HIGH COURT OF JUSTICE (CHANCERY DIVISION)—6 AND 7 NOVEMBER 1991 A

COURT OF APPEAL—1 AND 3 MARCH 1993

B

HOUSE OF LORDS—13 AND 14 DECEMBER 1993 AND 30 JUNE 1994

C

Marshall (H.M. Inspector of Taxes) *v*. Kerr(1)

D

Capital gains tax—Settlements—Deceased not resident in United Kingdom—Share of residuary estate accruing to his UK resident daughter—Trust effected by instrument of variation within 2 years of death—Trustee not resident in the United Kingdom—Capital payments made to daughter by trustee—Whether gains chargeable as daughter was settlor, or not chargeable as deceased was settlor—Finance Act 1965, *ss* 24(7), 24(11) *and* 42, *Finance Act* 1981, *ss* 80–85. E

Mrs. K's father, who died in 1977, was domiciled and ordinarily resident in Jersey and neither resident nor ordinarily resident in the United Kingdom. By his will he left a half-share of his residuary estate to Mrs. K absolutely. By an instrument of variation made in 1978, Mrs. K recited that she wished to make a family arrangement and declared trusts in respect of the fund and its income: the trustee was a trust company incorporated in Jersey and at all relevant times resident only in Jersey. In June 1979 the administration of the deceased's estate was completed. F

K appealed against assessments to capital gains tax for 1983–84 and 1984–85 made pursuant to ss 80–85 Finance Act 1981 in respect of capital payments made to Mrs. K by the trustees. It was common ground that those provisions could apply only if the settlor was domiciled and resident or ordinarily resident in the United Kingdom either on the date when the chargeable gains accrued or on the date of execution of the settlement, which condition would be satisfied if Mrs. K was to be regarded as the settlor but not if her father was to be regarded as the settlor. G H

The Special Commissioners allowed K's appeals, holding that s 24(11) Finance Act 1965 applied with the effect that Mrs. K's father was to be regarded as the settlor for the purposes of ss 80–85 Finance Act 1981. The Crown appealed. I

The Chancery Division held, allowing the Crown's appeal, that Mrs. K was to be regarded as the settlor because:

(1) Reported (ChD) [1991] STC 686; (CA) [1993] STC 360; (HL) [1995] 1 AC 148; [1994] 3 All ER 106; [1994] STC 638.

A (1) the purpose of ss 24(7) and 24(11) Finance Act 1965 was to exclude from computation of gains any difference in value between the date of death and the date of the instrument which would otherwise be thought to accrue a person who made a deed of variation or other disposal by an instrument;

B (2) those provisions were fully effective if they meant what they precisely said but did not carry over into any further considerations of deeming than they provided; and

C (3) those provisions disclosed no purpose which would lead to the conclusion that the words had wider and more effective results; in particular there was no reason why they should be seen to be applicable in answering the question posed by s 42 of the 1965 Act, now ss 80–85 Finance Act 1981, as to whether the settlement was made by a person who was domiciled and resident or ordinarily resident in the United Kingdom either at the date of the chargeable gains or at the date of the making of the settlement.

D K appealed.

The Court of Appeal held, allowing K's appeal that:—

E (1) the correct approach in construing a deeming provision is to give the words used their ordinary and natural meaning, consistent as far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but, if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction; and because there must be treated as real that which is only deemed to be so, there must be treated as real F the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless there is a prohibition from doing so;

G (2) nothing in the Finance Act 1965 as a whole or the deeming provisions of s 24 required the words of those provisions to be given any meaning other than their normal and natural meaning; a limited purpose for s 24(7) and s 24(11) could not be ascertained from the statutory language; no question arose of absurdity or injustice flowing from a literal interpretation; s 24(7) was not qualified in any way, and the implications of the statutory wording had to be accepted because no prohibition from doing so could be found from the context of s 24;

H (3) accordingly, the natural implication of s 24(7) was that Mrs. K never acquired or disposed of any assets, and she could not, therefore, be a person who made the disposition for the purposes of s 42; the final limb of s 24(11) confirmed that for all capital gains tax purposes the variation affected by the instrument was not a disposal by Mrs. K, so that in effect the testator was to be treated as having made the disposition in the instrument by his will.

I

Observations in *Ex parte Walton* (1881) 17 ChD 746, *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council* [1952] AC 109 and *Commissioners of Inland Revenue* v. *Metrolands (Property Finance) Ltd.* 54 TC 679, concerning deeming provisions, considered.

The Crown appealed.

Held, in the House of Lords, allowing the Crown's appeal, that Mrs. K was to be regarded as the settlor for the purposes of ss 80–85 Finance Act 1981 because:—

(1) the only property capable of being settled by Mrs. K under the family arrangement was a chose in action, being her right to have the deceased's estate duly administered; the arrangement could not have, and did not purport to have, settled any specific asset in the estate of the deceased; only on the later completion of administration of the estate did half of the assets become vested in the trust company as legatee on the trusts of the arrangement;

(2) the first effect of the deeming provision in s 24(11) did not require an assumption that Mrs. K did not dispose of any property when she executed the settlement, but required only that that disposition did not give rise to a chargeable event for the purposes of capital gains tax; the second effect was that, in so far as assets of which the deceased had been competent to dispose at this death became vested in a beneficiary under a family arrangement, those assets were deemed to have been acquired from the deceased, but the provision did not require wiping out of the process of administration of the estate and an assumption that all the assets vested in a beneficiary under a family arrangement were acquired by him at the date of death from the deceased; nothing in s 24(11) required an assumption of anything inconsistent with Mrs. K having been the settlor under the family arrangement, and any different view would produce a chaotic situation which Parliament could not have intended.

CASE

Stated under the Taxes Management Act 1970, s 56, by the Commissioners for Special Purposes of the Income Tax Acts for the opinion of the High Court of Justice.

1. On 2 October 1990, I, being a Commissioner for the Special Purposes of the Income Tax Acts, heard the appeals of Mr. Simon P. A. Kerr (hereinafter called "Mr. Kerr") against the following estimated assessments to capital gains tax:

1983–84	£63,338
1984–85	£17,438

2. Shortly stated, the question for my decision was whether the capital payments paid to Mrs. Kerr (at all relevant times the wife of Mr. Kerr) between 1981 and 1985 are subject to taxation by virtue of ss 80 to 85 Finance Act 1981. In order to answer that question, it was necessary for me to construe s 24 Finance Act 1965.

3. No witnesses gave evidence before me.

4. The following documents were proved or admitted before me:

Statement of agreed facts
Agreed statement of law

A Bundle of agreed documents

Copies of the above are not annexed hereto as exhibits but are available for inspection by the Court if required.

5. My findings of fact and the principal contentions of the parties are B set out in my decision which was issued on 16 October 1990 and a copy of which is annexed as part of this Case.

6. The following cases were cited to me in argument:—*Canada Southern Railway Co.* v. *International Bridge Co.* (1883) 8 App Cas 723; *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council*(1) [1952] AC 108; *Murphy* v. C *Ingram*(2) [1974] STC 205; *Inland Revenue Commissioners* v. *Metrolands (Property Finance) Ltd.*(3) [1981] STC 193; *Macpherson and Another* v. *Inland Revenue Commissioners* [1987] STC 73; *Russell and Another* v. *Inland Revenue Commissioners* [1988] STC 195.

7. At the request of Mr. Kerr's solicitors, I include here a subsidiary D argument of his counsel, not noted in my decision. Such argument was to the effect that, since by virtue of s 24(11) Finance Act 1965 no disposition made by the instrument (as defined in my decision) was to constitute a disposal for the purposes of Part III of that Act, Mrs. Kerr could not, for that reason too, be regarded as being a settlor of the settlement as she was deemed to have disposed of nothing on the occasion of the execution of the instrument E and as she, in fact, disposed of nothing on any other occasion.

8. By my decision I allowed the appeals and discharged the assessments.

9. The Appellant, immediately after the determination of the appeals, declared to us his dissatisfaction therewith as being erroneous in point of law F and on 25 October 1990 required us to state a Case for the opinion of the High Court, pursuant to the Taxes Management Act 1970, s 56, which Case I have stated and do sign accordingly.

10. The questions of law for the opinion of the Court are as follows;—

G i) whether, on a true construction of s 24 Finance Act 1965 Mrs. Kerr is deemed not to be the settlor of an instrument of family arrangement dated 31 January 1978, and

ii) whether the assessments to capital gains tax on Mr. Kerr fall to be discharged.

H

T. H. K. Everett } Commissioner for the Special Purposes of the Income Tax Acts

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6 December 1990

(1) [1951] All ER 587. (2) 49 TC 410. (3) 54 TC 679.

DECISION

In this appeal I am asked for a decision on a novel point of construction involving the provisions of s 24(11) Finance Act 1965. Although the point at issue is very short, it is one which has troubled even the learned authors of legal textbooks.

The nominal Appellant in these appeals is Mr. Simon P. A. Kerr but the facts of the appeals relate to Mrs. Kerr alone. The assessments have been made on Mr. Kerr pursuant to the provisions of s 45 Capital Gains Tax Act 1979. The assessments under appeal are two estimated assessments to capital gains tax. The first is for the year 1983–84 in the sum of £63,338. The second is for the following year in the sum of £17,438. There is no agreement between the parties as to figures but I am asked in the first place for a decision in principle only on the construction of the relevant section in the 1965 Act. Depending on the outcome of these appeals, it may be necessary for there to be a further hearing on the question of quantum.

I heard no oral evidence and the facts of the appeal were encompassed in a brief agreed statement of facts supported by a small agreed bundle of documents. Accordingly, I can state the facts briefly as follows:

1. Mrs. Kerr's father, the late Lionel Horace Brooks ("the testator") died in Jersey on 27 February 1977. He was domiciled and ordinarily resident in Jersey and neither resident nor ordinarily resident in the United Kingdom at the time of his death.

2. The testator was survived by his two children, John Brooks and Elizabeth Ann Kerr ("Mrs. Kerr"). Mrs. Kerr was, at all relevant times, the wife of and living with her husband, the Appellant, Mr. Kerr. On 30 March 1977 the Regent Trust Co. Ltd. ("Regent") proved the testator's will dated 25 February 1974 in the Probate Division of the Royal Court of the Island of Jersey. A copy of the probate was produced in evidence as document 1 and a copy of the testator's will was produced in evidence as document 2.

Regent is a company incorporated in Jersey and was, at all relevant times, resident and ordinarily resident there and in no other place.

3. Under the terms of the testator's will, his residuary personal estate was given to his two children in equal shares absolutely.

4. On 31 January 1978 Mrs. Kerr and Regent executed an instrument of family arrangement ("the instrument"). A copy of the instrument was produced in evidence as document 3.

The effect of the instrument was to settle Mrs. Kerr's share in the residuary personalty of the testator on the terms of a settlement of which Regent was and has remained sole trustee. The settlement was to be in favour of a class of persons, namely Mrs. Kerr, her husband or widower, her children and her mother. The trust property was to be held on their behalf for "a trust period" of 21 years (less one day), after the death of the last surviving descendant of King George V living at the date of the testator's death. In the meantime, Mrs. Kerr was to have a life interest in the trust property and to retain power to appoint capital to any member of the class. Subject to any appointment, at the end of the trust period the property was to vest in Mrs. Kerr's children in equal shares.

5. The administration of the estate of the testator was not completed until June 1979. The assets of the estate were at no time vested in Mrs. Kerr, but were transferred by Regent in its capacity as personal representative to Regent in its capacity as trustee. The assets held by Regent in such capacity were 12 £1 ordinary shares in Brookside Investments Ltd., a company also incorporated in Jersey and at all times resident there and only there.

6. The general administration of the trusts of the settlement constituted by the will of the testator (and varied by the instrument) has, at all times, been ordinarily carried on outside the United Kingdom.

7. The assessments on the Appellant are raised under the provisions of s 80 Finance Act 1981 in respect of capital payments made to Mrs. Kerr.

Unusually the documents placed before me included an agreed statement of law and, therefore, I set out the following two paragraphs which represent common ground between the parties in these appeals:

1. Pursuant to s 24 (1) Finance Act 1965, the personal representatives, Regent, acquired all the assets of which the testator was competent to dispose (including the testator's residuary personal estate to a share of which, Mrs. Kerr was beneficially entitled) at market value at the date of the death of the testator on 27 February 1977.

2. The instrument falls within s 24(11) Finance Act 1965 being "a deed of family arrangement or similar instrument" whose effect was to vary (within two years of the death of the testator) the dispositions of the property of which the testator was competent to dispose and that the transactions effected by the instrument did not constitute a disposal for capital gains tax purposes.

It is also common ground in these appeals that the statute which I am required to construe is Finance Act 1965, the instrument having been executed before the passing of the Finance Act 1978.

The agreed question for my determination in these appeals is as follows:—

> "Whether the capital payments paid to Mrs. Kerr between 1981 and 1985 are subject to taxation by virtue of sections 80 to 85 Finance Act 1981."

However, the somewhat narrower point on which my decision in principle is required concerns the identity of the settlor of the settlement constituted by the testator's will and varied by the instrument, having regard to the provisions of s 24 Finance Act 1965.

Mr. Robert Venables Q.C., who appeared for Mr. Kerr, contended that the settlor of the settlement for the purposes of ss 80 to 85 Finance Act 1981 was the testator, or in the alternative was not Mrs. Kerr, and that, accordingly, those sections cannot apply to the settlement.

Mr. Gerald Thirkell, of the Inland Revenue Solicitor's Office, appearing for the Inspector, made the following contentions:

1. By the instrument, Mrs. Kerr disposed of part of her beneficial share in her father's estate on trusts in a non-resident settlement. A

2. Sections 80 to 85 Finance Act 1981 applied to the taxation of gains of non-resident settlements which have shares in non-resident companies such as Brookside Investments Ltd. Pursuant to s 85, the gains of Brookside Investments Ltd. can be accrued to the gains of the settlement. Payments made and benefits conferred by the settlement to the beneficiaries can be liable to capital gains tax pursuant to s 80 and 83(5), provided that the settlor was resident in the United Kingdom on the date that the settlement was executed. B

C

3. The settlor for the purposes of s 80 to 85 was Mrs. Kerr, who was resident in the United Kingdom on the date the settlement was executed in 1978 and has continued to remain so resident. Therefore, the payments from the trust are subject to capital gains tax.

Conclusions D

It is common ground in these appeals that, if Mrs. Kerr is deemed not to have been the settlor by virtue of the provisions of s 24 Finance Act 1965, the assessments fall to be discharged. Equally, if I determine that, despite the provisions of that section, Mrs. Kerr remains the settlor, I am to hold, accordingly, in principle only, leaving the parties to consider whether a further hearing may be required in the absence of agreement between them on quantum. Accordingly, there is no need for me to consider at this stage the effect of the charging provisions contained in s 80 to 85 Finance Act 1981 and I shall not do so. E

Section 24 Finance Act 1965, as originally enacted, provided as follows: F

"**24.**—(1) On the death of an individual all the assets of which he was competent to dispose shall for the purposes of this Part of the Act be deemed to be disposed of by him at the date of death, and acquired by the personal representatives or other person on whom they devolve, for a consideration equal to their market value at that date.

G

(2) Subject to section 34 of this Act, the gains which accrue in consequence of subsection (1) of this section, together with any gains accruing to the deceased by reason of the disposal by him of any asset by way of donatio mortis causa, shall be aggregated and only so much of that aggregate as exceeds five thousand pounds shall constitute chargeable gains. H

In arriving at the aggregate—

(*a*) the respective amounts of the gains shall be computed in accordance with the provisions of this Act (other than this section) fixing the amount of chargeable gains, and I

(*b*) any allowable loss accruing in consequence of subsection (1) of this section, or in consequence of any donatio mortis causa, shall be deducted,

and the provision of this subsection shall not affect the computation of the amount of any allowable loss.

A (3) For the purposes of section 20(4) of this Act chargeable gains under subsection (2) of this section shall be included in the gains accruing to the deceased in the year of assessment in which the death occurs.

(4) For the purposes of the said section 20(4) and of the next following subsection allowable losses sustained in consequence of subsection (1) of this section shall be included in the losses sustained by the deceased in the year of assessment in which the death occurs so far as those losses have not been taken into account under subsection (2) of this section.

B

(5) Allowable losses sustained by an individual in the year of assessment in which he dies may, so far as they cannot be deducted from chargeable gains accruing in that year, be deducted from chargeable gains accruing to the deceased in the three years of assessment preceding the year of assessment in which the death occurs, taking chargeable gains accruing in a later year before those accruing in an earlier year.

C

(6) In relation to property forming part of the estate of a deceased person the personal representatives shall for the purposes of this Part of the Act be treated as being a single and continuing body of persons (distinct from the persons who may from time to time be the personal representatives), and that body shall be treated as having the deceased's residence, ordinary residence, and domicile at the date of the death.

D

E (7) On a person acquiring any asset as legatee—

(*a*) no chargeable gain shall accrue to the personal representatives, and

(*b*) the legatee shall be treated as if the personal representatives' acquisition of the asset had been his acquisition of it.

F

(8) Allowable losses which accrue to the personal representatives of a deceased person in the period of three years from the death, may, so far as they cannot otherwise be deducted from chargeable gains, be deducted from chargeable gains accruing to the deceased in the year of assessment in which the death occurs, or in the preceding three years of assessment, taking chargeable gains accruing in a later year before those accruing in an earlier year.

G

(9) In this section references to assets of which a deceased person was competent to dispose are references to assets of the deceased which (otherwise than in right of a power of appointment or of the testamentary power conferred by statute to dispose of entailed interests) he could, if of full age and capacity, have disposed of by his will, assuming that all the assets were situated in England and, if he was not domiciled in the United Kingdom, that he was domiciled in England.

H

(10) For the purposes of this section in its application to Scotland, where the deceased person was an heir of entail in possession of an entailed estate, whether *sui iuris* or not, or a proper liferenter of an estate, he shall be deemed to have been a person competent to dispose of such estate.

I

(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 the Act." A

It is thus apparent that, in its original form, s 24 was a charging section which imposed capital gains tax on the assets of a deceased individual as provided in s 24(2)–(4). Those subsections were repealed by Finance Act 1971. B

The fact that s 24 was a charging section, as originally enacted, assumes relevance when comparisons are made, as they have been in these appeals, between the capital gains tax legislation and the inheritance tax legislation. Having said that, it becomes necessary to compare the provision relating to capital gains tax with that relating to inheritance tax (formerly capital transfer tax). The relevant capital transfer tax provision was contained originally in s 47 Finance Act 1975 which provided; C

"**47**.—(1) So far as a deed of family arrangement or similar instrument which is made not more than two years after the death of any person varies the dispositions (whether effected by will or under the law relating to intestacy) of the property of which he was competent to dispose,— D

(*a*) the variation shall not be a transfer of value; and

(*b*) this Part of this Act shall apply as if the variation had been effected by the deceased." E

It will be noted that the relevant words in Finance Act 1975 are "... this Part of this Act shall apply". By contrast, the relevant words in s 24(11) Finance Act 1965 are "... this section shall apply". The gap between the sections has been further widened by s 142 Inheritance Tax Act 1984 which states "... this Act shall apply". It should be noted, however, that neither s 47 Finance Act 1975 nor s 142 Inheritance Tax Act 1984 are charging sections whereas s 24 Finance Act 1965 is such a section, or was as originally enacted. F

To make the statutory picture complete, I must look at s 49 Capital Gains Tax Act 1979, whilst bearing in mind that its provisions are not directly relevant to these appeals, the results of which turn, by common consent, on the words employed in Finance Act 1965. G

Section 49(4) Capital Gains Tax Act 1979 re-enacts s 24(7) Finance Act 1965. Section 49(6) of the later Act is an amended version of s 24(11) of the earlier Act, but the vital words "... this section shall apply" reappear in the 1979 Act. H

Mr. Thirkell submits that the policy behind s 24(11) is that disposals by personal representatives should be relieved from capital gains tax and that the words of this section limit strictly the relief available in contrast to the wide-ranging relief granted by s 47 Finance Act 1975 and s 142 Inheritance Tax Act 1984. Although the wording of s 24(11) Finance Act 1965 was recast in s 49 Capital Gains Tax Act 1979, the vital words "... this section shall apply" were retained in the consolidating Act. The distinction between the reliefs available for capital gains tax and for inheritance tax respectively was maintained. I

Although there are no authorities to assist me in construing s 24(11), Mr. Thirkell points to the conclusions of learned authors of legal textbooks in support of his contentions. The following appears in "Whiteman on Capital Gains Tax" (4th Edition) (1988), at page 619:

> "It was said in the previous edition of this book that in the case of settled property the deceased will be the settlor of the settlement for capital gains tax purposes, and reference was made to section 17 of the 1979 Act. It is now thought, however, that there is a trap here. Section 49(6)(b) provides that 'this section' shall apply as if the variation had been effected by the deceased, and the same was true of section 24(11) of the Finance Act 1965 (referring of course to that section). This is to be contrasted with section 142(1)(a) of the Inheritance Tax Act 1984 which provides that 'this Act' shall apply as if the variation had been effected by the deceased. On the basis of this distinction it is now arguable whether the back-dating effect of section 49(6) does or does not extend to anything not strictly within section 49 itself."

Whilst Mr. Whiteman and his learned fellow authors, therefore, sit on the fence, a more definite statement more helpful to Mr. Thirkell is to be found in "McCutcheon on Inheritance Tax" (3rd Edition) (1988), at pages 266–7. Mr. Thirkell submits that Mr. McCutcheon and his learned co-authors are clear that, in the circumstances, similar to those obtaining in relation to these appeals the testator will be the deemed settlor for the purposes of inheritance tax, but not, in their opinion, for the purposes of capital gains tax.

The third edition of Mr. Whiteman's book, published in 1980 and entitled "Whiteman and Wheatcroft on Capital Gains Tax" took the opposite view to that of Mr. McCutcheon. And I understand that it is only recently that the Inland Revenue has adopted its present stance of denying a backdating effect to variations for capital gains tax purposes, but not for inheritance tax purposes.

Even Mr. McCutcheon seems to be somewhat uncertain as to the position for he says, at page 265, para 7–86:

> "Under section 142 any variation or disclaimer is read back for all purposes: by contrast, the CGT legislation merely provides a reading back for the purposes of that section (i.e. s.49). This difference in wording may be important, for instance, when it is intended to effect a variation to take advantage of the deemed settlor provisions discussed at 7–92. For CGT purposes *it is thought* that the person who effects the variation will still be a settlor, e.g. for the purpose of the charges imposed by FA 1981, s.80."(my emphasis).

It, therefore, falls to me to put the question beyond doubt and I propose to do so by reference only to the words of the statute, in the absence of judicial authority.

Mr. Venables points out quite rightly that the provisions of s 24(11) Finance Act 1965 are governed, *inter alia*, by the provisions of s 24(7)(b). That being so, Regent is deemed to be a legatee of the testator's will, for s 45(1) Finance Act 1965 provides (where relevant):

"**45.**—(1) In this Part of this Act, unless the context otherwise requires,—

'legatee' includes any person taking under a testamentary disposition or on an intestacy or partial intestacy, whether he takes beneficially or as trustee ..."

Both s 24 and s 45 are to be found in Part III of Finance Act 1965.

Section 24(7)(b) Finance Act 1965 is a very wide provision which states that "... the legatee shall be treated as if the personal representatives' acquisition of the asset had been his acquisition of it". That wide wording is to be contrasted with the words of para 20(1) Sch 7 Finance Act 1965 dealing with transfers between husband and wife which states:

"**20.**—(1) If, in any year of assessment, and in the case of a woman who in that year of assessment is a married woman living with her husband, the man disposes of an asset to the wife, or the wife disposes of an asset to the man, both shall be treated as if the asset was acquired from the one making the disposal for a consideration of such amount as would secure that on the disposal neither a gain or a loss would accrue to the one making the disposal."

It is, therefore, apparent to me that, had the legislature wished to limit the effect of s 24(11) in the way contended for by Mr. Thirkell, it could have done so by the use of appropriate words. As it is, s 24(7)(b) operates to place the legatee (in this case the deemed legatee, namely Regent) in the shoes of the testator. Accordingly, there is not merely a no gain/no loss situation but the acquisition is also back-dated. I, therefore, accept Mr. Venables' submission that the policy behind s 24(11) is clear, namely that beneficiaries who satisfied its conditions were allowed to rewrite a will and that the consequences for capital gains tax purposes which flowed from such rewriting were the same as if the rewritten will had been written originally by the testator.

I cannot accept Mr. Thirkell's submissions. He strives to limit severely the effect of s 24(11) but fails entirely to take into account the effect on that subsection of s 24(7)(b). He also submitted that the deeming effect contended for by Mr. Venables was limited by the precise words used in s 24(11) but that submission also fails to take into account the effect of the earlier subsection. Mr. Thirkell offered no explanation of the effect of s 24(7)(b) in the present case.

Mr. Venables quoted a long line of authorities in relation to the effect of deeming provisions in statutes but I think that it is sufficient for me to refer only to the speech of Lord Asquith of Bishopstone in *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council* [1952] AC 109, at pages 132–3, where he said, in a unanimous decision of the House[1]:

"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 the consequences and incidence 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

(1) [1952] 2 All ER 587, at page 599B/E.

A 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.

As some of my noble and learned friends have pointed out, if Parliament had intended the meaning contended for by the respondents, nothing would have been easier than to provide that the value should be B assessed as if no war damage had occurred. Even, however, if the meaning of the words to be construed were not plain and the 'policy' of the legislation could legitimately be invoked as an interpretive factor, I am far from subscribing to the view that the policy in question is that for which the respondents contend, or that its importation would produce the result which they desire. But it is unnecessary to develop that argu- C ment."

Those words, although dealing with s 53(1) of the Town and Country Planning Act 1947, seem entirely appropriate, *mutatis mutandis*, to the words of s 24(11) and the facts of the present case.

D If reasons are required to explain the difference in wording between the legislation applicable to capital gains tax and the legislation applicable to inheritance tax, it is to be found, in my judgment, in the fact s 24 Finance Act 1965 was a charging provision, unlike s 47 Finance Act 1975 and s 142 Inheritance Tax Act 1984. There was no need for s 24(11) to refer to any- E thing else than the section within which it was comprised in order to be effective.

I prefer Mr. Venables' contentions in this case to those of Mr. Thirkell and I allow the appeals. As a necessary consequence, the assessments on Mr. Kerr fall to be discharged, as Mrs. Kerr is deemed not to be the settlor of the F instrument for the purposes of ss 80 to 85 Finance Act 1981.

T. H. K. Everett } Commissioner for the Special Purposes of the Income Tax Acts

G

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H

16 October 1989

I The case was heard in the Chancery Division before Harman J. on 6 November 1991 when judgment was reserved. On 7 November 1991 judgment was given in favour of the Crown, with costs.

Launcelot Henderson for the Crown.

Robert Venables Q.C. for the taxpayer.

The following case was cited in argument in addition to the cases referred to in the judgment:— *Murphy* v. *Ingram* 49 TC 410; [1974] Ch 363; [1974] STC 205.

Harman J.:— This is an appeal by Case Stated by one of the Special Commissioners (Mr. Everett) for the Purposes of the Income Tax Acts. The Case Stated is unusual in that the facts are agreed and no evidence was given. The sole question which the Special Commissioner was asked to determine at that stage was a question of law. The Special Commissioner decided the matter one way. It is now said that he erred in his understanding of the law, and it is plainly a proper matter for debate in this Court.

The appeals to the Special Commissioner were appeals by a Mr. Simon Kerr against two estimated assessments to capital gains tax: one for the year 1983–84 and the other for the year 1984–85. The amounts of the estimated assessments are wholly immaterial to this decision, no question of amount having yet been considered. The question is stated in para 2 as being whether the capital payments made to Mrs. Kerr, the wife of Mr. Kerr, are subject to taxation by virtue of ss 80 to 85 of the Finance Act 1981.

The Commissioner gave a written decision on the matter, which he described accurately as a novel point of construction on the provisions of s 24(11) of the Finance Act 1965. The facts are set out in the Case Stated and, in my view, do not need repeating now. There is no issue whatever about them and they do not really affect the question of law to be determined. They merely raise it.

The facts very briefly are that the late Mr. Brooks died in Jersey on 27 February 1977. He was domiciled and ordinarily resident there. He was the father of Mrs. Kerr. By his will he left a half-share of his residuary estate to Mrs. Kerr absolutely. By an instrument of variation, not a deed, Mrs. Kerr recited that she wished to effect a family arrangement and declared that trustees appointed by the instrument were to hold Mrs. Kerr's fund and the income thereof on trusts declared by the instrument. The trusts were, broadly, that Mrs. Kerr was to have the income for life; there was power to appoint capital to her and, subject thereto, to her children and remoter issue with a discretionary power limited by a royal lives clause.

That is plainly an instrument within the definition of s 24(11) of the Finance Act 1965, which provides as follows:

> "If not more than two years after a death"—that is satisfied in this case—"any of the dispositions of the property of which the deceased was competent to dispose ... effected by will ... are varied by a deed of family arrangement or similar instrument"—that is all satisfied—"this section shall apply as if the variations made by the deed or other instrument were effected by the deceased ..."

That is, in effect, a deeming provision deeming these variations to have effect as if they are provisions by the deceased. However, that only provides that "this section" shall apply. The section includes the provision in subs (7):

A "On a person acquiring any asset as legatee—(*a*) no chargeable gain shall accrue to the personal representatives, and (*b*) the legatee shall be treated as if the personal representatives' acquisition of the asset had been his acquisition of it."

Again, that is a deeming provision. In particular, subs (7)(b) deems the B personal representatives' acquisition, which is at the date of death in the usual case, to be the legatee's acquisition, notwithstanding that in fact personal representatives hold the assets of the estate with rights to deal in and dispose of them and the legatee does not have any vested interest in any of those assets until assent to him by the personal representatives. But the provision is that upon such an assent—which may in many cases be two, three C or four years after the date of death—the acquisition shall be treated as if it had been made at the time of acquisition by the personal representatives.

It is submitted to me that that provision has a double effect. It has the effect of deeming the legatee to acquire the assets at their value as at the date of death, and it has the effect of deeming the legatee to acquire at the date of D death so that nowadays for purposes of indexation, not extant in 1965 when this Finance Act was passed, one would compute the indexation from that date.

The Special Commissioner stated at page 3, letter G, of his written decision(1) that the point which required decision was the identity of the settlor of E the settlement. He sets out the argument advanced before him by a member of the Inland Revenue Solicitor's Office appearing for the Inspector of Taxes. Mr. Venables has observed to me that the argument of the Crown here has been somewhat different from the argument presented to the Special Commissioner. That is probably so, but I do not think it has any material bearing on the outcome of this matter.
F

The Special Commissioner set out the proposition that, if Mrs. Kerr is deemed not to have been the settlor for the purposes of ss 80 to 85 of the Finance Act 1981, which are in broad terms a re-enactment (that may not be wholly accurate but will suffice for present purposes) of s 42 of the Finance Act 1965, the assessments would fall to be discharged. That is common G ground.

He then sets out s 24 at length and observes that, in its original form, it was a charging section. Nobody has asserted before me that that makes any difference whatever to the construction of the section or the outcome of this appeal. It can simply be ignored. It is a true fact that this section was at one H time a charging section. It ceased to be so on an intervening date but the fact that it once was a charging section is immaterial.

However, the Special Commissioner said that, in his view, the section's former function as a charging section was of relevance when making comparisons between the Capital Gains Tax and Inheritance Tax (formerly Capital I Transfer Tax) legislation. He cited s 47(1) of the Finance Act 1975 and noted that the words of that section had substantially wider effects, in that the provisions of subs (1)(b) were that "... this Part of this Act shall apply" in contrast to the words in s 24(11) "... this section shall apply". He went on to consider the submission made to him about the policy behind s 24(11).

(1) Page 61H *ante*.

It is common ground that there is no authority upon the section. There are two textbooks which differ in their views of the section, as authors of textbooks are entitled to do. Judges unfortunately are not allowed to come to an intermediate decision neither one way nor the other. The textbooks do not seem to me to be helpful at all.

The submission of the Crown is that, since s 24(7) and (11) are both deeming provisions, I should start with the considerations set out by Nourse J. (as he then was) in *Inland Revenue Commissioners* v. *Metrolands (Property Finance) Ltd.*[1] [1981] 1 WLR 637 where he went through the cases down to that time and, in particular, referred to the famous passage in Lord Asquith's speech in *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council* [1952] AC 109. Lord Asquith, in that extreme felicity of language for which he is remembered, observes[2]:

> "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 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."

An observation couched in such striking terms can easily beguile those who read it with admiration into taking it too literally. The temptation to allow one's mind to think that because judges are bidden not to stop and boggle, therefore, one must follow a path leading to consequences far beyond those naturally springing to mind when considering the words of some statutory provision at the outset of a matter is an easy step to take, but to my mind can lead to error. Of course a judge is not to stop and boggle, as Lord Asquith said, at a result which *inevitably* (my emphasis) flows from some provision. Nonetheless, a judge has to consider whether the postulated result does, in fact, flow from words which inevitably lead to that result.

In terms which I have found a most illuminating guide on the journey from the words of s 24 to the conclusion of this appeal, Nourse J. deduced principles for judges to apply in considering deeming provisions. In *Inland Revenue Commissioners* v. *Metrolands (Property Finance) Ltd.*, at page 646, between G and H, he said[3]:

> "When considering the extent to which a deeming provision should be applied, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to."

The learned Judge there lays down a principle which I respectfully follow and adopt as my guide upon the journey of considering how far the deeming provision should be held to extend. In order to understand how far it should be carried, the Court in looking at a deeming provision starts off by asking: What is it for, and to whom does it apply? Nourse J. went on:

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(1) 54 TC 679. (2) [1952] AC, 109, at pages 132/133.
(3) 54 TC 679, at page 697D.

A "It will not always be clear what those purposes are."

I regret to say that that observation is a common feeling of all Chancery Judges when faced with Finance Act questions. It is very, very rare indeed that the purposes are clear. It is always a question of some difficulty, but it does not mean one does not have to ascertain to whom the purposes apply B and what they are. Nourse J. went on to say:

> "If the application of the provision would lead to an unjust, anomalous or absurd result then, unless its application would clearly be within the purpose of the fiction, it should not be applied. If, on the other hand, its application would not lead to any such result then, unless that C would clearly be outside the purposes of the fiction, it should be applied."

Thus, he makes an exception for unjust, anomalous or absurd results and says that, whatever the apparent purpose may be, if that is the result one must in some way have misunderstood the purpose or should limit the pur- D pose.

In that context it is commonplace to refer to that great Judge, James L.J., in *ex parte Walton* [1881] 17 ChD 746, at page 756, where he observed:

> E "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."

That is an exact precursor of the observations of Nourse J. in F *Commissioners of Inland Revenue* v. *Metrolands (Property Finance) Ltd.* James L.J. went on:

> "... the bankruptcy law is a special law, having for its object the distribution of an insolvent's assets equitably amongst his creditors and persons to whom he is under liability ... That being the sole object of G the statute, it appears to me to be legitimate to say, that, when the statute says that a lease, which was never surrendered in fact (a true surrender requiring the consent of both parties, the one giving up and the other taking), is to be deemed to have been surrendered, it must be understood as saying so with the following qualification, which is absolutely necessary to prevent the most grievous injustice, and the most revolting absurdity ..."

H

The Lord Justice then construes the statute as if it contained the words "... shall, as between the lessor on the one hand, and the bankrupt, his trustee and estate, on the other hand, be deemed to have been surrendered" to identify between what persons the deeming provision is to apply.

I

I, therefore, take Nourse J.'s words as the proper basis on which to construe these deeming provisions. I believe that the contrast which the Special Commissioner found instructive between this section and the inheritance tax section is not in truth instructive but merely different words to operate for different purposes, so that one section will have different results from the other and, upon its true construction, operates between different persons in one case from those in the other. On that basis, I turn back to what I see as

the policy of ss 24(7) and 24(11) derived from the terms of the statute and not from anything else.

It seems to me that Mr. Henderson must be right. The purpose of these sections is simply to deal with computations of gains and to exclude gains which would otherwise be thought to accrue to a person who made a deed of variation or other disposal by an instrument. The provisions are entirely satisfied, have a clear purpose and are fully effective if they mean what they precisely say but do not carry over into any further considerations of deeming than they provide. Subsection (11) applies as if the variations were effected by the deceased so that the legatee taking them and the personal representatives assenting to their vesting and so on are all to be treated as if the deceased by his will had made the provision which is in the instrument of variation. That sufficiently takes out of any tax net and any computations any difference in value between the date of death and the date of the instrument.

The provision that the legatee shall be treated as if the personal representative's acquisition had been his acquisition is both satisfied and adequately shown to have a purpose if one treats it as affecting dealings between the legatee (though I do not have to decide it here, Mr. Henderson suggests it is likely) and persons to whom the legatee assigns any assets and the personal representative, so there is no difficulty in the legatee's acquisition date being the date of death and the legatee's acquisition value being the value at that date.

The result of all that is that the deeming provisions can be seen to have limited purposes and to be limited to certain people. I can see no purpose which would lead me to consider that the words have wider and more effective results. In particular, there can be no reason why they should be seen to be applicable in answering the question posed by, as it then was, s 42 of the Finance Act 1965, now re–enacted in ss 80 to 85 of the Act of 1981. The question which is raised by those provisions is as to whether a settlement was made by a person who was domiciled and resident within the United Kingdom either at the date of the chargeable gain or at the date of the making of the settlement. In my judgment, the person designated by the answer to that question is not a person to whom it can be seen the deeming provisions of s 24 are to apply.

The subsidiary point noted by the Special Commissioner in the Case Stated but not dealt with in his reasons is to the effect that subs (11) of s 24 provides in its tailpiece that no disposal by virtue of the instrument shall constitute a disposal for the purposes of that Act. It is not a requirement that one should consider that for the purposes of s 42. There is no reason to think that the general words have to be applied throughout the whole Act to cover provisions which, as far as I can see, were probably not in the draughtsman's mind at all.

Mr. Venables argued that, on the Crown's stated purpose of the deeming provision, anomalies and absurdities might arise. He instanced two possibilities where facts could exist which would give rise to anomalous results upon the Crown's construction. I accept that, in those somewhat fanciful examples, the results would be unexpected. I do not accept that those results are properly to be called "anomalies", let alone "absurdities". It is frequently true that Taxing Acts produce results that seem surprising but that is the inevitable result of very complicated provisions having to apply to all factual circum-

A stances. In my judgment, there is nothing in Mr. Venables' examples to cause me to consider that the construction I have placed on the section must be erroneous.

It seems to me that the Special Commissioner did err in his legal conclusions. That is understandable and natural when dealing with matters which B are otherwise *res integra* and of some complexity. But, guiding myself by the principles laid down by Nourse J., I come to the conclusion that the Crown's appeal in this matter succeeds.

Appeal allowed, with costs.

C

The taxpayer's appeal was heard in the Court of Appeal (Balcombe, Simon Brown L.JJ. and Peter Gibson J.) on 1 March 1993 when judgment was reserved. On 3 March 1993 judgment was given unanimously against the D Crown, with costs.

Robert Venables Q.C. and *Robert Grierson* for the taxpayer.

A. W. H. Charles for the Crown.

E The cases cited in argument were those referred to in the judgment.

Peter Gibson J.:—This is an appeal by the taxpayer, Simon Kerr, from the order of Harman J. of 17 December 1991 allowing the Crown's appeal F from the determination of the Special Commissioner who had allowed appeals by the taxpayer against capital gains tax assessments for 1983–84 in the sum of £63,338 and for 1984–85 in the sum of £17,438. The Special Commissioner's decision was a decision in principle, the result of which was that no tax was payable. Harman J., in allowing the Crown's appeal, remitted the Case to the Special Commissioner to determine the figures in the light G of his judgment.

The relevant facts are agreed and can be stated shortly. The taxpayer's wife, Elizabeth Kerr, is one of the two children of the late Lionel Brooks ("the testator") who, at the time of his death on 27 February 1977, was domiciled and ordinarily resident in Jersey and was neither resident nor ordi-H narily resident in the United Kingdom. Both the testator's children survived him. The testator's will, dated 25 February 1974, was proved in Jersey by the Regent Trust Co. Ltd. ("Regent") the executor named in the will. Regent is resident and ordinarily resident in Jersey and in no other place. Under the will the testator left his residuary personal estate to his children in equal I shares absolutely.

On 31 January 1978, at a time when the administration of the estate was not complete, Mrs. Kerr and Regent executed an instrument of family arrangement. By the instrument, Mrs. Kerr's presumptive share of the residuary personal estate was settled on trusts whereunder Regent or other the trustees or trustee for the time being of the residuary personal estate were to hold that share, subject to an overriding power of appointment exercisable

in favour of a class which included Mrs. Kerr; subject thereto the income was payable to Mrs. Kerr for life with power in the trustees to pay her capital and subject thereto the capital and income were to be held for Mrs. Kerr's children. A

Pursuant to that instrument, when the administration of the estate was completed in June 1979, Regent ceased to hold the assets representing Mrs. Kerr's share of the residuary personal estate as executor but held them as trustee. The general administration of the varied trusts has at all times been ordinarily carried on outside the United Kingdom. Capital payments were made to Mrs. Kerr between 1981 and 1985 by Regent and the assessments for 1983–84 and for 1984–85 were consequently raised under s 80 of the Finance Act 1981. B C

This appeal raises a short point of statutory construction. The statute in question is the Finance Act 1965, Part III of which introduced capital gains tax. It is common ground that although the years of assessment are some years after the Finance Act 1965 was replaced by the Capital Gains Tax Act 1979, the former Act is the material Act for the purposes of this case. D

Section 24 is headed "Death". By s 24(1) there is a deemed disposal on the death of an individual of all the assets of which he is competent to dispose, the personal representatives being deemed to acquire those assets and for a consideration equal to their market value. Subsection (1) was amended in 1969 to provide that the assets of which a deceased person was competent to dispose should be deemed to be acquired on his death by the personal representatives for a consideration equal to their market value at the date of death, but should not be deemed to be disposed of by him on his death. Subsections (2) to (4) dealt with how gains and losses on the deemed disposal under the Act in its original form are to be treated for capital gains tax purposes and were repealed in 1969. Subsection (5) dealt with how certain losses of the deceased should be treated. By subs (6) the personal representatives are to be treated in relation to the estate of the deceased as a single and continuing body of persons having the deceased's residence and ordinary residence and domicile at his death. E F

Subsection (7) is one of the crucial provisions in this case. It reads: G

"On a person acquiring any asset as legatee—

(*a*) no chargeable gain shall accrue to the personal representatives, and

(*b*) the legatee shall be treated as if the personal representatives' acquisition of the asset had been his acquisition of it." H

By s 45(1) "legatee" includes any person taking under a testamentary disposition whether he takes beneficially or as a trustee. Subsection (8) contains a special provision relating to allowable losses and was repealed in 1969. Subsections (9) and (10) relate to the meaning of the references in subss (1) and (11) to competency to dispose. The final subsection, (11), is the other of the important provisions of this section. It reads: I

"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 sec-

A tion 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."

Finally, I should refer to s 42 which was the precursor of what at the B dates of assessments were ss 80 to 85 of the Finance Act 1981. Section 42 is an anti-avoidance section relating to non-resident trusts. Subsection (1) provides:

"This section applies as respects chargeable gains accruing to the trustees of a settlement if the trustees are not resident and not ordinarily resident in the United Kingdom, and if the settlor, or one of the settlors, C is domiciled and either resident or ordinarily resident in the United Kingdom, or was domiciled and either resident or ordinarily resident in the United Kingdom when he made his settlement."

By s 42(7) "settlement" and "settlor" have the same meaning as in Chapter III of Part XVIII of the Income Tax Act 1952. By s 411(2) of that D Act, "settlement" includes any disposition, trust, covenant, agreement or arrangement and "settlor" in relation to a settlement means any person by whom the settlement was made. A similar definition was applicable in the second but not the first of the years of assessment.

By the remainder of s 42, a beneficiary domiciled and resident or ordi- E narily resident in the United Kingdom in a year of assessment, to whom payments are made out of the capital or income of the settlement, may be treated as if an apportioned part of the amount on which the trustees of the settlement would have been chargeable to capital gains tax if domiciled and resident or ordinarily resident in the United Kingdom in that year had been chargeable gains accruing to the beneficiary in that year.

F

As can be seen from subs (1), the operation of the section is dependent on, among other things, the settlor being both domiciled and resident or ordinarily resident in the United Kingdom or as having that domicile and residence or ordinary residence when the settlement was made, and that is still a requirement for the operation of ss 80 to 85 of the Finance Act 1981.

G

The assessments were made on the footing that Mrs. Kerr, as a person domiciled and resident in the United Kingdom, was the settlor of the settlement created by the instrument. It is common ground that (1) pursuant to s 24(1) Regent as personal representative is deemed to have acquired all the assets of which the testator was competent to dispose, including the residuary H personal estate, at their market value at the testator's death, and (2) the instrument is "a deed of family arrangement or similar instrument" within s 24(11), whose effect was to vary within two years of the testator's death the disposition of the property of which the testator was competent to dispose and that the transaction effected by the instrument did not constitute a disposal for capital gains tax purposes.

I

While the agreed question for the Special Commissioner's determination was whether the payments made to Mrs. Kerr were subject to taxation by virtue of ss 80 to 85 of the Finance Act 1981, the narrower point on which his decision in principle was required concerned the identity of the settlor of the settlement constituted by the will and varied by the instrument, having regard to s 24. The Special Commissioner upheld the taxpayer's contention

that, by the combined effect of s 24(7) and (11), the variations made by the instrument were to be treated for all capital gains tax purposes as having been made by the testator and that Mrs. Kerr, therefore, is not to be treated as the settlor of the varied trusts for the purposes of ss 80 to 85 of the Finance Act 1981.

Harman J. reached a different conclusion. Before him emphasis had been placed on the fact that the crucial provisions of s 24(7) and (11) are both deeming provisions and he took as the proper basis on which to construe them the words of Nourse J. in *Inland Revenue Commissioners* v. *Metrolands (Property Finance) Ltd.* [1981] 1 WLR 637, at 646([1]):

> "When considering the extent to which a deeming provision should be applied, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to. It will not always be clear what those purposes are. If the application of the provision would lead 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. If, on the other hand, its application would not lead to any such result then, unless that would clearly be outside the purposes of the fiction, it should be applied:"

Harman J., guiding himself by those principles, turned to what he saw as the policy of s 24(7) and (11) which he said he "... derived from the terms of the statute and not from anything else". He continued([2]):

> "The purpose of these sections is simply to deal with computations of gains and to exclude gains which would otherwise be thought to accrue to a person who made a deed of variation or other disposal by an instrument. The provisions are entirely satisfied, have a clear purpose and are fully effective if they mean what they precisely say but do not carry over into any further considerations of deeming than they provide. Subsection (11) applies as if the variations were effected by the deceased so that the legatee taking them and the personal representatives assenting to their vesting and so on are all to be treated as if the deceased by his will had made the provision which is in the instrument of variation. That sufficiently takes out of any tax net and any computations any difference in value between the date of death and the date of the instrument.
>
> The provision that the legatee shall be treated as if the personal representative's acquisition had been his acquisition is both satisfied and adequately shown to have a purpose if one treats it as affecting dealings between the legatee (though I do not have to decide it here, Mr. Henderson [counsel appearing for the Crown] suggests it is likely) and persons to whom the legatee assigns any assets and the personal representative, so there is no difficulty in the legatee's acquisition date being the date of death and the legatee's acquisition value being the value at that date.
>
> The result of all that is that the deeming provisions can be seen to have limited purposes and to be limited to certain people. I can see no purpose which would lead me to consider that the words have wider and more effective results. In particular, there can be no reason why they should be seen to be applicable in answering the question posed by, as it then was, s 42 of the Finance Act 1965, now re-enacted in ss 80 to 85 of

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([1]) 54 TC 679, at page 697D/E. ([2]) Page 72A/G *ante*.

A the Act of 1981. The question which is raised by those provisions is as to whether a settlement was made by a person who was domiciled and resident within the United Kingdom either at the date of the chargeable gain or at the date of the making of the settlement. In my judgment, the person designated by the answer to that question is not a person to whom it can be seen the deeming provisions of s 24 are to apply."

B

He also referred to the final limb of s 24(11), providing as it does that for the purposes of Part III of the Finance Act 1965 no disposition made by the instrument shall constitute a disposal, and commented[1]:

> "It is not a requirement that one should consider that for the purposes of s 42. There is no reason to think that the general words have to be applied throughout the whole Act to cover provisions which, as far as I can see, were probably not in the draughtsman's mind at all."

C

Finally, he referred to certain anomalies instanced by Mr. Venables, then appearing for the taxpayer as he does before us, as flowing from what had been the Crown's construction of s 24 and found no assistance from them. They were based on the applicability of s 24(7) to certain other statutory provisions including s 42 of Chapter III of the Finance Act 1965 which at one stage, it appears, the Crown resisted. However, before us Mr. Charles, for the Crown, accepts that s 24(7) does indeed apply to those provisions for what he calls computational purposes, but he submits that they do not assist the taxpayer. I shall come back to them later.

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Mr. Venables submitted that Harman J., in failing to construe the statutory provisions literally, had adopted the wrong approach to construction and had given no reason why he deduced from the Act that s 24(7) had only the limited purposes found by him. Mr. Venables further submitted that s 24(7) applied for all capital gains tax purposes and that, because it provides that the trustee of the varied trusts is to be treated as if the personal representative's acquisition had been the trustee's acquisition, Mrs. Kerr could not be the settlor for the purposes of s 42. Mr. Charles, on the other hand, submitted that Harman J. had adopted the right approach to the construction of the Act and had reached the right conclusion for the right reasons.

F

G

I start with the issue of the approach to the construction of the deeming provisions. Nourse J. in the passage cited from the *Metrolands* case was not intending to lay down new law, but instead was stating the principles which he deduced from earlier cases of high authority. He was plainly drawing in part from what had been said by this Court in *Ex parte Walton In re Levy* (1881) 17 ChD 746. In that case, s 23 of the Bankruptcy Act 1869 fell to be construed. By that section, a trustee in bankruptcy could disclaim a lease belonging to the bankrupt, and on the execution of the disclaimer the lease was deemed to have been surrendered. It was held that the disclaimer operated as a surrender only so far as was necessary to relieve the bankrupt and his estate and the trustee from liability and did not otherwise affect the rights or liabilities of third parties in relation to the property disclaimed. Sir George Jessel M.R. said, at page 753:

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> "The results of a literal construction of the section would be so monstrous that such a construction must be considered absurd."

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(1) Page 72G/H *ante*.

James L.J. said, at page 754, that he was startled at the consequences which would result from a literal construction of the section. It was in that context that he suggested the principle, at page 756: A

> "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." B

Nourse J. was plainly adopting that principle.

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, in which case the grammatical and ordinary sense of the words may be modified so as to avoid that absurdity and inconsistency but no further (see *Ex parte Walton supra*, at page 751). C D

As Lord Asquith said in *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council* [1952] AC 109, at page 132, in relation to a deeming provision in s 53(1)(a) of the Town and Country Planning Act 1947([1]):

> "If the meaning of those words were cryptic or equivocal it would no doubt be permissible to interpret them in the light of a number of extrinsic considerations, including any scheme or policy which could be spelt out of this complex of legislation; and any anomalies which might follow from one construction and be avoided by another. Counsel for the respondents in his ingenious submission not unnaturally stressed these factors more than the primary meaning of the words themselves. Yet that meaning is the logical starting point; and is in my view in this case so plain, that none of these extrinsic factors can properly be invoked to repel or qualify it." E F

Further down the page, he said([2]): G

> "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 the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it... 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." H

Of course, if the policy of the Act or the purposes of the statutory fiction can be ascertained from the wording of the Act, it is permissible in construing the Act to adopt a purposive approach to try to give a meaning that accords with that policy or those purposes. But 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 that purpose, it will make a self-fulfilling assumption of what the purpose is. I

([1]) [1951] 2 All ER 587, at page 598G/H. ([2]) *Ibid*, at page 599B/C.

For my part, I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or absurdity, the application of the statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that, because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so.

So instructing myself, I have not been able to see anything in the Act as a whole or the deeming provisions themselves that requires me to give the words of those provisions other than their normal and natural meaning. In particular, I have been unable to ascertain from the statutory language the limited purpose which the learned Judge found for subss (7) and (11). It is not suggested by Mr. Charles that absurdity or injustice flows from a literal interpretation which would allow subs (7) to apply for all capital gains tax purposes.

Subsection (7) is not qualified in any way. Plainly it applies for what Mr. Charles calls computational purposes, that is to say it applies where there is a need to ascertain the chargeable gains of a legatee by giving the base cost and time of acquisition. Without subs (7) there might be a disposal giving rise to a chargeable gain when the personal representatives complete the administration and vest the assets in themselves as trustees or in other legatees and the base cost for such acquisition by the legatees would fall to be computed by reference to the market value of the assets at that date (s 22(4)(a) of the Finance Act 1965).

By means of subs (7) these consequences are avoided and the assets are treated as though they had passed from the deceased to the legatee with the administration effectively ignored. The legatee's acquisition does not give rise to a chargeable gain in the hands of the personal representatives and the legatee's acquisition is backdated to the date of death, both for giving him his base cost and for a time of acquisition.

Both are important in relation to a number of other provisions of the capital gains tax legislation. Thus the legatee may need to compute his chargeable gain or allowable loss in relation to subsequent actual and deemed disposals. Further, the base cost of an asset may be significant not only to the legatee but also to the legatee's spouse to whom the legatee disposes of an asset (para 20, Sch 7 to the 1965 Act). The time of a legatee's acquisition of an asset held on 6 April 1965 may be important because of the time apportionment provisions of Part II, Sch 6 to the 1965 Act. Further, under ss 41 and 42 of the Act, both anti-avoidance provisions, there are important consequences of the application of s 24(7).

Under s 41, the gains of certain non-resident companies can be visited on certain persons resident in the United Kingdom who hold shares in the companies at the time the gains accrued to the companies. Again, under s 42, gains accruing to the non-resident trustees of settlements which satisfy s 42(1) can be apportioned to the beneficiaries who receive payments, and s 24(7) applies for the purpose of computing the trustees' gains. The applicability,

disputed at one time by the Crown, of s 24(7) to some of these statutory provisions gave rise to some of the "anomalies" referred to by Harman J., but, as I have said, it is now accepted by Mr. Charles that s 24(7) does apply to those provisions. A

Section 24(11) provides a limited opportunity for two years after the death of a deceased to vary the dispositions of the property of the deceased, the section to apply as if the variations were effected by the deceased. Mr. Charles fastens on the words "... the section shall apply" as limiting words, but I do not see how that takes him very far, because the only provision of the section that is affected is subs (7) and that subsection is *prima facie* unqualified, with no limiting words to say that it should not apply for all capital gains tax purposes. B C

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

Mr. Charles submits that there is such a prohibition from the context of s 24, but I can see no proper basis for distinguishing computational purposes from other capital gains tax purposes in the absence of express words. He submitted that in s 24(7) there is never any need to identify who is the settlor. But that is putting Lord Asquith's direction the wrong way round. The implications of the statutory wording must be accepted unless there is some prohibition to be found. E

Finally, Mr. Charles submitted that assistance was to be derived from the final limb of s 24(11) coupled with the definition of "settlor" in s 42(7). He said that by providing that no disposition made by the deed of family arrangement or other similar instrument should constitute a disposal for the purposes of Part III of the Act, Parliament was recognising that the instrument was a disposition, albeit not giving rise to a disposal for capital gains tax purposes. When one turns to the definition of "settlor" in s 411(2), one finds that it includes anyone by whom a disposition was made, and Mrs. Kerr qualifies as such a person. Therefore, he submitted, it was inconsistent with that definition to exclude her from being a settlor for the purposes of s 42. F G

Ingenious though the argument is, I cannot accept it. If the natural implication of s 24(7) is that Mrs. Kerr never acquired or disposed of any assets for capital gains tax purposes, she could not be a person who made the disposition for the purposes of s 42. It would be very surprising if s 24(7) applied to s 42 for some purposes but not for others. The final limb of s 24(11) seems to me, if anything, to confirm that for all capital gains tax purposes the variation affected by the instrument was not a disposal by Mrs. Kerr. In effect, the testator in a case such as this is treated as having made the disposition in the instrument by his will. H I

For these reasons, with all respect to the learned Judge, I have come to a different conclusion from that reached by him on the true construction of the Act. I would allow the appeal and restore the determination of the Special Commissioner.

Simon Brown L.J.:—I agree.

A **Balcombe L.J.**:—The effect of s 24(11) of the Finance Act 1965, in the circumstances of this case, is that s 24(7) applies as if the settlement created by the instrument of family arrangement had been effected by the testator. Section 24(7) provides that, on a person acquiring any asset as legatee, in this case Regent as the trustee of a settlement, the legatee, that is Regent, shall be treated as if the personal representative's acquisition of the assets had been B his acquisition of them. In other words, the only person treated as having acquired the assets for capital gains tax purposes is Regent. This leaves no room for treating Mrs. Kerr as the settlor for the purposes of s 42.

I see no justification in the language of s 24 for construing it to apply for certain limited purposes only, as Mr. Charles submitted and the Judge seems C to have assumed. The language of the section is clear. Accordingly, I agree with Peter Gibson J., and for the reasons which he has given, that this appeal should be allowed and the decision of the Special Commissioner restored.

Appeal allowed, with costs.

D

The Crown's appeal was heard in the House of Lords (Lords Mackay of Clashfern L.C., Templeman, Goff of Chieveley, Lowry and Browne-Wilkinson) on 13 and 14 December 1993 when judgment was reserved. On 30 June 1994 E judgment was given unanimously in favour of the Crown, with no order as to costs.

Christopher McCall Q.C. and *A. W. H. Charles* for the Crown.

Robert Venables Q.C. and *Robert Grierson* for the taxpayer.

F

The following case was cited in argument in addition to the cases referred to in the judgment:—*Commissioners of Inland Revenue* v. *Plummer* 54 TC 1; [1980] AC 896.

G

Lord Mackay of Clashfern L.-C.:—I had written a speech of my own before I had the advantage of reading in draft the speeches of your Lordships. I find myself readily in agreement with my noble and learned friend Lord Browne-Wilkinson's approach to this case, save in respect of H one aspect.

All the assets which passed to Regent as trustees of Mrs. Kerr's settlement are for capital gains tax purposes to be treated as if they were acquired by Regent at the date or dates at which they were acquired by the personal representative. For assets owned by the deceased at the date of his death, this I date is the date of his death; and for assets subsequently acquired by the personal representatives in the course of administration, the date on which they were so acquired. In respect of all these assets, therefore, for the purposes of capital gains tax computations, my noble and learned friend and I appear to be agreed that the period of administration is to be disregarded. I have found it very difficult to accept that, in respect of these assets, the capital gains tax legislation allows an opportunity for Mrs. Kerr to assign her right in an estate under administration which is the foundation of my noble and learned

friend's view. However, I have concluded that this may be stretching the assumptions of s 24 further than Parliament intended.

Out of respect for the argument for the respondent I content myself with saying that, but for the fact that I have had the help of my noble and learned friend Lord Browne-Wilkinson's opinion, I should have been persuaded by the respondent's argument.

Lord Templeman:—My Lords, in this appeal the respondent taxpayer contends that, for the purpose of capital gains tax, a settlement in fact made on 31 January 1978 by a beneficiary under a will was either made by the testator who died on 27 February 1977 or was not made by anybody. The Revenue contend that Parliament neither intended nor achieved any such result.

Part III of the Finance Act 1965 charges capital gains tax on a taxpayer who is resident or ordinarily resident in the United Kingdom. A capital gain is the difference between the cost to the taxpayer of an asset and the price obtainable by the taxpayer on disposal of the asset. Section 24 of the Act of 1965 provides for the incidence of capital gains tax consequent on a death.

In the present case, the testator, Mr. Brooks, made his last will dated 27 February 1974 and died domiciled resident and ordinarily resident in Jersey outside the United Kingdom. His will was proved in Jersey on 30 March 1977 by his executor Regent Trust Co. Ltd. ("Regent") a company which was then and remained at all material times resident in Jersey. In the events which happened, the testator's daughter, Mrs. Kerr, became entitled under the will of the testator to one-half of his residuary personal estate absolutely.

Section 24(1) and (7) of the Finance Act 1965 amended down to 1977 provided as follows:

> "(1) For the purposes of this Part of this Act, the assets of which a deceased person was competent to dispose—
>
> (*a*) shall be deemed to be acquired on his death by the personal representatives or other person on whom they devolve for a consideration equal to their market value at the date of the death; but
>
> (*b*) shall not be deemed to be disposed of by him on his death (whether or not they were the subject of a testamentary disposition).
>
> . . .
>
> (7) On a person acquiring any asset as legatee—
>
> (*a*) no chargeable gain shall accrue to the personal representatives, and
>
> (*b*) the legatee shall be treated as if the personal representatives' acquisition of the asset had been his acquisition of it."

Under s 45 of the Act of 1965, "legatee" includes "any person taking under a testamentary disposition ... whether he takes beneficially or as trustee".

A Section 24(1) ensures that no capital gains tax is payable in respect of an increase in value of an asset between the date of acquisition by a testator and his death. Section 24(7) applies when a personal representative assents to the vesting in a legatee of an asset comprised in the estate at the date of death. The assent does not constitute a disposal for the purposes of the tax. The legatee is treated as if he had acquired the asset on the death of the testator B at market value. When the legatee disposes of the asset, his chargeable gain will be measured by the difference between the market value of the asset at the death of the testator and the price or value of the asset when the legatee disposes of the asset.

By s 24(11):

C "(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 ... are varied by a deed of family arrangement or similar instrument, this section shall apply as if the variations made by the deed ... were effected by the deceased, and no disposition made by the deed ... shall constitute D a disposal for the purposes of this Part of this Act."

As a result of s 24(11), an arrangement is not treated as a disposal for the purposes of the tax. When, following an arrangement, personal representatives assent to an asset vesting in the substitute legatee created by the arrangement, he is to be treated as if he acquired the asset on the death of E the testator at market value. In the result, when the substituted legatee disposes of the asset his capital gain will be measured by the difference between the market value of the asset at the death of the testator and the price or value of the asset at the date of disposal. There are no other effects of s 24.

An instrument of family arrangement dated 31 January 1978 ("the F arrangement") made between Mrs. Kerr and Regent cited the will, death and probate of the will of the testator and directed that " ... the one half share in the testator's said residuary personal estate to which Mrs. Kerr is entitled" be held by Regent upon the trusts and with and subject to the powers and provisions set forth in the arrangement. Under the arrangement, Regent as trustee had power to appoint capital to Mrs. Kerr. The arrangement com- G plied with the provisions of s 24(11) of the Act of 1965 and, pursuant to ss 24(7) and 24(11), did not constitute a disposal of any assets. When, following the arrangement, Regent as personal representative assented to the vesting in Regent of any asset to be held upon the trusts of the arrangement, the provisions of s 24(7) and 24(11) ensured that there was no disposal of that asset. Thenceforth Regent, the substitute legatee, was treated under s 24(7) and H s 24(11) as having acquired that asset for a consideration equal to the market value of the asset at the date of the death of the testator. In the result, when Regent disposed of that asset its capital gain fell to be measured by the difference between the market value of the asset at the death of the testator and the price or value of the asset at the date of disposal. In my opinion, s 24 deals with the consequences of death and nothing else.

I

Section 42 of the Act of 1965 as amended and replaced by s 80 of the Finance Act 1981 imposes capital gains tax on beneficiaries who receive capital payments under a non-resident settlement which has made capital gains. By s 80 of the Act of 1981, so far as material:

"(1) This section applies to a settlement for any year of assessment (beginning on or after 6th April 1981) during which the trustees are at

no time resident or ordinary resident in the United Kingdom if the settlor or one of the settlors is at any time during that year, or was when he made his settlement, domiciled and either resident or ordinarily resident in the United Kingdom. A

(2) There shall be computed in respect of every year of assessment for which this section applies the amount on which the trustees would have been chargeable to tax ... if they had been resident or ordinarily resident in the United Kingdom in the year; and that amount, together with the corresponding amount in respect of any earlier such year ... is in this section ... referred to as the trust gains for the year. B

(3) ... The trust gains for a year of assessment shall be treated as chargeable gains accruing in that year to beneficiaries of the settlement who receive capital payments from the trustees in that year or have received such payments in any earlier year. C

(4) The attribution of chargeable gains to beneficiaries under subsection (3) above shall be made in proportion to, but shall not exceed, the amounts of the capital payments received by them." D

After 6 April 1981 Regent, as trustee of the settlement constituted by the arrangement, made capital gains but did not pay capital gains tax because Regent was not resident nor ordinarily resident in the United Kingdom. Regent as trustee made capital payments to Mrs. Kerr who was at all material times domiciled and resident in the United Kingdom. Mrs. Kerr having created the settlement was, in my opinion, to the extent of the capital she received from Regent, liable under s 80 of the Act of 1981 to tax in respect of the capital gains made by Regent. Mrs. Kerr was the settlor of the settlement constituted by the arrangement because Mrs. Kerr and only Mrs. Kerr possessed the power to create the trust powers and provisions contained in the arrangement with regard to assets which became vested in Regent as trustee of the arrangement. E F

The taxpayer's principal argument was that s 24(11) requires the Court to assume that the provisions of the arrangement dated 31 January 1978 had been contained in the will of the testator who died on 27 February 1977. But s 24(11) only requires that " ... this section shall apply as if" the provisions of the arrangement had been contained in the will. As I have indicated, s 24 deals with the consequences of death and nothing else. The arrangement constituted a settlement under which Mrs. Kerr was the settlor because she alone could constitute the trust fund and dictate the terms of the arrangement. There is nothing in s 24 which requires s 80 of the Act of 1981 to be applied as if Mrs. Kerr had not constituted the trust fund or dictated the terms of the arrangement. When Mrs. Kerr settled her share in the residuary estate by means of the arrangement, s 24(11) operated to procure that the tax consequences of the death of the testator remained the same subject only to one difference, namely that Regent became the "legatee" in place of Mrs. Kerr. Regent became the legatee because of the settlement made by Mrs. Kerr. In the events which happened, capital gains made by Regent as trustee of the settlement and capital payments to Mrs. Kerr made by Regent as trustee of the settlement produced a claim for capital gains tax based on s 80 of the Act of 1981. Every settlement must have a settlor. The testator could not have been the settlor of the settlement constituted by the arrangement. The effect of s 24 of the Act of 1965 and s 80 of the Act of 1981 would have been precisely the same if the arrangement had been entitled a settlement and if Mrs. G H I

A Kerr had been described as the settlor. The arrangement was, in fact, a settlement and Mrs. Kerr was, in fact, the settlor. In my opinion, s 24 of the Act of 1965 does not require s 80 of the Act of 1981 to be applied as if Mrs. Kerr had not been the settlor.

For the purposes of capital gains tax, s 24 eliminated for the benefit of B beneficiaries interested in the estate of a testator as a result of the terms of his will or as a result of those terms as altered by an arrangement under s 24(11) the burden of any capital gains accruing in respect of an asset at the death of the testator. Section 24 also imposed on beneficiaries liable to capital gains tax who inherited the estate of the testator as a result of his will or as the result of the operation of s 24(11) the potential burden of tax C attributable to capital gains which arise after the death of the testator. Section 24 has no other effect.

Section 24(11) presented Mrs. Kerr with a valuable tax-planning mechanism but did not confer immunity from capital gains tax on Mrs. Kerr who was at all material times resident in the United Kingdom and was liable to D the burden of capital gains tax just like any other resident. Mrs. Kerr could have employed s 24(11) to substitute a legatee who was not liable to capital gains tax. Mrs. Kerr did so by a settlement under which she was the settlor and under which she appointed Regent to be trustee of the settlement. Mrs. Kerr could also have employed s 24(11) by means of a settlement of which she was the settlor in order to confer benefits on persons who were not liable E to capital gains tax because they were not resident or ordinarily resident in the United Kingdom. But Mrs. Kerr could not, by means of a settlement of which she was the settlor, confer immunity from capital gains tax on herself which tax was imposed on Mrs. Kerr because she received capital gains and was an United Kingdom resident at all material times both when she was a settlor and when she was a beneficiary. Accordingly, in my opinion, Mrs. F Kerr is liable to capital gains tax on the capital gains made by Regent as trustee of Mrs. Kerr's one-half share in the residuary personal estate of the testator but only, of course, to the extent of capital payments which she has received.

G The arrangement was a foreign settlement which Mrs. Kerr, an United Kingdom resident, decided to create and did create. Section 80 of the Act of 1981 imposes capital gains tax on capital gains deemed to be enjoyed by an United Kingdom beneficiary under a foreign settlement created by an United Kingdom resident. Mrs. Kerr was an United Kingdom beneficiary under a foreign settlement created by an United Kingdom resident. As my noble and H learned friend Lord Lowry points out, Parliament cannot have intended to grant especial exemption from s 80 to an United Kingdom beneficiary, provided that a foreign settlement is created by an United Kingdom resident within two years of the death of a foreign testator from whom the settled assets are derived. Your Lordships were invited to accept a narrow and technical argument in order to produce a result which Parliament could not have I intended and to favour a minority of United Kingdom residents to the detriment of the majority. This is an invitation which is not difficult to resist. But, in any event, the narrow and technical argument is itself flawed by inconsistency with the law of England which governs the administration of the estates of deceased persons and the rights of testamentary beneficiaries. This flaw was pointed out by Mr. McCall, on behalf of the Revenue, with his Chancery experience, and is fully developed by my noble and learned friend Lord Browne-Wilkinson.

The relevant common law and law of the Administration of Estates Act 1925 were explained by Lord Radcliffe delivering the advice of the Privy Council in *Commissioner of Stamp Duties (Queensland)* v. *Livingston*(1) [1965] AC 694 and were summarised by Buckley J. in *In re Leigh's Will Trusts* [1970] Ch 277, at 281, as follows:

> " ... (1) the entire ownership of the property comprised in the estate of a deceased person which remains unadministered is in the deceased's legal personal representative for the purposes of administration without any differentiation between legal and equitable interests; (2) no residuary legatee or person entitled upon the intestacy of the deceased has any proprietary interest in any particular asset comprised in the unadministered estate of the deceased; (3) each such legatee or person so entitled is entitled to a chose in action, viz. a right to require the deceased's estate to be duly administered, whereby he can protect those rights to which he hopes to become entitled in possession in the due course of the administration of the deceased's estate; (4) each such legatee or person so entitled has a transmissible interest in the estate, notwithstanding that it remains unadministered.
>
> This transmissible or disposable interest can, I think, only consist of the chose in action in question with such rights and interests as it carries in gremio ... If a person entitled to such a chose in action can transmit or assign it, such transmission or assignment must carry with it the right to receive the fruits of the chose in action when they mature."

By the arrangement Mrs. Kerr assigned and created a settlement of the chose in action to which she was then entitled as a beneficiary under the will of the testator. The trustees of that settlement received the fruits of the chose in action in due course. Those fruits have not been identified. The trustees may have received assets of which the testator was competent to dispose at his death within s 24(1) of the Act of 1965, being assets held by the testator at the date of his death and retained by the personal representatives. The trustees may have received cash obtained by the personal representatives as a result of sales of assets after his death. The trustees may have received assets purchased by the personal representatives after the death. Only those assets held by the testator at the date of his death and ultimately assigned by the personal representatives of the testator to the trustees of the settlement were " ... assets of which a deceased person was competent to dispose".

By the law of England, the arrangement was a settlement by Mrs. Kerr of a chose in action, namely the right to require the estate of the testator to be duly administered. Mrs. Kerr was the settlor of that chose in action which was not an asset of which the testator was competent to dispose. The trustees of the settlement made by Mrs. Kerr paid capital gains which, pursuant to s 80 of the Act of 1981, became chargeable gains in the hands of Mrs. Kerr who received capital payments from the trustees. Section 24 of the Act of 1965 did not prevent Mrs. Kerr being the settlor of the settlement she made of her chose in action.

For the reasons I have indicated and for the reasons given by my noble and learned friends Lord Browne-Wilkinson and Lord Lowry I would, accordingly, allow the appeal.

(1) [1964] 3 All ER 692.

A **Lord Goff of Chieveley**:—My Lords, for the reasons to be given in the speech of my noble and learned friend Lord Browne-Wilkinson, which I have read in draft and with which I agree, I too would allow the appeal.

Lord Lowry:—My Lords, I have had the advantage of reading in draft the speeches of your Lordships and I agree with the reasoning and conclu-
B sions of my noble and learned friends, Lord Templeman and Lord Browne-Wilkinson. Let me state as briefly as I can my reasons for this agreement.

Section 42 of the Finance Act 1965, subsequently amended, and now replaced by ss 80–85 of the Finance Act 1981, was enacted in order to close what would have been a loophole in the capital gains tax legislation: the
C trustees of a settlement who were not resident or ordinarily resident in the United Kingdom during a year of assessment were not liable for capital gains tax, but s 42 (and s 80) ensured that their beneficiaries in the United Kingdom who profited from capital gains would be liable for tax if the settlor was during that year, or when he made the settlement, domiciled and either resident or ordinarily resident in the United Kingdom. In this case, of
D course, Mrs. Kerr was both the settlor (in reality) and the beneficiary in the United Kingdom of the capital gains which are for the purpose of argument assumed to have been made.

Section 24 of the 1965 Act deals with the consequences of the death of a testator (or an intestate deceased) in relation to capital gains tax. I refer in
E particular to subss (1), (7) and (11) which are discussed by your Lordships. Section 24(11), by deeming something to be a fact which is not a fact, makes a concession to the taxpayer. The question at issue, both in the Courts below and among your Lordships, is what is that concession?

F According to the Revenue, the concession is this: if not more than two years after the death of the deceased, either testate or intestate, a settlor varies the dispositions of the property of which the deceased was competent to dispose by a deed of family arrangement or similar instrument, then s 24 (which they say is not the same thing as "this part of this Act") is to apply as if the variations were made by the deceased and no disposition made by the instrument shall constitute a disposal for the purposes of liability to capital
G gains tax. Thus, the Revenue contend, if a settlor makes a settlement of property of which the deceased was competent to dispose (but only of such property) within the two-year period, no capital gains tax liability will arise by virtue of the creation of that settlement. That result is achieved by the words " ... no disposition ... shall constitute a disposal". That is a benefit which, without subs (11), could not be achieved, because such a settlement would,
H without the help of the subsection, be a disposal, whenever made, and will continue to be, and be treated as, a disposal if made outside the two-year period. Deeming the variations to have been effected by the deceased causes s 24 to operate on the basis that the new dispositions were contained in a will made by the deceased. The Revenue make the point that the disposition (or settlement) is a reality and must continue to be regarded as such. It is, how-
I ever, deemed not to be a *disposal* and, therefore, no capital gains tax is due when the settlement is made.

The taxpayer, on the other hand, contends for a more far-reaching effect, namely, that deeming the variations in the instrument to have been made by the deceased has the effect of deeming the settlor not to have made the settlement, which in turn allows a beneficiary in the United Kingdom (in

this case the settlor) to escape the consequences of s 42 and its successor, because, thanks to the deeming process, embodied in the words " ... this section shall apply as if, etc." there is and was no settlor domiciled and either resident or ordinarily resident in the United Kingdom. A

If that is the meaning and effect of subs (11), the result must be accepted, but my first impression is that that is very unlikely to have been the intention of Parliament. The reason why I started by referring to s 42 was to emphasise the fact that the legislature set out to ensure that beneficiaries in the United Kingdom would not escape liability for capital gains tax just because the trustees were outside the United Kingdom. And yet, if the taxpayer's contention is right, the purpose of s 42 is defeated in the situation which is envisaged by s 24(11) and which can be created by the settlor. It is to be noted that s 42 contains no direct or indirect reference to s 24(11). Furthermore, if that subsection had been designed to nullify s 42, I would have expected a much clearer indication from the draftsman than the clue relied on by the taxpayer. B C

My first impression extends to another point: the tax concession, as portrayed by the Revenue, that no disposition within two years of death shall constitute a disposal benefits all settlements which qualify, but the concession for which the taxpayer argues helps only a particular class of beneficiaries (who are, as I have said, deliberately made the target of s 42) while doing nothing for the beneficiaries whose trustees are resident in the United Kingdom. D E

"First impressions" may typify an instinctive reaction which can often be shown to be fallacious by a close examination of the relevant words. My Lords, I suggest that that is not so in the present case. On reading s 24, whether in its original form or as amended, I think it is clear that the section is simply concerned with the consequences of death and that its provisions, including the deeming provisions, lay down times and levels of value by reference to which the liability for capital gains tax is to be computed. F

Your Lordships, and also Judges below, have commented on the words in subs (11), " ... this section shall apply" and "for the purposes of this Part of this Act". The Special Commissioner ([1991] STC 686, at pages 691h–693a) has also furnished your Lordships with a number of instructive observations. The contrast, however, does not appear decisive and I would only say that, if there is a moral to be drawn, the balance is slightly in favour of the Revenue and tends to contradict the theory that s 24(11) was intended to create the exemption from capital gains tax for which the taxpayer contends. G H

The right way for a court to approach deeming provisions has been discussed and reference has naturally been made to the felicitous and wise observations to be found in the *East End Dwellings Co. Ltd.* v. *Finsbury Borough Council* case[1] [1952] AC 109, the *Inland Revenue Commissioners* v. *Metrolands (Property Finance) Ltd.* case [1981] STC 193; 54 TC 679 and *Ex parte Walton* (1881) 17 Ch 746. Sound as the principles enunciated in those cases undoubtedly are, they can so easily lead a reader in the direction in which he was already facing. I would only say that the words of Nourse J. in *Metrolands* seem to accord very happily with the view of s 24(11) which I have formed, influenced no doubt by the great difficulty I have in seeing why I

(1) [1951] 2 All ER 587.

A Parliament should have favoured United Kingdom beneficiaries with foreign based trustees in the manner suggested, while doing nothing to help beneficiaries with United Kingdom based trustees.

My Lords, I would just refer to two specific points covered by my noble and learned friend, Lord Browne-Wilkinson. One arises from the confused B situation which, if the taxpayer is right, will arise when the settlor makes a disposition of property (or of his right to the due administration of property) which consists only partly of property of which the deceased was competent to dispose. To draw a picture of this confusion appears, to my mind, to emphasise the improbability that a capital gains tax concession of the kind contended for has been made. I also find it hard to see why Parliament, if it C has really decided in favour of a concession, should make only a partial concession in respect of the trust property. But, on the Revenue's version of the meaning and effect of s 24(11), I find it much easier to see why only the property of which the deceased was competent to dispose is covered. My noble and learned friend's second point was concerned with the settlor's ability to make a disposition at a time when he only has a right to have property D administered, a mere chose in action. Again, I consider that this point, once appreciated, goes far to dispose of the taxpayer's case in the way suggested by my noble and learned friend.

If the stated justification for my views on this appeal seems somewhat bare of detail, this is mainly due to my reluctance to repeat or paraphrase the E arguments of my noble and learned friends. For the reasons which they have advanced and also for those others which I have given, I, too, would allow this appeal.

Lord Browne-Wilkinson:—My Lords, Lionel Horace Brooks died on 27 February 1977 domiciled and resident in Jersey. His will was proved in F Jersey on 30 March 1977 by the executor, a Jersey resident company, Regent Trust Co. Ltd. ("Regent"). The will bequeathed the testator's personal residuary estate to his surviving children in equal shares absolutely. There were two such children, one of whom was Elizabeth Ann Kerr ("Mrs. Kerr") who at all material times was domiciled and resident in England.

G On 31 January 1978, whilst the estate of the deceased was still in course of administration, Mrs. Kerr entered into an instrument of family arrangement ("the arrangement") which was also executed by Regent. The arrangement recited that Mrs. Kerr was beneficially entitled to a one-half share in the testator's residuary personal estate (which was defined as "Mrs. Kerr's fund") and directed that Regent as trustees should hold Mrs. Kerr's fund H upon various trusts therein set out.

The administration of the estate of the deceased was completed in June 1979 whereupon the assets then comprised in Mrs. Kerr' s one-half share of the residuary estate were vested in Regent as trustee of the trusts established by the arrangement. There is no finding as to which of the assets so vested I were assets of which the deceased was competent to dispose at his death. At all material times Regent was the sole trustee of those trusts and administered them outside the United Kingdom.

The present case is designed to answer in principle certain questions as to liability for capital gains tax as to which the relevant facts have not yet been found. However, the case has proceeded on the assumption that capital

gains have accrued to Regent as trustee of the trust of the arrangement which would have been chargeable gains for the purposes of capital gains tax had Regent been resident in the United Kingdom. It is also further to be assumed that, at some time after 1981, capital payments have been made to Mrs. Kerr out of the assets to the arrangement trusts but the amount of these payments and the dates on which they occurred are facts which are not disclosed by the Case Stated.

The Respondent, who is Mrs. Kerr's husband (and, therefore, assessable to tax under s 45 of the Capital Gains Tax Act 1979 on any capital gains accruing to her) has been assessed to tax under s 80 of the Finance Act 1981 on the footing that the gains accruing to Regent as trustee are to be treated as having been realised by Mrs. Kerr in the years 1983–84 and 1984–85.

Where trusts are administered and the trustees are resident outside the United Kingdom (as in the case of the trusts established by the arrangement), capital gains tax is not normally payable on gains realised by those trustees. However, s 80 of the 1981 Act provides that, if certain conditions are satisfied, capital gains made by such trustees are to be treated as having accrued to the beneficiaries interested under the trust. It is not in dispute that, if the requirements of subs (1) of s 80 are satisfied, s 80 applies to this case so as to make Mrs. Kerr assessable to tax on the gains accruing to Regent as trustee. Section 80(1) provides as follows:

> "(1) This section applies to a settlement for any year of assessment ... during which the trustees are at no time resident or ordinarily resident in the United Kingdom if the settlor or one of the settlors is at any time during that year, or was when he made his settlement, domiciled and either resident or ordinarily resident in the United Kingdom."

Since Mrs. Kerr has at all material times been resident and domiciled in England and under the arrangement settled the share in the deceased's estate to which she was otherwise absolutely entitled, there is no doubt that in reality she was the settlor of the property disposed of by the arrangement. In reality, therefore, the requirements of s 80(1) are satisfied. But it is the taxpayer's case that the provisions of s 24 of the Finance Act 1965 (as amended) take effect so as to deem her not to be the settlor of the arrangement trust.

Although the question arises on the interpretation of s 80 of the 1981 Act in its application to circumstances applicable in the years of assessment of 1983–84 and 1984–85, Sch 6 para 10(1) of the Capital Gains Tax Act 1979 makes plain that the substitution of the provisions of that Act for the enactments which it repealed did not alter the effect of any such enactment so far as it determined to what extent events occurring in an earlier period might be taken into account for any tax purposes in a period of assessment to which the Capital Gains Tax Act applied. It is, therefore, s 24 of the Finance Act 1965, as it was in force at the time of the arrangement, which governs the answer to the question whether the making of the arrangement did or did not constitute Mrs. Kerr the settlor for the purposes of the application of s 80.

Section 24 of the Finance Act 1965, as in force at the date of the arrangement, provided so far as relevant as follows:

> "(1) For the purposes of this Part of this Act, the assets of which a deceased person was competent to dispose—

A (*a*) shall be deemed to be acquired on his death by the personal representatives or other person on whom they devolve for a consideration equal to their market value at the date of the death; but

(*b*) shall not be deemed to be disposed of by him on his death (whether or not they were the subject of a testamentary disposition).

B ...

(6) In relation to property forming part of the estate of a deceased person the personal representatives shall for the purposes of this Part of this Act be treated as being a single and continuing body of persons (distinct from the persons who may from time to time be the personal representatives), and that body shall be treated as having the deceased's C residence, ordinary residence, and domicile at the date of death.

(7) On a person acquiring any asset as legatee—

(*a*) no chargeable gain shall accrue to the personal representatives, and

D (*b*) the legatee shall be treated as if the personal representatives' acquisition of the asset had been his acquisition of it.

...

(11) If not more than two years after a death any of the dispositions E 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 F of this Act."

The word "legatee" is defined for the purposes of Part III of the Act as including " ... any person taking under a testamentary disposition or on an intestacy or partial intestacy, whether he takes beneficially or as trustee ... ".

G At the material time, Part III of the Finance Act 1965 contained a section, s 42, which is the statutory predecessor of s 80 of the 1981 Act. It provided for the attribution to beneficiaries of gains made by overseas trustees "... if the settlor ... was domiciled and either resident or ordinarily resident in the United Kingdom when he made his settlement", i.e. exactly the same question could arise under s 42 of the 1965 Act as in the present case arises H under s 80 of the 1981 Act.

In outline, the taxpayer's argument runs as follows. Under s 24(11) of the 1965 Act, the arrangement took effect as if the variations made by the arrangement were effected by Mrs. Kerr's father, the deceased, i.e. as though the deceased's will had bequeathed one-half of the residuary estate to Regent I on the trusts set out in the arrangement. When s 24(7) is applied to this "deemed" position, Regent as trustee is to be treated as if the acquisition of any asset by Regent, as personal representative, had been a direct acquisition of the asset by Regent as trustee. Under s 24(1) such acquisition by the personal representative is deemed to have taken place on the death of the testator at the market value of such asset at that date. Therefore, the argument runs, when proper effect is given to this series of "deemings", Mrs. Kerr can never have been the owner of the settled property since, under the statutory

fictions, all the assets are deemed to have been acquired at the date of death by Regent as legatee directly from the testator. It follows that Mrs. Kerr is deemed never to have owned the assets which were the subject-matter of the arrangement and, therefore, she cannot have been "the settlor" of the arrangement trusts for the purposes of s 42 of the 1965 Act or s 80 of the 1981 Act.

This argument succeeded before the single Special Commissioner but his decision was, on appeal, reversed by Harman J. who held that the deeming provisions of s 24 did not fall to be applied to s 42 of the 1965 Act or s 80 of the 1981 Act: see [1991] STC 686(1). The Court of Appeal (Balcombe, Simon Brown L.JJ. and Peter Gibson J.) reversed this decision (see [1993] STC 360(2)) and upheld the taxpayer's argument. In the Courts below the argument largely revolved around the correct principles of construction to be applied to s 24(7). Should the "deeming" which it requires be applied generally for the purposes of capital gains tax or has it a more limited effect? Peter Gibson J., who gave the leading judgment in the Court of Appeal, stated the correct approach to deeming provisions as follows (at page 366d)(3):

> "For my part, I take the correct approach in construing a deeming provision to be to give the words used their ordinary and natural meaning, consistent so far as possible with the policy of the Act and the purposes of the provisions so far as such policy and purposes can be ascertained; but if such construction would lead to injustice or statutory fiction should be limited to the extent needed to avoid such injustice or absurdity, unless such application would clearly be within the purposes of the fiction. I further bear in mind that, because one must treat as real that which is only deemed to be so, one must treat as real the consequences and incidents inevitably flowing from or accompanying that deemed state of affairs, unless prohibited from doing so."

Applying that principle of construction he expressed his conclusion as follows (at page 367d)(4):

> "If the trustee of the varied trusts is to be treated as if the personal representative's acquisition of the assets the subject of the instrument had been the trustee's acquisition ... one must surely, unless prohibited from doing so, also treat Mrs. Kerr as never having acquired or disposed of those trust assets."

If the arguments presented to your Lordships had been the same as those presented to the Court of Appeal, I would have agreed with their decision. But in this House Mr. McCall, for the Crown, put the case rather differently. He accepted that the passage I have quoted from the judgment of Peter Gibson J. represents the right approach to the construction of the deeming provisions of s 24 and that s 42 of the 1965 Act and s 80 of the 1981 Act take effect subject to those deeming provisions and after giving them full effect. But, he submitted, even if this is done, there is nothing in s 24 which requires one to postulate a state of affairs which renders it impossible for Mrs. Kerr to have been the settlor of the arrangement trusts. I accept Mr. McCall's arguments which require one first to identify what was the property settled by the arrangement and then to ask the question, "Is there anything in s 24 which requires one to

(1) Pages 68B/73B *ante*. (2) Pages 73E/81C *ante*. (3) Page 79A/B *ante*. (4) Page 80C/D *ante*.

A assume a state of facts inconsistent with Mrs. Kerr having been the settlor of the property so identified?"

What was the property settled by the arrangement?

In the Courts below two tacit assumptions were made: first, that the B arrangement was a settlement of the assets comprised in the testator's estate; second, that those assets were assets of which the testator was competent to dispose and were, therefore, deemed by s 24(1) to have been acquired by Regent, as personal representative, from the deceased. In my judgment, neither of these assumptions is justified.

C Mrs. Kerr entered into the arrangement on 31 January 1978 at a time when the estate of the deceased was still being administered. None of the assets was vested in Regent as trustee until administration of the estate was completed in June 1979. The arrangement, accordingly, did not settle, *in specie*, any specific assets comprised in the estate: it settled Mrs. Kerr's one-half share in the residuary estate which had not by then been constituted. D What, then, was the nature of the settled property? In English law the rights of a testamentary legatee in the unadministered estate of a testator are well settled: see *Lord Sudeley and Others* v. *The Attorney-General* [1897] AC 11 and *Commissioner of Stamp Duties (Queensland)* v. *Livingston* [1965] AC 694. In the absence of evidence to the contrary, the law of Jersey must be taken to be the same. A legatee's right is to have the estate duly administered E by the personal representatives in accordance with law. But during the period of administration the legatee has no legal or equitable interest in the assets comprised in the estate.

In *Livingston* A died domiciled in New South Wales leaving one-third of his residuary estate to B. The assets of the estate included land in F Queensland. Whilst the estate was still being administered, B died also domiciled in New South Wales. The Queensland revenue authorities claimed death duties on B's death on the one-third share of the land in Queensland to which B was entitled under A's will. The claim failed because B had no assets within Queensland. A's estate was still being administered and, so long as such administration continued, B (notwithstanding that she was entitled to G one-third of A's residuary estate) had no legal or equitable interest in the land in Queensland. Her sole right was to have A's estate duly administered. Lord Radcliffe (at pages 707E to 708C) speaking of the "trusts" on which personal representatives hold an unadministered estate said this([1]):

> "It may not be possible to state exhaustively what those trusts H are at any one moment. Essentially, they are trusts to preserve the assets, to deal properly with them, and to apply them in a due course of administration for the benefit of those interested according to that course, creditors, the death duty authorities, legatees of various sorts, and the residuary beneficiaries. They might just as well have been termed 'duties in respect of the assets' as trusts. What equity did not do I was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration. Conceivably, this could have been done, in the sense that the assets, whatever they might be from time to time, could have been treated as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective inter-

([1]) [1964] 3 All ER 692, at page 698E/H.

ests. But it was never done. It would have been a clumsy and unsatisfactory device from a practical point of view; and, indeed, it would have been in plain conflict with the basic conception of equity that to impose the fetters of a trust upon property, with the resulting creation of equitable interests in that property, there had to be specific subjects identifiable as the trust fund. An unadministered estate was incapable of satisfying this requirement. The assets as a whole were in the hands of the executor, his property; and until administration was complete no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be."

It is, therefore, clear, that, at the date of the arrangement, the only property capable of being settled by Mrs. Kerr was a chose in action, being her right to have the estate of the deceased duly administered. The arrangement could not, and did not purport to, settle any specific asset comprised in the estate of the deceased.

On completion of the administration of the deceased's estate in June 1979, one-half of the assets *then* comprising the residuary estate were vested in Regent as legatee on the trusts of the arrangement. Thenceforward, the trust fund comprised the assets so vested. But in answering the question posed by s 80(1), "Was Mrs. Kerr the settlor of the trusts of the arrangement when the arrangement was made?" it is crucial to appreciate that the property settled by her comprised, not the assets in the deceased's estate which eventually came to be vested in Regent as trustee, but a separate chose in action, the right to due administration of his estate. The question, therefore, is whether, due weight being given to the deeming provisions of s 24, the consequences of such deeming are irreconcilable with treating Mrs. Kerr as having been the settlor of her right to have the estate of the deceased duly administered.

The deeming provisions of s 24

The primary deeming provision is contained in subs (11) which provides that, in the event that a variation of the dispositions made by the will is made within two years of death, there shall be two consequences, viz.

(1) " ... *this section* shall apply as if the variations ... were effected by the deceased ... "

(2) " ... no disposition made by the deed or other instrument shall constitute a disposal *for the purposes of this Part of this Act*."

Consequence (1) operates only for the purposes of s 24 and does not directly apply to any other section. Consequence (2) applies generally to Part III of the Act which deals with all aspects of capital gains tax. But consequence (2) is very limited in its impact. It provides that the variation is not a "disposal"; it does not provide that the variation is not to be treated as a "disposition". On the contrary the subsection itself differentiates between the two words. In Part III of the 1965 Act the word "disposal" (although not defined) is used in a technical sense as being the occasion on which chargeable gains accrue and are taxable: see s 19(1). Accordingly, the principal effect of consequence (2) is to ensure that the making of the variation is not itself a taxable event, a disposal, which otherwise it would be as being the disposal of a chose in action which is a form of asset. Therefore, consequence (2) does not require one to assume (contrary to the true facts) that Mrs. Kerr

A did not "dispose" of any property when she executed the arrangement but only that such disposition did not give rise to a chargeable event.

I turn then to consider the impact of consequence (1). As I have said, it operates only for the purposes of s 24 and, therefore, has no direct impact on B s 42 of the 1965 Act or s 80 of the 1981 Act save to the extent that its impact on s 24 alters the position.

First, I must consider the general structure of s 24 which regulates capital gains tax on death. Broadly, the concept is that the personal representatives C are a single body which is liable to tax on gains like any other body: subs (6). So far as concerns the assets of which the deceased was competent to dispose at his death, the personal representatives are deemed to acquire such assets at the date of death at their then value: subs (1). If, in the course of administration, any such asset is sold at a profit, the personal representatives will be liable for capital gains tax on any gain, being the difference D between their value at the date of acquisition (i.e. the death) and the price obtained less any allowable expenditure by the personal representatives and subject to time apportionment allowances in respect of the period between the death and the date of sale. If, in the course of administration, the personal representatives buy any asset, there is nothing to deem such acquisition as having been made from the deceased: such asset will for capital gains tax E purposes have as its base value its actual acquisition cost and be deemed to have been acquired from the vendor. If personal representatives sell such asset, they are liable to capital gains tax on any capital gain they make. If the asset so acquired by the personal representatives is, after administration, vested in a legatee, the legatee is by virtue of subs (7)(b) treated as having acquired it " ... as if the personal representative's acquisition of the asset F had been [the legatee's] acquisition of it" i.e. on any subsequent disposal by the legatee he will be chargeable to capital gains tax on any gain over the purchase price paid by the personal representative, time apportionment being allowable over the period from the personal representative's acquisition to the date of disposal by the legatee. Subsection (7)(a) operates to ensure that the actual vesting of the assets in the legatees does not give rise to a charge to G tax, either as being an actual disposal by the personal representatives or a deemed disposal under s 25(3).

Consequence (1) (above) of the deeming provisions in subs (11) has a very limited impact on this scheme, viz. the interests of a beneficiary which H in fact, arise under the dispositions made by the instrument of variation ("the varied beneficiary") are to be treated as though they were contained in the will of the deceased. In consequence, an asset of which the deceased was competent to dispose at the death, which is not sold in due course of administration, but is vested in the varied beneficiary is deemed to have been acquired by the varied beneficiary as legatee under the will: subs (11). I As such, the acquisition of any such asset by the varied beneficiary is deemed to be the personal representative's acquisition (subs (7)) which in turn is deemed to have been made at the date of death at its then value (subs (1)). It was this line of reasoning which led the Court of Appeal to hold that, since the varied beneficiary under the arrangement is deemed to have acquired "the assets" at the date of death, there was never a time at which Mrs. Kerr owned such assets and, therefore, she cannot have been "the settlor" of such assets.

But such reasoning is fallacious. First, the effect of subs (11) is not that *all* assets vested in the varied beneficiary are to be deemed to have been acquired from the deceased. Such deeming only applies to an asset of which the deceased was competent to dispose at his death: see subs (1). Other assets, whether cash representing the proceeds of sales made by the personal representatives or property purchased by the personal representatives in the course of the administration, fall to be treated as though the varied beneficiary's acquisition was the personal representative's acquisition i.e. as being made at the time and from the person from whom the personal representatives in fact acquired such cash or property in the course of administration. There is nothing in subs (11) which requires one to assume that *all* the assets vested in the varied beneficiary as "legatee" are to be treated as acquired from the deceased at the date of death.

Still less is there anything which requires one to ignore the process of administration of the estate. Assets acquired by the personal representatives after the death are not deemed to have been acquired by them (and hence by the varied beneficiary as legatee) at any time or cost or from any person other than the time, cost and person at which, and from whom, they were in fact acquired. For the purposes of calculating the capital gains tax liability of the varied beneficiary on any future disposal by him of such assets, the acts done by the personal representatives in the course of administration remain relevant and indeed decisive. I cannot, therefore, see any ground for holding that, once assets are vested in the varied beneficiary, the effect of subs (11) is retrospectively to wipe out the process of administration and deem all the assets vested in varied beneficiary as having been acquired by him at the date of death from the deceased.

I come back, therefore, to the crucial question: is there anything in the deeming provisions of subs (11) which require one to assume something which is inconsistent with Mrs. Kerr having been "the settlor" of the property disposed of by the arrangement viz. her right to have the estate of the deceased duly administered. I can find nothing. Whether or not the deeming provisions of subs (11) are applied, s 24 recognises that the period of administration exists and attributes consequences to acts done by the personal representatives which continue after administration is complete and assets are vested in the legatees. Moreover, any different view would, in my judgment, produce a chaotic situation which I cannot accept that Parliament intended.

Take the not improbable case of a testator who, at his death, was competent to dispose of a house, some investments and a sum of cash. Whilst the estate is still being administered a deed of variation is executed. Thereafter, the personal representatives sell the investments and pay the proceeds into the same bank account as the cash derived from the testator. Then, out of the mixed moneys in the bank account, the personal representatives pay the debts and testamentary expenses. On the completion of the administration, they vest the house and the remaining cash in the beneficiaries under the deed of variation.

On the taxpayer's argument, in order to find out whether the original legatee who made the deed of variation is the settlor for the purposes of s 80 of the 1981 Act, one has to trace back each of the assets to its acquisition or deemed acquisition by the personal representative. The house presents no problem: the varied beneficiaries are treated as having acquired it as the personal representatives acquired it i.e. under subs (1) from the testator. The

A cash raises greater problems. To the extent that the cash is the same as that of which the testator was competent to dispose, the result is the same as with the house. But the rest of the cash in the mixed bank account is to be treated as having been acquired by the varied beneficiary when the personal representatives acquired it i.e. on the sale of the investments which took place *after* the deed of variation. So there is no ground for saying that, at the time B the deed was made, the settlement comprised such cash. It could be argued that one is then thrown back to the asset which was in fact comprised in the estate at the date of the variation i.e. the investments which were sold to produce the cash. But those investments (having been sold in course of administration) never vest in the legatees at all: therefore, the legatees never acquire such investments, therefore, subs 7(b) has no application, and therefore, there C is nothing to deem such investments to belong to anyone other than those interested in the estate at the date of the variation. Therefore, as to the part of the cash representing the proceeds of sale in the investments, there is nothing to displace the true state of facts i.e. that the original legatee is the settlor. It seems improbable that Parliament ever envisaged that, in such a case for the purposes of s 80, part of the assets subject to the variation should be D treated as settled by the original legatee but part not. Even if such intention is to be attributed to Parliament, how is one to trace the cash through the mixed account and the payment of the debts and testamentary expenses so as to allocate part to the cash derived directly from the testator (of which the legatee is not "the settlor") and the remainder to the balance of the proceeds of sale of the investments (of which the legatee is "the settlor"). To my mind, E this illustration (which is in no way improbable in practice) shows why the general law does not treat beneficiaries under a will as having any beneficial interest in specific assets comprised in an unadministered estate. It also shows the wisdom of the draftsman of s 24 in not ignoring the administration stage but accepting that the assets which eventually vest in the legatees may very well not have been vested in the deceased at his death.

F

It may be said that my view places undue stress on the fact that, in the present case, the estate was still in course of administration at the date the arrangement was made. If, within the two years allowed by s 24(11), administration of the estate had been completed and thereafter an arrangement made varying the trusts of the will, it could be argued that the subject-G matter of the settlement effected by such arrangement would be the assets then comprised in the estate. I do not think such an argument should carry much weight. First, the only arrangement which would be relevant would have to be made (a) within two years (b) after completion of administration *and* (c) before any assent had been made by the personal representatives in favour of the original legatee under the will. Administration H of an estate frequently takes more than two years to complete. More important, on completion of the administration, it is the duty and practice of personal representatives to assent immediately to the vesting of the assets comprised in the estate in the legatee. Once the assets have been vested in the original legatee under the will, any subsequent arrangement made by such legatee will undoubtedly be a settlement of the assets made by the origi-I nal legatee as settlor, since s 24(7) will never apply to any vesting of the assets in the varied beneficiary entitled under the arrangement. Therefore, any arrangement of the kind postulated will be of very rare occurrence indeed.

Second, in the rare case in which an arrangement is made after completion of the administration, within two years of the death but before any assent has been made in favour of the legatee, the taxpayer's argument (if

correct) would lead to all the practical difficulties involved in identifying which of the assets settled were vested in the estate at the date of death, being the difficulties I have already mentioned. A

In summary, in my judgment, the effect of giving the deeming provision in s 24(7) the effect contended for by the taxpayer would "lead to injustice and absurdity" and should be rejected. The deeming provisions in s 24 do not require one to assume that the actual settlor of the arrangement was not the settlor. B

Therefore, in my judgment, for the purposes of s 80 of the 1981 Act, Mrs. Kerr, being domiciled and resident in the United Kingdom, was the settlor of the settlement effected by the arrangement of her right to have the estate duly administered. There is nothing in s 24 which requires one to deem anything to the contrary. Therefore, in principle, s 80 of the 1981 Act applies to the gains realised by Regent as trustee. I would, accordingly, allow the appeal (save as to costs) and restore the order of Harman J. C

Leave to appeal to your Lordships was given on the terms that the Crown would not seek to alter the order of the Court of Appeal as to costs or to obtain any order for costs before your Lordships. The taxpayer sought, in addition, an order that the Crown pay the additional costs they have incurred as a result of having to file a supplemental Case to answer the contentions advanced for the first time in the Case for the Crown. I would not accede to this request. D E

Appeal allowed, no order as to costs.

[Solicitors:—Solicitor of Inland Revenue; Messrs. Sebastian Coleman & Co.]