LEGAL FICTIONS — A CRITICAL ANALYSIS

The uses and benefits of legal fictions are many and fictions have long been recognised as essential to the functioning of law. In this article, John Gwilliam uses both judicial and statutory fictions to show that some fictions have ceased to be useful. He categorises fictions as either static or dynamic and suggests that it is only when a fiction is dynamic that it bridges the gap between the abstract and the particular.

" . . . And these fictions of law, though at first they may startle the student, he will find upon farther consideration to be highly beneficial and useful: especially as this maxim is ever invariably observed, that no fiction shall extend to work an injury; its proper operation being to prevent a mischief, or remedy an inconvenience, that might result from the general rule of law."

— From *Blackstone's Commentaries* Vol. III p. 43 (1768)

I. INTRODUCTION

Blackstone's words are as true today as they were over 200 years ago. For when one looks at legal fictions one is probably startled by the fact that the law must perpetrate lies in order to achieve results. Yet the overwhelming fact is that fictions work, and therefore they can be a highly beneficial and useful device. In its right place the fiction is seen to operate as a device that gives the strict rigid rules of law enough flexibility to deal with the everchanging body of facts they have to face. But while fictions may give the law much of its flexibility, one can sense the danger that these fictions themselves may become inflexible legal concepts. Just as one may use a legal fiction, so there is a danger that one may also abuse it. It is the purpose of this paper to analyse the problems that arise from this indiscriminate use of legal fictions and to reassess the position of the fiction in light of such an analysis. It is therefore a critical analysis in that it is an analysis of the types of problems that legal fictions raise rather than an analysis of the types of legal fictions,[1] though, of course, examples of different types of fictions will be used.

There has never appeared to be much debate as to the reasons why the law has resort to fictions. It is clear that from as early as Blackstone, writers were aware of the fundamental maxim that the primary motive behind the use of a fiction was to prevent a mischief or remedy an inconvenience that might result from the general rule

1. For such an analysis see Fuller, L., *Legal Fictions* (Stanford 1967).

of law. Modern writers such as Fuller[2] see the fiction as forcing upon our attention the relation between theory and fact, between concept and reality and reminding us of the complexity of that relation. The problem that the fiction is intended to solve is, according to Fuller, the bridging of this gap between concept and reality and between understanding and the thing sought to be understood.[3]

As concepts are the instruments of our minds by which we deal with reality and reality is no more than the perception of it by these means, to provide an analysis of how fictions work to bridge this gap between concept and reality is both a pointless and meaningless exercise. The question to be asked is not, How is it that fictions provide us with correct results? but rather, Why is it that they are used, i.e. what is the purpose of employing fictions? Therefore the answer to any question regarding when a fiction will be resorted to will always be governed by pragmatic considerations. The reason why legal fictions will be used in particular circumstances yet not in others will very much depend on the intended legal result. In general terms, the purpose of any fiction is to reconcile a specific result with some premise or postulate. It is the realisation of this reconciliation which provides the basis for determining the validity of fictions in general. But the true mystery of the fiction consists not in the fact that we can reach specific conclusions from abstract ideas, but rather, that the human mind has had to resort to the creation of fictions in order to cope with reality.

All this of course means that the use of any abstract idea involves a resort to fiction. For example the concept of justice is a fiction. In a metaphysical sense it is self contradictory — i.e. what is justice for one man may be injustice for another. Logically then it can not exist. Similarly law itself as an abstract concept is also a fiction. However these types of fictions all involve metaphysical considerations so that they are beyond the scope of the present analysis. This is more clearly shown by adopting Fuller's dichotomy of "big" and "little" fictions. Big fictions, according to Fuller, "furnish a kind of general starting point, an original impetus to thought, they are not like the numerous little fictions of law and physics".[4] Therefore those fictions involving metaphysical considerations can be termed "big fictions". But the present analysis shall be essentially concerned with those "numerous little fictions of law", to which the court and the legislature has resort — i.e. fictions such as the authenticated signature fiction and the trust.

Because this analysis is concerned with the kinds of problems raised by the use of legal fictions, it is intended to break it into two parts. An analysis of what might be called judicial fictions, i.e. fictions of judicial reasoning; and a separate analysis of statutory fictions, i.e. those created by statute. This is largely for the reason that legally they are dealt with in different ways and appear to raise substantially different

2. Op. cit.
3. Op. cit. p. xii.
4. Op. cit. p. ix.

problems. The statutory fiction is there on show before the court. Once it is recognised the court is obliged to use it. Therefore the statutory fiction takes the form of a rule. In contrast to this, judicial fictions become mere devices of judicial reasoning. They are not on show; there is no obligation to use them and they can be discarded at any time.

II. Judicial Fictions

There are many situations in which courts will resort to the use of a fiction.[5] However it is from the reasons behind a fictions use that most problems arise. For the validity of a fiction will always be assessed in relation to its purpose and this assessment will invariably involve a consideration of Blackstone's maxim, namely that a fiction should be used solely to prevent an injustice occurring from the strict application of the law.[6] By examining some samples of fictions that have been resorted to in the past and the reasons behind their particular uses, one can see the number of advantages obtained through their use. Yet it will also be seen that they each raise potentially similar problems.

A. Conceptual Common Law Fictions

Probably the most commonly known is the notorious authenticated signature fiction.[7] It is also perhaps the most illustrative of Blackstone's maxim. It is used by the courts to overcome any harshness imposed by the Statute of Frauds (1677)[8] which provides that all contracts in relation to the sale of land must be in writing and signed by the party 'to be charged therewith', i.e. the person against whom the contract is to be enforced. The courts will deem a contract to be signed for the purposes of the statute if that party's name appears anywhere on the memorandum, whether written, typed, or printed; though, in fact, he has not actually signed it. This provides the party who is attempting to enforce the contract with some relief from the strict rule of law imposed by the Act, because it is this party that is usually the one that has signed the memorandum and therefore rightly expects that the contract will be binding and the resulting transaction carried through.

Another fiction of a somewhat different sort is that provided by the doctrine of land tenure.[9] This is the fiction that the Crown has absolute ownership of all land. Ordinary landowners are said to own an estate in land and this fictional entity is said to be granted by the Crown to the landowner, the Crown still retaining the absolute ownership of the land. This fiction has not so much been created as has evolved from the feudal times when the King would grant land to his

5. For examples see Fuller, op. cit.
6. See epigraph.
7. For recent applications of the fiction see *Short* v. *March* [1974]1 N.Z.L.R. 722, and *Sturt* v. *McInnes* [1974]1 N.Z.L.R. 729.
8. In New Zealand the Contracts Enforcement Act, 1956.
9. Introduced as part of New Zealand Law in *Veale* v. *Brown* (1868) 1 N.Z.C.A. 152.

subjects in return for certain services. The King was then, practically and theoretically, seen to have ownership of all land within his kingdom. Today, however, this is of purely theoretical value[10] for, in practice, landowners can exercise absolute ownership over their land subject only to statutory restrictions and their own contractual obligations. Therefore the fiction has evolved through a change in the social structure of land ownership. However the fiction has been retained to provide a justification for statutory control over the landowner's rights. If landowners had absolute ownership it is considered that there would be no theoretical justification for any statutory intervention. Therefore what the fiction does is to create a rational basis on which the law can control the way landowners deal with their land. This is that the Crown, now represented through Parliament by statute, can exercise control over any land within its realm because it is the original grantor of the estate and still retains absolute ownership. In terms of Blackstone's maxim the strict rule of law here is the notion that absolute ownership entails being able to use ones land free from any outside controls. The injustice of employing such a rule is said to be that neighbours' rights could be infringed through the landowner exercising his own rights and there would be no recourse to the courts to remedy any such infringement.

The common law provides us with yet another different kind of fiction, that of the 'reasonable man of ordinary prudence'. This fictional figure is central to the formula traditionally employed in passing the negligence issue for adjudication to the jury. Unable to pass judgment himelf on the particular defendent involved in the litigation, the judge is obliged, in formulating his instruction to the jury, to concert the problem of conduct into an abstraction sufficiently intelligible to guide them as to the legal considerations which they ought to apply to assessing the quality of this defendant's conduct. In order to objectify the law's abstractions the 'man of ordinary prudence' was invented[11] as a model of the standard to which all men are required to conform. The fiction seeks its justification in the fact that if it were not applied and a more relaxed subjective one were, this would lead inevitably to a large scale denial of compensation to accident victims and this is incompatible with the modern policy of wide and effective distribution of accident losses. Here again, we can sense the presence of Blackstones' maxim in the motive behind the fiction's use; for it is this policy of wide and effective distribution of accident losses that has given it such wide application as to include both sane and insane defendants[12] and to judge both inexperienced and experienced professional men in the same light.[13]

10. The only practical effect has been in the wording of statutes. In particular, see the Town and Country Planning Act 1953 and the Public Works Act 1928 where the Crown does not 'purchase' land; rather there is a 'compulsory acquisition' of land for which the Crown is bound to pay 'compensation'.
11. First used in *Vaughan* v. *Menlove* (1837) 3 Bing. N. C. 468, 475.
12. E.g. *Adamson* v. *Motor Vehicle Trust* (1957) 58 W.A.L.R. 56.
13. E.g. *Jones* v. *Manchester Corporation* [1952] 2 Q.B. 852.

Equity also provides many interesting examples of fictions, the most important being the trust. This originated from the medieval concept of use which consisted in the equitable right to receive the profit or benefit of lands and tenements, which was, in cases of land conveyed to uses, divorced from the land's legal ownership. In other words, land conveyed to A for the use of B was held by the courts of equity to be for the benefit of B even though A had the legal estate. The modern trust is the descendant of the use upon a use which was a device used to avoid the Statute of Uses (1535). This statute was passed in order to execute all uses by taking the legal estate out of A (to whom the land was conveyed) and converting the so-called equitable interest of B (to whom the use was made) into a corresponding legal estate. But if land was conveyed to A for the use of B for the use of C it was held that the statute only affected the first use. Therefore, although B had the legal estate the courts of equity recognised that C had a further equitable interest.[14] Therefore in the modern trust situation B as the trustee has the legal ownership of the property but C as beneficiary is recognised by the court as being entitled to all the profits and benefits of that property — i.e. C is treated as if he were the legal owner. Therefore the trust is enforced by the courts in order that the intention of the settlor is best carried out so that actual benefit of the property will go to the person or persons intended by the settlor. Further, through constructive and resulting trusts the equity courts have been able to use the trust concept as a convenient device for providing relief to a party which, in common law, that party may not have have been entitled to.

These few examples show some of the many situations in which fictions have been used and one is able to see the number of advantages that the court has obtained through their use. But it is submitted that each of these particular fictions outlined above raises potential problems for the court. For they are all fictions that stand before the court in their own right and therefore can be used indiscriminately as rigid rules of law applied independently of the particular fact situation. In other words what the court has done is to create another rule in order to overcome the injustices of a former rule. This creates the danger that the original purpose of using the fiction will be forgotten with the result that it will become open to abuse.

B. Particular Common Law Fictions

Yet there is a clear distinction between those fictions found on their own as separate concepts such as the examples above and those found only on a case to case basis. One can point to cases such as *In re Aldridge*,[15] *Unity Finance Ltd.* v. *Hammond*[16] and *In re Clarke*[17]

14. For detailed discussion on the development of the trust see Hanbury *Modern Equity* (9th Ed. London, 1969) p. 9.
15. (1896) 15 N.Z.L.R. 361.
16. (1965) 109 S.J. 70.
17. [1901] 2 Ch. 110.

which show the fiction at its best — i.e. as a device to obtain an intended legal result.

In re Aldridge involved a somewhat startling fiction, where a person was held to be a de facto Judge — i.e. even though he was not a Judge it was held that his decision had to be followed as if he were a Judge. At face value this fiction might appear to undermine our most hallowed ideas of the judiciary. But if we look to the particular facts of the case we can see the justification behind the use of the fiction. On Aldridge's behalf a writ of habeus corpus was applied for on the grounds that the presiding Judge was not entitled to sit on the Supreme Court bench and had no authority to convict and sentence him. The court held that as this Judge could be called a de facto Judge, the validity of his acts could not be questioned and one must regard his acts as those of a real Judge. A greater injustice would have occurred if the fiction were not applied because it could have opened the "floodgates of litigation" to every criminal convicted by a Judge who is later removed from office or whose appointment is purely conditional on 'good behaviour',[18] i.e. the fiction prevented an injustice to the community at large and was therefore used to help obtain the intended result. But this is not to say that the fiction must always be resorted to — i.e. that the acts of any de facto Judge will always be regarded as those of a real Judge. Indeed in the later case of *Adams* v. *Adams*[19] the court explicitly declined to use this fiction. That case involved the granting of a divorce by a Rhodesian Judge. The English court refused to recognise it because the Judge had been installed under 'a new government which had usurped power'. Therefore he was not recognised as a duly appointed Judge under English law; the court taking the view that this was still the law of Rhodesia.

Unity Finance[20] involved the fiction that a car with a small steering defect was to be treated as if it were not a car at all so that this would constitute a fundamental breach of the contract between the vendor and purchaser of the car. The fiction was largely used by Lord Denning to show his dislike for exemption clauses such as the one in this case which was that the vendor accepted no responsibility for the condition of the car. Therefore, in fact, what Denning was doing was adding a new term to the contract. But the fiction enabled him to reach the intended legal result — namely that the purchaser should be able to rescind the contract.

In re Clarke[21] dealt with a gift to an unincorporated society. Because such a society has no legal status apart from its individual members there is a problem of how to dispose of any gifts that are made to them. Here the court applied the fiction that the gift was to all the individual members in the name of the society. This was not, of course, the intention of the person making the gift who obviously

18. (1896) 15 N.Z.L.R. 361, 376.
19. [1971] P. 188.
20. (1965) 109 S.J. 70.
21. [1901] 2 Ch. 110.

considered the society as a separate entity and not as consisting of individual members who would each take absolutely a share of the gift. But the court treated this as if it were the real intention of the person making the gift. Therefore the result was that, in practical terms, the real intention was carried out in that the gift was made effective. Again we see the court looking towards the intended result namely that the gift be made effective and then using the fiction in order to obtain that result. This, it is submitted is the true vocation of the fiction.

C. Static/Dynamic Distinction

These latter examples show the court looking towards the consequences of using or not using that fiction. In other words, the court has already made a decision irrespective of the requirements imposed by the law. It then seeks to validate the legal reasoning behind its decision by resorting to the use of a fiction. One can call these *dynamic fictions* in that the court is involved in a constant process of manipulating its reasons to fit the result. But the major problems arising from judicial fictions are not those of dynamic fictions but rather those of what can be called *static fictions*. A fiction becomes static when the court no longer looks towards the consequences of using that fiction but rather looks to the present position of the law. The fiction itself, becomes used as an inflexible concept of law without the court taking into account the particular consequences that will ensue. In other words, the court becomes obsessed by the fiction into carrying out what seem to be natural repercussions — the fiction is applied and the result is logically deduced therefrom. There is no manipulation of reasons to fit the result as the result is seen as being logically deduced from ideas already postulated.

One can see that dynamic fictions are never made 'accidentally' or 'habitually' in that they will always be applied with a knowledge of the consequences in each particular case. Static fictions on the other hand do not depend on particular cases and are often made 'habitually' or 'accidentally' in that the court might not consider them fictions at the time they are used. Dynamic fictions concern themselves with the practicalities of the law whereas static fictions become trapped by the theoretical aspects. Consequently dynamic fictions seek their validity in the final result of the case; static fictions seek their validity in the conceptual structure of the case. Further, dynamic fictions are invariably made through necessity where no other course is open to the court. Static fictions become unnecessary and therefore superfluous and cumbersome. Hence dynamic fictions will involve pragmatic considerations while static fictions involve only conceptual considerations.

It is now proposed to reassess the particular problems raised by the above four conceptual examples in light of this static-dynamic distinction.

The basic problem raised by the authenticated signature fiction is

that because it has become used so frequently and somewhat indiscriminately by the courts there is a danger that it could become a static fiction. So far the fiction can be seen in a dynamic context in that the court is to a degree looking towards the consequences of its use, preventing any harshness that may occur through the strict application of the Statute of Frauds. But there is a real danger that through applying the fiction indiscriminately it will become another rule of law with the result that the court is forced into carrying out what seem to be natural repercussions — i.e. the individual circumstances of each case are ignored and the fiction is used in all cases where one party is attempting to enforce a contract against another who has not formally signed it. Thus the fiction becomes open to abuse with the likelihood that some injustices could result.

The fictional ownership of all land by the Crown raises further problems as it is a totally static fiction. This can be seen firstly in the fact that the fiction was not invented but rather evolved from a change in the social structure. Therefore the fiction has never been used in a truly dynamic context — i.e. it was never "invented" by the courts to fulfil some particular purpose. Secondly, the fiction operates purely on a theoretical level and seeks its justification in some obscure notion that absolute ownership entails absolute freedom and is therefore, not only socially undesirable but also practically impossible. It is this type of justification that makes one somewhat sceptical of the real necessity of the fiction. For there are ways of justifying statutory control where there is so called 'absolute ownership' of land — the American system providing an immediate example. Therefore any necessity the fiction may have originally had appears to have been lost when we compare it to other legal systems which have been able to operate without it. A fictional doctrine should only be made for necessity and this principle has since Blackstone been recognised. A fiction that is no longer necessary to achieve its purpose should be discarded. If it is not discarded then it becomes static.

The reasonable man has also become a static fiction that is no longer necessary to achieve its purpose. When the fiction was originally introduced its purpose was to aid the jury in the assessment of the defendant's conduct and therefore there was a certain dynamic element about it. If the jury wished to provide relief to the plaintiff, the fiction could be resorted to in the sense that the defendant's conduct would be held to be short of the required standard. But with the tendency towards a diminished use of juries in modern civil cases there is the danger that judges' decisions of fact may come to be treated as laying down detailed rules of law.[22] In other words the fiction could become completely static. For example, a certain type of conduct may be held to be below that of the 'reasonable man' in order that the plaintiff be entitled to damages. This is now seen as a hard rule of law and as

22. See *Qualcast (Wolverhampton) Ltd* v. *Harper* [1959] A.C. 743 per Somervell L.J. at pp. 757-758, per Lord Denning at pp. 759-761 where this tendency to regard findings of fact as findings of law was expressly condemned.

setting a precedent if another case involving similar conduct appears before the court. Consequently the fiction will be applied irrespective of other considerations. It might not take into account such other factors as the plaintiff's own conduct or the extent of his injuries — i.e. considerations relevant to the important question of whether the plaintiff should be entitled to damages. Therefore the fact that a certain type of conduct on the part of the defendant does not meet this fictional standard is seen to logically imply that the plaintiff shall be entitled to relief. Previously the fiction was not applied until after the initial decision was made as to whether the plaintiff should be entitled to relief or not. But we can see the problems inherent in the fiction when we recall that its original purpose was to provide a blanket rule by which to judge a defendant's conduct — no consideration could be made for particular circumstances of each case. The result in each case is that the fiction is applied indiscriminately so that individuals are often held guilty of legal fault for failing to live up to a standard which as a matter of fact they can not meet. Therefore one can question whether 'the reasonable man' is still a necessary fiction; especially in light of the fact that it is now the judge who is faced with the task of applying it. If the primary motive of the court is to provide relief to the injured party then one should be able to do so without having to resort to a fiction in order to find some kind of legal fault.

The problem raised by trusts can be seen in the context of what were once dynamic fictions but which have now become totally static. The only cases in which the court is still able to use the trust in a dynamic way are with resulting and constructive trusts. But the trust itself, as it is enforced by the courts has become completely static. It is no longer seen as a fiction but as a real entity and the courts appear to have lost sight of the original purpose in enforcing it. Consequently one now sees the trust as a major tool of estate planning in that it has now become a useful tax avoidance device. This result has been brought about by what has appeared to be a natural extension of the fiction into taxation laws. The courts now find themselves with trust litigation which is mostly between tax collectors and trustees who want to determine the taxable assets of the trust and to decide whether or not these trusts are valid for tax paying purposes. Yet there was no reason in the first place, apart from the actions of the legislature why the court should have accepted that some trusts had to be separate tax paying units. Therefore the majority of modern trust litigation that goes on in our courts is vastly different from the original setting which prompted the courts to recognise and enforce the trust in the first place. The court now applies the fiction indiscriminately without taking into account any particular consequences and it is clear that in some cases its original acceptance as a separate tax paying unit was the result of a logical deduction from the characteristics of the fiction itself.

Even particular fictions approached on a case to case basis, which in themselves are purely dynamic, can still be faced with the threat

of becoming static. Often, because of the doctrine of precedent, particular fictions used in one case will be misinterpreted when reused by later courts in similar fact situations. A clear example of this kind of situation was the way later courts dealt with gifts to unincorporated societies. The fiction used in *In re Clarke*[23] that such a gift can be treated as if it were a gift to each individual member of the society absolutely, has been completely misunderstood by the later courts which have held that this can only be a prima facie presumption which can be rebutted by such considerations as the actual form of the gift and its subject matter.[24] Therefore not only has the fiction been improperly construed as a presumption[25] but also, those considerations that are taken into account in rebutting the presumption are all based on an assessment of what is the real intention of the person making the gift. The result is of course, that the presumption must ultimately fail because it clearly does not represent the actual intention and was never intended to. This means that the gift will ultimately fail and one is left with the original problem which *In re Clark* attempted to avoid — namely that, although, in law, unincorporated societies have no separate existence, and cannot own or divest property, to the layman they do have in the sense that people will keep on making gifts to them in the belief that they are a separate entity. It is, therefore, unjustifiable that the court should not give proper effect to such gifts.[26]

D. The Importance of the Static/Dynamic Distinction

The article has, to this point, been concerned to outline the many different problems that some fictions raise when they are employed by the courts and it has attempted to analyse these problems in terms of static and dynamic fictions. It is now necessary to say something of the importance of this dichotomy and to show how this analysis fits into the general scheme of judicial reasoning.

The dynamic/static analysis can be applied to the whole field of judicial reasoning and, indeed, is borrowed from Becker's article on analogies.[27] Here Becker talks of two components of analogies. Firstly, static analogies which are analysed merely in terms of the similarities between the two analogs and secondly, dynamic analogies which are analysed in terms of the consequences of comparing the two analogs. Becker says that to recognise this second type is to take a significant step toward understanding judicial reasoning more accurately and toward understanding how one might begin to explicate criteria of

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23. [1901] 2 Ch. 110.
24. For examples of these kinds of considerations see *Leahy* v. *Att. Gen. (NSW)* [1959] A.C. 457 and *Bacon* v. *Pianta* (1966) 114 C.L.R. 634.
25. For the distinction between a fiction and a presumption see *Fuller* op. cit. p. 45.
26. However it now appears that the courts are prepared to look at unincorporated societies in a more favourable light as regards their capacity to receive gifts. See *In re Rechers Wills Trusts* [1972] 1 Ch. 531.
27. "Analogy in Legal Reasoning", Ethics Vol 83, No, 3 April (1973) p. 248.

validity for the analogical argument found in judicial reasoning.[28] According to Becker "relevance, or validity (i.e. whether A and B are appropriately thought of as analogs for a given purpose) is decided here in just the same way one decides the worth of a theoretical model: in terms of its consequences for predictive, explanatory, heuristic, or other tasks".[29]

Therefore, Becker submits that this leads to a very different and more directly manageable notion for validity arguments than is introduced by the usual search for 'relevant similarities' — i.e. the dynamic analogy is more crucial than the static analogy because it carries on its face the outline of validity conditions for analogical arguments in general. Similarly, on this analysis dynamic fictions, like dynamic analogies are more crucial than static fictions in that they carry on their face the outline of validity conditions for fictions in general. The purpose of any legal fiction will always be to reconcile a specific legal result with some premise or postulate[30] and this will always be governed to some extent by pragmatic considerations. Further, dynamic fictions are far more explicit in their effect on the development of the law and one can see their importance in providing the law with much flexibility. But in general terms the dynamic fiction allows us to assess the true nature of judicial reasoning as a dynamic process of searching for some path in order to reach an already chosen destination.

One question still remains and that is: why is it that there is always a danger that a fiction may become static? In clearer terms: what causes this process? What must first be accepted is that thought, with its complex of fictions, may be compared to the mechanism of a machine. The ideal is to do the greatest possible amount of work with the least possible amount of effort. What screws, levers, pulleys, planes and the like are to mechanics fictions are to thought. As rational beings we must always operate with them, but our rationality consists in the recognition of their fictitiousness. But this is the tragedy of life — to live and to act as if fiction were theoretically true.[31] Transforming this 'tragedy of life' into the judicial process one can see how this phenomenon is brought about from the tendency of the courts to treat a fiction as if it were theoretically true. In formulating a rule that will prevent this misuse of fictions, one must set up the precept that the fiction must drop out of the final reckoning. The fictional social contract whereby the community can derive the right to punish others provides an immediate example. The contract forms the intermediate idea from which the rights in question can be theoretically deduced. In the conclusion itself, however, the intermediate idea drops out, and so it drops out of the completed thought process.[32] A static fiction does not drop out of the conclusion and it becomes the sole premise from which the conclusion is deduced.

28. Ibid. p. 255.
29. Ibid, pp. 251-252.
30. See part I. Introduction.
31. For a fuller treatment of this argument see Vaihinger H., *The Philosophy of "As if"* (London, 1924).
32. As suggested by Vaihinger H., op. cit. p. 112.

Fuller attributes this phenomenon to what he calls 'hypostatization'[33] and traces it to dangers inherent in the use of concepts. He distinguishes three such dangers.[34] Firstly the centripetal force of the concept which proceeds from the penchant of the human mind for simplicity; secondly, their capacity inducing reification which is produced by isolating a reasoning process from its context; and thirdly, their metaphorical contamination which arises from the fact that human reasoning proceeds by assimilating new experiences under familiar categories. Cohen, in his paper on 'Jurisprudence as a Philosophical Discipline'[35] calls this tendency towards reification and hypostatization, a 'vicious kind of intellectualism'[36] in that it treats all concepts as unchangeable entities which are independent of any context into which they enter. He compares this phenomenon to Pound's "mechanical jurisprudence":[37] a jurisprudence in which deductions are made from concepts without taking into account the question whether changing conditions have made them no longer applicable. Therefore one can see that the static fiction of judicial reasoning is a product of a far wider process that underlies the whole law. This is the requirement that the law should be rational — i.e. deducible from established principles; which compels it to assume the form of a deductive science. But this deduction soon becomes an end in itself and is frequently pursued in flagrant contradiction with the ends of justice. It is this process which causes most problems for the judicial fiction in that it stifles much development that could be made within the law.[38]

III. Statutory Fictions

It can be seen at once that statutory fictions are, from the courts point of view, in an entirely different position from that of judicial fictions. For the courts the statutory fiction represents no less than a rule which it is bound to observe and apply. Therefore once a statutory fiction becomes unworkable and no longer necessary it can not be discarded by the court in the same way as the judicial fiction. It can only be changed by statute because theoretically the courts are powerless. The prime instigator of such fictions, i.e. the legislature, does not see itself bound by such doctrines as outlined by Blackstone[39] and in terms of constitutional theory, the legislature, as the supreme law-making body is seen by the courts to be free to apply what fictions it wishes. Therefore, theoretically at least, one might expect to see a wide

33. Op. cit. p. 118: 'Hypostatization consists in the isolation of one step in a reasoning process out of its compensatory context'.
34. Ibid p. 123.
35. From Cohen M.R., *Reason and Law* (1950) pp. 129-136.
36. Ibid p. 132.
37. Pound, "Mechanical Jurisprudence" (1908) 8 Col. Law. Rev. 605.
38. Cohen claims that it is this 'false intellectualism' which, under the guise of natural rights, is in the United States today stifling all progressive social legislation op. cit. p. 132.
39. See epigraph.

indiscriminate use of these kinds of fictions with the law becoming bogged down with fictions that are both unnecessary and unjustifiable. In practice, of course, such a situation is prevented by the courts because although it may be the legislature that creates the fiction it is the courts that give it effect. Therefore the problems associated with statutory fictions arise not so much from the actions of the legislature as from the way the courts interpret them.

Just as there are rules that govern the use of judicial fictions so there are rules that govern the interpretation of statutory fictions — the most general rule being that laid down by James L.J.:[40]

> When a statute enacts that something should be 'deemed' to have been done which, in fact and truth, was not done, the court is entitled and bound to ascertain for what purpose and between what persons the statutory fiction is to be resorted to.

This means that the court will only give effect to the fiction within the limits of the ascertained purpose that is behind it and this essentially involves the court in making a decision as to what this purpose is. Therefore those statutory fictions that pose the most problems for the court are invariably those whose purpose is difficult or impossible to obtain.

Initially one can distinguish between two types of statutory fictions — those used by the legal draftsman in order to make the statute coherent and free of loopholes and those actually incorporated into the statute through the intention of the legislature, itself. I shall call these respectively expository and general statutory fictions. It will be seen that it is the expository statutory fiction that provides most of the problems because it is this kind of fiction which is often placed in a statute without reference to its particular purpose. General statutory fictions, on the other hand, are usually written so that their purpose is made clear. Furthermore the court itself is in a position to ascertain far more clearly the general purpose of the legislation than the specific purpose of fictions employed only by the legal draftsman. For example, general statutory fictions such as those laid down in the Simultaneous Deaths Act 1958 and various parts of the Wills Act 1837 (U.K.) present few, if any, problems. The Simultaneous Deaths Act provides that where the property of two people, who die simultaneously or in circumstances such that it is unclear which person died first, is to be disposed of, then the 'younger shall be deemed to have survived the elder'.[41] Similarly the Wills Act provides that in the case of a testator who leaves all or part of his estate to issue who has predeceased him, then that gift shall take effect as if the death of that issue had occurred immediately after the death of the testator.[42] The purpose of these fictions is to prevent confusion as to how property should be disposed

40. *Ex parte Walton* 17 Ch. D. 746, 756.
41. S. 3(1) (i).
42. See in particular the Wills Amendment Act 1955, S. 16 and 833.

of in such circumstances. The courts then, aware of the purpose behind these fictions will not extend them to situations that might conflict with that purpose. For example, consider the decision in *Jones* v. *Hensler*[43] which dealt with the application of S.33 Wills Act:

> . . . the question arises whether the son must by a legal fiction be taken to have survived his father for all purposes, or to have survived him only for the purpose of giving effect to the gift of the father . . . Should the fiction be extended to include the situation where a son gives his father everything under the will? Clearly not; such as extension would make the will of the father ineffective, contrary to the original purposes of the fiction.[44]

The purpose behind the fiction — namely to give effect to the gift of the father — was easily ascertainable and from there the court was able to assess whether or not in these particular circumstances it should be given effect.

This example shows how the courts are unwilling to extend general statutory fictions beyond their original purpose but this is not to say that such fictions do not present problems. Indeed, the big problem is that they are sometimes misunderstood. For example consider Henry J's dicta in *Eunson* v. *CIR*.[45] Here the court was concerned with an interpretation of s.88(c) of the Land and Income Tax Act 1954 which stated:

> Without in anyway limiting the meaning of the term, the assessable income of any person shall for the purpose of this Act be deemed to include, save so far as express provision is made in this Act to the contrary, . . .
> . . . c) All profits or gains derived from the sale or other disposition of any real or personal property or any interest therein, . . .

Henry J. made the following comment:

> I reject any suggestion that the third limb of s.88(c) so departs from the general scheme of income tax that it imposes what is tantamount to a capital gains tax. It does not sweep away the distinction, long recognised by the courts, between capital gains and income gains . . .[46]

It appears that he completely misunderstands the fiction created by this particular section that certain types of capital gains are to be included in the assessable income as if they were income gains.

But it is clear that most problems associated with the interpretation of statutory fictions will very much depend on the actual words used

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43. (1881) 19 Ch.D. 612.
44. Ibid. p. 615.
45. [1963] N.Z.L.R. 278.
46. Ibid. at p. 280.

in the particular provision — the most common expression being that used by the deeming provision — 'shall be deemed'. The other major expression used is the more explicit 'as if' — e.g. " . . . the disposition shall be treated as regards any exercise of the right within the perpetuity period, *as if* it were not so invalid".[47] If one compares this particular provision to a later deeming provision in the same Act one can see the basic difference in their structure which makes it easier to give effect to the 'as if' provision than to the deeming provision. Consider: "The rule against perpetuities shall not apply and *shall be deemed* never to have applied to the trusts of any fund . . . ".[48] Note that the specific purpose behind the use of the fiction in the 'as if' provision is clearly set out — e.g. 'As regards any exercise of the right within the perpetuity period' and there is no danger of the fiction being extended beyond its explicit purpose — i.e. the fiction is clearly bound by the words themselves. The deeming provision, on the other hand, gives the fiction a more mandatory nature and does not set out any specific purpose for its inclusion. In other words, the fiction appears to be unbounded and capable of covering all situations. Though, in this particular instance, the purpose of the deeming provision can be ascertained by looking at the Act as a whole — its main purpose being to give the section retrospective effect. Therefore it is the deeming provision in regard to its interpretation and its resultant effect on the law that presents the court with the most problems.

The problems surrounding deeming provisions, themselves, are further exacerbated by the fact that they are used so frequently[49] and indiscriminately. For the deeming provision does not always imply that there is a fiction. It is sometimes only used in a declaratory way to state an indisputable conclusion. Thus in *Muller* v. *Dalgety*[50] it was acknowledged that the deeming provision could be used in two senses — to import an exclusive definition or an extension of meaning in which it took the form of a statutory fiction. But it is more commonly used for the purpose of creating a statutory fiction — i.e. extending the meaning of some term to a subject matter which it does not properly designate. Lord Radcliffe,[51] on the other hand, managed to find three different uses of deeming provisions:

> . . . Sometimes it is used to impose for the purposes of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is, in the ordinary sense, impossible.

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47. Perpetuities Act 1964, s. 8(3).
48. Ibid. s. 19(1).
49. From a sample year's legislation (1973) it was found that on average one of every six sections contained a deeming provision.
50. (1909) 9 C.L.R. 693, 696.
51. In *St. Aubyn* (L.M.) v. *Att-Gen (No 2)* [1952] A.C. 15.

But perhaps the major problem today posed by the deeming provision especially when it is being used in an expository way is that it is being "overused" with the effect that in some circumstances it has become a synonym for 'is'. Consider the following two examples:

1. Property Law Amendment Act 1975 s. 116K " . . . b) Evicts the lessee then the eviction shall be deemed wrongful and the lessor shall be liable in damages to the lessee accordingly".

2. Immigration Act 1964 .22(4): " . . . the recommendation for deportation shall be deemed to be suspended pending the determination of the appeal . . . "

If we delete both the expressions 'deemed' and 'deemed to be' we are left with essentially the same provisions, i.e. 'the eviction shall be wrongful and the lessor shall be liable in damages to the lessee accordingly' and 'the recommendation for deportation shall be suspended pending the determination of the appeal'. In other words, in these particular cases, the deeming provision has served no use at all — it has become superfluous. Probably these deeming provisions have been included because of some obscure notion of law that it is the court, not the legislature who decides whether an eviction is 'wrongful'[52] and whether an indisputable part of its sentence is to be suspended pending an appeal on another matter.[53]

But as I am essentially concerned with the problems that deeming provisions raise in their capacity as statutory fictions it is best to look at the areas of legislation in which one mostly finds them. After taking a sample year's legislation it was found that these kinds of provisions were used far more in remedial legislation, i.e. legislation that is passed to meet such defects and superfluities in the law that arise either from the general imperfection of human laws or from the changes of time and circumstances. Therefore it was found that there was a high percentage of deeming provisions implying statutory fictions in such legislation as the Industrial Relations Act, the Property Speculation Tax Act, the Overseas Investment Act, the Rate Rebate Act and the Volunteers Employment Protection Act. It is here that one can sense an analogy with the way the courts use judicial fictions, i.e. judicial fictions are essentially used to help the law deal with its own general imperfection — namely its inability to apply strict rigid concepts to an everchanging world. Remedial legislation is basically made for similar reasons. The legislature senses defects or superfluities in some past legislation and will pass new legislation to try and remedy those defects and superfluities. Consequently this is where the statutory fiction is seen to be most useful.

At the other end of the scale statutory fictions are seldom used in penal legislation. This can be traced to the principle that it is an

52. Cf. Rent Appeal Act 1973, s.20(3) " . . . and every eviction . . . *shall be unlawful*".
53. Cf. Plant Varieties Act 1973, s. 31: " . . . the operation of that decision *shall be suspended* until the final decision of the appeal".

injustice to hold one at fault for something he has, in truth, not done, but which in law he is 'deemed' to have done. But this principle is often discarded during periods of war and states of emergency. Most emergency legislation of a penal nature that is passed during such periods makes considerable use of statutory fictions in order to give that legislation the widest possible effect. A good example of this kind of legislation is the Official Secrets Act 1951 where rules as to the evidence required to secure a conviction under the Act are made so wide[54] as to secure a conviction against almost anyone. This, of course, shows the statutory fiction at its worst but also at its strongest. The only safeguard against such legislation is that the Attorney-General must give his consent to any such prosecutions and that, in peacetime at least, such legislation is never made and what legislation is made, is rarely used. But the problems that arise when statutory fictions are used in this way can never be solved by the courts for it is only the legislature than can change them.

IV. Conclusion

What must be first acknowledged is that although the above discussion proceeded with an analysis of two different types of fictions — judicial and statutory, for our purposes at least, they raise essentially the same problems. The court, in both cases gives the fiction its practical effect and therefore both types can be essentially analysed within a static-dynamic context for in regard to statutory fictions the courts will often place an interpretation upon it in a dynamic context and will see themseves bound by that interpretation in a different and unworkable context (i.e. the fiction has become static). Problems raised by statutory fictions as used in emergency legislation are outside the courts jurisdiction and these problems raise substantially different issues not entirely relevant to the present analysis. But the problems encountered by the courts in interpreting statutory fictions must be seen in the same light as those problems encountered by the courts in the use of judiciary fictions.

The fact that much statutory fiction is used in remedial legislation tends to place the statutory fiction in the same position as the judicial fiction — namely as a device that gives flexibility to the law. It is in this respect that one must assess the problems of both kinds of fictions.

In relation then to the above analysis what should be the position of the legal fiction? The static-dynamic dichotomy provides the bulk of the answer. The fiction finds its true worth in a dynamic context. It should not become a rule which the courts rigidly apply, but rather depend on the individual facts of each case. In this respect it must remain the ever faithful servant of both the judge and the legislature for the essential problem of the static fiction is that it has become

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54. See in particular s. 4(2), 4(1), and 15(2).
55. E.g. *Jones* v. *Hensler* (1881) 19 Ch. D. 612.

the master. Fictions that stand on their own, independent of any particular fact situation, are potentially dangerous and open to abuse. The fiction should remain humble, lifting its head only to acknowledge the particular consequence of its use. Therefore the key to any analysis of legal fictions is not to examine the fictions themselves, but rather to examine the different cases in which a fiction has been used and to inquire why it was used. This question will provide far more fruitful answers than by going to the fiction itself, and asking when and in what circumstances it will be used. For this latter question will be meaningless becaue it tacitly assumes that the fiction is a rule capable of application. But one does not 'apply' a fiction rather one 'invents' it and this, it is submitted, represents the essential distinction between what is a valid fiction and what is an invalid fiction; or, in the terminology of the view presented here, the distinction between a dynamic fiction and a static fiction.

JOHN GWILLIAM.