule 6 in relation to non-participating tenants’ flats, albeit not in relation to participating tenants’ flats”.

I am not going to comment on the competing arguments. I am conscious that I have already burdened my audience with more than enough technicality. But as my final comment on these troublesome cases on leasehold enfranchisement, please note how far we have moved from the notion of a hypothetical sale in a real open market, on which Hoffmann LJ (as then he was) placed so much emphasis in *Gray’s* case in 1994. This may be contrasted with the evidence of one of the expert valuers, Mr Cullum of Cluttons, quoted by Carnwath LJ in the Court of Appeal²⁵:

“I am providing my view about what would happen in a hypothetical market; it is a market which has not existed at all (in terms conformable to the Act) for 13 years. Indeed, for several years before that the market was under the threat of the Act and was already being distorted by anticipation of the legislation. Even before that the market was different from the hypothetical market I am to envisage today ... this hypothetical market will be operating with a degree of confidence which I have never experienced in a no-Act world and neither will any of the other experts. At the youngest, one would have to be in one’s late 60s or 70s to have had actual experience of the hypothetical market I am to envisage.”

Here we are in a sort of wonderland in which it is hard to distinguish fact from fiction, because the fiction alters the facts.

²⁴ [2010] 1 AC 226, 297 (para 125)

²⁵ [2005] 1 WLR 2142, 2160 (para 64)

After leasehold enfranchisement it is a relief to return to something simple, such as tax avoidance. *Marshall v Kerr*²⁶ was concerned with a deeming provision in the capital gains tax code enacted by the Finance Act 1965, and whether it could be ingeniously employed so as to escape an anti-avoidance provision aimed at gains made by the non-resident trustees of a settlement made by a resident settlor in favour of resident beneficiaries. The case is unusual though not unique in that it involved four successive appeals against the original assessment, and each appeal was allowed. The end result was that the Revenue finally prevailed (but only on special terms as to costs). The fluctuations of judicial opinion as to the proper outcome of the case reflect that the arguments, whether on a literal or a purposive approach, were finely balanced.

Section 24 of the 1965 Act dealt with the consequences of death, and of the administration of a deceased person's estate, in relation to the assets of which he was competent to dispose. Its sidenote is the single word "Death". Subsection (11) was in the following terms:

"(11) If not more than two years after a death any of the dispositions of the property of which the deceased was competent to dispose, whether effected by will, or under the law relating to intestacies, or otherwise, are varied by a deed of family arrangement or similar instrument, this section shall apply as if the variations made by the deed or other instrument were effected by the deceased, and no disposition made by the deed or other instrument shall constitute a disposal for the purposes of this Part of this Act."

²⁶ [1991] STC 686 (Harman J); [1993] STC 360 (Court of Appeal); [1995] 1 AC 148 (House of Lords)

The facts were that Mr Lionel Brooks died in 1977 resident and domiciled in Jersey, having appointed a Jersey company, Regent Trust, as his executor. He left half his residuary estate to his daughter, Mrs Kerr, who was resident and domiciled in England. Within two years of his death, and before completion of administration of his estate, Mrs Kerr executed a deed of family arrangement directing Regent Trust (which was a party to the deed) to hold her half share on trusts under which Mrs Kerr was the principal beneficiary. She received capital from Regent Trust (which had realised capital gains) in the 1983-84 and 1984-85 years of assessment. Her husband was assessed to capital gains tax under section 80 of the Finance Act 1981, which had replaced the original anti-avoidance provision in section 42 of the Finance Act 1965. The crucial issue was whether the settlor of the settlement established by the deed of family arrangement was Mrs Kerr or, by virtue of the deeming provision in section 24(11), her father. If her father was the settlor section 80 did not apply, because of his Jersey domicile. The anti-avoidance provisions in section 80 would have been circumvented.

The Special Commissioner decided in favour of the taxpayer, taking subsection (11) as applying for all capital gains tax purposes. Harman J reversed this, citing Nourse J in *Metrolands*, an earlier tax case²⁷. In that case, after referring to the well-known statement by James LJ in *ex parte Walton*, Nourse J continued:

“It will not always be clear what those purposes are. If the application of the provision would lend to an unjust, anomalous or absurd result then, unless its application would clearly be within the purposes of the fiction, it should not be applied.”

²⁷ *IRC v Metrolands (Property) Ltd* [1981] STC 193, 208

Harman J could discern no purpose which led to subsection (11) being given a wide meaning.

In the Court of Appeal the principal judgment was given by Peter Gibson J. He referred to *ex parte Walton* and to *Metrolands* but took a rather different view²⁸:

“But I do not read the authorities as requiring in the case of a deeming provision the abandonment of what is sometimes called the golden rule of construction, that is to say that in construing a statute the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity or some inconsistency...”

He also referred to the *East End Dwellings* case and commented²⁹:

“As Harman J himself recognised, it is only too often that the purposes of a fiscal provision are not apparent, and there is a real danger that if a court in every case feels bound to commence its construction of a statutory provision by finding their purpose, it will make a self-fulfilling assumption of what the purpose is.”

This perceptive comment was echoed by Lord Lowry in the House of Lords³⁰, and also (in the context of leasehold enfranchisement) by Lord Hoffmann in his powerful dissent in *Cadogan v Sportelli*³¹.

Peter Gibson J concluded in these terms:

²⁸ [1993] STC 360, 365

²⁹ [1993] STC 360, 366

³⁰ [1995] 1 AC 148, 160

³¹ [2010] 1 AC 226, 272 (para 25)

“If the trustee of the varied trusts is to be treated as if the personal representative’s acquisition of the assets...had been the trustee’s acquisition, in accordance with the direction of Lord Asquith which I have cited, one most surely, unless prohibited from doing so, also treat Mrs Kerr as never having acquired or disposed of those trust assets.”

Simon Brown and Balcombe LJJ agreed. So the Revenue was the appellant in the final appeal to the Lords.

The House of Lords unanimously allowed the appeal. I have to say that I have some difficulties with their reasoning. Lord Templeman (with whom Lord Lowry seems to have agreed) did not go so far as to say that the taxpayer’s argument led to absurdity, but he did say³²:

“Your Lordships were invited to accept a narrow and technical argument in order to produce a result which Parliament could not have intended and to favour a minority of United Kingdom residents to the detriment of the majority. This is an invitation which it is not difficult to resist.”

Lord Lowry based his opinion mainly on section 24 as a whole being “simply concerned with the consequences of death.”³³ Lord Browne-Wilkinson (with whom all the law lords agreed) expressly approved³⁴ Peter Gibson J’s statement of principle, but then based his decision on a point on the administration of assets which had not been raised below, and which I find unpersuasive. I consider that the arguments were indeed finely balanced. I think the case was

³² [1995] 1 AC 148, 157

³³ [1995] 1 AC 148, 160

³⁴ [1995] 1 AC 148, 164-170

in the end correctly decided, but I prefer the grounds relied on by Lord Templeman and Lord Lowry.

Parliament will no doubt continue to resort to the use of statutory hypotheses – though not, it is to be hoped, hypotheses as intractable as those in Schedules 6 and 13 of the Leasehold Reform, Housing and Urban Development Act 1993 – and the courts will continue to do their best to discern and give effect to the parliamentary intention. We must recognise that it is an aspect of statutory construction which has particular problems. I will end with some pertinent remarks of Neuberger J (as he then was) in another case about tax avoidance³⁵, together with a sort of footnote that I added to his remarks. This is what Neuberger J said:

“It appears to me that the observations of Peter Gibson J, approved by Lord Browne-Wilkinson, in *Marshall* indicate that, when considering the extent to which one can ‘do some violence to the words’ and whether one can ‘discard the ordinary meaning’, one can, indeed one should, take into account the fact that one is construing a deeming provision. This is not to say that normal principles of construction somehow cease to apply when one is concerned with interpreting a deeming provision; there is no basis in principle or authority for such a proposition. It is more that, by its very nature, a deeming provision involves artificial assumptions. It will frequently be difficult or unrealistic to expect the legislature to be able satisfactorily to [prescribe] the precise limit to the circumstances in which, or the extent to which, the artificial assumptions are to be made.”

³⁵ *Jenks v Dickinson* [1997] STS 853, 878; I added a footnote to this in *DCC Holdings (UK) Ltd v HMRC* [2011] 1 WLR 44, 58 (para 40)

This was my footnote in another tax case:³⁶

“But it may be helpful to consider a less abstract example. If a 40-something woman says to her teenage daughter, ‘If you were my age you would see things differently,’ you could not be sure that the mother was referring to anything more specific than the experience or disillusionment that is supposed to come with the advance of middle age. Of course, if she added something like ‘Because then you would have lived through the miners’ strike’ (or other words giving some real-life context) the hypothesis would become more specific. But there would almost certainly be no contextual grounds for taking the mother’s hypothesis as implying that they were no longer seeing things as mother and daughter (as they were hypothetically the same age) or alternatively that the mother herself must have been born a generation before her actual birth. Either implication would be taking the hypothesis further than was warranted.”

We have come quite a long way from Lord Asquith’s rather fulsome observations about not causing or permitting our imaginations to boggle. And no doubt the journey will continue.

³⁶ *DCC Holdings (UK) Ltd v HMRC* [2011] 1 WLR 44, para 40