Introductory Note by FB

The article below is a further addition to my writings on understanding legislation. Others are included within the Topic 'Understanding legislation'. The Topic can be found on this website at *www.francisbennion.com/topic/understandinglegislation.htm*.

Threading the Legislative Maze - 12

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In this, the final article of the series,[1] I explain the last of the four categories of guides to legislative intention or interpretative criteria, namely general linguistic canons applicable to any piece of prose, then finish by describing the methodology to be used in applying the four categories.

Linguistic canons

A linguistic canon of construction reflects the nature or use of language generally. It does not depend on the legislative character of the enactment in question, nor indeed on its quality as a legal pronouncement: it applies in much the same way to all forms of language. So linguistic canons are not confined to statutes, or even to the field of law. They are based on the rules of logic, grammar, syntax and punctuation; and the use of language as a medium of communication generally.[2] When judges say, as they sometimes do, that the principles of statutory interpretation do not materially differ from the principles applicable to the interpretation of documents generally, it is these linguistic canons they have in mind. It follows that the linguistic canons of construction are used to arrive at the literal meaning of an enactment.[3]

The first linguistic canon is that an Act or other legislative instrument is to be read as a whole, so that an enactment within it is not treated as standing alone but is interpreted in its context as part of the entire instrument. Hence Sir Richard Scott V-C said of the Consumer Credit Act 1974: "It is certainly right to try and construe the 1974 Act as a whole".[4] As Holmes J. said, "you let whatever galvanic current may come from the rest of the instrument run through the particular sentence".[5] The essence of construction as a whole is that it enables the interpreter to perceive that a proposition in one part of the Act may by implication be modified by another provision elsewhere in the Act.[6]

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[1] Previous articles are in volume 162 (1998) at pages 356, 436, 516, 596, 696, 856 and 995 and in volume 163 (1999) at pages 264, 364, 484 and 624.
[2] *Effort Shipping Co Ltd v Linden Management SA* [1998] 1 All ER 495, *per* Lord Cooke of Thorndon at 513.
[3] The literal meaning was discussed in the previous article.
[4] *Dimond v Lovell* [1999] 3 All ER 1 at 10.
[5] O. W. Holmes Jr., "The Theory of Legal Interpretation" (1898-99) 12 Harvard L.R. 417.
[6] See e.g. *Cooper v Motor Insurers' Bureau* [1985] QB 575 (meaning of "any person" in the Road Traffic Act 1972 s. 145(3)(a) restricted by an implication arising from s. 143(1)).

Construction as a whole requires, unless the contrary appears, that three principles should be applied: every word in the Act should be given a meaning, the same word should be given the same meaning, and different words should be given different meanings. So the Court of Appeal rejected the appellant's argument that the Perjury Act 1916 s. 1(1) applies only where the witness believes his false statement to be material, because this reading would render s. 1(6) of the Act meaningless.[7]

Sometimes terms of virtually identical meaning are used in conjunction, as in the Children Act 1989 s. 22(3)(a). This imposes a duty to "safeguard and protect" the welfare of a child. This involves surplusage, since either term suffices on its own. Surplusage is to be distinguished from intentional overlap: legislation often provides two or more overlapping remedies.[8]

Another cause of tautology has ancient roots, as I explained in the eighth article in the series. In medieval English translations of Latin texts the translator sometimes felt a need to supply, in translating a Latin term, *two* English words, one with a Latin root and the other with an English root. An example was noticed by Andrew Clark in editing *The English Register of Godstow Nunnery, near Oxford* (1905), which was translated into English c. 1450. Clark gives an example (p. 302) where "seu ratione dotis mee" was translated "by the reson or skille of her dowre". A similar phenomenon occurred with translations from Law French, which gave rise to such pairs of words as "fit and proper", where "fit" derives from Old English and "proper" from Old French. This particular combination is still used in our legislation, though either word would suffice on its own.[9]

It may happen however that no sensible meaning can be given to some word or phrase. It must then be disregarded. As Brett J. said: "It is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament or other document; but that, if there be a word or phrase therein to which no sensible meaning can be given, it must be eliminated."[10] Thus the Court of Appeal held that the Administration of Justice Act 1960 s.13(2) (appeal in cases of contempt of court), should be read as if the words "for committal or attachment" were, as Parker L.J. put it "not there at all". This was because otherwise a company could not appeal under the Act which, Parker L.J. said, would be "defeating the plain legislative purpose".[11]

It is presumed that a word or phrase is not to be taken as having different meanings within the same instrument, unless this intention is evident. Where therefore the context makes it clear that the term has a particular meaning in one place, it will be taken to have that meaning elsewhere.

Sometimes words of the same spelling are capable of different meanings, whether slightly different or altogether different. The same is true of phrases. Philologists call these terms *homonyms*. A drafter needs to take care not to use homonyms with different meanings in the same Act without making the intended meaning clear in each place. The House of Lords split 3-2 on the meaning of "issue" in relation to shares, as used in the Income and Corporation Taxes Act 1988 s.299A.[12] As Lord Hanworth MR earlier observed, "it is impossible to say that the word "issue" is used in all Acts of Parliament and in all circumstances with the same

[7] *R v Millward* [1985] QB 519.
[8] See, e.g., *Harrods Ltd v Remick* [1998] 1 All ER 52 (the fact that a certain type of discrimination fell within the Race Relations Act 1976 s. 30 or s. 31 did not mean it could not also be caught by s. 7 of the Act).
[9] See the eighth article, p. 264 above.
[10] *Stone v Yeovil Corpn* (1876) 1 CPD 691 at 701.
[11] *A-G v Hislop* [1991] 1 All ER 911 at 917, 918.
[12] *National Westminster Bank plc v IRC* [1995] 1 AC 119.

meaning".[13] The court said in a rent case: "Considerable difficulty arises in the construction of the Real Property Limitation Act 1833 by reason of the word 'rent' being used in two different senses throughout - *viz.* in the sense of a rent charged upon land, and of a rent reserved under a lease."[14]

It is presumed that the drafter did not indulge in elegant variation, but kept to a particular term when wishing to convey a particular meaning. Accordingly a change in the term used is taken to denote a different meaning. Blackburn J said: "It has been a general rule for drawing legal documents from the earliest times, one which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning . . . "[15] Different words in a consolidation Act may be given the same meaning because derived from different Acts.[16]

Construction as a whole may not be effective in itself when conflicts within the instrument are too pronounced to be dealt with simply by reading it as a whole, in other words where there is contradiction. Lord Herschell L.C. said that where there is a conflict between two sections in the same Act-

> "You have to try and reconcile them as best you may. If you cannot, you have to determine which is the leading provision and which the subordinate provision, and which must give way to the other."[17]

If no other method of reconciliation is possible, the court may under the rule in *Wood v Riley* adopt the principle that the enactment nearest the end of the instrument prevails.[18]

The concept that an Act is to be read as a whole is also applied to a group of Acts if they are Acts *in pari materia*. These are Acts which deal with the same subject matter on the same lines. Such Acts are sometimes described as forming a code, but this does not mean they are codifying Acts in the technical sense. They are "to be taken together as forming one system, and as interpreting and enforcing each other".[19] In other words they are to be construed as one, whether or not the relevant enactment expressly requires this.[20] It is however necessary to remain realistic. A drafter who produces an amending Bill does not always have the time or industry to read through the whole of a mass of preceding legislation to make sure the current drafting is in full accordance with it. "The broad principle laid down by Lord Mansfield in *R v Loxdale* as to the exposition of one statute by the language of another must be taken with a pinch of salt when a long series of Acts is being dealt with."[21]

Latin maxims

A number of linguistic canons are best known in their Latin form. One of these is *noscitur a sociis*, meaning "it is recognised by its associates".[22]

> "English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to

[13] *Tillotson (Oswald) v IRC* [1933] 1 KB 134 at 155.
[14] *Doe d Angell v Angell* (1846) 9 QB 328 at 355.
[15] *Hadley v Perks* (1866) LR 1 QB 444 at 457.
[16] *MRS Environmental Services Ltd v Marsh* [1997] 1 All ER 92 at 102.
[17] *Institute of Patent Agents v Lockwood* [1894] AC 347 at 360.
[18] *Wood v Riley* (1867) LR 3 CP 26 at 27 ("the known rule is that the last must prevail").
[19] *R v Palmer* (1785) Leach 352.
[20] *Chief Adjudication Officer v Foster* [1993] AC 754 at 769.
[21] *Littlewoods Mail Order Stores v I.R.C.* [1961] Ch. 597, per Harman L.J. at 633.
[22] Two detailed applications of this principle, the *ejusdem generis* principle and the rank principle, are treated separately below.

> the dictionary or decided cases, and then put back into the sentence with the meaning which you have assigned to them as separate words . . . "[23]

The Capital Allowances Act 1990 s. 18(1) defines the term "industrial building or structure" as one used for "a trade which consists in the manufacture of goods or materials or the subjection of goods or materials to any process". Nourse L.J. said "the close proximity between the two phrases requires that the word 'goods' in the second should be given the same meaning as in the first".[24]

Where a term is ambiguous, reference to a nearby passage may resolve the ambiguity. The Financial Services Act 1986 Sch. 1 paragraph 9 refers to a contract the purpose of which "is to secure a profit or avoid a loss". The question arose whether "secure a profit" meant obtain a profit or arrange security for a profit. The court decided the point by reference to a note included in paragraph 9 which disapplied the paragraph "where the profit is to be obtained" in a specified manner.[25]

The Latin words *ejusdem generis* (of the same kind or nature), have been attached to a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. The principle may apply whatever the form of the association, but the most usual form is a list or string of genus-describing terms followed by wider residuary or sweeping-up words.

Section 43 of the Customs Consolidation Act 1876 read: "The importation of arms, ammunition, gunpowder, *or any other goods* may be prohibited by proclamation or Order in Council."[26] Although the italicised words are completely general, it is obvious that some limitation is intended. Otherwise why did not the drafter simply say "The importation of any goods may be prohibited . . ."? It was held that the *ejusdem generis* principle applied. Sankey J. refrained from describing what the genus was, being content to hold that the substance in question, pyrogallic acid, was outside it.

The rank principle lays down that where a string of items of a certain level is followed by residuary words, it is presumed that the residuary words are not intended to include items of a different rank. Thus in the phrase "an officer or examiner of the court or some other person" in RSC Ord 39 r 4(a) the residuary words have been held not to include judges.[27]

The *reddendo singula singulis* principle (render each to each) concerns the use of words distributively. Where a complex sentence has more than one subject, and more than one object, it may be the right construction to render each to each, by applying each object to its appropriate subject. A similar principle applies to verbs and their subjects, and to other parts of speech. Section 1 of the Immigration Act 1971 lays down general principles. It begins: "All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom without let or hindrance . . ." The phrase "to come and go into and from" the United Kingdom appears clumsy. Applied reddendo singula singulis, it is to be read as if it said "to come into the United Kingdom and go from it". Why was it not put in this way? Because the drafter wished to keep the evocative phrase "come and go".

Many statutory propositions are implied rather than being directly expressed, which calls for accurate inference by the statute reader. The maxim *expressum facit cessare tacitum*

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[23] *Bourne v Norwich Crematorium Ltd*. [1967] 1 W.L.R. 691, *per* Stamp J. at 696.
[24] *Girobank plc v Clarke (Inspector of Taxes)* [1998] 4 All ER 312 AT 315.
[25] *City Index Ltd v Leslie* [1992] Q.B. 98.
[26] Emphasis added.
[27] Re Brickman's Settlement [1981] 1 W.L.R. 1560.

embodies the principle that no inference is proper if it goes against the express words Parliament has used. "Express enactment shuts the door to further implication.".[28] The question arose whether the Indecency with Children Act 1960 s. 1(1), which makes it an offence to commit an act of gross indecency with a child under the age of fourteen, contains an implication requiring knowledge that the child is under that age. It was held that such an implication does not arise in view of the fact that in the wide-ranging Sexual Offences Act 1956 it is expressly stated when knowledge of the relevant age is required. The 1960 Act was passed to fill a lacuna in the 1956 Act "wherein the specific defence which was sought to be advanced had been provided for in certain sections but pointedly omitted in others".[29]

The last of these Latin maxims, *expressio unius est exclusio alterius* (to express one thing is to exclude another) is an aspect of the principle *expressum facit cessare tacitum* discussed above. Known for short as the *expressio unius* principle, it is applied where a statutory proposition might have covered a number of matters but in fact mentions only some of them. Unless these are mentioned merely as examples, or out of excess of caution, or for some other sufficient reason, the rest are taken to be excluded from the proposition. In particular the *expressio unius* principle is applied where a formula which in itself may or may not include a certain class is accompanied by words of extension or exception naming only some members of that class. The remaining members of the class are then taken to be excluded from these words.

Section 2(3) of the Immigration Act 1971 states that for the purposes of s. 2(1) of the Act the word "parent" includes the mother of an illegitimate child. The class to which this extension relates is the parents of an illegitimate child. Lord Lane C.J. said: "Under the rule *expressio unius exclusio alterius*, that express mention of the mother implies that the father is excluded."[30]

Weighing the interpretative factors

I conclude this series of articles with a brief description of the methodology to be used in applying the four categories of interpretative criteria, or guides to legislative intention, described in this and the previous three articles. The essence of the method is to move from the general to the particular. The interpretative criteria are general in nature. What is required in an actual case is a method of applying the relevant interpretative criterion or criteria to the specific enactment in question and the specific facts of the case.

The first step in the required method is to identify, in relation to the enactment, the *factual outline* and the *legal thrust*. The usual legal effect of an enactment is that, when the facts of a case fall within an indicated area called the factual outline, specified consequences called the legal thrust ensue. Typically, the legal thrust in criminal law is the treatment of the facts as an offence, while in civil law it is the treatment of the facts as a cause of action.

Generally, an enactment lays down a legal rule in terms which show that the rule is triggered by the existence of certain facts. The enactment indicates these facts in outline form, omitting immaterial features. This is referred to as the *statutory factual outline*. It is the function of a court deciding on the legal meaning of an enactment accurately to identify this area of factual relevance. Sometimes a court will hold that the literal meaning of the outline stated in the enactment needs to be narrowed or widened in order to give effect to the legislator's true intention. The literal outline as so modified is referred to as the *judicial factual outline*.

[28] Whiteman v Sadler [1910] AC 514, per Lord Dunedin at 527.
[29] *B v Director of Public Prosecutions* [1998] 4 All ER 265 at 274.
[30] *R v Secretary of State for the Home Department, ex p Crew* [1982] Imm. A.R. 94.

The basis of the doctrine of precedent is that like cases must be decided alike. The ratio decidendi of a case involves postulating (whether expressly or by implication) the factual outline held to be laid down by the enactment, so far as relevant. If the facts of a later case fit within this judicial factual 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 do elicit the same legal thrust, the outline is too narrow.

The legal thrust of an enactment is the legal effect arising where the material facts of the instant case fall within the statutory or judicial factual outline. In criminal law the legal thrust of an enactment is often expressed by saying that where the factual outline is satisfied the defendant is guilty of an offence. Each detail of the legal consequences of this by way of trial procedure, punishment and so forth may be spelt out by the legislator or left to the general law. Similarly in civil law the legal thrust gives the plaintiff who has succeeded in establishing that the proved or admitted facts constitute a cause of action a remedy in damages or otherwise.

The next step is to identify the relevant interpretative *factors.* The term "interpretative factor", in relation to an enactment, is used to denote a specific legal consideration which-

> (a) derives from the way a general interpretative criterion applies to the text of the enactment and the facts of the instant case (and to other factual situations within the relevant factual outline), and
>
> (b) serves as a guide to the construction of the enactment in its application to those facts.

The principle to be followed was stated by Lord Reid as follows-

> "When doubt arises, 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'."[31]

No doubt 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. The task in a particular case is to determine (by reference to general criteria) the specific factors which, in the light of the facts of the instant case, are relevant in construing the enactment for the purposes of that case.

Where, as frequently happens, factors tend in different directions the interpreter then has to evaluate or "weigh" them. This is the next step in the process. As respects a particular construction of the enactment, an interpretative factor may be either positive (tending in favour of that construction) or negative (tending away from it). Usually a factor which is positive in relation to one of the opposing constructions will be reflected in a corresponding factor which is negative in relation to the other. A common case is whether a literal construction ("Construction L") or a strained construction ("Construction S") shall be applied to the enactment. The positive factor in favour of Construction L that it gives effect to the literal meaning is reflected in the negative factor against Construction S that it does not give effect to the literal meaning.

[31] *Maunsell v Olins* [1974] 3 WLR 835 at 837.

Where the interpretative factors do not all point one way, it is necessary for the interpreter to assess the respective weights of the relevant factors and determine which of the opposing constructions they favour *on balance*. This is the final step. Unless, in the light of the various factors, the court prefers a third construction, it will adopt this favoured construction. The relevant factors may be numerous, and no single one is overriding. As Lord Scarman said of the principle of no deprivation without compensation, "the principle is not an overriding rule of law: it is an aid *amongst many others*, developed by the judges in their never ending task of interpreting statutes . . ."[32] So it is wrong for judges to say, as they often do, that doubt as to a penal enactment must always be resolved in favour of the accused. In this, as in every other case of disputed statutory interpretation, the court's task is to identify *all* the relevant factors and then conduct a balancing exercise.

Summary

- A linguistic canon of construction reflects the nature or use of language generally, and does not depend on the legislative character of the enactment in question or its quality as a legal pronouncement.

- The first linguistic canon is that an Act or other legislative instrument is to be read as a whole.

- Construction as a whole requires, unless the contrary appears, that three principles should be applied: every word in the Act should be given a meaning, the same word should be given the same meaning, and different words should be given different meanings.

- Different words in a consolidation Act may be given the same meaning because derived from different Acts.

- It may happen that no sensible meaning can be given to some word or phrase. It must then be disregarded.

- The concept that an Act is to be read as a whole is also applied to a group of Acts if they are *in pari materia*.

- A number of linguistic canons are best known in their Latin form. One of these is *noscitur a sociis*, meaning "it is recognised by its associates".

- The Latin words *ejusdem generis* (of the same kind or nature), have been attached to a principle of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character.

- The rank principle lays down that where a string of items of a certain level is followed by residuary words, it is presumed that the residuary words are not intended to include items of a different rank.

- The *reddendo singula singulis* principle (render each to each) concerns the use of words distributively. Where a complex sentence has more than one subject, and more than one object, it may be the right construction to render each to each, by applying each object to its appropriate subject. A similar principle applies to verbs and their subjects, and to other parts of speech.

[32] *Secretary of State for Defence v Guardian Newspapers Ltd* [1985] A.C. 339 at 363 (emphasis added).

- The maxim *expressum facit cessare tacitum* embodies the principle that no inference is proper if it goes against the express words Parliament has used.

- The last of these Latin maxims, *expressio unius est exclusio alterius* (to express one thing is to exclude another) is an aspect of the principle *expressum facit cessare tacitum.*

- The interpretative criteria are general in nature. What is required in an actual case is a method of applying the relevant interpretative criterion or criteria to the specific enactment in question and the specific facts of the case.

- The first step is to identify, in relation to the enactment, the *factual outline* and the *legal thrust*. The usual legal effect of an enactment is that, when the facts of a case fall within an indicated area called the factual outline, specified consequences called the legal thrust ensue.

- The next step is to identify the relevant interpretative *factors.* The term "interpretative factor", in relation to an enactment, is used to denote a specific legal consideration which-

  (a) derives from the way a general interpretative criterion applies to the text of the enactment and the facts of the instant case, and

  (b) serves as a guide to the construction of the enactment in its application to those facts.

- Where the interpretative factors do not all point one way, it is necessary for the interpreter to assess the respective weights of the relevant factors and determine which of the opposing constructions they indicate *on balance*. This is the final step.