Website: www.francisbennion.com
Doc. No. NFB.1998.002 R35 London Review of Books 7 (2 April 1998)
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This beats me

Lord Justice Sedley

STATUTORY INTERPRETATION by Francis Bennion.
Butterworth, third edition, 1092 pp., £187, 11 December 1997, 0 406 02126 0

Law and Interpretation edited by Andrei Marmor.
Oxford, 463 pp., £18.99, 16 October 1997, 0 19 826487 9

Equality before the Law: Deaf People's Access to Justice by Mary Brennan and Richard Brown.
Deaf Studies Research Unit, University of Durham,189 pp., £17.50, 23 October 1997, 0 9531779 6 4

'So, then,' says a founding father, quill poised, to the founding fathers around him in Gary Larson's cartoon, 'Would that be "Us the people" or "We the people"?' If deciding what to write is tough, interpreting what gets written is tougher. Turgid texts need unravelling; obscure provisions need deciphering; occasional nonsense needs correcting; perfectly clear texts may be impossible to apply to novel situations. These and other quotidian exercises are the subject of judgments and commentaries which try to bring ordered methods to bear on the translation of a text into an outcome - that is to say, on trying to give a law its proper effect.

Because the interpretation of statutory texts is the job of the courts, and because the courts (for good but not unassailable reasons) generally follow their own precedents, the judgments by which texts have been interpreted themselves become the subject of interpretation. Law has historically been dominated by a reverence for the printed word which has driven students and lawyers to pore over judgments like theologians over scripture. It has been an unspoken article of faith that in these texts lies truth, and that if they appear not to make sense it is because of the imperfection of the reader's understanding. The common law no longer makes such claims for itself, but would claim only that it is doing the best it can to keep pace with society's complicated life without diluting legal principle, and judges keep having to repeat that their judgments are not to be construed like statutes. Statutes, on the other hand, do have to be construed like statutes and, until Parliament repeals or changes them, the job of the courts is to interpret and apply them.

There is here a unique interpenetration of the legislative and judicial powers, for what an Act of Parliament means is what the courts decide it means. Once it has spoken, Parliament has no continuing interpretative function. The need for the courts both to be loyal to Parliament's prescriptions and to try to do justice has sometimes interesting - indeed, sometimes legendary - consequences, most of which are recorded and categorised in Francis Bennion's book.

Bennion is a former Parliamentary drafter (the gender-neutral word is his) whose treatise on the at times agonising job of statutory interpretation substitutes for the conventional categories a series of derived principles and propositions which make it possible often to crack a problem of interpretation by approaching it laterally. To compose such a work is an act of civility on the part of a professional who, with his fellow drafters, cannot always have been happy about what first legislators and then lawyers and courts made of their texts. For their part, MPs and judges are sometimes at a loss to know what the drafter has been trying to achieve. MPs have at least the advantage of being able to ask the mover of a Bill for clarification. Judges, who have to do the best they can with the words on the page, are not generally as brusque as the Victorian Law Lord who said: 'This beats me.'

A ready source of help, which I hope will routinely be available when the coming freedom of information regime is in place, are the Notes on Clauses in which the Parliamentary drafter explains and expands the condensed prose of a Bill for the benefit of ministers and their officials. At present these are handled like a state secret. I can give a rare example. The Deregulation and Contracting Out Act 1994 provides that ministers are to remain responsible for contracted-out government functions, but not 'for the purposes of so much of any contract made between the authorised person and the Minister . . . as relates to the exercise of the function'. This is comprehensible with effort, though dense to the point of opacity. But the Notes on Clauses (released to a colleague in a moment of openness by the previous Government) make its purpose plain and simple: 'Essentially, the Minister . . . remains accountable for the exercising of the function but may take action, including termination, against the authorised person under the contract if he . . . does not discharge his obligations under the contract.' Why, with such light to hand, should we have to go on groping in the dark? Indeed we now turn in cases of bafflement to Hansard, in the hope that a minister was challenged in Committee about the meaning of the words, and hoping, too, that any explanation was read accurately from the Notes on Clauses and not (as has happened) from the wrong part of a briefing, or from the part headed 'not to be read out' (including, on one occasion, the words 'not to be read out'). In spite of the endeavours of both legislators and interpreters to get it right, each can produce a basket of windfalls from the other's garden. None, I suspect, will ever beat the Nuts (Unground) (Other than Groundnuts) (Amendment) Order: 'In the Nuts (Unground) (Other than Groundnuts) Order, the expression "nuts" shall have reference to such nuts, other than groundnuts, as would but for this amending Order not qualify as nuts (unground) (other than groundnuts) by reason of their being nuts (unground).'

The Law Lords in their wartime decision in *Liversidge v. Anderson* read the words 'if the Secretary of State has reasonable cause to believe' as meaning 'if the Secretary of State thinks he has reasonable cause to believe'; and the sole dissenter, Lord Atkin, was ostracised for describing the other Law Lords as more executive-minded than the executive. (Bennion, incidentally, may be wrong in asserting, as the Privy Council has asserted, that the majority decision is still good law 'on facts such as arose in that case': a judgment in the House of Lords in 1979 concluded that 'the majority . . . were expediently, and at that time perhaps excusably, wrong and the dissenting speech of Lord Atkin was right.') It has been suggested that the Law Lords who decided the Fares Fair case against the GLC misread the formula 'policies . . . which will promote the provision of integrated, efficient and economic transport facilities' as if the word 'economic' was 'economical': if so, Londoners are still paying a high price for the error.

The 1875 Public Health Act conferred a power to lay water mains on local authorities which supplied water - something they could not do unless they had first laid water mains. The courts cured this by deciding the Act meant what Parliament would have said if it had been awake at the time. They were less tender towards the early breath-test legislation which required the motorist to supply 'a sufficient quantity' of breath without saying that it had to be in one go; so that a driver who chose to supply the required quantity in two breaths, and so defeated the breathalyser, was held to have committed no crime. Only recently, a judge has had to reassure the world that a prison rule allowing inmates to be penalised for using 'improper language' would not allow the governor to award solitary confinement for splitting an infinitive.

The Victorians inherited and developed a style of legislative drafting which resembled conveyancing in its prolixity, its repetitiveness and its impenetrability. They had the excuse that 19th-century lawyers regarded statutes as unwelcome rents in the seamless garment of the common law, creating fears that judges, unless bound by prose which put everything beyond doubt, would circumvent what Parliament enacted. The Parliamentary Counsel Office established in 1869 introduced, Bennion says, 'a uniform technique . . . which to the present day has steadily improved in exactness and precision'. This is a dangerous claim. The early 19th-century draftsmen who set out to provide for every conceivable contingency at interminable length had an

almost indefeasible claim to exactness and precision - the tautology could have come from one of their pens. The improvement there has been is uneven, varying with the subject-matter and quite possibly with the drafter, but until recently it typically took the form of condensation and ellipsis.

Twentieth-century legislation is not verbose, but understanding it is frequently like trying to do the Times crossword. It tends to be heavily referential, so that to understand one provision it may be necessary to look at several different Acts, and it tends to use condensed prose (often demanding a logician's brain to comprehend it), not in order to simplify but in order to squeeze the same amount of detail as before into a fraction of the space. Its content tends, as Huckleberry Finn said of Pilgrim's Progress, to be interesting but tough. The drafting of the Groundnuts Order is not freakish; it simply employs the 20th-century mode to the point of self-parody. In very recent years, however, things have begun perceptibly to change. The influence of the Plain English campaign, championed by Margaret Thatcher, has begun to be noticeable throughout Whitehall, and some truly simple legislation has started to appear.

The Human Rights Bill, designed to bring the European Convention on Human Rights into UK law and now wending its way through Parliament, is an example of drafting which is laconic, lucid and readable in its presentation, albeit sophisticated in its effect. It says simple things like, 'so far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights,' and 'if the court is satisfied that the provision is incompatible with one or more of the Convention rights, it may make a declaration of that incompatibility' (the ultra-cautious phrase 'that incompatibility', it is true, betrays the old drafter's night-terror that unless the contrary is spelt out, some batty judge will find one incompatibility but declare a different one), and 'it is unlawful for a public authority to act in a way which is incompatible with one or more of the Convention rights' ('a Convention right' would have been too much of a wrench; but the absence of a 20-page schedule listing what are to be regarded as public authorities is a true watershed). This is a swallow, however, not a summer.

The Inland Revenue has embarked on a seven-maids-with-seven-mops project to consolidate in plain English the entire body of tax statutes. It is going to keep 40 lawyers in work for five years. The Law Commission has worked heroically for many years, using seconded Parliamentary drafters, to codify and simplify the heterogeneous body of criminal law, but Parliament has so far not found time to enact any of it. In spite of the sometimes elaborate exegetic exercises to which the courts are either led or driven, interpretation in the field of law is the work of making practical sense of words. Lawyers talk without differentiation of the 'meaning and effect' of an enactment because the pragmatic process of interpretation tends ineluctably to collapse meaning and effect into one another: law, in other words, acquires meaning only when it is applied to facts. The academic business of theorising about it tends to uncouple the two things. Severed from practice, interpretation lends itself readily to the laxity of abstraction.

The essays in Law and Interpretation are the product of an academic industry (riven in recent years by political conflict) which has built edifices of often baffling elaboration on the work of earlier practice-oriented theorists such as H.L.A. Hart. The heart beats a little faster at the editor's introductory announcement: 'Most contributors to this collection seem to agree that there is a close link between the concept of interpretation and the concept of meaning'; though perhaps in such cloud-capped terrain even this is something to be grateful for. 'A good stab at defining a useful notion of interpretation,' a contributor tells us, 'is that it is the activity we engage in when we are trying to find the meaning of something.' From such articulations of the stunningly obvious the authors move on to variously elaborate theories of legal authority, steering uneasily between the Scylla of limiting interpretation to the ascertainment of a supposed prime intent and the Charybdis of the notion that laws mean whatever judges say they mean. One contributor devotes several hundred words and an appeal to Wittgenstein to what is, if I understand it, the elementary proposition that rules acquire meaning only by being applied to facts.

Joseph Raz considers how it is the interpretation of a work of literary or musical art which invests it with meaning and (dubiously) distinguishes that exercise from the way in which historiography interprets history. The essay has virtually nothing to say about law. Unlike art, Raz simply remarks, law is not a mirror - such subjects as law 'are there, made by those who forged them, and are merely to be understood by those who interpret them. Or are they?' he adds as the essay ends. Thanks a bundle. For every practitioner who suspects that these swathes of mega-theory are banality parading as thought there is an academic who regards lawyers and judges as mechanics for whom thought is a distraction from the task of case disposal. Even so, the trouble with such abstraction is not only that it yields a diminishing return of relevance but that the urge to devise an alternative Grand Theory tends inexorably to take its exponents back to where they started. Heidi Hurd, for example, in one of the better-written essays, concludes that 'the law itself, as distinct from its authors, has a claim to authority.' So it undoubtedly has; but if you then have to ask what an authoritative but problematical law means, you are thrown back on the same old questions: do we seek out the authors' intentions? Do we stick to the letter, wherever that takes us? Do we make it mean what would now be most useful or most just? The courts, which repeatedly face these questions, have had from time to time to set out principles of interpretation in order to explain or justify what they are doing. They don't - at least in Britain - go looking for the sorts of anguish in which philosophers deal because they can find quite enough in the texts themselves.

The single greatest judicial controversy of the postwar years was between Lord Denning, who argued for the purposive construction of statutes, and the Lord Chancellor, Viscount Simonds, who insisted that the courts should stick to the letter; but they shared the objective of seeking the legislator's intent through the text. The article of judicial faith that what Parliament means is what it says is not an evasion: it bridges the philosophical duality of meaning and intent by recognising the authority of the text, by assimilating intention to meaning and by getting on with divining the former from the latter. It is depressing therefore to find one of the more interesting contributors to the Oxford volume, Jeremy Waldron, dismissing as 'a trivial version of intentionalism' a passage of Stanley Fish which strikes accurately at the soft core of this dualism: 'there cannot be a distinction between interpreters who look to intention and interpreters who don't, only a distinction between the differing accounts of intention put forward by rival interpreters . . . everyone who is an interpreter is in the intention business.' This is not trivial: unlike the interminable prose of some of Fish's critics, it is comprehensible and right; and meaning, as I have suggested, can be properly assimilated not only to intent but to effect. Such monism may not earn accolades among theorists, and it certainly doesn't provide a formula for solving all the problems that arise, but it has the real virtue of focusing thought where theory repeatedly attempts to dissipate it. Where trouble starts in practice is where it becomes apparent that Parliament (or, increasingly, a department of state deploying large delegated powers - over three thousand statutory instruments were issued in 1997 alone) has spoken unintelligibly, or that what it has laid down will work injustice or won't work at all.

Both Parliament and the courts have over time devised rules of law which are regularly subjected to that most percipient of critics, a jury of 12 ordinary people. Juries show a remarkable ability to assimilate at one hearing quite difficult concepts of law, simply because their minds are concentrated on the facts to which they are to apply them. But to watch their faces as they are told that the judge-made law of provocation makes a murder defendant guilty only of manslaughter if something the victim said or did provoked him and would equally have provoked a reasonable person in his situation to kill them, is to see interpretation in action. The jury are not pondering the relationship of morality to psychology: they are trying to visualise a person who (a) sharing the essential characteristics of the possibly violent and disturbed individual in the dock but (b) being otherwise entirely reasonable is capable of spontaneously stabbing to death someone who has sufficiently angered him. The law has these idiosyncratic ways of interpreting the crime of homicide because we used to hang people for murder and now lock them all up for life; so that instead of reflecting the fact that all killings and all killers are different by allowing a judicial power of sentence which can be but does not have to be for life, juries are instead offered a let-out

of manslaughter by reason of provocation or (even more byzantine in its conceptual complications) diminished responsibility - or both. Provocation (in the fine but now ageing prose of Lord Devlin in 1949) means 'rendering the accused so subject to passion as to make him or her for the moment not master of his mind'; diminished responsibility, introduced by Parliament in 1957 to England from Scotland where the judges had used it for many years, postulates 'such abnormality of mind . . . as substantially impaired [the defendant's] mental responsibility for his acts'. These are defences based on vocabularies of sentimental psychology and clinical psychiatry which few practitioners would now use if the law did not demand it. It is not judges or lawyers but juries who give them meaning by translating them into the facts of the case before them. How the evidence itself is interpreted is yet another region of mystery and dispute. Lawyers have their supposed ways of detecting error or falsehood, but they are rarely able to test them objectively. Occasionally something alarming disrupts their complacency.

When Stefan Kiszko was tried for the rape and murder of a child, the judge rightly told the jury that they should look for independent evidence corroborating his confession before relying on it. It is not widely known that the Crown apparently had such evidence: on the floor of Kiszko's car the police had found a piece of cardboard with car registration numbers scrawled on it, among them that of a car which could be proved to have been driven past the murder spot at about the time of the murder. It was only when, years and years later, it was established that the scientific evidence available at the time showed affirmatively that Kiszko could not have been the killer, that a fresh look was taken at the damning piece of cardboard. It turned out that Kisko, an erratic driver, was constantly having spats with other motorists and, Lear-like, would write down their numbers, promising vengeance. He had had a run-in with the car's previous owner on a garage forecourt - that was all. Circumstantial evidence like this is dangerously seductive, for it downplays the role of chance and is over-ready to interpret coincidence as cause and effect.

In other cases - but which ones? - circumstantial evidence can be entirely cogent. Yet, in spite of the pressure of scholars like William Twining, the interpretation of evidence has barely begun to be recognised as a subject of true academic concern. The risks of misunderstanding are never higher than when interpretation is literally involved. The Nuffield Foundation has in recent years developed a much-needed but still unimplemented set of standards for the training and accreditation of court interpreters. Deaf witnesses and defendants are reliant, as the well- written and well-researched Equality before the Law points out, on interpretation which is not only bilingual but bimodal. British Sign Language (BSL) is a sophisticated medium which, although it makes supplemental use of lip pattern and fingerspelling, relies on gesture and has difficulty with abstractions - drawbacks of which judges and lawyers may be unaware. For instance, 'murder' may be translated in several ways, but each involves a gesture - hanging, cutting the throat, strangling or (most commonly) stabbing - and the choice of gesture may convey an assumption which distorts the evidence. 'Touch' - a key word in relation to a variety of sexual offences - is even more mode- sensitive: BSL will convey it using a gesture which almost inescapably includes information or assumption about the shape of the hand and the part of it that was used, and about the manner of touching. There seems no reason in principle why in a suitable case a blind person cannot serve on a jury; indeed experiments have suggested that blind jurors are better at spotting liars than sighted ones. But having a deaf juror means having a 13th person in the jury room, and so far we have not found a means of accommodating this. Deaf defendants nevertheless have the same rights as hearing ones, and the state's obligation to afford them a fair trial will be highlighted when the European Convention's guarantee of a fair trial becomes part of UK law.

Bennion has had the double misfortune of having brought out his second edition just before *Pepper v. Hart* revolutionised the methodology of statutory interpretation, and now of bringing out his third edition just before the Human Rights Bill revolutionises our canons of statutory construction. What was decided in *Pepper v. Hart* was that if the meaning of a text is wrapped in ambiguity, instead of deriving intent from meaning, a ministerial explanation of the Bill's intent may enable the meaning to be derived from the intent. Whether the situation in *Pepper v. Hart* (or in later cases following it) actually warranted the application of the principle that meaning could

be derived from intent is, as Bennion suggests, debatable. But the Human Rights Bill is proposing something much more radical: to infuse all but totally resistant legislation with respect for the Convention rights, and to do this by requiring the courts to read all laws so far as possible in a manner that conforms with the Convention. This will apply not only to the resolution of ambiguities but to the application of every provision of law touching on a Convention right. We have already seen this kind of thing in operation in cases where domestic legislation has had to be mildly tortured by the courts to make it speak words required by European Union directives; but this will be an exercise of a different order, and it may distress the incumbent generation who were trained in close analysis and application of the printed word, much as their literary contemporaries were taught by Dr Leavis that there was no literary history, only literature.

Bennion has managed to slip into his new edition a loose note on the Human Rights Bill which concludes: 'One obvious difficulty is that the whole body of existing legislation will in future require to be interpreted in a different way. Since the basis of interpretation is to look to the original intention of the legislator, problems must arise when that is retrospectively modified by a new set of principles.' If, however, one accepts that intent is in the ordinary way derived from meaning and meaning expressed by effect, the process of qualifying existing meanings by new ones is less dramatic.

It is certainly not the same thing as the remarkable amendment to Article 9 of the Bill of Rights 1689, which was introduced to allow Neil Hamilton to pursue his ill-fated libel action against the Guardian and which purports to turn what was undoubtedly enacted as a privilege of the House itself against the calling into question elsewhere of its proceedings into a personal privilege capable of being waived at will. The Human Rights Act will not turn statutes into what they are not, but it will insinuate a fresh meaning into those which can accommodate it. Simple originalism cannot cope with such a process, but a shrewd analysis like Fish's will see in the expansion of meaning the accretion of intent.

The 17th-century Scots jurist Stair pointed out that unlike the common law, which is able to respond to changed circumstances, 'in statutes the lawgiver must at once balance the conveniences and inconveniences; wherein he may and often doth fall short.' That is why interpretation gives life to statutes. It is also why no legislature will ever produce, except by luck, acts of enduring lucidity and relevance. Even when, as legend asserts once happened, Parliament passed into law an interminable local Bill into which the town clerk had slipped the words 'and the marriage of the town clerk of X is hereby dissolved,' an issue arose as to whether his successors, too, would become divorced on taking office. Nobody has ever traced the legislation; but if the issue had reached court, the conventional appeal to Parliament's expressed intent would have died on counsel's lips.

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