

[Material for chapter 3 of "Information Sources in Law"]

3

Statute law

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This chapter is divided into seven sections, as follows-

General

Nature and classification of legislation

Drafting

Interpretation

Reform

Publications of legislative texts

Select bibliography

All literature mentioned in the first six sections appears under its full description in the final section. This consists of a list of books in alphabetical order of author's (or first author's) name, followed by a similarly-arranged list of journal articles, and finally a list of reports of committees etc. Where an author makes only one appearance in the final section, the work is usually referred to in the earlier sections by the author's name alone. In other cases the name of the work is also given. Some works are referred to in more than one section.

Although the treatment is primarily directed to England and Wales, mention is also made of Commonwealth and American works since these are usually treated in English courts as having persuasive authority.

GENERAL

Historical general works of note include *Plucknett* and *Barrington*, together with the erudite two-part article by *Richardson and Sayles*. Interesting and useful general studies from the nineteenth century are *Dwarris*, *Bacon* and *Wilberforce*. A notable historical account is found in Holdsworth's *History of English Law*. Interesting comparative treatments are contained in the Proceedings of the 1972 Ottawa Symposium.

The principal general works have for many years been *Craies* and *Maxwell*. The former began life as H. Hardcastle's *Statutory Law* (first published, by Stevens & Haynes, in 1879). Craies edited the second and third editions of *Hardcastle*. When he edited the fourth it was published (in 1907) as the first edition of *Craies*. The first edition of *Maxwell* appeared in 1875, so these two leading works are firmly rooted in Victorian practice and ethos. In successive editions, they have held sway for over a century.

Craies is somewhat arbitrarily divided into four Parts, respectively labelled 'construction of statutes', 'effect and operation of statutes', 'penal statutes', and 'local, personal and private Acts'. Though a careful and thorough treatise, and valuable on historical aspects, it bears the signs of its age. It was last updated in

1971, since when there have been many fresh developments in the subject.

The most recent edition of *Maxwell* was published as long ago as 1969, though it is still frequently referred to by judges on points of interpretation. Since it concentrates on that aspect, it is discussed in the section dealing with it (see p 000).

Bennion's *Statute Law* was first published in 1980. It too is divided into four Parts, and concentrates on legal and textual aspects. Part I describes the nature of the various legislative texts, including EEC law. Part II deals with the difficulties facing the interpreter, and analyses five doubt-factors. Part III considers the legislating function of judges and other interpreters, while Part IV deals with processing methods that do not affect the legal meaning. The unpublished thesis by *Maclin* is an able modern survey of British legislative methods.

Another recent general work, *Miers and Page*, concentrates on legislative procedure, reflecting the growing sense that lawyers need to be more skilled than they are in this aspect of statute law. (See also on procedure *Walkland*. As to the need for training generally see Bennion's article 'The Need for Training in Statute Law'.) Miers and Page also recognise the potential value of text-manipulation processing techniques such as composite restatement (as to this technique see Bennion's *Statute Law*, chap. 27). The first half of *Miers and Page* describes institutional arrangements for the preparation and passing of public bills. Then, after a lengthy analysis of secondary legislation (including Community law), and a brief discussion of statutory interpretation, the book ends with an investigation of the *impact* of legislation.

Impact depends on enforcement, about which the literature is sparse. *Putnam's* monumental work on the enforcement of the Ordinance (1349) and Statute (1351) of Labourers has not been equalled. Substantial research on the implementation of modern regulatory legislation began only in the 1970s, the Oxford Centre for Socio-Legal Studies being prominent (see sources cited in Harris's article, pp 324-325).

Twining and Miers deals on theoretical lines with the nature of rules in general, not confining itself to legislation or even law. The broad nature of reasoning and interpretation is discussed. There is a chapter on algorithms and similar aids (also dealt with in the article by Lewis, Horabin and Gane).

MacCormick is a brilliant philosophical survey, especially useful in relation to the application of formal logic to legislation. The latter is also the subject of Part XX of Bennion's *Statutory Interpretation*. Fitzgerald's article is a stimulating examination of the case for academic treatment of statute law.

A readable brief outline to the end of the eighteenth century will be found in Holdsworth's *Sources and Classification of English Law* (see Lecture II). A basic general work very useful for students is *Zander*, which gives lengthy extracts from relevant works. Glanville Williams' *Learning the Law* contains wise and readable matter on statutory interpretation particularly. Allen's *Law in the Making* remains a valuable source book, while *Comyn* is useful on earlier parliamentary procedure. *Griffith* (based on parliamentary proceedings in 1967- 1971) contains a useful modern treatment of this aspect. *Erskine May*, periodically edited by the parliamentary clerks, remains the great authority though still not effectively indexed.

On problems of access to legislation *Friedland*, though written of the Canadian scene, is relevant to Britain. Problems of text-comprehension are analysed in chapters 10 and 11 of Bennion's *Statute Law*.

NATURE AND CLASSIFICATION OF LEGISLATION

Introductory

In the United Kingdom, which lacks a written constitution, legislation consists of Acts of Parliament as primary legislation, together with various types of secondary or delegated legislation. Acts (also called statutes) may be public or private. Other kinds of classification are possible.

Craies (chap. 4) gives a classification of statutes. Bennion's *Statutory Interpretation* (Part II) deals with the juridical nature of Acts, including enactment procedure and classification. Lord Devlin's article on statutory offences gives an interesting treatment of one type of enactment.

Public general Acts

Parliamentary Acts other than private Acts are known as public general Acts. The literature cited in this chapter refers to these unless the context otherwise indicates.

Private Acts

Private Acts are divided into local and personal Acts. The distinctions between these, and between private and public Acts, were until recently not clearcut. General light is thrown on the emergence of the distinctions by the painstaking work of *Clifford* (see below). The modern treatment by *Lambert* of the evolution of private Bill procedure in the eighteenth century is enlightening in relation to the current position. Particularly instructive is her handling of Estate Bills, Inclosure Bills and Local Bills, together with the tracing of the emergence from considerable confusion of the modern division into public and private Acts.

Clifford's two-volume work surveys the subject exhaustively from a viewpoint near the end of the nineteenth century, when private legislation had passed its peak of social importance. Much attention is given to local authority legislation, coupled with that promoted by public utility companies. Railway companies feature prominently.

The second volume of *Clifford* appeared two years after the first. Published in the year of Victoria's golden jubilee, it records that nearly 11,000 local and personal Acts had so far been passed in her reign. In his dedication (by permission) to the Queen, Clifford says that his volumes attempt, for the first time, to trace the history of that private legislation "which, working quietly, is but little noticed, though it has done so much for the public good".

Craies (Part Four) deals at some length with the modern position regarding private Acts. In particular the treatment covers the special rules which, arising out of the peculiar nature of private Acts, govern their operation, construction, and relation to public general Acts.

Delegated legislation

General works on statute law usually include a description of delegated or subordinate legislation, mostly now promulgated in the form of statutory instruments. *Craies* devotes a chapter to it (chap. 13), as does Bennion's *Statute Law* (chap. 5). *Meirs and Page* give it most of their chapter 6, using the curious description *legislation without legislatures*.

A useful specialised work by a master in the subject is *Carr*. See also Harrison's *Delegation by Parliament of Legislative Powers* and Driedger's *Subordinate Legislation*. A noted work written mainly from a position opposing delegated legislation is Allen's *Law and Orders*.

European legislation

The impact of Community law resulting from its application to the United Kingdom by the European Communities Act 1972 is ably described in *Collins*. This is arranged in four chapters. Following an introductory chapter, the remainder deal respectively with community law as part of United Kingdom law, the national court and the European court, and challenges to Community law. Chapter 6 of Bennion's *Statute Law* is devoted to Community law as it applies in Britain.

DRAFTING OF LEGISLATION

General

Legislation is drafted on similar principles throughout the Commonwealth and other common law countries. Since 1869, United Kingdom public general Acts have mostly been drafted in the Parliamentary Counsel Office in Whitehall. The earliest head of that Office, Lord Thring, wrote *Practical Legislation* for the instruction of his assistant draftsmen. It was published in 1902, and never updated. The next year *Ilbert* presented another official view, also never updated. Since then the only book devoted to drafting published by a member of the Parliamentary Counsel Office has been the autobiographical *Kent*, covering the period 1933-1953. There have however been various articles (see, e. g., Graham Harrison's 'An Examination of the Main Criticisms of the Statute Book and of the Possibility of Improvement' and Hutton's 'Legislative Drafting Technique in the United Kingdom'). An official experiment in drafting by computer took place in the Parliamentary Counsel Office in 1975 (described in Bennion's article 'A Computer Experiment in Legislative Drafting').

The leading general work on legislative drafting in Britain and the Commonwealth is *Thornton*, first published in 1970. This contains thirteen chapters respectively covering such matters as the nature of language, syntax, style, the stages of drafting, and the framing of subordinate legislation. Also useful is Part One of *Robinson*, which deals with general principles of drafting. A popular short work (dealing with legal drafting generally) is *Piesse and Smith*. *Miers and Page* has a valuable chapter on the drafting process (chap. 4). *Russell* was the leading manual in colonial days.

American drafting methods are ably described in the two books by *Dickerson*, while the Canadian approach is set out in Driedger's *The Composition of Legislation*. All three are leading works, of considerable interest in relation to British conditions.

In Bennion's *Statute Law*, chapter 2 deals with selected drafting topics, including the drafting office and the contrast between common-law and civil-law (or European) drafting styles. The latter theme is developed at length by *Dale*, who argues that Britain should switch to the European method of generalized drafting. Bennion's *Statute Law* describes (chap. 3) the parameters that dictate the draftsman's method (and often cause the defects that give rise to criticism).

Linguistic considerations are dealt with in *Coode*, a monograph that has enjoyed a remarkable and persisting success. A thorough and comprehensive treatment of verbal aspects on historical grounds is *Mellinkoff*. For a discussion of LEGOL, a special legislative language developed under Stamper at the London School of Economics, see Bennion's article 'LEGOL and the Electronic Home Lawyer'. A valuable collection of essays on jurimetrics, or the scientific investigation of legal problems, is *Allen and Caldwell*. This includes six essays on the use of modern logic in composing and interpreting legislative texts, and eight essays on the value of decision theory in relation to drafting. A landmark article is that by Layman Allen on symbolic logic.

Criticism of drafting technique

There has been much criticism of British drafting technique. In modern times this was first drawn together by the Statute Law Society in the *Heap Report*. Suggestions for reforming the deficiencies catalogued in the Heap report were put forward by the Society in the *Stow Hill* and *Marshall* Reports. In response to pressure from within and outside the profession, the Government set up the Renton Committee, whose report contains proposals for improvement. Though numerous, these can fairly be described as little more than tinkering. Because of behind-the-scenes opposition from the Parliamentary Counsel Office, few even of these modest reforms have been implemented. The frustration engendered in the chairman, Lord Renton, by this failure, together with evidence put to the Renton Committee by the Statute Law Society and Francis Bennion, is set out in the Society's publication *Renton and the Need for Reform*.

STATUTORY INTERPRETATION

The most important and difficult aspect of statute law is concerned with interpretation. The search is for order. Parliament attempts to achieve this in its enactments, but not always with success. That is why, as Lord Hailsham of St Marylebone LC observed in *Johnson v Moreton* [1980] AC 37, at p 53, nine-tenths of all cases reaching the House of Lords turn on statutory interpretation. In his 1983 Hamlyn lectures (*Hailsham*, p 65), Lord Hailsham broadened even this striking remark by saying that over nine out of ten cases heard on appeal before the Court of Appeal or the House of Lords either turn upon, or involve, the meaning of words contained in enactments of primary or secondary legislation. A similar proportion no doubt applies in reported cases generally.

It follows that textbooks on statutory interpretation assume great importance. As mentioned above (p 000), the leading English authorities for more than a century have been *Craies* and *Maxwell*. To them must be added *Odgers*, which first appeared in 1939 and is concerned also with the interpretation of deeds and wills. The only full-length English work exclusively devoted to the construction of statutes which has appeared in this century is Bennion's *Statutory Interpretation*, published in 1984 and running to 1,200 pages. Mention should also be made of *Cross*, a short but distinguished handbook for students. These five works will now be briefly discussed.

Craies has already been partly described (p 000). It is still highly regarded, though some of its statements need to be treated with caution in the light of modern developments. By basing itself on different rules for when the meaning is 'plain' and when it is not 'plain', *Craies* overlooks the fundamental principle that a meaning can never be said to be plain or otherwise unless a fully informed view is taken. Nor would it now be considered sound to lay down such categorical rules as that 'if the meaning is plain the consequences are to be disregarded' (pp 64-79). However *Craies* contains a wealth of illustrative cases, and remains a valuable work of reference.

Maxwell, still the authority most widely relied on by the judiciary, is arranged in thirteen chapters. It bases itself on the old threefold concept of the literal rule, the golden rule, and the mischief rule, the theory apparently being that the interpreter selects one or other as the basis for his judgment. (The unsoundness of this was brilliantly, if somewhat crudely, exposed in the influential article by Willis.)

The chapters of *Maxwell*, like those of *Craies*, show no very scientific scheme of arrangement. In both works there are understandable attempts to lay down binding rules, for example about when a restrictive interpretation will be given, and when an expansive. This tends to lead to confusion however, because unfortunately the behaviour of judges does not lend itself to such certainty. *Odgers*, being a twentieth-century work, gives rise to less unease on this score. It is well written, and provides a crisp and often helpful treatment.

Nevertheless the inadequacy of these three works was felt by many, including Lord Hailsham and the late Sir Rupert Cross. The latter's little book is an attempt, as he put it, to overcome the 'malaise' induced in him by the so-called English rules of interpretation. Cross confessed to being 'as much in the dark as I had been in my student days about the way in which the English rules should be formulated' (p v). His book, though stimulating and popular with students, is admittedly tentative. It ends, fittingly enough, with a section headed 'Concluding Questions'.

Bennion's *Statutory Interpretation* was written partly in response to the challenge thrown down by *Cross*. It recognises that the courts have moved on from the old simplistic view. No longer is a problem of statutory interpretation settled by applying some talisman called the 'literal rule', or the 'golden rule', or the 'mischief rule'. Nowadays we have purposive construction, coupled with respect for the text and a recognition by judges that interpreting a modern Act is a matter sophisticated and complex.

Between the grammatical meaning and the overall legal meaning, courts now draw a conceptual

distinction. The two usually correspond, but sometimes there is doubt. Here the question is always: does the grammatical meaning truly give effect to Parliament's imputed intention? If it does not, the legal meaning will be something else. In searching for the legal meaning of a doubtful enactment, the court now proceeds by identifying, determining and weighing. It identifies the general interpretative criteria that are relevant in the instant case (of which there may be many). It determines by reference to these criteria the specific factors that, on the wording of the enactment and the facts of the instant case, are decisive. It weighs the factors that tell for or against each of the opposing constructions put forward by the parties.

The aim of Bennion's *Statutory Interpretation* is to describe this modern common-law system of statutory interpretation, presenting it in a coherent, self-consistent way. A former parliamentary draftsman, Bennion has framed the book in the form of a code. This runs to 396 sections, and is accompanied by a critical commentary. It shows that, in the last analysis, an enactment is given either a literal or a strained interpretation. For sound constitutional reasons, judges dislike admitting this. Nevertheless it holds the key to the whole problem of statutory interpretation.

Legislative intention is the paramount criterion in statutory interpretation, so the code sets out the guides to arriving at that intention. These are called the interpretative criteria, and are divided into (1) binding *rules*, (2) *principles* derived from general legal policy, (3) *presumptions* as to what Parliament had in mind, and (4) linguistic *canons* of construction. A doubt is resolved by first assembling the *relevant* guides to legislative intention, or interpretative criteria, out of the many that exist. From them the interpreter extracts, in the light of the facts of the instant case and the wording of the enactment, the relevant interpretative *factors*. The two 'bundles' of factors respectively favouring each of the opposing constructions put forward by the parties are figuratively weighed one against the other. Whichever, all things considered, comes out heavier in the juristic scales is preferred.

Further assistance may be gathered from two leading works on interpretation recently respectively published in Australia (*Pearce*) and Canada (Driedger's *The Construction of Statutes*). A nineteenth-century American classic is *Sedgwick*. Help on the meaning of particular expressions may be sought from *Broom*, *Stroud* or *Words and Phrases Legally Defined*. In addition *Beal* remains a mine of useful dicta. Helpful English articles (of which there are too many to list fully) include those by M. S. Amos and Mann respectively (the latter dealing with uniform statutes in international law). Max Radin's article is an irreverent, if not destructive, examination of the concept of legislative intention. Valuable light is thrown on the use of Interpretation Acts in the two articles by Leitch, and Leitch and Donaldson, respectively. The official *Index to Statutory Definitions*, which many people found useful, is no longer updated.

In the Commonwealth, Australia has recently been the most active in reforming its rules on statutory interpretation. Barwick's article, and the two final entries in the bibliographical section of the present chapter, illustrate this. Corry's Canadian article is instructive in relation to administrative law.

REFORM

The leading agency for statute law reform in England and Wales is the Law Commission. In Scotland the Scottish Law Commission performs a similar function. Both were set up by the Law Commissions Act 1965, which still regulates them. The moving spirit for setting them up was Lord Gardiner, whose *Law Reform NOW* indicated the way. Other agencies include the Lord Chancellor's Law Reform Committee and the Home Secretary's Criminal Law Revision Committee. The *List* of reform bodies periodically published by the Institute for Advanced Legal Studies has worldwide coverage, being arranged in alphabetical order of countries.

The duty of the Law Commissions in relation to statute law is set out in s 3(1) of the 1965 Act. Under the supervision of the Lord Chancellor, they are required to 'take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in

particular the codification of such law, the elimination of anomalies, the repeal of obsolete and unnecessary enactments, the reduction of the number of separate enactments and generally the simplification and modernisation of the law'.

The work of the Law Commission to 1979 is summarized in *Raistrick*. Law Commission reports are published by HMSO in a numbered series with the prefix LAW COM. No. ... Each year the Law Commission publishes an Annual Report which contains a cumulative list of all its published working papers, reports etc.

The problems of improving the form of the law are still relevantly expressed in Thring's *Simplification of the Law*, which has a vigorous, even racy, approach. The leading reformer in the field of statute law is usually said to be Jeremy Bentham. *Dillon* is a helpful summary of his more wide-ranging contribution. *Brougham*, another leading nineteenth-century reformer, expresses himself even more vigorously than Thring (notably on the topic of criminal law codification). Also vigorous, and erudite to boot, is Jamieson's article from New Zealand. The numerous proposals set out in Bennion's *Statute Law* are listed in the index under *Reform, Proposals for*.

Interpretation

The Law Commissions' proposals for reform of the system of statutory interpretation are set out in their 1969 report. As to the unsuccessful attempts to implement this report see Bennion's article 'Another Reverse for the Law Commissions' Interpretation Bill'.

Codification and restatement

There is a wide literature on codification. A useful account of the rise of the Anglo-American codification movement in the nineteenth century is given in *Hepburn*. The difficulties of producing an English code are ably discussed in *Sheldon Amos*. Source materials on American codification and restatement, including writings by the leading American codifier David Dudley Field, will be found in *Honnold*. The treatment in *Zander* forms a helpful summary of the modern English position, particularly in relation to the Law Commission's duty to codify. The difficulties and delays in that programme are mercilessly exposed in the two articles by Hahlo. Lord Scarman's two articles show how the then chairman of the Commission viewed his task at the outset.

Problems of codification are interestingly reviewed in *Stoljar*, while the article by Donald is another useful Australian contribution. The short article by Lawson is full of penetrating insights. The English relationship to European codification is shown in the report on the 1973 Franco-British colloquium. Particular English aspects are dealt with in the articles by Diamond (contract law) and Smith (criminal law).

Consolidation and statute law revision

A useful brief account of the Law Commission's function of consolidation of enactments and statute law revision is given in *Miers and Page* (see pp 38-47). Chapter 7 of Bennion's *Statute Law* is devoted to this topic, while an important detailed treatment is given in the article by Simon and Webb. Hutton's article 'Mechanics of Law Reform' is an illuminating account by a former First Parliamentary Counsel.

PUBLICATIONS OF LEGISLATIVE TEXTS

Public general Acts

Each public general Act is published separately by HMSO shortly after royal assent. This is noted in the *Daily List of Government Publications* and in the monthly list entitled *Government Publications* (both

published by HMSO, and respectively referred to below as the Daily List and the Monthly List). The public general Acts passed in each calendar year are published by HMSO in a bound volume or volumes. Another authoritative series is published by the Incorporated Society of Law Reporting under the title *Law Reports: Statutes*.

The current official edition known as *Statutes in Force*, begun in 1972, was completed in 1981. The Acts are arranged under 131 Titles, and printed in booklet form as currently amended. Since the booklets are often not completely up to date, reference to the annual cumulative supplement is essential.

Commercial editions of public general Acts usually include extensive annotation, as well as the text of the Act. The leading commercial publication is Butterworth's *Halsbury's Statutes of England*, which is arranged under subject titles, and of which a fourth edition is in progress. Some of the material for this series also appears separately in *Butterworth's Annotated Legislation Service* or as individual textbooks by named authors. A slight drawback of *Halsbury's Statutes* is that in order to keep to the system of titles it is often found necessary to split Acts between two or more volumes.

A rival commercial series is *Current Law Statutes Annotated* (Sweet & Maxwell) which began in 1948.

The publication known as *Statutes Revised* formed an earlier official collection. The first edition of this was completed in 1885, while the second was published in instalments between 1888 and 1929. The 32 volumes of the third edition were published together in 1950. Earlier still, *Statutes at Large*, of which various editions were published, covered Acts up to the year 1869. Before that, the Record Commission produced *Statutes of the Realm* which covered the period from 1235 to 1713.

Two important and useful official publications, reissued at frequent intervals, are the *Index to the Statutes* and the *Chronological Table of the Statutes*. The latter lists in chronological order all public general Acts passed since 1235, whether or not they are still in force. If an Act remains operative the *Table* lists all amendments made to it.

Local and personal Acts

Private Acts may be either local or personal, and are usually published by HMSO. They are then noted in the Daily and Monthly Lists. HMSO publish an annual list entitled *Local and Personal Acts / Tables and Index*. HMSO also publish an index entitled *Index to Local and Personal Acts 1801-1947*. This is updated by the *Supplementary Index to the Local and Personal Acts 1948-1966*. At the end of the second volume of the *Chronological Table of the Statutes* there is a table of local and personal Acts showing amendments made after 1973.

Statutory instruments

As published, statutory instruments are listed in the Daily and Monthly Lists. Moreover, HMSO publish the *List of Statutory Instruments* both monthly and annually. The SIs of each calendar year are published by HMSO in bound volumes. In these, until 1961, the instruments were arranged under subjects, but from 1961 onwards they have been set out in numerical order.

The official index to SIs is the *Guide to Government Orders*, published biennially by HMSO. It shows under appropriate subject headings the powers to make statutory instruments, together with the titles of the instruments made under those powers and still in force. Another annual publication by HMSO is the cumulative *Table of Government Orders* which lists general statutory instruments in chronological order and shows whether or not each instrument is still in force. For those which are, details are given of any amendments affecting them. The *Table* also lists instruments made under the royal prerogative.

A commercial series of the most important SIs is published by Butterworths under the title *Halsbury's Statutory Instruments*.

SELECT BIBLIOGRAPHY OF STATUTE LAW

A very large literature exists on statute law. Commonwealth and American sources are useful in the British context because what is called the common law system of drafting and interpretation applies in similar form in all the common law countries. Furthermore continuity of legislative practice means that good older sources retain much of their interest and utility.

The following is a selection of what are considered the most useful authorities. A lengthy bibliography of British and Commonwealth statute law materials is published by the Commonwealth Secretariat, Marlborough House, London SW1. Help can also be obtained from *Dane and Thomas*. The journal of the subject is the *Statute Law Review* (published by Sweet & Maxwell Ltd in association with the Statute Law Society).

Textbooks

Sir Carleton Allen's *Law and Orders* (3rd ed, Stevens, 1965).

Sir Carleton Allen's *Law in the Making* (7th ed, Oxford University Press, 1964).

Layman E. Allen and Mary E. Caldwell's *Communication Sciences and Law: Reflections from the Jurimetrics Conference* (1st ed, Bobbs-Merrill, 1965).

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