The Law Commission
and
The Scottish Law Commission

(LAW COM. No. 21)

(SCOT. LAW COM. No. 11)

THE INTERPRETATION OF STATUTES

Laid before Parliament by the Lord High Chancellor, the Secretary of State for Scotland and the Lord Advocate pursuant to section 3(2) *of the Law Commissions Act* 1965

Ordered by The House of Commons *to be printed* 9*th June* 1969

LONDON
HER MAJESTY'S STATIONERY OFFICE

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The Law Commission was set up by section 1 of the Law Commissions Act 1965 for the purpose of promoting the reform of the law other than the law of Scotland or of any law of Northern Ireland which the Parliament of Northern Ireland has power to amend. The Commissioners are:

The Honourable Mr. Justice Scarman, O.B.E., *Chairman.*
Mr. L. C. B. Gower.
Mr. Neil Lawson, Q.C.
Mr. Norman S. Marsh, Q.C.
Mr. Andrew Martin, Q.C.

Mr. Arthur Stapleton Cotton is a special consultant to the Commission. The Secretary of the Commission is Mr. J. M. Cartwright Sharp, and its offices are at Lacon House, Theobald's Road, London, W.C.1.

The Scottish Law Commission was set up by section 2 of the Law Commissions Act 1965 for the purpose of promoting the reform of the Law of Scotland. The Commissioners are:

The Honourable Lord Kilbrandon, *Chairman.*
Professor A. E. Anton.
Professor J. M. Halliday.
Mr. A. M. Johnston, Q.C.
Professor T. B. Smith, Q.C.

The Secretary of the Commission is Mr. A. G. Brand, M.B.E. Its offices are at the Old College, University of Edinburgh, South Bridge, Edinburgh, 8.

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THE LAW COMMISSION

and

THE SCOTTISH LAW COMMISSION

Item XVII of the First Programme of the Law Commission and Paragraphs 20 *and* 21 *of the First Programme of the Scottish Law Commission*

THE INTERPRETATION OF STATUTES

To the Right Honourable the Lord Gardiner, Lord High Chancellor of Great Britain,
the Right Honourable William Ross, M.B.E., M.P., Her Majesty's Secretary of State for Scotland, and
the Right Honourable the Lord Wilson of Langside, Q.C., Her Majesty's Advocate.

I INTRODUCTION

1. Item XVII of the Law Commission's First Programme reads as follows:

> " It is evident that a programme of law reform, which must necessarily use the instrument of legislation, depends for its successful realisation on the interpretation given by the courts to the enactments in which the programme is embodied. The rules of statutory interpretation, although individually reasonably clear, are often difficult to apply, particularly where they appear to conflict with one another and when their hierarchy of importance is not clearly established. The difficulty which faces the courts may be enhanced by present limitations on the means, other than reference to the actual text of the statute, for ascertaining the intention of the legislature. These difficulties are especially noticeable where English courts are called upon to interpret legislation implementing international conventions. In some Commonwealth and other countries different approaches to the problem of interpreting legislative instruments have been adopted which merit consideration.
>
> " *Recommended:* that an examination be made of the rules for the interpretation of statutes.
>
> " *Examining agency:* the Commission."

Paragraphs 20 and 21 of the First Programme of the Scottish Law Commission also refer to the interpretation of statutes in the following terms:

> **" Interpretation of Statutes**
>
> " 20. We recommend that the law relating to the interpretation of statutes should be examined by us.

" 21. We would propose to examine the recognised rules for the interpretation of statutes in relation to their consistency with each other, and their adequacy for the ascertaining of the intention of the Legislature. Clearly, we must be in close consultation with the Law Commission about this proposal."

2. The Commissions have conducted their enquiries in full consultation with each other. Problems of statutory interpretation present themselves in a slightly different way and with different emphasis in the two countries, and the contents of the report, which has been largely prepared by the Law Commission, may not all be applicable to Scotland. Both Commissions, however, concur in the recommendations and now present a joint report.

3. In the course of our study of the interpretation of statutes we prepared a Joint Working Paper[1] which was published on 10th August, 1967. The paper was given a very wide circulation and received considerable publicity in the press. We invited comments on the paper, and we list in Appendix B the individuals and bodies who sent us their observations. We also include in Appendix B the names of those who gave us invaluable assistance on the law and procedure relating to the interpretation of statutes in other countries or who have otherwise assisted us in our consideration of this topic. We wish to record our deep indebtedness to all who helped us in these various ways.

[1] Law Commission Published Working Paper No. 14. Scottish Law Commission Memorandum No. 6. We use the expression " Joint Working Paper " for brevity of reference.

II THE SCOPE AND NATURE OF THE PROBLEM

4. The interpretation of statutes is already a major part of the judicial function. We must expect that its importance will increase,[2] and new problems of interpretation will present themselves, as a greater proportion of our law is given statutory expression and, in particular, embodied in codes.[3] However, we do not regard the interpretation of statutes as a matter which need only be considered by reference to the decisions of the courts. A statute is not exclusively a communication between the legislator and the courts. A statute is directed, according to its subject matter, to audiences of varying extent. As it is part of our duty[4] to review the law with a view to its simplification our proposals must aim at ensuring that any statute can be understood, as readily as its subject matter allows, by all affected by it. In pursuing this aim we recognise of course that to understand the complex legislation of the modern state the ordinary citizen may require expert legal or other professional advice, and indeed that problems will arise from time to time which will require reference to the courts; but in our view satisfactory rules for the interpretation of statutes can help to keep such recourse to professional advisers or to the courts within acceptable limits. The intelligibility of statutes from the point of view of ordinary citizens or their advisers cannot in fact be dissociated from the rules of interpretation followed by the courts, for the ability to understand a statute depends in the ultimate analysis on intelligent anticipation of the way in which it would be interpreted by the courts. In view of some comments made on our Joint Working Paper it seems desirable to emphasise in this way that, although we are mainly concerned with rules of interpretation followed by the courts, we have constantly in mind the importance of these rules being workable rules of communication between the legislator and the legislative audience as a whole.[5]

5. Another widely made comment on our Joint Working Paper was that any problems which may arise in the interpretation of statutes are attributable in

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[2] The selection of cases which are reported affords some evidence of the importance of statutory interpretation and of the extent to which it has increased this century. It is only an approximate guide, as editorial policies on reporting are not necessarily constant and it is not always easy to say whether a case should be regarded as one involving statutory interpretation for this purpose. However, an analysis of the cases, emanating from England and Wales, reported in the Queen's Bench, Chancery and Probate volumes for 1965, when the present enquiry was initiated, appeared to show that 56 per cent involved some point of statutory interpretation. In 1905 the comparable percentage was 42 per cent. 75 per cent of the cases on appeal to the House of Lords from England and Wales reported in the 1965 Appeal Cases volume of the Law Reports involved some point of statutory interpretation, whereas the comparable figure for 1905 was 57 per cent.

[3] See, for example, Items I (Contract), VIII (Landlord and Tenant) of the First Programme and Items XVIII (Criminal Law) and XIX (Family Law) of the Second Programme of the Law Commission and Paragraphs 8 (Evidence) and 10 (Obligations) of the First Programme of the Scottish Law Commission.

[4] See section 3(1) of the Law Commissions Act 1965: " It shall be the duty of each of the Commissions to take and keep under review all the law with which they are respectively concerned with a view to . . . the simplification . . . of the law."

[5] This consideration is particularly important in any assessment of the value of aids to interpretation extraneous to the statute itself—e.g., reference to Parliamentary proceedings. See paragraphs 53–62 below.

great measure to defects in their drafting rather than to any inherent defects in our rules of interpretation. We fully appreciate the relevance of statutory drafting, and, we would add, of the form and arrangement of the Statute Book, to the interpretation of statutes. We have ourselves in our respective Annual Reports[6] drawn attention to these matters and to the work in that connection which is being done by the Commissions and by the Statute Law Committee. It would, however, in our view be an over-simplification to look solely to improvements in this field without regard to the rules of interpretation which have been developed by the courts. It would be more accurate to say that there is an interaction between the form of a communication and the rules by which it is to be interpreted. If defects in drafting complicate the rules of interpretation, it is also true that unsatisfactory rules of interpretation may lead the draftsman to an over-refinement in drafting at the cost of the general intelligibility of the law. Moreover, there are practical limits to the improvements which can be effected in drafting. Account must be taken of the inherent frailty of language, the difficulty of foreseeing and providing for all contingencies, the imperfections which must result in some degree from the pressures under which modern legislation has so often to be produced and the difficulties of expressing the finely balanced compromises of competing interests which the draftsman is sometimes called upon to formulate. Difficulties may also arise when words are inserted into a Bill in the course of its discussion in Parliament without sufficient regard to its overall structure, as originally planned. An important test of the adequacy of interpretative rules is their ability to cope with legislation subject to these factors.

6. The principles of statutory interpretation as a subject for consideration by a law-reforming body present special difficulties. It is manifest at the outset that it is not a topic where there are any clear-cut defects for which, once diagnosed, legislative intervention can promise a dramatic cure. Sir Carleton Allen, after a very full discussion of the problems of statutory interpretation, wrote that although—

> " it cannot be pretended that the principles of statutory interpretation form the most stable, consistent, or logically satisfying part of our jurisprudence . . . we are driven, in the end, to the unsatisfying conclusion that the whole matter ultimately turns on impalpable and indefinable elements of judicial spirit or attitude."[7]

Justice Frankfurter said:

> " Though my business throughout most of my professional life has been with statutes, I come to you empty-handed. I bring no answers. I suspect the answers to the problems of an art are in its exercise."[8]

And in a rather similar vein an English judge has said:

> " The duty of the Courts is to ascertain and give effect to the will of Parliament as expressed in its enactments. In the performance of this duty

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[6] See Law Commission, *Second Annual Report* 1966–1967, Law Com. No. 12, paragraphs 123–126, *Third Annual Report* 1967–1968, Law Com. No. 15, paragraphs 80–87; Scottish Law Commission, *Second Annual Report* 1966–1967, Scot. Law Com. No. 7, paragraphs 17 and 46, *Third Annual Report* 1967–1968, Scot. Law Com. No. 9, paragraphs 18 and 41.

[7] *Law in the Making*, 7th ed., 1964, at pp. 526 and 529.

[8] " Some Reflections on the Reading of Statutes," (1947) 2 *The Record of the Association of the Bar of the City of New York* 213 at pp. 216–7.

the Judges do not act as computers into which are fed the statutes and the rules for the construction of statutes and from whom issue forth the mathematically correct answer. The interpretation of statutes is a craft as much as a science and the judges, as craftsmen, select and apply the appropriate rules as the tools of their trade. They are not legislators, but finishers, refiners and polishers of legislation which comes to them in a state requiring varying degrees of further processing."[9]

7. These considerations lead not infrequently to the suggestion that what is important is not what the courts say about statutory interpretation, but what they in fact decide in regard to the statutes which come before them.[10] The courts, it may with reason be argued, do in fact decide the great majority of cases on statutory interpretation without especial difficulty, and their decisions rarely give rise to the criticism that they have failed to understand and give effect to the intention of Parliament. On this basis it may further be said that it is a sterile exercise to examine such rules as may be enunciated by the courts in the course of their interpretative function. We cannot share this point of view.

8. First, we do not think that an unsatisfactory body of interpretative principles is without effect in the marginal case on the actual decision reached. For example, we refer later in this Report[11] to the criticism of the rules of interpretation that they have tended excessively to emphasise the literal meaning of statutory provisions without giving due weight to their meaning in wider contexts. Although we also point out[12] that " literalism " has in a number of recent cases been in effect repudiated, there is even today some residue of authority for the so-called literal rule, especially in view of the force of precedents in our system. The result may sometimes be that a court, faced with a difficult problem of interpretation, is too readily attracted to the apparently simple course of relying on what is said to be the plain and ordinary meaning of particular words without giving sufficient weight to other considerations which might suggest a different meaning. An excessive emphasis on the words of a provision divorced from their context may be especially inappropriate where it is unlikely that the legislator had in contemplation the particular facts which subsequently arise before a court and where the question is whether the words of the provision ought to be applied to cover the facts. Thus, where the question arose whether a new furnace chamber and chimney tower of a crematorium ranked for an annual capital allowance, as being expenditure on " buildings and structures " in use " for the purpose of a trade which consists in the manufacture of goods or materials or the subjection of goods or materials to any process," the allowance was refused because it would be " a distortion of the English language to describe the living or the dead as goods or materials."[13] But, if it is recognised that probably neither Parliament nor the draftsman ever thought specifically of the process of cremation in connection with capital allowances, the question

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[9] *Per* Donaldson J. in *Corocraft Ltd.* v. *Pan American Airways Inc.* [1968] 3 W.L.R. 714 at p. 732; the actual decision was reversed on appeal, [1968] 3 W.L.R. 1273 (C.A.).

[10] See e.g., Willis, " Statute Interpretation in a Nutshell," (1938) 16 *Can. Bar Rev.* 1.

[11] See paragraphs 14 and 30 below.

[12] See paragraphs 11, 12 and 31 below.

[13] See *Bourne* v. *Norwich Crematorium Ltd.* [1967] 1 W.L.R. 691 at p. 695. The enactment in question was the Income Tax Act 1952, ss. 266 and 271.

was whether the words used were capable of covering that process, having regard to the context, namely the purpose of capital allowances; from this point of view, it is questionable whether it was necessary to exclude the admitted " trade " of cremation, which, in the words of the Court enabled " the obsequies of the human being to be carried out with that reverence and decorum demanded by a civilized society,"[14] while at the same time recognising for such allowances other trades with far less obvious claims on society.

9. Secondly, and we consider more important, there is the impact, irrespective of the actual decisions reached, of an unsatisfactory body of interpretative rules on the process of litigation and on the general public. In our adversary system of litigation it is likely to confuse and prolong the trial of the real issues underlying the interpretation of legislative provisions, if so-called rules of interpretation permit the debate at least to appear to be conducted on a plane of " sterile verbalism."[15] Moreover, as we have emphasised in paragraph 4 above, the rules of statutory interpretation, or the seeming absence of any coherent system of such rules, are a matter of serious concern to the various categories of legislative audience to which a statute may be directed. Apart from the more obvious categories of specialist advisers such as lawyers and accountants, many sections of the public such as employees, traders, officials, social workers, motorists and taxpayers, require in the conditions of modern society at least a working knowledge of the main principles of statutory law affecting them, and in some cases a detailed knowledge of particular provisions. It is true that such persons may have access to a wide range of explanatory material and be able to take expert advice, but the value of such comment or advice will in large measure depend on the degree of assurance with which it can be expressed; this in turn depends on the extent to which the interpretative process of the courts can be predicted.

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[14] *idem* at p. 695.

[15] Words applied in Hart and Sacks, *The Legal Process*: *Basic Problems in the Making and Application of Law*, Cambridge, Mass., Tentative ed., 1958, at p. 1265, to the refusal of the House of Lords in *Assam Railways and Trading Company Ltd.* v. *Commissioners of Inland Revenue* [1935] A.C. 445 to permit counsel to refer to a recommendation in the Report of the Royal Commission on Income Tax (1920) Cmd. 615 to elucidate a provision in the Finance Act 1920 as amended by the Finance Act 1927. In a later case before the House of Lords (*London and North-Eastern Railway Company* v. *Berriman* [1946] A.C. 278), although the clash between the rival policies of construing a penal measure restrictively and a remedial social measure liberally clearly emerged in the respective speeches of Lord Macmillan (at p. 295) and of Lord Wright (at p. 301), they reached opposite conclusions on the basis of what was the " fair and ordinary " (Lord Macmillan) and the " natural and ordinary " (Lord Wright) meaning of " repairing " in Rule 9 of the Prevention of Accidents Rules 1902, and counsel thought it necessary to refer to the Oxford English Dictionary, a will of 1577, Milton's " Paradise Lost " and Dr. Johnson, to throw light on the meaning of " repairing ". In *Price* v. *Claudgen Ltd.* 1967 S.C. (H.L.) 18; [1967] 1 W.L.R. 575 the House of Lords (affirming the First Division of the Court of Session, 1966 S.L.T. 64) had to decide whether a workman joining broken wires of a neon lighting installation on the face of a building held in place by clamps attached to pins driven into the building was engaged on " repair or maintenance of a building " within the meaning of Reg. 2(1) of the Building (Safety, Health and Welfare) Regulations 1948; if he was, the absence of adequate guards to his working platform or place required by Reg. 24(1) would have involved his employers in liability for his fall. Although the House of Lords conceded that what was or was not " part of a building " might be governed by different considerations in other parts of the law, as, for example, as between lessor or lessee in regard to " fixtures ", it is noteworthy that, whatever the underlying rationale of the case, its unfavourable conclusion for the appellant was expressed simply in the statement (at p. 579) that he was not repairing a building but only something on a building. See also *Lawson* v. *J. S. Harvey & Co. Ltd.* 1968 S.L.T. (Sh. Ct.) 24 where the Sheriff Court, " albeit with some hesitation and misgiving " held, in following *Price* v. *Claudgen*, that a disused lamp bracket was not part of a building.

10. In contrast to the views summarised in paragraph 7, it is sometimes admitted there are genuine problems arising in connection with the principles of statutory interpretation, but argued that their solution does not require legislative intervention. In support of this view it is said that recent judicial pronouncements indicate that any difficulties which may have existed in the past are in the process of being resolved by the courts themselves. We recognise the considerable force in this contention. For example, whatever may have been the position at some periods of our legal history, we do not think that one general criticism of the judicial attitude to statutes, which is sometimes made, gives a wholly fair impression of the present theory and practice of the British courts. The criticism is that the judicial approach to statutes is moulded by constitutional considerations which are outdated but which still result in an excessive predilection for common law doctrines.[16] As Lord Wright has said: " the principle that an Act of Parliament should be construed so as not to change the Common Law more than seemed to be unavoidable " is now discredited.[17]

11. Apart from their general attitude to statutes, there have been important developments by the courts of the more detailed principles of interpretation. That the so-called " literal rule "[18] does not today confine the judge to a sterile grammatical analysis of the actual words which he is called upon to interpret has been emphasised by Lord Somervell in *Attorney-General* v. *Prince Ernest Augustus of Hanover*[19] where he said:

> " Is it unreal to proceed as if the court looked first at the provision in dispute without knowing whether it was contained in a Finance Act or a Public Health Act. The title and general scope of the Act constitute the background of the context. When a court comes to the Act itself, bearing in mind any relevant extraneous matters, there is, in my opinion, one compelling rule. The whole or any part of the Act may be referred to and relied on. It is, I hope, not disrespectful to regret that the subject was not left where Sir John Nicholl left it in 1826. ' The key to the opening of every law is the reason and spirit of the law—it is the " animus imponentis", the intention of the law-maker, expressed in the law itself taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the

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[16] " Abandoning the mediaeval idea that there was a fundamental and immutable law, the common law recognised the legislative supremacy of Parliament. But to the words of the Parliament whose literal authority it thus recognised it accorded none of that aura of respect and generosity of interpretation with which it surrounded its own doctrines. The courts never entered into the spirit of the Benthamite game, but treated the statute throughout as an interloper upon the rounded majesty of the common law. The tendency still persists; the courts show a ripe appreciation of institutions of long standing, whether founded by statute or in the common law, but they inhibit themselves from seizing the spirit of institutions and situations which are in substance the creation of modern legislation. By repercussion draftsmen tend to concern themselves with minutiae, so that their intention may be manifest in every particular instance to upset the hydra-headed presumptions of the courts in favour of the common law." (E. C. S. Wade in Dicey, *Law of the Constitution*, 10th ed., 1959, Introduction, pp. c–ci, n.1, citing R. T. E. Latham in " The Law and the Commonwealth " in Survey of *British Commonwealth Affairs*, vol. I, 1937, pp. 510–11).

[17] (1945–7) 9 C.L.J. 2 at p. 3. That there is still a residue of force in the principle is however suggested by *Allen* v. *Thorn Electrical Industries Ltd.* [1968] 1 Q.B. 487 (C.A.) cited in n. 88 below. See Drake, (1967) 30 M.L.R. 694.

[18] See paragraph 28 below.

[19] [1957] A.C. 436 at p. 473.

statute: it is to be viewed in connexion with its whole context—meaning by this as well the title and preamble as the purview or enacting part of the statute ' (Sir John Nicholl in *Brett* v. *Brett*)[20]."

In the same case[21] Viscount Simonds said:

"... words, and particularly general words, cannot be read in isolation: their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use ' context ' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in *pari materia*, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."

And in a later passage[22] Viscount Simonds referred to—

"... the elementary rule ... that no one should profess to understand any part of a statute or of any other document before he had read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear or unambiguous."

Similarly in *R.* v. *Ottewell*[23] Lord Reid has emphasised that the principle that in doubtful cases a penal provision should be interpreted in favour of the accused does not come into play except—

" where after full enquiry and consideration one is left in real doubt. It is not enough that the provision is ambiguous in the sense that it is capable of having two meanings. The imprecision of the English language (and, so far as I am aware, of any other language) is such that it is extremely difficult to draft any provision which is not ambiguous in that sense ... the Court of Appeal (Criminal Division) attach one meaning to it, and your Lordships are attaching a different meaning to it. But if, after full consideration, your Lordships are satisfied, as I am, that the latter is the meaning which Parliament must have intended the words to convey, then this principle does not prevent us from giving effect to our conclusions."

12. There have also been notable clarifications of the principles of interpretation where the British courts have had to interpret domestic legislation against the background of international treaties. In *Salomon* v. *Commissioners of Customs and Excise*[24] the Court of Appeal has recently made clear that where there is cogent extrinsic evidence of a connection between an international treaty and an Act under interpretation, a court may look at the convention in elucidating the Act, although the Act nowhere makes mention of the treaty. And in *Post Office* v. *Estuary Radio Ltd.*[25] the Court of Appeal held that, where

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[20] (1826) 3 Add. 210 at p. 216.

[21] See n. 19 above [1957] A.C. 436 at p. 461.

[22] At p. 463.

[23] [1968] 3 W.L.R. 621 at p. 627.

[24] [1967] 2 Q.B. 116. The Act in question was the Customs and Excise Act 1952, s.258(1), and Schedule 6, paras. 1(1) and 2. See also *Samuel Montagu and Co. Ltd.* v. *Swiss Air Transport Co. Ltd.* [1966] 2 Q.B. 306 where the treaty was made part of the Act (Carriage by Air Act 1932) and the Court emphasised that a strict interpretation should not be given in view of its effect on the conduct of business and the importance of avoiding conflict between decisions of British courts and foreign courts interpreting the treaty.

[25] [1968] 2 Q.B. 740.

the meaning of the domestic legislation (in the case the Territorial Waters Order in Council 1964) is not clear, it should be construed in the light of the treaty to which it is giving effect, having regard to the presumption that the national authority (here the Crown) intends to carry out its international obligations.

13. In our view, however, the criticism of the interpretation of statutes by the British courts cannot, even so far as modern times are concerned, be altogether dismissed. Justice Frankfurter, in spite of his recognition of the intractable elements in the interpretation of statutes,[26] has written:

> " These current English rules of construction are simple. They are too simple. If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded. The rigidity of English courts in interpreting language merely by reading it disregards the fact that enactments are, as it were, organisms which exist in their environment. One wonders whether English judges are confined psychologically as they purport to be legally. The judges deem themselves limited to reading the words of a statute. But can they really escape placing the words in the context of their minds, which after all are not automata applying legal logic but repositories of all sorts of assumptions and impressions? "[27]

Sir Carleton Allen,[28] although emphasising the importance of an intangible judicial factor, has also said:

> " Whether or not . . . our whole doctrine of statutory interpretation rests upon false foundations, it is certain that this branch of our law exhibits inconsistencies which suggest radical weakness somewhere."[29]

And Lord Evershed M.R. has spoken of the—

> " . . . heritage of a multiplicity of so-called ' rules ' " and of an accretion of case law in which " some judicial utterance can be cited in support of almost any proposition relevant to the problems of statutory interpretation."[30]

14. Even if it is conceded that words in question in a statute must be read in the wider context of the statute as a whole, there is at present the authority of the House of Lords in *Ellerman Lines* v. *Murray*[31] that, where an international convention is referred to in the long and short titles of an Act, which also contains a preamble stating that the purpose of the Act is to give effect to the convention and sets out the relevant part of the convention in a schedule, it is nevertheless not proper to resort to the convention in order to give a section other than its " natural meaning".[32] This is difficult to reconcile with the above-cited passages from the *Prince Ernest of Hanover* case which was decided when the House of Lords was bound by its previous decisions. It is possible that the

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[26] See paragraph 6 above.

[27] " Some Reflections on the Reading of Statutes," (1947) 2 *The Record of the Association of the Bar of the City of New York* 213 at pp. 231–2.

[28] See paragraph 6 above.

[29] *Law in the Making*, 7th ed., 1964, at p. 518.

[30] " The Impact of Statute on the Law of England", Maccabean Lecture in Jurisprudence, (1956) XLII *Proceedings of the British Academy* 247 at pp. 260 and 258.

[31] [1931] A.C. 126.

[32] See Lord Tomlin at p. 147.

House of Lords with its present powers may have the opportunity of clarifying the law in this field. Meanwhile, however, it may be that, even in a case with an international content such as *Salomon* v. *Commissioners of Customs and Excise*,[33] it is only where the words of the provision to be interpreted are " reasonably capable of more than one meaning "[34] that the treaty becomes relevant. This does not seem to deal with the situation where the words of a provision, in the context of the national instrument alone, appear reasonably to have only one meaning, although in the wider context of a treaty they might offer a choice of meanings.[35]

15. The difficulties which still exist in the sphere of statutory interpretation are perhaps more strikingly illustrated where the courts have not the assistance afforded by a treaty to which the legislation before them appears to give effect. There are a few uncertainties about the parts of a statute to which it is permissible to refer in reaching an interpretation of a particular provision.[36] But even if a court is prepared to admit that there is a choice between the meaning of the provision in the context of ordinary usage and its meaning in the context of the statute as a whole or in the context of certain material outside the statute (and the permissible extent of the latter raises a number of difficulties[37]), there remains some uncertainty as to the principles on which that choice should be exercised, and little assistance is given to the courts in making it. The courts have tried to clarify the position by developing certain presumptions, which are in effect advance notice to the legislature that, if faced with particular types of legislation, they will, if the language in its context affords them a choice of interpretations, choose that interpretation which most closely accords with the relevant presumption. But as we explain later,[38] it is often difficult to determine the precise scope of a presumption[39] or the extent to which it prevails over, or must be subordinated to, another conflicting presumption.[40] For example, the

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[33] See n. 24 above.

[34] *ibid* at p. 143, *per* Diplock L.J. Lord Denning, M.R., however, said (at p. 141): " I am confirmed in this view [i.e., that a meaning should be given to the Act in conformity with the meaning of the relevant provision of the treaty] by looking at the international convention which preceded the Act. . . . I think we are entitled to look at it, because it is an instrument which is binding in international law; and we ought always to interpret our statutes so as to be in conformity with international law." Russell L.J. (at p. 152) appeared doubtful whether any observations on the right of the Court to look at the treaty could be more than *obiter dicta* in view of the fact that relevant parts of the Act in question were a mere re-enactment of the earlier provisions which had a cross heading stating that they were to give effect to an agreement. See also *Warwick Film Productions* v. *Eisinger and Others* [1967] 3 W.L.R. 1599 at pp. 1611–12, where Plowman J. refused to look at Article 15(2) of the Brussels Convention 1948 because the sub-section of the Act in question (Copyright Act 1956, s.20(4)) was unambiguous.

[35] It is uncertain how much further light is thrown on this question by *Post Office* v. *Estuary Radio Co. Ltd.* [1968] 2 Q.B. 740, as, although Diplock L.J. said (at p. 755) that it was convenient to look first at the Convention, among the reasons he gave for so doing was the fact that the Order in Council was not readily intelligible without knowledge of the Convention, and the particular circumstance that what was in question was an instrument promulgated under the prerogative powers of the Crown which was also the treaty-making power.

[36] See paragraphs 41–45 below.

[37] See paragraphs 46–52 below.

[38] See paragraphs 34–39 below.

[39] See, for example, the statement of Winn L.J. in *Allen* v. *Thorn Electrical Industries Ltd.* (n. 17 above) cited in n. 88 below.

[40] See e.g. *London and North-Eastern Railway Company* v. *Berriman* (n. 15 above) where the majority gave precedence to the presumption that penal provisions in Railway Regulations should be construed in favour of the defendant while Lord Wright in the minority thought that in such legislation the balance of interpretation should favour the workers and their dependants intended to be protected by the regulations.

presumption that penal provisions will, in cases of ambiguity, be construed in favour of the subject has not in practice enabled him to anticipate with any degree of precision the mental element which the courts will require in any criminal legislation by which he is bound.[41] Similarly, the courts have been unable to give any very precise indications of the principles on which they will decide whether a breach of a particular statutory duty gives rise to a civil claim.[42]

16. Finally, it should be emphasised that the problems of interpretation are not to be solved simply by relaxing the restrictions on the range of material to which the courts may have recourse in construing a legislative provision or by the clarification of presumptions. One of the difficulties which sometimes faces the courts in interpreting statutes is the lack of any material about the underlying policy of the statute in question. When the meaning of a provision may vary according to the view taken of the general purpose of the legislation, such a lack of information may put a court in an invidious position; it may have to make a choice between rival social assumptions, argued before it, with little fuller guidance than can be derived from those matters of which it can take judicial notice and such indications, which may be indecisive, as can be gathered from the language of the statute. In the result the interpretation of a provision may seem to depend on the choice and pattern of the language of the Act, when these may in fact have been chosen in the light of instructions to the draftsman which did not, and perhaps could not, anticipate the point being argued. In reality the court may have had to reach its decision as best it can, even if it is expressed in terms of an analysis of the language used. Thus the question arises whether the courts and the public should, where appropriate and practicable, be provided with some further authoritative aid to the construction of statutes.[43]

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[41] See e.g. *Warner* v. *Metropolitan Police Commissioner* [1968] 2 W.L.R. 1303 where the legislation concerned the prevention of the misuse of drugs.

[42] *Salmond on Torts*, 14th ed., 1965, p. 355 under the heading " Need for reform " speaks of the difficulty of laying down any definite principle.

[43] See paragraphs 63–73 below.

III THE RELEVANCE OF COMPARATIVE MATERIAL

17. In considering the problems of interpreting statutes in our own countries we have attached importance to comparative studies, for the difficulties resulting from the immense scope and complexity of modern legislation have had to be faced in some degree in every advanced community. We think that much can be learned from the experience and theoretical analysis of these problems in the Commonwealth and the United States and in the Civil Law countries. In their literature the topic is commonly considered from four aspects:[44]

(*a*) textual interpretation—i.e., interpretation in the light of the ordinary meaning of words and the rules of grammar;

(*b*) interpretation in the light of the context—i.e., in the light of factors going beyond the dictionary and the rules of grammar, with particular reference to the extent to which such factors ought to be taken into account, having regard to the intention of the legislator and the reasonable expectations of the persons to whom the legislation is directed;

(*c*) teleological interpretation—i.e., interpretation laying special weight on the aim or purpose of the legislation in question;

(*d*) historical interpretation—i.e., interpretation emphasising the process by which the enactment became law, including its origin in a committee report or other sources, its formulation as a legislative proposal and its passage through the legislature.

In contrast there is a remarkable dearth in our legal literature of writing on the general theory of statutory interpretation, and, to the limited extent that our courts have dealt with the matter systematically, it would seem that attention has been mainly directed to the first and, to a rather lesser extent, to the second of these four aspects, and that, at all events until recently, the latter two have been neglected or given insufficient attention.

18. In the United States the topic has been recognised as a vital one, both because of the range and importance of the questions which have turned upon the interpretation of the Constitution, and because of the immense importance of the social and economic legislation which has been enacted in a fast developing and complex society. In the Civil Law countries, with written constitutions and a largely codified law, both the courts and the body of jurists, whose writings form an important source of authority, have tested and developed theories of interpretation; they seek to clarify the function of the judiciary in applying the codes and in extending or restricting the scope of their language; they discuss the bounds of a judge's authority to correct manifest errors, and generally try to reconcile the roles of the judiciary and the legislature. The constitutional stimulus, and a somewhat greater degree of codification than at present exists

[44] These represent variations of emphasis rather than fundamental differences of approach. Thus all four are in one sense concerned with the context but (*a*) conceives of the context as much more limited than (*b*), (*c*) or (*d*); and (*b*) seeks to develop a general theory relating to contextual considerations, while (*c*) and (*d*) emphasise particular contextual considerations.

in the United Kingdom, have also provoked interest in the problems of statutory interpretation in some Commonwealth countries, as, for example, in Canada, Australia and New Zealand. If, as we envisage, our own law becomes increasingly codified, our courts will have to give greater attention to many of the problems which the courts of other countries have had to face, and it may well be that different techniques of interpretation will have to be developed.

19. It is of course true that any comparison with another legal system must take due account of a variety of extraneous factors which may underlie differences in the theory and practice of statutory interpretation. First, the freedom to adopt a very broad and liberal interpretation of statutes which is assigned to, or taken by, the courts in one country may not be acceptable to the legislative body in another. Secondly, the courts in Civil Law systems have not, generally speaking, been faced with the problem of reconciling statute law with an extensive body of common law. They conceive their role rather as one of finding a solution to a particular problem of interpretation in accord with the general principles of the relevant code. This approach influences the courts even when they are dealing with an individual statute; there is a similar tendency to assume that there is an underlying legislative policy in the light of which difficult provisions of the statute can be interpreted. It is true that our courts may take into account the scheme of a statute as a whole and other statutes dealing with similar subject matter, but there is a significant difference in degree between this process and the practice of courts in Civil Law countries. Thirdly, in those countries which require the courts to review the constitutionality of legislation, there is an important residual effect on the approach to interpretation even in cases not involving a constitutional issue. A court which in a certain sense is a partner of the legislature is likely to lay more emphasis on the policy behind statutes than a court which in theory at least asserts no comparable power of judicial review. Fourthly, differences in the process by which legislation is enacted may account for a greater or lesser readiness on the part of the courts of different countries to examine the historical origins of a statute, including the relevant parliamentary proceedings and earlier committee reports. Thus, the courts in one country may in the interpretation of statutes be able to make use of committee reports of the legislature in the course of the passing of the legislation in question, because they are prepared in a way which generally gives a reliable impression of its background, general purpose and specific intentions; in another country, on the other hand, committee reports of the legislature may be much less informative from the point of view of the courts concerned with the legislation which eventually emerges.

20. We refer in a number of places in this Report to the law and practice in other countries. We think that these comparative references may be helpful, always bearing in mind, however, the considerations discussed in the preceding paragraph. We also supply in Appendix C a select bibliography of material in English published in the Commonwealth and the United States. On practical grounds we have not attempted to give a bibliography of the material published on the Continent on this subject but we include in Appendix C certain material by Scandinavian lawyers which is available in English.

IV THE FUNCTION OF " RULES " AND " PRESUMPTIONS " IN INTERPRETATION

21. For the purposes of exposition and criticism we deal with the different elements in the process of interpretation as if they involved the successive application by a court of a series of tests with the purpose of arriving finally at a meaning of a provision in relation to the facts before it. We adopt this course purely as a matter of convenience, particularly in order to explain the historical development of the so-called " rules " of interpretation. We do not suggest that analysis of a judgment of a court today would necessarily reveal a separate consideration of all those elements or a treatment of them in the order of this Report.

(1) The Mischief Rule, the Golden Rule and the Literal Rule

(i) *Historical Development*

22. The basic principles of statutory interpretation are not to be found in any statute. They have developed from the decisions of the courts. The principles which have thus evolved are sometimes called " rules", but it would be more accurate to describe them as different approaches to interpretation, on which at different periods of our legal history greater or lesser emphasis has been placed.

23. The classic statement of the mischief rule is that given by the Barons of the Court of Exchequer in *Heydon's Case*:[45]

> " And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the Common Law), four things are to be discerned and considered:
>
> 1st. What was the Common Law before the making of the Act,
>
> 2nd. What was the mischief and defect for which the Common Law did not provide,
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth,
>
> And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and *pro privato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, *pro bono publico*."

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[45] (1584) 3 Co. Rep. 7a.

And Coke himself later referred to the same approach in his Institutes:[46]

> " Equity is a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischief, or cause of the making of the same, shall be within the same remedy that the statute provideth; and the reason hereof is, for that the law-makers could not possibly set down all cases in express terms."

24. A parallel approach to statutes is to be found in Scottish decisions. Thus in *Campbell* v. *Grierson*[47] the Lord Justice Clerk in dealing with an old Act of 1669 referred to the ascertainment of " the real object of the enactment " as one of the rules to be applied. And in *Magistrates and Town Council of Glasgow* v. *Commissioners of Police of Hillhead*[48] it was said that " it is a settled principle that the court should so construe an Act of Parliament as to apply the statutory remedy to the evil or mischief which it is the intention of the statute to meet."

25. In the nineteenth century, although *Heydon's Case* continued to be cited, the English courts began to describe their powers in increasingly guarded terms. Thus Lord Tenterden C.J. in *Brandling* v. *Barrington*[49] could not—

> " forbear observing that . . . there is always danger in giving effect to what is called the equity of a statute, and that it is much better and safer to rely on and abide by the plain words, although the Legislature might possibly have provided for other cases had their attention been directed to them."[50]

26. The judges were, however, prepared to some extent to consider Coke's " cases out of the letter of a statute " under the so-called golden rule. This rule was attributed to Lord Wensleydale by Lord Blackburn in *River Wear Commissioners* v. *Adamson* in which he said:

> " I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, viz., that we are to take the whole statute together, and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear."[51]

Although Lord Blackburn speaks of resulting " absurdity or inconvenience " as a possibility separate from " inconsistency", which suggests that a court might refuse to adopt the plain meaning of words if it thought that the plain meaning was absurd or inconvenient, nevertheless it is clear from the concluding words of his statement above that he only envisages the operation of the golden rule where the words in question have an ordinary signification and a " less

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[46] I Inst. 24(*b*).
[47] (1848) 10 D. 361.
[48] (1885) 12 R. 864.
[49] (1827) 6 B. & C. 467.
[50] At p. 475.
[51] (1877) 2 App. Cas. 743 at pp. 764–5.

proper " but permissible one. A comparable attitude was apparently taken independently by the Court of Session in Scotland.[52]

27. A somewhat bolder statement is that of Mackinnon L.J. in *Sutherland Publishing Co. Ltd.* v. *Caxton Publishing Co. Ltd.*:[53]

> " It may [where the purpose of an enactment is clear] even be necessary, and therefore legitimate, to substitute for an inept word or words that which such intention [i.e., of the legislature] requires. The most striking example of this I think is one passage in the Carriage of Goods by Sea Act 1924, where to prevent a result so nonsensical that the Legislature cannot have intended it, it has been held[54] necessary and legitimate to substitute the word ' and ' for the word ' or '. The violence of this operation has, I think, been minimized by saying that in this place the word ' or ' must be taken to mean ' and '. That is a cowardly evasion. In truth one word is substituted for another. For ' or ' can never mean ' and ".'[55]

28. There was, however, a strong current of judicial opinion in favour of an approach rather stricter than that of the golden rule; this is commonly given the label of the literal rule. Lord Bramwell in *Hill* v. *East and West India Dock Co.*,[56] rejecting the notion that the court can legitimately be concerned with the question whether a particular construction leads to absurdity, said:

> " I should like to have a good definition of what is such an absurdity that you are to disregard the plain words of an Act of Parliament. It is to be remembered that what seems absurd to one man does not seem absurd to another. . . . I think it is infinitely better, although an absurdity or an injustice or other objectionable result may be evolved as the consequence of your construction, to adhere to the words of an Act of Parliament and leave the legislature to set it right than to alter those words according to one's notion of an absurdity."[57]

Lord Esher M.R. in *R.* v. *The Judge of the City of London Court*[58] is equally forthright:

> " If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the Legislature has committed an absurdity."[59]

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[52] See *Caledonian Railway Co.* v. *North British Railway Co.* (1881) 8 R. (H.L.) 23 at p. 31; (1881) 6 App. Cas. 114 at p. 132.

[53] [1938] Ch. 174. In *Swan* v. *Pure Ice Company Limited* [1935] 2 K.B. 265 (C.A.) at p. 276 Romer L.J. had cited with approval the statement in Maxwell on *Interpretation of Statutes*, 7th ed., p. 217: " . . . the judicial interpreter may deal with careless and inaccurate words and phrases in the same spirit as a critic deals with an obscure or corrupt text, when satisfied, on solid grounds, from the context or history of the enactment, or from injustice, inconvenience or absurdity of the consequences to which it would lead, that the language thus treated does not really express the intention and that his amendment probably does." See also *R.* v. *Oakes* (paragraph 32 below).

[54] Apparently a reference to *Brown & Co.* v. *T. & J. Harrison* (1927) 96 L.J. K.B. 1025 (C.A.).

[55] See n. 53 above, at p. 201.

[56] (1884) 9 App. Cas. 448.

[57] At pp. 464–5.

[58] [1892] 1 Q.B. 273 (C.A.).

[59] At p. 290.

The following well-known passage from the speech of Lord Atkinson in *Vacher & Sons Ltd.* v. *London Society of Compositors*[60] is formally consistent with a restricted form of the golden rule, as it presupposes language which is completely unambiguous. In spirit, however, it challenges the rationale of any rule permitting the courts to correct an absurdity. Lord Atkinson said:

> " If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed, and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results. If the language of this sub-section be not controlled by some of the other provisions of the statute, it must, since its language is plain and unambiguous, be enforced, and your Lordships' House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievious."[61]

(ii) *Criticism of the Rules*

29. The three so-called rules which have been described above do not call for criticism if they are to be regarded simply as convenient headings by reference to which the different approaches of the courts to problems of interpretation may be described. They are less satisfactory, when they, or equivalent propositions in other language, are used to justify the meaning given to a provision. In our view, the ultimate function of a court in the interpretative process is not simply to decide whether it is bound to follow a literal interpretation on the one hand or to adopt on the other an interpretation reached in the light of the golden or mischief rules. It is rather to decide the meaning of the provision, taking into account, among other matters, the light which the actual language used, and the broader aspects of legislative policy arrived at by the golden and mischief rules, throw on that meaning.

30. To place undue emphasis on the literal meaning of the words of a provision is to assume an unattainable perfection in draftsmanship; it presupposes that the draftsmen can always choose words to describe the situations intended to be covered by the provision which will leave no room for a difference of opinion as to their meaning. Such an approach ignores the limitations of language, which is not infrequently demonstrated even at the level of the House of Lords when Law Lords differ as to the so-called " plain meaning " of words.[62] Furthermore, the literal approach affords no solution to cases where, for example, a statute prescribes certain consequences which are to attach to a house " unfit for habitation", and the question before the court is whether a particular house, with the window of one of its two bedrooms with a defective sash cord, is so unfit.[63] This is not a question which could ever be solved by looking at the words alone; in such a case[64] the legislator in effect leaves to the court a limited creative role (even if the court fulfils it in the language of interpretation) within

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[60] [1913] A.C. 107.

[61] At pp. 121–2.

[62] See e.g., *London and North-Eastern Railway Co.* v. *Berriman* (n. 15 above).

[63] A problem which faced the House of Lords in *Summers* v. *Salford Corporation* [1943] A.C. 283.

[64] Other examples are provided by the frequent cases in which the courts have had to decide whether an accident arose " out of and in the course of employment".

the limits set by the general policy of the statute to be discovered from the context of the statute as a whole and certain other contextual considerations outside the statute.[65]

31. However, although cases may arise from time to time which appear to adopt an excessively literal interpretation of a statutory provision,[66] we would not wish to place undue emphasis upon them.[67] The influence of the literal approach is less directly but perhaps more frequently seen where a court recognises that a provision may have more than one meaning if account is taken of contextual considerations going beyond the ordinarily accepted meaning of the words used; yet the court feels inhibited from examining these considerations where the actual words of the provision are " unambiguous ". We have already referred[68] in this connection to the difficulty created by the decision of the House of Lords in *Ellerman Lines* v. *Murray*[69] and to its apparent inconsistency with the emphasis put by Lord Somervell and Viscount Simonds in *Attorney-General* v. *Prince Ernest of Hanover*[70] on the importance of not assuming that the words of a provision are unambiguous until they have been read in their context. The courts of the United States have been faced with a similar difficulty and their decisions have undergone an instructive development. Thus in 1917 in *Caminetti* v. *United States*[71] Justice Day could say:

> " Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion."

But in 1940 in *United States* v. *American Trucking Associations*[72] Justice Reed

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[65] See paragraphs 40–52 below.

[66] An extreme example of the application of the literal rule is afforded by the decision in *Whiteley* v. *Chappell* (1868) L.R. 4 Q.B. 147 where personation of " any person entitled to vote " at an election (made an offence by the Poor Law Amendment Act 1851, s. 3) was held not to cover personation of a qualified voter who had died before the election. A modern case with a strong literal flavour is *Bourne* v. *Norwich Crematorium Ltd.* (see n. 13 above). The literal element in an interpretation does not always involve a preference for the meaning of words in the context of their everyday use. It may arise when a meaning elicited from a particular legal context is adopted and the meaning which the words might bear in a popular context is ignored. Thus in *Fisher* v. *Bell* [1961] 1 Q.B. 394, the Divisional Court, in dealing with a case of flick knives displayed in a shop window, restricted the statutory prohibition (in the Restriction of Offensive Weapons Act 1959, s.1(1)) on " offer for sale " of such knives to the technical legal meaning of " offer for sale " in the law of contract and held that there had been only an "invitation to treat". Lord Parker C.J. cited at p. 400 the statement of Viscount Simonds in *Magor and St. Mellons R.D.C.* v. *Newport Corporation* [1952] A.C. 189 at p. 191: " It appears to me to be a naked usurpation of the legislative function under the thin disguise of interpretation " [to " fill in the gaps " in legislation]. But this leaves open the question whether the legislature intended the words to be read in the context of contract law. The law was in fact changed by the Restriction of Offensive Weapons Act 1961. *Fisher* v. *Bell* was followed in *Partridge* v. *Crittenden* [1968] 1 W.L.R. 1204, although the relevant statute (Protection of Birds Act 1954, s.6(1) and Schedule 4) provided a choice to the prosecutor between selling, offering for sale and having in possession for sale, and he chose to rely on offering for sale.

[67] Cases which appear to adopt a somewhat literal approach to a statutory provision can be balanced by others in which judicial pronouncements emphasise that judges " are not the slaves of words but their masters " (*per* Lord Denning M.R. in *Allen* v. *Thorn Electrical Industries Ltd.* (n. 17 above at p. 865).

[68] See paragraph 14 above.

[69] See n. 31 above.

[70] See n. 19 above and paragraph 11.

[71] 242 U.S. 471 at p. 485.

[72] 310 U.S. 534 at pp. 543–4.

explained the " plain meaning " rule (the American equivalent of our literal rule) in more qualified terms:

> " There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning. When that meaning has led to absurd or futile results, however, this Court has looked beyond the words to the purpose of the act. Frequently, however, even when the plain meaning did not produce absurd results but merely an unreasonable one ' plainly at variance with the policy of the legislation as a whole ' this Court has followed that purpose rather than the literal words. When aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no ' rule of law ' which forbids its use, however clear the words may appear on ' superficial examination '."

32. When we turn from the literal rule to the golden rule, we find that this rule sets a purely negative standard by reference to absurdity, inconsistency or inconvenience, but provides no clear means to test the existence of these characteristics or to measure their quality or extent. When a court decides that a particular construction is absurd, it implies, although often tacitly, that the construction is absurd because it is irreconcilable with the general policy of the legislature. Thus in *R.* v. *Oakes*[73] (where the Court read " aids and abets *and* does any act preparatory to the commission of an offence " in s.7 of the Official Secrets Act 1920 as " aids and abets *or* does any act preparatory to the commission of an offence ") the underlying assumption was that the Act was framed to fit in with the general pattern of the criminal law. Similarly, in *Riddell* v. *Reid*[74] (where the majority of the House of Lords held that the words " outside the area of the building under construction " in the preamble to the Building Regulations 1926 made under s.79 of the Factory and Workshop Act 1901 could be read in effect as " outside the area used in the building operations ") the finding that a strict construction would be " narrow and unprofitable " (Lord Thankerton),[75] " illogical and inexplicable " (Lord Russell of Killowen)[76] and " paradoxical " and " generally inconvenient and unworkable " (Lord Wright)[77] can only be explained by reference to the purpose of the Building Regulations and their parent Act. In fact the golden rule on closer examination turns out to be a less explicit form of the mischief rule.

33. The mischief rule as expressed in *Heydon's Case*[78] describes in our view a somewhat more satisfactory approach to the interpretation of statutes. But, apart from the archaism of its language, it reflects a very different constitutional balance between the Executive, Parliament and the public than would now be acceptable. Hence, particularly under its fourth head, in its emphasis on the

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[73] [1959] 2 Q.B. 350 (C.C.A.).

[74] 1942 S.C. (H.L.) 51; *sub nom. Potts or Riddell* v. *Reid* [1943] A.C. 1.

[75] 1942 S.C. (H.L.) 51 at p. 58; [1943] A.C. 1 at p. 9.

[76] At pp. 64 and 16 respectively.

[77] At pp. 69 and 22 respectively.

[78] See n. 45 above. For reasons given in n. 177 below we think it clearer and more accurate to substitute " general legislative purpose " for " mischief " and use the former phrase in our legislative recommendation (paragraph 81(*b*)(1)) and in our Draft Clause (Appendix A, Clause 2 (*a*)) dealing with this topic.

suppression of the mischief and, in effect, adaptation of the remedy for that purpose, it does not make it clear to what extent the judge should consider the actual language in which the specific remedies contained in the statute are communicated to the public. *Heydon's Case* is also somewhat outdated in its approach, because it assumes that statute is subsidiary or supplemental to the common law, whereas in modern conditions many statutes mark a fresh point of departure rather than a mere addition to, and qualification of, common law principles. Furthermore, the mischief rule was enunciated before the rules excluding certain material, which might bear on the mischief and " true reason of the remedy", had been developed. If a court has inadequate means of discovering the policy behind a statute, a mere exhortation to consider that policy may not be very effective. It may be for these reasons that attempts in some Commonwealth countries to give statutory effect in modern language to the principles underlying *Heydon's Case* do not appear to have had any very marked effect in practice on the interpretation of statutes. Thus section 5(*j*) of the Acts Interpretation Act 1924 of New Zealand, which resembles provisions in a number of Commonwealth countries reads as follows:

> " Every Act, and every provision or enactment thereof, shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large, and liberal construction and interpretation as will best ensure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning, and spirit."[79]

The above provision in the Act of 1924 re-enacted a provision in the New Zealand Interpretation Act of 1888, and Mr. Denzil Ward, the New Zealand Law Draftsman, pointed out in 1963[80] that, although the provision had been in force for 75 years, the courts had paid little attention to it, being " so busy cultivating the trees that they lost sight of the pathway provided by Parliament in the Acts Interpretation Act." If this is true, one reason may be because exhortations to the courts to adopt " large and liberal " interpretations beg the question as to what is the real intention of the legislature, which may require in the circumstances either a broad or narrow construction of language. Another reason may be that although the New Zealand provision attempts to embody the mischief approach of *Heydon's Case* in more modern language, it makes no contribution to the problem of how the mischief and the remedy envisaged by the legislature are to be ascertained.[81]

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[79] Sections 10 and 11 of the Interpretation Act 1967 of Canada, which, under an Interpretation Act of 1952 (s.15) had an identical provision to that of New Zealand, now provide that effect shall be given to the enactment and every part thereof " according to its true spirit, intent and meaning " (s.10) and that " every enactment shall be deemed remedial and shall be given such fair, large and liberal construction as best ensures the attainment of its objects " (s.11). This formulation appears to have the same limitations as its more elaborate counterpart in New Zealand.

[80] [1963] *New Zealand L.J.* 293 at p. 296.

[81] At least one Commonwealth country has however attempted to indicate in a statute the sources of information to which a court may turn in interpreting an enactment. Thus, s.19 of the Interpretation Act 1960 of Ghana reads as follows:—

" (1) For the purpose of ascertaining the mischief and defect which an enactment was made to cure, and as an aid to the construction of the enactment, a court may have regard to any text-book or other work of reference, to the report of any commission of enquiry into the state of the law, to any memorandum published by authority in reference to the enactment or to the Bill for the enactment and to any papers laid before the National Assembly in reference to it, but not to the debates in the Assembly.

(2) The aids to construction referred to in this section are in addition to any other accepted aid."

(2) Presumptions

34. Whatever interpretation might be thought to emerge from the application of the rules discussed above, the final decision of a court may in fact be greatly influenced by presumptions of intent.[82] Presumptions of intent[83] have been called " policies of clear statement",[84] i.e., in effect announcements by the courts to the legislature that certain meanings will not be assumed unless stated with special clarity. Legislation is made not only against the background of an existing body of law but also within the framework of a society with particular social and economic values which, it can legitimately be assumed in the absence of evidence to the contrary, the legislature intended to respect. " Over the years", it has been said, " the courts have laboured to discern and articulate a great number of principles of social relations. In an almost literal sense these represent a distillation of the experience and wisdom of the society."[85] A court may, for instance, cut down the generality of certain enactments both in order to harmonize them with the existing law and to give effect to prevailing values—e.g., in restricting the apparently unfettered generality of provisions which entitle the competent authority to grant planning permission or issue site-licences for caravans subject to conditions.[86] Particular presumptions of intention will however be modified or even abandoned with the passage of time, and with the modification of the social values which they embody.

35. A judge is not effectively bound by the presumptions of intent for the following reasons:

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[82] Thus, where a court is in doubt as to the meaning of a provision imposing criminal liability, there is a presumption that Parliament intended the meaning most favourable to the accused. The importance of this presumption is illustrated by the decision in *Wright* v. *Ford Motor Company Limited* [1967] 1 Q.B. 230. The question before the Court was whether in the circumstances of the case the occupier of a factory was subject to vicarious criminal liability by reason of the combined operation of ss.14(1) and 155(1) of the Factories Act 1961, or whether these circumstances fell within the exemption from liability given by s.155(2) of that Act. A decision against such liability in these circumstances had been made in *Carr* v. *The Decca Gramophone Company Limited* [1947] K.B. 728 under the Factories Act 1937. S.130(2) of the Act of 1937, which corresponded with s.155(2) of the Act of 1961, was however amended by s.10 of the Factories Act 1948 and these amendments had been preserved in the consolidating Act of 1961. The amendments provided that the defence given by what finally became s.155(2) of the 1961 Act should apply to an offence " by reason only of the contravention of the said provisions of Part X of this Act " and that the section " shall not be taken as affecting any liability of the occupier . . . in respect of the same matters by virtue of some provision other than the provisions . . . aforesaid." S.14(1) is not in Part X of the Act. The Court in *Wright's Case* referred (at p. 237) to the " undoubted " inference that the 1948 amendments were the result of *Carr's Case*, but nevertheless refused to impose liability on the occupier because this would have involved vicarious criminal liability which the Court regarded as a " novel " concept, and Parliament had failed to use sufficiently clear words to achieve that result.

[83] Presumptions of intent, as dealt with in this Report, should be distinguished from canons of construction. The latter are not in any real sense rules of law. They are " axioms of experience " (*per* Holmes J. in *Boston Sand and Gravel Co.* v. *U.S.* (1928) 278 U.S. 41 at p. 48), which may be applied by way of guidance in the elucidation of language. They are by no means confined to the legal sphere, but they are valuable tools in the work of interpreting statutes and other legal documents if properly used. They do not bind the interpreter; they only indicate to him what is linguistically possible in attributing a meaning to a particular word pattern. A typical example is the so-called *ejusdem generis* rule, under which it is possible to restrict the meaning of a general word to things of the same class or kind indicated by particular preceding words.

[84] Hart and Sacks, *op. cit.* (n. 15 above) at p. 1255.

[85] Hart and Sacks, *op. cit.*, at p. 1240.

[86] See *Hall and Co. Ltd.* v. *Shoreham-by-Sea U.D.C.* [1964] 1 W.L.R. 240; *Mixnam's Properties Ltd.* v. *Chertsey U.D.C.* [1964] 1 Q.B. 214; [1965] A.C. 735.

(*a*) There is no established order of precedence in the case of conflict between different presumptions.

(*b*) The individual presumptions are often of doubtful status,[87] or imprecise scope.[88]

(*c*) A court can give a decision on the meaning of a statute which conflicts with a particular presumption without referring to presumptions of intent at all. The possibility for the court to decide in the first place that the meaning is clear enables it to exclude altogether any operation of a presumption.

(*d*) There is no accepted test for resolving a conflict between a presumption of intent, such as the presumption that penal statutes should be construed restrictively, and giving effect to the purpose of a statute (the " mischief " of *Heydon's Case*[89]), for example, the purpose of factory legislation to secure safe working conditions.

36. It has been suggested[90] that the difficulties and uncertainties which arise in regard to presumptions of intent might be avoided by the statutory classification of legislation with appropriate presumptions. We do not think that a general classification of this kind would be practicable. Any comprehensive statutory directives would either have to be so generalized as to afford little guidance to the courts, or so detailed that they would lead to intolerable complexity and rigidity of the law. Our consultations confirm this view.

37. In rejecting this approach we nevertheless recognise the force of the arguments, put forward by a number of those whom we have consulted, in favour of laying down statutory presumptions in three difficult areas of interpretation. First, it is notoriously difficult for the courts to decide the precise mental factor required in relation to each prescribed element of a number of statutory offences.

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[87] Thus, the extent to which there is a presumption in favour of the taxpayer in taxation statutes is not entirely clear. Rowlatt J. " whose outstanding knowledge of this subject was coupled with a happy conciseness of phrase " (*per* Viscount Simon L.C. in *Canadian Eagle Oil Co.* v. *R.* [1946] A.C. 119 at p. 140) in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* [1921] 1 K.B. 64 at p. 71, said: " In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." Yet in *Inland Revenue Commissioners* v. *Ross and Coulter* 1948 S.C.(H.L.)1 at p. 10; [1948]1 All E.R. 616 at p. 625 Lord Thankerton came near to admitting the continuing existence of a presumption in certain circumstances when he said: " . . . if the provision is capable of two alternative meanings the courts will prefer that meaning more favourable to the subject."

[88] See, for example, *Allen* v. *Thorn Electrical Industries Ltd.* (n. 17 above) at p. 507 where Winn L.J. said:—" I must reject as quite untenable any submission . . . that, if in any case one finds (*a*) that a statute is worded ambiguously in any particular respect, and (*b*) finds also clear indications *aliunde* that Parliament intended that they should have the strictest and most stringent meaning possible, the court is therefore compelled to construe the section in the sense in which Parliament would have desired it to take effect, by giving the words their most stringent possible meaning. On the contrary I think the right view is, and as I understand it always has been, that in such a case of ambiguity, it is resolved in such a way as to make the statute less onerous for the general public and so as to cause less interference, than the more stringent sense would, with such rights and liberties as existing contractual obligations." See also Lord Denning M.R. at p. 503 and Danckwerts L.J. at p. 505.

[89] See n. 45 above.

[90] Friedmann, " Statute Law and its Interpretation in the Modern State," (1948) 26 C.B.R. 1277 at pp. 1291–1300.

The difficulty arises where a statute fails to state whether the criminal liability which it creates is absolute or subject to a requirement of *mens rea* in regard to all or some of its elements. It is true that " in such cases there has for centuries been a presumption that Parliament did not intend to make criminals of persons who were in no way blameworthy in what they did."[91] This presumption is very strong in regard to offences which, although statutory in form, have their origins in the common law, but it appears to be much weaker in regard to relatively modern statutory offences providing criminal sanctions within the framework of legislation with a broad social purpose, such as the protection of factory workers or the furtherance of road safety. One way of removing the uncertainty might be to provide a statutory presumption, requiring the courts to import *mens rea* in regard to the prescribed elements of any statutory offence in the absence of express words to the contrary. However, we do not pursue the matter further in this Report. It is being separately investigated by the Law Commission, with the assistance of a Working Party, in connection with their codification of the general principles of English criminal law under Item XVIII of their Second Programme. Subject 11 (Strict Liability) of Published Working Paper No. 17, circulated by the Law Commission on 14 May 1967, is particularly relevant to the problems raised in this paragraph.

38. The second area in which a statutory presumption might be helpful concerns the determination of civil liability arising from breach of statutory duty. The courts have endeavoured to isolate the factors by reference to which they decide whether civil liability arises, but it is difficult to ascertain from the cases what measure of authority they enjoy and what is the respective weight to be attached to them.[92] In some recent statutes Parliament has expressly excluded a civil action and occasionally it has expressly provided that an obligation

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[91] *Per* Lord Reid in *Sweet* v. *Parsley* [1969] 2 W.L.R. 470 at p. 473. It is noteworthy that the Law Lords in that case relied less on this presumption than on the contention that *mens rea* was in fact required by the words of the Act—i.e., that s.5(*b*) of the Dangerous Drugs Act 1965 in referring to a person who " is concerned in the management of any premises used for [the purpose of smoking cannabis or cannabis resin] " meant that the manager must be not only managing the premises as such but conducting them for cannabis smoking.

[92] For example, A. L. Smith L.J. said in *Groves* v. *Lord Wimborne* [1898] 2 Q.B. 402 (C.A.) at p. 407 that a civil remedy is to be implied " unless it appears from the whole purview of the Act . . . that it was the intention of the Legislature that the only remedy for breach of the statutory duty should be by proceeding for the fine." Again, it was suggested by Atkin L.J. in *Phillips* v. *Britannia Hygienic Laundry Co. Ltd.* [1923] 2 K.B. 832 at p. 842 that a civil remedy is not to be implied from the statute if there is an adequate remedy at common law; but this seems difficult to reconcile with the many decisions according civil remedies for breach of statutory duties under factory legislation. Another approach, which might explain the decisions under factory or allied legislation, seeks to determine whether the Act was passed for the benefit of a defined class of persons, in which event the implication would be that a civil remedy was intended, or only for the public at large who would have no civil remedy—see e.g., Birkett L.J. in *Solomons* v. *R. Gertzenstein Ltd.* [1954] 2 Q.B. 243 at p. 261, although in *Phillips' Case* above Atkin L.J. (at p. 841) had already rejected this test. In *Cutler* v. *Wandsworth Stadium Ltd.* [1949] A.C. 398 an obligation on occupiers of dog tracks to admit bookmakers was held not to give a right of action to a bookmaker who was refused admission on the ground that the Act was passed to give the public a choice between betting with bookmakers and on the totalisator, and not for the benefit of bookmakers. But, as Professor Glanville Williams points out in a survey of this branch of the law (1960) 23 M.L.R. 233 at pp. 244 *et seq.*), it is difficult to find the evidence on which the House of Lords concluded that the Act was not intended to benefit bookmakers, and he therefore concludes that the case illustrates a rule that a criminal penalty does not imply a civil right of action unless there is an indication in the statute that it was so intended. If this is true, it is clearly inconsistent with the principle stated by A. L. Smith L.J. in *Groves* v. *Lord Wimborne* (see above) and not obviously true of industrial legislation where a civil remedy is readily implied.

imposed by statute is intended to ground a civil action,[93] but in spite of Lord du Parcq's invitation in *Cutler* v. *Wandsworth Stadium Ltd.*[94] neither of these courses has been generally followed. We recognise that difficulties may still arise in regard to duties imposed by existing legislation; but we think it would be helpful to the courts and the public if they could rely on a statutory presumption in relation to obligations imposed in or authorised by future statutes. We have considered whether the presumption should be in favour of or against a civil action, unless a contrary intention is expressly stated. To avoid any danger of the civil action being restricted in practice by a failure to provide for it in express terms, we recommend that the presumption should take the first form, namely, that the breach of an obligation is intended to be actionable at the suit of any person who by reason of that breach suffers or apprehends damage, unless a contrary intention is expressly stated.

39. The third area in which we have considered the desirability of a statutory presumption relates to legislation dealing with matters which are subject to international obligations of the United Kingdom (in particular treaties to which the United Kingdom is a party). This question is separately discussed in Section VII[95] of this Report.

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[93] For example, express exclusion in Representation of the People Act 1949, ss.50(2) and 51(2), Radioactive Substances Act 1960, s.19(5)(a), Water Resources Act 1963, s.135(8)(a), Medicines Act 1968, s.133(2); express provision in Consumer Protection Act 1961, s.3(1), Resale Prices Act 1964, s.4(2), Restrictive Trade Practices Act 1968, s.7(2).

[94] See n. 92 above at p. 410: " To a person unversed in the science or art of legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be . . . I trust, however, that it will not be thought impertinent, in any sense of that word, to suggest respectfully that those who are responsible for framing legislation might consider whether the traditional practice, which obscures, if it does not conceal, the intention which Parliament has, or must be presumed to have, might not safely be abandoned."

[95] See paragraphs 74–76 below.

V THE CONTEXTS OF A STATUTORY PROVISION

40. In our consideration of the rules of interpretation we have emphasised the importance in arriving at the meaning of a statutory provision of considering the various contexts in the light of which it may be read. We deal first with the context provided by the statute, and then turn to certain contexts which may be provided by other material outside the statute.

(1) The Context provided by the Statute

41. We begin with the interpretative status of the punctuation in the enacting provisions of a statute. In old cases the exclusion from consideration by the courts of punctuation in statutes appears to have been justified on the grounds that no punctuation was normally to be found in the Parliament Roll.[96] It has been said to be very doubtful whether in modern Acts account can be taken of punctuation.[97] In *Alexander* v. *Mackenzie*[98] the High Court of Justiciary, however, seems to have considered it legitimate in Scotland to give effect to punctuation in the construction of modern statutes. Its exclusion might today be justified on the grounds that amendments in Parliament to punctuation would not in practice be accepted, but, as we later point out, this factor has not excluded headings from consideration by the courts. We think that the punctuation of an enacting provision should be taken into account in interpreting a provision;[99] in modern usage punctuation is an important factor in the conveyance of meaning and its practical effect (as distinguished from its formal legal status) on Parliament when considering a Bill or on the courts or the public when interpreting the resulting Act, can hardly be denied.[100] With very few exceptions those whom we have consulted share this view.

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[96] See *Craies on Statute Law*, 6th ed., 1963, pp. 197–9.

[97] *Per* Lord Reid in *Inland Revenue Commissioners* v. *Hinchy* [1960] A.C. 748 at p. 765.

[98] 1947 J.C. 155.

[99] This view, as with headings and marginal notes, presupposes that the procedures relating to punctuation in the course of the passage of legislation are acceptable to Parliament. It has been suggested to us that it would involve changes in Parliamentary procedure regarding the admissibility of amendments to punctuation. The implication is that the admission of such amendments might lead to intolerable abuse. The validity and weight of this argument is of course a matter for Parliament.

[100] Punctuation is of course only one factor which may influence meaning. The Court of Appeal in *Corocraft Ltd.* v. *Pan American Airways Inc.* (see n. 9 above) held that article 8(i) of the Warsaw Convention, which as set out in the First Schedule of the Carriage by Air Act 1932 was by that Act given the force of law in the United Kingdom, must be interpreted so that, in the event of inconsistency between the English text (in the Schedule) and the French text, the French text should prevail. But the Court held that the French text, which required a consignor of goods to state " Le poids, la quantité, le volume ou les dimensions de la marchandise " was ambiguous; it might have meant that only one of the four particulars had to be stated, but the Court preferred to read Article 8(i) as saying that the particulars had to be given as far as applicable. No doubt if a comma had been inserted between " volume " and " ou " it might have tended to suggest that the first three requirements taken en bloc were an alternative to the fourth, but it seems more likely that the Court would have reached the same decision, because the text " should be interpreted so as to make good sense among commercial men " (p. 1282) and because (having regard to certain United States decisions) " the courts of all the countries should interpret this Convention in the same way " (p. 1283).

42. In interpreting a particular provision of a statute there is no doubt that a court may consider the context provided by other enacting provisions of the statute, the long title and the preamble. The interpretative status of the short title, although enacted by Parliament, is uncertain.[101]

43. Headings have been held to form part of the context in which the enacting sections may be read,[102] but there is authority for the proposition that where the words of a section are in themselves clear in the context of everyday usage they must be accepted in that sense by the court, even if the heading under which they come suggests a different meaning,[103] though it is doubtful how far these statements can stand against the general tenor of the remarks of Lord Somervell and Viscount Simonds in the *Prince Augustus Ernest of Hanover Case*.[104]

44. It is not clear how far, if at all, marginal notes can be used to elucidate the meaning of a statute.[105] The view that they cannot be used is supported by the argument that amendments to marginal notes are not made by either House, but that any necessary alterations are made by officials of Parliament in consultation with Parliamentary Counsel.[106] But if this is the reason for the exclusion of marginal notes from consideration, it would equally justify the exclusion of headings, which are similarly treated in Parliament. Another possible justification for the exclusion of marginal notes is that they provide only a convenient quick method of reference to the sections of an Act; in line with this view, it is said that, if a marginal note were regarded as providing more than an approximate indication of the contents of a section, its composition might cast an excessively heavy burden on the draftsmen. Those whom we have consulted are divided as to the interpretative weight which should be attached to marginal notes; while some consider that they should be ignored in interpretation, others take the view that the courts should be free to consider them, although sometimes with the qualification that this might involve a reconsideration by Parliament of its procedures in regard to marginal notes.

45. We do not attach great importance to the status of short titles, headings and marginal notes in the interpretative process, as long as that status is clearly understood between Parliament and those to whom its statutes are directed. It is important in this connection to bear in mind that a statute is directed not

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101 See *Re Boaler* [1915] 1 K.B. 21 (C.A.). Contrast conflicting dicta of Buckley L.J. at p. 27 and of Scrutton L.J. at pp. 40–41.

102 See *Qualter Hall & Co. Ltd.* v. *Board of Trade* [1961] Ch. 121 at p. 131. See also *Magistrates of Buckie* v. *The Dowager Countess of Seafield's Trustees* 1928 S.C. 525, in which it was held that certain words in the statute fell to be construed in the light of the context and of the heading of the group of sections in which they occurred.

103 See Farwell L.J. in *Fletcher* v. *Birkenhead Corporation* [1907] 1 K.B. 205 (C.A.) at p. 218 and Lord Goddard C.J. in *R.* v. *Surrey (North Eastern Area) Assessment Committee* [1948] 1 K.B. 28 at pp. 32–3.

104 See n. 19 and paragraph 11 above.

105 See *Maxwell on Interpretation of Statutes*, 11th ed., 1962, pp. 41–2. In *Gosling* v. *Gosling* [1968] P.1 (C.A.) at p. 26 Sachs L.J. declined to be influenced by a marginal note both because it differed from the marginal note to a corresponding section of an earlier Act and because, for the reasons given in *Maxwell*, " marginal notes are normally not regarded for purposes of interpretation, though they may be in certain cases."

106 See Lord Reid in *Chandler* v. *Director of Public Prosecutions* [1964] A.C. 763 at pp. 789–90.

merely to the courts but also to the community at large, who will tend to read the statute without giving any very refined attention to the exact legal status of its different parts. On the balance of the arguments we take the view that the courts should be able to consider the meaning of the provisions of a statute in the context of short titles, headings and marginal notes,[107] although we would emphasise that the weight to be attached to the particular meaning which they suggest may often be slight in comparison with the meaning suggested by other permissible and, in the circumstances, more compelling contexts.[108] We must also add that this view presupposes that the procedures governing both headings and marginal notes in the course of legislation are acceptable to Parliament.

(2) Contexts outside the Statute

(i) *Material other than Parliamentary History*

46. It is self-evident that in order to understand a statute a court has to take into account many matters which are not to be found within the statute itself. Legislation is not made in a vacuum, and a judge in interpreting it is able to take judicial notice of much information relating to legal,[109] social, economic

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[107] We have considered a suggestion that headings and marginal notes should be given no contextual weight by the courts, who would however remain free to treat them as " contemporaneous exposition". The scope of contemporaneous exposition is however rather doubtful in relation to modern Acts (see *Craies, op cit.*, n. 96 above, p. 80 *et seq.*) and we think it preferable to deal with headings and marginal notes in a more direct manner.

[108] Our impression is that in some other, particularly Civil Law, jurisdictions the problems affecting such parts of a statute as headings and marginal notes relate to their weight rather than to their specific inclusion or exclusion. We understand that in the United States both headings of the character of marginal notes in the United Kingdom and punctuation are taken into account. Ss. 1–109 of the United States Uniform Commercial Code provides that section captions shall be treated as part of the Code; some States, however, have omitted this section in adopting the Code.

[109] Thus earlier statutes on the same subject matter as a statute being interpreted and case law in which there is judicial interpretation of the word or words in question may under clearly established present practice form part of the context to be taken into account by the Court. Whether such material has the necessary relevance to entitle it to be regarded as part of the context is a question which in our view should be decided by the Court according to the circumstances, unfettered by any rigid presumptions as to the intent of Parliament. In this connection we have considered whether the rule enunciated in *Ex parte Campbell* (1870) 5 Ch. App. 703 at p. 706 (that " Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute ... the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them ") should be modified by statute. We doubt if this is necessary in spite of the apparent approval given to the rule by three of the Law Lords in *Barras* v. *Aberdeen Steam Trawling and Fishing Co. Ltd.* 1933 S.C. (H.L.) 21; [1933] A.C. 402. Apart from the fact that it is now open to the House of Lords to review its own decisions, and the cautious treatment of the rule by the courts which if they accept it at all, do so " only with considerable qualifications which may in time render it obsolete " (Allen, *op. cit.* (n. 7 at p. 509)), we think that any legislative guidance in this field would run the danger of causing rigidity in the rules of statutory interpretation, which it is our general purpose to remove. This view is strengthened by the decision of the Court of Appeal in *R.* v. *Bow Road Justices (Domestic Proceedings Court), Ex parte Adedigba* [1968] 2 Q.B. 572 (C.A.) in which Salmon L.J. (at p. 583) said: " It is quite true that it is a principle of construction that the courts may presume that when there has been a decision upon the meaning of a statute, and the statute is re-enacted in much the same terms, it was the intention of Parliament to endorse the decision. But this is merely a rule of construction for the guidance of the courts. It is not a presumption which the courts are bound to make." See also Lord Denning M.R. at p. 579. This recent clarification of the position may reduce difficulties concerning statutes applying to Scotland. Scottish draftsmen may have felt obliged to repeat an expression used in an earlier Act, although not wholly appropriate for Scotland, because a change of language might have suggested a change of intention.

and other aspects of the society in which the statute is to operate. We do not think it would serve a useful purpose to attempt to provide comprehensive legislative directives as to these factors. In this Report we are mainly concerned with the problems which have arisen regarding the admissibility of certain sources of information.

47. It is, we think, helpful to classify these sources by reference to the purpose for which they might be used in the process of interpretation. In the first place a judge might wish to inform himself about the general legal and factual situation forming the background to the enactment. Secondly, he might wish to know about the " mischief " underlying the enactment—i.e., the state of affairs within that legal or factual situation which it is the purpose of the legislature to remedy or change. Thirdly, he might look for information which might bear on the nature and scope of the remedy or change provided by the enactment.

48. Provided that the court thought that the information was relevant and reliable, there do not seem to be any specific limitations on the information to which the court might refer under the first heading. The extent to which material may be referred to under the second and third headings is more uncertain.

49. The admission of certain material under the second heading—i.e., to ascertain the mischief at which the statute aimed—has been allowed by the courts. In *Eastman Photographic Materials Co. Ltd.* v. *Comptroller-General of Patents, Designs and Trade Marks*[110] Lord Halsbury admitted a report of a Commission as a " source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy."[111] And in more general terms in *Govindan Sellappah Nayar Kodakan Pillai* v. *Punchi Banda Mundanayake*[112] the Judicial Committee of the Privy Council held that " judicial notice ought to be taken of such matters as the reports of Parliamentary Commissions and of such other facts as must be assumed to have been within the contemplation of the legislature when the Acts in question were passed."[113] Although it is conceivable that the inference drawn from a committee report as to the mischief which Parliament had in mind in regard to a statute might require modification in the light of statements subsequently made in Parliament, it is doubtful whether the courts can refer to parliamentary statements even to ascertain the mischief at which a Bill under debate is aimed. It is true that in *South Eastern Railway Co.* v. *The Railway Commissioners*[114] Cockburn C.J. spoke of matters which could be " safely asserted " not to " enter into the measure as contemplated nor [to be] present in the mind of the legis-

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110 [1898] A.C. 571.

111 At p. 575.

112 [1953] A.C. 514.

113 At p. 528. The judgment does not make it entirely clear whether the matters referred to could be taken into account in ascertaining only the mischief or could also be used to elucidate the remedy.

114 (1880) 5 Q.B.D. 217.

lature in the Act,"[115] having regard to a speech of the Lord Chancellor in the House of Lords and of the introducer of the Bill in the Commons. But his views were disapproved of by Lord Selborne L.C. on appeal.[116]

50. Material under the third heading—i.e., to ascertain the particular remedy which the statute provides to deal with the mischief—would appear to be excluded by the courts. In *Assam Railways and Trading Company Ltd.* v. *Commissioners of Inland Revenue*[117] the question was raised of the admissibility before the House of Lords of certain recommendations of a Royal Commission on Income Tax which had preceded an Act and which counsel for the appellants sought to cite as part of the context of intention of Parliament in relation to a particular section of the Act. Lord Wright said:

> " It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the Report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted."[118]

51. It should however be added that some judicial observations since the *Assam Case* appear to show a somewhat less strict attitude towards the recommendations of a committee which have been followed by legislation. Thus in *Letang* v. *Cooper*[119] Lord Denning M.R., having said that it was legitimate to look at the report of a committee to see the mischief at which a statute was directed, went on to say:

> " But you cannot look at what the committee recommended, or at least, if you do look at it, you should not be unduly influenced by it. It does not help you much, for the simple reason that Parliament may, and often does, decide to do something different to cure the mischief. You must interpret the words of Parliament as they stand, without too much regard to the recommendations of the committee: "[120]

And in *Cozens* v. *North Devon Hospital Management Committee* and *Hunter* v. *Turners (Soham) Ltd.*[121] Thompson J., while stating that counsel had correctly maintained that a Report of the Committee on Limitation of Actions in Cases of Personal Injury[122] could not be looked at to interpret the Limitation Act 1963,

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[115] At pp. 236–7. See also the earlier remarks of Lord Westbury L.C. in *Re Mew & Thorne* (1862) 31 L.J. Bcy. 87 at p. 89 which seem to sanction reference to parliamentary debates at least where " it may somewhat assist in interpreting [the words of a section] and in ascertaining the object to which they were directed." The issue was whether the enactment excluded a discretion as to the discharge of bankrupts; the defect revealed by the materials looked at was the evils attendant upon the existence of a discretion under the pre-existing law. In *Municipal Council of Sydney* v. *Commonwealth* (1904) 1 C.L.R. 208 at pp. 213–4 Griffiths C.J. of the High Court of Australia said that parliamentary debates might be referred to " for the purpose of seeing what was the subject of discussion, what was the evil to be remedied and so forth." See P. Brazil, " Legislative History and the Sure and True Interpretation of Statutes in general and the Constitution in particular", (1961) 4 *Univ. of Queensland L.J.*, pp. 1–22.

[116] (1881) 50 L.J. Q.B. 201 at p. 203.

[117] See n. 15 above.

[118] *ibid* at p. 458.

[119] [1965] 1 Q.B. 232 (C.A.).

[120] At p. 240.

[121] [1966] 2 Q.B. 318.

[122] 1962 Cmnd. 1829.

apparently permitted counsel to refer to the report for the negative purpose of showing that there was nothing in the recommendations inconsistent with a particular construction of certain provisions of the Act.[123] But in any event it seems that reference may not be made to parliamentary debates to ascertain the scope or nature of a particular remedy provided by a statute.[124]

52. We have considered whether the position summarized in paragraphs 49–51 is satisfactory. In principle it would seem right for the courts to be able to consider any material which " must be assumed to be in the contemplation of the legislature "[125] when the statute in question was passed. The cases in which the point has arisen have for the most part been concerned with the reports of Royal Commissions and official committees, but other documents which have been presented to the legislature by the executive may equally be in its contemplation when considering a statute and form part of the background against which it is passed.[126] This does not of course imply that the meaning which the context provided by this material suggests will be decisive, but only that it is a meaning to be considered by the court. In principle, also, we think that such material should be open to consideration by a court, in ascertaining not only the mischief at which a provision is aimed, but also the nature and scope of the remedy provided. It is, of course, true that the specific recommendations of, for example, an official committee preceding the introduction of legislation may not have been accepted in whole or in part in the first place by the sponsors of the legislation or subsequently by Parliament. If the resulting Act makes clear which recommendations have been accepted and which rejected no problem arises. A practical difficulty may, however, occur where the meaning of a provision in an Act varies according to whether it is, or is not, read in the context of a recommendation of an earlier committee which was before, but not necessarily accepted by, Parliament. But it is also true, although less likely, that Parliament may not have accepted in its entirety a committee's assessment of the mischief to be dealt with by legislation; yet as explained in paragraph 49, the report of a committee could under existing law be considered in ascertaining the mischief. We think that any rigid distinction between the admissibility of material in ascertaining the mischief and in ascertaining the remedy provided is unjustified. It should be borne in mind that a court would not be bound to imply from the presence of a recommended remedy in, for example, a committee report that Parliament accepted the remedy. Furthermore, if a court were

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[123] See n. 121 at p. 321.

[124] It is not uncharacteristic of this rather obscure branch of the law that not even this statement can be left entirely unqualified. Thus in *Beswick* v. *Beswick* [1968] A.C. 58 at p. 105 Lord Upjohn, in construing s.56 of the Law of Property Act 1925, referred to the report of the Joint Committee on Consolidation Bills which dealt with that Act although, as he pointed out, only for the purpose of ascertaining that the presumption against change in a purporting consolidation measure was not weakened by anything that had taken place in the proceedings.

[125] See *Govindan Sellappah Nayar Kodakan Pillai* v. *Punchi Banda Mundanayake* cited in paragraph 49 above.

[126] In *Katikiro of Buganda* v. *Attorney General* [1961] 1 W.L.R. 119 the Judicial Committee of the Privy Council held that the contents of a White Paper could not be used to interpret an agreement (having the force of law and to be construed by the rules applicable to the interpretation of statutes). However, it should be noted that the Judicial Committee (at p. 128) said that there was no ambiguity in the relevant part of the agreement " which would justify the admission of extraneous evidence", and added that in any event the contents of the White Paper would have fallen short of establishing the contention which it was said to support (which, it may be noted, suggests that they had in fact looked at it).

entitled to look not only at a committee report but also at a White Paper,[127] published after the appearance of the committee report but before or in connection with the Bill to which it related, the White Paper might inform the court as to the extent to which the recommendations had at that stage been accepted by the Government. The court of course would still have to determine whether any recommendations so accepted were in fact embodied in the resulting Act. This latter consideration, however, raises the question of the admissibility for purposes of statutory interpretation of material relating to the Parliamentary history of an enactment which we consider in paragraphs 53–62 below. Another source of guidance as to the extent to which a committee report had been accepted might in certain cases be provided by an explanatory document, authorised as an aid to interpretation by the Bill and by the subsequent Act to which it relates and subject to such procedure of adjustment (if any) to take account of amendments to the Bill in the course of its passage as Parliament might require. This possibility is dealt with in paragraphs 63–73 below.

(ii) *The Parliamentary History of an Act*

53. In considering the admissibility of Parliamentary proceedings, it is necessary to consider how far the material admitted might be *relevant* to the interpretative task of the courts, how far it would afford them *reliable* guidance, and how far it would be sufficiently *available* to those to whom the statute is addressed.

54. If the intention of Parliament is not to be treated as a mere figure of speech, it can hardly be denied in principle that proceedings in Parliament may be *relevant* to ascertain that intention. It is, however, a matter of controversy[128] whether there is a legislative intent capable of discovery apart from the language of the statute. In *Salomon* v. *Salomon & Co. Ltd.*[129] Lord Watson said:

> " ' Intention of the Legislature ' is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary implication."[130]

And in *Magor and St. Mellons R.D.C.* v. *Newport Corporation*[131] in which Denning L.J. had said in the Court of Appeal:

> " We sit here to find out the intention of Parliament and of Ministers [among other matters the case concerned the interpretation of an Order

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[127] Under the present law it is doubtful whether a White Paper would be admissible to elucidate the scope of remedies provided by subsequent legislation—see *Katikiro of Buganda* v. *Attorney General* (n. 126 above).

[128] See in particular Alf Ross, *On Law and Justice*, p. 143; Radin, " Statutory Interpretation ", (1930) 43 *Harvard L.R.* 863; Landis, " A Note on ' Statutory Interpretation ' ", (1930) 43 *Harvard L.R.* 886; Payne, " The Intention of the Legislature in the Interpretation of Statutes ", *Current Legal Problems*, 1956, p. 96.

[129] [1897] A.C. 22.

[130] At p. 38.

[131] [1952] A.C. 189.

made by the Minister of Health] and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis."[132]

Lord Simonds in the House of Lords made the reply:

> " . . . the general proposition that it is the duty of the court to find out the intention of Parliament—and not only of Parliament but of Ministers also —cannot by any means be supported."[133]

55. The apparent difficulties which arise in the analysis of the concept of the legislative intent may perhaps be clarified if a distinction is drawn between a *particular* legislative intent in the sense of the meaning in which the legislature intended particular words to be understood, and a *general* legislative intent in the sense of the purpose which the legislature intended to achieve.[134] Thus it is possible to agree with Lord Simonds that there are many occasions when it would be unrewarding to seek for the legislative intent in the sense of the intended meaning of particular words, when, for example, Parliament has laid down certain consequences which are to follow an " accident arising out of and in the course of the employment "[135] while leaving the courts to decide what lies within the course of employment; but it is also possible to accept Denning L.J.'s view that it is the duty of the courts in such a case " to find out the intention of Parliament . . . and carry it out by filling in the gaps and making sense of the enactment", if the intention of Parliament is here understood to mean the purpose of Parliament in referring to accidents arising out of and in the course of employment in the Workmen's Compensation Act 1897. As regards the reality of legislative intent in the sense of the purpose of the legislature in respect of a statute we see force in the statement that:

> " If [legislative intent] is looked upon as a common agreement on the purposes of an enactment and a general understanding of the kind of situation at which it is aimed, to deny the existence of a legislative intention is to deny the existence of a legislative function."[136]

We do not think therefore that a rule excluding Parliamentary proceedings can be supported solely on the grounds that they can never have any *relevance* to the statute which emerges from them; but the *reliability* and *availability* of Parliamentary material when used for this purpose are more questionable.

56. The *reliability* of Parliamentary history has had many severe critics. It has been said that the purpose of debating a Bill is to secure consent to its terms and to explain the intent and meaning of its precise language only to the extent that the explanation will further the object of getting consent to its passage; that the process of enacting legislation is not " an intellectual exercise in the pursuit of truth but an essay in persuasion or perhaps almost seduction", and that, in these circumstances, " to appeal from the carefully pondered terms of the

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[132] [1950] 2 All E.R. 1226 at p. 1236.

[133] See n. 131 above, at p. 191.

[134] See Gerald C. MacCallum Jr., " Legislative Intent", (1966) 75 *Yale L.J.* 754.

[135] S.1(1) of the Workmen's Compensation Act 1897. Similarly it cannot be said that Parliament had a particular legislative intent in regard to whether a particular number of missing window cords constituted " unfitness for habitation "—see paragraph 30 above.

[136] " A Re-evaluation of the Use of Legislative History in the Federal Courts", (1952) 51 *Columbia L.R.* 125 at p. 126.

statute to the hurly-burly of Parliamentary debate is to appeal from Philip sober to Philip drunk."[137] Justice Jackson[138] and Professor Henri Capitant[139] have alike pointed out the disadvantages of this extrinsic aid from which so many diverse constructions can find support somewhere in the varying statements made during the progress of a Bill through the stages of its enactment. Another American critic[140] has put the matter in this way:

> " The courts used to be fastidious as to where they looked for the legislative intention. They used to confine the enquiry to reports by committees [of the legislature] and statements by the member in charge of the Bill. But now the pressure of the orthodox doctrine has sent them fumbling about in the ashcans of the legislative process for the shoddiest unenacted expressions of intention."[141]

Apart from these general dangers, there is the particular danger that if Parliamentary history can be appealed to as evidence of intention, such evidence can be deliberately manufactured during the legislative process by those with an axe to grind.[142]

57. In most countries outside the Commonwealth, however, legislative material is not considered so unreliable as to be totally excluded from consideration by the courts. In the United States it is noteworthy that much of the criticism of American judges and writers has been directed not so much against its use in principle as against its abuse in practice. For example, Justice Frankfurter[143] has said:

> " Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still confined by it. Violence must not be done to the words chosen by the legislature. Unless indeed no doubt can be left that the legislature has in fact used a private code, so that what appears to be violence to language is merely respect to special usage. In the end, language and external aids, each accorded the authority deserved in the circumstances, must be weighed in the balance of judicial judgment."[144]

Where legislative material is admissible the courts become accustomed to the ways of the legislators and learn to discriminate between the value of different kinds of material. Thus, in general, debates in the legislature are much less frequently used than the reports presented by legislative committees. In so far as debates are used, their unevenness, from the point of view of the courts, is recognized and distinctions are commonly drawn between the leading speeches

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137 See J. A. Corry, " The Use of Legislative History in the Interpretation of Statutes", (1954) 32 *Can.BarRev.* 624 at pp. 621–2.

138 " The Meaning of Statutes: What Congress says or what the Court says", (1948) 34 *A.B.A. Journal* 535.

139 " L'interprétation des lois d'aprés les travaux préparatoires " in *Le Receuil d'études sur les sources du Droit en l'honneur du doyen François Gény*, Sirey, 1935, pp. 204–216.

140 Charles P. Curtis, " A Better Theory of Legal Interpretation " (1949) 4 *The Record of the Association of the Bar of the City of New York* 321.

141 At pp. 327–8.

142 At p. 328.

143 *op. cit.* (n. 8 above).

144 *op. cit.* (n. 8 above) at p. 234.

of Ministers or others who introduce or have the carriage of legislation, and other speeches made in the general debate.

58. The practice in the use of legislative materials varies from country to country, particularly having regard to the relative usefulness for statutory interpretation of the material. In a comparison of the situation in this respect in France, Germany and Sweden it has been pointed out[145] that the procedures in Germany and Sweden produce more material, particularly reports by legislative committees, which is suitable for interpretative purposes than do the corresponding procedures in France. Accordingly, the French courts are not able to derive as much assistance from this category of *travaux préparatoires* as do the courts of the other countries.[146] It should be borne in mind, moreover, that in all these countries a court is not bound to infer that a meaning of a provision in a statute is governed by the proceedings in the legislature; the language of the statute or other considerations may in the circumstances be more compelling.[147]

59. In our system the *reliability* of legislative material for use in the process of interpreting statutes has been called in question by many whom we have consulted. Amongst other considerations there is the fact, to which we drew attention in our Joint Working Paper, that our existing legislative procedures are not especially well adapted for the use of Parliamentary material as an aid to interpretation; in particular, we do not have committee reports of the kind which, as an authoritative summary of the purpose and scope of a legislative proposal, are available to the courts in countries which make use of legislative history. It will be seen that this emphasis on the practical objections[148] to the use of legislative history is no less important in regard to its availability.

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[145] See Strömholm, " Legislative Material and Construction of Statutes: Notes on the Continental Approach", *Scandinavian Studies in Law*, 1966, pp. 173–218.

[146] However, in a recent case (*Weiss c. Atton*, Cour d'Appel de Paris, 23rd November, 1967, *Gazette du Palais*, 17th-19th April, 1968) the right of a court to have recourse to *travaux préparatoires* (in the particular case to the unopposed statement of the rapporteur of the *Commission des Lois* of the National Assembly) was emphatically asserted.

[147] Thus a French law of 31st December 1957 conferred jurisdiction on *tribunaux de grande instance* to deal with cases of damage caused by a " vehicle of any kind". The *travaux préparatoires* made it quite clear that the legislature had not intended to include aircraft in this expression. Nevertheless the courts have consistently held that the statutory text does not permit the exclusion of aircraft. See also a decision of the German *Bundesgerichtshof* (unpublished decision of 7th July 1960, VIII ZR 215/59) where it was emphasised that the subjective conception of the organs taking part in the process of lawmaking, or of their individual members, concerning the significance of a provision is not decisive; the legislative history of a provision only has significance for its interpretation in so far as it confirms or raises doubts about the correctness of an interpretation arrived at by the application of the established general principles of interpretation.

[148] In *Beswick* v. *Beswick* (see n. 124 above) Lord Reid (at p. 74) said that " For purely practical reasons we do not permit debates in either House to be cited." However, in *R.* v. *Warner* [1968] 2 W.L.R. 1303 Lord Reid (at p. 1316) suggested that " this case seems to show there is room for an exception where examining the proceedings in Parliament would almost certainly settle the matter immediately one way or the other." In the light of this comment it is interesting to note the legislative history (see the letter by Mr. Graham J. Zellick in (1968) 118 *N.L.J.* 455) of s.5(*b*) of the Dangerous Drugs Act 1965 under which the Court of Appeal in *Sweet* v. *Parsley* [1968] 2 W.L.R. 1360 held the defendant guilty of being " concerned in the management of premises " in which unknown to her the smoking of cannabis took place. S.5(*b*) was a reproduction in the consolidation measure of 1965 of an identical provision (s.9(1)(*b*) of the Dangerous Drugs Act 1964). The latter was a private member's Bill and in moving the second reading in the House of Lords on April 7, 1964, Lord Amulree said:

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60. In speaking of the criterion of *availability* in regard to the admissibility legislative material for interpretative purposes we have in mind a consideration which has been emphasised in the comments we received on our Joint Working Paper. A statute may ultimately have to be interpreted by the courts but it is directed to a wider audience. The citizen, or the practitioner whom he consults, may have a heavy burden placed upon him if the context in which a statute is to be understood requires reference to materials which are not readily available without unreasonable inconvenience or expense. From the enquiries which we have made the availability of legislative material does not appear to present serious problems in continental countries; in Sweden, for example, we were told that every practising lawyer had, or could easily obtain, the volumes containing the essential legislative history of the statutes with which he has to deal. However in the United States the problem to which the availability of legislative material may give rise has not gone unremarked. Thus, Justice Jackson has said:

> " I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes. I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses practical problems for a large part of the legal profession. . . . Only the lawyers of the capital or the most prosperous offices in the large cities can have all the legislative material available. The average law office cannot afford to collect, house and index all this material. Its use by the Court puts knowledge of the law practically out of reach of all except the Government and a few law offices."[149]

In the setting of our own system we recognise that many legal practitioners, notably solicitors in places where library facilities are not conveniently available, may find it difficult to refer to the volumes of Hansard, and in particular to thoes volumes, not to be found in many libraries, which contain the reports of Parliamentary Standing Committees. We do not wish however to exaggerate this difficulty, as, if the legislative history of statutes was admissible, it is probable that the burden on the lawyer and other users of statutes would be lightened by the inclusion in text-books of significant extracts from the legislative history of the statutes with which they deal.[150]

" Clause 9 strengthens the powers of the police in dealing with cannabis. But it involves the provision that a person cannot be prosecuted unless he knowingly permits his premises to be used for the manufacture or smoking of cannabis." (257 H.L. Deb. col. 12). Another striking example of the disadvantage of our rule excluding judicial reference to Parliamentary history is described by Mr. Stephen Cretney in (1968) 112 S.J. 593–4. He points out that in *R.* v. *Wilson Ex parte Pereira* [1953] 1 Q.B. 59 (which involved the interpretation of s.27(2) of the Maintenance Orders Act 1950) the Divisional Court followed its decision in *O'Dea* v. *Tetau* [1951] 1 K.B. 184; Lord Goddard C.J. referring (at p. 61) to the earlier decision, said that between 24th July 1950, when *O'Dea* v. *Tetau* was decided, and 26th October 1950, when the Maintenance Orders Act 1950 was passed, there would have been time, had the legislature desired, to reverse that decision and perhaps to deal with it in that Act. But in fact the Government did deal with it. They introduced an amendment of the Maintenance Orders Bill in the House of Lords for the declared purpose of reversing the rule applied in *O'Dea* v. *Tetau*; see the statement of the Lord Chancellor (168 H.L. Deb. cols 1151–2) introducing an amendment which was accepted in both Houses and became part of s.27(2).

[149] (1948) 34 *A.B.A. Journal* 535 at pp. 537–8. It should be added that this criticism is not emphasised to the same extent by other American writers on the subject.

[150] Examples of text-books, making use of Parliamentary material, are those by Magnus & Estrin on the Companies Acts 1947 and 1967. An interesting recent French example is a series of commentaries on the legislation of 1966/7 reforming the law relating to commercial companies. (Hamiaut, *La Réforme des Sociétés Commerciales*, Dalloz, 1966, dealing with the law of 24th July 1966 and Hémard, Terre & Mabilat, *La Réforme des Sociétés Commerciales*, dealing with the decree of 23rd March 1967, Dalloz, 1967).

61. In our Joint Working Paper we left open the question whether the Parliamentary history of an enactment should be admissible in its later interpretation by the courts. A few commentators, including some with judicial or drafting experience, would appear ready to give the courts a discretion to admit such material, but the majority view is against its admission. Subject to separate treatment of one matter (see paragraph 62 below) we have reached the conclusion that at present reports of Parliamentary proceedings should not be used by the courts for the interpretation of statutes. We recognise that in principle there is much to be said in favour of relaxing the rule as to the exclusion of such reports. In supporting the existing law on this subject we are much influenced by three considerations: (*a*) the difficulty arising from the nature of our Parliamentary process of isolating information which will assist the courts in interpreting statutes; (*b*) the consequent difficulty of providing such information as could be given in a reasonably convenient and readily accessible form; and (*c*) the possibility that in some cases the function of legislative material in the interpretative process could be better performed by specially prepared explanatory material available to Parliament when a Bill is introduced and modified, if necessary, to take account of amendments during its passage through Parliament.[151]

62. It was suggested to us that certain aspects of the Parliamentary history of an Act might usefully be admitted as an aid to its interpretation without objections of the same weight as apply to the admission of the reports of debates. The suggested material, apart from the Bill for the Act as introduced would be, in one form or another, all amendments actually made during the Parliamentary proceedings on the Bill. In practice this material, and the order in which it had been built up, could usually be derived from inspection of copies of the Bill as reprinted after each relevant stage in both Houses. Such material might on occasions afford assistance to the courts in ascertaining the intention of Parliament,[152] and the practical problem of making it easily available to the users of statutes would be less than would have to be faced if the Parliamentary history as a whole (including the debates) were to be admissible. Drawing the boundaries of admissibility in this way would however be open to the criticism that the significance of amendments proposed but not made[153] may sometimes be as great as that of amendments which are actually made, and that any intelligible

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151 See paragraphs 63–73 below.

152 Thus in *R.* v. *Wilson Ex parte Pereira* (n. 148 above) it is conceivable that the Court might have reached a different conclusion if it could have taken cognizance of the fact that an amendment was made to the Bill which became the Maintenance Orders Act 1950 following the decision in *O'Dea* v. *Tetau* (n. 148 above). It has been suggested (see Wedderburn, (1961) 24 *M.L.R.* 572 at p. 589) that s.3 of the Trade Disputes Act 1906 might have received a different interpretation from that ultimately given it by the House of Lords in *Rookes* v. *Barnard* [1964] A.C. 1129 if it had been possible to construe the section taking account of its Parliamentary history. This shows that the first limb of s.3 was added after the introduction of the Bill as a result of an amendment proposed by Sir Charles Dilke (162 H.C. Deb. ser. 4, col. 1678 *et seq.*). But from the point of view of the proposal discussed in paragraph 62 above it is doubtful what significance a court would be able to attach to this fact if it could not also consider the debate which ensued.

153 In *Viscountess Rhondda's Claim* [1922] 2 A.C. 339 (which was before the Committee of Privileges of the House of Lords, not decided by the House in its normal judicial capacity) the issue was whether the removal by s.1 of the Sex Disqualification (Removal) Act 1919 of any disqualification by reason of sex from " the exercise of any public function " enabled a peeress of the United Kingdom in her own right to receive a writ of summons to Parliament

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account of how an Act took shape should include both kinds of amendments; and, if the proposal were thus extended to amendments proposed but not made, it is doubtful whether it would be tenable without also admitting reference to the reasons, as disclosed by the debates, underlying the rejection or withdrawal of an amendment. An amendment may well be rejected or withdrawn because Parliament is satisfied that its aim is adequately covered by the Bill; but the inference, without further information, would also be open that Parliament in fact did not intend to include the particular object of the amendment. In our view, however, the decisive objection to allowing the courts to refer to the history of amendments, is that the interpretative advantages which it might bring in the marginal case would be outweighed by the burden, which would be imposed on users of statutes in general, of obtaining copies of the amendments made or proposed and of elucidating their significance.

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and thus to take her seat in the House of Lords. The majority of the Committee of Privileges, in rejecting Viscountess Rhondda's claim, relied on an analysis of the nature of the right to sit in the House of Lords, which they held not to be a " public function " within the meaning of the Act. However, as pointed out in Erskine May's *Parliamentary Practice*, 17th ed., 1964 p. 192, a Commons' amendment, by which the words " public function " in the Bill were declared to include sitting and voting in the Lords, had been rejected by the Lords and not insisted on by the Commons. (C.J. (1919) 330 and 376; L.J. (1919) 431). Viscount Birkenhead, L.C. (at pp. 349–50) did not consider that it would have been improper for the Committee of Privileges, as distinguished from the House in its judicial capacity, to support its decision by reference to the Parliamentary history of the Bill.

VI SPECIALLY PREPARED MATERIAL EXPLAINING LEGISLATION

63. In this section we deal with the possibility of providing for interpretative purposes specially prepared material which might be used in ascertaining the context in which statutory provisions are to be read.[154] The basic rationale of such a proposal is that an explanatory statement available with a Bill on its introduction (and, if possible, amended to take account of changes in the Bill in the course of its passage) could be a useful aid in determining the meaning of its provisions.[155] It would enable the interpreter of an Act to take into account considerations which were before the legislature when the relevant Bill was under discussion.

It would not give rise to the same problems of availability for interpretative purposes to which we have referred in connection with the use of Parliamentary history, as it could without undue difficulty be made available to the users of statutes.

64. In exploring the possibility of the preparation of an explanatory statement which would be before Parliament when considering a Bill and, as a part of the contextual background against which the Bill is passed into law, could be used as an aid to interpretation, we have considered such guidance as is afforded by the practice of other countries. In the United States and in the Continental countries the need for such a statement is less obviously felt for two reasons. First, the courts have a wide discretion to refer to material extraneous to the statute, whether originating in the legislature or outside, from which they may obtain information both as to the general purposes and specific intentions of the statute. Secondly, the committees of the legislature dealing with a Bill formulate its purposes and implications in a deliberate and considered manner, usually through the agreed report of a chairman or rapporteur; this provides a more reliable indication of the background against which the Bill was passed than the record under our own system of committee debates. Nevertheless, it is the

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[154] The proposal is not of course new. See pp. 136–7 (Annexe V) of the 1932 Report of the Committee on Ministers' Powers (Cmd. 4060), where Professor Harold J. Laski suggested that a memorandum of explanation might set forth the purposes of a Bill, that authority could be conferred on the courts to utilize the memorandum as an aid in the work of interpretation, a judge not being bound thereby but having it available as " an invaluable guide . . . in his task of discovering what a statute is really intended to mean." See also the amendment to Clause 33 of the Theft Bill 1968 moved (but after debate withdrawn) by Lord Wilberforce (290 H.L. Deb. cols. 897–913). Paragraph (*c*) of the amendment was in the following terms: " Reference may be made, for the interpretation of this Act, to the Notes on Draft Theft Bill contained in Annexe 2 of Command 2977 [i.e. the 8th Report of the Criminal Law Revision Committee] but this commentary shall be for guidance only and shall have no binding force." An example of the type of material which we have in mind is provided by the Explanatory Notes accompanying the Draft Landlord and Tenant Bill, which forms Appendix I of the Law Commission's Report on the Landlord and Tenant Act 1954, Part II (Law Com. 17).

[155] We discuss this proposal only from the point of view of the interpretation of statutes. Parliament itself might consider that an explanatory statement would be of assistance in the discussion of legislation. Notes on Clauses (see paragraph 67 below) which in some measure provide the background to legislation which might be covered by an explanatory statement are not generally available to Members of Parliament. In the course of our consultations our

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practice in some European countries to accompany a Bill on its introduction in the legislature with an explanatory statement which is later available, together with the legislative material, as an authoritative (although not binding) guide in the interpretation of the resulting Act. Our attention has been particularly drawn to directives[156] issued by the Danish Government concerning the style and content of the Memorandum to be presented with Bills introduced in the Danish Parliament. Among other matters the directives require that the memorandum " should be so drafted as to amplify, for the members of Parliament and the public, the subject matter of the Bill and provide an adequate basis for evaluating the reasons underlying the Bill and its expected effects." It is further laid down that " in the preparation of the explanatory statement account should be taken of the fact that it is likely to be a guide to the authorities which will administer the Act or co-operate in its administration, and to the courts."

65. In our system the explanatory statement here under consideration must be distinguished from three types of material which may be produced in connection with a Bill. First, there is the preamble, which, when included in a Bill, is amendable by Parliament in consequence of changes made in the substantive provisions of the Bill and forms an integral part of the resulting Act. A preamble is, however, rarely included in modern Acts. In response to the tentative proposal of an explanatory statement in our Joint Working Paper some of those whom we consulted suggested that its purpose would be better served by a more general use of preambles, which might precede the operative sections of an Act or, where necessary, its particular parts or provisions.[157] The preamble would set out the general purposes of the enactment, or of the particular part or provision, and would thus provide a reliable context to which the courts, even under the existing law,[158] would have unquestioned access. We would agree that preambles may in recent times have suffered from undeserved unpopularity owing to the somewhat archaic form in which they were generally expressed, and that, in modern language, they might usefully elucidate the general purposes of legislation. But we do not think that they would be well adapted to serve all the purposes for which an explanatory statement might be used; for example, they would not be an appropriate way of providing the relatively detailed commentary on a codification statute, to which we refer in paragraph 73 below.

66. Secondly, there is the Explanatory and (where appropriate) Financial Memorandum attached to a Bill on its introduction in each House. These Memoranda are prepared primarily for the information of members of the two Houses and give a highly summarized account of the subject matter of Bills. They are not part of the Bill, and are removed on the first occasion when the Bill is reprinted in either House. It has been suggested to us that an Explanatory Memorandum is admissible in the courts in so far as it could be said to show

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attention was drawn to an occasion when a shortened version of the Notes on Clauses was in fact made available to the members of the Select Committee dealing with the Bill for the Armed Forces Act 1966 (see Special Report from the Select Committee on the Armed Force Bill, 11th August 1966, pp. 1–20), but this possible aspect of the proposal is a matter for the judgment of Parliament.

156 Circular of 16th September 1966 issued from the Danish Prime Minister's office.

157 For a modern example of a preamble to a section see s.8 of the Civil Aviation Act 1949.

158 See e.g., Lord Somervell and Viscount Simonds in *Attorney-General* v. *Prince Ernest of Hanover* (n. 19 above) cited in paragraph 11 above.

the state of the existing law and facts at the time when the Bill was introduced and the mischief at which the Act, or a particular provision of the Act, was directed; but we are not aware of any occasion when it has been so used, and in any event its value for these purposes would usually be minimal.

67. Thirdly, there are the Notes on Clauses. The latter are prepared by Government Departments for the use of Ministers or others who have the task of piloting legislation through the various Parliamentary stages; the text is amended as necessary for each House. They provide a general background to the legislation and explain the purpose and effect of each clause, often including practical examples of its application. They contain a proportion of confidential material and are not published outside the Government organization. Except in so far as their contexts form the basis of speeches made in Parliament, they cannot be said to form part of the contextual background against which Bills are discussed in Parliament; and, in any event being inaccessible to the courts, they can play no part in the latter's interpretative tasks.

68. The explanatory statement which we have in mind would owe something to each of the three devices described in the preceding paragraphs, but it would be more flexible and of wider scope than the preamble or present Explanatory Memorandum, and, unlike Notes on Clauses, would be accessible to users of statutes and admissible before the courts. It would be prepared by the promoters of the Bill (in the case of government legislation by the appropriate department in consultation with the draftsman) and the Bill to which it related would specifically authorise its use as an aid to interpretation. The explanatory statement would thus clearly form part of the contextual background against which the Bill was introduced into Parliament, and, consistently with the views expressed in paragraphs 46–52, it would seem reasonable that the court should be entitled, in its construction of the Act, at least to consider it. But it would be even more useful if it could be amended, as Notes on Clauses are in practice amended, at successive stages of the Bill's passage in the light of amendments made at the Committee and Report Stages. It would be more valuable still if the amended statement could be given some form of Parliamentary approval. Accordingly we next consider possible procedures for amending the explanatory statement in the course of the Bill's passage and for obtaining a measure of Parliamentary approval for its contents. These matters are for Parliament, and it would not be appropriate for the Law Commissions to formulate proposals relating to Parliamentary procedure. Nevertheless any discussion of this aspect of the interpretation of statutes would hardly be realistic without an awareness of the problems of Parliamentary procedure involved. In the course of our consultations various suggestions have been made to us and these we briefly discuss in the next following paragraph.

69. The tentative suggestions made to us broadly fall into four main categories:

(*a*) The explanatory statement might be incorporated in the Bill by way of a comment on the Bill as a whole or on particular provisions or groups of provisions. It would be amendable in consequence of changes made in the substantive provisions of the Bill, and would be transmuted into a statement of the intention of Parliament. Thus, it would in effect be treated in the same way as a preamble under present Parlia-

mentary procedure, and would have the same degree of authority on the courts. It is clear that this proposal would give the highest degree of Parliamentary approval to the statement. On the other hand it would involve a radical departure from the accepted conventions as to the content of preambles and it could not be assumed that Commons practice (which precludes amendments to preambles other than those consequential on amendments to the body of the Bill) would be appropriate. Accordingly, at least in a case where a relatively lengthy and detailed statement might be needed (e.g., a commentary on a code), the burden on Parliamentary time might be unacceptable.

(*b*) The statement, originally published with the Bill, might be revised after enactment by officials for the limited purpose of bringing it into line with the final Act. The revised statement, certified by the Clerk of the Parliaments, would be published by the Queen's Printer. The precedent for this responsibility would be the semi-editorial functions which draftsmen and Parliamentary officials already exercise in respect of such matters as headings, marginal notes and punctuation.[159] But the precedent is inexact; the adjustment of an explanatory statement might have more far-reaching consequences on the ultimate interpretation of a statute and therefore require a closer degree of Parliamentary control.

(*c*) The statement, after adjustment by officials to take account of amendments to the Bill in each House might be submitted for approval by each House on Third Reading. While this procedure would like proposal (*a*) ensure Parliamentary control, it might similarly raise problems of Parliamentary time, especially if provision were made for debating amendments to the statement.

(*d*) It might be the responsibility of the promoters (or of some specified authority, such as the Lord Chancellor) after the enactment of the Bill to lay before both Houses a draft of the adjusted explanatory statement, possibly under a procedure which would allow for approval with modifications. The pressure on Parliamentary time might be alleviated by the prior scrutiny of the revised statement by a Joint Committee of both Houses.

70. Apart from questions of Parliamentary procedure, the views of those whom we consulted through our Joint Working Paper on the proposal for an explanatory statement were divided. Some favoured the proposal; those who expressed in varying degrees a measure of doubt were chiefly concerned with two possible difficulties. First, it was feared that any device for conveying the intention of Parliament by means of two documents instead of one would be as likely to create difficulties as to resolve them and might sometimes present the courts with an irreconcilable conflict of meaning. But even if the explanatory statement were amended during the course of the Bill's passage and given some measure of Parliamentary approval, it would be no more binding on the courts than much other contextual material (e.g., other provisions of the statute, earlier legislation dealing with the same subject matter and non-statutory material dealing with the mischief) of which under the existing law the courts are entitled to take account. It might however give assistance to the courts in making more

[159] See paragraphs 41, 43 and 44 above.

explicit the contextual assumptions which at present have to be gleaned sometimes with great difficulty from a number of sources of varying reliability. No interpretative device can relieve the courts of their ultimate responsibility for considering the different contexts in which the words of a provision might be read, and in making a choice between the different meanings which emerge from that consideration. The existence of an explanatory statement would not prevent a court from regarding the meaning of the words in an enacting provision in the light of other relevant contexts as so compelling that it must be preferred to a meaning suggested by the statement. As we have already pointed out, even Continental courts, which have a much wider freedom than our courts to consider contextual material outside the statute itself, are not bound by that material.

71. The second difficulty raised by some of those who commented on our original proposal for an explanatory statement related to the time and labour which would be involved if such a statement had to be prepared for all legislation. We recognised the force of this practical objection, particularly with certain classes of major legislation, although we are inclined to think that it may be somewhat over-emphasised: first, because the practical difficulties might prove, with experience, to be less serious than they appear at first sight; secondly, because a good deal of the material which has in any event to be prepared for Notes on Clauses would be available for inclusion in, or as a basis for, the explanatory statement. However, we reached the conclusion that we should at this stage only recommend the use of an explanatory statement as a selective device, which could be adopted in relation to Bills considered by their sponsors to be appropriate for this purpose. We had particularly in mind Bills giving effect to our own reports or to those of comparable bodies such as the Law Reform Committee and the Criminal Law Revision Committee. In such a case the burden of preparing an explanatory statement would be considerably lightened by the existence of the relevant report; indeed sometimes the form of the report might make it possible to authorise in the Bill direct reference to it for purposes of interpretation, or at least to reproduce in the explanatory statement its relevant passages with any qualifications made necessary by a departure in the Bill in question from the basic rationale or specific recommendations of the committee.

72. An important advantage of applying the proposal for an explanatory statement in the first instance to selected rather than to all Acts is that it would enable Parliament to decide in each case whether the statement should be so available and, if so, subject to what safeguards. The Bill itself might of course provide for one of the methods of Parliamentary control discussed in paragraph 69 or for some other method; but these would be matters to be decided by Parliament in relation to the particular Bill. In the list of contextual material[160] to be taken into account by a court in the interpretation of a provision of a statute we therefore include any material which by that statute is authorised to be used as an aid to the interpretation of that provision. We appreciate that to provide in advance for what, irrespective of any such authorisation, Parliament would in any event by a future statute be able to effect is in a certain sense superfluous. But we think that anticipatory provision in a statute of a possible

[160] See Appendix A, Clause 1(1)(*e*).

course of action by Parliament in a future statute may be not without value, particularly as regards bodies such as the Law Commissions; they may thereby be encouraged to prepare their reports in a way facilitating the preparation of an explanatory statement for use with Bills based on the draft clauses attached to the reports. Moreover, if a particular Bill included provision for an explanatory statement as an aid to interpretation, Parliament would have the advantage of an earlier debate on the technique in principle and be able to give more attention to its propriety in the particular instance.

73. An explanatory statement would have a valuable function in connection with the various codification projects which feature prominently in the Programmes of the Law Commission and of the Scottish Law Commission[161] and which are likely to form a vital part of the work of both Commissions in the future. The object of a code is, in our understanding, to set out the essential principles which are to govern a given branch of the law. The degree of particularity in which the applications of these principles to specific situations are stated in the code may vary, but, even where detailed application is lacking, a court is expected to discover in the code the principles from which the answer to a particular problem can be worked out. In such a situation we think that an explanatory and illustrative commentary on the code could provide authoritative, but not compelling guidance on the interpretation of the code, which would be particularly valuable in the early years of the operation of the code.[162]

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[161] The Scottish Law Commission has published as Memorandum No. 8 Part I of a Draft Evidence Code for comment and criticism. The draft takes the form of Articles and Commentary. In the introduction to the Code it is explained that, although the Commentary attached to the final version of the Code will differ considerably from that presented with the Draft, it is hoped that Parliament will accept the Commentary as a legitimate extrinsic aid to the construction of the Articles. A similar technique has been adopted by the Law Commissions in their work on the Codification of the Law of Contract under Item I and the heading " Obligations " of their respective First Programmes; see also the propositions and commentary in the Working Party's Provisional Proposals relating to Termination of Tenancies (Published Working Paper No. 16 of the Law Commission) and in its Provisional Proposals relating to the Obligations of Landlords and Tenants (Parts II-IV of Published Working Paper No. 8 of the Law Commission), both sets of proposals falling under Item VIII of the Law Commission's First Programme (Codification of the Law of Landlord and Tenant).

[162] In Continental countries it is recognised that the interpretative weight of extraneous material contemporary with or preceding a code diminishes as the code develops its own momentum which tends to reduce reference to the intentions of the historical legislator.

VII TREATIES AND THE INTERPRETATION OF STATUTES

74. In Item XVII of the Law Commission's First Programme, set out in paragraph 1 above, reference was made to the difficulties which may arise when the courts are called upon to interpret legislation implementing international treaties. We have already drawn attention to the helpful decision in this field of *Salomon* v. *Commissioners of Customs and Excise*[163] but we had also to point out that the earlier ruling of the House of Lords in *Ellerman Lines* v. *Murray*[164] made it necessary for Diplock L.J. in *Salomon's Case* to limit the situations when a court can consult a treaty underlying a statutory provision to those where it is able to regard the words of the provision, irrespective of the treaty, as unclear or ambiguous.[165] However, the emphasis we would put on the necessity of examining any statutory expression in its full context (including any relevant treaty) before deciding whether it is clear and unambiguous, should help to ensure that treaties, implemented by legislation, will be duly considered by the courts and that the difficulties to which *Ellerman's Case* gave rise do not recur.

75. There remain two further questions affecting treaties and the interpretation of statutes. First, if an Act and the treaty underlying it are before a court, and a provision of the Act is susceptible of different meanings according to whether it is read in the context of the treaty or in some other context, the question arises whether the court should be given further guidance to ensure, as far as is consistent with the sovereignty of Parliament, compliance by the United Kingdom with its treaty obligations. Recent judicial pronouncements are not lacking to the effect that:

> " There is a *prima facie* presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred."[166]

In the light of our consultations we think it would be useful to embody the substance of such judicial pronouncements in a statutory form.

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[163] See n. 24 and paragraph 12 above.

[164] See n. 31 and paragraph 14 above.

[165] In *The Mecca* [1968] P. 665 Brandon J. was not satisfied that the relevant provision of the implementing Act was obscure or ambiguous, but did in fact refer to the treaty; and in *The Abadesa (No. 2)* [1968] P. 656 Karminski J. also looked at the same treaty, apparently by agreement between counsel. A contrary view was taken by Plowman J. in *Warwick Film Productions* v. *Eisinger and Others* (see n. 34 above).

[166] *Per* Diplock L.J. in *Salomon* v. *Commissioners of Customs and Excise* (n. 24 above) at p. 143. See also the same judge in *Post Office* v. *Estuary Radio Ltd.* (n. 25 above) at p. 757: " There is a presumption that the Crown did not intend to break an international treaty . . ., and if there is any ambiguity in the Order in Council, it should be resolved so as to accord with the provisions of the Convention in so far as that is a plausible meaning of the express words of the order." The earlier authorities are discussed in *Maxwell* (*op. cit.*, n. 105 above) at pp. 142 *et seq.* and in *Craies* (*op. cit.*, n. 96 above) at pp. 69–70, 461–3 and 467–8. The decision of

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76. Secondly, there is the question of the rules of interpretation to be applied by our courts to a treaty with which it has to deal either as part of the enacting provisions of a United Kingdom statute or as part of the context in which an enacting provision of a statute has to be read. We think that the clarifications and modifications which we have recommended in this Report regarding the interpretation of statutes by our courts may help to narrow any gap between the general interpretative approach of our courts and that required by international law in relation to the interpretation of treaties. Whether, or what, further guidance is required by our courts as to the principles of interpretation applicable to treaties raises questions[167] which, in the light of our consultations, we think should be considered later after the conclusion of the Diplomatic Conference on the Law of Treaties, which has been meeting in 1968 and will continue its work in 1969.[168]

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the House of Lords in *Collco Dealings Ltd.* v. *Inland Revenue Commissioners* [1962] A.C. 1 is not inconsistent with this presumption. The case concerned legislation aimed at " dividend-stripping " against a background of a series of agreements with the Irish Free State (later the Republic of Ireland) for the reciprocal exemption from income tax and supertax (later surtax) of persons resident in Great Britain or Northern Ireland on the one hand or in the Irish Free State (later the Republic of Ireland) on the other. In refusing to qualify the language of s.4(2) of the Finance (No. 2) Act 1955 in the light of the agreements, with the effect of exempting the respondents from the dividend stripping provisions, the House of Lords was in effect saying that such a qualified meaning could not—in the language later used by Diplock L.J.—" reasonably be ascribed to the legislation ", having regard to the right of " a sovereign state " to take " what steps it thinks fit to protect its own revenue laws from gross abuse, or to save its own citizens from unjust discrimination in favour of foreigners " (*per* Viscount Simonds at p. 19). See also *Corocraft Ltd.* v. *Pan American Airways Inc.* [1968] 3 W.L.R. 1273 (C.A.) where Lord Denning M.R. (at p. 1281) said, " The Warsaw Convention is an international convention which is binding in international law on all the countries who have ratified it: and it is the duty of these courts to construe our legislation so as to be in conformity with international law and not in conflict with it."

[167] It has been suggested to us that these might include: (i) the resolution of difficulties which may arise when the ordinary meaning of the text of a treaty appears to conflict with its objectives; (ii) the relevance of a treaty's preamble, annexes and related instruments, including in particular any protocols of agreed interpretation, and any material indicating that an expression was intended to carry a special meaning; (iii) the relevance of preparatory work and of subsequent practice; (iv) the interpretation of treaties which have more than one authoritative language; (v) the way in which the courts would determine a question of *international law*; (vi) the question of what text of a treaty (or of another international instrument, e.g., a resolution) is admissible in evidence; (vii) the weight to be attached to decisions of international tribunals or foreign courts interpreting the treaty in question; (viii) whether there is a need, in relation to Treaty Acts, to exclude any of the provisions of the Interpretation Act 1889.

[168] The Conference was called following the Report of the International Law Commission on the Law of Treaties (A/6309/Rev.1). The Diplomatic Conference at its first session in 1968 has dealt in Articles 27–29 of its draft with the interpretation of treaties (A/CONF.39/61/L.370/Add 4 pp. 13–14).

VIII THE INTERPRETATION OF DELEGATED LEGISLATION

77. Although this Report is primarily concerned with the interpretation of statutes we think that in principle the analysis and criticisms which we have made of statutory interpretation, and the proposals we have put forward for improvement, are also applicable to the interpretation of instruments made under the authority of statutes. Section 31 of the Interpretation Act 1889 provides that expressions in such an instrument are to be interpreted in the same way as the same expressions in the parent Act; but where there is no such coincidence of language or where, in spite of such coincidence, an intention is shown to depart in the delegated legislation from the meaning which an expression has in the parent Act, a tribunal dealing with the delegated legislation has to interpret it without the assistance of the statutory pointer to the parent Act. Although the Interpretation Act 1889 does not, apart from section 31, apply to the interpretation of delegated legislation, unless the latter incorporates its provisions by reference, it seems clear that the courts when dealing with such legislation apply the same general common law principles of interpretation[169] which they apply to statutes; indeed, a number of the cases which we have cited in illustration of the judicial view of the interpretative process have in fact been concerned with delegated rather than direct legislation. We think therefore that the emphasis which we place on the context of a provision both in and outside a statute, on wider freedom for the courts to admit such contextual material,[170] and on the importance of the general legislative purpose of Parliament and of the treaty obligations of the United Kingdom should apply also to the interpretation of delegated legislation.

78. One matter, however, concerning the interpretation of delegated legislation requires special mention. Our recommended presumption with regard to any civil action arising from breach of a statutory duty [171]; should in our view only apply to future statutes which provide for, or authorise the provision of, a duty. We have considered whether it would be possible to apply the presumption to any future delegated legislation, when made under an existing Act. This, how-

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[169] Subject to the qualification, which follows from the nature of subordinate legislation, that, if a court is faced with a choice between giving a meaning to the subordinate instrument within the authority conferred by the parent statute and a meaning which would exceed that authority, the court will no doubt prefer the first meaning. Even if a possible meaning of a provision in a subordinate instrument would not be *ultra vires* the parent statute, where an alternative meaning suggests itself in the light of the statute, the latter is likely to prevail. See Lord Herschell in *Institute of Patent Agents* v. *Lockwood* (1894) 21 R. (H.L.) 61 at p. 67; [1894] A.C. 347 at p. 360 (dealing with a case where the subordinate legislation was to have " the same effect as if they [subordinate rules] were contained in this [the parent] Act ").

[170] This freedom seems to have been at least envisaged in decision No. R (G) 3/58 of 19th May 1958 of a Tribunal of National Insurance Commissioners. The view was there taken that if the language of the regulation in question (Regulation 3 of the National Insurance (Claims and Payments) Amendment Regulations 1957 (S.I. 1957 No. 578)) had been ambiguous (which they held it was not) and if the Report of the National Insurance Advisory Committee had thrown light on the regulation (they held the Report was inconclusive) then they would have been entitled to use the Report as an aid to the interpretation of the Regulation.

[171] See paragraph 38 above.

ever, would not be practicable, since the powers conferred by existing Acts may or may not be sufficient to enable the subordinate legislation to deal with the question of the civil action.[172]

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[172] See, for example, *Gorris* v. *Scott* (1874) L.R. 9 Ex. 125 at p. 130, where Pigott B. said, with reference to the Contagious Diseases (Animals) Act 1869 and the Animals Order 1871 made thereunder: " The legislature never contemplated altering the relations between owners and carriers of cattle, except for the purposes pointed out in the Act; and if the Privy Council had gone out of their way and made provisions to prevent cattle from being washed overboard [which happened in the case owing to the failure to provide the pens required by the Order], their act would have been *ultra vires*." Similarly in *Phillips* v. *Britannia Hygienic Laundry Co.* [1923] 2 K.B. 832 (C.A.) at p. 842 Atkin L.J., in deciding whether the plaintiff had a remedy in damages for loss caused by the defendants' breach of the Motor Cars (Use and Construction) Order 1904 made under the Locomotives on Highways Act 1896, said: " It is not likely that the Legislature, in empowering a department to make regulations for the use and construction of motor cars, permitted the department to impose new duties in favour of individuals and new causes of action for breach of them in addition to the obligations already well provided for and regulated by the common law of those who bring vehicles upon highways. In particular it is not likely that the Legislature intended by these means to impose on the owners of vehicles an absolute obligation to have them roadworthy in all events even in the absence of negligence."

IX SUMMARY OF CONCLUSIONS AND RECOMMENDATIONS

79. We recognise that any examination of our system of interpreting legislation with a view to its reform must be of a rather different character from the enquiries which we undertake in other branches of the law and with a different aim. Under our constitutional arrangements it is the function of an independent judiciary to interpret the law and no proposals which we may make can or should undermine the freedom which this function requires. It is doubtless with this consideration in mind that Lord Devlin has written:[173]

> " The law is what the judges say it is. If the House of Lords were to give to an Act of Parliament a meaning which no one else thought it would reasonably bear, it is their construction of the words used in preference to the words themselves that would become the law."

In line with this reasoning the further conclusion may be drawn that statutory interpretation:

> " is what is nowadays popularly called a non-subject. I do not think that law reform can really grapple with it. It is a matter for educating the Judges and practitioners and hoping that the work is better done."[174]

Some of those whom we consulted through our Joint Working Paper have in fact suggested that the main purpose of an examination of the interpretation of statutes should be to make some contribution, through analysis and constructive criticism of the existing law and practice, to this educational process, rather than to formulate proposals for legislative intervention. We have endeavoured to meet in some degree this point of view by providing a more extended exposition of the whole topic than we would normally think necessary when presenting proposals for reform in other spheres.

80. The basic conclusions which we draw from this exposition are as follows:

(*a*) The meaning of a provision in a legislative instrument[175] is the meaning which it bears in the light of its intended context;

(*b*) In ascertaining the intended context of a provision reference may be made not only to the ordinary use of words and the rules of grammar, as well as to the setting provided by the instrument in which the provision is placed, but also to certain other assumptions on the basis of which the legislator may have made the provision;

(*c*) There is a tendency in our systems, less evident in some recent decisions of the courts but still perceptible, to over-emphasise the literal meaning of a provision (i.e., the meaning in the light of its immediate and obvious context) at the expense of the meaning to be derived from

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[173] *Samples of Lawmaking*, p. 2.

[174] Lord Wilberforce, 277 H.L. Deb. ser. 5, col. 1294, 16th November, 1966.

[175] The expression is intended to cover not only an Act but also an instrument made under the authority of a statute or under the prerogative powers of the Crown. In *Post Office* v. *Estuary Radio Ltd.* (n. 25 above), for example, the Court of Appeal had to construe the Territorial Waters Order in Council 1964, which " deals with a subject-matter which lies within the prerogative power of the Crown, videlicet a claim to exercise territorial sovereignty over an area of the sea adjacent to our shores " (*per* Diplock L.J. at p. 755).

other possible contexts; the latter include the " mischief " or general legislative purpose, as well as any international obligation of the United Kingdom, which underlie the provision;

(*d*) Common law presumptions as to the intent of Parliament may have a decisive influence on the meaning given to a provision, but they cannot, owing to their often indefinite scope and the indeterminate character of their inter-relationship, be regarded as binding. Particular difficulty has arisen with regard to the imputation of *mens rea* in a criminal statute (which is the subject of a separate enquiry by the Law Commission) and of a civil action for damages in case of breach of a duty imposed by a legislative instrument.

81. We accept nevertheless the argument summarised in paragraph 79 to the extent that we do not propose any comprehensive statutory enumeration of the factors to be taken into account by the courts in the interpretation of legislation; even in countries with the most highly codified systems the principles of interpretation largely rest on a body of flexible doctrine developed by legal writers and by the practice of the courts.[176] We think however that a limited degree of statutory intervention is required in this field for four purposes, which, although already stated at various points in this Report, it may be helpful here to summarise as follows:

(*a*) to clarify, and in some respects to relax the strictness of, the rules which, in the determination by our courts of the proper context of a provision, exclude altogether or exclude when the meaning is otherwise unambiguous, certain material from consideration;

(Paragraphs 14, 33, 41–62; 74;
Appendix A, Clause 1)

(*b*) to emphasise the importance in the interpretation of a provision of
(i) the general legislative purpose[177] underlying it

(Paragraphs 22–27, 32–3;
Appendix A, Clause 2(*a*))

(ii) the fulfilment of any relevant international obligation of Her Majesty's Government in the United Kingdom;

(Paragraph 75;
Appendix A, Clause 2(*b*))

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[176] Among Commonwealth jurisdictions it is noteworthy that not even the unusually detailed provisions of section 8(5) of the Nova Scotia Interpretation Act 1967 purport to be comprehensive. The sub-section provides: " Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering *among other matters*: (*a*) the occasion and necessity for the enactment; (*b*) the circumstances existing at the time it was passed; (*c*) the mischief to be remedied; (*d*) the object to be attained; (*e*) the former law, including other enactments upon the same or similar subjects; (*f*) the consequences of a particular interpretation; (*g*) the history of legislation on the subject". (our italics)

[177] It will be observed that we do not here use the expression "mischief", although in the historical and descriptive passages of this Report we have frequently made use of it. In a modern statement of the law we prefer to avoid words which, at least for the layman, have an archaic ring. Even for the lawyer the expression is unsatisfactory. It tends to suggest that legislation is only designed to deal with an evil and not to further a positive social purpose. Furthermore, it seems too narrow to speak of the "mischief of the statute". The general legislative purpose underlying a provision may emerge from a series of statutes dealing with the same subject matter (see n. 109 above), or from other indications of that purpose referred to in paragraph 46 above.

(*c*) to provide assistance to the courts in ascertaining whether a provision is or is not intended to give a remedy in damages to a person who suffers loss as a result of a breach of an obligation created by that provision;

(Paragraphs 38 and 78;
Appendix A, Clause 4)

(*d*) to encourage the preparation in selected cases of explanatory material for use by the courts, which may elucidate the contextual assumptions on which legislation has been passed.

(Paragraphs 63–73;
Appendix A, Clause 1(1)(*e*))

82. We have not dealt in this Report with the revision of the Interpretation Act 1889, although a number of those whom we consulted on the basis of our Joint Working Paper suggested that this was overdue.[178] We agree that this Act requires early consideration, but in this Report we have given attention to the general principles of interpretation rather than to the conventions or shorthand of particular legislative expressions with which the Interpretation Act is largely concerned. The revision of the Act is a task which of its nature closely involves the Parliamentary draftsmen and is dependent on their available manpower. We do not think however that our legislative proposals must necessarily await implementation until the Interpretation Act is revised, although the relevant provisions might later be reallocated to an appropriate place in the revised Act.

(*Signed*) LESLIE SCARMAN, *Chairman,*
Law Commission.
L. C. B. GOWER.
NEIL LAWSON.
NORMAN S. MARSH.
ANDREW MARTIN.

J. M. CARTWRIGHT SHARP, *Secretary.*

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Scottish Law Commission.
A. E. ANTON.
JOHN M. HALLIDAY.
ALASTAIR M. JOHNSTON.
T. B. SMITH.

A. G. BRAND, *Secretary.*

28*th April*, 1969.

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[178] Our attention was drawn, for example, to the Interpretation Act (Northern Ireland) 1954 (see W. A. Leitch, First Parliamentary Draftsman, Northern Ireland, " The Interpretation Act—Ten Years Later ", (1965) 16 *Northern Ireland L.Q.*, pp. 215–238). Other recent legislation on this topic in Common Law jurisdictions includes the Canadian Interpretation Act 1967 (replacing the Interpretation Act 1952) and the Hong Kong Interpretation and General Clauses Ordinance 1966. The preparation of a new Interpretation Act is one of the topics which has been undertaken by the New South Wales Law Reform Commission.

APPENDIX A

DRAFT CLAUSES

Aids to interpretation.

1.—(1) In ascertaining the meaning of any provision of an Act, the matters which may be considered shall, in addition to those which may be considered for that purpose apart from this section, include the following, that is to say—

(*a*) all indications provided by the Act as printed by authority, including punctuation and side-notes, and the short title of the Act;

(*b*) any relevant report of a Royal Commission, Committee or other body which had been presented or made to or laid before Parliament or either House before the time when the Act was passed;

(*c*) any relevant treaty or other international agreement which is referred to in the Act or of which copies had been presented to Parliament by command of Her Majesty before that time, whether or not the United Kingdom were bound by it at that time;

(*d*) any other document bearing upon the subject-matter of the legislation which had been presented to Parliament by command of Her Majesty before that time;

(*e*) any document (whether falling within the foregoing paragraphs or not) which is declared by the Act to be a relevant document for the purposes of this section.

(2) The weight to be given for the purposes of this section to any such matter as is mentioned in subsection (1) shall be no more than is appropriate in the circumstances.

(3) Nothing in this section shall be construed as authorising the consideration of reports of proceedings in Parliament for any purpose for which they could not be considered apart from this section.

Principles of interpretation.

2. The following shall be included among the principles to be applied in the interpretation of Acts, namely—

(*a*) that a construction which would promote the general legislative purpose underlying the provision in question is to be preferred to a construction which would not; and

(*b*) that a construction which is consistent with the international obligations of Her Majesty's Government in the United Kingdom is to be preferred to a construction which is not.

Application to subordinate legislation.

3. Sections 1 and 2 above shall apply with the necessary modifications in relation to Orders in Council (whether made by virtue of any Act or by virtue of Her Majesty's prerogative) and to orders, rules, regulations and other legislative instruments made by virtue of any Act (whether passed before or after this Act), as they apply in relation to Acts.

Presumption as to enforcement of statutory duty.

4. Where any Act passed after this Act imposes or authorises the imposition of a duty, whether positive or negative and whether with or without a special remedy for its enforcement, it shall be presumed, unless express provision to the contrary is made, that a breach of the duty is intended to be actionable (subject to the defences and other incidents applying to actions for breach of statutory duty) at the suit of any person who sustains damage in consequence of the breach.

APPENDIX B

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Bar Council of Northern Ireland	
Board of Inland Revenue	
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Maître André Garnault	Avocat, Paris
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APPENDIX C

A select bibliography of material on the interpretation of statutes published in Australia and New Zealand, Canada and the United States of America, and of Scandinavian material available in English

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