Bennion on Statute Law – 2nd edition

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Part I

Chapter Nine

Existing Rules of Interpretation

Although Parliament creates the texts, it says nothing about how they are to be interpreted. The so-called Interpretation Acts are no more than devices for shortening language. This was admitted in the long title of the first of them, Lord Brougham's Act of 1850. As Lord Scarman said in 1980: 'It has been axiomatic among lawyers and, indeed, in our legal professional thinking for a very long time that the interpretation of statutes is a matter for the judges; it is not a matter for legislation' (House of Lords Deb, 13 February 1980, col. 276).

Yet the judges are denied by the nature of their function the opportunity of drawing up satisfactory rules. The court's duty is to apply the law in the case before it. A judge cannot easily essay general principles when anxious litigants, looking no further than their own case, stand before him. Fragmentary *obiter dicta* are the best he can manage. Some judges have given up altogether. Lord Wilberforce says that statutory interpretation 'is what is nowadays popularly called a non-subject' (House of Lords Deb, 16 November 1966, col 1294).

But it is not a non-subject. Sir Rupert Cross recognized this when he recently turned aside from his usual academic work to write a book on it. His reasons for doing so are instructive. They spring from the reactions of his pupils when told to write essays criticizing the English rules. 'Each and every pupil told me that there were three rules — the literal rule, the golden rule and the mischief rule, and that the Courts invoke whichever of them is believed to do justice in the particular case' (Cross 1976, p v). Cross tells us that he felt a growing malaise over the mystery concerning the precise nature of these rules. That his malaise is justified can be confirmed by a reference to *Maxwell*, the leading textbook on the subject. The editor states that opposing counsel putting forward conflicting interpretations will each find *in Maxwell* dicta and illustrations

in support of his case (Maxwell 1969 p v). Nothing could better illustrate the inadequacy of the present situation. Its origins lie in the legal profession's general ignorance of the twin pillars of statute law: text-creation and text-validation.

By way of preparation for the attempt to put forward constructive suggestions for reform, we end Part I of this book by briefly describing what are regarded as the current rules and guidelines for statutory interpretation. We begin with what may be called the three primary rules.

The mischief rule

The so-called mischief rule is otherwise known as the rule in *Heydon 's Case* ((1584) 3 Co Rep 7a). The court held that four factors must be considered:

1 What was the *common law* before the making of the Act?
2 What was the *mischief and defect* for which the common law did not provide?
3 What *remedy* has parliament appointed to cure the mischief and defect?
4 What is the *true reason* of the remedy?

The ruling continued: 'and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and ... to add force and life to the cure and remedy, according to the true intent of the makers of the Act . . .'.

After nearly four centuries, the ruling continues to be cited because it is a succinct statement of the general interpretative process. The references to the common law should now be widened to include statute law, but otherwise the language stands. Its importance lies in the fact that it requires the interpreter to look beyond the legislative text itself. In the absence of a preamble or purpose clause, the text will not fully reveal either the 'mischief or defect' or the 'true reason of the remedy'. The extent to which a court may look beyond the text is a question of vital importance, to which we return.

A modern legacy of the final part of the ruling in *Heydon* s *Case* is found in many Commonwealth Interpretation Acts (though not in the new British Act). It forms a minor exception to the principle stated in the opening sentence of this chapter. As adopted in New Zealand it reads:

> 'Every Act . . . shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act . . . according to its true intent, meaning and spirit.' (Acts Interpretation Act 1924, s 5(/).)

A similar, though briefer, provision is contained as s 11 in the Interpretation Act 1967-68 of Canada (reprinted in Driedger 1974 pp 235-67). The New Zealand provision, which originated in an Act of 1888, has been acknowledged to be a failure (see Zander 1980, p 86). It merely creates confusion (for an instance of this see *A-G of New Zealand* v *Ortiz* [1982] 3 All ER 432). The problems of statutory interpretation are far too complex to be solved, or even assisted, by formulas of this kind (for a full explanation of the reasons for this see Bennion 1981 (8)).

In truncated form the New Zealand provision found favour with the British Law Commissions. The draft bill on interpretation put forward by the Commissions in 1969 contained the statement that the principles to be applied should include the following: 'that a construction which would promote the general legislative purpose underlying the provision in question is to be preferred to a construction which would not' (Law Com No 21, p 51). The Commissions explained that they did not use the word 'mischief because they preferred to avoid words which for the layman have an archaic ring *(ibid,* p 49). Laymen do not however read Interpretation Acts; and the term is well understood by lawyers.

When in 1980 Lord Scarman attempted unsuccessfully to persuade the House of Lords to give a second reading to the Law Commissions' bill, their lordships agreed that whatever might be said about other provisions of the bill this one was unnecessary (House of Lords Deb, 13 February 1980, cols 276—306). Nevertheless in the following year the Australian Federal Parliament added a provision in these terms to their Interpretation Act. (See [1981] Stat LR 181. The provision was inserted as a new s 15AA to the Australian Acts Interpretation Act 1901.)

The absurdity rule (or golden rule)

The rule in *Heydon's Case* has been criticized for failing to reflect the importance of the text. It dates from a period when there was no science of exact drafting and judges were expected to use a wide discretion in moulding the law. As parliament's attention to detail grew, the judge gradually assumed his present role of textual interpreter. Legislative texts were still frequently defective however, and this fact had to be allowed for. Accordingly there grew up what has been misleadingly called the golden rule. The name is ascribed to the following classic passage from a judgment by Lord Blackburn:

> 'I believe it is not disputed that what Lord Wensleydale used to call the golden rule is right, viz, that we are to take the whole statute together, and construe it all together giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to

> justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear' *{River Wear Commissioners* v *A damson* (1877) 2 App Cas 743, 764).

It is pretty clear that what might be termed the auriferous part of this statement was intended to be the first part, the phrase beginning 'unless when so applied' being a limiting provision akin to a proviso. The golden rule is that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification. In other words, it is a rule of literal construction. We are not surprised to find that for some 'the golden rule' has meant just that. In *Nokes* v *Doncaster Amalgamated Collieries* [1940] AC 1014, 1022, for example, Lord Simon said: 'The golden rule is that the words of a statute must *prima facie* be given their ordinary meaning'. (See also *Altrincham Electric Co.* v *Sale* (1936) 154 LT 379, 387.) In other words the name 'golden rule' is ambiguous. Indeed a third meaning has been suggested for it by Max Radin, namely that it is to the effect that the legislator's intent governs the meaning of an enactment (Radin 1930, p 872). Sir William Graham Harrison, a former First Parliamentary Counsel, playfully suggested a fourth meaning: 'the golden rule for the interpreter of Acts [is] that they were not intended to mean what, to the plain man, they would appear to say' (Graham Harrison 1935, p 16). It is plainly ridiculous that the name given to a rule of statutory interpretation should itself have several different meanings. All we can do now is discard this unsatisfactory name, and adopt Shaw's wise conclusion that the golden rule is that there are no golden rules.

It has been contended that in this connection the term 'absurdity' should be widened to include all the defects Lord Blackburn mentions, and indeed others. Thus Cross argues that such words as 'repugnancy', 'inconsistency', 'anomaly' and 'contradiction' can be properly subsumed under it (Cross 1976, p 81). If this is so it would be better to refer to the so-called 'golden rule' as the absurdity rule. The only thing that distinguishes it from the literal rule (to which we turn next) is that it allows the literal meaning to be departed from where to follow it would produce absurdity. Note however the distinction between the concept of *inconsistency* and that of *inconvenience.* An inconsistency *must* be resolved one way or the other, but a court can if it wishes disregard inconvenience (even where it amounts to injustice).

The literal rule

The literal rule states that if the words of the legislative text are plain they must be followed, wherever that may lead:

> 'If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their

> natural and ordinary sense. The words themselves alone do, in such a case, best declare the intention of the lawgiver' *(Per* Tindal CJ, *Sussex Peerage Claim* (1844) 11 CI & Fin 85, 143).

It is, says the literal rule, for parliament, and not the judges, to change the law if it leads to absurdity.

Predictable construction. The citizen (or in practice his adviser) should be able to rely on the plain meaning. As Lord Diplock has put it, confirming Sir William Graham Harrison's playful point mentioned above:

> 'The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates' *(Black-Qawson International Ltd* v *Papierwerke Waldhof-Aschaffenburg AG* [1975] 1 A11ER 810, 836).

This vital principle could not be more clearly expressed. It may be referred to as the principle of *predictable construction.* Two recent cases illustrate the importance attached by the House of Lords to observing the principle. The cases are briefly described below. (For a fuller treatment see Bennion 1981(2)).

Re Racal Communications Ltd [1980] 2 All ER 634 concerned the interpretation of s 441 of the Companies Act 1948. This authorises the Director of Public Prosecutions (among others) to apply *ex parte* to a High Court judge for an order for inspection and production of a company's books. It ends by saying that the judge's decision 'shall not be appealable'. As Lord Diplock said (p 636), what could be plainer than that? Yet the DPP, faced by Vinelott J's refusal to make an order, defied these words and appealed. In the Court of Appeal, Lord Denning and his colleagues, relying on Lord Denning's remarkable dictum in *Pearlman* v *Keepers and Governors of Harrow School* [1979] QB 56, 70 that no court has jurisdiction to make an error of law, upheld the DPP's appeal. Unanimously, the House of Lords asserted the predictability principle and reversed this.

The other case is *Midland Trust Co Ltd* v *Green* [1981] 1 All ER 153. For £1 a father gave his son an option to purchase the legal estate in a farm at a considerable undervalue. The option was registrable under the Land Charges Act 1925 as a class C land charge. But before the option was registered by the son, the father conveyed the legal estate in the farm to his wife Evelyne for £500, also a considerable undervalue. The money was actually paid over, and the legal title passed. The transaction was not a sham, and there was no fraud (though there was breach of contract by the father). Section 13(2) of the Land Charges Act 1925 deals with such a situation in language which could scarcely

be plainer. It says that a class C land charge is void against a 'purchaser' of a legal estate for money or money's worth unless the land charge is registered before completion of the purchase. Section 20(8) defines 'purchaser' as a person who, for valuable consideration, takes any interest in land.

How could it be denied that the son's option was void against Evelyne? She took the legal estate and she gave valuable consideration in money. Yet because the merits were against her, Lord Denning found arguments for departing from the literal meaning. To do this was described by Lord Wilberforce (p 157) as 'muddying clear waters'. Delivering the only speech in a unanimous reversal of the Court of Appeal's majority decision, he set out the point at issue, then said (P 156):

> 'Thus the case appears to be a plain one . . . In my opinion this appearance is also the reality. The case is plain; the Act is clear and definite. Intended as it was to provide a simple and understandable system for the protection of title to land, it should not be read down or glossed; to do so would destroy the usefulness of the Act.'

The predictability principle is important, but it does not amount to a *rule* that the literal meaning must always be followed. The idea of such a rule has become increasingly discredited.

In introducing his 1980 Interpretation Bill, Lord Scarman said that the old habit of sticking to the literal meaning 'is still lurking in the back corridors of the legal system, and must be exterminated' (House of Lords Deb, 13 February 1980, Col 279). The Law Commission argue that to place undue emphasis on literal meaning assumes an unattainable perfection in draftsmanship and ignores the limitations of language (Law Com No 21, p 17).

Professor Zander is particularly hard on the literal rule:

> 'The approach is mechanical, divorced both from the realities of the use of language and from the expectations and aspirations of the human beings concerned and, in that sense, it is irresponsible' (Zander 1980, pp 55-6).

Elsewhere Zander calls the literal rule 'defeatist and lazy': it is, he rather mysteriously says, the intellectual equivalent of deciding the case by tossing a coin (Zander 1980, p 54). These latter remarks were called forth by the decision in *Whiteley* v *Chappell* (1868-9) 4 LRQB 147. A statute aimed at electoral malpractice made it an offence to personate 'any person entitled to vote' at an election. The accused was charged with personating a *deceased* voter. The court, with reluctance, found there was no offence. The personation was not of a person entitled to vote because a dead man is not entitled to vote or do anything else. He does not exist, and therefore can have no rights. It is a *casus omissus.* The draftsman has gone *narrower than the object* (see 186 below).

What is the true analysis in such cases? It depends on the ground rule. If the ground rule is that statutory words are always to be applied according to their meaning (the literal rule) the accused was entitled to be acquitted. He had not personated a person entitled to vote. If the ground rule is something different (such as that the court must fill in a lacuna), then perhaps he should have been convicted. Criticism of the decision (as of any decision) needs to be rightly directed. *Tfie real complaint is that the ground ntles are not clear.*

The nearest one can get, in the light of recent decisions of the House of Lords, is that there is no literal ra/e but that the literal meaning is to be accorded great respect and departed from only for compelling reasons. Departure from the literal meaning in order to do justice or make sense marks a failure in communication. Words are designed for no other purpose than to transmit a message. If what the words say is rejected in favour of a meaning arrived at by other means, the message has not got through. Those who in good faith read it and acted accordingly are confounded.

A combined rule?

It has been suggested that, of the three primary rules, judges in practice apply whichever produces a result satisfying their sense of justice in the case before them (Willis 1938, p 16). Professor Driedger has gone further: 'Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament' (Driedger 1974, p 67).

This says everything, and says nothing. It returns us to square one, from which we must start again. If we are to get anywhere this time, we must follow a different tack. Before setting out however, let us take a brief look at other conventional principles of interpretation.

Maxims

For some mysterious reason it is customary to couch guidance of this sort in the decent obscurity of a dead language. Here are some of the leading maxims applied to legislative texts. They embody canons of construction applicable to any type of prose, and are mainly based on logic.

Ut res magis valeat quam pereat. It is better that a thing should have effect than be held void. Parliament should not be taken to have stultified itself by enacting a nullity. If there is a choice between two interpretations, but one of them will render the enactment ineffective, the other should be adopted.

Ejusdem generis. Where a string of terms falling within one genus is followed by sweeping-up words not expressly limited to that genus they are taken to be

so limited by implication. Thus in the phrase 'any orange, lime, banana or other article' the word article would be taken to be limited to an article of the same genus, namely fruit. There must be at least two preceding terms. In a reference to 'any banana or other article' the word article would not be taken as restricted to fruit under this rule, although in certain contexts the rule of *noscitur a sociis* (see below) might be held to apply. There must also be a genus: if the preceding terms are widely dissimilar the sweeping-up words will not be taken as limited by them. The rule is not needed for current legislation, since a modern draftsman ought not to draft in so sloppy a fashion as to make it applicable.

Noscitur a sociis. A thing is known from its associates. This is similiar to the previous rule, but wider in scope. Where words or phrases capable of different meanings are associated, they take colour from each other and this may exclude meanings which would be possible if the words or phrases stood alone. Thus, where a power was given to 'break up the soil and pavement of roads, highways, footways, commons, streets, lanes, alleys, passages and public places' the court held, 'construing the word "footway" from the company in which it is found' that the power was limited to paved footways in towns and did not extend to a field footpath *(Scales* v *Pickering* (1828) 4 Bing 448). Again, modern precision drafting should preclude reliance on this rule. It is however occasionally relied on by judges in relation to modern Acts. Thus the House of Lords applied it in determining that county courts did not fall within the definition of 'superior court' in s 19 of the Contempt of Court Act 1981: *Peart* v *Stewart* (1983) *The Times,* 14 March. Here Lord Diplock displayed the modern tendency of judges to avoid calling the rule by its Latin name. He referred to it as 'the principle of construction that the meaning of a doubtful word might be ascertained by reference to the meaning of words associated with it'.

Expressio unius est exchisio alterius. To mention one thing is to exclude another. This is an important rule, of frequent application. If a phrase which certainly includes some things and *possibly* includes others is followed by words of addition specifying some but not all of the others, then the earlier phrase is taken not to include the remainder of the others. For example a bequest to 'the children of A' certainly includes A's legitimate children, and possibly includes any illegitimate children as well. But if the bequest is 'to the children of A and any illegitimate sons of A' then A's illegitimate *daughter* would be excluded. The rule is sometimes worded *expressum facit cessare taciturn* (statement ends implication). For a recent example of the rule's application see *Inpro Properties (UK) Ltd v Sauvel (1983) The Times,* 7 April. Here it was held that the specific mention (in the definition of the term 'premises of the mission' in Sch 1 to the Diplomatic Privileges Act 1964) of the residence *oi t\\<t head of a.* mission made it clear that residences of other members of the mission were intended to be excluded.

Reddendo singula singulis. Give each to each. Operates where each of two provisions in one clause is applied distributively to each of two objects in another clause. Thus a provision in a will reading T devise and bequeath all my real and personal property to B' will be construed as if it read T devise all my real property and bequeath all my personal property to B', since 'devise' is inappropriate for personal property while 'bequeath' is inappropriate for real property. (For a more complex example see the account *of Bishop* v *Deakin* [1936] 2 Ch 409 on p 171 below.)

Generalia specialibus non derogant. General provisions do not derogate from particular ones. This too is an important rule. Public general Acts often contain provisions which taken literally would override local Acts. This maxim may save them. The rule can also apply to conflicting provisions in general Acts. In *Re Standard Manufacturing Co* [1891] 1 Ch 627 it was held that a Bills of Sale Act provision requiring the registration of agreements which created a charge over movables did not supersede provisions in a Companies Act providing in detail for the special case of the registration of debentures issued by a limited company, even though such debentures would be agreements of the type mentioned in the Bills of Sale Act.

Presumptions

Various presumptions of law are applied in the interpretation of statutory texts. Indeed the three primary rules can be expressed in the form of presumptions. We give here an outline list of the most important presumptions:

1 The literal meaning should be followed.
2 The intention of parliament should be implemented.
3 An Act should not be so interpreted as to produce absurdity.
4 An Act should not be given retrospective effect.
5 A person should not be put in peril upon an ambiguity.
6 The common law should only be displaced by clear words.
7 A provision should not be so interpreted as to make it a nullity.
8 There should be no crime without a guilty mind.
9 No one should profit from his own wrong.
10 The jurisdiction of the court should not be ousted.
11 A taxing Act should be strictly construed.
12 A consolidation Act does not change the law.
13 An Act does not bind the Crown.
14 An Act should accord with international law and treaty obligations.
15 An Act does not operate outside the national territory.

What is the function of these presumptions? Clearly most of them can be overriden by clear words. To be of any value, they need to be stated with

some degree of elaboration. Many are subject to exceptions, which in a textbook of statutory interpretation are spelt out in detail. Thus Craies says of the fourth presumption listed above: 'Where an Act is in its nature declaratory, the presumption against construing it retrospectively is inapplicable'. Craies goes on to discuss cases in support of this proposition. His treatment of retrospective enactments takes up twenty pages (Craies 1971, pp 387-406).

Also clear is the fact that different presumptions may conflict with each other in relation to a particular enactment. The first and third presumptions often conflict. Indeed to a large extent the literal rule and the absurdity rule are opposite sides of the question Can courts correct the errors of parliament? The second presumption often conflicts with almost all the others.

Some of the presumptions are doubtful. Is it really true, for example, that a taxing statute should be strictly construed? The social policies of a modern state are founded upon the revenue from taxation. It must therefore be assumed to be a beneficial instrument of government. If a taxing Act is construed narrowly, the revenue from it is reduced. Social welfare suffers, to the profit of the individual taxpayer. By what right do judges rule that this is the course to be preferred?

The position of consolidation Acts, as stated in the twelfth of the above presumptions, is again doubtful. We have seen in chapter 7 how some consolidation Acts do deliberately change the law. Apart from that, there is the question of whether reproducing a provision in a consolidation Act has the effect of confirming previous judicial decisions on the meaning of that provision. There are dicta to this effect (see *Re Cathcart, ex parte Campbell* (1870) 5 Ch App703, 706; *R* v *Bow Street Justices, ex parte Adedigba* [1968] 2 QB 572, 583; *Barras* v *Aberdeen Fishing and Steam Trawling Co Ltd* [1933] AC 402, 412; *Zimmerman* v *Grossman* [1972] 1 QB 167, 177). They are however ill-founded. In a straight consolidation, previous decisions are to be treated exactly as they would have been if the consolidation had not taken place. This is because the draftsman has no choice but to reproduce the original wording. If the consolidation is carried out with minor amendments, but the provision is reproduced unamended, all that one can say is that the draftsman has not thought fit to avail himself of the opportunity for amendment and the joint committee has concurred. There is no implication that previous judicial decisions are approved or confirmed (see also p 144).

Even where a presumption is soundly based, and its limits are exactly delineated, it is of little value in a particular case if it conflicts with another presumption. And, if it is relevant at all, it nearly always does conflict. The court is then distracted by having to decide which presumption is to prevail. It can only be guided by the sort of conflicting *dicta* in which, as we have seen, the editor of *Maxwell* rejoices. Is this really a useful process?

It is not even clear what is the juridicial nature of these presumptions. The

Law Commission call them *presumptions of intent* (Law Com No 21, p 21). It is presumed that parliament does not intend to do certain things (for example retrospectively punish actions which were blameless when done). Where the language is doubtful, the presumption adds its quota of information about what the intent actually was.

An alternative view is presented by Hart and Sacks, who call the presumptions 'policies of clear statement'. They are worked out by the courts as announcements to the legislature that certain meanings will not be assumed *unless stated with special clarity* (see Law Com No 21, p 21).

A third view is that the presumptions are aspects of the court's function of administering *justice.* Regardless of parliament's intention, it is unjust to burden the citizen without telling him clearly what you are doing. If he has to grope for the meaning, he should be allowed to remain in his previous condition.

One can roll together these three views by saying that parliament is presumed to intend to act fairly. If it wishes to act unfairly, the court will not aid it unless the intention is made abundantly plain.

In any case the court must always seek to ascertain the true intention. One aid in this task is the purpose clause.

Purpose clauses

The Renton Committee found that 'statements of purpose can be useful, both at the Parliamentary stage and thereafter, for the better understanding of the legislative intention and for the resolution of doubts and ambiguities' (Renton 1957, para 11.8). The preamble once served this purpose. As we have seen, it has fallen into disuse in British-type legislation though not in Community law.

An alternative to the preamble is the purpose clause, which was preferred to it by the Renton Committee *(ibid).* Some Commonwealth countries (though not Britain itself) have acted on the Renton recommendations and now regularly include purpose clauses. One such is Barbados. Here are some examples drawn from there.

The Off-shore Banking Act 1979 has the long title: 'An Act to enable certain banking and other businesses to be carried on from within Barbados in foreign moneys, securities and properties for foreign customers'. As is now customary there, s 1 gives the short title, s 2 deals with interpretation, and s 3 contains the purpose clause. It reads:

> 'The purposes of this Act are
>
> *(a)* to encourage the development of Barbados as a responsible off-shore financial centre;
>
> *(b)* to provide incentives by way of tax reduction, exemptions and benefits for off-shore banking carried on from within Barbados; and

> *(c)* to enable citizens of Barbados to share in the ownership, management and rewards of any business activities resulting therefrom.'

The purpose clause of the Extradition Act 1979 includes the statement that one purpose of the Act is to make extradition proceedings 'as uniform as circumstances permit irrespective of whether a fugitive is from a Commonwealth country or a foreign state'. Another purpose is:

> 'to adopt the principles relating to the rendition of fugitive offenders within the Commonwealth as formulated by the Law Ministers of the Commonwealth in their London Conference of 1966 and generally to accord with current international practice regarding the return of fugitives'.

Clearly there is room for conflict between these two purposes.

In the case of the Integrity in Public Life Act 1980, there is inconsistency between the long title and the purpose clause. The former speaks of avoiding conflicts of interest by 'persons engaged in governing, guiding or administering the public affairs of Barbados' while the latter refers to 'persons in public life to whom this Act applies'. The former speaks of establishing a body to monitor 'the assets' of persons in public life while the reference in the latter is to monitoring 'their personal income, expenditures, assets and liabilities'.

The Renton Committee reported opposition from draftsmen to the purpose clause. Sir Anthony Stainton took the view that 'in many cases the aims in the legislation cannot usefully or safely be summarized or condensed'. A purpose clause might be 'no more than a manifesto . . . which may obscure what is otherwise precise, and exact'. Amendments to a bill 'may not merely falsify the accompanying proposition but may even make it impracticable to retain any broad proposition'. Another draftsman said that 'the Act should in general explain itself (Renton 1975, para 11.7).

If the legislative intention cannot be summarized, and the text is composed of precise but colourless prescriptions, how can the court obtain guidance? This returns us to the four paragraphs of the rule in *Heydon 's Case* (p 89). The state of the law before the making of the Act is ascertainable by reference to legal sources freely available to the court. How is the court to discover the 'mischief and defect' for which that law did not provide? The Law Commission complain about this phrase. 'It tends to suggest,' they say, 'that legislation is only designed to deal with an evil and not to further a positive social purpose' (Law Com No 21, p 49). Instead they proffer 'general legislative purpose' *(ibid,* p 19). But this is captious. Every Act is remedial in the sense that its promoters think there is something wrong or inadequate about the existing law. But if the Act does not spell out what this defect is. how is the judge to discover it? Either by taking judicial notice of relevant facts or by considering external materials.

sometimes called *trauvawc preparatoires.* We consider these two methods in turn.

Judicial notice

Judges are taken to know the law operating within their jurisdiction, though foreign law has to be proved by expert evidence. In particular, judicial notice is by statute required to be taken of public Acts. This means all Acts passed after 1850, except where the Act says otherwise (Interpretation Act 1978, s 3 and Sched 2 para 2). In practice only personal Acts do say otherwise (see p 20 below). The rule is an ancient one, going back to *The Prince's Case* (1606) 8 Co Rep la, 13b.

Judges who are applying an Act do not require everything relevant to its meaning to be proved by evidence. There used to be an affectation by judges that they had never heard of well-known phenomena like, for example, leading popular entertainers. That was finally exploded when Vinelott J said in a 1982 case:

> 'I think I am entitled to take judicial notice of the fact that the late Elvis Presley was resident in and performed largely within the United States *(RCA Corporation* v*Pollard* [1982] 2 All ER 468, 479).

Nowadays judges are expected to take judicial notice of 'matters generally known to well-informed people' *(Escoigne Properties Ltd* v *IRC* [1958] AC 549, 566). This includes, for example, the fact that 'drugs are a great danger today' *(Yeandel* v *Fisher* [1966] 1 QB 440, 446) or that flags of convenience provide cheap labour *(NWL Ltd* v *Woods* [1979] 3 All ER 614, 622).

Judicial notice is taken of the meaning of the words of Acts, though most judges refresh their memories by use of dictionaries and other works of reference. Lord Wilberforce told me that he never uses dictionaries, and shuts his ears if they are referred to in court; but he is perhaps exceptional in this. Evidence may be given of the meaning of words used in a technical sense, for example relating to a particular science or industry *(London and North Eastern Railway Company* v*Berriman* [1946] AC 278).

Reference to external materials

A legislative text is an arid thing read by itself. However clear and precise it may be, and free from error, it cries out for explanation. We need to be told the background and object of each clause. We look for examples of how it is meant to work, and reassurance that what it seems to mean is what in fact it does mean. There is positive intellectual discomfort in being deprived of these aids. Lord Widgery expressed this feeling when he described how he and his

fellow-judges explored certain legislation, adding 'we came out of it again as fast as we could because ... the language is very uncomfortable and complicated' *(Grice* v*Needs* [1979] 3 All ER 501, 503).

Yet the traditional view is that you must do without external aids, at least where the language is free from doubt. Craies opens a long chapter on this topic by saying:

> 'Upon the failure of what Dr Lushington described as "the most satisfactory mode of construction" — *viz.* examining the statute, and if possible ascertaining the meaning from the statute alone — it is necessary to consider whether it is in any case allowable to have recourse to anything beyond the four corners of the statute for the purpose of ascertaining what was the intention of the legislature . . . ' (Craies 1971, p 125).

This is the exact opposite of what we should wish to do, if freed from authority and the practical difficulty of obtaining and studying all relevant sources. The ideal course would be to relive the history of the text in question, covering not only the entire process of text-creation and text-validation but also historical material such as reports of official enquiries and other background sources. If we soaked ourselves in all this, we would be in the best position to judge the meaning of the text and whether it was clear or doubtful. The assiduous academic commentator can act in this way (subject to the problem of access to confidential official records). The practical lawyer cannot.

The predictability principle (p !92) means people should be able to rely on the text alone. Considerations of comity have prevented British courts from referring to parliamentary debates (though there are isolated exceptions). Difficulties of time and availability necessarily rule out much ancillary material. Yet, as the Law Commissions have pointed out, statutes do not operate in a vacuum. A judge takes judicial notice of 'much information relating to legal, social, economic and other aspects of the society in which the statute is to operate' (Law Com No 21, p 28).

There remains the problem of admissibility. No source is admissible if it is not relevant, but many relevant sources are inadmissible. The rules however are far from clear, and different judges take different views. It is not too much to say that in this field the criteria are subjective. So the Law Commissions have sought to obtain parliamentary guidance. The draft bill attached to their 1969 report (and introduced into the House of Lords in 1980 and 1981) mentioned five matters as being made admissible. We consider them separately.

> *a)* all indications provided by the Act as printed by authority, including punctuation and side-notes, and the short title of the Act;'

We have given (p 5 7) reasons why this is unnecessary since it repeats undoubted

law. This was recognized by Lord Reid in *Director of Public Prosecutions* v *Schildkamp* [1971] AC 1, 10: 'But it may be more realistic to accept the Act as printed as being the product of the whole legislative process, and to give due weight to everything found in the printed Act ... it is not very meaningful to say that the words of the Act represent the intention of Parliament but the punctuation, cross headings and sidenotes do not'.

> *'(b)* any relevant report of a Royal Commission, Committee of other body which had been presented or made to or laid before Parliament or either House before the time when the Act was passed;'

The Renton Committee disagreed with this, holding that it would 'place too great a burden on litigants and their advisers, and indeed on the courts'. They added that the draftsman's desire for greater precision to avoid any possible ambiguity arising from comparison with 'these extensive materials' would produce more rather than less complicated provisions (Renton 1975 para 19.23).

In the House of Lords debate on Lord Scarman's 1980 reform Bill, Lord Mishcon, a practising solicitor, confirmed the Renton Committee's view. He pointed out that interpretation is not just the job of the courts: '... it is the almost daily job of my profession in advising ordinary citizens, and that power to interpret must not be beset by measures which make that interpretation uncertain or cumbersome or expensive'. The solicitor must not be forced, before advising on any statute, to obtain all the relevant reports and white papers in case they could have an effect on interpretation. He went on:

> 'I can envisage most definitely the prolongation of trials which deal with the question of interpretation . . . one astute counsel after another trying to drag from a report of a Royal Commission phrases which would help their interpretation, as against their opponent's . . . '

Lord Mishcon concluded with adverse references to a judgment which contained lengthy citations from a Royal Commission report. It was delivered by Edmund-Davies LJ in *Lucy* v *Henley's Telegraph Works* [1969] 3 All ER460 (House of Lords Deb, 13 February 1980, cols 289-294).

Lord Diplock, as might be expected, condemned this paragraph under the predictability principle: T still think that the public is entitled to look at the legislation to see what it says . . . if this were done we should be spending our time construing the documents which we were asked to look at as well as construing the Act itself *(ibid,* col 289).

> '(c) any relevant treaty or other international agreement which is referred to in the Act or of which copies had been presented to Parliament by command of Her Majesty before that time, whether or not the United Kingdom were bound by it at that time;'

Lord Dilhome felt that to the extent that this did not represent existing law it was too wide. He pointed out that when an Act is passed to implement a treaty, the courts can already look at the treaty *(ibid,* col 298).

> *d)* any other document bearing upon the subject-matter of the legislation which had been presented to Parliament by command of Her Majesty before that time;'

This has been generally held objectionable for the same reasons as apply to paragraph *(b).*

> *'(e)* any document (whether falling within the foregoing paragraphs or not) which is declared by the Act to be a relevant document for the purposes of this section.'

This is rejected because it is patently unnecessary. It is obvious that parliament can include such a declaration in an Act whenever it sees fit to do so. The efficacy of the declaration would be in no way enhanced by this provision.

The failure of the Law Commissions' bill means that the admissibility of external aids remains obscure. In practice much is left to the discretion of the individual judge. Litigation is already expensive in time, and therefore in money. To prolong it by detailed reference to outside sources cannot be in the public interest. Although their use might yield a truer result, the cost would be too great. Time is the enemy of truth; and the best is the enemy of the good. (For a full account of the Law Commissions' Bill and Lord Scarman's two unsuccessful attempts to procure its enactment see Bennion 1981(8).)

Other Commonwealth countries. Elsewhere in the Commonwealth, legislation has been enacted with regard to reference by the courts to external materials. When drafting the constitution of the first republic of Ghana in 1960, I was also closely involved with preparing the accompanying legislation. It was felt desirable to provide a new Interpretation Act, and to deal in it with the vexed question of recourse to external materials. The provision by which this was done was s 19 of the Interpretation Act 1960 (CA 4). In the explanatory book I wrote at the time, I said this about it:

'Section 19 empowers the court to turn for help —

> ". . . to any text-book or other work of reference, to the report of any commission of inquiry into the state of the law, to any memorandum published by authority in reference to the enactment or to the Bill for the enactment and to any papers laid before the National Assembly in reference to it, but not to the debates in the Assembly."

This marks a considerable increase in the sources made available to the court. It includes such things as Government white papers and the memorandum

of objects and reasons published on the front of every Bill. In relation to textbooks it removes the argument that the author must be an established authority (or must even be dead) before the court can consider what he has to say. It does not of course interfere with the rule that where the words of an enactment are clear effect must be given to them. Nor does it prevent the court from attaching what weight it thinks fit to the sources named. The exclusion of references to debates in the Assembly was explained in the memorandum to the Interpretation Bill as follows:

> "There are two cogent reasons for their exclusion: first, it would not be conducive to the respect which one organ of State owes to another that its deliberations should be open to discussion in Court; and, secondly, it would greatly interfere with the freedom of debate if members had to speak in the knowledge that every remark might be subject to judicial analysis."

A third reason might be added, namely that the extempore answer of a Minister pressed to explain a provision in a Bill is not always a reliable guide to its meaning.' (Bennion 1962, pp 278-9).

Sir Garfield Barwick, a former Chief Justice of the High Court of Australia, appeared to favour this provision. In a paper delivered to the Australian Legal Convention in 1961 he concluded:

> 'The question I leave with you is, does the expedient which has been adopted in Ghana, and which is not so far from preamble, perhaps . . . offer any promise as an aid to interpretation . . . ?
>
> Who doubts that the ascertainment of the legislative intent is at times an exercise in divination? And is there not some room to increase the material by reference to which the judge may discover the parliamentary intent and not be left to imagine it, or to give rein to what he would himself do if he were the legislator, *and legislating in the times that he knows*, or perhaps in the times that he but remembers?' (Barwick 1961; emphasis added. As to the italicised words see below).

Despite this, the Ghana provision has not so far been adopted in Australia (or anywhere else). It appears to have caused no difficulty in Ghana however, and is currently being considered for possible future adoption by the Australian Federal Government (Australia 1982, paras 3.17, 4.5 and 5.5). What Australia has already done is to follow the example of Canada and New Zealand in adopting a provision favouring purposive construction (see p 90 above).

In a policy discussion paper published in 1982, the Australian Federal Government put forward as a possible solution the publication of an official explanatory memorandum in relation to each Act, with statutory authorisation

for the courts to consult it. This would state the purpose or object of the Act, explain its provisions (giving worked examples) and furnish guidance as to the interpretation of broad terms. Accuracy, impartiality and completeness would be characteristics of the memorandum, which would not however be prepared by the draftsman. Parliamentary approval would be given to it. (Australia 1982, para 6.1.)

The paper cites a caveat entered by the *Australian Law Journal*, namely that the courts should be debarred from construing the memorandum, which 'should be regarded as self-speaking' (Australia 1982, para 4.16).

What can be said about this proposal? First, it is with respect naive to suppose that you can have an explanatory memorandum which is not to be 'construed'. This is to misunderstand the nature of the process of construction, which is inescapable whenever words have to be understood. To construe a form of words is simply to arrive at its meaning, and it is no use having an explanatory memorandum if you are forbidden to work out what it means.

Second, the proposal does not get round the well-known problems of having two competing texts, both approved by Parliament. These problems are compounded when different minds have been responsible for the drafting of each. Inevitably there will be conflicts between them, and each statement will tend to vitiate the other.

A third difficulty is rarely touched upon in the literature, and is not mentioned in the 1982 Australian paper. It is that an Act does not stand still. It is always speaking, and often has to be applied in circumstances which could not have been envisaged by its creators. Taken together with the judicial processing that follows its passing, it is an organic, living creation. This is touched upon in the above reference by Sir Garfield Barwick to the construing judge *legislating in the times that he knows*. To confine an Act within the terms of a detailed explanatory memorandum framed at the historic moment of its enactment is to put a strait-jacket on the Act's development. It is also to provide a pregnant source of future doubt, and in effect would mean that as well as processing the Act the courts would be obliged to process the explanatory memorandum also. (See further chapter 15 below.)

Community law

The detailed principles we have been discussing have little reference to Community law. The failure of Britain to enter the common market at the outset meant the loss of any slim chance there might have been that British-type statute law would prevail in the Community. It is the continental principles of drafting and interpretation that apply there, and French law has a dominating influence. As Daniel Pepy, formerly a member of the Conseil d'Etat has said: 'Aucune regie de principe n'existe en France pour l'interpretation des textes de

loi et decret . . . ' (Pepy 1971, p 108). Grammatical rules and principles are of course followed, but there is nothing akin to the three primary rules of British law, or the other presumptions we have been discussing.

As we have seen, Community legislation provides one important interpretative tool by its use of preambles. These are indeed obligatory, by virtue of art 190 of the EEC Treaty. Since the European Court concentrates on the purpose rather than the text of the legislation, the preamble furnishes valuable help in interpretation.

Another difference is that Community law is a unique, self-contained body of law. Our rules of interpretation partly derive from the fact that historically statute law in Britain has been an intruder in the domain of common law. The use of external aids is also historically different. The European judge is imbued by training and experience with the spirit of the *code civil*. He is accustomed to consult travaux preparatories, and does not find that they unduly delay proceedings. He, and the advocates with whom he works, know from long experience how to extract the contribution these materials have to make without damage to the fabric of justice.

In *R* v *Henn* [1980] 2 All ER 166, the House of Lords stressed the danger that lay ahead if our judges sought to apply their own rules of interpretation to Community law. Lord Diplock pointed out (p 196) that:

> The European Court, in contrast to English courts, applies teleological rather than historical methods to the interpretation of the treaties and other Community legislation.'

Conclusion

What practical rules are available now to assist the British courts in statutory interpretation? We first need to understand that we are in a situation different from that in which many of the dicta shaping existing rules were delivered.

The main difference lies in the nature and quality of modern British-type legislative texts. These are composed in a highly sophisticated way. They are drafted by skilled people, whose aim is to spell out in a logical and consistent manner the full detail of the legislative scheme. The common-law draftsman of today works under the literal view of interpretation. He aims to provide a text which contains the answers and can be obeyed as it stands.

It follows that the *general* rules and presumptions we have been discussing are now of little value. Either the meaning is plain or it is not. If it is not, then there is a doubt situation. The doubt cannot be resolved by a general rule. We have left behind the era when the answer to every Olness was the letting of blood, and the leech was always the convenient instrument. What is first needed now is a skilled diagnosis. What is the nature of the doubt? Exactly how does

it arise? What is its cause? What principles apply to the resolution of doubts of that nature?

We shall find in the remaining Parts of this book that there are answers to these questions. We have moved from the general to the particular. But we recognize that each particular rule must subserve the generality of the predictability principle that answers should lie in the text, and not in the opinion of a judge or official.