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Doc. No.2002.005.NFB 118 LQR (Jul 2002) 486-488
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# Book Review

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## Understanding Common Law Legislation: Drafting and Interpretation.

## By Francis Bennion.

**[Oxford: Oxford University Press. 2001. xxx + 237 pp. Hardback: £30.]**

## Book review by R. T. Oerton*

IN this book Francis Bennion's main concern is with the interpretation of - statutes drafted against the background of the common law system. Interpretation is a means to an end, and in this country the end is that of ascertaining the intention of Parliament. In fact, of course, nearly all our primary legislation (certainly all that which emanates from Government) is drafted by the Parliamentary Counsel Office (of which Bennion was a distinguished member) on instructions from civil servants who are seeking to convey policy which, broadly, is that of the ministerial head of the department but which, in its details, is largely their own. It is true that, once this policy has been translated into a Bill, Parliament has, in theory at least, a chance to accept, reject or change it, but there may be no single member of either House who understands all its details fully and in practice the outcome will largely depend on the actions and attitudes of Government. And the acquaintanceship which members have with subordinate legislation (statutory instruments, which are drafted by civil servants in Government departments) is hardly even nodding. So the intention of Parliament is a mythical beast, but that cannot be helped: the fiction is a necessary one.

In seeking Parliament's intentions, the courts fortunately do not go to Parliament itself (except in the circumstances laid down in what Bennion calls (p. 118) the "famous but mistaken" House of Lords decision in *Pepper (Inspector of Taxes) v. Hart* [1993] A.C. 593), but confine themselves to the wording of the legislation. How do they—or how should they—approach that wording? Readers will gain the impression that, in seeking an answer to this question, Bennion is trying to impose order on, and extract principles from, a maelstrom of dicta: his task is not easy and this part of Ms book reflects the difficulty. A very brief summary of its main thrust may be attempted. Even if the enactment, read as a piece of prose, seems to the judge to bear a clear literal meaning, he or she must not give effect to that interpretation without question. To begin with, a literal interpretation must always be considered, and if necessary modified, in the light of the history and context of the enactment and any decided cases on it. Only then does it become an "informed" interpretation. And even after that the judge must apply what Bennion calls "the interpretative criteria". Discussion of these criteria occupies a large part of the book. They include, among many other things, such matters as the current Interpretation Act (now that of 1978), which judges have been known to ignore, the ejusdem generis rule, the presumption against absurdity and the need to adopt, if circumstances justify it, what Bennion calls a "purposive-and-strained" construction. The purposive approach which, in contrast to the much stricter one of earlier times, the courts now adopt, is important enough to receive extended treatment before the other interpretative criteria are listed and discussed.

All these criteria must be considered—considered in the sense, at least, that judges must be sufficiently aware of them for bells to ring in their

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heads if any are relevant—even if the enactment in question seems on the face of it to present no difficulty. And when it does present a difficulty, their application, and the way in which the court weighs them and balances them one against another, will be crucial in resolving it. Certainly the

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book's strength lies, at least as much as in anything else, in identifying and explaining these interpretative criteria.

But it sheds light on much else. It shows, for example, that cases where those responsible for the enactment (Parliament if you like) have inadvertently left a doubt about its meaning must be sharply distinguished from cases in which they have deliberately left a doubt about its outcome in any given situation, with the intention that this doubt should be resolved by the court itself as an exercise either of judgment (as was so in Pepper v. Hart, supra, according to Bennion), or of discretion: the differences between judgment and discretion are the subject of two illuminating chapters. Other matters relevant to interpretation (for example, words in pairs, transitional provisions and updating constructions) are also considered in the course of a dense, but stylish, fascinating and even entertaining narrative.

The book sets out to distil Bennion's previous work on statute law, at present spread over half a dozen books and very many more articles, and his approach is uniquely painstaking. It is also inspired by a strong desire to remedy a situation which he finds disturbing (p. 1):

"In the life of the law as we know it lawyers who have not been taught \, statutory interpretation appear in court, day in and day out, before judges who labour under the same handicap of ignorance. From the point of view of legal coherence, the result is chaos."

As this quotation shows, readers who have come to expect a degree of iconoclasm from Francis Bennion will not be disappointed. He briskly dismisses a view of Ronald Dworkin with the words, "That is heresy" (p.. 172); he inveighs against the House of Lords for taking it upon itself to change the common law (pp. 144-146); he delivers what he calls a "jeremiad" against the very existence of the Human Rights Act 1998 (pp. 149-151); and he includes the occasional throwaway line ("True morality is surely unshifting" (p. 98)) which reverberates. All this serves only to increase the pleasure of reading the book: it never affects the careful objectivity which Bennion brings to bear on his subject.

Towards the end of the book a quite different method of interpretation rears its head. This is the approach adopted by the Court of Justice of the European Communities which, says Bennion (p. 155) "in advancing the 'spirit', -is always ready to depart from the text". This method of interpretation "uses the text merely as a starting point" {ibid.) and so goes far beyond the purposive: Bennion describes it as "developmental" and it must (pace Lord Denning) strike puzzled disquiet into the hearts of most- _ British lawyers. It is difficult to avoid the conclusion that it really is, to quote Viscount Simonds (in *Magor & St Mellons R.D.C. v. Newport Corporation* [1952] A.C. 189 at p. 190), "a naked usurpation of the

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legislative function". Whilst the meaning ascertained by applying the interpretative criteria may be said to be already inherent in the enactment itself, it is hard to say the same of the result produced by a developmental construction which must of necessity be much less predictable.

Be that as it may, it is this developmental method which, in Bennion's view, the courts of this country must apply to the interpretation of all European Community law—even when that law is expressed in a statute of our own. And it is also this method, he says, which our courts must in effect apply to our own domestic enactments if these would otherwise fall foul of the Human Rights Act 1998. When section 3(1) of this Act says that so far as "possible" United Kingdom legislation must be read and given effect in a way which is compatible with the Convention for the Protection of Human Rights and Fundamental Freedoms, it is the developmental construction which should be applied to that legislation in order to see whether this is "possible" or not.

The book ends with a chapter on the jurisprudential basis of the common law method; one on the common law system in America (which contains the interesting reflection that Governor Bush defeated Vice-President Gore only because, in the Supreme Court, a strict textual construction of the United States Constitution narrowly prevailed over a more creative one); and one on techniques of law management (which contains a strong plea for the subject of statutory interpretation to be taught to law students in a different and more comprehensive way). Ideally, no doubt, a book reviewer should be able to sit in judgment on the book which he or she is reviewing. The present reviewer must confess that, in this instance, the reverse is very largely the case. He draws such comfort as he can from the fact that the meagreness of his expertise in this subject puts him among what is still, regrettably, an overwhelming majority of lawyers.

*R. T. OERTON*