FRENCH USUFRUITS AND S.43(2) IHTA 1984

Carrying burning coals to Newcastle in the flickering light of Philipson-Stow v. IRC

Peter Harris[1]

To set the background for s.43(2) Inheritance Tax Act (IHTA) 1984, which defines what is a settlement for Inheritance Tax purposes, it is necessary to go back, not just to the 1975 and 1978 Finance Acts, which introduced the current definition into the statutory arena for Capital Transfer Tax purposes, but also to the prior definition of the term "regulated" as used in the same area of the arena that was Estate Duty.

The final part of s.43(2) IHTA 1984 includes two separate clauses, each referring back to the concept of the trust or settlement definition in the preceding subparagraphs (*a*)- property held in trust for persons in succession, (*b*) – property held on trust for accumulation or for discretionary payment of income and (*c*) – property charged with certain periodical payments:

> "…[i[2]] or would be so held or charged or burdened if the disposition or dispositions were regulated by the law of any part of the United Kingdom; or [ii[2]] whereby, under the law of any other country, the administration of the property is for the time being governed by provisions equivalent in effect to those which would apply if the property were so held, charged or burdened."

The sub-section (2) has to be read as a whole as addressing settlements only under its (*a*), (*b*) and (*c*).

The issue is whether HMRC have the power to override any disposition or dispositions of property in the world as settlements. The purpose of this article is to show that they do not.

Firstly, I am not going to set out the usual methodology, which is to go through an analysis of the foreign law through expert witness statements and then show that the

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2 *Clause and number for the purposes of this article only*

disposition or dispositions in question do not constitute settlements under s.43(2) ITA, 1984. It is clear that HMRC Technical's grasp of the foreign law concept is partial, in all senses of the term.

My aim is to look at the term "regulated" in this context and how the terms "disposition or dispositions" are affected by that.

It is undisputable that the aim of s.43(2) IHTA 1984 is to tax trusts as opposed to and distinct from legal property rights, which are dealt with under Part I of the Act. The only exceptions were the very English legal concept of the term of years, and certain Scottish and Northern Irish legal arrangements equivalents.

The Scottish Proper Liferent was defended by the Scottish Law Society as being other than a settlement under the initial 1975 definition. The Proper Liferent had to be added in by way of exception in Finance Act 1978, and the initial attempt to tax it as a trust without that amendment was recognised as an error by HMRC when the issue was drawn to its attention by a Parliamentary question[3]. That was a matter of one of the laws internal to the United Kingdom. "Proper" means owned directly, not improper which signifies held through a trustee.

In this context, beware also of the chimera often cited by HMRC as "United Kingdom law" - such a concept in property law matters simply does not exist. The law of any part of the United Kingdom includes its private international and conflict laws, it does not expressly exclude these. The error seems to come from a reading of Mr. John Pardoe's contributions in the minutes of Standing Committee A of 11th February, 1975 at §1735. Dr Gilbert abstained from any explanation of what the clause actually meant and how it changed the position for CTT after *Philipson-Stow*.

In Standing Committee A, on 17th February, 1975, at §1736, Dr. Gilbert's response to Mr. John Pardoe's criticism of the first clause, as opposed to the second clause in what is now §2 ds.43(2) IHTA 1984 reads as follows:

> "These dispositions are to rank as settlements if they would have fallen within subparagraph (2) (a), (b) or (c) had they been regulated by the law of any part of the United Kingdom;…"

Firstly, the disposition or dispositions in question certainly in any matter of immovable property are those of the *lex rei sitae / lex situs*, not those reinterpreted by HMRC in Newcastle. Mr. Davidson has already made some unfounded comment that French ownership is defined by reference to the prerogatives of *usus*, *fructus* and *abusus*, and has assumed that only the *nu-propriétaire* can sell the whole property, which would wrongly imply a form of management over the whole *propriété*, and not that the *usufruitier* can sell or dispose of their immovable property right independently of the *nu-propriétaire*, and vice versa.

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3 *HC Deb 06 March 1978 vol 945 c525W*525W §Lord James Douglas-Hamilton

It is clear, Dr. Gilbert stated that the aim of clause ii) and therefore clause i) was to catch foreign dispositions as settlements to the extent and only to the extent that these dispositions were in the nature of dispositions qualifying as trusts or settlements under the preceding paragraph. It does not entitle HMRC to go further. HMRC Newcastle have accepted that the wording as to "administration" in the second clause of the paragraph cannot be used against a French *usufruit*, as there is no central administration involved of both legal rights; on the one hand that of the *usufruitier*, and on the other that of the *nu-propriétaire*. HMRC Newcastle have accepted that the wording as to "administration" in the second clause of the paragraph cannot be used against a French *usufruit*, as there is no central administration involved of both legal rights; on the one hand that of the *usufruitier*, and on the other that of the *nu-propriétaire*.

Indeed in the Standing Committee A Minutes concerning this second clause, not the first, this was dubbed the "Liechtenstein clause" which would cover anstalts and foundations, which are not otherwise trusts or settlements, but which do administer property held by the foreign entity on a centralised basis.

The Standing Committee A Minutes of 1975 do not develop the reason for the first phrase so as to include for example *usufruits* or other well-known dismemberments, effectively equivalent to the Scottish Proper Liferent. Dr. Gilbert was asked to explain the clause and he did not do so in any greater detail than that cited above[4].

Had the aim been to include other aspects of foreign property law, without the intervening private international law issues of English law, he should have advised the Committee as to that issue, given the criticism raised by John Pardoe M.P. as to what effectively amounts to a fiscal fulcrum to treat any foreign disposition of, property as a settlement as opposed to a legal disposition. What is more, Mr. Pardoe stated as follows, in a critical manner [as to clause ii]:

> "The Bill asks us to imagine and presumably asks the courts to imagine, that the property would be so held, charged or burdened by United Kingdom law, whether it was or not—in other words, as if it were. That seems to cover dispositions whether they are regulated by United Kingdom law or by the law of any other country. Yet despite the fact that that is how it appears, it is repeated again in this rather convoluted way."[5]

This appears to be used by HMRC Newcastle as a quasi statutory authority to require the taxpayer to "use their imagination" as opposed to the law, in a manner contrary to the foreign legal disposition in question, and its actual and present effect under "one

4 A paper may or may not have been available to Standing Committee A, if so it is no longer readily available.

5 Referring to the second clause "*or whereby, under the law of any other country, the administration of the property is for the time being governed by provisions equivalent in effect to those which would apply if the property were so held, charged or burdened*".

of the laws of the United Kingdom", which, unless I am mistaken, includes its private international law or law of conflict and is not limited to its municipal law. A usufructuary dismemberment gives rise to two legal *choses in action*, defined by a deed, or rather a French *acte authentique* capable of being issued out of the notary's minute in executory form. Those *choses in action* are, on the one hand, the *usufruitier*'s and on the other, that of the *nu-propriétaire*. A *usufruit* is a property right which can be enforced in an English Court, not to define possessory title, but on the basis that it give rise to rights which can be enforced in an English Court against a person within the English jurisdiction. The rights are therefore immovable property, in themselves, under domestic English law and not by reference to any form of deemed trusteeship. The rights arising out of a usufructuary dismemberment in France are therefore already "regulated" by English municipal law, but not as settlements.

Mr. Pardoe was not a lawyer and whilst he used the term "constitutional change" in relation to the "Liechtenstein clause", Dr. Gilbert did not make him aware of the constitutional issues of the first clause, were the current "view" of HMRC to have been the correct position. Dr Gilbert did mention any intention that the first clause went further than modifying the effect of the laws rehearsed to in the judgment of *Philipson-Stow*, which are in any event outside the purview of Parliament in a Money Bill.

The legal *chose in action*, being the legal right arising under the *usufruit* is therefore a legal property right or interest as defined under s.262 IHTA 1984, and is therefore subject not to Part III, but to Part I of IHTA 1984, and to s.160 IHTA 1984 as to valuation. What is more, as it relates to an immovable, a *usufruit* is classified as an immovable in both jurisdictions, not a movable, as a result of article 526 Code civil.

Whilst that is clear in itself, understanding how the clause arrived on the statute book is of importance so as to limit an otherwise startling digression from the old principle that no United Kingdom Parliament ever legislates over foreign immovable rights *in rem* in the way in which HMRC are asserting. This was confirmed in relation to Estate Duty in 1936 by the then Attorney-General Sir Donald Somervell when addressing clause 22 of the Finance Bill. see HC Deb 16 June 1936 vol 313 cc855-60855 at 5.44 pm :

The Attorney-General	*In reply to the questions which have been put to me, the reference to immovable property does not contemplate the type of property referred to by the hon. Member for Chesterfield (Mr. Benson). It means land or such interests in land as are regarded as immovable property by the law of the country where the land is situate. By a general understanding between nations, no nation in the past has ever attempted to tax land which constitutes part of the territory of another*

	country. Therefore, foreign land has always been outside the Death Duty or Estate Duty net. It is simply a proviso that nothing in the Clause is to operate so as to charge with duty any property which by the law of the country in which it is situate is immovable property. It simply excludes foreign land.
Mr. Benson	*Does that also refer to foreign real property—to bricks and mortar?*
The Attorney-General	*Yes.*
Mr. Benson	*A man might invest his money abroad in foreign property and that would be excluded from Estate Duty. But if the property were sold and the proceeds brought back here, would they also be excluded?*
The Attorney-General	*No. It is only as long as the property consists of land and the buildings on it,* ***or such other interests in land as are within the words "immovable property,"*** *situate in a particular foreign country that this applies. One, of course, would have to look at the law of the foreign country concerned to see what was regarded as immovable property in that country. Under our own law, land and the buildings on it are included in real property and I have no doubt that foreign systems of law adopt the same principle. But once a man sells that property then, instead of being the owner of foreign land which has houses upon it or similar property, he becomes entitled as a personal right to the purchase price and when the purchase price is paid to him the money thus realised would come within the net. It is only as long as the property is land abroad that it is outside the net."*

The reader will note the initial comparative ignorance of the Parliamentarians discussing the terms of the Bill, in thinking that the issue was the effect of foreign expropriations, rather than the British domestic fiscal depredation or expropriation into which the matter has since degenerated. Mr. Benson retrieved the position by referring to the conversion into proceeds of sale, which in effect had always been the crux of the matter for Estate Duty and English law in general.

I can find nothing in the Parliamentary Papers relating to the Finance Act 1975 extending the writ of Parliament beyond that pre-war statement by the Attorney-General as to the taxing of foreign immovables being contrary to this fundamental practical restriction. Dr. Gilbert's bland statement that "these dispositions are to rank as settlements if they would have fallen within subparagraph (2)(*a*), (*b*) or (*c*) had they

been regulated by the law of any part of the United Kingdom" does not go so far as to override either the Parliamentary self-limitation, or to directly treat non-trust legal rights as equivalent to settlements simply because HMRC's collective imagination is aligned to settlements. That Parliamentary self-restriction includes a bar over legislating over a foreign usufructuary dismemberment as a set of immovable rights, which is unquestionably what a French *usufruit* over an immovable is[6].

What is more the French administration stated in the first paragraph of their *instruction* on the definition of a trust in the *loi de finances pour 2011*, that a usufructuary dismemberment was not a trust. They appear to master English law better than HMRC Newcastle. Whilst the 1984 legislation was drafted on the basis of a theoretical worldwide application, it paid tribute to the fundamental restriction on Parliamentary powers to tax by immediately cutting that universal and extra-territorial expropriation back by means of excluded property and domicile. However, there is no justification for HMRC seeking to require the taxpayer or the courts to "imagine" the creation of a settlement where none can exist or, in the material legal reality of their creation under foreign law, do not exist when the dismemberment of the property rights in question is already "regulated by" English municipal law. It is clear that s.43(2) ITA 1984 does not of itself convert a foreign immovable or for that matter English realty into movable rights.

The thread of Ariadne is tied to Sir Donald Somervell's last sentence as to a trust only being capable of taking effect over the proceeds of sale, which therefore excludes *inter vivos* gifts and dispositions *mortis causa* of the property right itself from Parliamentary interference.

Under their Lordships guiding light in *Philipson-Stow*, were the foreign land itself to be held in trust - a real trust, not an imaginary one - the immovable right remains immovable and governed or regulated by the *lex rei sitae* until it is sold, and the foreign or better alien "trust" then attaches itself to the proceeds of sale following its "conversion" to movable property. That refers to a fundamental concept of English private international law, or conflict of laws. S.43(2) IHTA 1984 does not overrule or overwrite English private international law; it in fact is reliant upon it: "*or would be so held or charged or burdened if the disposition or dispositions were regulated by the law of any part of the United Kingdom*". It is an error to believe that the private international law of any part of the United Kingdom has been repealed by the 1975 or the 1984 legislation. The 1975 legislation simply attempted to remove the barred interface between the *lex rei situs*, and the *lex domicilium* thus enabling the attachment to the trust of the proceeds of sale described by their Lordships. It did not permit the substitution of an imaginary settlement for a legal or for that matter equitable *chose in action* already regulated under English law or for that matter the law of any other part of the United Kingdom.

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6 See article 579 *et seq. Code civ* and the abundance of French learning and jurisprudence on that.

It is simply not legally possible to hold French immovable property rights through a trust or an English devise, saving under an advanced and probably incorrect reading of articles 21, 22 and 23 of the EU Succession Regulation, Regulation (EU) n° 650/2012. It is an affront to the unitary property law system governing French immovables to suggest otherwise, as it was in Italy prior to its adoption of the Hague Convention of 1984[7]. The French Cadastral authorities will refuse to register any such attempt to have a trustees' title registered as such as a matter of public order. There is therefore no manner in which the proceeds of sale of either the *usufruit* by the *usufruitier* or of the *nue-propriété* by the *nu-propriétaire* of their respective right can be reduced to a trust entitlement. HMRC were still labouring under the impression that the *nu-propriétaire* could sell the whole property, *usufruit* included without the *usufruitier* joining in as to their share, under a totally ludicrous interpretation of the roman law concept of *abusus*. I would point out that any attempt by a *nu-propriétaire* to sell what is effectively the *usufruitier*'s *usufruit*, would firstly be refused by the Notary, and even if that attempt got past the slips, would then be subject to an action in tort in the English Courts on the legal *chose in action*. Is that not English "regulation"? Of course it is.

So, to *Philipson Stow v. HMRC* [1961] A.C. 727, also reported at [1960] 3 W.L.R. 1008. I warn the reader immediately that they will need a copy of the judgment to hand. This is not a headnote exercise.

The facts in that case can be resumed as follows:

> An English trust had been constituted over land in South Africa, the holder of an interest in possession in what was effectively settled property had died. The question was whether under s. 28 (2. Finance Act, 1949 (12, 13 & 14 *Geo.* 6, c. 47), the South African immovable property could be treated for Estate Duty purposes as passing to the next holder of an interest in possession in the trust. For various reasons their Lordships held that it could not. The relevant part of the section read:
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> > *"As respects property passing on the death of a person dying after the commencement of this Part of this Act, sub section (2) of section 2 of the Finance Act, 1894, (which exempts from estate duty property situate abroad and not chargeable with legacy duty or succession duty), and section 24 of the Finance Act, 1936 (which restricts the exemption conferred by the said subsection (2)), shall not have effect; but that property shall be deemed for the purposes of estate duty not to include any property passing on the death which is situate out of Great Britain if it is shown that the proper law regulating the devolution of the property so situate, or the disposition under or by reason of which it passes, is the law neither of England nor of*

7 The Hague Convention on the law applicable to trusts and their recognition of 1985, ratified by IHTAly in 1990

> *Scotland and that one at least of the following conditions is satisfied, namely,—(a) That the deceased did not die domiciled in any part of Great Britain; (b) that the property so situate passes under or by reason of a disposition—(i) made by a person who, at the date at which the disposition took effect, was domiciled elsewhere than in some part of Great Britain; and (ii) not made, directly or indirectly, on behalf of, or at the expense of, or out of funds provided by, a person who at that date was domiciled in some part of Great Britain; (c) that the property so situate is, by the law of the country in which it is situate, immovable property; or if the property so situate passes only by virtue of paragraph (c) of subsection (1) of section 2 of the Finance Act, 1894, as having been the subject of a gift inter vivos and it is shown that one at least of the said conditions is satisfied."*

The reasoning of that decision was that until the foreign immovable property was sold, it remained subject to the *lex rei sitae*, and there was no operation of any form of doctrinal conversion of the immovable into either a movable or into proceeds of sale, which is the very essence of a settlement.

It is obvious that no trust over a French immovable can be created, so the whole issue of whether the immovable property rights of dismemberment can be treated as a "settlement" for the purposes of s.43(2) IHTA 1984 depends upon the extent of the clause "*or would be so held or charged or burdened if the disposition or dispositions were regulated by the law of any part of the United Kingdom*"

The point is that the disposition under English law can only be regulated by English law, including its private international law. Parliament made no statement that the "law" was limited to municipal law and neither can that be inferred. Therefore, the *ratio decidendi* of *Philipson-Stow* still holds good within the scope of s.43(2) IHTA 1984. In the absence of a trust, English law will not permit the application of a settlement to a foreign immovable unless it is either held in trust, or sold whilst under a trust or a will including a trust for sale.

There was no specific mention made by the then Chancellor Dennis Healey, or by Dr Gilbert on behalf of the Labour Government or in Standing Committee A 1975 that the intention of the Bill was to override firstly Parliamentary jurisdiction where there had been none in the past, and secondly to force a trust on a French immovable property right before any sale of the property was sold and, what is more, in the absence of any document enabling an English trust to be created and fix itself on those proceeds, when it was incapable of fixing itself on the foreign property. Whilst it is arguable that the Finance Act 1949 made the first steps in that direction in relation to domicile, it certainly did not in relation to immovable property rights out of the jurisdiction, and the private international law term *immovable* was used in the statute itself to designate the foreign property rights excluded. The Parliamentary papers certainly do not even give a hint that HMRC's current view was envisaged, namely to

convert foreign immovable rights into movable rights capable of being assimilated to a settlement.

The cases cited in *Philipson-Stow* give a clear understating of how private international law works in the Estate Duty, then CTT and now the Inheritance Tax arena. The judgment does not support HMRC Technical's "view" of the substance or the scope of the law of any part of the United Kingdom at all.

In *re Piercy* [1895] 1 Ch. 83, for example, an English domiciled testator left Italian land in trust for his widow. Italian law did not recognise trusts over Italian immovables at that time. So the trust was ineffective over the land in Italy which was governed by and regulated by the laws of Italy as the *lex rei sitae*, but, however, it was effective against the proceeds of sale of the land, and could therefore give rise to a right over those proceeds which could then be governed by English law, but not until sale. In effect that case and the others cited all clearly state that it is the *lex rei sitae* that is paramount, and it remains so, even were there to be a trust declared over the foreign property, until it was sold.

Given the concessions by Counsel for both sides in *Philipson-Stow* that the term "regulated by "was equivalent to "governed by", their Lordships' latin, unfortunately, was not called upon. The judgment did come to a conclusion on the meaning of the term "disposition", which is carried through to s.43(2) IHTA 1984 as being distinct from a devise. Their latin could have been brought to bear however on a clear definition of the terms "proper law", "regulated by" or "governed by". The term "regulated" has history in Estate Duty legislation. Those concepts may then have been ill-defined, the Parliamentary draftsman evidently borrowed "proper" from academic writings. With apologies for my limited scholarship using ordinary latin to determine the substantive meaning of the English term, using the latin from which it is derived.

The term "regulated by" signifies being subject to rules. The root of the English term is the latin *reglum*, which means rule not, as HMRC's interpretation would seem to have it, principle. The root of "governed by" means "steered by"; a *gubernator* being the helmsman using a rudder or a steering oar - *gubernaclum*. That infers guidance by a principle, as opposed to rules. Rules are precise and have limits as to object and implementation. Were Parliament to have intended HMRC's wider current interpretation, it would have used the term "governed by". "Regulated by" means regulated by rules, as in a rules based system similar to modern Income Tax statutory provisions not principles enabling a subtle switch of the type HMRC are attempting to justify from a legal right into some equitable fiscal Frankenstein[8].

The Inheritance Tax Act 1984 did indeed extend HMRC's powers to subject foreign immovable property to Inheritance Tax. That is uncontestable, as it is subject to a tax

8 with the legal nut on the bolt missing.

credit for any foreign taxation. However, the issue here is whether it actually empowers HMRC to go beyond that, and seek to undo and then ignore the very definition of those foreign immovable property rights to that extent of imposing English conveyancing practices and internal domestic law upon the foreign immovable property rights at death as if the immovable were English. That flies in the face of the drafting of most Tax Conventions in the area, and what is more the European Freedom of movement of capital provisions which refer specifically to successions and, incidentally to *usufruits*.

The point of the *Philipson-Stow* judgment was the rigourous application of private international law principles within the tax arena; coupled with a respect of what powers Parliament had, if any, over foreign assets and those which it does not. Parliament still has no right to regulate or govern, nor can it be construed as having attributed one to itself, foreign immovable property rights, saving those already held in a trust or similar disposition incorporating a legal conversion from immovable to movable. There is no such disposition in the creation of a French usufructuary dismemberment of an immovable. A trust over an Italian immovable might however now be possible, given the Italian ratification of the 1984 Hague Convention on Trusts. That issue is the province of Italian land lawyers.

The only change made in that historical position by the final part of s.43(2) IHTA 1984, was to remove the overriding application of the *lex rei sitae*, now frequently incorrectly referred to as *lex situs*[9], where there was a trust in place, as a disposition, not a devise, and enable a trust of that immovable to be treated as if it were the foreign property.

In other terms, in the absence of a disposition giving rise to a right of conversion, s.43(2) IHTA 1984 cannot be applied to interests in foreign land which are in themselves immovable rights, such as those arising from an immovable usufructuary dismemberment in France. It is even debatable whether the abolition of the doctrine of conversion of property into proceeds of, or trusts for sale in s.3 TOLATA 1996[10] has also not put an end to any flight of imagination by a taxpayer where there is no trust involved.

Now to Lord Radcliffe's judgment in *Philipson-Stow* at page 756:

> "In 1898 came the case of *In re Smyth*[11]. A testator domiciled in the United Kingdom died having created by his will a settlement of land in Jamaica. At a certain stage in the course of the successions under the settlement a trust for sale became effective. One of the remaindermen entitled to a vested interest in reversion in the resulting proceeds died before the trust for sale had become

9 *with no genitive in the latin.*

10 Trusts of Land and Appointment of Trustees Act 1996

11 [1898] 1 Ch. 89; 14 T.L.R. 77

> binding or any sale had been made. The learned judge (Romer J.) held, nevertheless, that probate duty was exigible in respect of this legatee's interest, on the explicit ground that the interest was of the nature of personalty, though the land remained unsold at the date of the legatee's death. It was an English asset, an English equitable *chose in action*, and it was not to be treated as foreign by reason of the fact that the plantation in question was situate in Jamaica. Having regard to the trust for sale, the Jamaican land was to be considered merely as an investment of the personalty fund."

When English law treats the foreign immovable right as a legal *chose in action*, as it is at present obliged to do in relation to a French authentic deed having executory force under French law[12] under article 58 of Regulation (EU) N° 1215/2012, and prior to that at common law, the issue raised in *in re. Smyth* and s.43(2) IHTA 1984 is resolved in favour of the English treatment of the property right by enforcement, a *chose in action*, which arises at law, not as an equitable remedy. So not, I stress, as any form of "settlement". The distinction between an equitable remedy and an equitable right holds good here.

The legal fact that the immovable right is governed by French law means that French law applies to it, and that any disposition of it is governed and regulated by French law, as recognised in the *chose in action or as a matter of English private international law*.

In the first place. S.43(2) IHTA 1984 does not substitute English conveyancing methodology or property rights over French immovables.

At the time of *Philipson-Stow*, the only manner in which a settlement could be presumed was if there were a trust or testamentary disposition enabling the asset to be held in such a manner as to give rise to a trust or equivalent governed by the law of the domicile of the deceased at the moment when it was sold. In the absence of such a disposition, by way of trust or will giving rise to a conversion from immovable to movable, there could be no application of English law as the law of the domicile to the foreign right. That was so well established that their Lordships had no difficulty in citing the authorities for it. Those principles of private international law have not been changed by s.43(2) ITA 1984.

It is clear that the rights and interests stemming from a French usufructuary dismemberment are already "regulated" by English law as a *chose in action*. There is therefore no reason justifying any flight of fancy, statutory or otherwise by HMRC Newcastle, nor one required of the individual filling out an IHT 400.

There is therefore no reason why what has degenerated into the statutory fiction of s.43(2) IHTA 1984 is required to be reapplied so as to give a usufructuary

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12 *force exécutoire* if issued out of the Notary's minute in that form

dismemberment a different treatment from that of the English law to which reference is made in the statute itself as a legal *chose in action*. That would be supertaxing the "deemed" imagination of both the taxpayer and the Courts to the point of fracture.

What is more, as the legal *chose in action* arises over an immovable property right, it is also classed as an immovable for the purposes of the law, and not as a movable. That removes it from any plausible definition of a settlement and under the reasoning developed in this article, from the first clause of the second paragraph of s.43(2) ITA 1984. Applying the law as stated by their Lordships in *Philipson-Stow*, it is an immovable and remains an immovable. That law remains unchanged and applicable despite the change from Estate Duty to CTT and then IHT.

It is clear that the rights and interests stemming from a French usufructuary dismemberment are already "regulated" by English law as a legal *chose in action* over an immovable. There is therefore no reason justifying any flight of fancy, statutory or otherwise by HMRC Newcastle, nor one required of the individual filling out an IHT 400. Given *Philipson-Stow*, the Courts cannot "exercise their imagination" in HMRC's favour either.

Had Dr. Gilbert made clear what Government was intending in 1975, if it were any more than removing the private international law interface between the *lex rei sitae* (now *lex situs*) and the *lex domicilium*, then the matter would have needed a specific Parliamentary debate. In the absence of any such clarification, the lawyer is entitled to assume that Parliament had no intention of doing as HMRC are currently stating that it did. Parliament simply had no competence to do as HMRC is saying it did, either constitutionally or for that matter through a mere Money Bill. A Money Bill is reliant firstly on the English Court's jurisdiction and then upon what effectively is the common law. Such an initiative is really for the Attorney-General to advise upon: having a competence as the Government's lawyer for matters of international law in international property law matters. Treasury Counsel has no such jurisdiction or competence.

As a *chose in action*, the *usufruit* is valued as a wasting asset in relation to its French statutory and legal valuation, not as the full value of the property. The inverse value of the *nu-propriétaire*'s *chose in action* has to be taken into consideration in the calculation of the value of the *usufruit* at any time of its existence until the *usufruit*'s extinction at nil value.