Bennion on Statute Law

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Part II - Statutory Interpretation

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The Technique of Statutory Interpretation

This introductory chapter to Part II aims to describe the common- law technique of statutory interpretation. Before we get started, a fundamental question should be addressed. Why is such a technique necessary?

On the continent of Europe, which follows the civil law, this necessity is not felt. There the words of legislation are considered approximate. They do not have to mean what they say, even if what they say is clear. They are a mere starting point for flights by the judges. The function of the legislator is to sketch out some ideas. Filling them in, refining them, and shaping them for real life is the job of the judge and administrator. Their literal meaning is not decisive, and therefore time need not be wasted in attempting to formulate interpretative techniques.

Countries which have inherited the common law system see things differently. Despite the fact that it was their judges who created the common law, they now prefer to be ruled by a democratic legislature. Its members are people they voted for. Its Acts are passed after full debate, carried out in public. Almost every word in every Act is weighed and argued over through successive legislative stages. So it matters how these Acts are interpreted by the courts.

It follows that in common-law systems there is a technique of statutory interpretation, though admittedly it is little understood. Indeed many people, including most judges and advocates, do not wholeheartedly accept that the technique exists, let alone attempt to practise it. This is scarcely their fault, since usually they have not been taught it. Indeed up until now, the technique can hardly be said to have been worked out. The function of this Part, which is based on the more detailed treatment in the author's book *Statutory Interpretation* (Butterworths 1984, Supplement 1989), is to present the working out of such a technique.

With the advance of the European Community, it may be thought a little late in the day to present such a thesis as this. Better late than never. There is still time for people to reflect on how, and by whom, they wish to be governed.

To construe or interpret?

We began with a trivial argument: Is there any material distinction between construction and interpretation? The answer is no. The terms are interchangeable, though it is more natural to speak of interpreting a word or phrase and construing an extended passage. Bentham said: 'People in general when they speak of a Law and a Statute are apt to mean the same thing by the one as by the other. So are they when they speak of construing and interpreting' (Bentham 1775, p 9).

Interpretation perhaps connotes, more than construction does, the idea of determining the *legal* meaning of an enactment. Construction is more concerned with extracting the *grammatical* meaning, which may not be the same. This important distinction is discussed below (see pp 87-91)

The enactment as the unit of enquiry

The concept of the *enactment* is central to statutory interpretation.

Nature of an enactment

An enactment is a *proposition* expressed in an Act or other legislative text. The effect of the proposition is that, when facts fall within an indicated area (the factual outline), then specified legal consequences (the legal thrust) ensue. Difficulties about meaning are usually centred on one proposition only, though the full meaning of a legislative provision often cannot be gained without considering numerous aspects of the legal system.

An enactment consists of express words, though it is likely to have implied meanings as well. While a single word may come under examination as the root of an ambiguity or other obscurity, a word in itself can have little significance. Every word needs a verbal context to raise any question of its meaning. The enactment provides this.

Usually an enactment consists of either of the whole or part of a single sentence. One sentence may thus contain two or more enactments. On the other hand a single legislative proposition may fall to be collected from two or more sentences, whether consecutive or not. The provision in the Interpretation Act 1889, s 35(1) that 'any enactment may be cited by reference to the section or subsection of the Act in which the enactment is contained' (not reproduced in the Interpretation Act 1978) is itself an example of an enactment.

The unit of enquiry is an enactment whose legal meaning in relation to a particular factual situation falls to be determined. Where the combined effect of two or more enactments is in question, each in turn is treated as a unit of enquiry, their combined legal effect then falling to be determined. To discover which are the relevant enactments, it is necessary to frame the question of law at issue

in the particular case. The significant legislative words then have to be isolated.
For this purpose the statute user must develop a technique of skimming through a legislative provision and mentally picking out the portions that matter in the case before him. If his mind can learn to blot out the irrevelant words, the remainder will often read continuously and make sense on their own. Thus in *Riley* v *A- G of Jamaica* [1983] 1 AC 719, 730 Lord Scarman cited an enactment in a form he described as 'trimmed of words inessential for present purposes'. Isolating the relevant enactment in this way often calls for use of the technique of selective comminution, described below (P 235).

How the enactment is drawn

In ascertaining the legal meaning of an enactment it is necessary to determine whether the drafting is precise or imprecise. Modern British Acts are produced by *precision drafting,* where (although there are occasional lapses) the drafter aims to use language accurately and consistently, and moreover is allowed to draft any amendments made to the Act during its parliamentary progress. Older Acts are frequently the subject of *disorganised composition.* Here the text may be the product of many hands and the language is often confused and inconsistent. Delegated legislation may be drafted with less precision than Acts. The technique of interpretation applied to any enactment can only be as precise and exacting as the method of drafting permits.
It is to be presumed, unless the contrary appears, that the enactment was competently drafted, so that the accepted principles of grammar, syntax and punctuation, and other literary canons, are taken to have been observed and the drafter is presumed to have executed his task with due knowledge of the relevant law *(Spillers Ltd* v *Cardiff Assessment Committee* [1931] 2 KB 21, 43; *New Plymouth Borough Council* v *Taranack Electric Power Board* [1933] AC 680, 682). This principle is expressed in the maxim *omnia praesumuntur rite et solemniter esse acta* (all things are presumed to be correctly and solemnly done).

The factual outline

An enactment lays down a legal rule in terms showing that the rule is triggered by the existence of certain facts. The enactment indicates these facts in outline form (the factual outline). All sets of facts that fall within the outline thus trigger the legal thrust of the enactment, unless by an authoritative decision (known as dynamic processing) the court modifies, or has previously modified, the literal meaning of the factual outline in order to carry out what it considers the true intention of Parliament.

Where the court finds it necessary to narrow the factual outline because its literal meaning goes wider than Parliament's intention, the court indicates what the narrower outline is. Alternatively, the statutory factual outline may be thought to need clarification by the court. Either way, the court processes the enactment by laying down a sub-rule from which can be drawn a description of the narrower or more precise range of facts that will in future cases trigger the operation of the enactment. Often the factual outline will show that both physical and mental facts have to be present. In criminal law the terms *actus reus* and *mens rea* are traditionally used, though they have been frowned on by the House of Lords *(R* v *Miller* [1983] 2 AC 161, 174).

We may take as an example of a factual outline the Criminal Damage Act 1971, s 1(1), which specifies several offences. A selective comminution of one of these reads: 'A person who without lawful excuse damages any property belonging to another, being reckless as to whether any such property would be damaged, shall be guilty of an offence.'

Here the factual outline can be set out as follows:

1 The *subject* is any person with criminal capacity, the last three words being implied by virtue of the presumption that relevant legal rules are intended to be attracted (see pp 178-181 below).

2 The *actus reus* is without lawful excuse damaging any property belonging to another.

3 The *mens rea* is being reckless as to whether any such property would be damaged.

The factual outline of a legal rule may contain alternatives, in the sense that the same legal thrust applies in two or more factual situations. Lord Diplock gave the example of buggery at common law 'which could be committed with a man *or* a woman *or* an animal' *[R* v *Courtie* [1984] 2 WLR 330, 335).

The statutory factual outline is often too wide for juridical purposes. Grammatically it includes, or may be thought to include, some factual situations which are, and others which are not, intended to trigger the operation of the enactment. Alternatively, the statutory factual outline may be thought to need clarification, for example, by the finding of implications as to mental states. In either case it is for the court to determine the sub-rules which lay down the boundary or clarify the provision.

In a particular case the *relevant* factual outline indentifies the situations which, in relation to the legal rule or sub-rule in question, are material on the actual facts. For example, if a man charged with murder claimed to be absolved because what he admittedly maliciously killed was a person born an idiot, any enquiry as to the law would be concerned only with whether the crime of murder extends to the killing with malice aforethought of persons who are congenital idiots.

It is the function of a court accurately to identify this area of

relevance. The basis of the doctrine of precedent is that like cases must be decided alike. This requires a correct identification of the factual outline that triggers the statutory rule on actual facts such as are before the court. In his book *Precedent in English Law*, Sir Rupert Cross insisted that under the doctrine of precedent, judgments must be read in the light of the facts of the cases in which they are delivered (Cross 1977, p 42). The principle is the same whether the case is decided under a rule of common law or statute law.

Judicial statements of principle must be related to the facts of the instant case, but the juristic function of the court is to *generalize* those facts. The *ratio decidendi* of a case involves postulating a general factual outline. This is part of the rule laid down or followed by the case, since a legal rule imports a factual situation to which it applies. If the facts of a later case fit within this outline but demand amendment of the legal thrust of the rule, the outline is too broadly stated. If on the other hand the facts of a later case do not fit into the outline, but elict the same legal response, the outline is too narrow.

The legal thrust of an enactment

The legal thrust is the effect in law produced by the enactment where the facts of the instant case fall within the factual outline. Problems of statutory interpretation concern either the exact nature of the factual outline, or the exact nature of the legal thrust, or both. Respectively, these turn on *when* the enactment operates and *how* it operates. In criminal law the legal thrust of an enactment is usually expressed by saying that where the factual outline is satisfied the person in question is guilty of an offence. The legal consequences of this by way of punishment and so forth may be spelt out or left to the general law.

The legal thrust of a non-criminal enactment may be more complex, and thus give rise to more difficult questions of statutory interpretation. For an illustration we may take *Inland Revenue Commissioners* v *Hinchy* [1960] AC 748. This turned on the meaning of a phrase in the Income Tax Act 1952, s 25(3) which expressed the legal thrust of the provision. Lord Reid said (p 766):

> I can now state what I understand to be the rival contentions as to the meaning of section 25(3). The appellants contend that 'treble the tax which he ought to be charged under this Act' means treble his whole liability to income tax for the year in question . . . It is not so easy to state the contrary contention briefly and accurately.

Legal meaning and grammatical meaning of an enactment

The interpreter's duty is to arrive at the *legal* meaning of the enactment, which is not necessarily the same as its grammatical

(or literal) meaning. There is a clear conceptual difference between grammatical meaning apart from legal considerations and the overall meaning taking those considerations into account. While it may sometimes be difficult to draw in practice, this distinction is basic in statutory interpretation.

The legal meaning of an enactment must be arrived at in accordance with the rules, principles, presumptions and canons which govern statutory interpretation (in this book referred to as the interpretative criteria or guides to legislative intention). They are described in the four following chapters.

By applying the relevant interpretative criteria to the facts of the instant case, certain interpretative *factors* will emerge. These may pull different ways. For example the desirability of applying the clear grammatical meaning may conflict with the fact that in the instant case this would not remedy the mischief that Parliament clearly intended to deal with. In such cases a balancing operation is called for. In a particular case the legal meaning of an enactment will usually be found to correspond to the grammatical meaning. If this were never so, the system would collapse. If it were always so, there would be no need for books on statutory interpretation. Where it is not so, the enactment is being given a ***strained*** construction.

Real doubt as to legal meaning

There may be doubt as to whether the legal meaning does or does not correspond to the grammatical meaning. There may even be doubt as to what is the grammatical meaning, for language is always prone to ambiguity.

The law will pay regard to such doubt only if it is ***real***. If, on an informed interpretation, there is no real doubt that a particular meaning of an enactment is to be applied, that is to be taken as its legal meaning. If there is real doubt, it is to be resolved by applying the interpretative criteria. For this purpose a doubt is 'real' only where it is substantial, and not merely conjectural or fanciful. As Lord Cave LC said, no form of words has ever yet been framed with regard to which some ingenious counsel could not suggest a difficulty *(**Pratt** v **South Eastern Railway*** [1897] 1 QB 718, 721). Judges thus need to be on guard against the plausible advocate. They also need to guard against being too clever themselves. Lord Diplock pointed out that where the meaning of the statutory words is plain 'it is not for the judges to invent fancied ambiguities' *(**Duport Steels*** v ***Sirs*** [1980] 1 WLR 142, 157). The main causes of doubt, or doubt-factors, are examined in Part III.

Nature of the grammatical meaning

The grammatical (or literal) meaning of an enactment is its linguistic

meaning taken in isolation. This is the meaning it bears when, as a piece of English prose, it is construed according to the rules and usages of grammar, syntax and punctuation, and the accepted linguistic canons of construction applicable to prose generally. There are often difficulties in arriving at the grammatical meaning, even before legal questions are considered. Pollock CB said: 'grammatical and philological disputes (in fact all that belongs to the history of language) are as obscure and lead to as many doubts and contentions as any question of law' *(Waugh* v *Middleton* (1853) 8 Ex 352, 356).

Ambiguity

Though judges sometimes use it in a wider sense, the term 'ambiguity' should be reserved for cases where there is more than one meaning that is grammatically apt. The drafter has produced, whether deliberately or inadvertently, a text which from the grammatical viewpoint is capable, on the facts of the instant case, of bearing either of the opposing constructions put forward by the parties. It may be a *semantic ambiguity* (caused by the fact that one word can in itself have several meanings), a *syntactic ambiguity* (arising from the grammatical relationship of words as they are chosen and arranged by the drafter), or a *contextual ambiguity* (where there is conflict between the enactment and its internal or external context).

Another subdivision is between *general ambiguity,* where the enactment is ambiguous quite apart from any particular set of facts, and *relative ambiguity,* where it is ambiguous only in relation to certain facts.

An example of general ambiguity came before the Court of Appeal in *Leung* v *Garbett* [1980] 1 WLR 1189. This concerned provisions relating to arbitration in the County Courts Act 1959, s 92(1), which said the judge 'may, with the consent of the parties, revoke the reference [to arbitration] or order another reference to be made.' Did the qualifying phrase 'with the consent of the parties' govern both limbs or only the first? It may be thought there is no ambiguity at all, and that the structure and punctuation of the sentence indipate that the qualifying phrase applied to both limbs. Yet the Court of Appeal held otherwise. As an example of relative ambiguity we may take the Finance Act 1975, Sched *5,* para 3(1), of which Viscount Dilhoume LC said: I do not think the words 'interest in possession in settled property' are equally open to divers meanings. It is the determination of the application of those words to particular circumstances which give rise to difficulty.' *(Pearson* v *IRC* [19811 AC 753, 771.)

Semantic obscurity and the 'corrected version'

Where, either generally or in relation to the facts of the instant case, the wording of the enactment is disorganised, garbled or

otherwise semantically *obscure,* the interpreter must go through a two-stage operation. It is first necessary to determine what was the intended grammatical formulation. The version of the enactment thus arrived at may be referred to as 'the corrected version'. The interpretative criteria are then applied to the corrected version as if it had been the actual wording of the enactment.

As our first example we may take the House of Commons Disqualification Act 1975, s 10(2), which says that the enactments 'specified in Schedule 4 to this Act' are repealed. The Act contains no Sched 4. It does however have Sched 3, which is headed 'Repeals'. Other internal evidence confirms that Sched 3 is the one intended. The court will apply a corrected version referring to the enactments 'specified in Schedule 3'.

With some garbled texts, like that in the previous example, it is quite obvious what the corrected version should be. In other cases it may be less clear, and the court must do the best it can. The considerations involved may be complex.

It is a well-known fact that in a trial on indictment the accused pleads either guilty or not guilty. If he pleads guilty there is no verdict because he is not put in charge of the jury. So an enactment worded as if there were *always* a verdict in a trial on indictment is bound to be obscure. This was the case with the Criminal Appeal Act 1907, s 4(3), which said:

> On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have passed, quash die sentence passed at the trial, and pass such other sentence warranted in law *by the verdict. . .* as they think ought to have been passed.

In *R* v *Ettridge* [1909] 2 KB 24, 28 the court hearing an appeal against sentence by a prisoner who had pleaded guilty rectified s 4(3) by deleting the words 'by the verdict'. The court claimed the right to 'reject words, transpose them, or even imply words, if this be necessary to give effect to the intention and meaning of the Legislature'. (For further examples of garbled texts see pp 256-263).

Literal or strained construction?

Where the grammatical meaning of an enactment is clear, to apply that meaning is to give it a literal construction. Where on the other hand the grammatical meaning is obscure, giving the enactment a literal construction involves applying the grammatical meaning of the corrected version. If (in either case) a literal construction does not correspond to the legislative intention it becomes necessary instead to apply a *strained* construction in order to arrive at the legal meaning of the enactment.

Where the enactment, or (in the case of grammatical obscurity) its corrected version, is not ambigious the question for the interpreter therefore is: shall it be given a literal or strained construction in

arriving at the legal meaning? Where the enactment is ambiguous the questions are first, which of the ambiguous meanings is more appropriate in arriving at a literal construction, and second, should it in any case be given some other (strained) meaning? As Mackinnon LJ said in *Sutherland Publishing Co* v *Caxton Publishing Co* [1938] Ch 174, 201: 'When the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used . . . "

In the later case of *Jones* v *DPP* [1962] AC 635, 668 Lord Reid appeared to contradict this by saying: 'It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of the provision cannot reasonably bear . . . '. In this conflict Lord Reid must be adjudged wrong and Mackinnon LJ right. There are very many decided cases where courts have attached meanings to enactments which in a grammactical sense they cannot reasonably bear. Sometimes the arguments against a literal construction are so compelling that even though the words are not, withing the rules of language, capable of another meaning they must be given one. To assert, in the face of the innumerable cases where judges have applied a strained construction, that there is no power to do so is to infringe the *principium contradictionis,* or logical principle of contradiction.

In former times the practice of giving a strained meaning to statutes was known as 'equitable construction'. This term had no more than an oblique reference to the technical doctrines of equity, but mainly indicated a free or liberal construction.

Since, in the light of the interpretative criteria which apply to a particular enactment, its legal meaning may be held to correspond either to the grammatical meaning or to a strained meaning, it follows that the legal meaning of a particular verbal formula may differ according to its statutory context *Customs and Excise Comrs* v *Cure &DeeleyLtd* [1962] 1 QB 340, 367). Automatic literalism is rejected in modern statutory interpretation. Legislative intention is always the ultimate guide to legal meaning, and this varies from Act to Act.

Filling in textual detail by implications

Parliament is presumed to intend that the literal meaning of the express word of an enactment is to be treated as elaborated by taking into account all implications which, in accordance with the recognised guides to legislative intention, it is proper to treat the legislator as having intended. Accordingly, in determining which of the opposing constructions of an enactment to apply in the factual situation of the instant case, the court seeks to identify the one that embodies the elaborations intended by the legislator. Implications arise either because they are directly suggested by

the words expressed or because they are indirectly suggested by rules or principles of law not disapplied by the words expressed. In ordinary speech it is a recognised method to say expressly no more than is required to make the meaning clear (the obvious implications remaining unexpressed). The drafter of legislation, striving to be as brief as possible and use ordinary language, adopts the same method. The distinguished American drafter Reed Dickinson observed, 'It is sometimes said that a draftsman should leave nothing to implication. This is nonsense. No communication can operate without leaving part of the total communication to implication.' (Dickerson 1981, p 133.)

An implication cannot properly be found which goes against an express statement: ***expressum facit cessare taciturn*** (statement ends implication). So it is not permissable to find an implied meaning where this contradicts the grammatical meaning. Where the court holds that the legal meaning of an enactment contradicts the grammatical meaning, it is not finding an implication but applying a strained construction.

So far as implications are relevant in the case before it, the court treats the enactment as if it were worded accordingly. As Coleridge J said in *Gwynne* v *Burnett* (1840) 7 Cl & F 572, 606: 'If … the proposed addition is already necessarily contained, although not expressed, in the statute, it is of course not the less cogent because not expressed.'

Parliament acknowledges its reliance on implications by occasionally including in its Acts an express statement that a particular implication is not to be taken as intended (see for example the Administration of Justice Act 1960, s 12(4)).

The device of leaving unsaid some portion of what the drafter means is known as ellipsis. It is discussed at length in chapter 15.

Must an implication be 'necessary'?

The question of whether an implication should be found within the express words of an enactment depends on whether it is proper, having regard to the accepted guides to legislative intention, to find the implication; and not on whether the implication is 'necessary'.

It is sometimes suggested by judges that only necessary implications may legitimately be drawn from the wording of Acts (see, eg *Salomon* v *Salomon* [1897] AC 22, 38). This is too narrow. The necessity referred to could only be *logical* necessity, but requirements of logic are not the only criteria in determining the legal meaning of a text. While the implications intended are a matter of inference, it is often psychological rather than logical inference that is involved.

The principle was accurately stated by Willes J when he said that the legal meaning of an enactment includes 'what is necessarily

or properly implied' by the language used *{Chorlton* v *Lings* (1868) LR 4 CP 374, 387).

Must an implication be 'obvious'?

Another way the rule is sometimes put by judges is that the implication must be 'clear' or 'obvious'. Thus in *Temple* v *Mitchell* (1956) SC 267, 272 Lord Justice-Clerk Thomson said: "There is no express provision, and I cannot discover any clear implication'. This is also open to objection. Courts of construction are not usually troubled with a 'clear' provision. On the contrary they exist to give judgment where the law is not clear but doubtful. There is likely to be a fine balance to be struck where one side claims that a particular implication arises and their opponents deny it.

Implications affecting related law

The fact that Parliament has by an enactment declared its express intention in one area of law may carry an implication that it intends corresponding changes in related areas of law, or in relevant legal policy. The courts accept that where a legislative innovation is based on a point of principle, the effect of receiving it into the body of the law may be to treat the principle in question as thereafter embodied in general legal policy. Thus Acts such as the Race Relations Act 1976, the Sex Discrimination Act 1975 and the Equal Pay Act 1970 are taken to indicate that it has become the general policy of the law to counter the relevant types of injurious personal discrimination whenever opportunity offers. Lord Morris of Borth- y-Gest said:

... by enacting the Race Relations Acts 1965 and 1968 Parliament introduced into the law of England a new guiding principle of fundamental and far-reaching importance. It is one that affects and must influence action and behaviour in this country within a wide-ranging sweep of human activities and personal relationships. *(Charter* v *Race Relations Board* [1973] AC 868, 889. *Cf* the remarks by Lord Denning MR on the effect of the European Communities Act 1972 in *Re Westinghouse Uranium Contract* [1978] AC 547, 546.)

On questions of personal morality the courts tend not to follow Parliament's lead (eg *R* v *City of London Coroner, ex pane Barber* [1975] Crim LR 515 (eg decriminalisation of suicide) *Knuller* v *DPP* [1973] AC 435 (decriminalisation of homosexual practices)).

The enactment and the facts

The court is not required to determine the meaning of an enactment in the abstract, but only when applied to the relevant facts of the

case before it. The question for the court is whether or not these facts fall within the legal outline laid down by the enactment, and if so what the legal trust of the enactment is.

Because the court exercises the judicial power of the state, it has a two-fold function. First it is required to decide the *Us,* that is the dispute between the parties who are before it in the instant case. Secondly it has the duty, so that justice according to law may be seen to be done and the law in question may be known, of indicating the legal principle held to be determinative of the *Us.*

That an enactment may have fundamentally different meanings in relation to different facts was recognised by Lord Brightman in a dictum on the Statutes of Limitation: 'A limitation Act may. . . be procedural in the context of one set of facts, but substantive in the context of a different set of facts.' *(Yew Bon Tew* v *Kenderaan Bas Mara* [1983] AC 553, 563).

So the practical question for the court is not what does this enactment mean in the abstract, but what does it mean *on these facts?* The point was concisely put by Lord Somervell of Harrow:

> A question of construction arises when one side submits that a particular provision of an Act covers the facts of the case and the other side submits that it does not. Or it may be agreed it applies, but the difference arises as to its application. *(A-G* v *Prince Ernest Augustus of Hanover* [1957] AC 436, 473.)

Relevant and irrelevant facts

As we have seen, the operation of the enactment is triggered by a particular factual situation comprised in the factual outline. This statutory description must be 'tranferred' to the material facts of the instant case or, as it were, fitted over them to see if it corresponds. Here it is important to grasp exactly which facts are relevant. It is necessary to separate material from immaterial facts.

Many of the actual facts of a case are irrelevant. The name of a party is irrelevant (unless a question of identity is in issue). The particular moment when an incident happened is irrelevant (unless time is of the essence), and so on. It requires skill to determine, in relation to the triggering of a particular enactment, which actual fact is a relevant fact. While a fact may be relevant, it may still be necessary to strip it of its inessential features in order to arrive at its juristic significance. This is particularly true where the decision on that fact later comes to be treated as a precedent. Where the enactment is very simple, the facts which trigger it can be stated very simply. Caution is always necessary however.

The Murder (Abolition of Death Penalty) Act 1965, s 1 says 'No person shall suffer death for murder.' The statutory factual outline might be stated as 'a conviction of murder'. This would

not be strictly accurate however, since the enactment does not apply to convictions anywhere in the world. After referring to the extent provision in the 1965 Act, namely s 3(3), we arrive at the following as the statutory factual outline: 'a conviction of murder by a court in Great Britain, or by a court-martial in Northern Ireland.'

Where a court articulates the meaning of an enactment but describes the generalised facts in terms that are too wide, its decision, to the extent that it is expressed too widely, will be of merely persuasive authority. A court decision can be a binding precedent only in relation to similar facts, that is facts that do not *materially* differ from those of the instant case. In a particular case a fact is not necessarily relevant merely because it is within the statutory factual outline. The total factual outline usually has only a partial application.

Section 9 (drink driving) of the Road Traffic Act 1972, says that in certain circumstances a person may be 'required' to provide a specimen for a laboratory test, and that if without reasonable excuse he refuses, he commits an offence. In ***Hier*** v ***Read*** [1977] Crim LR 483 the defendant D, having been required to provide a specimen, was first asked to sign a consent form. He refused to sign the form without reading it first, but the opportunity to do this was refused by the police. ***Held*** a requirement to provide a specimen after signing a consent form which one is not allowed to read is not a 'requirement' within the meaning of the Act. Accordingly no offence was committed.

This case called for a careful assessment of just what the factual outline was. It was important to avoid confusion of thought. For example it might have been said that the behaviour of the police in refusing to allow D to read the consent form furnished him with a 'reasonable excuse' as contemplated by s 9. This would have been faulty reasoning, because that stage was never reached. On the facts, there had not been any valid 'requirement'. A full statement of the factual outline of what is a 'requirement' within the Road Traffic Act 1972, s 9 would run to many pages. All that was needed here was a statement dealing solely with cases where the defendant is asked to sign a consent form which he is not allowed to read. Once it is clear that, whatever the full factual outline may be, the instant case is outside it the matter is concluded.

Proof of facts

Usually a case contains a mass of facts. Most of these are irrelevant to the legal issues involved. The art of the advocate is to analyse the facts and present them in a way which strips them of irrelevant detail. If any are in dispute the analysis can initially be presented in the alternative. When the court determines the disputed facts the advocate may, if the determination is made by a judge or other

legally-qualified functionary, have an opportunity of crystallising his legal argument by reference to the facts as so found.

Matters of fact and degree

Where facts are ascertained, the question of whether they fit the factual outline and so trigger the legal thrust of the enactment may not have an obvious answer. It is then what is called a matter of fact and degree. Such matters depend on the view taken by the fact-finding tribunal. If the tribunal has directed itself properly in law and reached its decision in good faith, the decision is beyond challenge.

A matter of fact and degree marks the limit of statutory interpretation. After the relevant law has been ascertained correctly, it becomes a question for the judgment of the magistrate, jury, official, or other fact-finding tribunal to determine whether the matter is within or outside the factual outline laid down by the enactment.

As Woolf J said on the question of whether certain persons were members of a 'household' within the meaning of the Family Income Supplements Act 1970, s 1(1) *England* v *Secretary of State for Social Services* [1982] 3 FLR 222, 224), there are three possibilities:

1 The only decision the tribunal of fact can, as a matter of law, come to is that the persons concerned *are* members of the household.

2 The only decision the tribunal of fact can, as a matter of law, come to is that the persons concerned *are not* members of the household

3 It is proper to regard the persons concernced as being or not being members of the household, depending on 'the view which the fact-finding tribunal takes of all the circumstances as a matter of fact and degree'.

Difficulties over matters of fact and degree usually arise in connection with *broad terms*, which are fully discussed in chapter 16 of this book.

The opposing constructions of the enactment

The usual circumstance in which a doubtful enactment falls to be construed is where the respective parties each contend for a different meaning of the enactment in its application to the facts of the instant case. These may be referred to as the opposing constructions. The enactment may be ambiguous in all cases, or only on certain facts. An example of the former is the Rent Act 1968, s 18, of which Lord Wilberforce remarked 'the section is certainly one which admits, almost invites, opposing constructions' *{Maunsell* v *Olins* [1974] 3 WLR 835, 840).

Where the enactment is grammatically ambiguous, the opposing constructions put forward are likely to be alternative meanings each

of which is grammatically possible. Where on the other hand the enactment is grammatically capable of one meaning only, the opposing constructions are likely to contrast the grammatical (or literal) meaning with a strained construction.

In some cases one of the opposing constructions may be said to present a wide and the other a narrow meaning of the enactment. This is a convenient usage, but requires care. It is necessary to remember that one is speaking of a wider or narrower construction of the enactment forming the unit of enquiry, and not necessarily of the Act as a whole. An enactment which is the unit of enquiry may be a proviso cutting down the effect of a substantive provision. A wider construction of the proviso then amounts to a narrower construction of the substantive provision.

In other cases there may be no sense in which a construction is wider or narrower. For example an enactment may bear on the question whether a person who undoubtedly needs a licence for some activity needs one type of licence (say a category A licence) or another (category B). If the legal meaning of the enactment is uncertain, the opposing constructions on the facts of the instant case will respectively be that it requires a category A licence or requires a category B licence.

The art of determining precisely which is the most helpful yet plausible construction to advance to the court is an important forensic accomplishment. Reed Dickerson said, 'A knack for detecting the two (or more) meanings which are being confused in a disputed verbal question is of more service in reasoning than the most thorough knowledge of the moods and figures and syllogism.' (Dickerson 1981, p63)

Where the parties advance opposing constructions of the enactment the court may reject both of them and apply its own version. Or it may insist on applying the unvarnished words, which amounts to holding that there is no 'real doubt' over the meaning.

An enactment regulating taxis made it an offence for an unlicensed cab to display a notice which 'may suggest' that the vehicle is being used for hire. In *Green* v *Turkington* [1975] Crim LR 242, which concerned a notice displayed in an unlicensed cab, the opposing constructions for 'may suggest' put forward in the magistrates' court were (1) 'is reasonably likely to suggest' and (2) 'might possibly suggest'. The Divisional Court rejected both constructions, holding that on the facts opposing constructions were not needed. There could be no doubt that the notice in question fell within the wording of the enactment as it stood.

Legislative intention as the paramount criterion

As we have seen, an enactment has the legal meaning taken to be intended by the legislator. In other words the legal meaning corresponds to what is considered to be the legislative intention.

As Lord Radcliffe said in *A-G for Canada* v *Halien & Carey Ltd* [1952] AC 427, 449:

There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention.

This is a general rule for the construction of written instruments, and is not confined to legislation. Halsbury's *Laws of England* (4th edn, vol 36, para 578) says: 'The object of all interpretation of a written instrument is to discover the intention of the author as expressed in the instrument.'

Statutory interpretation is concerned with written texts, in which an intention is taken to be embodied, and by which that intention is communicated to those it affects. This idea **that a** society should govern itself by verbal formulas, frozen in the day of their originators yet continuing to rule, is a remarkable one. It is pregnant with unreality, yet can scarcely be improved upon. Those concerned with working out its effect have an important role, in which sincerity must be uppermost. An Act is a statement by the democratic Parliament. What the interpreter is required to do is give just effect to that statement.

Lord Halsbury LC summed up the historical principle in *Eastman Photographic Materials Co Ltd* v *Comptroller-General of Patents, Designs and Trade-Marks* [1898] AC 571, 575:

Turner LJ in *Hawkins* v *Gathercole* and adding his own high authority to that of the judges in *Stradling* v *Morgan,* after enforcing the proposition that the intention of the Legislature must be regarded, quotes at length the judgment in that case: that the judges have collected the intention 'sometimes by considering the cause and necessity of making the Act. . . sometimes by foreign circumstances' (thereby meaning extraneous circumstances), 'so that they have been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion'. And he adds: 'We have therefore to consider not merely the words of this Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject'.

In former times Acts commonly referred to 'the true intent and meaning' of an Act (see eg 2 Geo 3 c 19 (1762) s 4). In our own day Lord Lane CJ has said that when *interpreting* an Act the court must be careful not to *misinterpret* Parliament's intention *(A-G's Reference (No 1 of 1981)* [1982] QB 848, 856).

Many commentators have mistakenly written off the concept of legislative intention as unreal. Max Radin called it 'a transparent

and absurd fiction' (Radin 1930, p 881). The least reflection, he said, makes clear that the lawmaker 'does not exist' *(ibid,* p 870). If the lawmaker does not exist, what human mind first thinks of and then validates the legislative text? It is not made into law otherwise than through the agency of the human mind. We have not yet reached the point of having our laws made by a computer. Under our present system Acts are produced, down to the last word and comma, by people. The lawmaker may be difficult to identify, but it is absurd to say that the lawmaker does not exist. As Dickerson argues, legislative intent is ultimately rooted in individual intents (Dickerson 1981, p 51). These go right down to the democratic roots, as C K Allen grasped when he said that laws are not solely the creation of individuals who happen to compose the legislative body: 'Legislators, at least in democratic countries, are still representative enough to be unable to flout with impunity the main currents of contemporary opinion.' *(Law in the Making* (4th edn, 1946, p 388).

Allen might have added that on the contrary legislators *reflect* such currents. The idea that there is no true intention behind an Act of Parliament is anti-democratic. An Act is usually the product of much debate and compromise, both public and private. The intention that emerges as the result of these forces is not to be dismissed as in any sense illusory. Such dismissal marks a failure to grasp the true nature of legislation. The judges know this well enough; and would not dream of treating a legislative text as having no genuine intendent. As said by Lord Simon of Glaisdale: 'In essence drafting, enactment and interpretation are integral parts of the process of translating the volition of the electorate into rules which will bind themselves.' *(Black-Clawson* v *Papierwerke* [1975] AC 591, 651.)

The guides to legislative intention

The guides to legislative intention, or interpretative criteria, consist of various rules, principles, presumptions and linguistic canons applied at common law or laid down by statute for assisting in statutory interpretation. These can be broadly distinguished as follows:

1 A rule of construction is of binding force, but in cases of real doubt rarely yields a conclusive answer.
2 A principle embodies the policy of the law, and is mainly persuasive.
3 A presumption is based on the nature of legislation, and affords a *pritna facie* indication of the legislator's intention.
4 A linguistic canon of construction reflects the nature or use of language and reasoning generally, and is not specially referable to legislation.

The guides to legislative intention are peculiar in that, while most general legal rules or principles directly govern the actions of the subject, these directly govern the actions of the court. There is however an indirect effect on the subject. Since the court is obliged to apply an enactment in accordance with the interpretative criteria, persons governed by the enactment are well advised to read it in that light. The law in its practical application is not what an Act says but what a court says the Act means.

The way the interpretative criteria operate can be shown schemetically as follows:

A question of the legal meaning of enactment E arises. Opposing constructions are put forward by the respective parties in relation to the facts of the instant case. The plaintiff puts forward construction P and the defendant construction D.

In the light of the facts of the instant case and the guides to legislative intention, constructions P and D are considered in turn by the court. On examining construction P the court finds some of the interpretative criteria produce factors that tell in its favour. The plaintiff might call them positive factors. Other criteria produce factors (negative factors) that tell against construction P. The court repeats the process with construction D, and then assesses whether on balance P or D comes out as more likely to embody the legislator's intention.

A variety of interpretative criteria are likely to be relevant, but to simplify the example suppose there are only two: the primacy of the grammatical meaning and the desirability of purposive construction. In relation to construction P, a postive factor is that it corresponds to the grammatical meaning while a negative factor is that it does not carry out the purpose of the enactment. In relation to construction D, a positive factor is that it does carry out the purpose of the enactment while a negative factor is that it is a strained construction. The court weighs the factors, and gives its decision.

Obviously this brief analysis does not necessarily correspond to the steps actually taken in court. In practice the intellectual processes and interchanges usually occur in a less formal way. The persons involved are, after all, experts engaging in a familiar routine. But formal analysis must be attempted if we are to believe that the law of statutory interpretation has progressed beyond what it was in the fourteenth century, when:

> . . . the courts themselves had no ordered ideas on the subject and were apt to regard each case on its merits without reference to any other case- still less to any general canons of interpretation—and trust implicity in the light of nature and the inspiration of the moment (Plucknett 1980, p9.)

Applying the guides to legislative intention

As we have seen, where on an informed construction there is no real doubt, the plain meaning is to be applied. We now examine the practical way of arriving at the legal meaning of the enactment where there is real doubt.

First the cause of the doubt must be ascertained. The doubt is then resolved by assembling the relevant guides to legislative intention, or interpretative criteria. From them the interpreter extracts, in the light of the facts of the instant case and the wording of the enactment which forms the unit of enquiry, the interpretative *factors* that govern the case. Where the relevant factors point in different directions, the interpreter embarks on the operation of *weighing* them. The factors that weigh heaviest dictate the result.

Ascertaining the cause of the doubt

As explained above, the categories where there is real doubt about the legal meaning of an enactment in relation to particular facts can be reduced to two: grammatical ambiguity and the possible need for a strained construction. Semantic obscurity may also cause doubt, but as has been explained this is a defect of a different nature. It is a corruption of" the text which, when resolved by producing the 'corrected version', still leaves the possibility of ambiguity or the need for a strained construction.

A particular factor may both cause the doubt and give the means to resolve it. If a literal construction would produce gravely adverse consequences, for example the endangering of national security, this will raise doubt as to whether it could really have been Parliament's intention that the court should apply the grammatical meaning. At the same time the presumption that Parliament does not intend to endanger national security will assist in the working out of the appropriate strained construction.

The doubt-factors arising in statutory interpretation are discussed at length in Part III of this book.

Nature of an interpretative factor

The term 'interpretative factor' denotes a specific legal consideration which derives from the way a general interpretative criterion applies (a) to the text of the enactment under enquiry and (b) to the facts of the instant case (and to other factual situations within the relevant factual outline). The factor serves as a guide to the construction of the enactment in its application to those facts. As respects either of the opposing constructions of the enactment, an interpretative factor may be either positive (tending in favour of that construction) or negative (tending away from it). There are many different criteria which may be relevant in deciding

which of the opposing constructions of a doubtful enactment the court should adopt. The principle to be followed was stated by Lord Reid in *Maumell* v *Olins* [1974] 3 WLR 835, 837:

> Then rules of construction are relied on. They are not rules in the ordinary sense of having some binding force. They are our servants not our masters. They are aids to construction, presumptions or pointers. Not infrequently one 'rule' points in one direction, another in a different direction. In each case we must look at all relevant circumstances, and decide as a matter of judgment what weight to attach to any particular 'rule'.

When Lord Reid put the word rule in quotation marks here he meant to acknowledge that many of the interpretative criteria are not true rules. Some can be formulated as such. Others, as we have seen, are more accurately described as principles, presumptions or canons.

Weighing the interpretative factors

There are no fixed priorities as between various factors, since so much depends on the wording of the enactment and the particular facts. For example, in some cases the adverse consequences of a particular construction may be very likely to arise whereas in others they may be unlikely.

Injustice will usually weigh heavily, as will the grammatical meaning of the enactment. Mere inconvenience will usually get a low rating, as Lord Wilberforce indicated in *Tuck* v *National Freight Corporation* [1979] 1 WLR 137, 41 when he said: 'It would require a high degree of inconvenience to deter me from what seemed to me, on the language, the true meaning'. On the other hand in an old Irish case the court declined to allow duty evaders to rely on the privilege against self-incrimination because 'so much public inconvenience would result from a contrary decision' *(A-G* v *Conroy* (1838) 2 Jo Ex Ir 791, 792).

The judge may feel confident in his decision or agonise over it. In a borderline case he may find it very difficult to make up his mind. It is notorious that different judicial minds may, and frequently do, conscientiously arrive at differential readings (as to these see pp 316-320 below).

Great difficulty may arise where different values are truly incommensurable, for example, those respectively attached to property and human life. How do you equate personal freedom and public inconvenience? In the end judges can find no better words to use than 'instinct' or 'feel'.

The wording of an enactment may indicate that the legislature has determined the relative weights which are to be given to certain factors, or at least wished to give guidance on the matter. In such a case the court must conform to the legislative intention thus signified.

The weight given by the courts to a particular interpretative criterion may change from time to time. For example, the presumption that an enactment is to be given its grammatical (or literal) meaning has varied in weight over the years. At its height in the middle of the nineteenth century, it has declined somewhat recently. All legal doctrines are subject to this kind of temporal variation, a fact to be borne in mind when considering, in the light of the binding or persuasive authority of relevant precedents, the weight to be attached in the instant case to a factor derived from the criterion of legal policy.

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 ^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 British interpretative criteria.

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 preparatoires,* 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 WLR 597, 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 636) 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.'

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