Review of the 1st edition of *Statutory Interpretation*

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Bennion's Statutory Interpretation

by John Bell[1]

For many years, statutory interpretation, dubbed a non-subject by Lord Wilberforce, has not attracted the same jurisprudential attention as the methodology of the common law. The study of legal methods may seem arid ground for fruitful reflection and may not appear a lively source of issues for critical thought. In part, this is the result of the technical, rule-centred way in which legal methods have been presented. Like the rules of grammar to those who use a language, they appear things to be known, rather than to be dwelt upon. In part also, there is the problem of the sheer width of the subject. From the non-legal side, the subject needs to incorporate material from both the philosophy of language and from constitutional theory. From the legal perspective, it requires a survey of techniques used in a wide variety of legal topics, which is daunting to any but the Herculean mind. Despite these difficulties for any writer, the subject surely repays careful study at a time when most of the difficult cases coming to appellate courts involve some element of statutory interpretation and most of legal practice involves the application and interpretation of statutes.

Like any aspect of legal methodology, statutory interpretation can be approached from a number of perspectives. Legal approaches may concentrate on isolating the kinds of argument which will succeed in court, or a repertoire of possible arguments, or simply to enable lawyers to read texts intelligently. Such approaches may seem far from linguistic philosophy or political theory which would study the same subject-matter with different objectives in mind. All the same, any 'legal' approach will take for granted a certain set of presuppositions about how words derive their meaning and about the constitutional role of the judge in the process of statutory interpretation. From the point of view of both practical value and legal theory, it is important that these presuppositions are adequately expressed and integrated into a work on legal methodology, particularly on statutory interpretation.

Francis Bennion's *Statutory Interpretation*[2] sets out to be a major work in the field. This is not only shown by its size (854 pages plus appendices), and by its price (a staggering £85), but also by the objective which it sets itself. It aims to provide a Code of the current principles governing the construction of Acts and other legislative instruments in English law, and to provide a critical commentary on them (p. xxviii). It claims to be usable by readers at all levels and provides them with a guide on how to use it. However, closer analysis suggests that the book is more unconventional in its structure than in its objectives. We are presented with

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a methodology book for lawyers, primarily those who are well acquainted with the subject and wish to use it for reference. Some of its headings may give the impression that more is being attempted, but this is not really the case. For example, the 'dynamic processing of legislation* concentrates on the judicial role and pays no attention to the importance of departmental circulars as an important part of the further processing of legislation, a feature which would be obvious to a French lawyer.[3] Again, parliamentary processes and other such matters are discussed merely for background. The optic of the book is a conventional approach to the legal framework and to the principles and factors considered within it.

In many ways, Appendix A is the most revealing section on the purpose of the study. It provides a short presentation of court technique in interpreting statutes. The checklist of questions to be asked when reading a statute to be found in Appendix B also indicates the purpose of trying to improve the

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[1] Fellow and Tutor in Law, Wadham College, Oxford.

[2] Butterworths, London, 1984; £85 (hardback only).

[3] Section 26; cf J. Ghestin & G. Goubeaux, Traite de Droit Civil: Introduction Generate (2nd ed, Paris 1983), ch II, section 3. Also C. Harlow & R. Rawlings, Law and Administration (London 1984), pp 118-130.

methods by which lawyers make use of statutes. Discussions of introducing material *de bene esse* (sect 264) and of the technique of selective comminution (sect 74) equally demonstrate that the principal audience is practitioners. The book may be wide-ranging in the topics covered, but everything is organized around the practitioners concerns.

Being a kind of *Halsbury* of statutory interpretation, this is very much a resource book of considerations and arguments which may provide ammunition to the practitioner in any problem, rather than a book to be read from cover to coyer. Its content is frequently set out alphabetically, rather than thematically (e.g. on territorial extent in Part IX, or on legal maxims in Part XIX). Considerable space is devoted to matters such as the weight of various component elements of an Act, and the minutiae of the territorial extent of Acts, even though the issue of the inclusion of Berwick upon Tweed poses few problems today. Its extensive list of terms (Appendix C) and its lengthy index make it an easily usable reference book, which is thorough in its coverage.

Were this simply an ordinary practitioner's manual, the reviewer might have contented himself with comments on matters such as the awkwardness of the separation between the general principles of construction in Division 1 and the supplementary principles in Division 2. (Why, for example, does 'deductive reasoning' belong in the latter rather than the former?) It is in the author's claim to provide a 'critical' commentary on the current law in a codified form (p. xxviii) that its interest lies to wider scholarship.

THE CODE

The originality of Bennion's presentation of the subject is its format of 'Code' and 'Commentary'. The Code consists of short statements of principle which are then

expanded and commented upon in smaller type underneath (except on pp 434-8 and 540-1). The division roughly mirrors the line between obvious principles such as an 'Act of the United Kingdom Parliament ... is a *law* made by the Queen in Parliament', and the complexities about which lawyers may be called upon to advise. The value of the device is seen as helping presentation, as of aid to the initiate, and as points of orientation in solving problems.

As a presentation device, the Code enables the reader to grasp quickly the sort of matters with which a section deals. It is a summary around which the main material of a section is organized. For the most part, the summaries provided in the Code are helpful, though their synthetic nature has inevitable traps for the unwary. For example, section 132 on coherence and consistency introduces the principle of non-duplication of remedy merely in the commentary. Again labels such as 'The Principle Against Doubtful Penalization' can be misleading for Part XIII really deals with the values which the courts are loathe to let statutes infringe. However, used carefully, the Code sections can be of help to the reader.

Although, as the guide to the reader suggests, outline knowledge can be obtained from reading the Code, it is far too laconic and general, while the Commentary is too detailed for the initiate. As a result, the student initiate would not be referred to this book, but to the author's smaller book, *Statute Law* (2nd ed, 1983), even though that book really deals with a different subject matter. The initiate who uses this book will really be the reader who intends to refer back to it at a later date.

The notion of a Code seems to make greater claims than as a mere technique of I presentation. The author suggests that it is more than just a structure around which the book is organized. Codes typically offer general principles and starting points for problem-solving. Their purpose is not just to be an adequate summary of the existing law, but to direct legal interpretations. To provide such an orientation requires the author to adopt a position on the role the judge is to play in the process of the 'dynamic processing' of the text. To the extent, as we shall see, that Bennion eschews such constitutional aspects of statutory interpretation, his end-product is more of a summary re-statement of basic points that an interpreter must remember, rather than a programmatic Code. He is at his best

in discussing technical devices such as ‘comminution’ and ways of presenting material in court, rather than rising to the kind of principled generality that one expects of continental Codes.

The difficulty with the notion of a ‘code’ stems partly from the ambitions of the author, but mainly from the subject-matter with which he is dealing. The ambition of this book is primarily to organize the vast body of practice on statutory interpretation with an element of analysis. To some extent these ambitions conflict. The summarizing concentrates on grouping materials under familiar labels which will enable the practitioner to find the cases he or she wants with ease. The analysis aims to present critically the materials in a way which will provoke and aid reflection, precisely because of the unusual way in which familiar

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material is presented. Although the book reflects the author’s thoughtful consideration of the subject over many years, it tends to adopt the summarizing approach in its Commentary.

The problem is well illustrated by pursuing the issue of what values the courts will apply in interpreting statutes. To study the point, a reader would have to look at ‘Principles derived from Legal Policy’ and ‘Presumptions as to Legislative Intention’ (sections 126—46 of Part VI), ‘Principles against Doubtful Penalization’ (Part XIII), taxing Acts (Sect 319 of Part XV), and ‘Legislative Presumptions’ (Parts XVIII and XIX), bearing in mind some of the general points about construction to avoid absurdity and to prevent the mischief against which the Act was passed. Surely a critical and coherent presentation of the values which the courts will apply would be of value to the expert and be illuminating to the serious student of legal methodology? To the extent that the sections in Part XIII try to link some of the values to which the courts give effect with the European Convention on Human Rights, this is already a step in the right direction, and one only regrets that the author did not pursue it further.

For the most part the critical analysis comes within the sections which summarize the existing law according to familiar labels, even when these (as in the case of ‘mischief’) are recognized as being inadequate. Although one may regret that Bennion frequently adopts a summarizing approach, there are valuable insights to be found in the Commentary analysis. Bennion is at his best in the analysis of what is involved in the current purposive construction of statutes. His analysis of a ‘purposive’ construction embracing both a ‘literal’ and a ‘strained’ approach is valuable in correcting the impression that purposivism must necessarily be expansionist. His analysis of the approach to statutes as requiring ‘informed’ reading captures the essential point that even ‘literal’ interpretation sets the statute in a context which may be very different from that which would appear obvious to a layman. The special features for setting such context are the value assumptions which lawyers make. It is in this area that Bennion’s work has great value, though the analysis could be pursued further. The various sections on values build together into a scheme which provides a context into which any statute can be put. A new statute is not an isolated act, but is rightly seen as being fitted into a network of rules and values which have to be adjusted to make room for it. The appropriate analogy is not mechanical, but organic. Working out how the legal body is to react to the implant of foreign matter is more than a technical issue, but requires attention to the purposes and functions of the organism. The purposiveness of a construction is not to be viewed simply in terms of the new statutory rules, but also in terms of their place in the overall purposes of the organism. It is the vision of the whole which the interpreter brings to the text through an ‘informed reading’.

While the summarizing approach makes a programmatic Code difficult to realize, the objective faces further problems in the nature of ‘authorities’ in matters of legal methodology. Whereas in substantive law a code or restatement

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can generalize from persuasive or binding authorities, the study of legal methodology relies on finding illustrations of current practice and conventions which do not lend themselves so easily to codification.

In his Commentary, Bennion offers quotations from learned authors such as Blackstone and Coke, cases from various centuries illustrating a principle, dicta from particular judges, and problems

which have arisen in relation to individual statutes outside court. These are made to appear an almost timeless set of authorities on which a lawyer can rely. Yet, as the author does note, the role of the judge in this area is essentially constitutional. That role has changed over past centuries, and the judiciary of our own period is by no means at one about its proper role. This presents problems in setting out 'authorities' drawn from earlier periods and from particular factions within the judiciary which Bennion's approach encounters. One can cite instances of references to dicta of one judge which illustrates a point, but no reference to other dicta in the history of the same case.[4] Again, statements of the same judge can be inconsistent.[5] Although the author is prepared to suggest that some cases might no longer be reliable authorities, cases are typically presented out of their historical context.

It seems to me that legal 'authorities' on questions of methodology cannot be treated in the same way as binding rules of law. The author admits as much when he suggests that there is no single golden rule of interpretation but 'a thousand and one interpretative *criteria* . . . that the interpreter must figuratively weigh and balance' (p. xxviii). However, it is not just that these principles are less binding on subsequent courts that matters. Our reasons for considering them are different. In areas like tort law, legal rules derived from cases are for the guidance of citizens in planning their affairs. In an area of legal methodology, the primary purpose of the relevant criteria and principles is different. Firstly they form a tradition within which lawyers set about their tasks, which may include presenting cases in court. Secondly, they set the relevant competences of the courts and Parliament within the overall context of developing and changing the law. These legal-tradition and constitutional aspects do, in the end, have effects on the way citizens are encouraged to view legal rules, but these features are not primary. In seeking the current principles on which statutes will be interpreted, we are essentially looking for conventions which are both professional and constitutional in character. They will mainly be obligatory conventions, setting a kind of positive legal and constitutional morality,[6] but the force of any illustration is inevitably less than any legal rules or even principles. To that extent, the very idea of a 'Code' is misleading in suggesting that statutory interpretation can be reduced to a fixed set

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of principles and rules in the same manner as any branch of the civil or criminal law.

Older cases and statements of commentators may illustrate good sense and also the inherited legal tradition, but they are not authoritative unless they can be shown to be continuing parts of legal practice. Equally, as in the case of many other constitutional conventions, one cannot expect the same sort of agreement as one can achieve over legal rules. The fact that one court has acted in a particular way in a different constitutional context does not justify the conclusion that a modern court must act in that way. To that extent, points made about statutory interpretation are not simply reports of settled conventions, but also arguments for or against them. For this reason, the attempts by the author to argue for certain approaches is correct and valuable. His discussions on 'informed interpretation* and the admissibility of Hansard are good illustrations of this. However, his overall approach is perhaps too an-historical and legalistic in his treatment of illustrations.

COMPREHENSIVENESS

The notion of a 'Code', especially accompanied by a 'Commentary* conveys an impression of comprehensiveness. As has been stated, Bennion's work does deal with a limited variety of matters connected with statutory interpretation, but is most impressive by the broad spectrum of case-law which is represented. He does succeed in choosing illustrations from a wide variety of branches of the law.

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[4] E.g. p 293 citing Lord Edmund-Davies in *McLoughlin v O'Brien* [1982] 2 All ER 298, 307, but not Lord Scarman at 310; also p 623 where he cites Templeman LJ but not the rebuke to his approach by Lord Scarman in the House of Lords, *Shar vBarnet LBC* [1983] 1 All ER at 328.

[5] Compare the comment of Megarry VC cited on p 216 with his judicial statements at [1982] 3 All ER 793-4.

[6] See G. Marshall, *Constitutional Conventions* (Oxford 1984), pp 10-12.

Clearly an author cannot be expected to document all illustrations of the conventions and practices in relation to statutory interpretation, but he can be expected to note the major recent ones. His object must be to convey to the reader a sense of what is in vogue as a legal approach. Bennion's choice is generally apposite, and, as a person steeped in the current practice, he is able to present materials which will be found very helpful on particular issues. There are, of course, some important absentees. For instance, the principle that a person can renounce a right introduced for his benefit by a statute is discussed without reference to *Johnson v Moreton*,[7] and the section on act of state fails to mention *Nissan v Att-Gen*.[8] Such absences merely point to the difficulty in selecting illustrations from the great bulk of case-law. In the end, the aptness of the illustrations and comments depends on whether they capture a contemporary lawyer's sense of the practice of the courts. They are not to be disproved simply by citing another case which went the other way. Rather they must be shown not to fit what we know about the current law and the way it is generally operated. Bennion's impressive knowledge of the detail of the case-law on particular topics ensures that his book is very representative of the way courts are deciding particular points, even if it does not ask wider questions about the role which this

material suggests that the judges are playing. In the end, the user will have to bring to bear his or her own understandings of current legal methods, but the materials provided by Bennion will provide a valuable starting point for reflection.

While Bennion is comprehensive in his presentation of materials on statutory interpretation, he is, in my opinion over-ambitious in his presentation of the connections between those branches and statutory interpretation. Part XVIII on 'Legislative Presumptions: Application of Ancillary Rules of Law* attempts to show how values from particular branches of the law are used to interpret statutes. To be done properly, this would require familiarity with many branches of the law which few lawyers would possess. The attempt to appear comprehensive is over-ambitious and the sections within that Part are not of great help After all, anyone: using the book would be able to have access to leading works on the subject area within which the statute operates. Indeed, the author reveals understandable weaknesses in particular areas of the law. Perhaps the most notable is that of administrative law. The author does not appear to be acquainted with enough of the recent case-law and its implications to make the kinds of comment he does about the subject in question.[9] Even in the more central area of delegated legislation, his presentation is inadequate, as the references are somewhat dated and there is no discussion of the Standing Committee procedure.[10] Though few would rely on a generalist book for statements on particular branches of the law, the ambition of the writer on legal methodology to be a polymath of legal science must be held in check. In some branches of law, he is very good, in others Bennion is not.

CONSTITUTIONAL ASPECTS

Although the author may give very sound advice on techniques, it would be a mistake to presume that he sees statutory interpretation as a purely technical activity, any more than a writer of a medical book considers the art of the physician as a purely technical matter. Among the criteria to be weighed and balanced are moral and political values, as the various sections of the book make clear. This brings us very centrally to the constitutional function of statutory interpretation. Bennion is very aware of the difficulties facing the draftsman and

[7] [1980] AC 37 missing from pp 28-9.
[8] [1970] AC 179 missing from p 130.
[9] For example, p 42 (no mention is made of the local authority's power to bring a relator action under s. 222 Local Government Act 1972); p 57 ('record* is defined without reference to *R v Knightsbridge Crown Court ex p International Sporting Club Ltd* [1981] 3 All ER 417); p 68 (a limitation of certiorari and prohibition to a duty to act 'judicially' is outdated, see H. W. R. Wade *Administrative Law* (4th ed 1977), p 430, and this is substantially admitted in sect 335); p 144 (the suggestion that 'the unreasonableness of a statutory instrument is not a ground for holding it invalid' is odd in context: cf H. W. R. Wade, *Administrative Law* (5th ed 1982), p 752 and *R v Environment Sec, ex p Brent LBC* [1983] 3 All ER 321); p 749 cites *Pearlman v Harrow School Governors* but not *Re Racal Communications Ltd* [1981] AC 374 in which the dicta cited were disapproved.
[10] pp 134-7.

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Parliament in constructing legislation to fit the objectives which are to be achieved. He points out to the reader at a number of junctures the failures which have occurred in the past to make things clear. He gives the impression of wanting the courts to act reasonably to tidy up the mess which has been created to give effect to what has been inadequately stated. However comprehensible this request may be from a leading draftsman of legislation, it does raise important constitutional issues about the function of the judiciary which he fails adequately to discuss. Indeed, the political side of the job of statutory interpretation is consistently downplayed. Even in discussing the role of policy in the interpretation of statutes, he considers that all that is involved is finding the policy of the law rather than any more general notion of policy, though he does discuss the jurisprudential views of R. M. Dworkin in this context.[11]

The tenor of the book and its approach suggests that statutory interpretation, though not a purely technical exercise, is a politically neutral one and that the political assumptions of the task do not need explaining or discussing. It is very much the epitome of what Dworkin has called the 'rule book approach* to statutory interpretation.[12] It suggests that wider questions might be appropriate for studies of the political role of the judiciary, but are not relevant to the presentation of the practice of statutory interpretation in the courts. However, I would argue that an analysis of the political function of the courts is an essential element in the background to statutory interpretation which makes sense of the various principles and criteria used.

To begin with, the kinds of argument and technique which are approved as appropriate by the legal tradition reflect very much what the judges and the profession accept as the role to be played by lawyers in statutory interpretation. In many ways, the central place of judicial decisions and dicta in Bennion's work shows the way in which the courts are setting the standards for legal interpretation. The appropriate way of reading a statute seems determined in large part by what the courts will or will not treat as an acceptable legal argument. This, in turn, merely reflects what judges perceive to be their constitutional role, and what constitutional conventions are appropriate to the performance of that role. Of course, the judges are not unconstrained. Their perception of their constitutional position is moulded in part by what they perceive that Parliament and others, such as the Law Commission, expect from them, and criticism within the legal profession may also have its role to play. This is not the place to discuss the precise influences shaping the judicial perception of its role, but we can say that judges adopt a role-perception which informs and shapes the legal methods adopted in the task of judging. The way to understand the balance of factors used by the judiciary in statutory interpretation is to relate them to the role-perceptions in vogue at the moment. There may, of course, be a number of these within the judiciary, just as there are disagreements on many other political roles in society.

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However, it is only in relation to these that the criteria really make any sense. Bennion provides some information on these matters, but no overall synthesis.

The importance of understanding value-perspectives is also seen in the approach to the techniques of statutory interpretation. Bennion takes the view that one has to start with the 'grammatical meaning' of an enactment, i.e. 'its linguistic meaning taken in isolation, that is the meaning it bears when, as a piece of English prose, it is construed according to the rules and usages of grammar, syntax and punctuation, and the accepted canons of construction'.[13] However, the author also accepts that the reader must adopt an informed interpretation, setting I the statute in its legal context.[14] It is, after all, this informed reading which enables the reader to discern whether what Bennion calls a 'literal' or a 'strained* meaning is to be given. Bennion's way of putting these ideas suggests that one can simply read the text as a piece of prose without legal background and then can invoke special legal meanings if there is linguistic ambiguity. The impression is wrong, and is not, on the whole, what he

[11] p 287.
[12] *A Matter of Principle* (Cambridge, Mass, 1985), p 11.
[13] p 200.
[14] pp 5-6.

means to convey. At section 261, he notes that one looks to see if words are, in themselves, unambiguous and then see if they need further education. But both of these stages involve an informed interpretation. As Lord Simon of Glaisdale suggested in *Maunsell v Olinsy* there is an informed reading at both stages:

> The first task of a court of construction is to put itself in the shoes of the draftsman—to consider what knowledge he had and, more importantly, what statutory objective he had—if only as a guide to the linguistic register. Here is the first consideration of the 'mischief. Being thus placed in the shoes of the draftsman, the court proceeds to ascertain the meaning of the statutory language. In this task 'the first and most elementary rule of construction' is to consider the plain and primary meaning, in their appropriate register, of the words used. If there is no such plain meaning (i.e., if there is an ambiguity), a number of secondary canons are available to resolve it. Of these one of the most important is the rule in *Heydon' s Case*. Here, then, may be a second consideration of the mischief.[15]

While one may have some doubts about the metaphors Lord Simon uses, the basic idea that the initial 'literal' reading is already informed by an understanding of the general purposes of the law and of a statute in this area is surely correct. The linguistic context from which the words derive their meaning is the legal framework into which they are to be inserted. The idea that a grammatical meaning can exist independently of a context is a nonsense.

It may, then, be said that any reading is going to involve a sensitive 1 understanding and application of the values involved in the law. There is no abrupt change between 'literal' and 'strained' interpretations, but rather a following of the direction which gives most sense to the values involved in the law and in the text, as well as the role of the interpreter in this exercise. Informed reading necessarily involves judgments about which values should be developed

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and which restrained in a particular legal context. The strained interpretation I really amounts to giving effect to values both in the text and in the general legal environment, very much the way this is done with literal interpretation. Whether one characterizes such value-judgments as 'political' or not does not detract from the fact that the whole exercise of interpretation involves fine judgment along paths which are, on Bennion's own admission, not clearly determined.

It is because of both these aspects, the way approaches to interpretation are organized in relation to judicial role-perceptions, and the value-oriented dynamics of the process of interpretation, that more needs to be said about the political role of statutory interpretation. The judges do not simply give effect to whatever values appear in a statute. They relate the statute to the values which they think they ought to put into effect and interpret this statute accordingly. Dworkin, in his analysis, requires the judges to base themselves on the rights which people have. Reading both his comment on Dworkin and his discussion of 'Doubtful Penalization' (pp 285—8, 609—29), I would think that Bennion would not substantially disagree, though others might. What is misguided in Bennion's presentation is the implication that discussion of the political orientation of statutory interpretation is not relevant to the practitioner's task. Discussion of such basic judicial orientations is fundamental, and need not degenerate into a simple statement of judicial prejudices, or a statement of the positions adopted by different judges. The understanding of role-perceptions is essential for the practitioner to make use of his tools, and is an essential part of any critical presentation of the subject. The fact that judges, as Bennion documents, feel obliged from time to time to make remarks about their constitutional position rather reinforces my point. The determination of what is law may involve contentious judgments of political morality and can never be just a technical exercise of chasing established social facts about a statute's enactment.

CONCLUSION

[15] [1975] AC at 395.

Despite the more wide-ranging comments contained in the book, Bennion principally offers a compendium of rules and statements of current practice to replace works like *Maxwell*.[16] It is a more reflective and analytical work than its predecessors of this genre and arguably more compendious in its content. It provides some reflection on both the purposes of the rules and practices, and on the nature of the legal methods involved. Although these could have been developed much more in a work of this length, they do provide a resource for students of legal methods, as well as for those seeking judicial practice on particular points. However, given the book's basic ambitions, it is not surprising if the latter group is better served than the former.

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Apart from being an unusual presentation device, the Code will not, I think, gain much favour as a guide to practice. The subject-matter is not reducible to bland, general statements of law, and the Code lacks fundamental purposive statements of policy familiar in other codes of practice. Given the constitutional framework within which practices are developed, any 'code* needs to set out the objectives to be achieved and the place of judiciary in developing statute law.

The book reflects the author's zeal and knowledge of the subject and it is perhaps his laudable ambition to write more than a rule-book which can account for many of the points criticized here. Despite its imperfections, this book has many valuable elements and repays dipping into by readers of many different kinds.

Website: www.francisbennion.com
Doc. No. 1986.002.NFB R10 *Oxford Journal of Legal Studies*, Vol. 6, No. 2, pp. 288-298
For full version of abbreviations click 'Abbreviations' on FB's website.

[16] *Interpretation of Statutes* (12th ed by St. John Langan, London 1969).