2005 Supplement to fourth edition of Bennion's STATUTORY INTERPRETATION

INTRODUCTION TO SUPPLEMENT

The Prefatory Note explains the makeup of this Supplement. In this brief Introduction I take the opportunity of making a few remarks regarding the condition of the work from the standpoint of 2005.

When I first began to write the book in 1983 I aimed to use techniques and experience gained over many years as a British legislative draftsman in order to produce a codified version of the mainly common law criteria which govern the construction of legislation. This was done from the viewpoint of English law, but I believed then, as I believe now, that in essence the same criteria apply throughout the common law world.[1]

I sought to produce a text on the same lines as had been adopted by such codifiers as Chalmers, who successfully drafted the Sale of Goods Act 1894 and other codes. I of course realised that my own code would not have the authority of Parliament behind it, and would not actually be law, unless (as could still happen) it were adopted as such. Nevertheless I felt that the code, together with my extensive comments on each section of it, would be considered to have some persuasiveness.

My sole reason for embarking on this task was that I really thought the result would be found helpful by judges, advocates, law teachers and students. From my drafting experience I was only too well aware that the existing common law interpretative criteria were in disarray. They had mostly been set out in isolated dicta needing to be hunted down in innumerable case reports. These dicta had been enunciated in a disorganised way by judges really only concerned (quite properly) to reach a just and correct result in the particular case committed to their charge. Judges were not concerned to ensure that their spontaneous pronouncements married up with those of their fellow judges to produce a coherent whole.

Authors such as Craies and Maxwell had valiantly endeavoured to reduce these judicial dicta to some kind of order and system, but without much success. Maxwell's latest editor confessed as much when he said he hoped it was not taking too cynical a view when he expressed the hope that practitioners needing to persuade a court of the validity of their argument, any argument, would find whatever they needed in its pages.[2] In fact that was taking a depressingly cynical view, indicating that there were virtually no effective principles in this area.

The first edition of this book appeared in 1984, with subsequent editions in 1994, 1997 and 2002. In between, various updating supplements have been published, and the work has also been updated annually in the *All England Law Reports Annual Review* (LexisNexis UK). Twenty years after publication of the first edition, it is time to take stock. Things have not worked out as I expected. Judges have shown very little sign of accepting my code. Few

[1] This view led to the writing of my short summarising book *Understanding Common Law Legislation* (Oxford University Press, 2001).
[2] *Maxwell on the Interpretation of Statutes* (12th edn 1969), ed. P St J Langan, N M Tripathi Private Ltd, Bombay, p. v.

judges even seem to be aware of its existence. They still prefer to trot out odd dicta from the past, disorganised as always. Why should this be? There seem to be several reasons.

First, senior judges in Britain are appointed mainly from successful members of the Bar who have led busy, not to say hectic, professional lives. That is why they were successful. A well-known professor of law recently told me that these people believe they do not have time to read law books. If that is really what they believe, there is little point in writing law books for them. But should that be what they believe? I do not think so. Law is supposed to be, and surely ought to be, a learned profession. The Master of the Rolls Lord Phillips of Worth Matravers recently confirmed to me that he thinks the law still is a learned profession.

Second, judges tend to confine themselves to what is put before them by advocates in the case.[3] This means that if a particular advocate has not studied this book, and therefore does not lay relevant passages from it before the court, they are likely to be overlooked.

Thirdly, academic lawyers tend not to fulfil the practical role of overseeing court performances in this regard. Academic texts on the subject of legislative interpretation tend to be rarefied and abstract.[4] Books for students now tend to ignore textbooks and scholarly articles altogether, and concentrate on those very judicial dicta I am criticising.[5] Many of them still trot out the supposed three rules criticised by Sir Rupert Cross in 1976, when he wrote-

> 'When teaching law at Oxford in the 1950s and 1960s I treated my pupils as I had been treated and told them to write essays criticising the English rules governing the subject. Each and every pupil told me that there were three rules - the literal rule, the golden rule and the mischief rule, and that the Courts invoke whichever is believed to do justice in the particular case.'[6]

I first argued in detail that these three supposed rules of the common law are illusory in 1984, in the first edition of the present work. Yet they are still trotted out as authoritative.

The effect, and indeed object, of reducing case law into a code is to clarify and state concisely the rules and principles inherent in the decisions concerned. Common law judges tend to dislike this process of codification. Not usually being academically minded, they fancy more freedom of decision is left to them when each new case can be decided on its merits by the light of reason as currently perceived. There are, it needs to be remembered, fashions in such matters.[7]

This judicial attitude is the despair of the analyst. What is more it damages the law by rendering it more difficult for advisers to predict outcomes. Legal certainty is a valuable advantage for the public. Together with justice, it is the essence of law.

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[3] See the remarks on *Copeland v Smith* [2000] 1 All ER 457 at Code p 731 (Example 281.1C).

[4] See for example *Law and Interpretation*, ed. Andrei Marmor (Oxford University Press, 1995). Not one of the twelve essays in that collection mentions the present work, or any similar practitioners' textbook.

[5] See for example Manchester, Salter and Moodie, *Exploring the Law: The Dynamics of Precedent and Statutory Interpretation* (Sweet & Maxwell, 2nd edn 2000).

[6] Sir Rupert Cross, *Statutory Interpretation* (Butterworths, 1st edn 1976), p v.

[7] For example the recent fashion for purposive construction: see Code Part XX.