

## **Bennion on Statute Law**

### **Part II - Statutory Interpretation**

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#### **Guides to Legislative Intention III: Presumptions Derived from the Nature of Legislation**

The present chapter deals with the ten presumptions derived from the nature of legislation, which are that:

- 1 the text is the primary indication of intended meaning
- 2 the text is *prima facie* to be given a literal construction
- 3 the court is to apply the remedy provided for the 'mischief'
- 4 an enactment is to be given a purposive construction
- 5 regard is to be had to the consequences of a particular construction
- 6 an 'absurd' result is not intended
- 7 errors in the legislation are to be rectified
- 8 evasion of the legislation is not to be allowed
- 9 the legislation is intended to be construed by the light of ancillary rules of law and legal maxims
- 10 an updating construction is to be applied wherever requisite.

*Nature of legislative presumptions* A presumption affords guidance, arising from the nature of legislation in a parliamentary democracy, as to the legislator's *prima facie* intention regarding the working of the enactment. It looks in particular to the effective implementation of what the legislator has enacted.

#### **Presumption that text to be primary indication of intention**

In construing an enactment, the text of the enactment, in its setting within the Act or instrument containing it, is to be regarded as the pre-eminent indication of the legislator's intention. British courts, towards the end of the twentieth century, regard the text of Acts of the United Kingdom Parliament with great respect. When called upon to construe an Act, the court takes its primary duty as being to look at the text and say what, in itself, it means: 'The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases' (*Barrell v Fordree* [1932] AC 676, 682).

The text is the starting point, and the centre of the interpreter's attention from then on. It is the text, after all, that is being interpreted. In the next chapter we consider the purely linguistic canons of construction that assist in this. Meanwhile we turn to one consequence of the present presumption: the respect paid to the literal meaning.

### **Presumption that enactment to be given its literal meaning**

*Prima facie*, the meaning of an enactment intended by the legislator (in other words its legal meaning) is taken to be the literal meaning. As explained above (pp 87-91), the 'literal meaning' corresponds to the grammatical meaning where this is straightforward. If however the grammatical meaning, when applied to the facts of the instant case, is ambiguous, then any of the possible grammatical meanings may be described as the literal meaning. If the grammatical meaning is garbled or otherwise semantically obscure, then the grammatical meaning likely to have been intended (or any one of them in the case of ambiguity) is taken as the literal meaning.

The point here is that the literal meaning is one arrived at from the wording of the enactment alone, without consideration of other interpretative criteria. When account is taken of such other criteria it may be found necessary to depart from the literal meaning and adopt a strained construction. The initial presumption is however in favour of the literal meaning (*Caledonian Railway Co v North British Railway Co* (1881) 6 App Cas 114, 121; *Capper v Baldwin* [1965] 2 QB 53, 61). In general, the weight to be attached to the literal meaning is far greater than applies to any other interpretative criterion, though with older Acts it tends to be less. As Lord Bridge said of an Act of 1847, it is 'legitimate to take account, when construing old statutes, of the prevailing style and standards of draftsmanship' (*Wills v Bowley* [1983] 1 AC 57, 104).

### **Presumption that court to apply remedy provided for the mischief**

Parliament intends that an enactment shall remedy a particular mischief. It therefore intends the court, in construing the enactment, so to apply the remedy provided by it as to suppress that mischief. Except in the case of purely declaratory provisions, virtually the only reason for passing an Act is to change the law. So the reason for an Act's passing must lie in some defect in the law. If the law were not defective, Parliament would not need or want to change it. That defect is the 'mischief to which the Act is directed.

#### *Social or legal mischief*

Since all an Act can do is change the law, the immediate mischief

must be some defect in the law. However the overall mischief may be a social mischief coupled with this legal mischief. As society changes, what are thought of as social mischiefs continually emerge. Whether or not they are really so may be disputable. But it is true that only a static society concentrates on removing purely legal mischiefs.

A social mischief is a factual situation, or mischief 'on the ground', that is causing concern to the society (such as an increase in mugging, or a decline in the birthrate). While a mischief on the ground may correspond to a defect in the law, this is not necessarily so. An increase in mugging may arise because the law is inadequate. Or it may arise because an adequate law is inadequately enforced. A decline in the birthrate may lie beyond the reach of law.

An example of a *social* mischief is given in the preamble to the statute 4 Hen 7 c 19 (1488):

Great inconveniences daily doth increase by desolation and pulling down and wilfull waste of houses and Towns within [the king's realm], and laying to pasture lands which customarily have been used in tillage, whereby idleness—ground and beginning of all mischiefs—daily doth increase ... to the subversion of the policy and good rule of this land.

A purely *legal* mischief was remedied by the statute 2 & 3 Edw 6 c 24 (1548). So refined had the common law rules of criminal venue become that, where a person was fatally wounded in one county but expired in the next, the assailant could be indicted in neither.

The Water Act 1973 introduced a new system, to be financed by water rates, for the management of the nation's water resources. The Act was silent on the important question of who was to be liable to pay these rates (*Daymond v South West Water Authority* [1976] AC 609). This 'mischief of omission', as Lord Scarman called it in *South West Water Authority v Rumble's* [1985] AC 609, 618, was remedied by the Water Charges Act 1976, s 2.

#### *Party-political mischiefs*

In modern times there has arisen a new class of legislation. No longer is Parliament largely concerned with repelling the nation's enemies, keeping the Queen's peace, financing the administration, and holding the ring between citizens. The legislature becomes an engine of social change. It regulates the national economy. It takes on the management and control of great industries. The subject matter of its Acts enters the realm of argument and opinion, party politics, economic theory, religious or sociological controversy, class warfare, and other matters as to which there is no consensus.

How is the interpreter to regard legislation of this type? The answer is clear. A court of construction is bound to ignore the fact that what to the majority in one Parliament seemed a defect in

the existing law may appear the reverse to their successors of a different political hue. Until the successors get round to repealing an Act with which they disagree, it stands as the will of the Parliament that made it. The same applies where a decisive change has occurred in the views of a political party since the Act's passing (eg *R v Secretary of State for the Environment, ex pane Greater London Council* (1983) *The Times*, 2 December).

It is important not to let confusion creep in by treating the mischief as somehow altered by later events. These may indeed require to be taken into account, but not as altering or glossing the historical facts which occasioned the passing of the Act.

#### *Hey don's Case*

In medieval times the country was largely governed by common law. Then, as social progress set in, there arose many varieties of social mischief. These exposed legal mischiefs, which marred the common law and required correction by Parliament. Arguments began to arise among common lawyers as to the attitude the judges administering the common law should adopt towards legislative interventions. The judges, having framed 'our lady the common law', were not disposed to acknowledge flaws in their creation. The question became pressing, and at the instance of the king was considered by the Barons of the Exchequer in *Hey don's Case* (1584) 3 Co Rep 7a. They passed the following resolution (I have modified the wording slightly to assist reference and improve clarity):

That for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned and 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 the Parliament hath resolved and appointed to cure the disease of the commonwealth; and
- (4) the true reason of the remedy,

and then the office of all the judges is always to make such construction as shall:

- (a) suppress the mischief and advance the remedy, and
- (b) suppress subtle inventions and evasions for the continuance of the mischief *pro privato commodo* (for private benefit), and
- (c) add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico* (for the public good).

This resolution, which forms the basis of the so-called 'mischief rule' of statutory interpretation, has been approved in many cases down to the present day (eg *Salkeld v Johnson* (1848) 2 Ex 256, 272; *Blackwell v England* (1857) 8 El & Bl Rep 541; *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 764; *Re May fair*

*Property Co, Bartlett v Mayfair Property Co* [1898] 2 Ch 28, 35; *Ealing LBC v Race Relations Board* [1972] AC 342, 368).

*Dangers in relying on the mischief*

It does not necessarily follow that legislation enacted to deal with a mischief (a) was intended to deal with the whole of it (eg *Hussain v Hussain* [1982] 3 WLR 679), or (b) was not intended to deal with other things also (see *Central Asbestos Co Ltd v Dodd* [1973] AC 518; *Maunsell v Olins* [1974] 3 WLR 835,842). As Viscount Simonds LC said: 'Parliament may well intend the remedy to extend beyond the immediate mischief (*A-G v Prince Ernest Augustus of Hanover* [1957] AC 436, 462).

Furthermore common sense may indicate that the ambit of the mischief is narrower than the literal meaning of the remedial enactment, as occurred in the Australian case of *Ingham v Hie Lie* (1912) 15 CLR 267. A Chinese laundryman was charged under an Act whose purpose was to limit the hours of work of Chinese in factories, laundries etc so as to protect other industries. The defendant, who had been found *ironing his own shirt*, was held not guilty of an offence that on a literal interpretation of the Act it had created.

*Unknown mischief*

Particularly with older Acts, it may not be possible for the court to find out what the mischief was. It must then do the best it can with the Act as it stands (eg *Nugent-Head v Jacob (Inspector of Taxes)* [1948] AC 321, 327).

*Remedy provided for the mischief*

The remedy provided by an Act for a mischief takes the form of an amendment of the existing law. It is to be presumed that Parliament, having identified the mischief with which it proposes to deal, intends the remedy to operate in a way which may reasonably be expected to cure the mischief. At its simplest, the remedy for the mischief may consist of removing the obnoxious legal provision and not replacing it by anything. This often happens with a party-political Act when the opposition gets into power. For example the Conservative Government of 1971 disliked the Land Commission set up by an Act of its Labour predecessors. The very existence of the Commission was conceived to be a mischief, so it was abolished by the Land Commission (Dissolution) Act 1971. That simple procedure, accompanied by a few transitional provisions, constituted the 'remedy'. Another example from the same year is the Licensing (Abolition of State Management) Act 1971.

Clearly Parliament is unlikely to intend to abolish one mischief at the cost of establishing another which is just as bad, or even worse. Avoiding such an anomaly is an important consideration in statutory interpretation (see p 172-3 below).

### **Presumption that court to apply a purposive construction**

A construction that promotes the remedy Parliament has provided to cure a particular mischief is nowadays known as a purposive construction. Parliament is presumed to intend that in construing an Act the court, by advancing the remedy which is indicated by the words of the Act and the implications arising from those words, should aim to further every aspect of the legislative purpose. A purposive construction is one which gives effect to the legislative purpose by either (a) following the literal meaning where that is in accordance with that purpose, which may be called a purposive and literal construction; or (b) applying a strained meaning where the literal meaning is not in accordance with the purpose, which may be called a purposive and strained construction.

When present day judges speak of a purposive construction, they usually mean a purposive and strained construction. Thus Staughton J referred to 'the power of the courts to disregard the literal meaning of an Act and to give it a purposive construction' (*A-G of New Zealand v Ortiz* [1982] 3 All ER 432, 442). Lord Diplock spoke of 'competing approaches to the task of statutory construction— the literal and the purposive approach' (*Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 879).

#### *Novelty of the term*

The term 'purposive construction' is new, though the concept is not. Viscount Dilhorne said that, while it is now fashionable to talk of the purposive construction of a statute, the need for such a construction has been recognised since the seventeenth century (*Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231, 234). The term's entry into fashion betokens a swing by the appellate courts away from literal construction. Lord Diplock said in 1975:

If one looks back to the actual decisions of [the House of Lords] on questions of statutory construction over the last 30 years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions. (*Carter x Bradbeer* [1975] 1 WLR 1204, 1206-7.)

#### *Supervening factors*

As always in statutory interpretation it is necessary, when considering

the possibility of applying a purposive construction, to take account of any other applicable criteria also. The overriding object is to give effect to Parliament's intention, and this is unlikely to be to achieve the immediate purpose at no matter what cost. Contrary purposes of a more general nature may supervene, as in *A-G of New Zealand v Ortiz* [1982] 3 WLR 570. Here it was held at first instance that the phrase 'shall be forfeited' in the New Zealand Historic Articles Act 1962, s 12(2) was ambiguous, and that a purposive construction should be applied to decide whether forfeiture was automatic or depended upon actual seizure of the historic article in question. The decision was overruled on appeal because, though right as far as it went, it failed to take into account a further (and overriding) criterion. This was the rule of international law that limits the extra-territorial effect of legislation relating to property rights.

#### *Non-purposive-and-literal construction*

In the sense used in English law, purposive construction is an almost invariable requirement. But a non-purposive construction may be necessary, because unavoidable, where there is insufficient indication of (a) what the legislative purpose is, or (b) how it is to be carried out. Thus in *IRC v Hinchy* [1960] AC 748, 781 Lord Keith of Avonholm declined to apply a purposive construction of an income tax enactment because, as he said, the court could not take upon itself the task of working out an assessment in a different way to that indicated on a literal construction. For a further example see *IRC v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637.

Non-purposive construction may be necessary where the court considers a predictable construction (see p 153 above) is required. Apart from these cases, it is usually only where the literal meaning is too strong to be overborne that the court will apply a non- purposive-and-literal construction (eg *Richards v MacBride* (1881) 8QBD 119).

#### *Statements of purpose*

The search for the purpose of an enactment is sometimes assisted by an express statement on the lines of: 'The purpose of [this enactment] is to remedy the defect in the law consisting of [*description of the mischief*] by amending the law so as to [*description of the remedy*].' A statement of purpose (whether on these lines or not, and whether comprehensive or not) may be found either in the Act or in the judgment of a court devising the statement as an aid to construction (see *Whitley v Stumbles* [1930] AC 544, 547; *Haskins v Lewis* [1931] 2 KB 1, 14; *Dudley and District Building Society v Emerson* [1949] Ch 707, 715; *Wallersteiner v Moir* [1974] 1 WLR 991, 1032; *R v*

*Marlborough Street Magistrates' Court Metropolitan Stipendiary Magistrate, ex pane Simpson* (1980) 70 Cr App R 291, 293).

When found in the Act, the statement of purpose may be in the long title or preamble, or in a purpose clause or recital. A well-known example is the Fires Prevention (Metropolis) Act 1774, s 83, which is still in force. The opening recital tells us that the section was enacted 'in order to deter and hinder ill-minded persons from wilfully setting their house or houses or other buildings on fire with a view to gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered'. For modern examples see the Road Traffic Act 1960, s 73(1) and the Wildlife and Countryside Act 1981, s 39(1).

#### *Judicial duty not to deny the statute*

It is the duty of the court to accept the purpose decided on by Parliament. This applies even though the court disagrees with it. It even applies where the court considers the result unjust, provided it is satisfied that Parliament really did intend that result. As Lord Scarman said in *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 168:

... in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes and unmakes the law [and] the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute.

#### *Alteration of an Act's purpose*

A later Act *in pari materia* may have the effect of altering an Act's purpose, so far as concerns matters arising after the commencement of the later Act. In *R v Hammersmith and Fulham LBC, ex pane Beddowes* [1987] QB 1050, 1065 Fox LJ said:

Historically, local authority housing has been rented. But a substantial inroad on that was made by Part I of the Housing Act 1980, which gave municipal tenants the right to purchase their dwellings. In the circumstances it does not seem to me that a policy which is designed to produce good accommodation for owner-occupiers is now any less within the purposes of the Housing Acts than the provision of rented housing . . .

#### *British and European versions of purposive construction*

The British doctrine of purposive construction is more literalist than

the European variety, and permits a strained construction only in comparatively rare cases. Lord Denning said:

[European judges] do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose . . . behind it. When they come upon a situation which is *to their minds* within the spirit—but not the letter—of the legislation, they solve the problem by looking at the design and purpose of the legislature—at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? *They lay down the law* accordingly. (*James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1977] 2 WLR 107, 112 (emphasis added).)

### **Presumption that regard to be had to consequences of a construction**

It is presumed to be the legislator's intention that the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, should assess the likely consequences of adopting each construction, both to the parties in the case and (where similar facts arise in future cases) for the law generally. If on balance the consequences of a particular construction are more likely to be *adverse* than *beneficent* this is a factor telling against that construction.

Consequential construction is of modern adoption. The earlier attitude of the judges was expressed by Lord Abinger CB in *A-G v Lockwood* (1842) 9 M & W 378, 395:

. . . I cannot enter into a speculation of what might have been in the contemplation of the legislature, because they have not stated what they contemplated . . . The Act of Parliament practically has had, I believe, a very pernicious effect—an effect not at all contemplated—but we cannot construe the Act by that result.

The modern attitude is shown by Mustill J in *R v Committee of Lloyd's, ex parte Moran* (1983) *The Times*, 24 June: 'a statute . . . cannot be interpreted according to its literal meaning without testing that meaning against the practical outcome of giving effect to it'.

#### *Adverse and beneficent consequences*

The consequence of a particular construction may be regarded as 'adverse' if it is such that in the light of the interpretative criteria the court views it with disquiet because, for example, it frustrates the purpose of the Act, or works injustice, or is contrary to public policy, or is productive of inconvenience or hardship. Any other

consequences (whether merely neutral or positively advantageous) may be called 'beneficent'. For this purpose a consequence clearly intended by Parliament is to be treated as beneficent even though the judge personally dislikes it.

*Consequences for the parties and the law*

In judging consequences it is important to distinguish consequences to the parties in the instant case and consequences for the law generally. It will usually be a straightforward matter to determine the effect on the court's final order of a finding in favour of one possible construction rather than another. But the court must also bear in mind that under the doctrine of precedent its decision may be of binding, or at least persuasive, authority for the future.

The court may be less unwilling to adopt an 'adverse' construction where some functionary is interposed whose discretion may be so exercised as to reduce the practical ill-effects (see, eg, *IRC v Hinchy* [1960] AC 748).

Judges are particularly ready to apply a strained construction on consequential grounds where this will assist the work of the courts. Thus in *R v Stratford-on-Avon District Council, ex pane Jackson* [1985] 1 WLR 1319 the Court of Appeal held that, although the literal meaning of RSC Ord 53, r 4 is to lay down a time limit for making substantive applications for judicial review, it should be construed instead as referring to applications for *leave* to make such substantive applications. This reading confirmed the existing practice of the courts, which is 'the only sensible course from a practical point of view' (p 772).

*Consequences tending both ways*

Since the consequences to be borne in mind are often of a wide variety it is not surprising that they may tend in both directions. Each of the opposing constructions may involve some adverse and some beneficent consequences. Lord Morris of Borth-y-Gest pointed this out in relation to anti-racist legislation:

In one sense there results for some people a limitation on what could be called their freedom: they may no longer treat certain people, because of their colour or race, or ethnic or national origins, less favourably than they would treat others. But in the same cause of freedom, although differently viewed, Parliament has, in statutory terms now calling for consideration, proscribed discrimination . . . (*Charter v Race Relations Board* [1973] AC 868, 889).

Where the result of a literal construction is sufficiently 'adverse', consequential construction usually indicates a decision requiring a strained construction of the enactment (eg *Mann v Malcolmson (The Beta)* (1865) 3 Moo PCC NS 23).

### **Presumption that 'absurd' result not intended**

The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a wide meaning to the concept of 'absurdity', using it to include virtually anything that appears inappropriate, unfitting or unreasonable.

In *Williams v Evans* (1876) 1 Ex D 277 the court had to construe the Highway Act 1835, s 78, which created an offence of furious horse riding but omitted to include this in the penalty provision. Grove J said (p 282) that unless a strained construction were applied the court would be holding that the legislature had made an 'absurd mistake'. Field J agreed, adding (p 284):

No doubt it is a maxim to be followed in the interpretation of statutes, that the ordinary grammatical construction is to be adopted; but when this leads to a manifest absurdity, a construction not strictly grammatical is allowed, if this will lead to a reasonable conclusion as to the intention of the legislature.

#### *Six types of 'absurdity'*

The six types of 'absurdity' a court seeks to avoid when construing an enactment are: (a) an unworkable or impracticable result; (b) an inconvenient result; (c) an anomalous or illogical result; (d) a futile or pointless result; (e) an artificial result; and (f) a disproportionate counter-mischief.

*Unworkable or impracticable result* The court seeks to avoid a construction of an enactment that produces an unworkable or impracticable result, since this is unlikely to have been intended by Parliament. For example Lord Reid said in *Federal Steam Navigation Co v Department of Trade and Industry* [1974] 1 WLR 505, 509 that cases where it has properly been held that one word can be struck out of a statute and another substituted include the case where without such substitution the provision would be unworkable.

An obvious justification for strained construction arises where the literal meaning presents a logical impossibility. This arose in *Jones v Conway Water Supply* [1893] 2 Ch 603. The court had to construe the Public Health Act 1875, s 54, which said that where a local authority 'supply water' they have power to lay water mains (or pipes). Since the authority could not satisfy the condition of 'supplying' water unless they first had mains to carry it in, the power to lay mains was held to operate as soon as the authority had *undertaken* to supply water.

In *Wills v Bowley* [1983] 1 AC 57, 102 Lord Bridge said it would be 'quite ridiculous' to construe the Town Police Clauses Act 1847, s 28 in such a way as to force on a constable 'a choice between

the risk of making an unlawful arrest and the risk of committing a criminal neglect of duty'. That would be 'to impale him on the horns of an impossible dilemma'. In *S J Grange Ltd v Customs and Excise Commissioners* [1979] 2 All ER 91, 101 Lord Denning MR said of a VAT provision in the Finance Act 1972, s 31 that a literal construction 'leads to such impracticable results that it is necessary to do a little adjustment so as to make the section workable'.

The courts are always anxious to facilitate the smooth working of legal proceedings and avoid the intention of the law being stultified. In *R v West Yorkshire Coroner, ex pane Smith* [1985] QB 1096 the court rejected the argument that, although a coroner clearly had a statutory power to fine for contempt, it could not be operated since no machinery had been provided for collecting such a fine. In *R v Sowden* [1964] 1 WLR 1454, 1458 the court gave a strained interpretation to the Poor Prisoners' Defence Act 1930, s 1(1), which entitled a person committed for trial to free legal aid for the preparation and conduct of his defence. It held that this did not give him an unrestricted right to have a solicitor at the trial, since if misused this could cause 'expense to the country, delays and abuse of the whole procedure' (*ciAmin v Entry Clearance Officer, Bombay* [1983] 2 AC 818, 868, where a construction was rejected which would give a right of appeal 'unworkable in practice').

Sometimes Parliament contemplates that an enactment may in some circumstances prove unworkable, and makes express provision for this (eg the Mines and Quarries Act 1954, s 157).

*Inconvenient result* The court seeks to avoid a construction that causes unjustifiable inconvenience to persons who are subject to the enactment, since this is unlikely to have been intended by Parliament. Modern courts seek to cut down technicalities attendant upon a statutory procedure where these cannot be shown to be necessary to the fulfilment of the purposes of the legislation (see, eg, *Lawrence Chemical Co Ltd v Rubenstein* [1982] 1 WLR 284). Modern regulatory enactments bear heavily on business enterprise, and the courts are alert to avoid any inconvenience which is not essential to the operation of the Act, and which may in addition have adverse economic consequences (eg *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, 417). The financial demands of the welfare state make modern legislation particularly coercive on the taxpayer, and again the courts are ready to ensure that, even though in the public interest proper taxes must be paid, the taxpayer is not unreasonably harassed by the tax authorities (eg *Hallamshire Industrial Finance Trust Ltd v IRC* [1979] 1 WLR 620; *IRC v Helen Slater Charitable Trust Ltd* [1982] Ch 49).

It sometimes happens that each of the constructions contended for involves some measure of inconvenience, and the court then has to balance the effect of each construction and determine which

inconvenience is greater (eg *Pascoe v Nicholson* [1981] 1 WLR 1061; *Dillon v The Queen* [1982] AC 484).

*Anomalous or illogical result* The court seeks to avoid a construction that creates an anomaly or otherwise produces an irrational or illogical result. Every legal system must seek to avoid unjustified differences and inconsistencies in the way it deals with similar matters, for as Lord Devlin said, 'no system of law can be workable if it has not got logic at the root of it' (*Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] AC 465, 516). Consistency requires that a statutory remedy or benefit should be available, and should operate in the same way, in all cases of the same kind (eg *Davidson v Hill* [1901] 2 KB 606, 614). In *Gordon v Cradock* [1964] 1 QB 503, 506 where it was argued that the Supreme Court of Judicature (Consolidation) Act 1925, s 31(2) should be construed in a way which would mean that a plaintiff could cross-appeal only with leave while a defendant could appeal without leave, Willmer LJ said this would be 'a very strange result', and the court declined to implement it.

The converse of the principle that a statutory remedy should be available in all like cases is that a statutory duty should be imposed in all like cases (eg *Din v National Assistance Board* [1967] 2 QB 213; *Mills v Cooper* [1967] 2 QB 459; *T&E Homes Ltd v Robinson (Inspector of Taxes)* [1979] 1 WLR 452; *A-G's Reference (No 1 of 1981)* [1982] QB 848).

It is clearly anomalous to treat a person as being under a statutory duty where some essential factual pre-requisite that must have been in the contemplation of the legislator is missing. In the Australian case of *Turner v Ciappara* [1969] VR 851 the court considered the application of an enactment requiring obedience to automatic traffic signals. On the facts before the court it was shown that through mechanical failure the device was not working properly. *Held* it must be treated as implicit that obedience was required only where the apparatus was in working order.

For examples of other legal anomalies on certain constructions see *Re Lockwood deed* [1958] Ch 231 (distant relatives preferred to nearer on intestacy); *R v Minister of Agriculture and Fisheries, ex pane Graham* [1955] 2 QB 140, 168 (officer of sub-committee could hear representations while officer of main committee could not); *R v Baker* [1962] 2 QB 530 (person arrested on suspicion of offence liable to higher penalty than if he had committed the offence).

A possible anomaly carries less weight if there is interposed the discretion of some responsible person, by the sensible exercise of which the risk may be obviated (eg *Re a Debtor (No 13 of 1964), ex pane Official Receiver* [1980] 1 WLR 263). The court will pay little attention to a proclaimed anomaly if it is purely hypothetical, and unlikely to arise in practice (see, eg, *Home Office v Harmon* [1983] AC 280). If an anomaly has remained on the statute book for a lengthy period, during which Parliament has had opportunities

to rectify it but has neglected to do so, this may indicate that the anomaly is intended. Thus where an anomalous distinction between the relative powers of the High Court and the county court in relation to relief against forfeiture had existed for well over a century, the Court of Appeal declined to place any interpretative weight on the fact that it was anomalous (*Di Palma v Victoria Square Property Co Ltd* [1985] 3 WLR 207).

*Futile or pointless result* The court seeks to avoid a construction that produces a futile or pointless result, since this is unlikely to have been intended by Parliament. Parliament does nothing in vain, a principle also expressed as *lex nil frustra facit* (the law does nothing in vain). It is an old maxim of the law that *quod vanum et inutile est, lex non requirit* (the law does not call for what is vain and useless). Lord Denning MR said: 'The law never compels a person to do that which is useless and unnecessary' (*Lickiss v Milestone Motor Policies at Lloyd's* [1966] 2 All ER 972, 975).

Where an enactment appears to impose a legal duty that, by reason of some other enactment or rule of law, already exists *aliunde*, the court strives to avoid pronouncing in favour of such a duplication in the law (eg *Re Terman* (1864) 33 LJMC 201). Where the literal meaning of an enactment appears to impose some legal disability that can be avoided by a trifling rearrangement of affairs, the court will be slow to penalise a person who has inadvertently failed to make this rearrangement or could still easily do so (*Holmes v Bradfield RDC* [1949] 2 KB 1, 7).

The court is always averse to requiring litigants to embark on futile or unnecessary legal proceedings. This includes a stage in proceedings that could without detriment to any party be avoided. Judges are uncomfortably aware of the costs and delays involved in a legal action, and do all in their power to minimise them. Thus Lord Reid ruled against a construction of the Landlord and Tenant Act 1954, s 29(3) that for no substantial reason would require judges to scrutinise every application for a new business tenancy, and thus incur needless delay and cost (*Kammins Ballrooms Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 860).

*Artificial result* The court seeks to avoid a construction that leads to an artificial result, since this is unlikely to have been intended by Parliament. Thus when in *R v Cash* [1985] QB 801 it was argued that the Theft Act 1968, s 22(1) required the prosecution to prove that an alleged handling was not done in the course of stealing, the Court of Appeal rejected the argument on the ground that it would require the court to engage in artificial reasoning. Lord Lane CJ said (p 806): 'We do not believe that this tortuous process, leading in some cases to such an artificial verdict could have been the intention of Parliament. The law can deem anything to be the case, however unreal. The

law brings itself into disrepute however if it dignifies with legal significance a wholly artificial hypothesis. Thus in the Scottish case of *Maclennan v Maclennan* (1958) SC 105 the court declined to rule that a wife's having availed herself, without the husband's knowledge or consent, of AID (artificial insemination by a donor) constituted her adultery within the meaning of that term in the relevant Scottish divorce Act. To do so, the court argued, would lead to wholly artificial results. For example if the donor had happened to die before the date of insemination, the legally-imputed adultery would be with a dead man—involving a kind of constructive necrophilia.

Artificiality need not be so extreme as this to rank as a significant factor in statutory interpretation. One area of importance here concerns corporations. Being entities purely of legal creation, these are imbued with a certain artificiality from the start. Sight must not be lost of the realities behind them. In *Re New Timbiqui Gold Mines Ltd* [1961] Ch 319 it was held that a person who purported to have become a member of a company *after it had been dissolved* could not, as a 'member' of the company, petition for its restoration to the register under the Companies Act 1948, s 353(6). Commenting that s 353(6) already involved 'some degree of make-believe', Buckley J said (p 326) that this should not be carried further than was absolutely necessary.

Whenever an Act sets up some fiction the courts are astute to limit the scope of its artificial effect, and are particularly concerned to ensure that it does not create harm in ways outside the intended purview of the Act (eg *Re Levy, Ex pane Walton* (1881) 17 Ch D 746, 756).

*A voiding a disproportionate counter-mischief* The court seeks to avoid a construction that cures the mischief the enactment was designed to remedy only at the cost of setting up a disproportionate counter-mischief, since this is unlikely to have been intended by Parliament. Where one possible construction of an enactment intended to remedy the mischief caused by the operations of unskilful river pilots would prevent there being any pilots at all for a period, Dr Lushington looked 'at the mischief which would accrue' from the latter restriction and adopted the other reading of the enactment (*Mann v Makolmson (The Beta)*(1865) 3 Moo PCC NS 23, 27). Again, where one construction of an enactment meant that the defendant escaped conviction for fraud because in earlier bankruptcy proceedings he had 'disclosed' what was already known, Lord Campbell CJ rejected it as productive of 'great public mischief outweighing the mischief at which the protective enactment was directed (*R v Skeen and Freeman* (1859) LJMC 91, 95).

A type of mischief which is often the subject of modern legislation is danger to the safety of industrial workers. The court will be reluctant to read an Act as requiring one danger to be obviated

at the cost of creating another (eg *Jayne v National Coal Board* [1963] 2 All ER 220, 224). Often it is reasonable to assume that the counter-mischief that has arisen was quite unforeseen by Parliament. Enacted law suffers by comparison with unwritten law in that it involves laying down in advance an untried remedy.

As interpreters of legislation, it is the function of the courts to mitigate this defect of the legislative process so far as they properly can. Where an unforeseen counter-mischief becomes evident it may be reasonable to impute a remedial intention to Parliament. This would be an intention that, if such an untoward event should happen, the court would modify the literal meaning of the enactment so as to remedy the unexpected counter-mischief.

This is one aspect of consequential construction (see p 166 above). Similar considerations may arise where some drafting error has occurred (as to rectifying construction). A third possible cause of an unforeseen counter-mischief, or increase in an expected counter-mischief, is social or other change taking place after the passing of the Act (updating construction is discussed at p 181 below).

### **Presumption that drafting errors to be rectified**

It is presumed that the legislator intends the court to apply a construction which rectifies any error in the drafting of" the enactment, where this is required to give effect to the legislator's intention. There are occasions when, as Baron Parke said, the language of the legislature must be modified in order to avoid inconsistency with its manifest intentions (*Miller v Salomons* (1852) 7 Ex 475, 553). Cross held that rectification is the right word for this procedure 'because it is a word which at least implies some sort of intention on the part of Parliament with regard to the added words' (Cross 1987, p 35).

It has to be accepted that drafting errors frequently occur (for an account of the various types of drafting error see chapter 19). The promulgating of a flawed text as expressing the legislative intention raises a difficult conflict between literal and purposive construction. Judges tread a wary middle way between the extremes. The court must do the best it can to implement the intention without being unfair to those who not unreasonably looked for a predictable construction.

The cases where rectifying construction may be required can be divided into:

- (a) the garbled or corrupt text
- (b) errors of meaning
- (c) the *casus omissum*
- (d) the *casus male inclusus* and
- (e) the textual conflict.

*Garbled or corrupt text*

A text may be garbled by the omission of necessary words, the inclusion of unnecessary words, or the presence of mistaken words, typographical errors or punctuation mistakes. The duty of the court is to rectify the text so as to give it the intended meaning. This produces what may be called the 'corrected version' of the text (see pp 89-90 above).

If a legislative text is garbled the fact is usually obvious on the face of it, at least when the reading is careful (eg the Salford Hundred Court of Record (Extension of Jurisdiction) Rules 1955, r 2, which authorises a defendant to apply to have the action transferred to 'the County Court in which he resides or carries on business').

The Queen's printer sometimes corrects merely typographical errors. As originally promulgated the Landlord and Tenant (Rent Control) Act 1949, s 11(5) referred to s 6 (instead of s 7) of the Furnished Houses (Rent Control) Act 1946. This was corrected in subsequent published copies.

In other cases Parliament itself finds it necessary to step in. In 1879 an Act was passed with the clumsy short title of the Artizans and Labourers Dwellings Act (1868) Amendment Act 1879. The clumsiness did not stop there. Section 22(3) of the Act required loans under the Act to be secured by a mortgage 'in the form set forth in the Third Schedule hereto'. There was no Third Schedule; and nowhere in the Act was a mortgage form to be found. The mistake was put right in the following year by an Act which apparently had the same drafter. Its short title was the Artizans and Labourers Dwellings Act (1868) Amendment Act (1879) Amendment Act 1880.

Sometimes the error is made in transcribing an enactment for inclusion in a consolidation Act (eg *Re a solicitor* [1961] Ch 491 and comments thereon in *Harrison v Tew* [1988] 2 WLR 1, 10-12, concerning an error in the (consolidating) Solicitors Act 1932, s 66 repeated in the (also consolidating) Solicitors Act 1957, s 69). Here there is an inference that the original wording should be followed. The Law of Property Act 1922, s 125(2) empowered trustees to appoint agents for 'executing and perfecting assurances of property'. In the Trustee Act 1925, s 23(2) this appears as a reference to *insurances* of property (for a judicial comment see *Green v Whitehead* [1930] 1 Ch 38, 45). For another consolidation Act case see *The Arabert* [1963] P 102.

One of the best known examples of an incomplete text is the Statute of Frauds Amendment Act 1828 (Lord Tenterden's Act), s 6. For the fascinatingly varied ways in which three judges attempted to rectify the obvious omission of words in this section see *Lyde v Barnard* (1836) 1 M & W 101. (For other examples of omitted words see *Re Wainwright* (1843) 1 Ph 258; *A-Gv Beauchamp* [1920] 1 KB 650).

Instead of intended words being omitted, unintended words may

be included. The Criminal Appeal Act 1907, s 4(3) said that on an appeal against sentence the court could impose another sentence warranted in law 'by the verdict', overlooking that where the accused pleads guilty there is no verdict. In *R v Ettridge* [1909] 2 KB 24 the court rectified the enactment by deleting the intrusive words.

*Errors of meaning*

Rectification of a more substantial kind may be required where the meaning is vitiated by some error on the part of the drafter which is not apparent on the face of the text. He may have misconceived the legislative project, or based the text on a mistake of fact. Or he may have made an error in the applicable law or mishandled a legal concept. Examples of such errors, and how the courts dealt with them, are given in chapter 19.

*Casus omissus*

Where the literal meaning of an enactment is narrower than the object there arises what is called a *casus omissus*. Nowadays it is regarded as not in accordance with public policy for the court to allow a drafter's ineptitude to prevent the legislative intention being carried out, and so a rectifying construction may be applied (eg *R v Corby Juvenile Court, ex parte M* [1987] 1 WLR 55).

Another type of *casus omissus* is where an enactment requires a thing to be done which can be done in more than one way, but fails to specify which way is to be employed (eg *Re Unit 2 Windows Ltd* [1985] 1 WLR 1383).

*Casus male inclusus*

Again the court may apply a rectifying construction where a case obviously intended to be excluded is covered by the literal meaning (eg *Crook v Edmondson* [1966] 2 QB 81).

*Textual conflicts*

Some form of rectifying construction is obviously needed where the court is confronted with conflicting texts (see p 189 below).

**Presumption that evasion not to be allowed**

It is the duty of a court to further the legislator's aim of providing a remedy for the mischief against which the enactment is directed. Accordingly the court will prefer a construction which advances this object rather than one which circumvents it. When deliberately embarked on, evasion is judicially described as a fraud on the Act (*Ramsden v Lupton* (1873) LR 9 QB 17, 24; *Bills v Smith* (1865)

6 B & S 314, 319). It was so prevalent in early times that a general prohibition was entered on the Statute Roll: 'And every man . . . shall keep and observe the aforesaid ordinances and statutes . . . without addition, or fraud, by covin, evasion, art or contrivance, or by interpretation of the words' (10 Edw 3 st 3, 1336).

To prevent evasion, the court turns away from a construction that would allow the subject (a) to do what Parliament has indicated by the Act it considers mischievous (eg *R v Ealing London Borough Council, ex pane Sidhu* (1982) *The Times*, 16 January; or (b) to refrain from doing what Parliament has indicated it considers desirable (eg *Lambert v Ealing London Borough Council* [1982] 1 WLR 550).

The desire of the courts to prevent evasion of statutes is manifest in many fields (eg *Dutton v Atkins* (1871) LR 6 QB 373 (vaccination order could be made where parent failed to produce the child, since otherwise the parent could evade the intention of Parliament that children should be vaccinated); *London School Board v Wood* (1885) 15 QBD 415 (parent did not satisfy the requirement to 'cause the child to attend school' where he sent him to school without the school fees); *Patterson v Redpath Brothers Ltd* [1979] 1 WLR 553, 557 ('it cannot have been the intention of the legislature to allow the provisions of the regulations to be circumvented merely by packing goods into a larger receptacle'); *London Borough of Hackney v Ezedinma* [1981] 3 All ER 438, 442 (the term 'household' in the Housing Act 1961 must be construed widely since otherwise 'lodging houses would be taken out of the code which is applied by the Act for houses in multiple occupation').

#### *Evasion distinguished from avoidance*

It is necessary to distinguish, as respects the requirements of an enactment, between lawfully escaping those requirements by so arranging matters that they do not apply (referred to as avoidance) and unlawfully contravening or failing to comply with the requirements (referred to as evasion). As Grove J expressed it, there can be no objection to 'getting away from the remedial operation of the statute while complying with the words of the statute' (*Ramsden v Lupton* (1873) LR 9 QB 17, 32).

Literal compliance will not suffice where it amounts to a sham. The Theatres Act 1843 prohibited the performance of plays on a stage without a licence. It was held in *Day v Simpson* (1865) 34 LJMC 149 that it was an evasion of this for the actors to perform below stage, their actions being reflected by mirrors so that to the audience they appeared to be on stage.

The *Ramsay* principle, whereby the court sets its face against purely artificial tax avoidance schemes, was laid down in *WT Ramsay Ltd v IRC* [1982] AC 300. That it is not confined to revenue cases is shown by *Sherdley v Sherdley* [1986] 1 WLR 732, where the

Court of Appeal held that the principle should also be applied by the Family Division (reversed by the House of Lords on other grounds in *Sherdley v Sherdley* [1987] 2 WLR 1071). In *Gisbome v Burton* [1988] 3 WLR 921 the Court of Appeal applied the *Ramsay* principle in the case of the protection intended to be given to tenants by the Agricultural Holdings (Notices to Quit) Act 1977, s 2(1).

*What must not be done directly should not be done indirectly*

Where an enactment prohibits the doing of a thing, the prohibition is taken to extend to the doing of it by indirect or roundabout means, even though not expressly referred to in the enactment. Where Parliament wishes to prohibit the doing of any act, it tends to concentrate in its wording on the obvious and direct ways of doing it. Yet if the intention is to be achieved, the prohibition must be taken to extend to indirect methods of achieving the same object— even though these are not expressly mentioned (eg *Walker v Walker* [1983] 3 WLR 421; *Street v Mountford* [1985] AC 809).

*Evasion by deferring liability*

The court will infer an intention by Parliament to treat as evasion of an Act the deferring of liability under it in ways not envisaged by the Act. If an Act imposes a liability falling at a certain time, it is an evasion of the Act to procure a postponement of the liability by artificial means not contemplated by the Act (eg *Furniss (Inspector of Taxes) v Dawson* [1984] AC 474).

*Evasion by repetitious acts*

The court will infer an intention by Parliament that evasion of an Act should not be countenanced where the method used is constant repetition of acts which taken singly are unexceptionable, but which considered together cumulatively effect an evasion of the purpose of the Act. The Public Houses Amendment (Scotland) Act 1862 gave magistrates power to order the public houses 'in any particular locality' to close at an earlier hour than the statutory closing time. An attempt was made to use this power to close *all* public houses early by making one order after another until the whole district was covered. In *Macbeth v Ashley* (1874) LR 2 HL(SC) 352, 357 this was held unlawful as 'evading an Act of Parliament'.

Sometimes the monetary penalties for breach laid down by the Act are, or through inflation have become, so inadequate that they fail to deter. Here the court may resort to the use of the injunction to counter continued repetition of evasive acts. In *A-G v Harris* [1961] 1 QB 74 repeated breaches of a byelaw against the selling

of flowers outside cemeteries were restrained by injunction, since the statutory penalties were considered by the court insufficient.

*Construction which hinders legal proceedings under Act*

So that the purpose of an Act may be achieved, it is necessary that any legal proceedings connected with its enforcement and administration should be facilitated and not hindered. Accordingly the courts frown on attempts to construe an enactment in such a way as to frustrate or stultify prosecutions or other legal proceedings under the Act (eg *R v Aubrey-Fletcher, ex pane Ross-Munro* [1968] 1 QB 620, 627; *R v Holt* [1981] 1 WLR 1000).

*Construction which otherwise defeats legislative purpose*

The principle requiring a construction against evasion is not limited to cases of deliberate or obvious evasion. It extends to any way by which an Act's integrity may be undermined, even innocently or unwittingly (eg *Stile Hall Properties Ltd v Gooch* [1980] 1 WLR 62).

**Presumption that ancillary rules of law and legal maxims apply**

Unless the contrary intention appears, an enactment by implication imports any principle or rule of law (whether statutory or non- statutory), and the principle of any legal maxim, which prevails in the territory to which the enactment extends and is relevant to its operation in that territory. An Act of Parliament is not a statement in a vacuum. Parliament intends its Act to be read and applied within the context of the existing corpus juris, or body of law. The Act relies for its effectiveness on this implied importation of surrounding legal principles and rules.

It is impossible for the drafter to restate in express terms all those ancillary legal considerations which are, or may become, necessary for the Act's working. In this respect an Act is treated in the same way as a contract. With a contract, by importing established legal principles in accordance with the maxim *quando abest provisio partis, adest provisio legis* (when provision of party is wanting, provision of law is present), the law supplies what the parties have failed to say (*Flack v Downing College, Cambridge* (1853) 13 CB 945, 960). An Act requires similar treatment.

This is a presumption of very great importance in statutory interpretation. Each relevant item of the existing law, so far as not altered by the Act in question (whether expressly or by implication) operates for the purposes of that Act just as if written into it. It goes without saying, in Lord Denning's homely phrase (*R v Secretary*

*of State for Foreign and Commonwealth Affairs, ex pane Indian Association of Alberta* [1982] QB 892, 919).

These implied ancillary rules range from the widest principles of legal policy to narrow technical rules. They include both statutory and non-statutory principles and rules. They may be substantive or procedural. Equally they may be domestic or international, civil or criminal. All that matters is that they should have a place in the law of the territory to which the Act extends. This means that virtually the whole body of law is imported, by one enactment or another, as implied ancillary rules or maxims.

*Unless the contrary intention appears* As usual in statutory interpretation, this presumption applies except where the intention that it should not apply is indicated in the Act in question. It is axiomatic that in its Act Parliament can always, if it chooses, disapply any existing principle or rule. It is equally axiomatic that, unless Parliament does so, the principle or rule, being relevant, applies. Thus Lord Pearce said of a tribunal set up by Act: 'it is assumed, unless special provisions provide otherwise, that the tribunal will make its enquiry and decision according to the law of the land' (*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 195). Equally Byles J said that 'it is a sound rule to construe a statute in conformity with the common law, except where or in so far as the statute is plainly intended to alter the course of the common law' (*R v Morris* (1867) LR 1 CCR 90, 95). See also *Lord Eldon v Hedley Bros* [1935] 2 KB 1, 24; *R v Thomas* [1950] 1 KB 26, 31.

#### *Disapplication or modification?*

Sometimes it is difficult to be sure whether or not Parliament does intend to disapply an ancillary rule. Or the problem may be whether the intention is to disapply a rule altogether or merely modify it. This can be particularly troublesome where the rule is peripheral to the subject-matter of the Act.

Rules relating to surrounding areas of criminal law (such as inchoate offences or the position of accessories) present problems with many Acts, usually because the drafter has overlooked them. Drafters framing a new criminal offence tend to have a blind spot about such matters. There is no difficulty if the new offence is worded so as not to trespass on the peripheral area: the latter's rules then come in by implication as they stand. But suppose the drafter forgets the peripheral area and words the new offence so as inadvertently to trespass on some part, but not the whole, of it?

The Misuse of Drugs Act 1971, s 4(2)(6) makes it an offence 'to be concerned in the production of [a controlled drug] in contravention of [s 4(1) of the Act] by another'. This looks very like a description of aiding and abetting, but is it intended to replace

the whole law of aiding and abetting, or leave it standing so far as not inconsistent? This is a difficult question to answer because probably the truth is that the drafter did not think about the law of aiding and abetting, and so had no true intention in the matter (see *R v Farr* [1982] Crim LR 745).

#### *Geographical extent*

The presumption as stated above refers to the geographical extent of the Act because the implied ancillary rules and maxims will be those of the relevant territory. If an Act extends both to England and Scotland then, so far as the Act applies in England the implied ancillary rules will be those prevailing under English law while so far as the Act applies in Scotland they will be those of Scots law. Thus in the Scottish case of *Temple v Mitchell* (1956) SC 267 the court treated a difference in implied ancillary rules between England and Scotland as precluding the court from following English precedents in a Rent Act case.

#### *Legal concepts*

Use in an enactment of a concept, eg relating to age, time or status, attracts general legal rules applying to that concept. Thus the statement in the Landlord and Tenant Act 1954, s 29(3) that no application under s 24(1) of the Act shall be entertained 'unless it is made not less than two . . . months after the giving of the landlord's notice' under s 25 attracts the *corresponding date rule*, under which, if the relevant period is a specified number of months after the relevant event, the period ends on the corresponding day of the subsequent month (*Riley (EJ) Investments Ltd v Eurostile Holdings Ltd* [1985] 1 WLR 1139).

#### *Free-standing terms*

One of the most obvious ways in which Parliament indicates its intention to attract ancillary rules is by the use of a free-standing term, that is a word or phrase which is not defined in the Act but has an independent meaning at common law or otherwise.

The Sexual Offences Act 1956, s 14(1) states that it is an offence 'for a person to make an indecent assault on a woman'. The Act contains no definition either of 'indecent' or 'assault'. Parliament is therefore taken to intend to apply the common-law meaning of these terms when taken in conjunction (*R v Kimber* [1983] Crim LR 630).

#### *Ancillary maxims*

Legal maxims are repositories of that wisdom the best lawyers

contribute to human welfare. While a broadly-stated maxim is likely to have exceptions and require qualification, the law still finds a use for this way of expressing some basic principle. Coke said: It is holden for an inconvenience that any of the maxims of the law should be broken . . . for that by infringing of a maxim, not only a general prejudice to many, but in the end a public uncertainty and confusion to all would follow.' (Co Lift 152b.) What is said above about the implied importation of ancillary rules of law also applies to maxims.

*Development of applied rules of law*

The court will not merely treat an existing rule of law as intended to apply in the construction of an enactment, but will if necessary go further and modify or develop the rule as it applies to that enactment.

The House of Lords developed an applied rule in *British Leyland Motor Corporation Ltd v Armstrong Patents Co Ltd* [1986] AC 577. The plaintiffs alleged that in copying parts of their vehicles, and marketing the copies as spare parts, the defendants were guilty of breaches of design copyright under the Copyright Act 1956, s 3. It was held that Parliament could not be taken to intend that the copyright should apply so as to enable the plaintiffs to deny purchasers of their cars the right to have them repaired by use of spare parts, and in arriving at this result the House of Lords applied and modified the real property principle whereby a person is not to be permitted to derogate from his grant.

**Presumption that updating construction to be applied**

While it remains law, an Act is to be treated as always speaking. In its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law. With regard to updating, Acts can be divided into two categories: the Act that is intended to develop in meaning with developing circumstances (which may be called an ongoing Act) and the Act that is intended to be of unchanging effect (a fixed-time Act). Most Acts are of the former kind.

*The ongoing Act*

It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed. In particular where, owing to developments occurring since the original passing of an enactment, a counter-mischief comes into existence or increases, it is presumed that Parliament intends the court so to construe the

enactment as to minimise the adverse effects of the counter-mischief. The editors of the second edition of Cross's *Statutory Interpretation* express agreement (p 49) with the present author that 'there is a general rule in favour of an "updating" or "ambulatory" approach, rather than an "historical" one'.

It was the great Victorian drafter Lord Thring who said that an Act is taken to be always speaking (Thring 1902, p 83). While it remains in force, the Act is necessarily to be treated as current law. It speaks from day to day, though always (unless textually amended) in the words of its original drafter. With this in mind, the competent drafter frames his language in terms suitable for continuing operation into the unforeseeable future. He does not conspicuously compose the Act as at the date of his draft. Rather, he aims to employ a continuous present tense. He uses, as Thring enjoined, the word 'shall' as 'an imperative only, and not as a future' (ibid).

Each generation is largely ruled by the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. What the original framers intended sinks gradually into history. While their language may endure as law, its current subjects are likely to find that law more and more ill-fitting if taken literally.

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing in the law, social conditions, technology, the meaning of words, and other matters. That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate developments. The drafter should try to foresee the future, and allow for it so much as possible in his wording.

On one view of the definition of 'superior court' in the Contempt of Court Act 1981, s 19, it applied to a type of court that did not exist in 1981. In *Peart v Stewart* [1983] 2 AC 109, 117 Lord Diplock said:

I should . . . have reached the same conclusion on the construction of the definition of 'superior court' in s 19, even if it were impossible to point to any existing court which complied with the description and one were driven to the conclusion that the draftsman was making anticipatory provision for possible new courts that might be subsequently created with the status of superior courts of record.

#### *Changes in the mischief*

The mischief at which an enactment was originally directed needs to be 'discerned and considered' in order to construe the enactment

correctly (see p 161 above). Difficulty can be caused by the obvious fact that while the enactment may be suffered to continue in force the social mischief, or mischief on the ground, is likely to change. If the remedial enactment is successful it will remove, or at least alleviate, the social mischief. In the early days however the court will need to help the enactment achieve its object. At best, the enactment may have only partial success. Persons wishing to continue the mischief may attempt to do so. As time goes on, various factors may cause changes in the mischief or may lead to its disappearance. It is by no means certain that the enactment will be amended or repealed at the moment the need for this arises. It may continue to have effect well after the conditions which caused it to be added to the statute book have significantly changed or even disappeared. Towards the end of an enactment's life on the statute book, perhaps the mischief has dwindled to little or nothing. It is then not something that needs to be remedied. The enactment declines into the category of a technical or nominal law. If it is activated by a prosecution the court will react accordingly. It will criticise the bringing of the case. It will sum up against the prosecution. If the legal meaning of the enactment is doubtful, the court will give little weight to the original mischief and much weight to the principle against doubtful penalisation. It will apply an updating construction.

*Changes in relevant law*

After an Act is passed, later amendments of law (perhaps carried out for a quite different purpose) may mean that the legal remedy provided by the Act to deal with the original mischief has become inadequate or inappropriate. The court must then, in interpreting the Act, make allowances for the fact that the surrounding legal conditions prevailing on the date of its passing have changed. Thus in *Gissing v Liverpool Corporation* [1935] Ch 1 the word 'tax' in a pre-income tax enactment was held to include income tax.

Drafters of amending Acts sometimes fail to realise that changes in surrounding law call for corresponding changes in the language they choose. In *Nugent-Head v Jacob (Inspector of Taxes)* [1948] AC 321, 322 Viscount Simon complained that the language of the income tax enactments relating to married women had not been updated: 'the words now in operation are largely borrowed from Acts of 1803, 1805 and 1806, at which dates the effect of marriage on the property of a wife was very different from what it is today'.

When the question arises of whether an ongoing enactment covers a legal entity not known at the date it was passed, the key is whether it is of the same type or genus as things originally covered by the enactment. Where in *R v Manners* [1976] Crim LR 255 the question arose whether the North Thames Gas Board, set up under the Gas Act 1948, was a 'public body' within the meaning of the Prevention of Corruption Acts 1889 to 1916, it was held that it was to be answered

by determining what type of body was regarded in 1916 as a 'public body'.

Where there has been a significant change in law since the enactment was framed, it is applied to the *substance* of the new law. If the original terminology referred to has been allotted a different meaning, the court will look at the substance behind the wording. The fact that the term referred to by the enactment is still in use does not mean the enactment will apply if the current use gives the term an essentially different meaning (eg *Zecca v Government of Italy* [1982] 2 WLR 1077.)

Also relevant are changes in judicial approach over the years. An Act might be differently construed before and after such a change. Thus Lord Diplock said in 1981 that 'Any judicial statements on matters of public law if made before 1950 are likely to be a misleading guide to what the law is today' (*IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 WLR 722, 736).

#### *Changes in social conditions*

Where relevant social conditions have changed since the date of enactment, what was then classed as a social mischief may not be so regarded today. It is very difficult for the court to apply an enactment so as to 'remedy' what is no longer regarded as a mischief. The consequence is an interpretation that minimises the coercive effect of the enactment and gives great weight to criteria such as the principle against doubtful penalisation.

The London Hackney Carriage Act 1853, s 17 makes it an offence for a cab driver to demand *or take* more than the proper fare. The literal meaning clearly includes taking a tip, whether demanded or not. A century later, the tipping of cab drivers had become an accepted social custom. In *Bassam v Green* [1981] Crim LR 626 both members of the Divisional Court stated *obiter*, without giving reasons, that tipping did *not* contravene s 17.

Changes in the practices of mankind may necessitate a strained construction if the legislator's object is to be achieved (eg *Collins v British Airways Board* [1982] QB 734); *Marina Shipping Ltd v Laughton* [1982] QB 1127). Similarly the earlier processing by the court of an enactment may be disregarded if it is no longer appropriate in the light of changed conditions (eg *R v Bow Road JJ, ex parte Adedigba* [1968] 2 QB 572, 586).

#### *Developments in technology*

The nature of an ongoing Act requires the court to take account of changes in technology, and treat the statutory language as modified accordingly when this is needed to implement the legislative intention.

Section 3(1) of the Coroners Act 1887 (a consolidation Act) says

that where a coroner is informed that the dead body of a person is lying within his jurisdiction, and certain conditions are satisfied, the coroner, whether or not the cause of death arose within his jurisdiction, shall hold an inquest. The development of refrigeration and air freight services means that bodies can now easily be brought to England from foreign parts. In 1887 this was impossible, so there was no need for the Act to state that the death must have occurred in Britain. Now that new technology makes real the possibility that a decedent whose body is in Britain died abroad, the courts have had to decide whether a territorial limitation is to be treated as implied (*R v West Yorkshire Coroner, ex pane Smith* [1982] QB 335 and [1983] QB 335).

In *Pierce v Bemis, The Lusitania* [1986] QB 384 the court considered the question whether the sunken ship *Lusitania* was 'derelict', which could scarcely have arisen before modern techniques of wreck recovery had been developed. Sheen J held (p 394) that because of changes since its passing 'it is now necessary to disregard some part of the language of [the Merchant Shipping Act 1894]'.

#### *Changes in meaning of words*

Where an expression used in an Act has changed its original meaning, the Act may have to be construed as if there were substituted for that expression a term with a modern meaning corresponding to that original meaning (*The Longford* (1889) 14 PD 34). If it seems that the meaning of an expression used in an Act may have changed materially since the Act was passed, evidence may be adduced to establish the original meaning (*London and North Eastern Rly Co v Berriman* [1946] AC 278, 312, *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Assn Ltd* [1966] 1 WLR 287).

#### *The fixed-time Act*

A fixed-time Act is one which, contrary to the usual rule, was intended to be applied in the same way whatever changes might occur after its passing. It has a once for all operation. It is to such an Act only that the much quoted words of Lord Esher apply: 'the Act must be construed as if one were interpreting it the day after it was passed' (*The Longford* (1889) 14 PD 34,36). An obvious example is the Indemnity Act. There are various other possibilities. Thus it was held in *Lord Colchester v Kewney* (1866) LR 1 Ex 368, 380 that the Land Tax Act 1798, s 25, which exempted 'any hospital' from the land tax, was intended by Parliament to apply only to hospitals which were in existence at the time the Act was passed.

The presumption is that an Act is intended to be an ongoing Act, since this is the nature of statute law: an Act is always speaking. So there must be some reason adduced for finding it to be a fixed-time Act. One such reason is where the Act is of the nature of

a *contract*. If an Act can be said to form or ratify a contract its meaning cannot properly be 'developed' in the usual way, an obvious example being an Act implementing an international convention. (The convention itself may be subject to 'development', but that is another matter.) Thus in a Canadian constitutional appeal Lord Sankey LC said:

The process of interpretation as the years go on ought not to be allowed to dim or whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss 91 and 92 should impose a new and different contract upon the federating bodies. (*Re the Regulation and Control of Aeronautics in Canada* [1932] AC 54, 70.)

It was held in *A-G for Alberta v Huggard Assets Ltd* [1953] AC 420 that the Tenures Abolition Act 1660 was of the nature of a compact between the king and his people in England and Wales, and thus did not extend to after-acquired territories of the Crown such as those in Canada.

An obvious instance of the Act which partakes of the nature of a compact is the private Act. The courts treat this as a contract between its promoters (or that portion of the public directly interested in it) and Parliament (*Milnes v Mayor etc of Huddersfield* (1886) 11 App Cas 511; *Perchard v Heywood* (1800) 8 TR 468).

#### *Increase in counter-mischief*

Where, owing to developments occurring since the original passing of an enactment, a counter-mischief comes into existence or increases, it is presumed that Parliament intends the court so to construe the enactment as to minimise the adverse effects of the counter-mischief (eg *R v Wilkinson* [1980] 1 WLR 396).