7 THE INTERPRETATION OF STATUTES

"The golden rule is that there are no golden rules."[1]

—G.B. Shaw, *Man and Superman*.

Modern pressures upon the syllabus are such that the subject of the legislative process and statutory interpretation is rarely taught in law schools other than as a small part of an English Legal System or similar course. Yet statutes, Acts of Parliament and secondary legislation are unquestionably the most important source of the law, and I hope that even that degree of exposure will persuade you of the importance of this facet of the law. A practitioner with any pretension to legal learning should certainly know the lines of argument that may be open on the reading of a statute; as Lord Steyn observed, "the preponderance of enacted law over common law is increasing year by year, . . . and the subject of interpretation has moved to the centre of the legal stage"[2] and most cases in the law reports turn on disputed points of statutory interpretation.

What follows is intended largely to show how the complex business of extracting precise meanings from an apparently simple set of words is assisted by certain practices and understandings. It will be seen that there are certain principles at work, and various presumptions that have a bearing on the task. Parliament has recently affected

[1] Shaw's aphorism has been elaborated upon in the context of statutory interpretation by Francis Bennion: "Alas, . . . there is no golden rule. Nor is there a mischief rule, or a literal rule or any other cure-all rule of thumb. Instead, there are a thousand and one interpretative *criteria*" (1997) 147 New L.J. 684. Bennion refers the reader to his own excellent monograph, *Statutory Interpretation* (now *Bennion on Statutory Interpretation* (6th edn, 2013) plus supplements, for an elaboration of the point. Whilst I do not dissent from Mr Bennion's stance, I take the view that the student might nevertheless benefit from considering the difficulties inherent in the apparently straightforward tasks of interpretation and that the three "rules" (discussed below) afford a framework for discussion, not a "cure-all" for decision-making.

[2] "*Pepper v Hart*; a Re-examination" (2001) 21 O.J.L.S. 59.

the process by enacting s.3 of the Human Rights Act 1988, which considerably alters the traditional role of the courts in this respect.[3]

THE STRUCTURE OF A STATUTE

A few words first about the structure of a statute. An Act of Parliament consists of a number of parts; there is the short title, the long title, the date of Royal assent, the enacting formula, the sections and subsections, marginal notes, the citation, the extent (territorial) and the commencement. In addition you will normally find definition sections, savings and repeals and (at the end of the Act), the schedules. Not all of these are of equal significance as indicators of the meaning of the statute. There is a good deal of ancient learning about the matter, but the essential distinction is that some of these features are the enacting parts of the statutes (which can be considered and amended by Parliament), whereas the others (the cross-headings, the side-notes or marginal notes and the punctuation) are regarded as being of less significance since they do not enact anything.[4] It seems likely, however, that a court post *Pepper v Hart*[5] would permit some use to be made of them if they shed light on the meaning of the Act. Indeed, in *Calley v Gray*,[6] the Court of Appeal acknowledged that it had derived considerable assistance from the explanatory notes by which the statute under construction was accompanied when it was first introduced into Parliament, notwithstanding that the notes specifically state that "they do not form part of the Bill and have not been endorsed by Parliament".

THE IMPORTANCE OF CONTEXT

When Parliament has passed an Act the words of the Act are authoritative as words. In ordinary life, if someone says something that you

[3] Further discussed below, p.146.

[4] Affirmed by the House of Lords in *Montila* [2004] UKHL 50; [2004] 1 W.L.R. 3141.

[5] [1993] A.C. 593. The significance of the point will become apparent when readers have considered the section dealing with that case at p.138 below.

[6] [2001] 1 W.L.R. 2124. See also Lord Hope in *R. v A (No.2)* [2001] UKHL 25 at [82]; [2001] 1 A.C. 45 who took the view that such recourse was permissible. On the use of "explanatory notes" see R. Munday [2005] Crim. L.R. 337.

do not understand, you ask for a fuller explanation. This is impossible with the interpretation of statutes, because only the words of the statute have passed through the legal machinery of law-making, and individual Members of Parliament cannot be put into the witness-box to supplement or interpret what has been formally enacted. Hence the words of an Act carry a sort of disembodied or dehumanised meaning: not necessarily the meaning intended by any actual person in particular, but the meaning that is conventionally attached to such words. The point must not be pressed too far, since the statute obviously has a broad purpose (or, to speak more precisely, those who collaborated in framing and passing the statute had a broad purpose) which is expressed in the words.

The most important rules[7] for the interpretation (otherwise called construction) of statutes are those suggested by common sense. The judge may look up the meaning of a word in a dictionary or technical work; but this ordinary meaning may be controlled by the particular context. As everyone knows who has translated from a foreign language, it is no excuse for a bad translation that the meaning chosen was found in the dictionary; for the document may be its own dictionary, showing an intention to use words in some special shade of meaning. This rule, requiring regard to be had to the context, is sometimes expressed in the Latin maxim *noscitur a sociis*, which Henry Fielding translated: a word may be known by the company it keeps. One may look not only at the rest of the section in which the word appears but at the statute as a whole, and even at earlier legislation dealing with the same subject-matter—for it is assumed that when Parliament passed an Act, it probably had the earlier legislation in mind, and probably intended to use words with the same meaning as before.[8] However, words need not always have a consistent meaning attributed to them: the context may show that the same word bears two different senses even when it is repeated in the same section.[9]

[7] The word "principles" would capture the function of these guides to interpretation more accurately than the term "rules", since principles (unlike rules) are not determinative of the particular issue to which they are applied—they act as guides.

[8] Maxwell, *Interpretation of Statutes* (12th edn, 1969), pp.64 *et seq.*

[9] *R. v Allen* (1872) 1 C.C.R. at 374; *West Midlands Joint Electricity Authority v Pitt* [1932] 2 K.B. 1 at 46.

Formerly, the rule permitting recourse to earlier statutes was taken to allow the court to compare the wording of a consolidation Act with the Acts that it superseded, and to conclude that variation of wording indicated a change of meaning. But this tended to defeat the object of consolidation, which was to supersede a jumble of Acts of various dates by a single statute. Consolidation would be little help if one still had to look at the old repealed Acts in order to interpret the new one. Consequently, the rule laid down by the House of Lords is that where in construing a consolidation Act:

> "the actual words are clear and unambiguous it is not permissible to have recourse to the corresponding provisions in the earlier statute repealed by the consolidation Act and to treat any difference in their wording as capable of casting doubt upon what is clear and unambiguous language in the consolidation Act itself."[10]

DEFINITION SECTIONS

In reading a statute, always look for a definition section, assigning special meanings to some of the words in the statute. Parliamentary counsel adopt the inconsiderate practice of not telling you (for example, in a footnote or marginal note) that a particular word in the section is defined somewhere else in the statute; you have to ferret out the information for yourself. In addition to the interpretation section in the statute, the Interpretation Act 1978 operates as a standing legal dictionary of some of the most important words used in legislation. This Act declares, among other things, that the plural includes the singular, and the singular the plural, unless a contrary intention appears. Also, by virtue of the Act, if not independently of it, "words importing the feminine gender include the masculine", and *vice versa*. These special meanings are duly noticed in the various annotations of statutes, such as *Halsbury's Statutes* and *Current Law Statutes*, but not in the official versions of the statutes.

[10] *per* Lord Diplock in *Commissioner of Police of the Metropolis v Curran* [1976] 1 W.L.R. 87 at 90H–91A; [1976] 1 All E.R. 162 at 165b, reaffirmed by a majority of the Lords in *Farrell v Alexander* [1977] A.C. 59; see the reservations by Lord Simon at 84.

INTERPRETATION IN THE LIGHT OF POLICY: FRINGE MEANING

When interpreting statutes the courts often announce that they are trying to discover "the intention of the legislature".[11] In actual fact, if a court finds it hard to know whether a particular situation comes within the words of a statute or not, the probability is the situation was not foreseen by the legislature, so that the Lords and Members of Parliament would be just as puzzled by it as the judges are. Here, the "intention of the legislature" is a fiction.

Because of this difficulty, some deny that the courts are really concerned with the intention of Parliament.

> "In the construction of written documents including statutes, what the court is concerned to ascertain is, not what the promulgators of the instruments meant to say, but the meaning of what they have said."[12]

Others, however, think it proper to speak of the intention of Parliament, in the sense of "the meaning which Parliament must have intended the words to convey".[13] In case of doubt the court has to guess what meaning Parliament would have picked on if it had thought of the point. The intention is not actual but hypothetical.[14] There is, of course, a limit to what a court can do by way of filling out a statute, but to some extent this is possible.

An illustration is the familiar legal problem of "fringe meaning". The words we use, though they have a central core of meaning that

[11] Lord Steyn in the House of Lords in *R. v K.* [2001] UKHL 41; [2002] 1 A.C. 462 at [30] cites with approval the remarks of Lord Reid in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] A.C. 591 at 613–615: "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the words which Parliament used." "The contextual meaning of the enacted text" added Lord Steyn, "is controlling". Incidentally, the citation may look incorrect, but it is not. The first number, it will be recalled, is the number officially allotted to the judgment itself. The second is a reference to the paragraph number in the judgment.

[12] *per* Lord Simon in *Farrell v Alexander* [1977] A.C. 59 at 81G.

[13] *per* Lord Edmund-Davies, *Farrell v Alexander* [1977] A.C. 59 at 95B.

[14] Fresh controversy as to the utility and scope of legislative intent functioning as a guide to statutory interpretation has been aroused by Richard Ekins in his book, *The Nature of Legislative Intent* (2012).

is relatively fixed, have a fringe of uncertainty when applied to the infinitely variable facts of experience. For example, the general notion of a "building" is clear, but a judge may not find it easy to decide whether a temporary wooden hut, or a telephone kiosk, or a wall, or a tent, is a "building". In problems like this, the process of interpretation is indistinguishable from legislation: the judge is, like it or not, a legislator. For, if the conclusion is that the wooden hut is a building, this is in effect adding an interpretation clause to the statute which gives "building" an extended application; whereas to decide that the hut is not a building, effectively adds a clause to the statute and gives it a narrower meaning. The words of the statute, as they stand, do not give an answer to the question before the judge; and the question is therefore legislative rather than interpretative. This simple truth is rarely perceived or admitted: almost always the judge pretends to get the solution out of the words of the Act, though confessing in so doing to be guided by its general policy. The rational approach would be to say candidly that the question, being legislative, must be settled with the help of the policy implicit in the Act, or by reference to convenience or social requirements or generally accepted principles of fairness.

This kind of "interpretation" may be legally and socially sound although it reaches results that would surprise the lexicographer. Thus it has actually been held that murder can be an "accident".[15] The word "accident" was being interpreted in the context of the Workmen's Compensation Act 1906, and the result of the decision was that the widow of the deceased workman was entitled to compensation from

[15] *Nisbet v Rayne & Burn* [1910] 2 K.B. 689. See *Morris v K.L.M. Royal Dutch Airlines* [2002] UKHL 7; [2002] 2 A.C. 628, where the claimant was seeking damages when she suffered clinical depression following an assault on her by a fellow passenger. Although the incident was treated by the court as being clearly an "accident", she nevertheless was unable to recover since (so it was held) "bodily injury" did not include mental injury, on the grounds that this could not have been present to the minds of those drafting the relevant international Convention in 1929. Yet in *R. v Ireland* [1998] A.C. 147, it was held that psychiatric illness fell within the scope of an offence under the Offences Against the Person Act 1861, and by causing it the appellant had been guilty of a serious criminal offence, notwithstanding that the "Victorian legislator . . . would not have had in mind psychiatric illness . . .". "It is a matter of interpretation whether a court must search for the historical or original meaning of a statute or whether it is free to apply the current meaning of the statute to present day conditions": *per* Lord Steyn at 158. This looks, it must be said, suspiciously like judicial legislation.

the employer, because the murder in question arose out of and in the course of the employment. The court admitted that it was giving an unusual meaning to the word, for "an historian who described the end of Rizzio by saying that he met with a fatal accident in Holyrood Palace would . . . fairly be charged with a misleading statement of fact". Similarly, Farwell L.J. remarked that one would not in ordinary parlance say that Desdemona died by accident, because "the horror of the crime dominates the imagination and compels the expression of the situation in terms related to the crime and the criminal alone." Yet, if one looks at the situation from the point of view of the victim, it is an accident, in the sense that it was not expected or intended by the victim himself. In preferring this wider meaning of the term "accident" the court looked to the general purpose of the Act.

THE LITERAL RULE

Granted that words have a certain elasticity of meaning, the general rule remains that the judges regard themselves as bound by the words of a statute when these words clearly govern the situation before the court. The words must be applied with nothing added and nothing taken away. More precisely, the general principle is that the court can neither extend the statute to a case not within its terms though perhaps within its purpose nor curtail it by leaving out a case that the statute literally includes, though it should not have. Lord Diplock expressed the argument in favour of judicial self-restraint as follows:

> "At a time when more and more cases involve the application of legislation which gives effect to policies that are the subject of bitter public and parliamentary controversy, it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers; Parliament makes the laws, the judiciary interpret them. When Parliament legislates to remedy what the majority of its members at the time perceive to be a defect or a lacuna in the existing law (whether it be the written law enacted by existing statutes or the unwritten common law as it has been expounded by the judges in decided cases), the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and

to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust or immoral. In controversial matters such as are involved in industrial relations there is room for differences of opinion as to what is expedient, what is just and what is morally justifiable. Under our constitution it is Parliament's opinion on these matters that is paramount."[16]

Lord Diplock went on to say that the principle applies even though there is reason to think that if Parliament had foreseen the situation before the court it would have modified the words it used: "If this be the case it is for Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Acts."

According to this, courts should not use the alternative principles of construction[17] when the statute is "plain and unambiguous". They can decline to apply the literal rule if the statute is ambiguous, but must not "invent fancied ambiguities" in order to do so.

It is, nevertheless, difficult to reconcile the literal rule with the "context" rule. We understand the meaning of words from their context, and in ordinary life the context includes not only other words used at the same time but the whole human or social situation in which the words are used. Professor Zander gives the example of parents asking a childminder to keep the children amused by teaching them a card game. In the parents' absence the childminder teaches the children to play strip poker. There is no doubt that strip poker is a card game, but equally no doubt that it was not the sort of card game intended by the instructions given. One knows this not from anything the parents have said but from customary ideas as to the proper behaviour and upbringing of children. On its face, the literal rule seems to forbid this common-sense approach to statutory interpretation.

The literal rule has often been criticised by writers. Blindly applied, it is a rule against using intelligence in understanding language.

[16] *Duport Steels Ltd v Sirs* [1980] 1 W.L.R. 142 at 157; 1 All E.R. 529. For earlier pronouncements to the same effect see *Magor and St Mellons v Newport Corpn* [1952] A.C. 189; *Stock v Frank Jones (Tipton) Ltd* [1978] 1 W.L.R. 231; 1 All E.R. 948.

[17] Such as the mischief rule discussed further below, p. 137

Anyone who in ordinary life interpreted words literally, being indifferent to what the speaker or writer meant, would be regarded as a pedant, a mischief-maker or an eccentric.

Applying the rule also occasions difficulty. What is a real ambiguity, and what is a fancied ambiguity? Consider the following case decided by the House of Lords on the construction of the Factories Act. This Act[18] required dangerous parts of machines to be constantly fenced while they were in motion. A workman repairing a machine removed the fence and turned the machine by hand in order to do the job. Unfortunately he crushed his finger. Whether the employers were in breach of the statute and liable in damages for breach of statutory duty depended on whether the machine was "in motion" at the time of the accident. In the primary or literal sense of the words it was; but since the machine was not working under power and was only in temporary motion for necessary adjustment, the House of Lords chose to give the words the secondary meaning of "mechanical propulsion".[19] Since the machine was not being mechanically propelled it was not in motion, and the employers were not liable.

This was a decision of the House of Lords 25 years before the pronouncement of Lord Diplock previously quoted, and no doubt has been cast upon it. Is the provision in the Factories Act ambiguous or not? "Motion" primarily means movement; the machine was in movement, and therefore, in the ordinary meaning of the phrase, was in motion. The reason why the House of Lords cut down the meaning of the phrase must have been because the House did not believe that Parliament intended to cover the particular situation. According to Lord Diplock it is improper to do this if the meaning of the statute is plain. So the decision in the Factories Act case was justifiable only if the Act was regarded as not plain. But in what way was it not plain? "In motion" is on its face a perfectly plain phrase.

Was not the reason why the House thought it not plain that their Lordships believed that Parliament did not have this situation in mind and would have cut down the wording if it had? Yet it seems that according to Lord Diplock such reasoning is merely the invention of a

[18] A predecessor of the Health and Safety at Work Act 1974.

[19] *Richard Thomas & Baldwins Ltd v Cummings* [1955] A.C. 321. For a fuller discussion see J. Bell and G. Engle, *Cross, Statutory Interpretation* (3rd edn, 1995), pp.88–90.

fancied ambiguity, which is no reason for denying the "plain" meaning of a statute.

One practical reason for the literal rule is that judges have no wish to be accused of making political judgments at variance with the purpose of Parliament when it passed the Act. This fear is sometimes understandable, but not all statutes divide Parliament on party lines.

Other reasons advanced for the literal rule may be briefly answered.[20] "Many statutes are passed by political bargaining and snap judgments of expediency; the courts can rarely be sure that Parliament would have altered the wording if it had foreseen the situation." This may be true, but is it any reason why the courts should not do justice as best they can, leaving it to Parliament to intervene again if the decision does not meet with Parliament's approval? "If courts habitually rewrote statutes in order to effect supposed improvements, this might cause statutes to become more complex in order to exclude judicial rewriting in a way that was politically unacceptable." This supposes that the court misjudges what Parliament would wish it to do, whereas in fact the decision may win general approval. A court that tries to decide as Parliament would have wished is more likely to be right than a court that follows the words believing it was not what Parliament intended. "People are entitled to follow statutes as they are; they should not have to speculate as to Parliament's intention." This is a strong reason against the extensive construction of prohibitory (criminal) legislation, but is less persuasive in other cases. "If the courts undertook to rewrite statutes this would tend to foment litigation, because it would encourage people who objected to the legislation to try their luck with the courts." To suggest that the courts will ever completely rewrite a statute is a great exaggeration; and even judges who accept the literal rule in words will depart from it when the circumstances press them hard enough.

Lord Diplock says that there may be differences of opinion as to what is expedient, just and moral, and that Parliament's opinion on these questions is paramount. This is obviously true, once Parliament's opinion is established. It is also true that Parliament's opinion is ascertained primarily from the words it has used.

[20] Some of these reasons are given by Lord Simon in *Stock v Frank Jones (Tipton) Ltd* [1978] 1 W.L.R. 231 at 236–237; 1 All E.R. 948 at 953–954.

Nevertheless, the facts of the case may be such as to raise serious doubts whether Parliament intended its words to apply. The decision by a court that a particular situation was not intended to come within the ambit of a statute, though within its words in what may be their most obvious meaning, does not deny the supremacy of Parliament, for if Parliament disagrees with the decision it can pass another Act dealing specifically with the type of case. However, the hard truth is that Parliament generally pays little attention to the working of the law. It is not merely that Parliament fails to keep old law under continuous revision; it loses interest in its new creations as soon as they are on the statute book.

A "PURPOSIVE" APPROACH: THE MISCHIEF RULE

As can be seen from the illustration just given, the task of interpreting statutes gives judges the chance of expressing their own opinions as to social policy; and, inevitably, their opinions do not always command universal assent. However, the judges are on fairly safe ground if they apply the "mischief" rule, otherwise known as the rule in *Heydon's Case*.[21] This bids them to look at the common law (i.e. the legal position) before the Act, and the mischief that the statute was intended to remedy; the Act is then to be construed in such a way as to suppress the mischief and advance the remedy. This approach to the reading of statutes is an early example of what is now commonly referred to as a "purposive" approach,[22] which goes rather wider than merely ascertaining the mischief. Lord Nicholls explains:

> "Nowadays, the courts look at external aids for more than merely identifying the mischief the statute is intended to cure. In adopting a purposive approach to the interpretation of statutory language, courts seek to identify and give effect to the purpose of the legislation. To the extent that extraneous material assists in identifying the purpose of the legislation, it is a useful tool."[23]

[21] (1584) 3 Co.Rep. at 7b; 76 E.R. at 638.

[22] See, e.g. Lord Griffiths in *Pepper v Hart* [1993] A.C. 593 at 617; Lord Nicholls in *Associated Dairies Ltd v Baines* [1997] A.C. 524 at 532.

[23] *R. v Secretary of State for the Environment, Transport and the Regions, ex p. Spath Holme* [2001] 2 A.C. 349 at 397E, HL.

So stated, the purposive approach is rather wider than the mischief rule, since it does not suppose (as the older rule does) that all statutes are passed for the purpose of remedying a mischief, as opposed to promoting some social good or purpose. In recent years, the purposive approach has supplanted both the literal rule and the mischief rule as the proper approach to the ascertainment of Parliament's will.[24]

Pepper v Hart

The practical utility of the mischief rule depends to some extent upon the means that the courts are entitled to employ in order to ascertain what mischief the Act was intended to remedy. A true historical investigation would take account of press agitation, party conferences, government pronouncements, and debates in Parliament. Until comparatively recently, all of these were ignored as the result of a rule excluding evidence of the political history of a statute. The exclusionary rule was justified by the burden that would otherwise be placed upon legal advisers (and the resulting costs to their clients) and the uncertainty that would be introduced into the law if such historical materials had to be consulted.[25] In practice, therefore, the judge generally gathered the object of a statute merely from perusal of its language, in the light of his knowledge of the previous law and general

[24] It is at least plausible that membership of the European Union has involved the adoption of fresh approaches to interpretation; a fuller discussion of the point is beyond my scope, but see J. Bell in ed A. Burrows, *English Private Law* (3rd edn, 2013), p.17 for a discussion of "European teleological approaches". He concludes: "the role assigned to the court as interpreter by the European teleological approach is more active than would be acceptable in domestic law. In domestic law, the sources of information about the purpose of the legislation are more focused and public . . . ".

[25] Where a statute is passed to give effect to an international treaty (convention), the courts will apply the continental rule that the discussions leading to the treaty may be looked at: *Fothergill v Monarch Airlines Ltd* [1981] A.C. 251. But the consensus is that such *travaux préparatoires* should be used only where the text is ambiguous or where a literal construction appears to conflict with the purpose of the treaty. It is important that the interpretation adopted in the United Kingdom should be the same as that adopted in other states. Thus in *Morris v K.L.M. Royal Dutch Airlines* [2002] Q.B. 100, the Court of Appeal relied upon a decision of the United States Court of Appeal, Second Circuit on the meaning of "accident" (holding that it might encompass an intentional assault on an air passenger). Such decisions are not binding, but: "respect falls to be paid to relevant decisions of courts of other signatories . . . " [12].

knowledge of social conditions.[26] However, in *Pepper (Inspector of Taxes) v Hart*,[27] it was held that in certain limited situations and for certain limited purposes, *Hansard* (i.e. the Parliamentary record) can be consulted for the purposes of ascertaining the intention of the legislature. The precise limits is which this may be done are somewhat unclear, and remain hotly contested.[28] According to Lord Oliver, this is permissible

> "only . . . where the expression of the legislative intention is genuinely ambiguous or obscure or where a literal or prima facie construction leads to a manifest absurdity and where the difficulty can be resolved by a clear statement to the matter in issue".[29]

The conditions for consulting legislative history were summarised in the headnote as follows:

(a) legislation is ambiguous or obscure or leads to an absurdity;

(b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together . . . with such other Parliamentary material as is necessary to understand such statements and their effect;

(c) the statements relied upon are clear.

Exactly how these conditions should apply in any particular case is, however, still a matter of some controversy. In *R. v Secretary of State for the Environment, Transport and the Regions, ex p. Spath Holme Ltd*,[30] two members of the House (Lords Nicholls[31] and

[26] See, e.g. *Davis v Johnson* [1979] A.C. 264 at 338F.

[27] [1993] A.C. 593.

[28] One of the most hostile and vocal critics of the decision is Lord Steyn. See his article, cited above, p.127, fn.2. See also A. Kavanagh, "*Pepper v Hart* and Matters of Constitutional Principle" (2005) 121 L.Q.R. 98.

[29] [1993] A.C. 593 at 620. Applied in *Craftrule Ltd v 41–60 Albert Mansion Palace Mansions Ltd*; [2011] 1 W.L.R. 2425; [2011] EWCA Civ 185 at [25] where it was held that the conditions were not satisfied, and *Hansard* was accordingly ignored.

[30] [2001] 2 A.C. 349.

[31] In *R. (Jackson) v Att.-Gen.*; [2005] UKHL 56; [2006] 1 A.C. 262 at [65] Lord Nicholls acknowledged that the practice of referring to Hansard is "currently under something of a judicial cloud".

Cooke) dissented on the use to which *Hansard* might be put. Section 31 of the Landlord and Tenant Act 1985 gave the Minister a power to make rent restriction orders. The grounds upon which the Minister could rely in making such an order were unclear, but might have included either or both (i) the desirability of reflecting equities between landlords and tenants and/or (ii) the need to control inflation. The majority (Lords Bingham, Hope and Hutton) took the view that two of the thresholds set by Lord Browne-Wilkinson in *Pepper v Hart*, namely paragraphs (a) and (b) had not been met and that reference to *Hansard* was therefore impermissible to resolve the dilemma. The minority took the view that they could consult various parliamentary statements, but decided that they were inconclusive of the issue and concluded (with the majority) that the Minister was free to use both criteria.

Under the purposive approach, it is still necessary to answer the question: when is a provision ambiguous? Lord Cooke in his speech said that "a provision is ambiguous if reasonably open on orthodox rules of construction to more than one meaning", and concluded that the section under consideration fell within that ambit. He took the view that there are cases in which the court can in the end derive real help from *Hansard*, even if it is not necessarily decisive help. If the answer is not "decisive" one way or the other as to Parliament's meaning, it shows that the court has a real choice to make.

Another difficulty is that the statements to be relied upon must be "clear". But the question arises: how do you know whether they are clear until you have looked at them? Lord Mackay dissented in *Pepper v Hart*. His objections were the practical and pragmatic ones, concerned as they were with the availability (or rather the unavailability) of the background materials, and the costs of undertaking research into them. In other words, it is still necessary for legal advisers to undertake all the research work the avoidance of which is behind the majority approach in the *Spath Holme* decision even in order to know whether or not what has been said is "clear".

More recently still, a far more restrictive approach to the use of legislative history has been suggested. It has been argued that the only purpose for which such material should be consulted would be to prevent a government or minister from denying before the courts

what he or she had asserted before Parliament.[32] Whilst it is true that this was what happened in *Pepper v Hart* itself, Lord Hope's view is a minority one.

Many statutes are the result of recommendations made by the Royal Commissions and departmental committees. Can the reports of these commissions and committees be looked at as an aid to construction? The short answer is that they can be consulted for the same purposes and to the same extent as *Hansard* itself. And they can still be consulted to show the mischief against which the Act was directed. A nice example of the use of such a report for these purposes is to be found in the prosecution for "making off without payment", *Allen*.[33] The question was whether a person who left without paying a bill could be convicted in the absence of proof that he or she intended never to pay. The Theft Act 1978 was silent on the point, but the Thirteenth Report of the Criminal Law Revision Committee made it clear that such an intention must be proved. The Court of Appeal refused to consult the Report, taking the view that it was not permitted to consult, but arrived at the "correct" conclusion unaided. The House of Lords did look at the Report and reinforced its own conclusions about the mischief at which the section was aimed. It may be expected that the practice of referring to these reports will extend itself in the future, because they often supply the best commentary upon the wording of an Act.[34]

INTERPRETATIONS TO AVOID ABSURDITY: THE GOLDEN RULE

As the Factories Act case discussed earlier illustrates, the courts sometimes allow themselves to construe a statute in such a way as to produce a reasonable result, even though this involves departing from the prima facie meaning of the words. The rule that a statute may be construed to avoid absurdity is conveniently called the

[32] See in particular Lord Hope in *Spath Holme* [2001] 2 A.C. 349 at 407–408. Lord Steyn in *R. (Jackson v Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [97] lent support to the views of Lord Hope.

[33] [1985] A.C. 1029.

[34] See also *I v DPP* [2001] UKHL 10; [2002] 1 A.C. 285 (affray).

"golden rule".[35] It is by no means unlimited, and seems to apply only in three types of case.

The golden rule allows the court to prefer a sensible meaning to an absurd meaning, where both are linguistically possible. It does not matter that the absurd meaning is the more natural and obvious meaning of the words. Lord Reid:

> "Where a statutory provision on one interpretation brings about a startling and inequitable result, this may lead the court to seek another possible interpretation which will do better justice."[36]

On another occasion Lord Reid put the point more strongly.

> "It is only where the words are absolutely incapable of a construction which will accord with the apparent intention of the provision and will avoid a wholly unreasonable result that the words of the enactment must prevail."[37]

This application of the golden rule does not contradict the literal rule, *provided* that the absurdity of the particular proposed application of the statute is conceded to be a reason for finding an ambiguity in it. If one accepts the golden rule, this involves rejecting Lord Diplock's opinion that the inexpediency, injustice or immorality of the proposed application of the statute cannot in itself be a reason for finding an ambiguity in the statute. According to the golden rule it can be a powerful motivating force leading the court to detect such an ambiguity.

[35] *Mattison v Hart* (1854) 14 C.B. at 385, 139 E.R. at 159. The general statement of the golden rule is that the literal (primary) meaning must be adopted unless this results in absurdity. It must be admitted, however, that it is now rare to find the judges using the expression in that sense. In *Cotgrave v Cotgrave* [1992] Fam. 33, Butler-Sloss L.J. reacted to a suggestion that legislation produced a result that was "illogical, unreasonable and unfair" by saying that "that is how Parliament has enacted . . . " the relevant legislation. Since the avoidance of "absurdity" will be encompassed within the purposive approach and permit parliamentary materials to be consulted for the purpose, it must be acknowledged that the "golden rule" might have been in effect supplanted. It would be most unusual to find, surely, that Parliament had deliberately legislated for a result that is later condemned as "absurd".

[36] *Coutts & Co v Inland Revenue Commissioners* [1953] A.C. 267 at 281.

[37] *Luke v Inland Revenue Commissioners* [1963] A.C. 557 at 577.

It is frequently said that the question of absurdity cannot influence a decision in any type of case except the one just stated. Nevertheless, the courts sometimes act on a second principle, stated by Cross as follows:

> "The judge may read in words which he considers to be necessarily implied by words which are already in the statute, and he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible or absurd or totally unreasonable, unworkable or totally irreconcilable with the rest of the Statute."[38]

Acting on this principle judges have occasionally corrected a statute that foolishly said "and" when it meant "or", or that foolishly said "or" when it meant "and". However, the argument must be very strong to induce the court to meddle with a statute.[39] Instances occur where the courts feel obliged to construe a statute in a way that they themselves acknowledge creates outrageous injustice.

PRESUMPTIONS

In interpreting statutes, various presumptions may be applied, most of which are of a negative or restrictive character. They are the background of legal principles against which the Act is viewed, and in the light of which Parliament is assumed to have legislated, without being expected to express them. Some embody traditional notions of justice, such as the rule that a statute is presumed not to be retrospective (except in procedural matters). Others reflect what was almost certainly the intention of Parliament, as that an Act applies only to the United Kingdom unless the contrary is expressed. The most controversial presumptions are those enshrining the values of a

[38] *Cross, Statutory Interpretation* (3rd edn, 1995). p.93. For the power of the courts to rewrite legislation in cases where the draftsman has clearly made a drafting mistake, see *Inco Europe v First Choice Distribution* [2000] 1 W.L.R. 586; [2000] 2 All E.R. 109.

[39] In the Public Order Act 1986, a power of arrest was conferred to restrain a person engaging in disorderly conduct. But the power was conferred only upon "the" policeman who had first required the person at risk of arrest to desist from the objectionable conduct, and the court in *DPP v Hancock and Tuttle* [1995] Crim. L.R.139 declined to read this to cover "any" or "a" policeman. Parliament put the matter right in the Public Order (Amendment) Act 1996.

capitalist society—the presumption against interference with vested rights, the presumption against the taking of property without compensation, and the presumption against interference with contract. The last of these now has few followers, but the first two still retain vitality. Even so, the judges are hampered by the thought that they must not run counter to political trends, for example by implying a right to full compensation for the appropriation of property when a legislature (acting for reasons of wealth redistribution) did not in terms provide for such compensation. The traditional presumption upon which a clear consensus still exists is that against interference with personal liberty.

Presumptions may be regarded as instances of the proposition that the duty of judges goes beyond the automatic enforcement of the dictates of Parliament. The judges' function is also to do justice in accordance with certain settled principles of law in a free society; and they are entitled to assume that Parliament does not intend to subvert these principles, unless there is a clear statement that it does. For this reason, the courts apply the rule that when Parliament has conferred a judicial or quasi-judicial power upon a person, that power must be exercised in accordance with the rules of natural justice. When Parliament creates a new crime, this is presumed to be subject to certain defences at common law, such as self-defence and duress, and also (very frequently) to the requirement of a state of mind (intention, knowledge or recklessness).[40] These are judge-made principles required by our ideas of justice and grafted on the statute by "implication" although there may be no words in the statute to suggest them.

The common law provides quite an armoury of such principles, and new applications can be found for them by a bold judge. A striking example is *Re Sigsworth*.[41] Under legislation (in force then and now) a child has certain rights of succession on the death of the parent intestate. For the purpose of his decision in *Re Sigsworth*, the trial judge assumed it to have been proved that the deceased, Mary Ann Sigsworth, had been murdered by her son; and the question was whether the son was entitled to her estate as "issue" under the Act.

[40] *B (a Minor) v DPP* [2000] 2 A.C. 428; *R. v K* [2001] UKHL 41; [2002] 1 A.C. 462.
[41] [1935] Ch. 89.

The learned judge held not, for the reason that no one is entitled to profit from his own wrong. The decision was rendered somewhat easier by the fact that a similar conclusion had already been arrived at in the law of wills: a murderer cannot take under the victim's will. Long before that— at least as early as 1775—the courts had laid down the general principle of law that a person cannot bring an action based on his own wrong (*ex turpi causa non oritur actio*).[42] In *Re Sigsworth*, the judge applied this principle to the interpretation of the intestacy statute which made no mention of it. Even statutes may be read as subject to certain fundamental principles of justice which are to be discovered in the common law.

Incidentally, *Re Sigsworth* is enough to disprove the oft-repeated assertion that "where the words of an Act of Parliament are clear, there is no room for applying any principles of interpretation".[43] This proposition may have a useful application in limiting some of the more pedantic canons of interpretation, but it does not exclude the application of a presumption or certain common-sense principles. Although *Re Sigsworth* was only the decision of a judge at first instance, it has been approved by the Court of Appeal and extended to other statutes raising a similar question.[44] One can therefore say that the courts retain the power to read statutes in the light of general principles, the only question being whether the particular court will be able to find or invent a general principle that will enable it to give a sensible effect to the statute. Much will depend on the legal knowledge and ingenuity of counsel and the court, as well as on the readiness of the court to take a liberal view.

A liberal interpretation to prevent the statute operating upon an accidental inclusion may sometimes be comparatively easy, as it was in *Re Sigsworth*. Although the courts have not expressly said so, it may be more difficult to do anything in the situation where Parliament has left out something germane. To extend a statute to a regrettably omitted case looks too much like legislation. Even so, it is possible for a court to interpret a statute as covering what looks at first sight as

[42] See *Broom's Legal Maxims* (10th edn, 1937), p.497.
[43] *per* Scott L.J. in *Croxford v Universal Insurance Co* [1936] 2 K.B. 253 at 280.
[44] *R. v Chief National Insurance Commissioners, ex p. O'Connor* [1981] Q.B. 758; *R. v Secretary of State for the Home Department, ex p. Puttick* [1981] Q.B. 767; Whiston *v Whiston* [1995] Fam. 198; *Re DWS (decd)* [2001] Ch. 568.

an omission if it can find or invent some plausible general principle of interpretation, an exercise that may call for a little ingenuity.

Consider, for example, *Adler v George*.[45] The Official Secrets Act 1920, s.3, prohibits persons "in the vicinity of" any prohibited place from impeding sentries. The defendant impeded a sentry when he was inside a prohibited place. The argument for the defence was that the defendant, being inside, was not "in the vicinity of" the place, which meant outside. The court rejected the argument, holding that the statute was to be read as if it were "in or in the vicinity of". Obviously, the case was stronger than the one actually provided for, so it could be regarded as *a fortiori*.[46] Just as the greater includes the less, so a provision for the marginal case must include the central case. *Adler v George* shows that statutes may be read not only against the background of notions of justice and settled legal principle (which tend to limit their operation) but also against the background of notions of ordinary common sense (which may extend their operation).

There is a long-standing presumption that Acts of Parliament are not intended to derogate from the requirements of international law. When interpreting legislation, therefore, the courts presume that Parliament must have intended to act in accordance with international obligations. For many years, the European Convention on Human Rights was treated as no more than an aid to construction of this kind, although one that assumed increasing significance after a right of individual petition to the European Court of Human Rights was accorded in 1966. Technically, the International Covenant on Civil and Political Rights is a treaty of the same status as the European Convention before incorporation. But its provisions are only rarely noted, even though binding on us as a matter of international law.

HUMAN RIGHTS ACT 1998, S.3

Section 3 of the Human Rights Act 1998 warrants separate consideration because it introduces special considerations in cases where the protection of certain human rights is involved. The section provides

[45] [1964] 2 Q.B 7.

[46] "With stronger reason"—generally anglicised as "ay forsheeory".

that, "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 Convention rights". If the court is unable to achieve a reading of the statute in conformity with the Convention rights, it may then grant a "declaration of incompatibility" whose effect is that the law must be changed subsequently in order to make it consistent with Convention rights. It will be clear that, at a stroke, Parliament has thereby rendered relevant to the interpretation process many considerations that would otherwise have been irrelevant, or of doubtful standing, and at the same time introduced a fundamentally new approach to the task of interpretation.

The section has been already been considered on hundreds of occasions since it came into force on 2 October 2000. Its potential to make a difference to the outcome of a dispute is illustrated by the decision of the House of Lords in *R. v A (No.2)*[47] where the protection afforded to rape victims in court was the subject of consideration. Parliament had enacted legislation (s.41 of the Youth Justice and Criminal Evidence Act 1999) setting out with some precision the circumstances in which a judge might give leave to permit the questioning of a rape victim. The ban apparently prevented the defendant from adducing evidence or asking questions as to his own previous relationship with the complainant, even in a case where the defence was that the complainant had consented. Four members of the House agreed that, according to the ordinary canons of construction, the statute would indeed have that result which meant that a court would be unable to hear evidence that might be highly relevant to the defence. The majority in the House were clear that s.3 permitted (or even required) the court to take into account Article 6 of the European Convention guaranteeing a fair trial whatever violence this might do to the language of s.41. Lord Hope was in a minority. He disagreed about the potential relevance of the evidence (the mere fact that the complainant might have consented on previous occasions is no evidence that she consented on the occasion giving rise to the charge), and took the line that Parliament did indeed intend that a defendant should not have been permitted to ask the disputed questions. Section 3 "does not entitle the judges to act as legislators". The courts have said on

[47] [2002] 1 A.C. 45.

a number of occasions that they must respect the distinction between interpreting and legislating, but as critics point out,[48] the line is a difficult one to draw.

It is at least arguable that the line between interpretation and legislation was overstepped by a majority of the House of Lords in *Ghaidan v Godin-Mendoza*,[49] where the decision in *R v A* was affirmed. There the House of Lords held that legislation (which traced its origins back to 1977) protecting the inheritance rights of a deceased's "spouse" could be extended to protect a same sex partner even though this could not have been in the contemplation of the legislature when the provision was first enacted. The House was unanimous in deciding that the legislation did violate the anti-discrimination provisions of s. 14 of the Human Rights Act, but divided as to the question whether it was legitimate to interpret the word "spouse" in a way that was never intended by Parliament in the first place. To the puzzlement of the critics,[50] a majority decided that it was possible to find the rights compliant "meaning" through the use of section 3.

This involves a reading of the legislation to produce a result that the legislature did not intend, and there can be little doubt that the implementation of the Human Rights Act involving decisions such as these has materially contributed to the tensions that have developed between the executive and the judiciary, a tension frequently inflamed by sensational press coverage of particular decisions.[51]

Section 3 therefore creates tension between judges as interpreters and judges as quasi-legislators. In the first place, s.3 obliges the judges to find a compatible interpretation "so far as it is possible to do so". The meaning of the words that Parliament has used must set some limits to what is "possible" in any particular case. The approach of the majority in *A* enables the courts to nullify the effect of statutory

[48] See A. Kavanagh (above 000) at 29ff.

[49] [2004] UKHL 30, [2004] 2 AC 557. There is excellent treatment of the issues arising from this decision in A. Kavanagh, *Constitutional Review under the Human Rights Act* (2009), especially chapters 2–5.

[50] The Supreme Court of Victoria in *R v Momcilovic* [2010] VCSA 5, [69]-[110] declined to follow the approach of the House of Lords, taking the view that it was not entitled to interpret legislation in a way that was clearly at variance with what the legislature must have intended. But the equivalent interpretation section there is differently worded.

[51] This was the stated view of the House of Lord's Committee on the Constitution, "Relations between the executive, the judiciary and Parliament", 6th report of Session 2006–7, discussed by A.W. Bradley [2008] P.L. 470.

provisions and it may be doubted whether that is the purpose of s.3. Rather, if the courts are forced to a conclusion that it is simply not possible to find an interpretation that protects one of the enshrined rights, then it has the power to make (under s.4 of the Human Rights Act 1998) a "declaration of incompatibility" leaving Parliament to set the matter right.

It is hoped that these few words are sufficient to enable the student to understand something of the complexities that are involved in the interpretation of statutes.

FURTHER READING

For an enlargement upon the theme of interpretation, see Michael Zander, *The Law-Making Process* (7th edn, 2015), Ch.3. A fuller account of the technical rules will be found in J. Bell and G. Engle eds, *Cross, Statutory Interpretation* (3rd edn, 1995). The practitioner's work is F.A.R. Bennion, *Statutory Interpretation* (6th edn, 2013). A new edition is expected imminently. The same author has written *Understanding Common Law Legislation* (2009). See also J. Bell, "Sources of Law" in A. Burrows ed., *English Private Law* (2nd edn, 2007), Ch.1; Manchester and Salter, *Exploring the Law: The Dynamics of Precedent and Statutory Interpretation* (4th edn, 2011).