

*** *Page 082 - Part II*

Statutory Interpretation

*** *Page 083 - Chapter Eight*

The Technique of Statutory Interpretation

This introductory chapter to Part II aims to describe the common-law technique of statutory interpretation. Before we get started, a fundamental question should be addressed. Why is such a technique necessary?

On the continent of Europe, which follows the civil law, this necessity is not felt. There the words of legislation are considered approximate. They do not have to mean what they say, even if what they say is clear. They are a mere starting point for flights by the judges. The function of the legislator is to sketch out some ideas. Filling them in, refining them, and shaping them for real life is the job of the judge and administrator. Their literal meaning is not decisive, and therefore time need not be wasted in attempting to formulate interpretative techniques.

Countries which have inherited the common law system see things differently. Despite the fact that it was their judges who created the common law, they now prefer to be ruled by a democratic legislature. Its members are people they voted for. Its Acts are passed after full debate, carried out in public. Almost every word in every Act is weighed and argued over through successive legislative stages. So it matters how these Acts are interpreted by the courts.

It follows that in common-law systems there is a technique of statutory interpretation, though admittedly it is little understood. Indeed many people, including most judges and advocates, do not wholeheartedly accept that the technique exists, let alone attempt to practise it. This is scarcely their fault, since usually they have not been taught it. Indeed up until now, the technique can hardly be said to have been worked out. The function of this Part, which is based on the more detailed treatment in the author's book *Statutory Interpretation* (Butterworths 1984, Supplement 1989), is to present the working out of such a technique.

With the advance of the European Community, it may be thought a little late in the day to present such a thesis as this. Better late than never. There is still time for people to reflect on how, and by whom, they wish to be governed.

To construe or interpret?

We began with a trivial argument: Is there any material distinction between construction and interpretation? The answer is no. The terms are interchangeable, though it is more natural to speak of interpreting a word or phrase and construing an extended passage. Bentham said: 'People in general when they speak of a Law and a Statute are apt to mean the same thing by the one as by the other. So are they when they speak of construing and interpreting' (Bentham 1775, p 9).

Interpretation perhaps connotes, more than construction does, the idea of determining the *legal* meaning of an enactment. Construction is more concerned with extracting the *grammatical* meaning, which may not be the same. This important distinction is discussed below (see pp 87-91)

The enactment as the unit of enquiry

The concept of the *enactment* is central to statutory interpretation.

Nature of an enactment

An enactment is a *proposition* expressed in an Act or other legislative text. The effect of the proposition is that, when facts fall within an indicated area (the factual outline), then specified legal consequences (the legal thrust) ensue. Difficulties about meaning are usually centred on one proposition only, though the full meaning of a legislative provision often cannot be gained without considering numerous aspects of the legal system.

An enactment consists of express words, though it is likely to have implied meanings as well. While a single word may come under examination as the root of an ambiguity or other obscurity, a word in itself can have little significance. Every word needs a verbal context to raise any question of its meaning. The enactment provides this.

Usually an enactment consists of either of the whole or part of a single sentence. One sentence may thus contain two or more enactments. On the other hand a single legislative proposition may fall to be collected from two or more sentences, whether consecutive or not. The provision in the Interpretation Act 1889, s 35(1) that 'any enactment may be cited by reference to the section or subsection of the Act in which the enactment is contained' (not reproduced in the Interpretation Act 1978) is itself an example of an enactment.

The unit of enquiry is an enactment whose legal meaning in relation to a particular factual situation falls to be determined. Where the combined effect of two or more enactments is in question, each in turn is treated as a unit of enquiry, their combined legal effect then falling to be determined. To discover which are the relevant enactments, it is necessary to frame the question of law at issue

in the particular case. The significant legislative words then have to be isolated.

For this purpose the statute user must develop a technique of skimming through a legislative provision and mentally picking out the portions that matter in the case before him. If his mind can learn to blot out the irrelevant words, the remainder will often read continuously and make sense on their own. Thus in *Riley v A- G of Jamaica* [1983] 1 AC 719, 730 Lord Scarman cited an enactment in a form he described as 'trimmed of words inessential for present purposes'. Isolating the relevant enactment in this way often calls for use of the technique of selective comminution, described below (P 235).

How the enactment is drawn

In ascertaining the legal meaning of an enactment it is necessary to determine whether the drafting is precise or imprecise. Modern British Acts are produced by *precision drafting*, where (although there are occasional lapses) the drafter aims to use language accurately and consistently, and moreover is allowed to draft any amendments made to the Act during its parliamentary progress. Older Acts are frequently the subject of *disorganised composition*. Here the text may be the product of many hands and the language is often confused and inconsistent. Delegated legislation may be drafted with less precision than Acts. The technique of interpretation applied to any enactment can only be as precise and exacting as the method of drafting permits.

It is to be presumed, unless the contrary appears, that the enactment was competently drafted, so that the accepted principles of grammar, syntax and punctuation, and other literary canons, are taken to have been observed and the drafter is presumed to have executed his task with due knowledge of the relevant law (*Spillers Ltd v Cardiff Assessment Committee* [1931] 2 KB 21, 43; *New Plymouth Borough Council v Taranack Electric Power Board* [1933] AC 680, 682). This principle is expressed in the maxim *omnia praesumuntur rite et solemniter esse acta* (all things are presumed to be correctly and solemnly done).

The factual outline

An enactment lays down a legal rule in terms showing that the rule is triggered by the existence of certain facts. The enactment indicates these facts in outline form (the factual outline). All sets of facts that fall within the outline thus trigger the legal thrust of the enactment, unless by an authoritative decision (known as dynamic processing) the court modifies, or has previously modified, the literal meaning of the factual outline in order to carry out what it considers the true intention of Parliament.

Where the court finds it necessary to narrow the factual outline because its literal meaning goes wider than Parliament's intention, the court indicates what the narrower outline is. Alternatively, the statutory factual outline may be thought to need clarification by the court. Either way, the court processes the enactment by laying down a sub-rule from which can be drawn a description of the narrower or more precise range of facts that will in future cases trigger the operation of the enactment. Often the factual outline will show that both physical and mental facts have to be present. In criminal law the terms *actus reus* and *mens rea* are traditionally used, though they have been frowned on by the House of Lords (*R v Miller* [1983] 2 AC 161, 174).

We may take as an example of a factual outline the Criminal Damage Act 1971, s 1(1), which specifies several offences. A selective comminution of one of these reads: 'A person who without lawful excuse damages any property belonging to another, being reckless as to whether any such property would be damaged, shall be guilty of an offence.'

Here the factual outline can be set out as follows:

- 1 The *subject* is any person with criminal capacity, the last three words being implied by virtue of the presumption that relevant legal rules are intended to be attracted (see pp 178-181 below).
- 2 The *actus reus* is without lawful excuse damaging any property belonging to another.
- 3 The *mens rea* is being reckless as to whether any such property would be damaged.

The factual outline of a legal rule may contain alternatives, in the sense that the same legal thrust applies in two or more factual situations. Lord Diplock gave the example of buggery at common law 'which could be committed with a man *or* a woman *or* an animal' [*R v Courtie* [1984] 2 WLR 330, 335).

The statutory factual outline is often too wide for juridical purposes. Grammatically it includes, or may be thought to include, some factual situations which are, and others which are not, intended to trigger the operation of the enactment. Alternatively, the statutory factual outline may be thought to need clarification, for example, by the finding of implications as to mental states. In either case it is for the court to determine the sub-rules which lay down the boundary or clarify the provision.

In a particular case the *relevant* factual outline identifies the situations which, in relation to the legal rule or sub-rule in question, are material on the actual facts. For example, if a man charged with murder claimed to be absolved because what he admittedly maliciously killed was a person born an idiot, any enquiry as to the law would be concerned only with whether the crime of murder extends to the killing with malice aforethought of persons who are congenital idiots.

It is the function of a court accurately to identify this area of

relevance. The basis of the doctrine of precedent is that like cases must be decided alike. This requires a correct identification of the factual outline that triggers the statutory rule on actual facts such as are before the court. In his book *Precedent in English Law*, Sir Rupert Cross insisted that under the doctrine of precedent, judgments must be read in the light of the facts of the cases in which they are delivered (Cross 1977, p 42). The principle is the same whether the case is decided under a rule of common law or statute law.

Judicial statements of principle must be related to the facts of the instant case, but the juristic function of the court is to *generalize* those facts. The *ratio decidendi* of a case involves postulating a general factual outline. This is part of the rule laid down or followed by the case, since a legal rule imports a factual situation to which it applies. If the facts of a later case fit within this outline but demand amendment of the legal thrust of the rule, the outline is too broadly stated. If on the other hand the facts of a later case do not fit into the outline, but elicit the same legal response, the outline is too narrow.

The legal thrust of an enactment

The legal thrust is the effect in law produced by the enactment where the facts of the instant case fall within the factual outline. Problems of statutory interpretation concern either the exact nature of the factual outline, or the exact nature of the legal thrust, or both. Respectively, these turn on *when* the enactment operates and *how* it operates. In criminal law the legal thrust of an enactment is usually expressed by saying that where the factual outline is satisfied the person in question is guilty of an offence. The legal consequences of this by way of punishment and so forth may be spelt out or left to the general law.

The legal thrust of a non-criminal enactment may be more complex, and thus give rise to more difficult questions of statutory interpretation. For an illustration we may take *Inland Revenue Commissioners v Hinchy* [1960] AC 748. This turned on the meaning of a phrase in the Income Tax Act 1952, s 25(3) which expressed the legal thrust of the provision. Lord Reid said (p 766):

I can now state what I understand to be the rival contentions as to the meaning of section 25(3). The appellants contend that 'treble the tax which he ought to be charged under this Act' means treble his whole liability to income tax for the year in question . . . It is not so easy to state the contrary contention briefly and accurately.

Legal meaning and grammatical meaning of an enactment

The interpreter's duty is to arrive at the *legal* meaning of the enactment, which is not necessarily the same as its grammatical

(or literal) meaning. There is a clear conceptual difference between grammatical meaning apart from legal considerations and the overall meaning taking those considerations into account. While it may sometimes be difficult to draw in practice, this distinction is basic in statutory interpretation.

The legal meaning of an enactment must be arrived at in accordance with the rules, principles, presumptions and canons which govern statutory interpretation (in this book referred to as the interpretative criteria or guides to legislative intention). They are described in the four following chapters.

By applying the relevant interpretative criteria to the facts of the instant case, certain interpretative *factors* will emerge. These may pull different ways. For example the desirability of applying the clear grammatical meaning may conflict with the fact that in the instant case this would not remedy the mischief that Parliament clearly intended to deal with. In such cases a balancing operation is called for. In a particular case the legal meaning of an enactment will usually be found to correspond to the grammatical meaning. If this were never so, the system would collapse. If it were always so, there would be no need for books on statutory interpretation. Where it is not so, the enactment is being given a *strained* construction.

Real doubt as to legal meaning

There may be doubt as to whether the legal meaning does or does not correspond to the grammatical meaning. There may even be doubt as to what is the grammatical meaning, for language is always prone to ambiguity.

The law will pay regard to such doubt only if it is *real*. If, on an informed interpretation, there is no real doubt that a particular meaning of an enactment is to be applied, that is to be taken as its legal meaning. If there is real doubt, it is to be resolved by applying the interpretative criteria. For this purpose a doubt is 'real' only where it is substantial, and not merely conjectural or fanciful. As Lord Cave LC said, no form of words has ever yet been framed with regard to which some ingenious counsel could not suggest a difficulty (*Pratt v South Eastern Railway* [1897] 1 QB 718, 721). Judges thus need to be on guard against the plausible advocate. They also need to guard against being too clever themselves. Lord Diplock pointed out that where the meaning of the statutory words is plain 'it is not for the judges to invent fancied ambiguities' (*Duport Steels v Sirs* [1980] 1 WLR 142, 157). The main causes of doubt, or doubt-factors, are examined in Part III.

Nature of the grammatical meaning

The grammatical (or literal) meaning of an enactment is its linguistic

meaning taken in isolation. This is the meaning it bears when, as a piece of English prose, it is construed according to the rules and usages of grammar, syntax and punctuation, and the accepted linguistic canons of construction applicable to prose generally. There are often difficulties in arriving at the grammatical meaning, even before legal questions are considered. Pollock CB said: 'grammatical and philological disputes (in fact all that belongs to the history of language) are as obscure and lead to as many doubts and contentions as any question of law' (*Waugh v Middleton* (1853) 8 Ex 352, 356).

Ambiguity

Though judges sometimes use it in a wider sense, the term 'ambiguity' should be reserved for cases where there is more than one meaning that is grammatically apt. The drafter has produced, whether deliberately or inadvertently, a text which from the grammatical viewpoint is capable, on the facts of the instant case, of bearing either of the opposing constructions put forward by the parties. It may be a *semantic ambiguity* (caused by the fact that one word can in itself have several meanings), a *syntactic ambiguity* (arising from the grammatical relationship of words as they are chosen and arranged by the drafter), or a *contextual ambiguity* (where there is conflict between the enactment and its internal or external context).

Another subdivision is between *general ambiguity*, where the enactment is ambiguous quite apart from any particular set of facts, and *relative ambiguity*, where it is ambiguous only in relation to certain facts.

An example of general ambiguity came before the Court of Appeal in *Leung v Garbett* [1980] 1 WLR 1189. This concerned provisions relating to arbitration in the County Courts Act 1959, s 92(1), which said the judge 'may, with the consent of the parties, revoke the reference [to arbitration] or order another reference to be made.' Did the qualifying phrase 'with the consent of the parties' govern both limbs or only the first? It may be thought there is no ambiguity at all, and that the structure and punctuation of the sentence indicate that the qualifying phrase applied to both limbs. Yet the Court of Appeal held otherwise. As an example of relative ambiguity we may take the Finance Act 1975, Sched 5, para 3(1), of which Viscount Dilhorne LC said: I do not think the words 'interest in possession in settled property' are equally open to diverse meanings. It is the determination of the application of those words to particular circumstances which give rise to difficulty.' (*Pearson v IRC* [1981] AC 753, 771.)

Semantic obscurity and the 'corrected version'

Where, either generally or in relation to the facts of the instant case, the wording of the enactment is disorganised, garbled or

otherwise semantically *obscure*, the interpreter must go through a two-stage operation. It is first necessary to determine what was the intended grammatical formulation. The version of the enactment thus arrived at may be referred to as 'the corrected version'. The interpretative criteria are then applied to the corrected version as if it had been the actual wording of the enactment.

As our first example we may take the House of Commons Disqualification Act 1975, s 10(2), which says that the enactments 'specified in Schedule 4 to this Act' are repealed. The Act contains no Sched 4. It does however have Sched 3, which is headed 'Repeals'. Other internal evidence confirms that Sched 3 is the one intended. The court will apply a corrected version referring to the enactments 'specified in Schedule 3'.

With some garbled texts, like that in the previous example, it is quite obvious what the corrected version should be. In other cases it may be less clear, and the court must do the best it can. The considerations involved may be complex.

It is a well-known fact that in a trial on indictment the accused pleads either guilty or not guilty. If he pleads guilty there is no verdict because he is not put in charge of the jury. So an enactment worded as if there were *always* a verdict in a trial on indictment is bound to be obscure. This was the case with the Criminal Appeal Act 1907, s 4(3), which said:

On an appeal against sentence the Court of Criminal Appeal shall, if they think that a different sentence should have passed, quash the sentence passed at the trial, and pass such other sentence warranted in law *by the verdict*. . . as they think ought to have been passed.

In *R v Ettridge* [1909] 2 KB 24, 28 the court hearing an appeal against sentence by a prisoner who had pleaded guilty rectified s 4(3) by deleting the words 'by the verdict'. The court claimed the right to 'reject words, transpose them, or even imply words, if this be necessary to give effect to the intention and meaning of the Legislature'. (For further examples of garbled texts see pp 256-263).

Literal or strained construction?

Where the grammatical meaning of an enactment is clear, to apply that meaning is to give it a literal construction. Where on the other hand the grammatical meaning is obscure, giving the enactment a literal construction involves applying the grammatical meaning of the corrected version. If (in either case) a literal construction does not correspond to the legislative intention it becomes necessary instead to apply a *strained* construction in order to arrive at the legal meaning of the enactment.

Where the enactment, or (in the case of grammatical obscurity) its corrected version, is not ambiguous the question for the interpreter therefore is: shall it be given a literal or strained construction in

arriving at the legal meaning? Where the enactment is ambiguous the questions are first, which of the ambiguous meanings is more appropriate in arriving at a literal construction, and second, should it in any case be given some other (strained) meaning? As Mackinnon LJ said in *Sutherland Publishing Co v Caxton Publishing Co* [1938] Ch 174, 201: 'When the purpose of an enactment is clear, it is often legitimate, because it is necessary, to put a strained interpretation upon some words which have been inadvertently used . . . '

In the later case of *Jones v DPP* [1962] AC 635, 668 Lord Reid appeared to contradict this by saying: 'It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of the provision cannot reasonably bear . . . '. In this conflict Lord Reid must be adjudged wrong and Mackinnon LJ right. There are very many decided cases where courts have attached meanings to enactments which in a grammatical sense they cannot reasonably bear. Sometimes the arguments against a literal construction are so compelling that even though the words are not, within the rules of language, capable of another meaning they must be given one. To assert, in the face of the innumerable cases where judges have applied a strained construction, that there is no power to do so is to infringe the *principium contradictionis*, or logical principle of contradiction.

In former times the practice of giving a strained meaning to statutes was known as 'equitable construction'. This term had no more than an oblique reference to the technical doctrines of equity, but mainly indicated a free or liberal construction.

Since, in the light of the interpretative criteria which apply to a particular enactment, its legal meaning may be held to correspond either to the grammatical meaning or to a strained meaning, it follows that the legal meaning of a particular verbal formula may differ according to its statutory context (*Customs and Excise Comrs v Cure & Deeley Ltd* [1962] 1 QB 340, 367). Automatic literalism is rejected in modern statutory interpretation. Legislative intention is always the ultimate guide to legal meaning, and this varies from Act to Act.

Filling in textual detail by implications

Parliament is presumed to intend that the literal meaning of the express word of an enactment is to be treated as elaborated by taking into account all implications which, in accordance with the recognised guides to legislative intention, it is proper to treat the legislator as having intended. Accordingly, in determining which of the opposing constructions of an enactment to apply in the factual situation of the instant case, the court seeks to identify the one that embodies the elaborations intended by the legislator. Implications arise either because they are directly suggested by

the words expressed or because they are indirectly suggested by rules or principles of law not disappplied by the words expressed. In ordinary speech it is a recognised method to say expressly no more than is required to make the meaning clear (the obvious implications remaining unexpressed). The drafter of legislation, striving to be as brief as possible and use ordinary language, adopts the same method. The distinguished American drafter Reed Dickinson observed, 'It is sometimes said that a draftsman should leave nothing to implication. This is nonsense. No communication can operate without leaving part of the total communication to implication.' (Dickerson 1981, p 133.)

An implication cannot properly be found which goes against an express statement: *expressum facit cessare taciturn* (statement ends implication). So it is not permissible to find an implied meaning where this contradicts the grammatical meaning. Where the court holds that the legal meaning of an enactment contradicts the grammatical meaning, it is not finding an implication but applying a strained construction.

So far as implications are relevant in the case before it, the court treats the enactment as if it were worded accordingly. As Coleridge J said in *Gwynne v Burnett* (1840) 7 Cl & F 572, 606: 'If ... the proposed addition is already necessarily contained, although not expressed, in the statute, it is of course not the less cogent because not expressed.'

Parliament acknowledges its reliance on implications by occasionally including in its Acts an express statement that a particular implication is not to be taken as intended (see for example the Administration of Justice Act 1960, s 12(4)).

The device of leaving unsaid some portion of what the drafter means is known as ellipsis. It is discussed at length in chapter 15.

Must an implication be 'necessary'?

The question of whether an implication should be found within the express words of an enactment depends on whether it is proper, having regard to the accepted guides to legislative intention, to find the implication; and not on whether the implication is 'necessary'.

It is sometimes suggested by judges that only necessary implications may legitimately be drawn from the wording of Acts (see, eg *Salomon v Salomon* [1897] AC 22, 38). This is too narrow. The necessity referred to could only be *logical* necessity, but requirements of logic are not the only criteria in determining the legal meaning of a text. While the implications intended are a matter of inference, it is often psychological rather than logical inference that is involved.

The principle was accurately stated by Willes J when he said that the legal meaning of an enactment includes 'what is necessarily

or properly implied' by the language used (*Chorlton v Lings* (1868) LR 4 CP 374, 387).

Must an implication be 'obvious'?

Another way the rule is sometimes put by judges is that the implication must be 'clear' or 'obvious'. Thus in *Temple v Mitchell* (1956) SC 267, 272 Lord Justice-Clerk Thomson said: "There is no express provision, and I cannot discover any clear implication'. This is also open to objection. Courts of construction are not usually troubled with a 'clear' provision. On the contrary they exist to give judgment where the law is not clear but doubtful. There is likely to be a fine balance to be struck where one side claims that a particular implication arises and their opponents deny it.

Implications affecting related law

The fact that Parliament has by an enactment declared its express intention in one area of law may carry an implication that it intends corresponding changes in related areas of law, or in relevant legal policy. The courts accept that where a legislative innovation is based on a point of principle, the effect of receiving it into the body of the law may be to treat the principle in question as thereafter embodied in general legal policy. Thus Acts such as the Race Relations Act 1976, the Sex Discrimination Act 1975 and the Equal Pay Act 1970 are taken to indicate that it has become the general policy of the law to counter the relevant types of injurious personal discrimination whenever opportunity offers. Lord Morris of Borth-y-Gest said:

... by enacting the Race Relations Acts 1965 and 1968 Parliament introduced into the law of England a new guiding principle of fundamental and far-reaching importance. It is one that affects and must influence action and behaviour in this country within a wide-ranging sweep of human activities and personal relationships. (*Charter v Race Relations Board* [1973] AC 868, 889. Cf the remarks by Lord Denning MR on the effect of the European Communities Act 1972 in *Re Westinghouse Uranium Contract* [1978] AC 547, 546.)

On questions of personal morality the courts tend not to follow Parliament's lead (eg *R v City of London Coroner, ex pane Barber* [1975] Crim LR 515 (eg decriminalisation of suicide) *Knüller v DPP* [1973] AC 435 (decriminalisation of homosexual practices)).

The enactment and the facts

The court is not required to determine the meaning of an enactment in the abstract, but only when applied to the relevant facts of the

case before it. The question for the court is whether or not these facts fall within the legal outline laid down by the enactment, and if so what the legal trust of the enactment is.

Because the court exercises the judicial power of the state, it has a two-fold function. First it is required to decide the *Us*, that is the dispute between the parties who are before it in the instant case. Secondly it has the duty, so that justice according to law may be seen to be done and the law in question may be known, of indicating the legal principle held to be determinative of the *Us*.

That an enactment may have fundamentally different meanings in relation to different facts was recognised by Lord Brightman in a dictum on the Statutes of Limitation: 'A limitation Act may. . . be procedural in the context of one set of facts, but substantive in the context of a different set of facts.' (*Yew Bon Tew v Kenderaan Bas Mara* [1983] AC 553, 563).

So the practical question for the court is not what does this enactment mean in the abstract, but what does it mean *on these facts*? The point was concisely put by Lord Somervell of Harrow:

A question of construction arises when one side submits that a particular provision of an Act covers the facts of the case and the other side submits that it does not. Or it may be agreed it applies, but the difference arises as to its application. (*A-G v Prince Ernest Augustus of Hanover* [1957] AC 436, 473.)

Relevant and irrelevant facts

As we have seen, the operation of the enactment is triggered by a particular factual situation comprised in the factual outline. This statutory description must be 'transferred' to the material facts of the instant case or, as it were, fitted over them to see if it corresponds. Here it is important to grasp exactly which facts are relevant. It is necessary to separate material from immaterial facts.

Many of the actual facts of a case are irrelevant. The name of a party is irrelevant (unless a question of identity is in issue). The particular moment when an incident happened is irrelevant (unless time is of the essence), and so on. It requires skill to determine, in relation to the triggering of a particular enactment, which actual fact is a relevant fact. While a fact may be relevant, it may still be necessary to strip it of its inessential features in order to arrive at its juristic significance. This is particularly true where the decision on that fact later comes to be treated as a precedent. Where the enactment is very simple, the facts which trigger it can be stated very simply. Caution is always necessary however.

The Murder (Abolition of Death Penalty) Act 1965, s 1 says 'No person shall suffer death for murder.' The statutory factual outline might be stated as 'a conviction of murder'. This would

not be strictly accurate however, since the enactment does not apply to convictions anywhere in the world. After referring to the extent provision in the 1965 Act, namely s 3(3), we arrive at the following as the statutory factual outline: 'a conviction of murder by a court in Great Britain, or by a court-martial in Northern Ireland.'

Where a court articulates the meaning of an enactment but describes the generalised facts in terms that are too wide, its decision, to the extent that it is expressed too widely, will be of merely persuasive authority. A court decision can be a binding precedent only in relation to similar facts, that is facts that do not *materially* differ from those of the instant case. In a particular case a fact is not necessarily relevant merely because it is within the statutory factual outline. The total factual outline usually has only a partial application.

Section 9 (drink driving) of the Road Traffic Act 1972, says that in certain circumstances a person may be 'required' to provide a specimen for a laboratory test, and that if without reasonable excuse he refuses, he commits an offence. In *Hier v Read* [1977] Crim LR 483 the defendant D, having been required to provide a specimen, was first asked to sign a consent form. He refused to sign the form without reading it first, but the opportunity to do this was refused by the police. *Held* a requirement to provide a specimen after signing a consent form which one is not allowed to read is not a 'requirement' within the meaning of the Act. Accordingly no offence was committed.

This case called for a careful assessment of just what the factual outline was. It was important to avoid confusion of thought. For example it might have been said that the behaviour of the police in refusing to allow D to read the consent form furnished him with a 'reasonable excuse' as contemplated by s 9. This would have been faulty reasoning, because that stage was never reached. On the facts, there had not been any valid 'requirement'. A full statement of the factual outline of what is a 'requirement' within the Road Traffic Act 1972, s 9 would run to many pages. All that was needed here was a statement dealing solely with cases where the defendant is asked to sign a consent form which he is not allowed to read. Once it is clear that, whatever the full factual outline may be, the instant case is outside it the matter is concluded.

Proof of facts

Usually a case contains a mass of facts. Most of these are irrelevant to the legal issues involved. The art of the advocate is to analyse the facts and present them in a way which strips them of irrelevant detail. If any are in dispute the analysis can initially be presented in the alternative. When the court determines the disputed facts the advocate may, if the determination is made by a judge or other

legally-qualified functionary, have an opportunity of crystallising his legal argument by reference to the facts as so found.

Matters of fact and degree

Where facts are ascertained, the question of whether they fit the factual outline and so trigger the legal thrust of the enactment may not have an obvious answer. It is then what is called a matter of fact and degree. Such matters depend on the view taken by the fact-finding tribunal. If the tribunal has directed itself properly in law and reached its decision in good faith, the decision is beyond challenge.

A matter of fact and degree marks the limit of statutory interpretation. After the relevant law has been ascertained correctly, it becomes a question for the judgment of the magistrate, jury, official, or other fact-finding tribunal to determine whether the matter is within or outside the factual outline laid down by the enactment.

As Woolf J said on the question of whether certain persons were members of a 'household' within the meaning of the Family Income Supplements Act 1970, s 1(1) *England v Secretary of State for Social Services* [1982] 3 FLR 222, 224), there are three possibilities:

- 1 The only decision the tribunal of fact can, as a matter of law, come to is that the persons concerned *are* members of the household.
- 2 The only decision the tribunal of fact can, as a matter of law, come to is that the persons concerned *are not* members of the household
- 3 It is proper to regard the persons concerned as being or not being members of the household, depending on 'the view which the fact-finding tribunal takes of all the circumstances as a matter of fact and degree'.

Difficulties over matters of fact and degree usually arise in connection with *broad terms*, which are fully discussed in chapter 16 of this book.

The opposing constructions of the enactment

The usual circumstance in which a doubtful enactment falls to be construed is where the respective parties each contend for a different meaning of the enactment in its application to the facts of the instant case. These may be referred to as the opposing constructions. The enactment may be ambiguous in all cases, or only on certain facts. An example of the former is the Rent Act 1968, s 18, of which Lord Wilberforce remarked 'the section is certainly one which admits, almost invites, opposing constructions' (*Maunsell v Olins* [1974] 3 WLR 835, 840).

Where the enactment is grammatically ambiguous, the opposing constructions put forward are likely to be alternative meanings each

of which is grammatically possible. Where on the other hand the enactment is grammatically capable of one meaning only, the opposing constructions are likely to contrast the grammatical (or literal) meaning with a strained construction.

In some cases one of the opposing constructions may be said to present a wide and the other a narrow meaning of the enactment. This is a convenient usage, but requires care. It is necessary to remember that one is speaking of a wider or narrower construction of the enactment forming the unit of enquiry, and not necessarily of the Act as a whole. An enactment which is the unit of enquiry may be a proviso cutting down the effect of a substantive provision. A wider construction of the proviso then amounts to a narrower construction of the substantive provision.

In other cases there may be no sense in which a construction is wider or narrower. For example an enactment may bear on the question whether a person who undoubtedly needs a licence for some activity needs one type of licence (say a category A licence) or another (category B). If the legal meaning of the enactment is uncertain, the opposing constructions on the facts of the instant case will respectively be that it requires a category A licence or requires a category B licence.

The art of determining precisely which is the most helpful yet plausible construction to advance to the court is an important forensic accomplishment. Reed Dickerson said, 'A knack for detecting the two (or more) meanings which are being confused in a disputed verbal question is of more service in reasoning than the most thorough knowledge of the moods and figures and syllogism.' (Dickerson 1981, p63)

Where the parties advance opposing constructions of the enactment the court may reject both of them and apply its own version. Or it may insist on applying the unvarnished words, which amounts to holding that there is no 'real doubt' over the meaning.

An enactment regulating taxis made it an offence for an unlicensed cab to display a notice which 'may suggest' that the vehicle is being used for hire. In *Green v Turkington* [1975] Crim LR 242, which concerned a notice displayed in an unlicensed cab, the opposing constructions for 'may suggest' put forward in the magistrates' court were (1) 'is reasonably likely to suggest' and (2) 'might possibly suggest'. The Divisional Court rejected both constructions, holding that on the facts opposing constructions were not needed. There could be no doubt that the notice in question fell within the wording of the enactment as it stood.

Legislative intention as the paramount criterion

As we have seen, an enactment has the legal meaning taken to be intended by the legislator. In other words the legal meaning corresponds to what is considered to be the legislative intention.

As Lord Radcliffe said in *A-G for Canada v Halien & Carey Ltd* [1952] AC 427, 449:

There are many so-called rules of construction that courts of law have resorted to in their interpretation of statutes but the paramount rule remains that every statute is to be expounded according to its manifest and expressed intention.

This is a general rule for the construction of written instruments, and is not confined to legislation. Halsbury's *Laws of England* (4th edn, vol 36, para 578) says: 'The object of all interpretation of a written instrument is to discover the intention of the author as expressed in the instrument.'

Statutory interpretation is concerned with written texts, in which an intention is taken to be embodied, and by which that intention is communicated to those it affects. This idea **that a** society should govern itself by verbal formulas, frozen in the day of their originators yet continuing to rule, is a remarkable one. It is pregnant with unreality, yet can scarcely be improved upon. Those concerned with working out its effect have an important role, in which sincerity must be uppermost. An Act is a statement by the democratic Parliament. What the interpreter is required to do is give just effect to that statement.

Lord Halsbury LC summed up the historical principle in *Eastman Photographic Materials Co Ltd v Comptroller-General of Patents, Designs and Trade-Marks* [1898] AC 571, 575:

Turner LJ in *Hawkins v Gathercole* and adding his own high authority to that of the judges in *Stradling v Morgan*, after enforcing the proposition that the intention of the Legislature must be regarded, quotes at length the judgment in that case: that the judges have collected the intention 'sometimes by considering the cause and necessity of making the Act. . . sometimes by foreign circumstances' (thereby meaning extraneous circumstances), 'so that they have been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion'. And he adds: 'We have therefore to consider not merely the words of this Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject'.

In former times Acts commonly referred to 'the true intent and meaning' of an Act (see eg 2 Geo 3 c 19 (1762) s 4). In our own day Lord Lane CJ has said that when *interpreting* an Act the court must be careful not to *misinterpret* Parliament's intention (*A-G's Reference (No 1 of 1981)* [1982] QB 848, 856).

Many commentators have mistakenly written off the concept of legislative intention as unreal. Max Radin called it 'a transparent

and absurd fiction' (Radin 1930, p 881). The least reflection, he said, makes clear that the lawmaker 'does not exist' (*ibid*, p 870). If the lawmaker does not exist, what human mind first thinks of and then validates the legislative text? It is not made into law otherwise than through the agency of the human mind. We have not yet reached the point of having our laws made by a computer. Under our present system Acts are produced, down to the last word and comma, by people. The lawmaker may be difficult to identify, but it is absurd to say that the lawmaker does not exist. As Dickerson argues, legislative intent is ultimately rooted in individual intents (Dickerson 1981, p 51). These go right down to the democratic roots, as C K Allen grasped when he said that laws are not solely the creation of individuals who happen to compose the legislative body: 'Legislators, at least in democratic countries, are still representative enough to be unable to flout with impunity the main currents of contemporary opinion.' (*Law in the Making* (4th edn, 1946, p 388).

Allen might have added that on the contrary legislators *reflect* such currents. The idea that there is no true intention behind an Act of Parliament is anti-democratic. An Act is usually the product of much debate and compromise, both public and private. The intention that emerges as the result of these forces is not to be dismissed as in any sense illusory. Such dismissal marks a failure to grasp the true nature of legislation. The judges know this well enough; and would not dream of treating a legislative text as having no genuine intent. As said by Lord Simon of Glaisdale: 'In essence drafting, enactment and interpretation are integral parts of the process of translating the volition of the electorate into rules which will bind themselves.' (*Black-Clawson v Papierwerke* [1975] AC 591, 651.)

The guides to legislative intention

The guides to legislative intention, or interpretative criteria, consist of various rules, principles, presumptions and linguistic canons applied at common law or laid down by statute for assisting in statutory interpretation. These can be broadly distinguished as follows:

- 1 A rule of construction is of binding force, but in cases of real doubt rarely yields a conclusive answer.
- 2 A principle embodies the policy of the law, and is mainly persuasive.
- 3 A presumption is based on the nature of legislation, and affords a *prima facie* indication of the legislator's intention.
- 4 A linguistic canon of construction reflects the nature or use of language and reasoning generally, and is not specially referable to legislation.

The guides to legislative intention are peculiar in that, while most general legal rules or principles directly govern the actions of the subject, these directly govern the actions of the court. There is however an indirect effect on the subject. Since the court is obliged to apply an enactment in accordance with the interpretative criteria, persons governed by the enactment are well advised to read it in that light. The law in its practical application is not what an Act says but what a court says the Act means.

The way the interpretative criteria operate can be shown schemetically as follows:

A question of the legal meaning of enactment E arises. Opposing constructions are put forward by the respective parties in relation to the facts of the instant case. The plaintiff puts forward construction P and the defendant construction D.

In the light of the facts of the instant case and the guides to legislative intention, constructions P and D are considered in turn by the court. On examining construction P the court finds some of the interpretative criteria produce factors that tell in its favour. The plaintiff might call them positive factors. Other criteria produce factors (negative factors) that tell against construction P. The court repeats the process with construction D, and then assesses whether on balance P or D comes out as more likely to embody the legislator's intention.

A variety of interpretative criteria are likely to be relevant, but to simplify the example suppose there are only two: the primacy of the grammatical meaning and the desirability of purposive construction. In relation to construction P, a positive factor is that it corresponds to the grammatical meaning while a negative factor is that it does not carry out the purpose of the enactment. In relation to construction D, a positive factor is that it does carry out the purpose of the enactment while a negative factor is that it is a strained construction. The court weighs the factors, and gives its decision.

Obviously this brief analysis does not necessarily correspond to the steps actually taken in court. In practice the intellectual processes and interchanges usually occur in a less formal way. The persons involved are, after all, experts engaging in a familiar routine. But formal analysis must be attempted if we are to believe that the law of statutory interpretation has progressed beyond what it was in the fourteenth century, when:

. . . the courts themselves had no ordered ideas on the subject and were apt to regard each case on its merits without reference to any other case—still less to any general canons of interpretation—and trust implicitly in the light of nature and the inspiration of the moment (Plucknett 1980, p9.)

Applying the guides to legislative intention

As we have seen, where on an informed construction there is no real doubt, the plain meaning is to be applied. We now examine the practical way of arriving at the legal meaning of the enactment where there is real doubt.

First the cause of the doubt must be ascertained. The doubt is then resolved by assembling the relevant guides to legislative intention, or interpretative criteria. From them the interpreter extracts, in the light of the facts of the instant case and the wording of the enactment which forms the unit of enquiry, the interpretative *factors* that govern the case. Where the relevant factors point in different directions, the interpreter embarks on the operation of *weighing* them. The factors that weigh heaviest dictate the result.

Ascertaining the cause of the doubt

As explained above, the categories where there is real doubt about the legal meaning of an enactment in relation to particular facts can be reduced to two: grammatical ambiguity and the possible need for a strained construction. Semantic obscurity may also cause doubt, but as has been explained this is a defect of a different nature. It is a corruption of "the text which, when resolved by producing the 'corrected version', still leaves the possibility of ambiguity or the need for a strained construction.

A particular factor may both cause the doubt and give the means to resolve it. If a literal construction would produce gravely adverse consequences, for example the endangering of national security, this will raise doubt as to whether it could really have been Parliament's intention that the court should apply the grammatical meaning. At the same time the presumption that Parliament does not intend to endanger national security will assist in the working out of the appropriate strained construction.

The doubt-factors arising in statutory interpretation are discussed at length in Part III of this book.

Nature of an interpretative factor

The term 'interpretative factor' denotes a specific legal consideration which derives from the way a general interpretative criterion applies (a) to the text of the enactment under enquiry and (b) to the facts of the instant case (and to other factual situations within the relevant factual outline). The factor serves as a guide to the construction of the enactment in its application to those facts. As respects either of the opposing constructions of the enactment, an interpretative factor may be either positive (tending in favour of that construction) or negative (tending away from it). There are many different criteria which may be relevant in deciding

which of the opposing constructions of a doubtful enactment the court should adopt. The principle to be followed was stated by Lord Reid in *Maumell v Olins* [1974] 3 WLR 835, 837:

Then rules of construction are relied on. They are not rules in the ordinary sense of having some binding force. They are our servants not our masters. They are aids to construction, presumptions or pointers. Not infrequently one 'rule' points in one direction, another in a different direction. In each case we must look at all relevant circumstances, and decide as a matter of judgment what weight to attach to any particular 'rule'.

When Lord Reid put the word rule in quotation marks here he meant to acknowledge that many of the interpretative criteria are not true rules. Some can be formulated as such. Others, as we have seen, are more accurately described as principles, presumptions or canons.

Weighing the interpretative factors

There are no fixed priorities as between various factors, since so much depends on the wording of the enactment and the particular facts. For example, in some cases the adverse consequences of a particular construction may be very likely to arise whereas in others they may be unlikely.

Injustice will usually weigh heavily, as will the grammatical meaning of the enactment. Mere inconvenience will usually get a low rating, as Lord Wilberforce indicated in *Tuck v National Freight Corporation* [1979] 1 WLR 137, 41 when he said: 'It would require a high degree of inconvenience to deter me from what seemed to me, on the language, the true meaning'. On the other hand in an old Irish case the court declined to allow duty evaders to rely on the privilege against self-incrimination because 'so much public inconvenience would result from a contrary decision' (*A-G v Conroy* (1838) 2 Jo Ex Ir 791, 792).

The judge may feel confident in his decision or agonise over it. In a borderline case he may find it very difficult to make up his mind. It is notorious that different judicial minds may, and frequently do, conscientiously arrive at differential readings (as to these see pp 316-320 below).

Great difficulty may arise where different values are truly incommensurable, for example, those respectively attached to property and human life. How do you equate personal freedom and public inconvenience? In the end judges can find no better words to use than 'instinct' or 'feel'.

The wording of an enactment may indicate that the legislature has determined the relative weights which are to be given to certain factors, or at least wished to give guidance on the matter. In such a case the court must conform to the legislative intention thus signified.

The weight given by the courts to a particular interpretative criterion may change from time to time. For example, the presumption that an enactment is to be given its grammatical (or literal) meaning has varied in weight over the years. At its height in the middle of the nineteenth century, it has declined somewhat recently. All legal doctrines are subject to this kind of temporal variation, a fact to be borne in mind when considering, in the light of the binding or persuasive authority of relevant precedents, the weight to be attached in the instant case to a factor derived from the criterion of legal policy.

Community law

The detailed principles we have been discussing have little reference to Community law. The failure of Britain to enter the Common Market at the outset meant the loss of any slim chance there might have been that British type statute law would prevail in the Community. It is the continental principles of drafting and interpretation that apply there, and French law has a dominating influence. As Daniel Pepy, formerly a member of the Conseil d'Etat has said: '*Aucune regie de principe n'existe en France pour l'interpretation des textes de loi et decret . . .*' (Pepy 1971, p 108). Grammatical rules and principles are of course followed, but there is nothing akin to the British interpretative criteria.

As we have seen, Community legislation provides one important interpretative tool by its use of preambles. These are indeed obligatory, by virtue of art 190 of the EEC Treaty. Since the European Court concentrates on the purpose rather than the text of the legislation, the preamble furnishes valuable help in interpretation.

Another difference is that Community law is a unique, self-contained body of law. Our rules of interpretation partly derive from the fact that historically statute law in Britain has been an intruder in the domain of common law. The use of external aids is also historically different. The European judge is imbued by training and experience with the spirit of the *code civil*. He is accustomed to consult *travaux preparatoires*, and does not find that they unduly delay proceedings. He, and the advocates with whom he works, know from long experience how to extract the contribution these materials have to make without damage to the fabric of justice.

In *R v Henn* [1980] 2 WLR 597, the House of Lords stressed the danger that lay ahead if our judges sought to apply their own rules of interpretation to Community law. Lord Diplock pointed out (p 636) that: 'The European Court, in contrast to English courts, applies teleological rather than historical methods to the interpretation of the treaties and other Community legislation.'

Guides to Legislative Intention I: Rules of Construction

As we saw in the previous chapter, the law lays down various guides to legislative intention, or interpretative criteria. Now examining these more closely we see that they can be identified as consisting of the following: six common law *rules*, a varying number of *rules* laid down by statute, eight *principles* derived from legal policy, ten *presumptions* as to legislative intention, and a collection of linguistic *canons* of construction which are applicable to the deciphering of language generally. These criteria are described in detail in this and the next three chapters.

The six common law rules of statutory interpretation are:

- 1 the basic rule,
- 2 the informed interpretation rule (recognising that the interpreter needs to be well informed on all relevant aspects),
- 3 the plain meaning rule,
- 4 the effectiveness rule (*ut res magis valeat quam pereat*),
- 5 the commonsense construction rule, and
- 6 the functional construction rule (concerning the function of different elements in an enactment, such as long title and sidenotes).

In addition there are various statutory rules, usually laid down for the purpose of shortening the verbiage used in legislation.

Basic rule of statutory interpretation

The basic rule of statutory interpretation is that it is taken to be the legislator's intention that the enactment shall be construed in accordance with the guides laid down by law; and that where in a particular case these do not yield a plain answer but point in different directions the problem shall be resolved by a balancing exercise, that is by weighing and balancing the factors they produce. For at least the past half century the teaching of this subject has been bedevilled by the false notion that statutory interpretation is governed by a mere three 'rules' and that the court selects which 'rule' it prefers and then applies it in order to reach a result. The error perhaps originated in an article published in 1938 by J Willis,

a Canadian academic. After warning his readers that it is a mistake to suppose that there is only one rule of statutory interpretation because 'there are three—the literal, golden and mischief rules', Willis went on to say that a court invokes 'whichever of the rules produces a result which satisfies its sense of justice in the case before it' (Willis 1938, p 16). Academics are still producing textbooks which suggest that the matter is dealt with by these three simple 'rules' (see eg Zander (1989) pp 90-114). However, as demonstrated at length in my 1984 textbook *Statutory Interpretation*, and more briefly in this part of the present book, the truth is far more complex.

Willis, and those who have followed him, are wrong in two ways. First, there are not just three guides to interpretation but a considerable number. Second, the court does not 'select' one of the guides and then apply it to the exclusion of the others. The court takes (or should take) an overall view, weighs all the relevant factors, and arrives at a balanced conclusion. What is here called the basic rule of statutory interpretation sets out this truth. It is a *rule* because it is the duty of the interpreter to apply it in every case. (Thus Cotton LJ said in *Ralph v Carrick* (1879) 11 Ch D 873, 878 that judges 'are bound to have regard to any rules of construction which have been established by the Courts'.) It is the basic rule because it embraces all the guides to legislative intention that exist to be employed as and when relevant.

Informed interpretation rule

Next it is a rule of law, which may be called the informed interpretation rule, that the interpreter is to infer that the legislator, when settling the wording of an enactment, intended it to be given a fully informed, rather than a purely literal, interpretation (though the two usually produce the same result). Accordingly, the court does not decide whether or not any real doubt exists as to the meaning of a disputed enactment (and if so how to resolve it) until it has first discerned and considered, in the light of the guides to legislative intention, the overall context of the enactment, including all such matters as may illumine the text and make clear the meaning intended by the legislator in the factual situation of the instant case.

This rule is a necessary one, for if the drafter had to frame the enactment in terms suitable for a reader ignorant both of past and contemporary facts and legal principles (and in particular the principles of statutory interpretation), he would need to use far more words than is practicable in order to convey the legal meaning intended.

In interpreting an enactment, a two-stage approach is necessary. It is not simply a matter of deciding what doubtful words mean. It must first be decided, on an informed basis, whether or not there *is* a real doubt about the legal meaning of the enactment. If there is, the interpreter moves on to the second stage of resolving the

doubt. (The experienced interpreter combines the stages, but notionally they are separate.) As Lord Upjohn said: 'you must look at all the admissible surrounding circumstances before starting to construe the Act' (*R v Schildkamp* [1971] AC 1, 23).

The interpreter of an enactment needs to be someone who is, or is advised by, a person with legal knowledge. This is because an Act is a legal instrument. It forms part of the body of law, and necessarily partakes of the character of law. It cannot therefore be reliably understood by a lay person. Moreover the meaning of the enactment which is needed by any person required to comply with the Act is its *legal* meaning.

The informed interpretation rule is to be applied no matter how plain the statutory words may seem at first glance. Indeed the plainer they seem, the more the interpreter needs to be on guard. A first glance is not a fully-informed glance. Without exception, statutory words require careful assessment of themselves and their context if they are to be construed correctly. A danger of the first glance approach lies in what is called *impression*. When the human mind comes into contact with a verbal proposition an impression of meaning may immediately form, which can be difficult to dislodge. Judges often say that the matter before them is 'one of impression' but it is important that the impression should not be allowed to form before all surrounding circumstances concerning the enactment in question have been grasped.

The informed interpretation rule thus requires that, in the construction of an enactment, attention should be paid to the entire content of the Act containing the enactment. It should also be paid to relevant aspects of: (1) the state of the law before the Act was passed, (2) the history of the enacting of the Act, and (3) the events which have occurred in relation to the Act subsequent to its passing. These may be described collectively as the legislative history of the enactment, and respectively as the pre-enacting, enacting, and post-enacting history.

Another aspect of the need for an informed interpretation relates to the factual situation in the case before the court. In order to determine the legal meaning of an enactment as it applies in a particular case it is necessary to know the relevant facts of the case and relate them to the factual outline laid down by the enactment. It is by reference to these that the parties submit to the court their opposing constructions of an enactment whose meaning is disputed.

For the purpose of applying the informed interpretation rule, the context of an enactment thus comprises, in addition to the other provisions of the Act containing it, the legislative history of that Act, the provisions of other Acts *in pari materia*, and all facts constituting or concerning the subject-matter of the Act. Viscount Simonds said in *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436, 463:

... it must often be difficult to say that any terms are clear and unambiguous until they have been read in their context . . . the elementary rule must be observed that no one should profess to understand any part of a statute . . . before he has 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 and unambiguous.

The surrounding facts are also important to the understanding, and therefore correct interpretation, of an Act. For example why does s 1(3)(a) of the Factories Act 1961 (a consolidation Act) require the inside walls of factories to be washed every *14 months*? An annual spring cleaning one could understand, but why this odd period? Sir Harold Kent, who drafted the original provision in the Factories Act 1937, gives the answer: factory spring cleaning takes place at Easter, and Easter is a movable feast (Kent 1979, p 88).

In determining whether consideration should be given to any item of legislative history or other informative material, and if so what weight should be given to it, regard is to be had (a) to the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the enactment, taking into account its context in the Act or other instrument and the legislative intention; and (b) to the need to avoid prolonging legal or other proceedings without compensating advantage. (This statement of the law is taken from s 15AB(3) of an Australian statute, the Acts Interpretation Act 1901 as amended by the Acts Interpretation Amendment Act 1984, s 7. In turn s 15AB was derived from clause 5(3) of the draft Bill proposed in the present book (see p 344 below).)

The informed interpretation rule does not go so far as to permit the court to take into account material which is not generally available. As Lord Reid said in *Black-Clawson v Papierwerke* [1975] AC 591, 614: 'An Act is addressed to all the lieges and it would seem wrong to take into account anything that was not public knowledge at the time'. Nevertheless the mind of the interpreter can never be too well stocked. A conscientious judge, like a conscientious legislator or drafter, keeps himself fully informed about what is going on in the world.

Legislative history

An enactment does not stand alone. It is part of the Act containing it. The Act in its turn is part of the total mass of legislation loosely referred to as the statute book, which is itself part of the whole *corpus juris*. The enactment must therefore be construed in the light of its overall context. Subject to certain restrictive rules (for example that restraining reference to *Hansard*), a court considering an enactment is master of its own procedure (*R v Board of Visitors of Wormwood Scrubs Prison, ex parte Anderson* [1985] QB 251). It therefore has the power, indeed the duty, to consider such aspects of the legislative history of the enactment as may be necessary to

arrive at its legal meaning, and must give them their proper weight. For a correct understanding of an item of *delegated* legislation, it is necessary not only to consider the wording of the enabling Act, but also the legislative history of that Act (*Crompton v General Medical Council* [1981] 1 WLR 1435, 1437).

Pre-enacting history

The interpreter cannot judge soundly what mischief an enactment is intended to remedy unless he knows the previous state of the law, the defects found to exist in that law, and the facts that caused the legislator to pass the Act in question. The first book on statutory interpretation in England, written in the sixteenth century, said that interpreters who disregard the pre-enacting history are much deceived 'for they shall neither know the statute nor expound it well, but shall as it were follow their noses and grope at it in the dark' (cited Plucknett 1944, p 245).

Under the doctrine of judicial notice, the court is taken to know the relevant law prevailing within its jurisdiction. This applies both to past and present law. Accordingly there can be no restriction on the sources available to the court for reminding itself as to the content of past and present law (*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, 637).

Where a subject has been dealt with by a developing series of Acts, the courts often find it necessary, in construing the latest Act, to trace the course of this development. By seeing what changes have been made in the relevant provision, and why, the court can better assess its current legal meaning (eg *R v Governor of Holloway Prison, ex p. Jennings* [1982] 3 WLR 450, 458).

Where an Act uses a term with a previous legal history it may be inferred that Parliament intended to use it in the sense given by the earlier history, and again the court is entitled to inform itself about this (eg *Welham v DPP* [1961] AC 103, 123). Lord Reid said: 'Where Parliament has continued to use words of which the meaning has been settled by decisions of the court, it is to be presumed that Parliament intends the words to continue to have that meaning' (*Truman Hanbury Buxton & Co Ltd v Kerslake* [1955] AC 337, 361).

If two Acts are *in pari materia*, it is assumed that uniformity of language and meaning was intended. This attracts the considerations arising from the linguistic canon of construction that an Act is to be construed as a whole. Such Acts 'are to be taken together as forming one system, and as interpreting and enforcing each other' (*Palmer's Case* (1785) 1 Burr 445, 447). This has even been applied to repealed Acts within a group (*Ex p. Copeland* (1852) 22 LJ Bank 17, 21). The following are *in pari materia*:

- 1 Acts which have been given a collective title.
- 2 Acts which are required to be construed as one.

3 Acts having short titles that are identical (apart from the calendar year).

4 Other Acts which deal with the same subject matter on the same lines (here it must be remembered that the Latin word *par* or *parts* means equal, and not merely similar). Such Acts are sometimes loosely described as forming a code.

Consolidation

Consolidation brings together different Acts which are *in part materia*, so the relevant pre-enacting history is that of the consolidation Act's component enactments. This fights against the presumption that such an Act is *prima facie* to be construed in the same way as any other Act. If any real doubt as to its meaning arises, the following rules apply:

1 Unless the contrary intention appears, an Act stated in its long title to be a consolidation Act is presumed not to be intended to change the law (*Gilbert v Gilbert and Boucher* [1928] 1, 8; *R v Governor of Brixton Prison, ex pane De Demko* [1959] 1 QB 268, 280-1; *Atkinson v US Government* [1971] AC 197).

2 In so far as the Act constitutes straight consolidation, its words are to be construed exactly as if they remained in the earlier Act. Re-enactment in the form of straight consolidation makes no difference to legal meaning. It does not import parliamentary approval of judicial decisions on the enactments consolidated, because Parliament has not had those decisions in mind. Not even the drafter will have had them in mind. He will not have taken time to look them up, because his concern is simply to reproduce accurately the statutory wording.

3 In so far as the Act constitutes consolidation with amendments, its words are to be construed as if they were contained in an ordinary amending Act.

Straight consolidation consists of reproduction of the original wording without significant change; consolidation with amendments is any other consolidation (see p 70 above). For examples of consolidation Acts where there was real doubt and the earlier law was looked at, see *Mitchell v Simpson* (1890) 25 QBD 183, 188; *Smith v Baker* [1891] AC 325, 349; *IRC v Hinchy* [1960] AC 748, 768; *Barentz v Whiting* [1965] 1 WLR 433.

A common type of consolidation with amendments arises where a consolidation Act incorporates either corrections and minor improvements made under the Consolidation of Enactments (Procedure) Act 1949, or (as is more common in recent legislation) 'lawyer's law' amendments proposed by the Law Commission. In such cases the court may look at any official memorandum published in connection with an Act (*Atkinson v United States of America Government* [1971] AC 197).

Where, without any express indication that an amendment is intended, a consolidation Act reproduces the previous wording in *altered* form the court must construe it as it stands. It is not permissible, just because the Act is described as a consolidation Act, to treat it as if it reproduced the original wording (*Pocock v Steel* [1985] 1 WLR 229, 233). In *Re a solicitor* [1961] Ch 491 the court applied this rule where the Solicitors Act 1843, s 41, providing that *application* for a costs order could not be made after one year, had been consolidated in the Solicitors Act 1932, s 66(2) to the effect that *the order* must be made within one year. A change in meaning should not be effected in a provision purporting to be straight consolidation, since this amounts to a fraud on Parliament. For an example see *Bennion* 1986(4) (omission of 'any' from Companies Act 1985, s 196(2)).

Codification

Codification consists in the useful reduction of scattered enactments and judgments on a particular topic to coherent expression within a single formulation. It may therefore condense into one Act rules both of common law and statute. The codifying Act may also embrace custom, prerogative, and practice. In *Mutual Shipping Corporation of New York v Bay shore Shipping Co of Monrovia* [1985] 1 WLR 625, 640 Sir Roger Ormrod remarked that codification of what had previously been no more than usage 'converts a practice into a discretion and subtly changes its complexion'.

A codifying Act is *prima facie* to be construed in the same way as any other Act. If however any real doubt as to its meaning arises, the following rules apply:

- 1 Unless the contrary intention appears, an Act stated in its long title to be a codifying Act is presumed not to be intended to change the law.
- 2 In so far as the Act constitutes codification (with or without amendment) of common law rules or judicial sub-rules, reports of the relevant decisions may be referred to but only if this is really necessary.
- 3 In so far as the Act constitutes consolidation of previous enactments (with or without amendment), the rules stated above in relation to consolidation Acts apply.

These are aspects of the plain meaning rule discussed below. They accord with the classic principle laid down by Lord Herschell LC in *Bank of England v Vagliano* [1891] AC 107, 144 (see p 76 above).

For a case where there was real doubt, and the previous law was looked at, see *Yorkshire Insurance Co Ltd v Nisbet Shipping Co* [1962] 2 QB 330.

Enacting history

The enacting history of an Act is the surrounding corpus of public knowledge relative to its introduction into Parliament as a Bill, and subsequent progress through, and ultimate passing by, Parliament. In particular it is the extrinsic material assumed to be within the contemplation of Parliament when it passed the act, which may or may not be expressly mentioned therein (*Salomon v Commrs of Customs and Excise* [1967] 2 QB 116). Judicial notice is to be taken of such facts 'as must be assumed to have been within the contemplation of the legislature when the Acts in question were passed' (*Govindan Sellappah Nayar Kodakan Pillai v Punchi Banda Mundanayake* [1953] AC 514, 528). The court may permit counsel to cite any item of enacting history in support of his construction of the enactment where the purpose is to show that his construction is not contrary to that item (*Cozens v North Devon Hospital Management Committee; Hunter v Turners (Soham) Ltd* [1966] 2 QB 318, 321; *Beswick v Beswick* [1968] AC 58, 105).

In considering whether to admit an item of enacting history, the court needs to bear in mind that it is unlikely to be proper to take the item at face value. Material should not be used in the interpretation of the enactment without correct evaluation of its nature and significance. This may in some cases greatly prolong the court proceedings if the item is admitted. Justice Frankfurter accurately summed up the constraining factors: '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.' (Frankfurter 1947, p 234.)

Although the court has power to inspect whatever enacting history it thinks fit, it will be governed by the submissions of the counsel on either side, at least where they are in agreement. (See *M/S Aswan Engineering Establishment Co v Lupdine Ltd* [1987] 1 WLR 1, 14).

A court, after admitting an item of legislative history, often finds that it carries the matter no further. The question of marginal utility arises here, since admitting the item inevitably adds to trial costs. In an Australian case the judge commented:

I have necessarily ventured far into the use of legislative history only, in the outcome, to discover that it leads to no conclusion different from that which would have followed from a disregard of anything extrinsic to the words of the legislation itself. (*Dugan v Mirror Newspapers Ltd* (1979) 142 CLR 583, 599.)

Committee reports may be referred to as useful sources of enacting history. (*Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, 647; see also *Fothergill v Monarch Airlines Ltd* [1981] AC 251.)

In *Eastman Photographic Materials Co Ltd v Comptroller-General of Patents* [1898] AC 571 the House of Lords considered the meaning

of a provision of the Patents, Designs and Trade Marks Act 1888 based on the report of a departmental commission. Lord Halsbury LC said (p 573):'. . . I think no more accurate source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy could be imagined than the report of that commission.'

In *Assam Railways and Trading Co Ltd v IRC* [1935] AC 445, 458, Lord Wright stressed that Lord Halsbury here approved the citation of the commission's report 'not directly to ascertain the intention of the words used in the Act' but merely 'to show what were the surrounding circumstances'.

In *R v Allen (Christopher)* [1985] AC 1029, 1035 Lord Hailsham of St Marylebone LC said that the present practice is for courts to look at committee reports 'for the purpose of defining the mischief of the Act but not to construe it'. However in *British Leyland Motor Corporation Ltd v Armstrong Patents Co Ltd* [1986] AC 577 the House of Lords allowed detailed argument relating to the Gregory Report (Report of the Copyright Committee (1952) Cmd 8662), upon which the Copyright Act 1956 was based. The argument was permitted to go beyond merely ascertaining the mischief, and touched on the intended legal effect of certain of the Act's provisions.

Bills are often preceded by government white papers and similar memoranda. Resort may be had to these in interpretation of the ensuing Act. Thus the House of Lords in *Duke v GEC Reliance Ltd* [1988] 2 WLR 359 referred to the 1974 government White Paper *Equality for Women* (Cmd 5724) as a guide to Parliament's intention in enacting provisions of the Sex Discrimination Act 1975. Lord Templeman said (pp 368-369):

If the government had intended to sweep away the widespread practice of differential retirement ages, the 1974 White Paper would not have given a contrary assurance and if Parliament had intended to outlaw differential retirement ages, s 6(4) of the Sex Discrimination Act 1975 would have been very differently worded in order to make clear the profound change which Parliament contemplated.

In *Pickstone v Freemans plc* [1989] AC 66, 27 Lord Oliver said that though an explanatory note attached to regulations is not part of the regulations it 'is of use in identifying the mischief which the regulations were attempting to remedy'.

Hansard reports, and other reports of parliamentary proceedings on the Bill which became the Act in question, are of obvious relevance to its meaning. They are of doubtful reliability and limited availability however. The Canadian jurist JA Corry suggested that 'to appeal from the carefully pondered terms of the statute to the hurly-burly of Parliamentary debate is more like appealing from Philip sober to Philip drunk' (Corry 1954, p 632). The American realist Charles P Curtis described the court which unrestrainedly pursues enacting history as 'fumbling about in the ashcans of the legislative process

for the shoddiest unenacted expressions of intention' (Curtis 1949). A further objection is that once legislators realised that their statements might influence judicial interpretation they would inevitably insert in them passages designed only for this purpose. Thus would be perverted, not only the judicial technique of interpretation, but the very legislative process itself.

Out of considerations of comity, that is the courtesy and respect that ought to prevail between two prime organs of state the legislature and the judiciary, and because such materials are essentially unreliable and pursuit of them involves an expenditure of time and effort that can only add to costs, *Hansard* and other parliamentary materials such as amendment papers and explanatory memoranda are not in general admissible for purposes of statutory interpretation. In 1982 Lord Diplock said:

There are a series of rulings by this House, unbroken for a hundred years, and most recently affirmed emphatically and unanimously in *Davis v Johnson* [1979] AC 264, that recourse to reports of proceedings in either House of Parliament during the passage of the Bill that on a signification of royal assent became the Act of Parliament which falls to be construed is not permissible as an aid to its construction. (*Hadntor Productions Ltd v Hamilton* [1983] 1 AC 191, 232.)

Nevertheless the court retains a residuary right to admit parliamentary materials where, in rare cases, the need to carry out the legislator's intention appears so to require. Courts must be in charge of their own procedure, and it is ultimately for the court with the duty of interpreting a particular enactment to decide what items of enacting history it will permit counsel to cite, having regard to the various relevant considerations (including the need not to protract the proceedings without commensurate benefit). The numerous precedents for citation of parliamentary material cancel out dicta saying it can *never* be done. In *Pierce v Bemis* [1986] QB 384, 392 for example Sheen J allowed counsel to cite, and himself cited in his judgment, extensive details as to the parliamentary proceedings on the Bill which became the Merchant Shipping Act 1906, including details as to how the clause that became the Merchant Shipping Act 1906, s 72 was added to the Bill during its passage through the House of Commons.

The House of Lords has justified reference to *Hansard* in the case of an amendment to an Act made by regulations which, though subject to parliamentary approval, could not be amended by Parliament (*Pickstone v Freemans plc* [1989] AC 66.)

A treaty (a term which may be used to cover any type of international agreement) is not self-executing in English law (*Fothergill v Monarch Airlines Ltd* [1981] AC 251). The enacting history of an Act to implement an international treaty includes the terms of the treaty, its preparatory work or *travaux préparatoires* (*Porter v Freudenberg* [1915] 1 KB 857, 876; *Post Office v Estuary*

Radio Ltd [1968] 2 QB 740, 761; *Fothergill v Monarch Airlines Ltd* [1981] AC 251), the decisions on it of foreign courts, known as *la jurisprudence*, and the views on it of foreign jurists, known as *la doctrine*.

A treaty may have three different kinds of status, considered as a source of law.

1 An Act may embody, whether or not in the same words, provisions having the effect of the treaty. This may be referred to as direct enactment of the treaty.

2 An Act may say that the treaty is itself to have effect as law, leaving the treaty's provisions to apply with or without modification. This may be referred to as indirect enactment of the treaty.

3 The treaty may be left simply as an international obligation, being referred to in the interpretation of a relevant enactment only so far as called for by the presumption that Parliament intends to comply with public international law.

The interpretation of a treaty imported into municipal law by indirect enactment was described by Lord Wilberforce as being 'unconstrained by technical rules of English law, or by English legal precedent, but [conducted] on broad principles of general acceptance' (*Buchanan (James) & Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, 152). This echoes the dictum of Lord Widgery CJ that the words 'are to be given their general meaning, general to lawyer and layman alike . . . the meaning of the diplomat rather than the lawyer' (*R v Governor of Pentonville Prison, ex pane Ecke* [1974] Crim LR 102). Dicta suggesting that the court is entitled to consult a relevant treaty only where the enactment is ambiguous (see, *Ellerman Lines Ltd v Murray* [1931] AC 126; *IRC v Collco Dealings Ltd* [1962] AC 1; *Warwick Film Productions Ltd v Eisinger* [1969] 1 Ch 508) can no longer be relied on. The true rule is that in this area, as in others, the court is to arrive at an informed interpretation. The Vienna Convention on the Law of Treaties (Treaty Series No 58 (1980); Cmnd 7964) contains provisions governing the interpretation of treaties (the details are set out in Bennion 1984(1), pp 539-540).

Post-enacting history

It may be thought that nothing that happens after an Act is passed can affect the legislative intention at the time it was passed. This overlooks two factors: (1) in the period immediately following its enactment, the history of how an enactment is understood forms part of the *contemporanea expositio*, and may be held to throw light on the legislative intention; (2) the later history may, under the doctrine that an Act is always speaking, indicate how the enactment is regarded in the light of developments from time to time.

Contemporary exposition of an Act (*contemporanea expositio*) helps to show what people thought the Act meant in the period immediately after it was passed. Official statements on its meaning are particularly important here, since the working of almost every Act is supervised, and most were originally promoted, by a government department which may be assumed to know what the legislative intention was. Official statements by the government department administering an Act, or by any other authority concerned with the Act, may be taken into account as persuasive authority on the meaning of its provisions (*Wicks v Firth (Inspector of Taxes)* [1983] 2 AC 214).

In *Hanning v Maitland (No 2)* [1970] 1 QB 580 the Court of Appeal admitted statistics showing that, whereas £40,000 a year was being appropriated by Parliament towards the expenses under a legal aid enactment, only about £300 a year was actually being expended. This followed an earlier restrictive court ruling on the operation of the enactment, and suggested that the ruling did not conform to Parliament's intention.

One element in the post-enacting history of an Act is delegated legislation made under the Act. This may be taken into account as persuasive authority on the meaning of the Act's provisions (*Britt v Buckinghamshire County Council* [1964] 1 QB 77; *Leung v Garbett* [1980] 1 WLR 1189; *R v Uxbridge JJ, ex pane Commissioner of Police of the Metropolis* [1981] QB 829).

In *Jackson v Hall* [1980] AC 854, 884 Viscount Dilhorne rejected the submission that the contents of a form produced pursuant to rules made by the Agricultural Land Tribunals (Succession to Agricultural Tenancies) Order 1976 could be relied on as an aid to the construction of the Agriculture (Miscellaneous Provisions) Act 1976. Yet in *British Amusement Catering Trades Association v Westminster City Council* [1988] 2 WLR 485 the House of Lords declined to take this as authority for the general proposition that subordinate legislation can never be used as an aid to statutory interpretation, citing *Hanlon v The Law Society* [1981] AC 124. They held that the meaning of the term 'cinematograph exhibition' as defined in the Cinematograph (Amendment) Act 1982, s 1(3) should be arrived at by reference to the Cinematograph (Safety) Regulations 1955.

Where a later Act is *in pari materia* with an earlier Act, provisions of the later Act may be used to aid the construction of the earlier Act. In determining whether the later provision *alters* the legal meaning of the earlier, the test as always is whether or not Parliament intended to effect such an alteration (*Casanova v R* (1866) LR 1 QB 444, 457). Such an intention is more readily gathered where the Acts are expressly required to be construed as one, since this is a positive indication that Parliament has given its mind to the question.

Where a term is used without definition in one Act, but is defined in another Act which is *in pari materia* with the first Act, the definition

may be treated as applicable to the use of the term in the first Act. This may be done even where the definition is contained in a later Act. Thus in *Wood v Commissioner of Police of the Metropolis* [1986] 1 WLR 796 the Divisional Court construed the undefined term 'offensive weapon' in the Vagrancy Act 1824, s 4, in the light of the definition of that term laid down for different though related purposes by the Prevention of Crime Act 1953, s 1(4).

Where Parliament passes an Act which on one (but not the other) of two disputed views of the existing law is unnecessary, this suggests that the other view is correct. Thus in *Murphy v Duke* [1985] QB 905 it was held that since the meaning of the House to House Collections Act 1939 which was applied in *Emanuel v Smith* [1968] 2 All ER 529, would render the Trading Representations (Disabled Persons) Act 1958 unnecessary the latter case must be held to have been decided *per incuriam*. (This sensible view was dissented from on doubtful grounds in *Cooper v Coles* [1987] QB 230.)

Where it is clear that an enactment proceeds upon a mistaken view of earlier law, the question may arise of whether this effects a change in that law (apart from any amendment directly made by the enactment). Here it is necessary to remember that, except when legislating, Parliament has no power authoritatively to interpret the law. That function belongs to the judiciary alone. When legislating, Parliament may, with binding effect, *declare* what the law is to be considered to be or have been. But a declaratory enactment must be intended as such. A mere inference that Parliament has mistaken the nature or effect of some legal rule does not in itself amount to a declaration that the rule is other than what it is (*Dore v Gray* (1788) 2 TR 358, 365; *IRC v Dowdall, O'Mahoney & Co Ltd* [1952] AC 401, 417, 421; *IRC v Butterley & Co Ltd* [1955] 2 WLR 785, 807-808). However the view taken by Parliament as to the legal meaning of a doubtful enactment may be treated as of persuasive, though not binding, authority (*Cape Brandy Syndicate v IRC* [1921] 2 KB 403, 414; *Camille & Henry Dreyfus Foundation Inc v IRC* [1954] Ch 672, 690).

The court will not only be guided by later Acts, but by later delegated legislation which is *in pari materia* with the enactment being construed. (*R v Newcastle-upon-Tyne Justices, ex parte Skinner* [1987] 1 WLR 312.)

Under the doctrine of precedent or *stare decisis* dynamic processing of an enactment by the court produces sub-rules which are of either binding or persuasive authority in relation to the future construction of the enactment. Where Parliament subsequently indicates that it adopts any such sub-rule, the status of the sub-rule becomes equivalent to that of legislation. If Parliament has a subsequent opportunity to alter the effect of a decision on the legal meaning of an enactment, but refrains from doing so, the implication may be that Parliament approves of that decision and adopts it (eg *Denman*

v *Essex Area Health Authority* [1984] 3 WLR 73). This is an aspect of what may be called *tacit legislation*.

The House of Lords held in *Otter v Norman* [1988] 3 WLR 321 that the provision of one meal only a day, namely continental breakfast, amounted to 'board'. In so holding it was influenced by the fact that Parliament had impliedly adopted a similar ruling on the meaning of this term laid down by the Court of Appeal in *Wilkes v Goodwin* [1923] 2 KB 86.

The court may treat as of persuasive authority in the construction of an enactment the view of an official committee reporting on the meaning of the enactment (eg *Mohammed-Holgate v Duke* [1984] QB 209).

Plain meaning rule

Where the meaning is plain it must be followed, but for this purpose a meaning is 'plain' only where no relevant interpretative criterion points away from it. It is thus a rule of law (which may be called the plain meaning rule) that where, in relation to the facts of the instant case, (a) the enactment under enquiry is grammatically capable of one meaning only, and (b) on an informed interpretation of that enactment the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator, the legal meaning of the enactment corresponds to that grammatical meaning and is to be applied accordingly. As it is put in Halsbury's *Laws of England*:

If there is nothing to modify, nothing to alter, nothing to qualify the language which a statute contains, the words and sentences must be construed in their ordinary and natural meaning. (4th edn, Vol 36 para 585.)

The plain meaning rule determines the operation of nearly every enactment, simply because nearly every enactment has a straightforward and clear meaning with no counter-indications.

Rule where meaning not 'plain'

Where on the facts of the instant case the enactment is grammatically ambiguous, the legal meaning is determined by weighing the interpretative factors in the manner explained in the previous chapter. Where the enactment is semantically obscure, the interpreter first arrives at the 'corrected version' (see pp 89-90 above). This is then treated as if it were the actual text, of which the meaning may be either 'plain' or not. In other words the plain meaning rule either will or will not apply to the corrected version.

Effectiveness rule (*ut res tnagis valeat quant pereat*)

It is a rule of law that the legislator intends the interpreter of an

enactment to observe the maxim *ut res magis valeat quam pereat* (it is better for a thing to have effect than to be made void). He must thus construe the enactment in such a way as to implement, rather than defeat, the legislative purpose. As Dr Lushington put it in *The Beta* (1865) 3 Moo PCC NS 23, 25:

... if very serious consequences to the beneficial and reasonable operation of the Act necessarily follow from one construction, I apprehend that, unless the words imperatively require it, it is the duty of the court to prefer such a construction that *res majis [sic] valeat, quam pereat*.

The rule requires inconsistencies within an Act to be reconciled. Blackstone said: 'One part of the statute must be so construed by another, that the whole may, if possible, stand: *ut res magis valeat quam pereat*, (Blackstone 1765, i 64). It also means that, if the obvious intention of the enactment gives rise to difficulties in implementation, the court must do its best to find ways of resolving these.

An important application of the rule is that an Act is taken to give the courts such jurisdiction and powers as are necessary for its implementation, even though not expressly conferred (eg *Buckley v Law Society (No 2)* [1984] 1 WLR 1101).

Commonsense **construction rule**

It is a rule of law (which may be called the commonsense construction rule) that when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, the court should presume that the legislator intended common sense to be used. Thus Lord Lane CJ said when construing an enactment: 'We are dealing with the real world and not some fanciful world' (*Gaimster v Marlow* [1984] QB 218, 225).

Many judicial dicta say that common sense, or good sense, or native wit, or the reason of the case, are expected by Parliament to be applied in the interpretation of its laws (see eg *Barnes v Jarvis* [1953] 1 WLR 649,652). Indeed common sense is a quality frequently called for in law generally (eg *R v Rennie* [1982] 1 WLR 64).

It follows that when a particular matter is not expressly dealt with in the enactment this may simply be because the drafter thought it went without saying as a matter of common sense (eg *Re Green's Will Trusts* [1985] 3 All ER 455; *R v Orpin* [1975] QB 283). Where the court fails to employ common sense it may be right to conclude that the decision is arrived at *per incuriam* and should, when opportunity offers, be overruled (as happened in *R v Pigg* [1982] 1 WLR 762).

Greater includes less The requirement that common sense shall be used in interpretation brings in such principles as that the greater includes the less, which the law recognises in many contexts in

accordance with the maxim *omne triajus continet in se minus* (eg *R v Cousins* [1982] QB 526). Common sense may not provide an answer where the elements are incommensurable. Thus one cannot measure whether an *actual* minor assault is 'greater' or 'less' than a *threat* to carry out a major assault (eg the Australian case of *Rosza v Samuels* [1969] SASR 205).

The concept that the greater includes the less is akin to the reverse concept that it is common sense to assume that an Act remedying a lesser mischief is also intended to remedy a greater mischief of the same class (eg *Quiltotex Co Ltd v Minister of Housing and Local Government* [1966] 1 QB 704, 712).

Separate ingredients Where the enactment uses a phrase mentioning two or more ingredients, it is common sense to conclude that if the ingredients are each present separately the description is met. Caution is needed however where the phrase has a special meaning amounting to more than the sum of its parts. This arose in *Leech Leisure Ltd v Hotel and Catering Industry Training Board* (1984) *The Times*, 18 January, which concerned the Industrial Training Levy (Hotel and Catering) Order 1981, art 3. This imposes a levy on businesses providing 'board and lodging' for guests or lodgers. It was argued that a self-catering establishment which provided lodging, and also operated a cafe in which cooked meals and snacks could be consumed, was liable to the levy. *Held* the phrase 'board and lodging' is a composite one, and it is not satisfied where lodging is provided and, as an independent activity, food is also made available.

Formal ambiguity Formal or syntactical ambiguity can sometimes be resolved by the use of common sense. In *The Complete Plain Words*, a manual written to improve the use of language by civil servants, Sir Ernest Gowers cited as an example of formal ambiguity an instruction contained in a child care handbook: 'If the baby does not thrive on raw milk, boil it' (Gowers 1973, p 191). The way the instruction is worded raises a theoretical doubt which common sense is enough to resolve. The same is true of a government regulation cited by Gowers: 'No child shall be employed on any weekday when the school is not open for a longer period than four hours.' (ibid, p 163).

Interpretation by non-lawyers In the rare cases where an enactment is to be applied by non-lawyers such as juries and lay magistrates it is particularly important that room should be found for a commonsense approach (eg *R v Boyesen* [1982] AC 768).

Functional construction rule

The various components of an Act or statutory instrument have

been described in chapters 3 and 4. It is a rule of law (which may be called the functional construction rule) that in construing an enactment the significance to be attached to each type of component of the Act or other instrument containing it must be assessed in conformity with its legislative function and juridical nature as a component of that type.

Knowledge of the relevant parliamentary procedure (including royal assent procedure) will assist the interpreter to give correct weight to each component of an Act, judged as an aid to construction. Some components, although part of the Act, carry little if any weight for this purpose: they are intended as nothing more than quick guides to content. Other components (for example the long title) owe their presence in the Act wholly or mainly to the procedural rules applicable to parliamentary Bills, and are to be regarded in that light.

Are there 'second class' components?

Any suggestion that certain components of an Act are to be treated, for reasons connected with their parliamentary nature or history, as not being part of the Act is unsound and contrary to principle. As Scrutton LJ said in relation to the short title:

... I do not understand on what principle of construction I am not to look at the words of the Act itself to help me understand its scope in order to interpret the words Parliament has used in the circumstances in which they were legislating. (*In re the Vexatious Actions Act 1886—In re Bernard Boaler* [1915] 1 KB 21, 40).

To suppose, as some judges have done, that the components of a Bill which are subject to printing corrections by parliamentary clerks (such as punctuation, sidenotes and headings) cannot be looked at in interpretation of the ensuing Act is to treat them as in some way 'unreliable'. Dicta to this effect in cases such as *R v Schildkamp* [1971] AC 1 ignore two major considerations. One is that the entire product is put out by Parliament as its Act and the courts have no authority to question this (Bill of Rights 1688, art 9) and the other is that by virtue of the Interpretation Act 1978, s 19(1) a reference to an Act is a reference to it *as officially published* and this includes all components. Such dicta transgress the principle of law expressed in the maxim *omnia praesumuntur rite et solemniter esse acta donec probetur in contrarium* (all things are presumed to be rightly and duly performed unless the contrary is proved). They are also open to objection as introducing an unjustified distinction between the interpretation of Acts and that of statutory instruments. A statutory instrument is not subject to the making of printing corrections by parliamentary clerks. The headings, marginal notes and punctuation of a statutory instrument must necessarily therefore be treated as being as much part of the instrument as any other

component. To avoid an unjustified distinction (never drawn in practice), the same must be taken to be true of an Act. In their 1969 report on statutory interpretation, the Law Commissions said 'it seems clear that the courts when dealing with [delegated] legislation apply the same general common law principles of interpretation which they apply to statutes' (*The Interpretation of Statutes* (Law Com No 21), para 77).

Components used in different ways

Apart from the distinctions between components which have been mentioned so far, there is another type of distinction to be drawn. A component of one kind, for example a section of an Act, may be used in different ways and thus have different functions. Thus a section or similar item may be one of the substantive provisions of the Act, or it may be purely concerned with the machinery of bringing the Act into operation. Difficulty is caused by the fact that under our system provisions of the latter type (known as commencement and transitional provisions) are not clearly differentiated in the arrangement of the Act.

That internal distinctions of this kind may be relevant in interpretation is illustrated by the following dictum of Nourse J in relation to the Development Land Tax Act 1976, s 45(4) and (8):

One thing which is clear about sub-ss (4) and (8) is that the former is a permanent provision and the latter is a transitional one. On a superficial level I can see the attractions of the argument which appealed to the Special Commissioners. But I think it would be very dangerous, in trying to get to the effect of the permanent provision, to attach too much weight to the particular wording of the transitional one. (*IRC v Metrolands (Property Finance) Ltd* [1981] 1 WLR 637, 649.)

Categories of components

For purposes of interpretation the components of an Act may be classified as operative components, amendable descriptive components, and unamendable descriptive components.

Operative components

The operative components of an Act or statutory instrument are those that constitute the legislator's pronouncements of law, or in other words consist of *enactments*. In an Act they consist of *sections* and *Schedules*, either of which may incorporate a *proviso* or a *saving*. They carry the direct message of the legislator, forming the Act's 'cutting edge' (*Spencer v Metropolitan Board of Works* (1882) 22 Ch D 142, 162). All other components serve as commentaries on

the operative components, of greater or lesser utility in interpretation depending on their function.

Sections Each section is deemed to be a substantive enactment, without the need for enacting words other than the Act's initial enacting formula (Interpretation Act 1978, s 1). To aid the reader, the modern drafter makes use of paragraphing in his undivided section, or in his subsection. The provision remains a single sentence, but is printed with indentations and paragraph numbers so as to bring out the sense and aid cross-referencing. Judges take notice of the paragraphing as a guide to what are intended to be the units of sense (eg *The Eastman Photographic Materials Co Ltd v The Comptroller-General of Patents, Designs and Trade-Marks* [1898] AC 571, 579, 584; *Nugent-Head v Jacob (Inspector of Taxes)* [1948] AC 321, 329). Drafters take great care to design a section so that it deals with a single point. Under the present system of precision drafting, the way the sections are organised and arranged is a useful guide to legislative intention.

Schedules The Schedule is an extension of the section which induces it, and is to be read in the light of the wording of that section. Material is put into a Schedule because it is too lengthy or detailed to be conveniently accommodated within the section, or because it forms a separate document (such as a treaty). If by mischance the inducing words were omitted, the Schedule would still form part of the Act if that was the apparent intention. A note of the section or sections in which the inducing words appear is given in the margin at the head of the Schedule. Sometimes an error is made in citing the relevant section or sections (eg the heading to the Crown Proceedings Act 1947, Sched 1, which omits a reference to s 13 of the Act). Such an error does not affect the validity of the Schedule.

Whether material is put in a section or in a Schedule is usually a mere matter of convenience. Little significance should therefore be attached to it. As Brett LJ said in *A-G v Lamplough* (1878) 3 Ex D 214, 229: 'A schedule in an Act is a mere question of drafting, a mere question of words. The schedule is as much a part of the statute, and is as much an enactment, as any other part.'

Since an Act is to be read as a whole, a Schedule does not have 'second-class' status as compared to a section. In *IRC v Gittus* [1920] 1 KB 563, 576 Lord Sterndale MR gave the following guidance on conflicts between a Schedule and the inducing section:

If the Act says that the Schedule is to be used for a certain purpose and the heading of the part of the Schedule in question shows that it is prima facie at any rate devoted to that purpose, then you must read the Act and the Schedule as though the Schedule were operating for that purpose,

and if you can satisfy the language of the section without extending it beyond that purpose you ought to do it. But if in spite of that you find in the language of the Schedule words and terms that go clearly outside that purpose, then you must give effect to them and you must not consider them as limited by the heading of that part of the Schedule or by the purpose mentioned in the Act for which the Schedule is prima facie to be used. You cannot refuse to give effect to clear words simply because prima facie they seem to be limited by the heading of the Schedule and the definition of the purpose of the Schedule contained in the Act.

For a case where ambiguous words in a Schedule were construed by reference to a heading see *Quaker, Hall & Co Ltd v Board of Trade* [1962] Ch 273.

The proviso A proviso is a formula beginning 'Provided that . . .' which is placed at the end of a section or subsection of an Act, or of a paragraph or sub-paragraph of a Schedule, and the intention of which is to narrow the effect of the preceding words. It enables a general statement to be made as a clear proposition, any necessary qualifications being kept out of it and relegated to the proviso.

As Mervyn Davies J said in *Re Memco Engineering Ltd* [1986] Ch 86, 98 'a proviso is usually construed as operating to qualify that which precedes it'. In *Mullins v Treasurer of Surrey* (1880) 5 QBD 170, 173 Lush J said: 'When one finds a proviso to a section, the natural presumption is that, but for the proviso, the enacting part of the section would have included the subject-matter of the proviso'. While the substance of this dictum is undoubtedly correct, the treatment of the proviso as qualitatively different from the rest of the section is not. The entire section, including the proviso, is an operative component of the Act (*Gubay v Kington (Inspector of Taxes)* [1984] 1 WLR 163).

Judges used to cast doubt on the value of a proviso in throwing light on the meaning of the words qualified by it. This was because provisos, like savings, were often put down as amendments to Bills by their opponents, and accepted to allay usually groundless fears. This still happens in the case of private Bills; but is no longer true of public general Acts.

In the case of precision drafting, the proviso is to be taken as limited in its operation to the section or other provision it qualifies (*Leah v Two Worlds Publishing Co* [1951] Ch 393, 398); *Lloyds and Scottish Finance Ltd v Modern Cars & Caravans (Kingston) Ltd* [1966]

1 QB 764, 780-781). Where however the Act is the subject of disorganised composition, what is in form a proviso may in fact be an independent substantive provision (*Rhondda UDC v Taff Vale Railway* [1909] AC 253, 258; *Eastbourne Corp v Fortes Ltd* [1959]

2 QB 92, 107. The proviso is then said not to be a 'true' proviso (*Commissioner of Stamp Duties v Atwill* [1973] AC 558, 561).

A reference to a section includes any proviso to the section, since the proviso forms part of the section. Thus the repeal of the section also repeals the proviso (*Horsnail v Bruce* (1873) LR 8 CP 378, 385; cf *Piper v Harvey* [1958] 1 QB 439, where the proviso extended beyond the repealed enactment). In accordance with principle, the repeal may be effected by implication.

Savings A saving is a provision the intention of which is to narrow the effect of the enactment to which it refers so as to preserve some existing legal rule or right from its operation. A saving thus resembles a proviso, except that it has no particular form. Furthermore it relates to an existing legal rule or right, whereas a proviso is usually concerned with limiting the new provision made by the section to which it is attached. A saving often begins with the words 'Nothing in this [Act] [section] [etc] shall . . . '.

Very often a saving is unnecessary, but is put in *ex abundanti cautela* to quieten doubts (*Ealing London Borough Council v Race Relations Board* [1972] AC 342, 363). There is an example of this in the Welsh Language Act 1967, which deals with the use of Welsh in legal proceedings and matters. Its final provision is s 5(3), which reads: 'Nothing in this Act shall prejudice the use of Welsh in any case in which it is lawful apart from this Act'. An important example of a saving is the Interpretation Act 1978, s 16, relating to the effect of repeals.

A saving is taken not to be intended to confer any right which did not exist already (*Alton Woods' Case* (1600) 1 Co Rep 40b; *Arnold v Gravesend Corpn* (1856) 2 K & J 574, 591; *Butcher v Henderson* (1868) LR 3 QB 335; *R v Pirehill North JJ* (1884) 14 QBD 13, 19). An unsatisfactory feature of savings, and a reason why drafters resist the addition of unnecessary savings, is that they may throw doubt on matters which it is intended to preserve, but which are not mentioned in the saving (eg *Re Williams, Jones v Williams* (1887) 36 Ch D 573). This is an aspect of the application of the *expressio unius* principle (see pp 201-203 below).

Amendable descriptive components

An amendable descriptive component of an Act is one that (a) in some way describes the whole or some part of the Act, and (b) was subject to amendment (as opposed to a mere printing correction) when the Bill for the Act was going through Parliament. The following are amendable descriptive components: long title, preamble, purpose clause, recital, short title, example.

Long title The long title of an Act (formerly and more correctly called the title) appears at the beginning of the Act. As it is really no more than a remnant from the Bill which on royal assent became the Act, its true function pertains to the Bill rather than the Act.

It sets out in general terms the purposes of the Bill, and under the rules of parliamentary procedure should cover everything in the Bill. If the Bill is amended so as to go wider than the long title, the long title is required to be amended to correspond. Although thus being of a procedural nature, the long title is nevertheless regarded by the courts as a guide to legislative intention.

The long title begins with the words 'An Act to . . .'. Being drafted to comply with parliamentary procedural rules, it is not designed as a guide to the contents of the Act. It is a parliamentary device, whose purpose is in relation to the Bill and its parliamentary progress. Under parliamentary rules, a Bill of which notice of presentation has been given is deemed to exist as a Bill even though it consists of nothing else but the long title. Once the Bill has received royal assent, the long title is therefore vestigial.

The long title is undoubtedly part of the Act, though its value in interpretation has often been exaggerated by judges (eg *Fielding v Morley Corpn* [1899] 1 Ch 1, 3, 4; *Suffolk County Council v Mason* [1979] AC 705; *Gold Star Publications Ltd v DPP* [1981] 1 WLR 732). The courts have been inconsistent on the question of whether the effect of operative provisions should be treated as cut down by the long title. This is to be expected, since the weight of other relevant interpretative factors is bound to vary. Thus in *Watkinson v Hollington* [1944] KB 16 the Court of Appeal resorted to the long title to cut down the plain literal meaning of the phrase 'the levying of distress' in the Courts (Emergency Powers) Act 1943, s 1(2) and exclude from it the impounding of trespassing cattle by the ancient remedy of levying distress *damage feasant*. This was because the consequence of applying the literal meaning of s 1(2) would have been unfortunate. On the other hand, in *In the Estate of Groos* [1904] P 269 the court declined to limit the application of the Wills Act 1861, s 3 to British subjects merely because of the reference to them in the long title (see also, to like effect, *Ward v Holman* [1964] 2 QB 580).

We may summarise by saying that the long title is an unreliable guide in interpretation, but should not be ignored. It may arouse doubt where it appears to conflict with the operative parts of the Act; and this doubt should then be resolved by a balancing exercise in the usual way. It is not right to say with Slade LJ in *Manuel v A-G* [1982] 3 WLR 821, 846 that the court is not entitled to look at the long title unless the operative provisions are ambiguous, because this strikes at the basis of the informed interpretation rule. Lord Simon of Glaisdale said:

In these days, when the long title can be amended in both Houses, I can see no reason for having recourse to it only in case of an ambiguity— it is the plainest of all guides to the general objectives of a statute. But it will not always help as to particular provisions.' (*Black-Clawson*

International Ltd v Papierwerke Waldhof-Aschaffenberg AG [1975] AC 591, 647).

Preamble The courts are reluctant to allow a preamble to override inconsistent operative provisions. Thus it was laid down by the House of Lords in *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436 that the preamble should not be allowed to contradict plain words in the body of an Act. The recital of facts in the preamble to an Act does not amount to conclusive proof that the facts are true; but constitutes prima facie evidence of them (*R v Sutton* (1816) 4 M & S 532; *A-G v Foundling Hospital* [1914] 2 Ch 154; *Dawson v Commonwealth of Australia* (1946) 73 CLR 157, 175). Further evidence is then admissible (*DFC of T (NSW) v W R Moran Pty Ltd* (1939) 61 CLR 735).

Since the preamble may be a guide to the legal meaning of an enactment, it is unsafe to construe the enactment without reference to the preamble; indeed to do so contravenes the informed interpretation rule. The repeal of a preamble by a Statute Law Revision Act does not affect the meaning of the Act (*Powell v Kempton Park Racecourse Co Ltd* [1899] AC 143).

Purpose clauses A purpose clause, which is an optional component of an Act, is an express statement of the legislative intention. When present, it is included in the body of the Act. It may apply to the whole or a part of the Act. An example is the Income and Corporation Taxes Act 1970, s 488(1): 'This section is enacted to prevent the avoidance of tax by persons concerned with land or the development of land.'

Drafters tend to dislike the purpose clause, taking the view that often the aims of legislation cannot usefully or safely be summarised or condensed by such means. A political purpose clause is no more than a manifesto, which may obscure what is otherwise precise and exact. Moreover detailed amendments made to a Bill after introduction may not merely falsify the purpose clause but even render it impracticable to retain any broad description of the purpose. The drafter's view is that his Act should be allowed to speak for itself. (See Renton 1975, para 11.7.)

Recitals A recital has the same function as a preamble, but is confined to a single section or other textual unit. It is so called because it recites some relevant matter, often the state of facts that constitutes the mischief the provision is designed to remedy. There may be recitals in this sense within a preamble. Or indeed they may occur anywhere else in an Act. The specialised use of the term however confines it to a statement beginning 'Whereas . . .' which forms the prefix to a distinct enactment. For example the Statute Law (Repeals) Act 1975, s 1(3) begins: 'Whereas this Act repeals so much of section 16(4) of the Marriage Act 1949 as requires a

surrogate to have given security by his bond . . ." and then goes on to release surrogates from their bonds.

A recital in a private Act is strong but not conclusive evidence of the truth of what is recited (*Wylde v Silver* [1963] 1 QB 169, 187; *Neaverson v Peterborough Rural Council* [1901] 1 Ch 22).

Short title When using the short title as a guide to legislative intention, it must be remembered that its function is simply to provide a brief label by which the Act may be referred to. As Scrutton LJ said: ". . . the short title being a label, accuracy may be sacrificed to brevity" (*In re the Vexatious Actions Act 1886-in re Bernard Boaler* [1915] 1 KB 21, 40). This does not mean that such limited help as it can give must be rejected, and judges not infrequently mention the short title as being at least confirmatory of one of the opposing constructions (eg *Lonrho Ltd v Shell Petroleum Co Ltd* [1982] AC 173, 187).

Examples Where an Act includes examples of its operation, these are to be treated as detailed indications of how Parliament intended the enactment to operate in practice (*Amin v Entry Clearance Officer, Bombay* [1983] 2 AC 818). If however an example contradicts the clear meaning of the enactment the latter is accorded preference, it being assumed in the absence of indication to the contrary that the framer of the example was in error. Acts containing examples include the Occupiers Liability Act 1953, s 2(3) and (4), the Race Relations Act 1968, s 2(2), the Sex Discrimination Act 1975, s 29(2), and the Consumer Credit Act 1974, s 188 and Sched 2.

Unamendable descriptive components

An unamendable descriptive component of an Act is one which describes the whole or some part of the Act, and is not subject to any amendment (as opposed to a mere printing correction) when the Bill for the Act is going through Parliament. It is part of the Act, and may be used in interpretation so far as, having regard to its function, it is capable of "providing a reliable guide. The following are unamendable descriptive components: chapter number, date of passing, enacting formula, heading, sidenote or marginal note, punctuation, format.

Chapter number The only significance of the chapter number for statutory interpretation is in determining which of two Acts receiving royal assent on the same date are to be treated as first in time. Thus where two Acts passed on the same day are inconsistent, the chapter numbers indicate which of them, being deemed the later, is to prevail. Where two or more Acts receive assent by the same letters patent, chapter numbers are allocated according to the order in which the short titles are set out in the schedule to the letters

patent. Accordingly where Acts are shown as receiving royal assent on the same day, the chapter number shows the deemed order of passing.

The chapter number for a public general Act is in large arabic figures. It is in small roman for local Acts (including Provisional Order Confirmation Acts), and small *italicised* arabic for personal Acts (if printed). This is important because the type face of the chapter number is the only thing that tells the reader which sort of Act he is looking at, or is being referred to.

Date of passing The passing of the Act and the receiving of royal assent amount to the same thing (*R v Smith* [1910] 1 KB 17). The significance of the date of passing is therefore that, unless the contrary intention appears, it is also the date of commencement.

Headings A heading within an Act, whether contained in the body of the Act or a Schedule, is part of the Act. It may be considered in construing any provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore often inaccurate, guide to the material to which it is attached. In accordance with the informed interpretation rule modern judges consider it not only their right but their duty to take account of headings (eg *Dixon v British Broadcasting Corp'n* [1979] QB 546; *Customs and Excise Commrs v Mechanical Services (Trailer Engineers) Ltd* [1979] 1 WLR 305; *Lloyds Bank Ltd v Secretary of State for Employment* [1979] 1 WLR 498; *Re Phelps (deed)* [1980] Ch 275).

Where a heading differs from the material it describes, this puts the court on enquiry. However it is most unlikely to be right to allow the plain literal meaning of the word? to be overridden purely by reason of a heading (*Fitzgerald v Hall Russell & Co Ltd* [1970] AC 984, 1000; *Pilkington Bros Ltd v IRC* [1982] 1 WLR 136, 145). However where general words are preceded by a heading indicating a narrower scope it has been held to be legitimate to treat the general words as cut down by the heading (*Inglis v Robertson and Baxter* [1898] AC 616).

Sidenotes A sidenote or marginal note to a section is part of the Act. It may be considered in construing the section or any other provision of the Act, provided due account is taken of the fact that its function is merely to serve as a brief, and therefore necessarily inaccurate, guide to the content of the section (*R v Schildkamp* [1971] AC 1, 10). For example the Bail Act 1976, s 6 makes it an offence if a person who has been released on bail in criminal proceedings fails without reasonable cause to surrender to custody. The sidenote reads: 'Offence of *absconding* by person released on bail' (emphasis added). Absconding is not the only possible reason for failing to

surrender to bail. Does the sidenote restrict the width of the section? The answer returned in *R v Harbax Singh* [1979] QB 319 was no.

Thring said that the sidenotes, when read together in the arrangement of sections at the beginning of the Act, 'should have such a consecutive meaning as will give a tolerably accurate idea of the contents of the Act' (Thring 1902, p 60). This is an aim drafters pursue, so that the arrangement of sections (or collection of sidenotes) gives a helpful indication of the scope and intention of the Act.

Format The layout or format is part of the Act. It may be considered in construing any provision of the Act, provided due account is taken of the fact that it is designed merely for ease of reference. Megarry V-C said extra-judicially that 'arrangement may be of the highest importance in suggesting one interpretation and concealing another' ((1959) 75 LQR 31). For example it is the modern practice to break a long section or subsection into paragraphs. Where a provision consists of several numbered paragraphs with the word 'or' before the last paragraph only, that word is taken to be implied before the previous paragraphs after the first (*R E Megarry* (1959) 75 LQR 29; *Phillips v Price* [1958] 3 WLR 616).

The following statement of the reasons for dividing an Act into parts was given by Holroyd J in the Australian case of *Re The Commercial Bank of Australia Ltd* (1893) 19 VLR 333, 375:

When an Act is divided and cut into parts or heads, *prima facie* it is, we think, to be presumed that those heads were intended to indicate a certain group of clauses as relating to a particular object . . . The object is *prima facie* to enable everybody who reads to discriminate as to what clauses relate to such and such a subject matter. It must be perfectly clear that a clause introduced into a part of an Act relating to one subject matter is meant to relate to other subject matters in another part of the Act before we can hold that it does so.

In *Chalmers v Thompson* (1913) 30 WN (NSW) 162 the court considered a section of the Children's Protection Act (a consolidation Act). The section, relating to ill-treatment of children, appeared in a Part headed 'Adoption of Children'. The question was whether a child's natural father could be convicted of contravening the section. The court held that he could, reaching this result by consulting the preconsolidation version, which was not divided into parts.

If material is put into the form of a *footnote* it is still fully a part of the Act, and must be construed accordingly (*Erven Warnink BV v Townend & Sons (Hull) Ltd* [1982] 3 All ER 312, 316). For other cases where the court was guided in its construction of an enactment by its typography and layout see *Piper v Harvey* [1958] 1 QB 439; *In re Allsop* [1914] 1 Ch 1; *Dormer v Newcastle-on-Tyne Corp* [1940] 2 KB 204.

Punctuation Since fashions in punctuation change, an Act should be construed with regard to the fashion prevailing when it was passed. The Australian case of *Moore v Hubbard* [1935] VLR 93 concerned the construction of an enactment making it an offence to deface 'any house or building or any wall fence lamp post or gate'. The defendant had defaced a post carrying electric lines. He was convicted on the ground that the word 'post' stood by itself, and appealed. *Held* The enactment, having been passed in the days when it was not customary to use hyphens in legislation, should be read as if it was written 'any house or building, or any wall, fence, lamp- post, or gate'.

Incorporation by reference

It is a common device of drafters to incorporate earlier statutory provisions by reference, rather than setting out similar provisions in full. This device saves space, and also attracts the case law and other learning attached to the earlier provisions. Its main advantage is a parliamentary one however, since it shortens Bills and cuts down the area for debate. The functional construction rule applies to incorporation by reference, since the provisions incorporated are in a sense components of the Act or other instrument into which they are incorporated.

Where two Acts are required by a provision in the later Act to be construed as one, every enactment in the two Acts is to be construed as if contained in a single Act, except in so far as the context indicates that the later Act was intended to modify the earlier Act. The like principle applies where more than two Acts are to be construed as one, or where a part only of an Act is to be construed as one with other enactments (*Canada Southern Railway Company v International Bridge Company* (1883) 8 App Cas 723, 727; *Han v Hudson Bros Ltd* [1928] 2 KB 629; *Phillips v Parnaby* [1934] 2 KB 299). Construction as one often causes difficulty to the interpreter. This is because it is a 'blind' form of drafting, far inferior to textual amendment. Mackinnon LJ, a member of the committee whose proposals led to the Arbitration Act 1934, recorded how the drafter of the Act came to see him about the rejection of the committee's recommendation that there should be no legislation by reference in the Act:

I declined to take any interest in it: I reminded him of our request, but 'Here', I said, 'is the detestable thing—legislation by reference of the worst sort'. By way of defence he said what we had proposed was impossible. A Bill so drafted would be intelligible to any MP of the meanest parts; he could debate every section of it, and move endless amendments. (MacKinnon 1942, p 14).

An enactment sometimes incorporates into the Act a whole body

of law as it existed at a given time. This may include the practice prevailing at that time, as well as the substantive law then operative. The provisions thus incorporated may not otherwise continue in force. This form of legislation by reference may be called *archival drafting* because it requires persons applying the Act, after a considerable period has elapsed since the relevant date, to engage in historical research in order to find out what the law thus imported amounts to. The effect of archival drafting is to 'freeze' the body of law, so far as thus imported, in the form it was in on the relevant date. Subject to any amendments subsequently made for the purposes of the applying Act, the body of law is to be interpreted for those purposes at any subsequent time, unless the contrary intention appears, as if it had remained unaltered since that date. Thus the Representation of the People Act 1983, s 5(1) says that residence is to be determined 'in accordance with the general principles formerly applied'.

Rules laid down by statute (statutory definitions)

For the purposes of shortening language, and avoiding repetition, Parliament often finds it convenient to lay down limited rules of interpretation by statute. Whether or not framed as such, these are usually in essence *definitions* of some word or phrase, which must then be understood in the stipulated sense. Wherever the defined term appears, the text must be read as if the full definition were substituted for it (*Thomas v Marshall* [1953] AC 543, 556; *Suffolk County Council v Mason* [1979] AC 709, 713).

Statutory definitions may be general, or restricted to the appearance of the defined term in the defining Act. Whether it is so stated or not, the definition does not apply if the contrary intention appears from an Act in which the defined term is used, since the legislator is always free to disapply a definition whether expressly or by implication (*Jobbins v Middlesex County Council* [1949] 1 KB 142,160; *Parke v Secretary of State for the Environment* [1978] 1 WLR 1308). A contrary legislative intention displacing a statutory rule of construction relating to a particular term may be manifested by the enactment which uses the term spelling out, in a way different to the statutory rule, how the term is to be construed (*Austin Rover Group v Crouch Butler Savage Associates* [1986] 1 WLR 1102).

A term may be defined differently in different Acts, according to the purpose of the Act (eg *Earl of Normanton v Giles* [1980] 1 WLR 28, which was concerned with varying definitions of 'livestock'). It is even possible for a term to have different meanings within the same Act (eg the Protection of Birds Act 1954, s 14(1), which gives 'wild bird' one meaning in ss 5, 10 and 12 of the Act and a different meaning elsewhere in the Act). This produces obvious risk of confusion.

The wording of a definition may in relation to certain uses of

the defined term produce a meaning that is unexpected or unlikely. This does not require the meaning to be rejected if the wording of the definition is clear. It does however suggest caution, and such cases have attracted judicial censure (eg *Lindsay v Cundy* (1876) 1 QBD 348, 358; *Bradley v Baylis* (1881) 8 QBD 195, 210, 230; *R v Commissioners under the Boilers Explosion Act 1882* [1891] 1 QB 703, 716). The Factories Act 1961, s 175 was unexpectedly held to require a film studio to be treated as a 'factory' since articles (namely films) were made there (*Dunsby v British Broadcasting Corporation* (1983) *The Times*, 25 July; cf *Savoy Hotel Co v London County Council* [1900] 1 QB 665, 669, where the Savoy Hotel was treated as a 'shop').

It is a drafting error (less frequent now than formerly) to incorporate a substantive enactment in a definition (eg *Wakefield Board of Health v West Riding & Grimsby Railway Company* (1865) LR 1 QB 84). A definition is not expected to have operative effect as an independent enactment. If it is worded in that way, the courts will tend to construe it restrictively and confine it to the proper function of a definition.

Sometimes a drafter causes confusion by defining an established term in a misleading way. For example the Parliament Act 1911, s 1(2) gives 'Money Bill' a meaning slightly different from that borne by the term in parliamentary usage. Erskine May comments:

... the number of bills which are money bills in both senses of the term is sufficiently large to create the mistaken belief that the term has only one meaning. As the framers of the Parliament Act did not realise the inconvenience of using an established term in a new and partly different sense, the resulting ambiguity must be frankly recognised. (May 1976, p 810).

Sometimes a term is given a definition which is omitted in later legislation within the same field. Here it is assumed, unless the contrary intention appears, that the definition is intended to continue to apply (eg *Newbury District Council v Secretary of State for the Environment* [1981] AC 578, 596).

Statutory definitions, which may be simple or complex, can be divided into the following six types: clarifying, labelling, referential, exclusionary, enlarging, and comprehensive—some of these overlap:

Clarifying definition This clarifies the meaning of a common word or phrase, by stating expressly that as used in the Act it does or does not include specified matters. The purpose is to avoid doubt. As Viscount Dilhorne said: 'It is a familiar device of a draftsman to state expressly that certain matters are to be treated as coming within a definition to avoid argument on whether they [do] or not' (*IRC v Parker* [1966] AC 141, 161). A term may have a fairly certain meaning, yet give rise to uneasiness by the drafter about leaving it to stand without comment. The remedy is to specify the main ingredients, and rely for any others on the potency of the term

itself. This greatly reduces the danger area. The formula is 'T means A, B, C or D, or any other manifestation of T'. An example is the following definition contained in the Supreme Court Act 1981, s 72(5): ' "intellectual property" means any patent, trade mark, copyright, registered design, technical or commercial information or other intellectual property'.

Labelling definition This uses a term as a label denoting a concept which can then be referred to merely by use of the label. Instead of the drafter having to keep repeating the description of the concept, the label alone can be used. In its simplest form a labelling definition may be very brief. Thus the Courts Act 1971, s 57(1) stated that in the Act 'the Judicature Act 1925' meant the Supreme Court of Judicature Act 1925. This enabled a commonly used abbreviated short title to be employed throughout the Act. A common device is for an amending Act to use the label 'the principal Act' to describe the Act it is amending.

A labelling definition may be in indirect form. Thus the Employment Protection (Consolidation) Act 1978, s 58(5) states: 'Any reason by virtue of which a dismissal is to be regarded as unfair in consequence of subsection (1) or (3) is in this Part referred to as an inadmissible reason'.

In selecting a label the drafter must bear in mind that words have their own potency. Whatever meaning may be expressly attached to a term, the dictionary or legal meaning exercises some sway over the way the definition will be understood by the court. As Richard Robinson said: 'it is not possible to cancel the ingrained emotion of a word merely by an announcement' (Robinson 1952, p 77). An example related to dictionary meaning arose in *Eastleigh BC v Betts* [1982] 2 AC 613, 628, where the definition said that a person is to be taken to have, or not to have, a 'local connection' with a place by reference to stated concepts such as normal residence, employment, and family connections. The House of Lords treated the stated concepts not in their ordinary sense but as coloured by the overall idea of 'local connection'. An example related to legal meaning is furnished by *McCullom v Wrightson* [1968] AC 522, where the House of Lords considered the apparently comprehensive definition of 'gaming' in the Betting, Gaming and Lotteries Act 1963 s 55(1) and held that the common law meaning of 'gaming' must be taken to apply so as to cut down the width of the statutory definition.

Referential definition This attracts a meaning already established in law, whether by statute or otherwise. Thus the Charities Act 1960, s 45(1) says that in the Act 'ecclesiastical charity' has the same meaning as in the Local Government Act 1894. The method carries a danger. Suppose the Act referred to is amended or repealed? Here the principle is clear. Unless the amending or repealing Act contains

an indication to the contrary, the amendment or repeal does not affect the meaning of the referential definition.

Exclusionary definition This expressly deprives the term of a meaning it would or might otherwise be taken to have. Such a definition tends to mislead however if a wide term is artificially cut down by an unexpected extent. Thus the long title of the Animal Boarding Establishments Act 1963 says it is 'An Act to regulate the keeping of boarding establishments for animals'. All the way through, the Act refers to 'animals'. Only when the reader gets to the definition section at the end is he informed that the term 'animal' means cats and dogs only.

The short title of an Act may warn the reader, and so justify a definition of this kind. Thus a definition of 'suspected' as 'suspected of being diseased' could be criticised if it were not contained in a measure called the Diseases of Animals Act 1950 (see s 84(4)).

Enlarging definition This adds a meaning that otherwise would or might not be included in the term. The formula is 'T includes X', which is taken to signify 'T means a combination of the ordinary meaning of T plus the ordinary meaning of X'. In other words the mention of X does not affect the application of the enactment to T in its ordinary meaning (*Nutter v Accrington Local Board* (1878) 4 QBD 375, 384; *Deeble v Robinson* [1954] 1 QB 77, 81-2; *Ex parte Ferguson* (1871) LR 6 QB 280, 291). The Income and Corporation Taxes Act 1970, s 454(3) begins: 'In this Chapter, "settlement" includes any disposition, trust, covenant, agreement or arrangement . . .'. In *Thomas v Marshall* [1953] AC 543, 556 Lord Morton, considering an earlier version of this definition in the Income Tax Act 1952, s 42, said: 'the object of the subsection is, surely, to make it plain that. . . the word "settlement" is to be enlarged to include other transactions which would not be regarded as "settlements" within the meaning which that word ordinarily bears'.

An enlarging definition may not fall to be applied to its full literal extent. Thus in a later case the House of Lords held the definition considered in the previous example to be restricted by implication to 'settlements' (in the enlarged sense) which contain an element of bounty (*IRC v Plummer* [1980] AC 896).

An enlarging definition may make the term include a division or section of the matter in question (eg the Employment Protection (Consolidation) Act 1978, s 58(6)); *Bradley v Baylis* (1881) 8 QBD 210, 230).

Where an enactment contains an enlarging definition of a term, words used in connection with the term in its normal meaning are by implication required to be modified as necessary.

Comprehensive definition This provides a full statement of the meaning of the term, specifying everything that is to be taken as

included in it. Thus the Charities Act 1960, s 46 says: "'charitable purposes" means purposes which are exclusively charitable according to the law of England and Wales'. This comprehensively describes the concept in question. It is also an example of a referential definition, since it draws on the legal meaning of 'charity'.

Interpretation Act 1978

The general Interpretation Act currently in force is the Interpretation Act 1978. This replaced the Interpretation Act 1889, which in turn replaced the first Interpretation Act, known as Lord Brougham's Act 1850.

The basic idea of an Interpretation Act is indicated by the long title to Lord Brougham's Act: 'An Act for shortening the Language used in Acts of Parliament'. An Interpretation Act is thus essentially a collection of labelling definitions.

Every interpreter needs to bear in mind the provisions of the Interpretation Act 1978, which are constantly overlooked in practice.

For a list of terms defined generally by Act see the title 'Act of Parliament' in the official publication *Index to the Statutes*.

Guides to Legislative Intention II: Principles Derived from Legal Policy

The present chapter deals with the eight principles derived from legal policy. These are:

- 1 law should serve the public interest
- 2 law should be just
- 3 persons should not be penalised under a doubtful law
- 4 'adverse' law should not operate retrospectively
- 5 law should be predictable
- 6 law should be coherent and self-consistent
- 7 law should not be subject to casual change
- 8 municipal law should conform to public international law. Some of these principles overlap. For example the principle against

doubtful penalisation and the principle against retrospectivity are both manifestations of the wider principle that law should be just. It is however convenient to treat them separately because of their individual importance.

Nature of legal policy

A principle of statutory interpretation derives from the wider policy of the law, which is in turn based on what is called public policy. The interpreting court is required to presume, unless the contrary intention appears, that the legislator intended to conform to this. Thus in *Re Royse (deed)* [1985] Ch 22, 27 Ackner LJ said of the principle that a person should not benefit from his own wrong that the Inheritance (Provision for Family and Dependants) Act 1975 'must be taken to have been passed against the background of this well-accepted principle of public policy'.

A principle of statutory interpretation can thus be described as a principle of legal policy formulated as a guide to legislative intention. Here it is necessary to remember the juridical distinction between principles and rules. A rule binds, but a principle guides: *principiorum non est ratio*. As we saw in the previous chapter, if an enactment incorporates a rule it makes that rule binding in discerning the purposes of the Act. But if it attracts a principle it leaves scope for flexible application.

General principles of law and public policy underlie and support

the specific rules laid down by the body of legislation. If it were not so the latter would be merely arbitrary. Even where a rule does appear arbitrary (for example that one must drive on the left), there is likely to be a non-arbitrary principle underlying it (road safety is desirable). However that sort of principle is an element of social policy. While it may point to the mischief and remedy of a particular enactment, and assist in purposive construction, it is not the kind of principle this chapter is concerned with.

What we are now considering is the body of general principle built up by the judiciary over the centuries, and referred to as legal policy. It is also referred to as public policy; but it is the judges' view of public policy, and confined to justiciable issues. Public policy in this sense has been judicially described as 'a very unruly horse' (*Richardson v Mellish* (1824) 2 Bing 252), and is not a concept that admits of precise definition. Nevertheless it is clear that it exists, and necessarily has a powerful influence on the interpretation of statutes.

Legal policy, equivalent to what the Germans call *Reschtopolitik*, consists of the collection of principles the judges consider it their duty to uphold. It is directed always to the wellbeing of the community, and is by no means confined to statute law. Thus without reference to any statute it was said by the court in *R v Higgins* (1801) 2 East 5 that all such acts and attempts as tend to the prejudice of the community are indictable. The framing of legal policy goes to the root of the judicial function as understood in Britain. The judges do not exactly invent legal policy: it evolves through the cases. Yet the function is an important creative one, even in relation to statutes. Friedmann remarked, that in his auxiliary function as interpreter of statutes, 'the task of the judge is to leave policy to the elected organs of democracy and to interpret such policy intelligently' (Friedmann 1949, p 315).

The constituent elements of legal policy are drawn from many sources. These include parliamentary enactments, past judgments, ideas of natural law, the writings of domestic jurists, and comparative jurisprudence. The sources are not all legal however. Religious, philosophical and economic doctrine enters in. Political reality flavours the mixture. International obligations are not forgotten. Common sense and *savoir faire* bind the whole together.

The underlying basis of legal policy is the welfare of the inhabitants: *Salus populi est suprema lex* (13 Co Inst 139). It follows that in the formation of legal policy public opinion plays its part, and should never be far from the judge's mind (eg *Foley v Foley* [1981] Fam 160, 167 where on a claim for maintenance by a divorced wife, Eveleigh LJ said 'public opinion would readily recognise a stronger claim founded on years of marriage than on years of cohabitation').

Neither principles of law nor those of wider public policy are static. In their judgments, the courts reflect developments in these

principles. In their Acts, legislators do likewise. There is an interaction between the two. As Lord Sumner said:

The fact that opinion grounded on experience has moved one way does not in law preclude the possibility of its moving on fresh experience in the other; nor does it bind succeeding generations, when conditions have again changed. (*Bowman v Secular Society Ltd* [1917] AC 406, 467.)

However the court ought not to enunciate a new head of public policy in an area where Parliament has demonstrated its willingness to intervene when considered necessary (*Re Brightlife Ltd* [1987] 2 WLR 197). For the concept of public policy in the European Community see *R v Bouchereau* [1978] QB 732.

Principle that law should serve the public interest

It is the basic principle of legal policy that law should serve the public interest. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which is in any way adverse to the public interest. All enactments are presumed to be for the public benefit, there being no sound method of distinguishing between them in this regard. This means that the court must always assume that it is in the public interest to give effect to the true intention of the legislator, even though it may disagree with that intention. Every legal system must concern itself primarily with the public interest. Hence the numerous Latin maxims beginning with the phrase *interest reipublicae* (it concerns the state). One of these maxims, *interest reipublicae ut sit finis litium*, is of frequent application, though modern judges often prefer not to use the Latin form. In *R v Pinfold* [1988] 2 WLR 635 the Court of Appeal, Criminal Division, construed the Criminal Appeal Act 1968, ss 1(1) and 2(1) (which confer a right of appeal in cases of conviction on indictment) by applying the maxim. The convict had already instituted one (unsuccessful) appeal, and now sought to lodge a second appeal on the ground of new evidence. Delivering the judgment of the court Lord Lane CJ did not cite the maxim directly, but nevertheless relied on it. Dismissing the application he said ' . . . one must read those provisions against the background of the fact that it is in the interests of the public in general that there should be a limit or a finality of legal proceedings, sometimes put in a Latin maxim, but that is what it means in English'. On the application of this maxim see also *Buckbod Investments Ltd v Nana-Otchere* [1985] 1 WLR 342 (reluctance of courts to allow appeal to be withdrawn rather than dismissed); *G v G* [1985] 1 WLR 647, 652 (maxim applies strongly in child custody cases, since children are disturbed by prolonged uncertainty).

A proper balance needs to be struck between individual and community rights. Nor is this an even balance, since our present and inherited law constantly takes the view that *jura publica anteferenda privatis* (public rights are to be preferred to private). Lord Denning quoted the statement by Lord Reid in *A-G v Times Newspapers Ltd* [1974] AC 273, 296 that 'there must be a balancing of relevant considerations', then added his own rider: 'The most weighty consideration is the public interest' (*Wallersteiner v Moir* [1974] 1 WLR 991, 1005). Too great an emphasis on the principle against doubtful penalisation can harm the public interest, for the public suffers if dangerous criminals escape on a technicality, or taxes are improperly evaded. In time of war or other national emergency the need to curtail some human rights is greater, as the case of *Liversidge v Anderson* [1942] AC 206 illustrated. Different aspects of the public interest may conflict. In the case of public interest immunity, for instance, 'the balance . . . has to be struck between the public interest in the proper functioning of the public service (ie the executive arm of government) and the public interest in the administration of justice' (*Burmah Oil Co Ltd v Bank of England (A-G intervening)* [1980] AC 1090, per Lord Scarman at p 1145).

Construction in bonam partem In pursuance of the principle that law should serve the public interest the courts have evolved the technique of construction *in bonam partem*. This ensures that, if a statutory benefit is given on a specified condition being satisfied, the court presumes that Parliament intended the benefit to operate only where the required act is performed in a *lawful* manner. Thus where an Act gave efficacy to a fine levied on land, it was held to refer only to a fine lawfully levied (Co Lift s 728). A more recent example concerned the construction of the Town and Country Planning Act 1947, s 12(5), which said that, in respect of land which on the appointed day was unoccupied, planning permission was not required 'in respect of the use of the land for the purpose for which it was last used'. In *Glamorgan County Council v Carter* [1963] 1 WLR 1 the last use of the land had contravened a local Act, so the court held that s 12(5) did not apply. For other examples see *Gridlow-Jackson v Middlegate Properties Ltd* [1974] QB 361 (the 'letting value' of a property, within the meaning of the Leasehold Reform Act 1967, s 4(1), could not exceed the statutory standard rent); *Harris v Amery* (1865) LR 1 CP 148 (voting qualification based on interest in land: actual interest illegal); *Hipperson v Electoral Registration Officer for the District of Newbury* [1985] QB 1060 (residential qualification for the franchise did not by implication require the residence to be lawful, though it did require that it should not be in breach of a court order).

Equally a person does not forfeit a statutory right because he has abstained from acting illegally, as by becoming intentionally homeless to avoid remaining as a trespasser (i? v *Portsmouth City*

Council, ex pane Knight (1983) *The Times*, 18 July) or to avoid infringing immigration laws (*R v Hillingdon London Borough Council, ex pane Wilson* (1983) *The Times*).

Construction *in bonam partem* applies where a disability is removed conditionally, since the removal of a disability ranks as a benefit (eg *Adlam v The Law Society* [1968] 1 WLR 6, where 'in continuous practice as a solicitor' in the Solicitors Act 1957, s 41(1) was read as 'in continuous *lawful* practices-

Principle that law should be just

It is a principle of legal policy that law should be just, and that court decisions should further the ends of justice. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction that leads to injustice.

Parliament is presumed to intend to act justly and reasonably (*IRC v Hinchy* [1960] AC 748, 768), and for this purpose justice includes social justice (*Williams & Glyn's Bank Ltd v Boland* [1981] AC 487, 510). Here courts rely on 'impression and instinctive judgment as to what is fair and just' (*Home Office v Dorset Yacht Co Ltd* [1970] AC 1004, 1054). Thus *in De Vesce (Evelyn Viscountess) v O'Connell* [1908] AC 298, 310 Lord Macnaghten said: 'The process vulgarly described as robbing Peter to pay Paul is not a principle of equity, nor is it, I think, likely to be attributed to the Legislature even in an Irish Land Act.'

In *Coutts & Co v IRC* [1953] AC 267, 281, where the Crown demanded estate duty of £60,000 although by reason of the death of a trust beneficiary the income of another beneficiary was increased by a mere £1,976 per annum, Lord Reid said:

In general if it is alleged that a statutory provision brings about a result which is so startling, one looks for some other possible meaning of the statute which will avoid such a result, because there is some presumption that Parliament does not intend its legislation to produce highly inequitable results.

It sometimes happens that injustice to someone will arise whichever way the decision goes. Here the court carries out a balancing exercise, as in *Pickett v British Rail Engineering Ltd* [1980] AC 136. The case concerned damages recoverable by a deceased's estate under the Law Reform (Miscellaneous Provisions) Act 1934, and Lord Wilberforce said that there might in some cases be duplication of recovery. He went on (p 151):

To that extent injustice may be caused to the wrongdoer. But if there is a choice between taking a view of the law which mitigates a clear and

recognised injustice in cases of normal occurrence, at the cost of the possibility in fewer cases of excess payments being made, or leaving the law as it is, I think our duty is clear. We should carry the judicial process of seeking a just principle as far as we can, confident that a wise legislator will correct resultant anomalies.

The courts nowadays frequently use the concept of *fairness* as the standard of just treatment (eg *Cardshops Ltd v John Lewis Properties Ltd* [1983] QB 161). This is sometimes referred to as the 'aequum et bonum', after the maxim *aequum et bonum est lex legum* (that which is equitable and good is the law of laws).

Discretionary powers

The principle that law should be just means that Parliament is taken to intend, when conferring a discretionary power, that it is to be exercised justly. Thus in *R v Tower Hamlets London Borough Council, ex pane Chetnik Developments Ltd* [1988] 2 WLR 654 the House of Lords laid down the principle that where an apparently unfettered discretion is conferred by statute on a public authority it is to be inferred that Parliament intended the discretion to be exercised in the same high-principled way as is expected by the court of its own officers.

Principle against doubtful penalisation

A person is not to be put in peril upon an ambiguity. As an aspect of the principle that law should be just, legal policy requires that a person should not be penalised except under clear law, which may be called the principle against doubtful penalisation. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction that penalises a person where the legislator's intention to do so is doubtful, or penalises him in a way or to an extent which was not made clear in the enactment.

For this purpose a law that inflicts hardship or deprivation of any kind is treated as penal. There are degrees of penalisation, but the concept of detriment inflicted through the state's coercive power pervades them all. Accordingly this principle is not concerned with any technical rules as to what is or is not a penal enactment. The substance is what matters. Whenever it can be argued that an enactment has a meaning requiring infliction of a detriment of any kind, the principle against doubtful penalisation comes into play. If the detriment is minor, the principle will carry little weight. If the detriment is severe, the principle will be correspondingly powerful. However it operates, the principle states that persons

should not be subjected by law to any sort of detriment unless this is imposed by clear words. As Brett J said in *Dickenson v Fletcher* (1873) LR 9 CP 1, 7:

Those who contend that a penalty may be inflicted must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances. They must fail if the words are merely equally capable of a construction that would, and one that would not, inflict the penalty.

Deprivation without compensation

An obvious detriment is to take away rights without commensurate compensation. The common law has always frowned on this. Brett MR said: It is a proper rule of construction not to construe an Act of Parliament as interfering with or injuring persons' rights without compensation unless one is obliged so to construe it.' (*A-G v Homer* (1884) 14 QBD 245, 257; approved *Consett Iron Co v Clavering* [1935] 2 KB 42, 58; *Bond v Nottingham Corpn* [1940] Ch 429, 435.)

The same applies where rights, though not taken away, are restricted (*London and North-Western Railway Co v Evans* [1893] 1 Ch 16, 27; *Mayor etc of Yarmouth v Simmons* (1879) 10 Ch D 518, 527). It applies both to the rights of an individual and those possessed by the public at large (*Forbes v Ecclesiastical Commissioners* (1872) LR 15 Eq 51, 53; *R v Strachan* (1872) LR 7 QB 463, 465).

Where a statutory procedure exists for taking away rights with compensation, the court will resist the argument that some other procedure can legitimately be used for doing the same thing without compensation (*Hartnell v Minister of Housing* [1965] AC 1134; *Hall v Shoreham-by-Sea UDC* [1964] 1 WLR 240).

Common law rights The principle against doubtful penalisation applies to the taking away of what is given at common law: 'Plain words are necessary to establish an intention to interfere with . . . common law rights' (*Deeble v Robinson* [1954] 1 QB 77, 81).

Detailed statutory codes Where Parliament finds it necessary to lay down a detailed system of regulation in some area of the national life the courts recognise that it may then be impossible to avoid inflicting detriments which, taken in isolation, are unjustified. The presumption against doubtful penalisation is therefore applied less rigorously in such cases (*Young v Secretary of State for the Environment* [1983] 2 AC 662, 671).

Standard of proof Where an enactment would inflict a serious detriment on a person if certain facts were established then, even though the case is not a criminal cause or matter, the criminal standard

of proof will be required to establish those facts (eg *R v Milk Marketing Board, ex pane Austin* (1983) *The Times* 21 March).

Types of detriment

We now consider in detail the various types of detriment to which the principle against doubtful penalisation applies. It is convenient to do this in conjunction with references to relevant provisions of the European Convention on Human Rights, since our courts are required by treaty to have regard to these.

First we look at impairment of human life or health. Then follow various kinds of interference, namely with freedom of the person, family rights, religion, free assembly and association, and free speech. Next come detriment to property and other economic interests, detriment to status or reputation, and infringement of privacy. We conclude with impairment of rights in relation to law and legal proceedings, and with other infringement of a person's rights as a citizen. Criminal sanctions, with which the principle against doubtful penalisation is chiefly identified, appear in several of these categories. Capital and corporal punishment fall within the first. Imprisonment curtails freedom of the person and interferes with family rights. A fine is an economic detriment. All convictions impose a stigma, and therefore affect status or reputation.

Impairment of human life or health The leading aspect of the principle against doubtful penalisation is that by the exercise of state power the life or health of a person should not be taken away, impaired or endangered, except under clear authority of law. An exception as to preservation of human life is imported whenever necessary into a penal enactment. Even where the exception is not stated expressly, the probability that it is to be taken as implied necessarily raises doubt as to the application of the enactment, and thus the principle against doubtful penalisation applies. As was said long ago by an advocate in *Reniger v Fogossa* (1550) 1 Plowd 1,

When laws or statutes are made, yet there are certain things which are exempted and excepted out of the provision of the same by the law of reason, although they are not expressly excepted. As the breaking of prison is felony in the prisoner himself by the Statute de Frangentibus Prisonam: yet if the prison be on fire, and they who are in break the prison to save their lives, this shall be excused by the law of reason, and yet the words of the statute are against it.

Similarly in *R v Rose* (1847) 2 Cox CC 329 an enactment penalising 'revolt in a ship' was held subject to an implied exception where revolt was justified to prevent the master from unlawfully killing persons on board.

When in a poor law case it was objected that the law gave an alien no claim to subsistence, Lord Ellenborough CJ said:

... the law of humanity, which is anterior to all positive laws, obliges us to afford them relief, to save them from starving; and [the poor laws] were only passed to fix the obligation more certainly, and point out distinctly in what manner it should be borne. (*R v Inhabitants of Eastbourne* (1803) 4 East 103, 106.)

The law requires convincing justification before it permits any physical interference, under alleged statutory powers, with a person's body (eg *W v W* (1963) [1964] P 67; *Aspinall v Sterling Mansell Ltd* [1981] 2 All ER 866; *Prescott v Bulldog Tools Ltd* [1981] 3 All ER 869). The court will be reluctant to arrive at a meaning which would hinder self-help by a person whose health is endangered (eg *R v Dunbar* [1981] 1 WLR 1536).

Article 2 of the European Convention on Human Rights requires everyone's right to life to be protected by law, and states that no one shall be deprived of his life intentionally save in the execution of a court sentence following conviction for a crime for which the law imposes the death penalty. Exceptions cover self-defence, lawful arrest, and action taken to quell riot or insurrection. Article 3 of the Convention follows the Bill of Rights (1688) in prohibiting torture, and 'inhuman or degrading treatment or punishment'.

Physical restraint of the person One aspect of the principle against doubtful penalisation is that by the exercise of state power the physical liberty of a person should not be interfered with except under clear authority of law. Freedom from unwarranted restraint of the person has always been a keystone of English law, and continues to be recognised by Parliament (eg the Supreme Court Act 1981, s 18(h)(i)). It follows that an enactment is not held to impair this without clear words. As Goff LJ said in *Collins v Wilcock* [1984] 1 WLR 1172, 1177, where a conviction for assaulting a police officer who took hold of the defendant's arm was quashed: 'the fundamental principle, plain and incontestable, is that every person's body is inviolate'.

Article 4 of the European Convention on Human Rights states that no one shall be held in slavery or servitude, or be required to perform forced or compulsory labour. Exceptions cover lawful imprisonment, military service, work to meet an emergency threatening the life or well-being of the community, and 'normal civic obligations'. Article 5 of the Convention states that everyone has the right to liberty and security of person, and that no one shall be deprived of his liberty except in one of a number of specified cases. These cover lawful imprisonment, care of minors, and detention of lunatics, alcoholics, drug addicts, vagrants, and persons with infectious diseases. Protocol 4 to the Convention forbids imprisonment merely on the ground of inability to fulfil a contractual obligation. It also states that, subject to obvious exceptions, everyone

lawfully within the territory of the state shall have the right to liberty of movement (including freedom to choose his residence), and freedom to leave the state.

Interference with family rights One aspect of the principle against doubtful penalisation is that by the exercise of state power the family arrangements of a person should not be interfered with, nor his relationships with family members impaired, except under clear authority of law.

English law has always concerned itself with the protection of the home. Unless the contrary intention appears, an enactment by implication imports the principle *domus sua cuique est tutissimum refugium*, which may be freely translated as 'a man's home is his castle'. An interpretation that would make a person homeless is adopted with reluctance (eg *Annicola Investments Ltd v Minister of Housing and Local Government* [1968] 1 QB 631, 644).

In considering the enactments relating to child care, Lord Scarman said:

The policy of the legislation emerges clearly from a study of its provisions. The encouragement and support of family life are basic. The local authority are given duties and powers primarily to help, not to supplant, parents. A child is not to be removed from his home or family against the will of his parent save by the order of a court, where the parent will have an opportunity to be heard before the order is made. Respect for parental rights and duties is, however, balanced against the need to protect children from neglect, ill-treatment, abandonment and danger, for the welfare of the child is paramount. (*London Borough of Lewisham v Lewisham Juvenile Court JJ* [1980] AC 273, 307.)

The courts lean in favour of the transmission of an intestate's estate to members of his family, rather than that it should pass to the state as *bona vacantia* (eg *Re Lockwood, Atherton v Brooke* [1958] Ch 231).

Article 8 of the European Convention on Human Rights states that everyone has the right to respect for his family life and his home, with exceptions for national security, public safety, economic well-being of the state, prevention of crime or disorder, protection of health or morals, and the freedom of others. Article 12 of the Convention says that men and women of marriageable age have the right to marry and to found a family. Protocol 1 states that no person shall be denied the right to education, and adds that the state shall respect the right of parents to ensure that education is in conformity with their own 'religious and philosophical convictions'.

Interference with religious freedom Another aspect of the principle against doubtful penalisation is that by the exercise of state power

the religious freedom of a person should not be interfered with, except under clear authority of law. English law is still predisposed to the Christian religion, particularly that form of it which is established by law (or in other words Anglicanism). However Parliament has discarded most of the former laws, such as the Corporation and Test Acts, which caused discrimination against persons of other faiths or none. The House of Lords dismissed as 'mere rhetoric' Hale's statement that Christianity is 'parcel of the laws of England' (*Bowman v Secular Society Ltd* [1917] AC 406,458). Yet the House of Lords has recently enforced, after an interval of more than half a century, the ancient offence of blasphemous libel as a safeguard solely of Christian believers (*R v Lemon* [1979] AC 617). The previous recorded conviction for this offence was *R v Gott* (1922) 16 Cr App R 87.

Article 9 of the European Convention on Human Rights states that, within obvious limitations, everyone has the right to freedom of thought, conscience and religion. This is stated to include freedom to change one's religion or belief, and freedom (either alone or in community with others, and either in public or private) to manifest one's religion or belief in worship, teaching, practice and observance. Lord Scarman has said that by necessary implication art 9 'imposes a duty on all of us to refrain from insulting or outraging the religious feelings of others' (*R v Lemon* [1979] AC 617, 665).

Interference with free assembly and association The principle against doubtful penalisation requires that by the exercise of state power the freedom of a person to assemble and associate freely with others should not be interfered with, except under clear authority of law. Thus in *Beany v Gillbanks* (1882) 9 QBD 308, 313, where local Salvation Army leaders were convicted of unlawful assembly for organising revival meetings and marches which would have been entirely peaceful if a hostile group had not sought to break them up by force, Field J said:

As far as these appellants are concerned there was nothing in their conduct when they were assembled together which was either tumultuous or against the peace. But it is said, that the conduct pursued by them on this occasion was such, as on several previous occasions, had produced riots and disturbances of the peace and terror to the inhabitants . . . Now I entirely concede that everyone must be taken to intend the natural consequences of his own acts . . . the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition . . .

Article 11 of the European Convention on Human Rights states that everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. There

are exceptions for members of the armed forces, police and state administration, and the other usual qualifications.

Interference with free speech One aspect of the principle against doubtful penalisation is that by the exercise of state power a person's freedom of speech should not be interfered with, except under clear authority of law. Lord Mansfield said: 'The liberty of the press consists in printing without any previous licence, subject to the consequences of law' (*R v Dean of St Asaph* (1784) 3 TR 428 (note); see also *R v Cobbett* (1804) 29 St Tr 1). Scarman LJ, in remarks concerning the Administration of Justice Act 1960, s 12(4), referred to 'the law's basic concern to protect freedom of speech and individual liberty' (*Re F (a minor) (publication of information)* [1977] Fam 58, 99). The dictum was approved by Lord Edmund-Davies on appeal (see [1979] AC 440, 465).

In *Re X (a minor)* [1975] Fam 47 it was sought to prohibit the publication of discreditable details about a deceased person on the ground that this might harm his infant child if the child became aware of them. *Held* the public interest in free speech outweighed the possible harm to the child, and the injunction would be refused.

Article 10 of the European Convention on Human Rights says that everyone has the right to freedom of expression. This includes freedom to hold opinions and receive and impart information and ideas without interference by public authority, and regardless of frontiers. Licensing of broadcasting and cinemas is allowed, but not licensing of the press. Other restrictions such as 'are necessary in a democratic society' are allowed. Article 6 of the Convention permits restrictions on the reporting of criminal trials.

Detriment to property and other economic interests The principle against doubtful penalisation requires that by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law.

It was said by Pratt CJ in the great case against general warrants, *Entick v Carrington* (1765) 19 St Tr 1030, 1060 that: 'The great end for which men entered into society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been abridged by some public law for the good of the whole'

Blackstone said that the right of property is an absolute right, inherent in every Englishman: 'which consists in the free use, enjoyment, and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land'. He added that the laws of England are therefore 'extremely watchful in ascertaining and protecting this right' (Blackstone 1765, i 109). It follows that whenever an enactment is alleged to authorise interference with property the court will apply the principle against doubtful

penalisation. The interference may take many forms. All kinds of taxation involve detriment to property rights. So do many criminal and other penalties, such as fines, compensation orders and costs orders. Compulsory purchase, trade regulation and restrictions, import controls, forced redistribution on divorce or death, and maintenance orders are further categories. It must be stressed however that, as so often in statutory interpretation, there are other criteria operating *in favour* of all these and the result must be a balancing exercise.

Perhaps the most severe interference with property rights is expropriation. Buckley LJ said that:

... in an Act such as the Leasehold Reform Act 1967, which, although it is not a confiscatory Act is certainly a dispropriatory Act, if there is any doubt as to the way in which language should be construed, it should be construed in favour of the party who is to be dispropriated rather than otherwise. (*Methuen-Campbell v Walters* [1979] QB 525, 542).

Property rights include the right of a person who is *sui juris* to manage and control his own property. Nourse J referred to 'the general principle in our law that the rights of a person whom it regards as having the status to deal with them on his own behalf will not ... be overridden' (*Re Savoy Hotel Ltd* [1981] Ch 351, 365).

The tendency is for the conferring of property rights to be by common law, and for their abridgement to be by statute. The courts, having created the common law, are jealous of attempts to deprive the citizen of its benefits (eg *Turton v Turnbull* [1934] 2 KB 197, 199; *Newtons of Wembley Ltd v Williams* [1965] 1 QB 560, 574). Where property rights given at common law are curtailed by statute, the statutory conditions must be strictly complied with. Thus Davies LJ said of the Landlord and Tenant Act 1954: 'The statute, as we all know, is an invasion of the landlord's right, for perfectly proper and sound reasons; but it must be construed strictly in accordance with its terms' (*Stile Hall Properties Ltd v Gooch* [1980] 1 WLR 62, 65).

On taxation the modern attitude of the courts is that the revenue from taxation is essential to the running of the state, and that the duty of the judiciary is to aid its collection while remaining fair to the subject, eg *IRC v Berrill* [1981] 1 WLR 1449 (construction rejected which would have made it impossible for Inland Revenue to raise an assessment).

Protocol 1 to the European Convention on Human Rights says that every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one is to be deprived of his possessions except in the public interest and by due process of law.

Detriment to status or reputation Under the principle against doubtful penalisation it is accepted that by the exercise of state

power the status or reputation of a person should not be impaired or endangered, except under clear authority of law. Therefore the more a particular construction is likely to damage a person's reputation, the stricter the interpretation a court is likely to give.

The court accepts that any conviction of a criminal offence imparts a stigma, even though an absolute discharge is given. Thus in *DPP for Northern Ireland v Lynch* [1975] AC 653, 707 Lord Edmund-Davies spoke of the obloquy involved in the mere fact of conviction'. If an offence carries a heavy penalty, the stigma will be correspondingly greater (*Sweet v Parsley* [1970] AC 132, 149). This is an important consideration in determining whether Parliament intended to require *mens rea*.

The European Convention on Human Rights does not reproduce the provision in the Universal Declaration of Human Rights 1948 stating that no one shall be subjected to 'attacks upon his honour and reputation' (art 12). However art 10 of the European Convention, in conferring the right of free speech, does include an exception 'for the protection of the reputation or rights of others'.

Infringement of privacy One aspect of the principle against doubtful penalisation is that by the exercise of state power the privacy of a person should not be infringed, except under clear authority of law. An important element in the law's protection of privacy springs from the principle that a man's home is his castle, discussed above (p 145). Even outside the home, the courts tend to require clear words to authorise an invasion of privacy. For example it was held that a predecessor of the Licensing Act 1964, s 186, which says that a constable 'may at any time enter licensed premises ... for the purpose of preventing or detecting the commission of any offence', must be treated as subject to the implied limitation that it did not authorise a constable to enter unless he had some reasonable ground for suspecting a breach of the law (*Duncan v Dowding* [1897] 1 QB 575).

There is no principle in English law by which documents are protected from discovery by reason of confidentiality alone. This does not mean that, in deciding whether to order discovery under statutory powers, an authority is intended to ignore the question of confidentiality. It is to be taken into account along with other factors (*Science Research Council v Nasse* [1980] AC 1028, 1065). Article 8 of the European Convention on Human Rights states that everyone has the right to respect for his private life and his correspondence, with exceptions for national security, public safety, economic well-being of the state, prevention of crime or disorder, protection of health or morals, and the freedom of others.

Impairment of rights in relation to law and legal proceedings One aspect of the principle against doubtful penalisation is that by the exercise of state power the rights of a person in relation to law

and legal proceedings should not be removed or impaired, except under clear authority of law. The rule of law requires that the law should apply equally, and that all should be equal before it (*Richards v McBride* (1881) 51 LJMC 15, at p 16). It also requires that all penalties be inflicted by due process of law, which in turn demands that there should be no unauthorised interference with that process. In general, no citizen should without clear authority be 'shut out from the seat of justice' (*Aspinall v Sterling Mansell Ltd* [1981] 3 All ER 866, 867). This applies even to a convicted prisoner (*Raymond v Honey* [1983] AC 1, 12). These principles are embedded in various ancient constitutional enactments. Thus a chapter of Magna Carta enshrines the Crown's promise that a man shall not be condemned 'but by lawful judgment of his peers, or by the law of the land'. It goes on: 'we will sell to no man, we will not deny or defer to any man either justice or right' (25 Edw 1 (1297) c 29). The statute 28 Edw 3 c 3 (1354) enacts that 'no man of what estate or condition that he be, shall be put out of land or tenement, nor taken, nor imprisoned, nor disinherited, nor put to death, without being brought to answer by due process of law'. The Bill of Rights (1688) forbids excessive bail, excessive fines, and cruel and unusual punishments; and requires jurors to be duly empannelled and returned. Alleged deprivation of the common law right to trial by jury will be strictly construed (*Looker v Halcomb* (1827) 4 Bing 183, 188).

The right to bring, defend and conduct legal proceedings without unwarranted interference is a basic right of citizenship (*In re the Vexatious Actions Act 1896—in re Bernard Boaler* [1915] 1 KB 21, 34-5). While the court has control, subject to legal rules, of its own procedure, this does not authorise any ruling which abridges the basic right. In the case of a defendant, the right covers 'the right to defend himself in the litigation as he and his advisers think fit [and] choose the witnesses that he will call' (*Starr v National Coal Board* [1977] 1 WLR 63, 71).

The removal of legal remedies is strictly construed (*Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606), as are provisions allowing technical defences (*Sanders v Scott* [1961] 2 QB 326). It is presumed that a party is not to be deprived of his right of appeal (*Mackey v Monks* [1918] AC 59, 91). A litigant who has obtained a judgment is by law entitled not to be deprived of that judgment without 'very solid grounds' (*Brown v Dean* [1910] AC 373, 374). An important aspect of rights in relation to law is the right not to have legal burdens thrust upon one. It is a detriment to be obliged to carry out statutory duties against one's will, or to incur the risk of being the subject of legal proceedings. This is so even though no economic loss is involved. (*R v Loxdale* (1758) 1 Burr 445; *R v Cousins* (1864) 33 LJMC 87; *Finch v Bannister* [1908] 2 KB 441; *Gaby v Palmer* (1916) 85 LJKB 1240, 1244.)

Articles 5 and 6 of the European Convention on Human Rights give elaborate protection for rights in legal proceedings. This covers

safeguards in case of arrest, the presumption of innocence, the right to a fair trial, the right of cross-examination, the publicity of proceedings, and other matters.

Other interference with rights as a citizen In addition to the rights previously referred to, the principle against doubtful penalisation requires that by the exercise of state power no other right of a person as a citizen should be interfered with except under clear authority of law. The policy of the law is to protect the rights enjoyed by a person as a citizen. In a notable dissenting judgment, Earl Warren CJ said: 'Citizenship is man's basic right for it is nothing less than the right to have rights. Remove this priceless possession and there remains a stateless person, disgraced and degraded in the eyes of his countrymen'. (*Perez v Brownell* (1958) 356 US 64.)

Thus because of the importance attached to *voting rights* the courts tend to give a strict construction to any enactment curtailing the franchise (*Randolph v Milman* (1868) LR 4 CP 107; *Piercy v Maclean* (1870) LR 5 CP 252, 261 *Hipperson v Electoral Registration Officer for the District of Newbury* [1985] QB 1060, 1067).

Protocol 1 to the European Convention on Human Rights requires the holding of free elections at reasonable intervals by secret ballot, under conditions which ensure the free expression of the opinions of the people in the choice of the legislature. Protocol 4 requires that no one shall be expelled, by means either of an individual or of a collective measure, from the territory of the state of which he is a national. It also says that no one shall be deprived of the right to enter the territory of the state of which he is a national.

Principle against retrospectivity

As a further aspect of the principle that law should be just, legal policy requires that, except in relation to procedural matters, changes in the law should not take effect retrospectively. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle.

A person is presumed to know the law, and is required to obey the law. It follows that he should be able to trust the law. Having fulfilled his duty to know the law, he should then be able to act on his knowledge with confidence. The rule of law means nothing else. It follows that to alter the law retrospectively, at least where that is to the disadvantage of the subject, is a betrayal of what law stands for. Parliament is presumed not to intend such betrayal. As Willes J said, retrospective legislation is:

... contrary to the general principle that legislation by which the conduct

of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law (*Phillips v Eyre* (1870) LR 6 QB 1, 23).

Thus in the absence of a clear indication in an amending enactment the substantive rights of the parties to any civil legal proceedings fall to be determined by the law as it existed when the action commenced (*Re Royse (deed)* [1985] Ch 22, 29).

Degrees of retrospectivity Where, on a weighing of the factors, it seems that *some* retrospective effect was intended, the general presumption against retrospectivity indicates that this should be kept to as narrow a compass as will accord with the legislative intention (*Lauri v Renad* [1892] 3 Ch 402, 421; *Skinner v Cooper* [1979] 1 WLR 666).

Procedural changes Rules of legal procedure are taken to be intended to facilitate the proper settlement of civil or, as the case may be, criminal disputes. Changes in such rules are assumed to be for the better. They are also assumed to be neutral as between the parties, merely holding the ring. Accordingly the principle against retrospectivity does not apply to them, since they are supposed not to possess any penal character (*Yew Bon Tew v Kenderaan Bas Maria* [1983] 1 AC 553). Indeed if they have any substantial penal effect they cannot be merely procedural.

Pending actions Where an amending enactment is intended to be retrospective it will apply to pending actions, including appeals from decisions taken before the passing of the amending Act (*Hewitt v Lewis* [1986] 1 WLR 444).

Penalties for offences It has been held that an enactment fixing the penalty, or maximum penalty, for an offence is merely procedural for the purpose of determining retrospectivity (*DPP v Lamb* [1941] 2 KB 89; *Buckman v Button* [1943] KB 405; *R v Oliver* [1944] KB 68). This seems wrong in principle, as well as conflicting with our international obligations under the European Convention on Human Rights. Article 7 of this says: 'Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed'. In *R v Deery* [1977] Crim LR 550 the Northern Ireland Court of Criminal Appeal declined to follow the English authorities mentioned above. In *PenwithJJ, ex pane Hay* (1979) 1 Cr App R (S) 265 it was said by the Divisional Court that, where the maximum penalty for an offence is increased, this should not be applied to offences committed before the increase unless there is a clear legislative intention to this effect (see also commentary on *R v Craig* [1982] Crim LR 132 at [1982] Crim LR 191-2).

European Convention on Human Rights

Article 7 of the European Convention on Human Rights states that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. As mentioned above, where the act or omission did constitute an offence when committed, no penalty is to be imposed which is heavier than the one applicable at that time. Article 7 is expressed not to prejudice the trial and punishment of any person for any act or omission which, at the time it was committed, was criminal according to 'the general principles of law recognised by civilised nations'.

The principle laid down by art 7 is common to all the legal orders of the member states. It is among the general principles of law whose observance is ensured by the European Court (*R v Kirk (Kent)* (No 63/83) [1985] 1 All ER 453, 462).

Principle that law should be predictable

It is a principle of legal policy that law should be certain, and therefore predictable. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to reach a construction which was reasonably foreseeable by the parties concerned. As Lord Diplock said: 'Unless men know what the rule of conduct is they cannot regulate their actions to conform to it. It fails in its primary function as a rule.' (Diplock 1965, p 16).

This follows a maxim cited by Coke (4 Inst 246): *misera est servitus, ubi jus est vagum aut incertum* (obedience is a hardship where the law is vague or uncertain).

The classic modern statement of the need for predictability is that of Lord Diplock in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenberg AG* [1975] AC 591, 638:

The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates.

One advantage of predictability is that it encourages the settlement of disputes without recourse to litigation. And where litigation has been embarked upon, predictability helps to promote settlements without pursuing the litigation to the bitter end.

It is the policy of the law to promote settlement of disputes.

Thus Lord Diplock, in referring to a judicial guideline as to the rate of interest to be adopted in relation to damages awards, said its purpose lay 'in promoting predictability and so facilitating settlements' (*Wright v British Railways Board* [1983] 2 AC 773,785).

Principle that law should be coherent and self-consistent

It is a principle of legal policy that law should be coherent and self-consistent. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. The court should therefore strive to avoid adopting a construction which involves accepting that on the point in question the law lacks coherence or is inconsistent.

Consistency within the system of laws is an obvious benefit, as recognised by the maxim *lex beneficialis rei consimili remedium praestat* (a beneficial law affords a remedy for cases which are on the same footing) (2 Co Inst 689). It is encouraged by our legal system, under which until recently judges were all drawn from the practising Bar. One of the grounds on which Blackstone praised the old system of travelling assize judges was the resulting consistency in the law:

These justices, though . . . varied and shifted at every assizes, are all sworn to the same laws, have had the same education, have pursued the same studies, converse and consult together, communicate their decisions and resolution . . . And hence their administration of justice and conduct of trials are consonant and uniform; whereby . . . confusion and contrariety are avoided . . . (Blackstone 1765, iii 354).

The dangers where a court cuts across established legal categories and procedures were spelt out by Lord Dilhorne in *Imperial Tobacco Ltd v A-G* [1981] AC 718, 741, a case where it was sought to obtain a civil law declaration on whether particular conduct constituted a criminal offence. In *Vestey v IRC* [1980] AC 1148 the House of Lords justified its departure from a previous decision of the House on the ground that it could now see what Lord Edmund-Davies called (p 1196) the 'startling and unacceptable' consequences of that decision when applied to circumstances never contemplated by the House when reaching it. Again, where a literal construction of the phrase 'a matter relating to trial on indictment' in the Supreme Court Act 1981, s 29(3) would mean that no appeal lay from certain Crown Court decisions, the House of Lords applied a narrow meaning of the phrase (*Re Smalley* [1985] AC 622, 636).

The integrity of legal doctrines should be safeguarded when courts construe legislation. Thus in *Mutual Shipping Corporation York v Bay shore Shipping Co of Monrovia* [1985] 1 WLR 625 it was held that the wide discretion given by the literal meaning of the Arbitration Act 1950, s 22 was subject to severe implied restrictions so as to preserve the finality of arbitration awards.

It is a principle of legal policy that law should be altered deliberately rather than casually, and that Parliament should not be assumed to change either common law or statute law by a side-wind, but only by measured and considered provisions. In the case of common law, or Acts embodying common law, the principle is somewhat stronger than in other cases. It is also stronger the more fundamental the change is. As Lord Devlin said: 'It is a well-established principle of construction that a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion.' (*National Assistance Board v Wilkinson* [1952] 2 QB 648, 661.)

There are many examples of the application of this principle. Thus the House of Lords refused to place on the Law of Property Act 1925, s 56 a construction which would overturn the doctrine of privity of contract (*Beswick v Beswick* [1968] AC 58). Similarly the Court of Appeal preserved the equity doctrine of mortgages in construing s 86(2) of that Act (*Grangeside Properties Ltd v Collingwoods Securities Ltd* [1964] 1 WLR 139).

In *Leach v R* [1912] AC 305 the House of Lords refused, in the absence of clear words, to acknowledge a departure from the principle that a wife cannot be compelled to testify against her husband. Lord Atkinson said (p 311) the principle 'is deep seated in the common law of this country, and I think if it is to be overturned it must be overturned by a clear, definite and positive enactment'.

In *Re Seaford* [1968] p 53, 68 the Court of Appeal refused to hold that the doctrine of relation back of a judicial decision to the beginning of the day on which it was pronounced 'was, as a result of the Supreme Court of Judicature Act 1873 made applicable, as it were by a side-wind, in matrimonial proceedings'. In *R v Owens* (1859) 28 LJQB 316 the court held that an Act allowing a mayor to stand as a councillor did not enable him to act as returning officer at an election for which he was a candidate since it would not be legitimate to infer from the language used that the legislature had intended to repeal by a side-wind the principle that a man shall not be a judge in his own cause.

Courts prefer to treat an Act as regulating rather than replacing a common law rule (*Lee v Walker* [1985] QB 1191, which concerned the power to suspend committal orders in contempt proceedings). Alteration of the common law is presumed not to be intended unless this is made clear (eg *Basildon District Council v Lesser (JE) (Properties) Ltd* [1985] QB 839, 849: 'it would be surprising if Parliament when limiting the effect of contributory negligence in tort [in the Law Reform (Contributory Negligence) Act 1945] introduced it into contract').

Principle that municipal law should conform to public international law

It is a principle of legal policy that the municipal law should conform to public international law. The court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle.

Public international law is what used to be called the law of nations, or *jus gentium*. A rule of public international law which is incorporated by a decision of a competent court then becomes part of the municipal law (*Thai-Europe Tapioca Service Ltd v Govt of Pakistan* [1975] 1 WLR 1485, 1495. Or, under the principle known as *adoption*, a rule of international law may be incorporated into municipal law by custom or statute. It is an important principle of public policy to respect the comity of nations, and obey treaties which are binding under public international law. Thus Diplock LJ said:

. . . there is a prima facie presumption that Parliament does not intend to act in breach of [public] international law, including therein specific treaty obligations; and if one of the meanings that can reasonably be attributed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is so consonant is to be preferred. (*Salomon v Commrs of Customs and Excise* [1967] 2 QB 116, 143).

European Convention The European Convention on Human Rights (Cmnd 8969) entered into force on 3 September 1953. To date it has been ratified by 22 nations, including the United Kingdom. For these it imposes the usual obligations and rights under a treaty in public international law. The machinery for enforcement of these consists of the European Commission of Human Rights and the European Court of Human Rights, both of which operate at Strasbourg. The United Kingdom has accepted the right of individual petition to the Commission, but has not made the Convention part of its municipal law.

It follows that the Convention does not directly govern the exercise of powers conferred by or under an Act (*R v Secretary of State for the Home Department, ex pane Fernandes* (1980) *The Times* 21 November; *R v Secretary of State for the Home Department, ex pane Kirkwood* [1984] 1 WLR 913). However it is presumed that Parliament, when it passes an Act, intends it to be construed in conformity with the Convention, unless the contrary intention appears.

Judicial notice Judicial notice is taken of rules and principles of public international law, even when not embodied in municipal law (*Re Queensland Mercantile and Agency Ltd* [1892] 1 Ch 219, 226). This also applies to treaties made by the British Crown. As Scarman

LJ said in *Pan-American World Airways Inc v Department of Trade* [1976] 1 Lloyd's Rep 257, 261 (emphasis added):

If statutory words have to be construed or a legal principle formulated in an area of the law where Her Majesty has accepted international obligations, our courts—*who, of course, take notice of the acts of Her Majesty done in the exercise of her sovereign power*—will have regard to the convention as part of the full content or background of the law. Such a convention, especially a multilateral one, should then be considered by the Courts even though no statute expressly or impliedly incorporates it into our law.

Citation of treaties The existence of the principle under discussion means that the court is obliged to consider any relevant rule of public international law, and permit the citation of any relevant treaty. For this reason it seems that Lord Parker CJ was mistaken when in *Urey v Lummis* [1962] 1 WLR 826, 832 he said it was not for the court to consider whether the United Kingdom had implemented the international Agreement regarding the status of forces of parties to the North Atlantic Treaty.

Uniform statutes An act passed to give effect to an international agreement will be construed in the light of meanings attached to the agreement in other contracting states, so as to promote uniformity (*Stag Line Ltd v Foscolo Mango & Co Ltd* [1932] AC 328, 350; *Riverstone Meat Co v Lancashire Shipping Co* [1961] AC 807, 8690. See further F A Man 'The Interpretation of Uniform Statutes' (1946) 62 LQR 278; 'Uniform Statutes in English Law' (1983) 99 LQR 376.

Guides to Legislative Intention III: Presumptions Derived from the Nature of Legislation

The present chapter deals with the ten presumptions derived from the nature of legislation, which are that:

- 1 the text is the primary indication of intended meaning
- 2 the text is *prima facie* to be given a literal construction
- 3 the court is to apply the remedy provided for the 'mischief'
- 4 an enactment is to be given a purposive construction
- 5 regard is to be had to the consequences of a particular construction
- 6 an 'absurd' result is not intended
- 7 errors in the legislation are to be rectified
- 8 evasion of the legislation is not to be allowed
- 9 the legislation is intended to be construed by the light of ancillary rules of law and legal maxims
- 10 an updating construction is to be applied wherever requisite.

Nature of legislative presumptions A presumption affords guidance, arising from the nature of legislation in a parliamentary democracy, as to the legislator's *prima facie* intention regarding the working of the enactment. It looks in particular to the effective implementation of what the legislator has enacted.

Presumption that text to be primary indication of intention

In construing an enactment, the text of the enactment, in its setting within the Act or instrument containing it, is to be regarded as the pre-eminent indication of the legislator's intention. British courts, towards the end of the twentieth century, regard the text of Acts of the United Kingdom Parliament with great respect. When called upon to construe an Act, the court takes its primary duty as being to look at the text and say what, in itself, it means: 'The safer and more correct course of dealing with a question of construction is to take the words themselves and arrive if possible at their meaning without, in the first instance, reference to cases' (*Barrell v Fordree* [1932] AC 676, 682).

The text is the starting point, and the centre of the interpreter's attention from then on. It is the text, after all, that is being interpreted. In the next chapter we consider the purely linguistic canons of construction that assist in this. Meanwhile we turn to one consequence of the present presumption: the respect paid to the literal meaning.

Presumption that enactment to be given its literal meaning

Prima facie, the meaning of an enactment intended by the legislator (in other words its legal meaning) is taken to be the literal meaning. As explained above (pp 87-91), the 'literal meaning' corresponds to the grammatical meaning where this is straightforward. If however the grammatical meaning, when applied to the facts of the instant case, is ambiguous, then any of the possible grammatical meanings may be described as the literal meaning. If the grammatical meaning is garbled or otherwise semantically obscure, then the grammatical meaning likely to have been intended (or any one of them in the case of ambiguity) is taken as the literal meaning.

The point here is that the literal meaning is one arrived at from the wording of the enactment alone, without consideration of other interpretative criteria. When account is taken of such other criteria it may be found necessary to depart from the literal meaning and adopt a strained construction. The initial presumption is however in favour of the literal meaning (*Caledonian Railway Co v North British Railway Co* (1881) 6 App Cas 114, 121; *Capper v Baldwin* [1965] 2 QB 53, 61). In general, the weight to be attached to the literal meaning is far greater than applies to any other interpretative criterion, though with older Acts it tends to be less. As Lord Bridge said of an Act of 1847, it is 'legitimate to take account, when construing old statutes, of the prevailing style and standards of draftsmanship' (*Wills v Bowley* [1983] 1 AC 57, 104).

Presumption that court to apply remedy provided for the mischief

Parliament intends that an enactment shall remedy a particular mischief. It therefore intends the court, in construing the enactment, so to apply the remedy provided by it as to suppress that mischief. Except in the case of purely declaratory provisions, virtually the only reason for passing an Act is to change the law. So the reason for an Act's passing must lie in some defect in the law. If the law were not defective, Parliament would not need or want to change it. That defect is the 'mischief to which the Act is directed.

Social or legal mischief

Since all an Act can do is change the law, the immediate mischief

must be some defect in the law. However the overall mischief may be a social mischief coupled with this legal mischief. As society changes, what are thought of as social mischiefs continually emerge. Whether or not they are really so may be disputable. But it is true that only a static society concentrates on removing purely legal mischiefs.

A social mischief is a factual situation, or mischief 'on the ground', that is causing concern to the society (such as an increase in mugging, or a decline in the birthrate). While a mischief on the ground may correspond to a defect in the law, this is not necessarily so. An increase in mugging may arise because the law is inadequate. Or it may arise because an adequate law is inadequately enforced. A decline in the birthrate may lie beyond the reach of law.

An example of a *social* mischief is given in the preamble to the statute 4 Hen 7 c 19 (1488):

Great inconveniences daily doth increase by desolation and pulling down and wilfull waste of houses and Towns within [the king's realm], and laying to pasture lands which customarily have been used in tillage, whereby idleness—ground and beginning of all mischiefs—daily doth increase ... to the subversion of the policy and good rule of this land.

A purely *legal* mischief was remedied by the statute 2 & 3 Edw 6 c 24 (1548). So refined had the common law rules of criminal venue become that, where a person was fatally wounded in one county but expired in the next, the assailant could be indicted in neither.

The Water Act 1973 introduced a new system, to be financed by water rates, for the management of the nation's water resources. The Act was silent on the important question of who was to be liable to pay these rates (*Daymond v South West Water Authority* [1976] AC 609). This 'mischief of omission', as Lord Scarman called it in *South West Water Authority v Rumble's* [1985] AC 609, 618, was remedied by the Water Charges Act 1976, s 2.

Party-political mischiefs

In modern times there has arisen a new class of legislation. No longer is Parliament largely concerned with repelling the nation's enemies, keeping the Queen's peace, financing the administration, and holding the ring between citizens. The legislature becomes an engine of social change. It regulates the national economy. It takes on the management and control of great industries. The subject matter of its Acts enters the realm of argument and opinion, party politics, economic theory, religious or sociological controversy, class warfare, and other matters as to which there is no consensus.

How is the interpreter to regard legislation of this type? The answer is clear. A court of construction is bound to ignore the fact that what to the majority in one Parliament seemed a defect in

the existing law may appear the reverse to their successors of a different political hue. Until the successors get round to repealing an Act with which they disagree, it stands as the will of the Parliament that made it. The same applies where a decisive change has occurred in the views of a political party since the Act's passing (eg *R v Secretary of State for the Environment, ex pane Greater London Council* (1983) *The Times*, 2 December).

It is important not to let confusion creep in by treating the mischief as somehow altered by later events. These may indeed require to be taken into account, but not as altering or glossing the historical facts which occasioned the passing of the Act.

Hey don's Case

In medieval times the country was largely governed by common law. Then, as social progress set in, there arose many varieties of social mischief. These exposed legal mischiefs, which marred the common law and required correction by Parliament. Arguments began to arise among common lawyers as to the attitude the judges administering the common law should adopt towards legislative interventions. The judges, having framed 'our lady the common law', were not disposed to acknowledge flaws in their creation. The question became pressing, and at the instance of the king was considered by the Barons of the Exchequer in *Hey don's Case* (1584) 3 Co Rep 7a. They passed the following resolution (I have modified the wording slightly to assist reference and improve clarity):

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:

- (1) what was the common law before the making of the Act;
- (2) what was the mischief and defect for which the common law did not provide;
- (3) what remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth; and
- (4) the true reason of the remedy,

and then the office of all the judges is always to make such construction as shall:

- (a) suppress the mischief and advance the remedy, and
- (b) suppress subtle inventions and evasions for the continuance of the mischief *pro privato commodo* (for private benefit), and
- (c) add force and life to the cure and remedy according to the true intent of the makers of the Act *pro bono publico* (for the public good).

This resolution, which forms the basis of the so-called 'mischief rule' of statutory interpretation, has been approved in many cases down to the present day (eg *Salkeld v Johnson* (1848) 2 Ex 256, 272; *Blackwell v England* (1857) 8 El & Bl Rep 541; *River Wear Commissioners v Adamson* (1877) 2 App Cas 743, 764; *Re May fair*

Property Co, Bartlett v Mayfair Property Co [1898] 2 Ch 28, 35; *Ealing LBC v Race Relations Board* [1972] AC 342, 368).

Dangers in relying on the mischief

It does not necessarily follow that legislation enacted to deal with a mischief (a) was intended to deal with the whole of it (eg *Hussain v Hussain* [1982] 3 WLR 679), or (b) was not intended to deal with other things also (see *Central Asbestos Co Ltd v Dodd* [1973] AC 518; *Maunsell v Olins* [1974] 3 WLR 835,842). As Viscount Simonds LC said: 'Parliament may well intend the remedy to extend beyond the immediate mischief (*A-G v Prince Ernest Augustus of Hanover* [1957] AC 436, 462).

Furthermore common sense may indicate that the ambit of the mischief is narrower than the literal meaning of the remedial enactment, as occurred in the Australian case of *Ingham v Hie Lie* (1912) 15 CLR 267. A Chinese laundryman was charged under an Act whose purpose was to limit the hours of work of Chinese in factories, laundries etc so as to protect other industries. The defendant, who had been found *ironing his own shirt*, was held not guilty of an offence that on a literal interpretation of the Act it had created.

Unknown mischief

Particularly with older Acts, it may not be possible for the court to find out what the mischief was. It must then do the best it can with the Act as it stands (eg *Nugent-Head v Jacob (Inspector of Taxes)* [1948] AC 321, 327).

Remedy provided for the mischief

The remedy provided by an Act for a mischief takes the form of an amendment of the existing law. It is to be presumed that Parliament, having identified the mischief with which it proposes to deal, intends the remedy to operate in a way which may reasonably be expected to cure the mischief. At its simplest, the remedy for the mischief may consist of removing the obnoxious legal provision and not replacing it by anything. This often happens with a party-political Act when the opposition gets into power. For example the Conservative Government of 1971 disliked the Land Commission set up by an Act of its Labour predecessors. The very existence of the Commission was conceived to be a mischief, so it was abolished by the Land Commission (Dissolution) Act 1971. That simple procedure, accompanied by a few transitional provisions, constituted the 'remedy'. Another example from the same year is the Licensing (Abolition of State Management) Act 1971.

Clearly Parliament is unlikely to intend to abolish one mischief at the cost of establishing another which is just as bad, or even worse. Avoiding such an anomaly is an important consideration in statutory interpretation (see p 172-3 below).

Presumption that court to apply a purposive construction

A construction that promotes the remedy Parliament has provided to cure a particular mischief is nowadays known as a purposive construction. Parliament is presumed to intend that in construing an Act the court, by advancing the remedy which is indicated by the words of the Act and the implications arising from those words, should aim to further every aspect of the legislative purpose. A purposive construction is one which gives effect to the legislative purpose by either (a) following the literal meaning where that is in accordance with that purpose, which may be called a purposive and literal construction; or (b) applying a strained meaning where the literal meaning is not in accordance with the purpose, which may be called a purposive and strained construction.

When present day judges speak of a purposive construction, they usually mean a purposive and strained construction. Thus Staughton J referred to 'the power of the courts to disregard the literal meaning of an Act and to give it a purposive construction' (*A-G of New Zealand v Ortiz* [1982] 3 All ER 432, 442). Lord Diplock spoke of 'competing approaches to the task of statutory construction— the literal and the purposive approach' (*Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 879).

Novelty of the term

The term 'purposive construction' is new, though the concept is not. Viscount Dilhorne said that, while it is now fashionable to talk of the purposive construction of a statute, the need for such a construction has been recognised since the seventeenth century (*Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231, 234). The term's entry into fashion betokens a swing by the appellate courts away from literal construction. Lord Diplock said in 1975:

If one looks back to the actual decisions of [the House of Lords] on questions of statutory construction over the last 30 years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions. (*Carter x Bradbeer* [1975] 1 WLR 1204, 1206-7.)

Supervening factors

As always in statutory interpretation it is necessary, when considering

the possibility of applying a purposive construction, to take account of any other applicable criteria also. The overriding object is to give effect to Parliament's intention, and this is unlikely to be to achieve the immediate purpose at no matter what cost. Contrary purposes of a more general nature may supervene, as in *A-G of New Zealand v Ortiz* [1982] 3 WLR 570. Here it was held at first instance that the phrase 'shall be forfeited' in the New Zealand Historic Articles Act 1962, s 12(2) was ambiguous, and that a purposive construction should be applied to decide whether forfeiture was automatic or depended upon actual seizure of the historic article in question. The decision was overruled on appeal because, though right as far as it went, it failed to take into account a further (and overriding) criterion. This was the rule of international law that limits the extra-territorial effect of legislation relating to property rights.

Non-purposive-and-literal construction

In the sense used in English law, purposive construction is an almost invariable requirement. But a non-purposive construction may be necessary, because unavoidable, where there is insufficient indication of (a) what the legislative purpose is, or (b) how it is to be carried out. Thus in *IRC v Hinchy* [1960] AC 748, 781 Lord Keith of Avonholm declined to apply a purposive construction of an income tax enactment because, as he said, the court could not take upon itself the task of working out an assessment in a different way to that indicated on a literal construction. For a further example see *IRC v Ayrshire Employers Mutual Insurance Association Ltd* [1946] 1 All ER 637.

Non-purposive construction may be necessary where the court considers a predictable construction (see p 153 above) is required. Apart from these cases, it is usually only where the literal meaning is too strong to be overborne that the court will apply a non-purposive-and-literal construction (eg *Richards v MacBride* (1881) 8QBD 119).

Statements of purpose

The search for the purpose of an enactment is sometimes assisted by an express statement on the lines of: 'The purpose of [this enactment] is to remedy the defect in the law consisting of [*description of the mischief*] by amending the law so as to [*description of the remedy*].' A statement of purpose (whether on these lines or not, and whether comprehensive or not) may be found either in the Act or in the judgment of a court devising the statement as an aid to construction (see *Whitley v Stumbles* [1930] AC 544, 547; *Haskins v Lewis* [1931] 2 KB 1, 14; *Dudley and District Building Society v Emerson* [1949] Ch 707, 715; *Wallersteiner v Moir* [1974] 1 WLR 991, 1032; *R v*

Marlborough Street Magistrates' Court Metropolitan Stipendiary Magistrate, ex pane Simpson (1980) 70 Cr App R 291, 293).

When found in the Act, the statement of purpose may be in the long title or preamble, or in a purpose clause or recital. A well-known example is the Fires Prevention (Metropolis) Act 1774, s 83, which is still in force. The opening recital tells us that the section was enacted 'in order to deter and hinder ill-minded persons from wilfully setting their house or houses or other buildings on fire with a view to gaining to themselves the insurance money, whereby the lives and fortunes of many families may be lost or endangered'. For modern examples see the Road Traffic Act 1960, s 73(1) and the Wildlife and Countryside Act 1981, s 39(1).

Judicial duty not to deny the statute

It is the duty of the court to accept the purpose decided on by Parliament. This applies even though the court disagrees with it. It even applies where the court considers the result unjust, provided it is satisfied that Parliament really did intend that result. As Lord Scarman said in *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 168:

... in the field of statute law the judge must be obedient to the will of Parliament as expressed in its enactments. In this field Parliament makes and unmakes the law [and] the judge's duty is to interpret and to apply the law, not to change it to meet the judge's idea of what justice requires. Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the judge to choose the construction which in his judgment best meets the legislative purpose of the enactment. If the result be unjust but inevitable, the judge may say so and invite Parliament to reconsider its provision. But he must not deny the statute.

Alteration of an Act's purpose

A later Act *in pari materia* may have the effect of altering an Act's purpose, so far as concerns matters arising after the commencement of the later Act. In *R v Hammersmith and Fulham LBC, ex pane Beddowes* [1987] QB 1050, 1065 Fox LJ said:

Historically, local authority housing has been rented. But a substantial inroad on that was made by Part I of the Housing Act 1980, which gave municipal tenants the right to purchase their dwellings. In the circumstances it does not seem to me that a policy which is designed to produce good accommodation for owner-occupiers is now any less within the purposes of the Housing Acts than the provision of rented housing . . .

British and European versions of purposive construction

The British doctrine of purposive construction is more literalist than

the European variety, and permits a strained construction only in comparatively rare cases. Lord Denning said:

[European judges] do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose . . . behind it. When they come upon a situation which is *to their minds* within the spirit—but not the letter—of the legislation, they solve the problem by looking at the design and purpose of the legislature—at the effect it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation? *They lay down the law* accordingly. (*James Buchanan & Co Ltd v Babco Forwarding & Shipping (UK) Ltd* [1977] 2 WLR 107, 112 (emphasis added).)

Presumption that regard to be had to consequences of a construction

It is presumed to be the legislator's intention that the court, when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, should assess the likely consequences of adopting each construction, both to the parties in the case and (where similar facts arise in future cases) for the law generally. If on balance the consequences of a particular construction are more likely to be *adverse* than *beneficent* this is a factor telling against that construction.

Consequential construction is of modern adoption. The earlier attitude of the judges was expressed by Lord Abinger CB in *A-G v Lockwood* (1842) 9 M & W 378, 395:

. . . I cannot enter into a speculation of what might have been in the contemplation of the legislature, because they have not stated what they contemplated . . . The Act of Parliament practically has had, I believe, a very pernicious effect—an effect not at all contemplated—but we cannot construe the Act by that result.

The modern attitude is shown by Mustill J in *R v Committee of Lloyd's, ex parte Moran* (1983) *The Times*, 24 June: 'a statute . . . cannot be interpreted according to its literal meaning without testing that meaning against the practical outcome of giving effect to it'.

Adverse and beneficent consequences

The consequence of a particular construction may be regarded as 'adverse' if it is such that in the light of the interpretative criteria the court views it with disquiet because, for example, it frustrates the purpose of the Act, or works injustice, or is contrary to public policy, or is productive of inconvenience or hardship. Any other

consequences (whether merely neutral or positively advantageous) may be called 'beneficent'. For this purpose a consequence clearly intended by Parliament is to be treated as beneficent even though the judge personally dislikes it.

Consequences for the parties and the law

In judging consequences it is important to distinguish consequences to the parties in the instant case and consequences for the law generally. It will usually be a straightforward matter to determine the effect on the court's final order of a finding in favour of one possible construction rather than another. But the court must also bear in mind that under the doctrine of precedent its decision may be of binding, or at least persuasive, authority for the future.

The court may be less unwilling to adopt an 'adverse' construction where some functionary is interposed whose discretion may be so exercised as to reduce the practical ill-effects (see, eg, *IRC v Hinchy* [1960] AC 748).

Judges are particularly ready to apply a strained construction on consequential grounds where this will assist the work of the courts. Thus in *R v Stratford-on-Avon District Council, ex pane Jackson* [1985] 1 WLR 1319 the Court of Appeal held that, although the literal meaning of RSC Ord 53, r 4 is to lay down a time limit for making substantive applications for judicial review, it should be construed instead as referring to applications for *leave* to make such substantive applications. This reading confirmed the existing practice of the courts, which is 'the only sensible course from a practical point of view' (p 772).

Consequences tending both ways

Since the consequences to be borne in mind are often of a wide variety it is not surprising that they may tend in both directions. Each of the opposing constructions may involve some adverse and some beneficent consequences. Lord Morris of Borth-y-Gest pointed this out in relation to anti-racist legislation:

In one sense there results for some people a limitation on what could be called their freedom: they may no longer treat certain people, because of their colour or race, or ethnic or national origins, less favourably than they would treat others. But in the same cause of freedom, although differently viewed, Parliament has, in statutory terms now calling for consideration, proscribed discrimination . . . (*Charter v Race Relations Board* [1973] AC 868, 889).

Where the result of a literal construction is sufficiently 'adverse', consequential construction usually indicates a decision requiring a strained construction of the enactment (eg *Mann v Malcolmson (The Beta)* (1865) 3 Moo PCC NS 23).

Presumption that 'absurd' result not intended

The court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by Parliament. Here the courts give a wide meaning to the concept of 'absurdity', using it to include virtually anything that appears inappropriate, unfitting or unreasonable.

In *Williams v Evans* (1876) 1 Ex D 277 the court had to construe the Highway Act 1835, s 78, which created an offence of furious horse riding but omitted to include this in the penalty provision. Grove J said (p 282) that unless a strained construction were applied the court would be holding that the legislature had made an 'absurd mistake'. Field J agreed, adding (p 284):

No doubt it is a maxim to be followed in the interpretation of statutes, that the ordinary grammatical construction is to be adopted; but when this leads to a manifest absurdity, a construction not strictly grammatical is allowed, if this will lead to a reasonable conclusion as to the intention of the legislature.

Six types of 'absurdity'

The six types of 'absurdity' a court seeks to avoid when construing an enactment are: (a) an unworkable or impracticable result; (b) an inconvenient result; (c) an anomalous or illogical result; (d) a futile or pointless result; (e) an artificial result; and (f) a disproportionate counter-mischief.

Unworkable or impracticable result The court seeks to avoid a construction of an enactment that produces an unworkable or impracticable result, since this is unlikely to have been intended by Parliament. For example Lord Reid said in *Federal Steam Navigation Co v Department of Trade and Industry* [1974] 1 WLR 505, 509 that cases where it has properly been held that one word can be struck out of a statute and another substituted include the case where without such substitution the provision would be unworkable.

An obvious justification for strained construction arises where the literal meaning presents a logical impossibility. This arose in *Jones v Conway Water Supply* [1893] 2 Ch 603. The court had to construe the Public Health Act 1875, s 54, which said that where a local authority 'supply water' they have power to lay water mains (or pipes). Since the authority could not satisfy the condition of 'supplying' water unless they first had mains to carry it in, the power to lay mains was held to operate as soon as the authority had *undertaken* to supply water.

In *Wills v Bowley* [1983] 1 AC 57, 102 Lord Bridge said it would be 'quite ridiculous' to construe the Town Police Clauses Act 1847, s 28 in such a way as to force on a constable 'a choice between

the risk of making an unlawful arrest and the risk of committing a criminal neglect of duty'. That would be 'to impale him on the horns of an impossible dilemma'. In *S J Grange Ltd v Customs and Excise Commissioners* [1979] 2 All ER 91, 101 Lord Denning MR said of a VAT provision in the Finance Act 1972, s 31 that a literal construction 'leads to such impracticable results that it is necessary to do a little adjustment so as to make the section workable'.

The courts are always anxious to facilitate the smooth working of legal proceedings and avoid the intention of the law being stultified. In *R v West Yorkshire Coroner, ex pane Smith* [1985] QB 1096 the court rejected the argument that, although a coroner clearly had a statutory power to fine for contempt, it could not be operated since no machinery had been provided for collecting such a fine. In *R v Sowden* [1964] 1 WLR 1454, 1458 the court gave a strained interpretation to the Poor Prisoners' Defence Act 1930, s 1(1), which entitled a person committed for trial to free legal aid for the preparation and conduct of his defence. It held that this did not give him an unrestricted right to have a solicitor at the trial, since if misused this could cause 'expense to the country, delays and abuse of the whole procedure' (*ciAmin v Entry Clearance Officer, Bombay* [1983] 2 AC 818, 868, where a construction was rejected which would give a right of appeal 'unworkable in practice').

Sometimes Parliament contemplates that an enactment may in some circumstances prove unworkable, and makes express provision for this (eg the Mines and Quarries Act 1954, s 157).

Inconvenient result The court seeks to avoid a construction that causes unjustifiable inconvenience to persons who are subject to the enactment, since this is unlikely to have been intended by Parliament. Modern courts seek to cut down technicalities attendant upon a statutory procedure where these cannot be shown to be necessary to the fulfilment of the purposes of the legislation (see, eg, *Lawrence Chemical Co Ltd v Rubenstein* [1982] 1 WLR 284). Modern regulatory enactments bear heavily on business enterprise, and the courts are alert to avoid any inconvenience which is not essential to the operation of the Act, and which may in addition have adverse economic consequences (eg *Cutler v Wandsworth Stadium Ltd* [1949] AC 398, 417). The financial demands of the welfare state make modern legislation particularly coercive on the taxpayer, and again the courts are ready to ensure that, even though in the public interest proper taxes must be paid, the taxpayer is not unreasonably harassed by the tax authorities (eg *Hallamshire Industrial Finance Trust Ltd v IRC* [1979] 1 WLR 620; *IRC v Helen Slater Charitable Trust Ltd* [1982] Ch 49).

It sometimes happens that each of the constructions contended for involves some measure of inconvenience, and the court then has to balance the effect of each construction and determine which

inconvenience is greater (eg *Pascoe v Nicholson* [1981] 1 WLR 1061; *Dillon v The Queen* [1982] AC 484).

Anomalous or illogical result The court seeks to avoid a construction that creates an anomaly or otherwise produces an irrational or illogical result. Every legal system must seek to avoid unjustified differences and inconsistencies in the way it deals with similar matters, for as Lord Devlin said, 'no system of law can be workable if it has not got logic at the root of it' (*Hedley Byrne & Co Ltd v Heller and Partners Ltd* [1964] AC 465, 516). Consistency requires that a statutory remedy or benefit should be available, and should operate in the same way, in all cases of the same kind (eg *Davidson v Hill* [1901] 2 KB 606, 614). In *Gordon v Cradock* [1964] 1 QB 503, 506 where it was argued that the Supreme Court of Judicature (Consolidation) Act 1925, s 31(2) should be construed in a way which would mean that a plaintiff could cross-appeal only with leave while a defendant could appeal without leave, Willmer LJ said this would be 'a very strange result', and the court declined to implement it.

The converse of the principle that a statutory remedy should be available in all like cases is that a statutory duty should be imposed in all like cases (eg *Din v National Assistance Board* [1967] 2 QB 213; *Mills v Cooper* [1967] 2 QB 459; *T&E Homes Ltd v Robinson (Inspector of Taxes)* [1979] 1 WLR 452; *A-G's Reference (No 1 of 1981)* [1982] QB 848).

It is clearly anomalous to treat a person as being under a statutory duty where some essential factual pre-requisite that must have been in the contemplation of the legislator is missing. In the Australian case of *Turner v Ciappara* [1969] VR 851 the court considered the application of an enactment requiring obedience to automatic traffic signals. On the facts before the court it was shown that through mechanical failure the device was not working properly. *Held* it must be treated as implicit that obedience was required only where the apparatus was in working order.

For examples of other legal anomalies on certain constructions see *Re Lockwood deed* [1958] Ch 231 (distant relatives preferred to nearer on intestacy); *R v Minister of Agriculture and Fisheries, ex pane Graham* [1955] 2 QB 140, 168 (officer of sub-committee could hear representations while officer of main committee could not); *R v Baker* [1962] 2 QB 530 (person arrested on suspicion of offence liable to higher penalty than if he had committed the offence).

A possible anomaly carries less weight if there is interposed the discretion of some responsible person, by the sensible exercise of which the risk may be obviated (eg *Re a Debtor (No 13 of 1964), ex pane Official Receiver* [1980] 1 WLR 263). The court will pay little attention to a proclaimed anomaly if it is purely hypothetical, and unlikely to arise in practice (see, eg, *Home Office v Harmon* [1983] AC 280). If an anomaly has remained on the statute book for a lengthy period, during which Parliament has had opportunities

to rectify it but has neglected to do so, this may indicate that the anomaly is intended. Thus where an anomalous distinction between the relative powers of the High Court and the county court in relation to relief against forfeiture had existed for well over a century, the Court of Appeal declined to place any interpretative weight on the fact that it was anomalous (*Di Palma v Victoria Square Property Co Ltd* [1985] 3 WLR 207).

Futile or pointless result The court seeks to avoid a construction that produces a futile or pointless result, since this is unlikely to have been intended by Parliament. Parliament does nothing in vain, a principle also expressed as *lex nil frustra facit* (the law does nothing in vain). It is an old maxim of the law that *quod vanum et inutile est, lex non requirit* (the law does not call for what is vain and useless). Lord Denning MR said: 'The law never compels a person to do that which is useless and unnecessary' (*Lickiss v Milestone Motor Policies at Lloyd's* [1966] 2 All ER 972, 975).

Where an enactment appears to impose a legal duty that, by reason of some other enactment or rule of law, already exists *aliunde*, the court strives to avoid pronouncing in favour of such a duplication in the law (eg *Re Terman* (1864) 33 LJMC 201). Where the literal meaning of an enactment appears to impose some legal disability that can be avoided by a trifling rearrangement of affairs, the court will be slow to penalise a person who has inadvertently failed to make this rearrangement or could still easily do so (*Holmes v Bradfield RDC* [1949] 2 KB 1, 7).

The court is always averse to requiring litigants to embark on futile or unnecessary legal proceedings. This includes a stage in proceedings that could without detriment to any party be avoided. Judges are uncomfortably aware of the costs and delays involved in a legal action, and do all in their power to minimise them. Thus Lord Reid ruled against a construction of the Landlord and Tenant Act 1954, s 29(3) that for no substantial reason would require judges to scrutinise every application for a new business tenancy, and thus incur needless delay and cost (*Kammins Ballrooms Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 860).

Artificial result The court seeks to avoid a construction that leads to an artificial result, since this is unlikely to have been intended by Parliament. Thus when in *R v Cash* [1985] QB 801 it was argued that the Theft Act 1968, s 22(1) required the prosecution to prove that an alleged handling was not done in the course of stealing, the Court of Appeal rejected the argument on the ground that it would require the court to engage in artificial reasoning. Lord Lane CJ said (p 806): 'We do not believe that this tortuous process, leading in some cases to such an artificial verdict could have been the intention of Parliament. The law can deem anything to be the case, however unreal. The

law brings itself into disrepute however if it dignifies with legal significance a wholly artificial hypothesis. Thus in the Scottish case of *Maclennan v Maclennan* (1958) SC 105 the court declined to rule that a wife's having availed herself, without the husband's knowledge or consent, of AID (artificial insemination by a donor) constituted her adultery within the meaning of that term in the relevant Scottish divorce Act. To do so, the court argued, would lead to wholly artificial results. For example if the donor had happened to die before the date of insemination, the legally-imputed adultery would be with a dead man—involving a kind of constructive necrophilia.

Artificiality need not be so extreme as this to rank as a significant factor in statutory interpretation. One area of importance here concerns corporations. Being entities purely of legal creation, these are imbued with a certain artificiality from the start. Sight must not be lost of the realities behind them. In *Re New Timbiqui Gold Mines Ltd* [1961] Ch 319 it was held that a person who purported to have become a member of a company *after it had been dissolved* could not, as a 'member' of the company, petition for its restoration to the register under the Companies Act 1948, s 353(6). Commenting that s 353(6) already involved 'some degree of make-believe', Buckley J said (p 326) that this should not be carried further than was absolutely necessary.

Whenever an Act sets up some fiction the courts are astute to limit the scope of its artificial effect, and are particularly concerned to ensure that it does not create harm in ways outside the intended purview of the Act (eg *Re Levy, Ex pane Walton* (1881) 17 Ch D 746, 756).

A voiding a disproportionate counter-mischief The court seeks to avoid a construction that cures the mischief the enactment was designed to remedy only at the cost of setting up a disproportionate counter-mischief, since this is unlikely to have been intended by Parliament. Where one possible construction of an enactment intended to remedy the mischief caused by the operations of unskilful river pilots would prevent there being any pilots at all for a period, Dr Lushington looked 'at the mischief which would accrue' from the latter restriction and adopted the other reading of the enactment (*Mann v Makolmson (The Beta)*(1865) 3 Moo PCC NS 23, 27). Again, where one construction of an enactment meant that the defendant escaped conviction for fraud because in earlier bankruptcy proceedings he had 'disclosed' what was already known, Lord Campbell CJ rejected it as productive of 'great public mischief outweighing the mischief at which the protective enactment was directed (*R v Skeen and Freeman* (1859) LJMC 91, 95).

A type of mischief which is often the subject of modern legislation is danger to the safety of industrial workers. The court will be reluctant to read an Act as requiring one danger to be obviated

at the cost of creating another (eg *Jayne v National Coal Board* [1963] 2 All ER 220, 224). Often it is reasonable to assume that the counter-mischief that has arisen was quite unforeseen by Parliament. Enacted law suffers by comparison with unwritten law in that it involves laying down in advance an untried remedy.

As interpreters of legislation, it is the function of the courts to mitigate this defect of the legislative process so far as they properly can. Where an unforeseen counter-mischief becomes evident it may be reasonable to impute a remedial intention to Parliament. This would be an intention that, if such an untoward event should happen, the court would modify the literal meaning of the enactment so as to remedy the unexpected counter-mischief.

This is one aspect of consequential construction (see p 166 above). Similar considerations may arise where some drafting error has occurred (as to rectifying construction). A third possible cause of an unforeseen counter-mischief, or increase in an expected counter-mischief, is social or other change taking place after the passing of the Act (updating construction is discussed at p 181 below).

Presumption that drafting errors to be rectified

It is presumed that the legislator intends the court to apply a construction which rectifies any error in the drafting of" the enactment, where this is required to give effect to the legislator's intention. There are occasions when, as Baron Parke said, the language of the legislature must be modified in order to avoid inconsistency with its manifest intentions (*Miller v Salomons* (1852) 7 Ex 475, 553). Cross held that rectification is the right word for this procedure 'because it is a word which at least implies some sort of intention on the part of Parliament with regard to the added words' (Cross 1987, p 35).

It has to be accepted that drafting errors frequently occur (for an account of the various types of drafting error see chapter 19). The promulgating of a flawed text as expressing the legislative intention raises a difficult conflict between literal and purposive construction. Judges tread a wary middle way between the extremes. The court must do the best it can to implement the intention without being unfair to those who not unreasonably looked for a predictable construction.

The cases where rectifying construction may be required can be divided into:

- (a) the garbled or corrupt text
- (b) errors of meaning
- (c) the *casus omissum*
- (d) the *casus male inclusus* and
- (e) the textual conflict.

Garbled or corrupt text

A text may be garbled by the omission of necessary words, the inclusion of unnecessary words, or the presence of mistaken words, typographical errors or punctuation mistakes. The duty of the court is to rectify the text so as to give it the intended meaning. This produces what may be called the 'corrected version' of the text (see pp 89-90 above).

If a legislative text is garbled the fact is usually obvious on the face of it, at least when the reading is careful (eg the Salford Hundred Court of Record (Extension of Jurisdiction) Rules 1955, r 2, which authorises a defendant to apply to have the action transferred to 'the County Court in which he resides or carries on business').

The Queen's printer sometimes corrects merely typographical errors. As originally promulgated the Landlord and Tenant (Rent Control) Act 1949, s 11(5) referred to s 6 (instead of s 7) of the Furnished Houses (Rent Control) Act 1946. This was corrected in subsequent published copies.

In other cases Parliament itself finds it necessary to step in. In 1879 an Act was passed with the clumsy short title of the Artizans and Labourers Dwellings Act (1868) Amendment Act 1879. The clumsiness did not stop there. Section 22(3) of the Act required loans under the Act to be secured by a mortgage 'in the form set forth in the Third Schedule hereto'. There was no Third Schedule; and nowhere in the Act was a mortgage form to be found. The mistake was put right in the following year by an Act which apparently had the same drafter. Its short title was the Artizans and Labourers Dwellings Act (1868) Amendment Act (1879) Amendment Act 1880.

Sometimes the error is made in transcribing an enactment for inclusion in a consolidation Act (eg *Re a solicitor* [1961] Ch 491 and comments thereon in *Harrison v Tew* [1988] 2 WLR 1, 10-12, concerning an error in the (consolidating) Solicitors Act 1932, s 66 repeated in the (also consolidating) Solicitors Act 1957, s 69). Here there is an inference that the original wording should be followed. The Law of Property Act 1922, s 125(2) empowered trustees to appoint agents for 'executing and perfecting assurances of property'. In the Trustee Act 1925, s 23(2) this appears as a reference to *insurances* of property (for a judicial comment see *Green v Whitehead* [1930] 1 Ch 38, 45). For another consolidation Act case see *The Arabert* [1963] P 102.

One of the best known examples of an incomplete text is the Statute of Frauds Amendment Act 1828 (Lord Tenterden's Act), s 6. For the fascinatingly varied ways in which three judges attempted to rectify the obvious omission of words in this section see *Lyde v Barnard* (1836) 1 M & W 101. (For other examples of omitted words see *Re Wainwright* (1843) 1 Ph 258; *A-G v Beauchamp* [1920] 1 KB 650).

Instead of intended words being omitted, unintended words may

be included. The Criminal Appeal Act 1907, s 4(3) said that on an appeal against sentence the court could impose another sentence warranted in law 'by the verdict', overlooking that where the accused pleads guilty there is no verdict. In *R v Ettridge* [1909] 2 KB 24 the court rectified the enactment by deleting the intrusive words.

Errors of meaning

Rectification of a more substantial kind may be required where the meaning is vitiated by some error on the part of the drafter which is not apparent on the face of the text. He may have misconceived the legislative project, or based the text on a mistake of fact. Or he may have made an error in the applicable law or mishandled a legal concept. Examples of such errors, and how the courts dealt with them, are given in chapter 19.

Casus omissus

Where the literal meaning of an enactment is narrower than the object there arises what is called a *casus omissus*. Nowadays it is regarded as not in accordance with public policy for the court to allow a drafter's ineptitude to prevent the legislative intention being carried out, and so a rectifying construction may be applied (eg *R v Corby Juvenile Court, ex pane M* [1987] 1 WLR 55).

Another type of *casus omissus* is where an enactment requires a thing to be done which can be done in more than one way, but fails to specify which way is to be employed (eg *Re Unit 2 Windows Ltd* [1985] 1 WLR 1383).

Casus male inclusus

Again the court may apply a rectifying construction where a case obviously intended to be excluded is covered by the literal meaning (eg *Crook v Edmondson* [1966] 2 QB 81).

Textual conflicts

Some form of rectifying construction is obviously needed where the court is confronted with conflicting texts (see p 189 below).

Presumption that evasion not to be allowed

It is the duty of a court to further the legislator's aim of providing a remedy for the mischief against which the enactment is directed. Accordingly the court will prefer a construction which advances this object rather than one which circumvents it. When deliberately embarked on, evasion is judicially described as a fraud on the Act (*Ramsden v Lupton* (1873) LR 9 QB 17, 24; *Bills v Smith* (1865)

6 B & S 314, 319). It was so prevalent in early times that a general prohibition was entered on the Statute Roll: 'And every man . . . shall keep and observe the aforesaid ordinances and statutes . . . without addition, or fraud, by covin, evasion, art or contrivance, or by interpretation of the words' (10 Edw 3 st 3, 1336).

To prevent evasion, the court turns away from a construction that would allow the subject (a) to do what Parliament has indicated by the Act it considers mischievous (eg *R v Ealing London Borough Council, ex pane Sidhu* (1982) *The Times*, 16 January; or (b) to refrain from doing what Parliament has indicated it considers desirable (eg *Lambert v Ealing London Borough Council* [1982] 1 WLR 550).

The desire of the courts to prevent evasion of statutes is manifest in many fields (eg *Dutton v Atkins* (1871) LR 6 QB 373 (vaccination order could be made where parent failed to produce the child, since otherwise the parent could evade the intention of Parliament that children should be vaccinated); *London School Board v Wood* (1885) 15 QBD 415 (parent did not satisfy the requirement to 'cause the child to attend school' where he sent him to school without the school fees); *Patterson v Redpath Brothers Ltd* [1979] 1 WLR 553, 557 ('it cannot have been the intention of the legislature to allow the provisions of the regulations to be circumvented merely by packing goods into a larger receptacle'); *London Borough of Hackney v Ezedinma* [1981] 3 All ER 438, 442 (the term 'household' in the Housing Act 1961 must be construed widely since otherwise 'lodging houses would be taken out of the code which is applied by the Act for houses in multiple occupation').

Evasion distinguished from avoidance

It is necessary to distinguish, as respects the requirements of an enactment, between lawfully escaping those requirements by so arranging matters that they do not apply (referred to as avoidance) and unlawfully contravening or failing to comply with the requirements (referred to as evasion). As Grove J expressed it, there can be no objection to 'getting away from the remedial operation of the statute while complying with the words of the statute' (*Ramsden v Lupton* (1873) LR 9 QB 17, 32).

Literal compliance will not suffice where it amounts to a sham. The Theatres Act 1843 prohibited the performance of plays on a stage without a licence. It was held in *Day v Simpson* (1865) 34 LJMC 149 that it was an evasion of this for the actors to perform below stage, their actions being reflected by mirrors so that to the audience they appeared to be on stage.

The *Ramsay* principle, whereby the court sets its face against purely artificial tax avoidance schemes, was laid down in *WT Ramsay Ltd v IRC* [1982] AC 300. That it is not confined to revenue cases is shown by *Sherdley v Sherdley* [1986] 1 WLR 732, where the

Court of Appeal held that the principle should also be applied by the Family Division (reversed by the House of Lords on other grounds in *Sherdley v Sherdley* [1987] 2 WLR 1071). In *Gisbome v Burton* [1988] 3 WLR 921 the Court of Appeal applied the *Ramsay* principle in the case of the protection intended to be given to tenants by the Agricultural Holdings (Notices to Quit) Act 1977, s 2(1).

What must not be done directly should not be done indirectly

Where an enactment prohibits the doing of a thing, the prohibition is taken to extend to the doing of it by indirect or roundabout means, even though not expressly referred to in the enactment. Where Parliament wishes to prohibit the doing of any act, it tends to concentrate in its wording on the obvious and direct ways of doing it. Yet if the intention is to be achieved, the prohibition must be taken to extend to indirect methods of achieving the same object— even though these are not expressly mentioned (eg *Walker v Walker* [1983] 3 WLR 421; *Street v Mountford* [1985] AC 809).

Evasion by deferring liability

The court will infer an intention by Parliament to treat as evasion of an Act the deferring of liability under it in ways not envisaged by the Act. If an Act imposes a liability falling at a certain time, it is an evasion of the Act to procure a postponement of the liability by artificial means not contemplated by the Act (eg *Furniss (Inspector of Taxes) v Dawson* [1984] AC 474).

Evasion by repetitious acts

The court will infer an intention by Parliament that evasion of an Act should not be countenanced where the method used is constant repetition of acts which taken singly are unexceptionable, but which considered together cumulatively effect an evasion of the purpose of the Act. The Public Houses Amendment (Scotland) Act 1862 gave magistrates power to order the public houses 'in any particular locality' to close at an earlier hour than the statutory closing time. An attempt was made to use this power to close *all* public houses early by making one order after another until the whole district was covered. In *Macbeth v Ashley* (1874) LR 2 HL(SC) 352, 357 this was held unlawful as 'evading an Act of Parliament'.

Sometimes the monetary penalties for breach laid down by the Act are, or through inflation have become, so inadequate that they fail to deter. Here the court may resort to the use of the injunction to counter continued repetition of evasive acts. In *A-G v Harris* [1961] 1 QB 74 repeated breaches of a byelaw against the selling

of flowers outside cemeteries were restrained by injunction, since the statutory penalties were considered by the court insufficient.

Construction which hinders legal proceedings under Act

So that the purpose of an Act may be achieved, it is necessary that any legal proceedings connected with its enforcement and administration should be facilitated and not hindered. Accordingly the courts frown on attempts to construe an enactment in such a way as to frustrate or stultify prosecutions or other legal proceedings under the Act (eg *R v Aubrey-Fletcher, ex pane Ross-Munro* [1968] 1 QB 620, 627; *R v Holt* [1981] 1 WLR 1000).

Construction which otherwise defeats legislative purpose

The principle requiring a construction against evasion is not limited to cases of deliberate or obvious evasion. It extends to any way by which an Act's integrity may be undermined, even innocently or unwittingly (eg *Stile Hall Properties Ltd v Gooch* [1980] 1 WLR 62).

Presumption that ancillary rules of law and legal maxims apply

Unless the contrary intention appears, an enactment by implication imports any principle or rule of law (whether statutory or non- statutory), and the principle of any legal maxim, which prevails in the territory to which the enactment extends and is relevant to its operation in that territory. An Act of Parliament is not a statement in a vacuum. Parliament intends its Act to be read and applied within the context of the existing corpus juris, or body of law. The Act relies for its effectiveness on this implied importation of surrounding legal principles and rules.

It is impossible for the drafter to restate in express terms all those ancillary legal considerations which are, or may become, necessary for the Act's working. In this respect an Act is treated in the same way as a contract. With a contract, by importing established legal principles in accordance with the maxim *quando abest provisio partis, adest provisio legis* (when provision of party is wanting, provision of law is present), the law supplies what the parties have failed to say (*Flack v Downing College, Cambridge* (1853) 13 CB 945, 960). An Act requires similar treatment.

This is a presumption of very great importance in statutory interpretation. Each relevant item of the existing law, so far as not altered by the Act in question (whether expressly or by implication) operates for the purposes of that Act just as if written into it. It goes without saying, in Lord Denning's homely phrase (*R v Secretary*

of State for Foreign and Commonwealth Affairs, ex pane Indian Association of Alberta [1982] QB 892, 919).

These implied ancillary rules range from the widest principles of legal policy to narrow technical rules. They include both statutory and non-statutory principles and rules. They may be substantive or procedural. Equally they may be domestic or international, civil or criminal. All that matters is that they should have a place in the law of the territory to which the Act extends. This means that virtually the whole body of law is imported, by one enactment or another, as implied ancillary rules or maxims.

Unless the contrary intention appears As usual in statutory interpretation, this presumption applies except where the intention that it should not apply is indicated in the Act in question. It is axiomatic that in its Act Parliament can always, if it chooses, disapply any existing principle or rule. It is equally axiomatic that, unless Parliament does so, the principle or rule, being relevant, applies. Thus Lord Pearce said of a tribunal set up by Act: 'it is assumed, unless special provisions provide otherwise, that the tribunal will make its enquiry and decision according to the law of the land' (*Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147, 195). Equally Byles J said that 'it is a sound rule to construe a statute in conformity with the common law, except where or in so far as the statute is plainly intended to alter the course of the common law' (*R v Morris* (1867) LR 1 CCR 90, 95). See also *Lord Eldon v Hedley Bros* [1935] 2 KB 1, 24; *R v Thomas* [1950] 1 KB 26, 31.

Disapplication or modification?

Sometimes it is difficult to be sure whether or not Parliament does intend to disapply an ancillary rule. Or the problem may be whether the intention is to disapply a rule altogether or merely modify it. This can be particularly troublesome where the rule is peripheral to the subject-matter of the Act.

Rules relating to surrounding areas of criminal law (such as inchoate offences or the position of accessories) present problems with many Acts, usually because the drafter has overlooked them. Drafters framing a new criminal offence tend to have a blind spot about such matters. There is no difficulty if the new offence is worded so as not to trespass on the peripheral area: the latter's rules then come in by implication as they stand. But suppose the drafter forgets the peripheral area and words the new offence so as inadvertently to trespass on some part, but not the whole, of it?

The Misuse of Drugs Act 1971, s 4(2)(6) makes it an offence 'to be concerned in the production of [a controlled drug] in contravention of [s 4(1) of the Act] by another'. This looks very like a description of aiding and abetting, but is it intended to replace

the whole law of aiding and abetting, or leave it standing so far as not inconsistent? This is a difficult question to answer because probably the truth is that the drafter did not think about the law of aiding and abetting, and so had no true intention in the matter (see *R v Farr* [1982] Crim LR 745).

Geographical extent

The presumption as stated above refers to the geographical extent of the Act because the implied ancillary rules and maxims will be those of the relevant territory. If an Act extends both to England and Scotland then, so far as the Act applies in England the implied ancillary rules will be those prevailing under English law while so far as the Act applies in Scotland they will be those of Scots law. Thus in the Scottish case of *Temple v Mitchell* (1956) SC 267 the court treated a difference in implied ancillary rules between England and Scotland as precluding the court from following English precedents in a Rent Act case.

Legal concepts

Use in an enactment of a concept, eg relating to age, time or status, attracts general legal rules applying to that concept. Thus the statement in the Landlord and Tenant Act 1954, s 29(3) that no application under s 24(1) of the Act shall be entertained 'unless it is made not less than two . . . months after the giving of the landlord's notice' under s 25 attracts the *corresponding date rule*, under which, if the relevant period is a specified number of months after the relevant event, the period ends on the corresponding day of the subsequent month (*Riley (EJ) Investments Ltd v Eurostile Holdings Ltd* [1985] 1 WLR 1139).

Free-standing terms

One of the most obvious ways in which Parliament indicates its intention to attract ancillary rules is by the use of a free-standing term, that is a word or phrase which is not defined in the Act but has an independent meaning at common law or otherwise.

The Sexual Offences Act 1956, s 14(1) states that it is an offence 'for a person to make an indecent assault on a woman'. The Act contains no definition either of 'indecent' or 'assault'. Parliament is therefore taken to intend to apply the common-law meaning of these terms when taken in conjunction (*R v Kimber* [1983] Crim LR 630).

Ancillary maxims

Legal maxims are repositories of that wisdom the best lawyers

contribute to human welfare. While a broadly-stated maxim is likely to have exceptions and require qualification, the law still finds a use for this way of expressing some basic principle. Coke said: It is holden for an inconvenience that any of the maxims of the law should be broken . . . for that by infringing of a maxim, not only a general prejudice to many, but in the end a public uncertainty and confusion to all would follow.' (Co Lift 152b.) What is said above about the implied importation of ancillary rules of law also applies to maxims.

Development of applied rules of law

The court will not merely treat an existing rule of law as intended to apply in the construction of an enactment, but will if necessary go further and modify or develop the rule as it applies to that enactment.

The House of Lords developed an applied rule in *British Leyland Motor Corporation Ltd v Armstrong Patents Co Ltd* [1986] AC 577. The plaintiffs alleged that in copying parts of their vehicles, and marketing the copies as spare parts, the defendants were guilty of breaches of design copyright under the Copyright Act 1956, s 3. It was held that Parliament could not be taken to intend that the copyright should apply so as to enable the plaintiffs to deny purchasers of their cars the right to have them repaired by use of spare parts, and in arriving at this result the House of Lords applied and modified the real property principle whereby a person is not to be permitted to derogate from his grant.

Presumption that updating construction to be applied

While it remains law, an Act is to be treated as always speaking. In its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law. With regard to updating, Acts can be divided into two categories: the Act that is intended to develop in meaning with developing circumstances (which may be called an ongoing Act) and the Act that is intended to be of unchanging effect (a fixed-time Act). Most Acts are of the former kind.

The ongoing Act

It is presumed that Parliament intends the court to apply to an ongoing Act a construction that continuously updates its wording to allow for changes since the Act was initially framed. In particular where, owing to developments occurring since the original passing of an enactment, a counter-mischief comes into existence or increases, it is presumed that Parliament intends the court so to construe the

enactment as to minimise the adverse effects of the counter-mischief. The editors of the second edition of Cross's *Statutory Interpretation* express agreement (p 49) with the present author that 'there is a general rule in favour of an "updating" or "ambulatory" approach, rather than an "historical" one'.

It was the great Victorian drafter Lord Thring who said that an Act is taken to be always speaking (Thring 1902, p 83). While it remains in force, the Act is necessarily to be treated as current law. It speaks from day to day, though always (unless textually amended) in the words of its original drafter. With this in mind, the competent drafter frames his language in terms suitable for continuing operation into the unforeseeable future. He does not conspicuously compose the Act as at the date of his draft. Rather, he aims to employ a continuous present tense. He uses, as Thring enjoined, the word 'shall' as 'an imperative only, and not as a future' (ibid).

Each generation is largely ruled by the law it inherits. Constant formal updating is not practicable, so an Act takes on a life of its own. What the original framers intended sinks gradually into history. While their language may endure as law, its current subjects are likely to find that law more and more ill-fitting if taken literally.

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the true original intention. Accordingly the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing in the law, social conditions, technology, the meaning of words, and other matters. That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate developments. The drafter should try to foresee the future, and allow for it so much as possible in his wording.

On one view of the definition of 'superior court' in the Contempt of Court Act 1981, s 19, it applied to a type of court that did not exist in 1981. In *Peart v Stewart* [1983] 2 AC 109, 117 Lord Diplock said:

I should . . . have reached the same conclusion on the construction of the definition of 'superior court' in s 19, even if it were impossible to point to any existing court which complied with the description and one were driven to the conclusion that the draftsman was making anticipatory provision for possible new courts that might be subsequently created with the status of superior courts of record.

Changes in the mischief

The mischief at which an enactment was originally directed needs to be 'discerned and considered' in order to construe the enactment

correctly (see p 161 above). Difficulty can be caused by the obvious fact that while the enactment may be suffered to continue in force the social mischief, or mischief on the ground, is likely to change. If the remedial enactment is successful it will remove, or at least alleviate, the social mischief. In the early days however the court will need to help the enactment achieve its object. At best, the enactment may have only partial success. Persons wishing to continue the mischief may attempt to do so. As time goes on, various factors may cause changes in the mischief or may lead to its disappearance. It is by no means certain that the enactment will be amended or repealed at the moment the need for this arises. It may continue to have effect well after the conditions which caused it to be added to the statute book have significantly changed or even disappeared. Towards the end of an enactment's life on the statute book, perhaps the mischief has dwindled to little or nothing. It is then not something that needs to be remedied. The enactment declines into the category of a technical or nominal law. If it is activated by a prosecution the court will react accordingly. It will criticise the bringing of the case. It will sum up against the prosecution. If the legal meaning of the enactment is doubtful, the court will give little weight to the original mischief and much weight to the principle against doubtful penalisation. It will apply an updating construction.

Changes in relevant law

After an Act is passed, later amendments of law (perhaps carried out for a quite different purpose) may mean that the legal remedy provided by the Act to deal with the original mischief has become inadequate or inappropriate. The court must then, in interpreting the Act, make allowances for the fact that the surrounding legal conditions prevailing on the date of its passing have changed. Thus in *Gissing v Liverpool Corporation* [1935] Ch 1 the word 'tax' in a pre-income tax enactment was held to include income tax.

Drafters of amending Acts sometimes fail to realise that changes in surrounding law call for corresponding changes in the language they choose. In *Nugent-Head v Jacob (Inspector of Taxes)* [1948] AC 321, 322 Viscount Simon complained that the language of the income tax enactments relating to married women had not been updated: 'the words now in operation are largely borrowed from Acts of 1803, 1805 and 1806, at which dates the effect of marriage on the property of a wife was very different from what it is today'.

When the question arises of whether an ongoing enactment covers a legal entity not known at the date it was passed, the key is whether it is of the same type or genus as things originally covered by the enactment. Where in *R v Manners* [1976] Crim LR 255 the question arose whether the North Thames Gas Board, set up under the Gas Act 1948, was a 'public body' within the meaning of the Prevention of Corruption Acts 1889 to 1916, it was held that it was to be answered

by determining what type of body was regarded in 1916 as a 'public body'.

Where there has been a significant change in law since the enactment was framed, it is applied to the *substance* of the new law. If the original terminology referred to has been allotted a different meaning, the court will look at the substance behind the wording. The fact that the term referred to by the enactment is still in use does not mean the enactment will apply if the current use gives the term an essentially different meaning (eg *Zecca v Government of Italy* [1982] 2 WLR 1077.)

Also relevant are changes in judicial approach over the years. An Act might be differently construed before and after such a change. Thus Lord Diplock said in 1981 that 'Any judicial statements on matters of public law if made before 1950 are likely to be a misleading guide to what the law is today' (*IRC v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 WLR 722, 736).

Changes in social conditions

Where relevant social conditions have changed since the date of enactment, what was then classed as a social mischief may not be so regarded today. It is very difficult for the court to apply an enactment so as to 'remedy' what is no longer regarded as a mischief. The consequence is an interpretation that minimises the coercive effect of the enactment and gives great weight to criteria such as the principle against doubtful penalisation.

The London Hackney Carriage Act 1853, s 17 makes it an offence for a cab driver to demand *or take* more than the proper fare. The literal meaning clearly includes taking a tip, whether demanded or not. A century later, the tipping of cab drivers had become an accepted social custom. In *Bassam v Green* [1981] Crim LR 626 both members of the Divisional Court stated *obiter*, without giving reasons, that tipping did *not* contravene s 17.

Changes in the practices of mankind may necessitate a strained construction if the legislator's object is to be achieved (eg *Collins v British Airways Board* [1982] QB 734); *Marina Shipping Ltd v Laughton* [1982] QB 1127). Similarly the earlier processing by the court of an enactment may be disregarded if it is no longer appropriate in the light of changed conditions (eg *R v Bow Road JJ, ex parte Adedigba* [1968] 2 QB 572, 586).

Developments in technology

The nature of an ongoing Act requires the court to take account of changes in technology, and treat the statutory language as modified accordingly when this is needed to implement the legislative intention.

Section 3(1) of the Coroners Act 1887 (a consolidation Act) says

that where a coroner is informed that the dead body of a person is lying within his jurisdiction, and certain conditions are satisfied, the coroner, whether or not the cause of death arose within his jurisdiction, shall hold an inquest. The development of refrigeration and air freight services means that bodies can now easily be brought to England from foreign parts. In 1887 this was impossible, so there was no need for the Act to state that the death must have occurred in Britain. Now that new technology makes real the possibility that a decedent whose body is in Britain died abroad, the courts have had to decide whether a territorial limitation is to be treated as implied (*R v West Yorkshire Coroner, ex pane Smith* [1982] QB 335 and [1983] QB 335).

In *Pierce v Bemis, The Lusitania* [1986] QB 384 the court considered the question whether the sunken ship *Lusitania* was 'derelict', which could scarcely have arisen before modern techniques of wreck recovery had been developed. Sheen J held (p 394) that because of changes since its passing 'it is now necessary to disregard some part of the language of [the Merchant Shipping Act 1894]'.

Changes in meaning of words

Where an expression used in an Act has changed its original meaning, the Act may have to be construed as if there were substituted for that expression a term with a modern meaning corresponding to that original meaning (*The Longford* (1889) 14 PD 34). If it seems that the meaning of an expression used in an Act may have changed materially since the Act was passed, evidence may be adduced to establish the original meaning (*London and North Eastern Rly Co v Berriman* [1946] AC 278, 312, *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Assn Ltd* [1966] 1 WLR 287).

The fixed-time Act

A fixed-time Act is one which, contrary to the usual rule, was intended to be applied in the same way whatever changes might occur after its passing. It has a once for all operation. It is to such an Act only that the much quoted words of Lord Esher apply: 'the Act must be construed as if one were interpreting it the day after it was passed' (*The Longford* (1889) 14 PD 34,36). An obvious example is the Indemnity Act. There are various other possibilities. Thus it was held in *Lord Colchester v Kewney* (1866) LR 1 Ex 368, 380 that the Land Tax Act 1798, s 25, which exempted 'any hospital' from the land tax, was intended by Parliament to apply only to hospitals which were in existence at the time the Act was passed.

The presumption is that an Act is intended to be an ongoing Act, since this is the nature of statute law: an Act is always speaking. So there must be some reason adduced for finding it to be a fixed-time Act. One such reason is where the Act is of the nature of

a *contract*. If an Act can be said to form or ratify a contract its meaning cannot properly be 'developed' in the usual way, an obvious example being an Act implementing an international convention. (The convention itself may be subject to 'development', but that is another matter.) Thus in a Canadian constitutional appeal Lord Sankey LC said:

The process of interpretation as the years go on ought not to be allowed to dim or whittle down the provisions of the original contract upon which the federation was founded, nor is it legitimate that any judicial construction of the provisions of ss 91 and 92 should impose a new and different contract upon the federating bodies. (*Re the Regulation and Control of Aeronautics in Canada* [1932] AC 54, 70.)

It was held in *A-G for Alberta v Huggard Assets Ltd* [1953] AC 420 that the Tenures Abolition Act 1660 was of the nature of a compact between the king and his people in England and Wales, and thus did not extend to after-acquired territories of the Crown such as those in Canada.

An obvious instance of the Act which partakes of the nature of a compact is the private Act. The courts treat this as a contract between its promoters (or that portion of the public directly interested in it) and Parliament (*Milnes v Mayor etc of Huddersfield* (1886) 11 App Cas 511; *Perchard v Heywood* (1800) 8 TR 468).

Increase in counter-mischief

Where, owing to developments occurring since the original passing of an enactment, a counter-mischief comes into existence or increases, it is presumed that Parliament intends the court so to construe the enactment as to minimise the adverse effects of the counter-mischief (eg *R v Wilkinson* [1980] 1 WLR 396).

Guides to Legislative Intention IV: Linguistic Canons of Construction

The present chapter deals with the linguistic canons of construction, which reflect the nature or use of language. They are employed to arrive at the literal meaning of an enactment, and depend neither on its legislative character nor on its quality as a legal pronouncement. These canons apply in much the same way to all verbal forms, being based on the rules of grammar, syntax and punctuation and the use of language as a general medium of communication. When judges say, as they sometimes do, that the principles of statutory interpretation do not materially differ from those applicable to the interpretation of documents generally, it is these linguistic canons they have in mind.

Construction of text as a whole

The first linguistic canon is that an Act or other legislative instrument is to be read as a whole, so that an enactment within it is not treated as standing alone but is interpreted in its verbal context. As Holmes J said, 'you let whatever galvanic current may come from the rest of the instrument run through the particular sentence' (Holmes 1898- 99, 417).

Coke said that it is the most natural and genuine exposition of a statute to construe one part of it by another 'for that best expresseth the meaning of the makers' (1 Co Inst 381 lb). In *South West Water Authority v Rumble's* [1985] AC 609, 617 Lord Scarman said of paragraphs (a) and (b) of the Water Act 1973, s 30: 'It is not... possible to determine their true meaning save in the context of the legislation read as a whole'.

It follows that a general term used in one provision of an Act may by implication be modified by another provision elsewhere in the Act. Thus in *Cooper v Motor Insurers' Bureau* [1985] QB 575 the general term 'any person' in the Road Traffic Act 1972, s 145(3)(a) was held to be modified by an implication arising from s 143(1) of the Act.

Certain specific rules follow from the idea that a legislative text is to be construed as a whole.

All words to be given meaning

On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every part of an enactment. It is presumed that if a word or phrase appears in the enactment, it was put there for a purpose and must not be disregarded. This applies *a fortiori* to a longer passage, such as a section or subsection. Where in *Albert v Lavin* [1981] 2 WLR 1070, 1083 Hodgson J said that in an enactment defining a criminal offence the word 'unlawful' was surely tautologous he was rebuked by Lawton LJ in a later case (*R v Kimber* [1983] 1 WLR 1118, 1122). In *A-G's Reference (No 1 of 1975)* [1975] QB 773, 778 it was held that in the Accessories and Abettors Act 1861, s 8 the words 'aid, abet, counsel or procure' must each be taken to have a distinct meaning since otherwise Parliament would be indulging in tautology in using all four words. In *R v Millward* [1985] QB 519 the Court of Appeal rejected the appellant's argument that the Perjury Act 1916, s 1(1) applies only where the witness believes his false statement to be material, because this reading would render s 1(6) of the Act meaningless. In *Chaudhary v Chaudhary* [1984] Fam 19 it was held that the Recognition of Divorces and Legal Separations Act 1971, s 2(a) must have a restrictive effect, since otherwise it would have no operation.

It may happen however that no sensible meaning can be given to some statutory word or phrase. It must then be disregarded. As Brett J said in *Stone v Corporation of Yeovil* (1876) 1 CPD 691, 701: 'It is a canon of construction that, if it be possible, effect must be given to every word of an Act of Parliament or other document; but that, if there be a word or phrase therein to which no sensible meaning can be given, it must be eliminated'. Words may be robbed of meaning by a subsequent change in the law and the failure of the drafter of the amending Act to effect a consequential amendment (eg *R v Wilson (Clarence)* [1983] 3 WLR 686, 691).

Same words to be given same meaning

It is presumed that a word or phrase is not to be taken as having different meanings within the same instrument, unless this intention is made clear. Where the context shows that the term has a particular meaning in one place, it will be taken to have that meaning elsewhere. Thus Cleasby B said: 'It is a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament' (*Courtauld v Legn* (1869) LR 4 Ex 126, 130). Where through unskilful drafting there is doubt as to whether this was indeed Parliament's intention, much difficulty may be caused (eg *Doe d Angell v Angell* (1846) 9 QB 328, 355, where 'rent' was used in two different senses throughout an Act).

A word or phrase with more than one ordinary meaning is termed

a homonym. It is presumed, unless the contrary intention appears, that where the legislator uses a homonym in an Act or other instrument it is intended to have the same meaning in each place. The same applies to cognate expressions such as 'married' and 'marry' (*/? v Allen* (1872) LR 1 CCR 367, 374).

Where an artificial meaning is given to a term for a particular purpose, it will not apply to use of the term where that purpose does not operate (eg *Moir v Williams* [1892] 1 QB 264).

Different words to be given different meanings

It is presumed that the drafter did not indulge in elegant variation, but kept to a particular term when he wished to convey a particular meaning. Accordingly a variation in the term used is taken to denote a different meaning. Blackburn J said in *Hadley v Perks* (1866) LR 1 QB 444, 457:

It has been a general rule for drawing legal documents from the earliest times, one which one is taught when one first becomes a pupil to a conveyancer, never to change the form of words unless you are going to change the meaning . . .

In the same place however Blackburn J recognised the possibility of elegant variation when he said that the legislature 'to improve the graces of the style and to avoid using the same words over and over again' may employ different words without any intention to change the meaning. It can only be said that this is bad drafting. Making use of pronouns when safe, the drafter should otherwise stick to the same word. Graces of style are all very well, but in Acts of Parliament they take a far second place to certainty of meaning.

Conflicting statements within one instrument

Where two enactments within an Act or other instrument conflict, it is necessary to treat one as modifying the other. If no other method of reconciliation is possible, the court adopts the principle that the enactment nearest the end of the instrument prevails (*Wood v Riley* (1867) LR 3 CP 26, 27) (see further pp 275-278).

Effect of specific on general provision

Drafters who wish to make clear that a specific provision is not intended to modify the meaning of a wider general provision often preface the former with the formula 'without prejudice to the generality of [the general provision] . . . This type of formula has its dangers, since often courts find themselves mentally unable to disregard the special provision when construing the wider one (eg

R v Akan [1973] QB 491, followed in *R v Secretary of State for the Home Department, ex parte Thornton* [1987] QB 36).

Consolidation Acts

The presumption of consistent meaning is weaker with consolidation Acts, since these combine the work of different drafters executed at different times (see *IRC v Hinchy* [1960] AC 748, 766). This particularly applies to tax enactments. Thus ss 428 and 455 of the Income and Corporation Taxes Act 1970, reproducing provisions of the Finance Act 1938, achieve results similar to those of s 16 of the Finance Act 1973, though by a different form of words. On this Lord Templeman said in *Carver v Duncan (Inspector of Taxes)* [1985] AC 1082, 1125:

. . . the Income Tax Acts are a vast patchwork begun in the nineteenth century and doomed never to be completed. It is useless to speculate why the draftsman in 1973 used words different from those employed by the draftsman in 1938. Oversight, or some difficulty, real or imagined, may have played a part.

Meaning of ordinary words

The legal meaning of a non-technical word used in an enactment is presumed to correspond to its ordinary meaning, which has been defined as its 'proper and most known signification'. If there is more than one ordinary meaning, the most common and well-established is taken to be intended. Lord Tenterden said words are to be applied 'as they are understood in common language' (*A-G v Winstanley* (1831) 2 D & CI 302, 310). Parke B spoke of adhering to 'the grammatical and ordinary sense of the words used' (*Grey v Pearson* (1857) 6 HL Cas 61, 106). Viscount Dilhorne LC required words to be given 'their ordinary natural meaning' (*Selvey v DPP* [1970] AC 304, 330). Graham J said 'words must be treated as having their ordinary English meaning as applied to the subject-matter with which they are dealing' (*Exxon Corp v Exxon Insurance Consultants International Ltd* [1981] 1 WLR 624, 633). In an appeal concerning who should be treated as a 'member of the family' within the meaning of the Rent Acts, Cohen LJ said that the question the county court judge should have asked himself was: 'Would an ordinary man, addressing his mind to the question whether Mrs Wollams was a member of the family or not, have answered "Yes" or "No"?'

Several ordinary meanings

Many terms have more than one ordinary meaning. Here the starting point is the most common and well-established meaning. In *R v*

Income Tax Commissioners (1888) 22 QBD 296, 309 Fry LJ said: 'The words of a statute are to be taken in their primary, and not in their secondary, signification'.

Composite expressions

A composite expression must be construed as a whole, but it is incorrect to assume that the whole is necessarily the sum of its parts. Because a certain meaning can be collected by taking each word in turn and then combining their several meanings, it does not follow that this is the true meaning of the whole phrase. Each word in the phrase may modify the meaning of the others, giving the whole its own meaning. (See *Mersey Docks and Harbour Board v Henderson* (1883) 13 App C as 595, 599.)

Constructive meaning

The court will apply a statutory term in a sense wide enough to include constructive meanings of the term. Thus in *Re Clore (deed) (No 3)* [1985] 1 WLR 1290 it was held that the provision in the Finance Act 1975, Sched 4, para 2(1) requiring a trustee to deliver an account specifying certain information 'to the best of his knowledge' extended to information contained in documents etc within the trustee's possession or control, even though not present to his mind.

Technical terms

If a word or phrase has a technical meaning in relation to a particular expertise, and is used in a context dealing with that expertise, it is to be given its technical meaning unless the contrary intention appears.

Technical terms are not terms in ordinary use, but require knowledge of the expertise with which they are connected in order to be correctly understood. As Blackstone said, they must be taken according to the acceptance of the learned in each art, trade and science (Blackstone 1765, i 39). Lord Esher MR said, where used in connection with a particular business, words are presumed to be used in the sense in which they are understood in regard to that business (*Unwin v Hanson* [1891] 2 QB 115, 119).

A technical expression may incorporate an ordinary word and give it a special meaning. An obvious example is Bombay duck, which not being duck at all but fish, would not be covered by an enactment regulating 'duck'. Again the Excise Acts place a duty on 'spirits' without elaborating the meaning. In *A-G v Bailey* (1847) 1 Ex 281 it was held that this, being a word of known import, is used in the sense in which it is ordinarily understood. It therefore

does not cover sweet spirits of nitre, an article of commerce not ordinarily described as 'spirits'. A technical term may have different meanings, or a wider and narrower meaning. Lord Macmillan once said that the term 'assessment' is used in the Income Tax Acts with no less than eight different meanings (*Commissioners for the General Purposes of the Income Tax Acts for the City of London v Gibbs* [1942] AC 402, 424). For examples of the judicial treatment of technical terms see, *Prophet v Plan Bros & Co Ltd* [1961] 1 WLR 1130 (fettling of metal castings); *Blankley v Godley* [1952] 1 All ER 436n (aircraft 'taking off'); *London and North Eastern Railway Co v Berriman* [1946] AC 278 (repairing of permanent way).

Technical legal terms

If a word or phrase has a technical meaning in a certain branch of law, and is used in a context dealing with that branch, it is to be given its technical legal meaning, unless the contrary intention appears. Thus in *R v Slator* (1881) 8 QBD 267, 272, where it was argued that the term indictment as used in the Corrupt Practices Prevention Act 1863, s 7 applied to any form of criminal proceeding, Denman J said: 'It always requires the strong compulsion of other words in an Act to induce the court to alter the well-known meaning of a legal term' (see also *Jenkins v Inland Revenue Commissioners* [1944] 2 All ER 491, 495; *Knocker v Youle* [1986] 1 WLR 934, 936).

Free-standing legal terms stand on their own feet, without need of definition. They have a meaning in law which exists for all purposes, not just for those of a particular enactment. This may be given by statute or at common law. Thus *highway* is defined at common law whereas *highway maintainable at the public expense* is defined generally by the Highways Act 1980, s 36(2).

Technical non-legal terms

If a word or phrase has a technical meaning in relation to a certain area of trade, business, technology, or other non-legal expertise, and is used in a context dealing with that expertise, it is to be given its technical meaning, unless the contrary intention appears. *Injenner v Allen West & Co Ltd* [1959] 1 WLR 554 it was argued that the term 'crawling boards' in certain regulations should be given the literal meaning of plain boards over which workmen could crawl. Evidence showed however that the term had a technical meaning in the trades concerned which required cross battens to be fitted to the boards, so as to prevent men from slipping. It was held that this technical meaning should be applied.

If a word is a technical term of two or more different fields of expertise it is necessary to determine which field is intended. In

Chesterfield Tube Co Ltd v Thomas (Valuation Officer) [1970] 1 WLR 1483 the Court of Appeal held that the legal meaning of the technical phrase 'generation . . . of power' in the General Rate Act 1967, Sched 3, para 1(a) was what the phrase meant to rating valuers not physicists.

Terms with both ordinary and technical meaning

Where an enactment uses a term which has both an ordinary and a technical meaning, the question of which meaning the term is intended to have is influenced by the context. If the context is technical, the presumption is that the technical meaning of the term is intended. Otherwise the ordinary meaning is taken as meant.

In *R v Commissioners under Boiler Explosions Act 1882* [1891] 1 QB 703, 716 Lord Esher MR, when considering in the light of scientific evidence the meaning of the word 'boiler', concluded that the Act 'was not meant to draw these scientific distinctions but to deal with the thing in which there is steam under pressure which is likely to explode'.

The Restriction of Offensive Weapons Act 1959, s 1(1) penalises any person 'who manufactures, sells or offers for sale or hire, or lends or hires, to any other person' any flick-knife. In *Fisher v Bell* [1961] 1 QB 394 a shopkeeper was accused of offering a flick-knife for sale by putting it in his shop window. The question was whether 'offer' was used in its popular or technical sense. Rather surprisingly it was held to be used in its technical sense in the law of contract, under which placing goods in a shop window does not constitute an 'offer'.

Case law may give an ordinary word a technical meaning. As Lord Wilberforce said in connection with 'office' as used in the Income Tax Acts, many words of ordinary meaning acquire a signification coloured over the years by legal construction in a technical context such that return to the pure source of common parlance is no longer possible (*Edwards (Inspector of Taxes) v Clinch* [1981] 3 WLR 707, 710). Where a term is used which has both an ordinary and a technical meaning it is permissible, in order to determine which meaning was intended, to seek guidance from the pre-enacting history. (*R v Nanayakkara* [1987] 1 WLR 265).

Archaisms

Sometimes, though very rarely, the legislator may use a term which is already archaic or obsolete. It is presumed that the term is intended to have this archaic meaning, though that does not prevent its legal meaning in the Act from being developed by the courts in the ordinary way (see pp 181-6 above as to updating construction).

The Civil Evidence Act 1968, s 8(2)(b) provides for enabling a party to require a person to be called as a witness unless he is 'beyond the seas', a phrase which also occurs in the Criminal Evidence

Act 1965, s 1(b). In *Rover International Ltd v Cannon Film Sales Ltd (No 2)* [1987] 1 WLR 1597, 1601 Harman J said of this:

It is a phrase which seems to me to be entirely archaic today. It has splendid overtones of Elizabeth I's reign and suchlike matters but is not a matter, I would think, of current speech or even lawyers' speech . . . However Parliament in its wisdom has chosen to use that phrase and I have to wrestle with it.

Both archaic and modern meaning Where Parliament uses a term which has an archaic meaning and also a (different) modern meaning it will be presumed, in the absence of any indication to the contrary, that the modern meaning is intended. In *R v Secretary of State for the Environment, ex pane Hillingdon LBC* [1986] 1 WLR 192 (affd [1986] 1 WLR 807) Woolf J held that 'committee' as used in the Local Government Act 1972, s 101(l)(a) was intended to have its modern meaning of a group of two or more persons, and not its obsolete meaning of a person to whom any function is committed.

Term becoming archaic Where a term used in relation to a statutory procedure has become archaic since the statute was enacted, the procedure should if possible employ an alternative term in current use (eg *R v Portsmouth Coroner, ex pane Anderson* [1987] 1 WLR 1640, 1645 (meaning of 'misadventure')).

Judicial notice of meaning

Judicial notice is taken of the meaning of words in Acts and delegated legislation (other than technical terms not being those of the law prevailing within the court's jurisdiction). Martin B said: 'Is not the Judge bound to know the meaning of all words in the English language?' (*Hills v London Gaslight Co* (1857) 27 LJ Ex 60, 63), while Pollock CB remarked that 'Judges are philologists of the highest order' (*Ex pane David* (1857) 5 W R 522, 523).

Most judges allow their putative memories to be refreshed by the citation of dictionaries and other works of reference. Lord Coleridge said of dictionaries: 'it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books' (*R v Peters* (1886) 16 QBD 636, 641). A dictionary cited should be well known and authoritative' (*Camden (Marquess) v IRC* [1914] 1 KB 641, 647).

If the court is concerned with the contemporary meaning of a word at the time the Act was passed, it should consult a dictionary of that period (*Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association Ltd* [1966] 1 WLR 287; *R v Bouch* [1982] 3 WLR 673, 677).

Dictionaries can be used to arrive at the etymology of the word, which may guide the court (eg *R v Bates* [1952] 1 All ER 842, 845-846). If the term has been judicially defined in a relevant context, this will be treated by the court as a more reliable guide to its meaning than a dictionary is likely to provide (*Midland Railway v Robinson* (1889) 15 App Cas 19, 34; *Kerr v Kennedy* [1942] 1 KB 409, 413). This is because the term has then been 'processed' by the court, a topic discussed in Part IV below.

Evidence of meaning

Evidence may not be adduced of the meaning of terms of which the court takes judicial notice; but is admissible as respects the meaning of other terms (*Camden (Marquess) v IRC* [1914] 1 KB 641, 650; *R v Colder and Boyars Ltd* [1969] 1 QB 151; *R v Anderson* [1972] 1 QB 304; *R v Stamford* [1972] 2 QB 391).

It seems that evidence should be admitted to establish whether or not a term is a technical term (*London and North Eastern Railway Company v Berriman* [1946] AC 278, 305). If the evidence shows it is, then the court determines whether it was intended to be understood in the technical sense.

Expert evidence of a technical matter may be admitted in order to determine whether the matter falls within a statutory term. Thus in *R v Skirving* [1985] QB 819 a book on cocaine was alleged to be an 'obscene article' within the meaning of the Obscene Publications Act 1959. It was held that expert evidence as to the nature and effect of cocaine was admissible, since this was not within the experience of an ordinary person.

Reference books may be consulted in lieu of evidence. Thus books by Mill and Stephen were cited in *Re Castioni* [1891] 1 QB 149 on the question of what offences are 'of a political character' within the meaning of the Extradition Act 1870, s 3(1). (See also *Bank of Toronto v Lambe* (1887) 12 App Cas 575, 581 (works on political economy cited as to meaning of 'direct taxation' in British North America Act 1867); *R v Bouch* [1983] QB 246 (*Encyclopedia Britannica* cited as to definition of 'explosive substance' in the Explosive Substances Act 1883, s 3(1)).

We now go on to consider certain specific canons of construction. Many of these are of great antiquity, as indicated by the fact that they are usually known in the form of a Latin phrase or maxim.

Noscitur a sociis

A statutory term is often coloured by its associated words. As Viscount Simonds said in *A-G v Prince Ernest Augustus of Hanover* [1957] AC 436, 461: 'words, and particularly general words, cannot

be read in isolation; their colour and their content are derived from their context'. The Latin maxim *noscitur a sociis* (it is recognised by its associates) states this contextual principle, whereby a word or phrase is not to be construed as if it stood alone but in the light of its surroundings. While of general application and validity, the maxim has given rise to particular precepts such as the *eiusdem generis* principle and the rank principle, discussed later. The general contextual principle was well stated by Stamp J in *Bourne v Norwich Crematorium Ltd* [1967] 1 WLR 691, 696:

English words derive colour from those which surround them. Sentences are not mere collections of words to be taken out of the sentence, defined separately by reference to the dictionary or decided cases, and then put back into the sentence with the meaning which you have assigned to them as separate words . . . (See also *Peart v Stewart* [1983] AC 109, 117).

As always with an interpretative criterion, other considerations may displace the principle. For example the drafter may have specified certain terms not so as to give colour to a general phrase but to prevent any doubt as to whether they are included (*IRC v Parker* [1966] AC 141, 161). Where an enactment includes a word which in itself is neutral or colourless, the context provides the colouring agent. Walton J said that the word 'payment' 'has no one settled meaning but . . . takes its colour very much from the context in which it is found' (*Garforth (Inspector of Taxes) v Newsmith Stainless Ltd* [1979] 1 WLR 409, 412). In another case Stamp LJ said 'the words "occupation" and "occupier" are not words of art having an ascertained legal meaning applicable, or prima facie applicable, wherever you find them in a statute, but take their colour from the context' (*Lee-Verhulst (Investments) Ltd v Harwood Trust* [1973] 1 QB 204, 217).

Eiusdem generis

The Latin words *eiusdem generis* (of the same kind or nature), have been attached to a canon of construction whereby wide words associated in the text with more limited words are taken to be restricted by implication to matters of the same limited character. The principle may apply whatever the form of the association, but the most usual form is a list or string of genus-describing terms followed by wider residuary or sweeping-up words. The canon arises from the linguistic implication by which words having literally a wide meaning (when taken in isolation) are treated as reduced in scope by the verbal context. It is an instance of ellipsis, or reliance on implication.

As Rupert Cross put it, following Lord Diplock: 'the draftsman must be taken to have inserted the general words in case something which ought to have been included among the specifically enumerated items had been omitted . . .' (Cross 1987, 133). Or, as Odgers says,

it is assumed 'that the general words were only intended to guard against some accidental omission in the objects of the kind mentioned and were not intended to extend to objects of a wholly different kind' (Odgers 1987, 184). It follows that the principle is presumed to apply unless there is some contrary indication (*Tillmans & Co v SS Knutsford Ltd* [1908] 2 KB 385).

It is necessary to be able to formulate the genus; for if it cannot be formulated it does not exist. 'Unless you can find a category', said Farwell LJ, 'there is no room for the application of the *ejusdem generis* doctrine' (*ibid*).

Judges do not always trouble to formulate the genus fully, it often being enough to indicate how it might be framed. In *Coleskill and District Investment Co Ltd v Minister of Housing and Local Government* [1968] 1 All ER 62, 65, where the generic string was 'building, engineering, mining', Widgery J said: 'without attempting to define the genus in detail, it seems clear to me that it is restricted to operations of the scale, complexity and difficulty which require a builder or an engineer or some mining expert'.

Nature of a 'genus'

For the *ejusdem generis* principle to apply there must be a sufficient indication of a category that can properly be described as a class or genus, even though not specified as such in the enactment. Furthermore the genus must be narrower than the literal meaning of the words it is said to regulate. The Customs Consolidation Act 1876, s 43 reads: 'The importation of arms, ammunition, gunpowder, *or any other goods* may be prohibited'. Although the italicised words are completely general, it is obvious that some limitation is intended. Otherwise why did not the drafter simply say 'The importation of any goods may be prohibited'? In *A-G v Brown* [1920] 1 KB 773 it was held that the *ejusdem generis* principle applied to restrict the italicised words to objects of the same nature as the substantives listed in the generic string.

The *ejusdem generis* principle has also been applied to strings of adjectives (eg *Re Stockport Ragged, Industrial & Reformatory Schools* [1898] 2 Ch 687, where the phrase in question was 'cathedral, collegiate, chapter or other schools').

The tendency of the courts is to restrict the imputed genus to an area that goes no wider than is necessary to encompass the entire generic string. Thus a string specified as 'boots, shoes, stockings and other articles' would import the genus 'footwear' rather than the wider category of 'wearing apparel' (*Magnhild (SS) v McIntyre Bros & Co* [1920] 2 KB 321, 331). The string 'railway, road, pipeline or other facility' imports a facility for conveying goods, and so excludes storage facilities (see the Australian case of *Canwan Coals Pty Ltd v FCT* (1974) 4 ALR 223).

In addition to the generic string, other parts of the context may

give assistance in finding the genus. The Finance Act 1894, s 8(4) contained the string 'every trustee, guardian, committee, or other person'. It was held in *Re Latham, IRC v Barclays Bank Ltd* [1962] Ch 616 that the genus was persons holding property in a fiduciary capacity, but this was helped by previous mention in the subsection of persons holding beneficially.

Single genus-describing term Despite numerous dicta to the contrary, the *ejusdem generis* principle may apply where one term only establishes the genus, though in such cases the presumption favouring the principle is weakened. Thus in *A-G v Seccombe* [1911] 2 KB 688 it was held that the words 'or otherwise' in the phrase 'any benefit to him by contract or otherwise' in the Customs and Inland Revenue Act 1889, s 11(1) must be construed *ejusdem generis* with 'contract'. In *Lewisham BC v Maloney* [1948] 1 KB 51 it was held that in the phrase 'easement, right or other privilege' the word 'right' must be construed *ejusdem generis* with 'easement'. In *Parkes v Secretary of State for the Environment* [1978] 1 WLR 1308 the Court of Appeal held that in the phrase 'building or other operations' in the Town and Country Planning Act 1971, s 290 the other operations must be read as akin to building.

Genus-describing terms surrounding wider word Where a word of wider meaning is included in a string of genus-describing terms of narrower meaning, the *ejusdem generis* principle may operate to restrict the meaning of the wider word so as to keep it within the genus. The Dublin Carriages Act 1853, s 25 required a licence to be held before any person could lawfully 'use or let to hire any hackney carriage, job carriage, stage carriage, cart, or job horse'. In *Shaw v Ruddin* (1859) 9 Ir CLR 214 it was held that hackney carriage, job carriage, stage carriage and job horse were genus-describing words, the genus being conveyances used for hire. According the unrestricted word *cart* when found in their company, must be construed as limited to carts used for hire. (See also *Scales v Pickering* (1828) 4 Bing 448).

General words followed by narrower genus-describing terms The *ejusdem generis* principle is presumed not to apply where apparently general words are followed by narrower words suggesting a genus more limited than the initial general words, if taken by themselves, would indicate: *Re Wellsted's Will Trusts* [1949] Ch 296, 318; *Ambatielos v Anton Jurgens Margarine Works* [1923] AC 175, 183; *Canadian National Railways v Canadian Steamship Lines Ltd* [1945] AC 204, 211; *Re Wellsted's Will Trusts* [1949] Ch 296, 305.

Exclusion of ejusdem generis principle

An intention to exclude the *ejusdem generis* principle may be shown

expressly or by implication. Thus if he desires to indicate that the *ejusdem generis* principle is not to apply, the drafter may qualify the residuary or sweeping-up words by a suitable generalisation such as 'or things of whatever description' (*A-G v Leicester Corporation* [1910] 2 Ch 359, 369). However the word 'whatsoever' in the phrase 'or other person whatsoever' in the Sunday Observance Act 1677, was held *not* to disapply the principle (*Palmer v Snow* [1900] 1 QB 725). Again, the principle was applied to the phrase 'corn and grass, hops, roots, fruits, pulse' notwithstanding that the residuary words were 'or other product whatsoever' (*Clark v Gaskarth* (1818) 8 Taunt 431).

These examples show that the only safe drafting method is to use in relation to the residuary words explicit disapplying words. (See, eg, the Finance Act 1976, s 61(2), which speaks of benefits 'whether or not similar to any of those mentioned above in this subsection'). Another method is to include a definition of the residuary words. This will be construed on its own, without reference to the *ejusdem generis* principle (*Beswick v Beswick* [1968] AC 58, 87).

An implication against the application of the *ejusdem generis* principle to narrow a term arises where the term is used elsewhere in the Act in a wide sense (eg *Young v Gratridge* (1868) LR 4 QB 166).

The rank principle

Where a string of items of a certain rank or level is followed by general residuary words, it is presumed that the residuary words are not intended to include items of a higher rank than those specified. By specifying only items of lower rank the impression is created that higher ranks are not intended to be covered. If they were, then their mention would be expected *a fortiori*.

Examples of the application of the rank principle include the following. In the Sunday Observance Act 1677, s i, the string 'tradesman, artificer, workman, labourer, or other person whatsoever' was held not to include persons above the artisan class (*Gregory v Fearn* [1953] 1 WLR 974). The string 'copper, brass, pewter, and tin, and all other metals' in a local Act of 1825 was held not to include precious metals such as gold and silver (*Casher v Holmes* (1831) 2 B & Ad 592). A power given to the Barons of the Exchequer by s 26 of the Queen's Remembrancer Act 1859 to make procedural rules for their court did not extend to giving rights of appeal to higher courts (*A-G v Sillem* (1864) 10 HLC 704; *Hotel and Catering Industry Training Board v Automobile Proprietary Ltd* [1968] 1 WLR 1526).

Megarry V-C suggests that the principle may apply to exclude a judge from the provision that in Welsh legal proceedings the Welsh language may be spoken 'by any party, witness or other person

who desires to use it' (Welsh Language Act 1967, s 1(1); see Megarry 1973, 169). Another modern example is the phrase 'an officer or examiner of the court or some other person' in RSC Ord 39, r 4(a). The concluding words have been held not to include judges (*Re Brickman's Settlement* [1981] 1 WLR 1560).

Tapering strings The rank principle has been held to apply where the string was regarded as tapering down, and the item in question, though not superior to items at the beginning, was superior to those listed towards the end. Thus where the string was 'horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep or other cattle' bulls were held to be excluded since, although not superior to horses, they were regarded as superior to oxen, cows etc (*Ex parte Hill* (1827) 3 C & P 225). See also *R v Marcus* [1981] 1 WLR 774.

Necessary disapplication The rank principle does not apply if no items are left for the residuary words to cover but those of higher rank, or as Blackstone puts it, where 'the general words would otherwise be entirely void' (Blackstone 1765, i 63). He gives as an example the provision in the Statute of Marlborough 1267 which lists essoins 'in counties, hundreds, or in courts baron, or in other courts'. Since there were no other courts of lower or equal jurisdiction, the latter words were held to include the king's courts of record at Westminster (2 Inst 137).

Reddendo singula singulis

The *reddendo singula singulis* principle concerns the use of words distributively. Where a complex sentence has more than one subject, and more than one object, it may be the right construction to *render each to each*, by reading the provision distributively and applying each object to its appropriate subject. A similar principle applies to verbs and their subjects, and to other parts of speech. A typical application of this principle is where a testator says 'I *devise and bequeath* all my *real and personal* property to B'. The term *devise* is appropriate only to real property. The term *bequeath* is appropriate only to personal property. Accordingly, by the application of the principle *reddendo singula singulis*, the testamentary disposition is read as if it were worded 'I *devise* all my real property, and *bequeath* all my personal property, to B'.

The Immigration Act 1971, s 1 lays down general principles. It begins: 'All those who are in this Act expressed to have the right of abode in the United Kingdom shall be free to live in, and to come and go into and from, the United Kingdom . . .'. The phrase 'to come and go into and from' the United Kingdom appears clumsy. Applied *reddendo singula singulis*, it is to be read as if it said 'to come into the United Kingdom and go from it'. Why did not the

drafter put it in this way? No doubt because he wished to use the evocative phrase 'come and go'. Enactments often need to be read *reddendo singula singulis*. An important modern example is the European Communities Act 1972, s 2(1) (see p 60 above). For an instructive example founded on the Local Government Act 1933, s 59(1) see *Bishop v Deakin* [1936] Ch 409.

Expressum facit cessare taciturn

To state a thing expressly ends the possibility that something inconsistent with it is implied in the passage in question. No inference is proper if it goes against the express words Parliament has used. 'Express enactment shuts the door to further implication' (*Whiteman v Sadler* [1910] AC 514, 527).

Where an enactment codifies a rule of common law, equity, custom or prerogative it is presumed to displace that rule altogether. This applies even where the term codification is not used. Accordingly the statutory formulation of the rule, whether or not it is to the like effect as the previous rule, by implication disapples any aspect of that rule not embodied in the new formulation. Note that this principle raises a purely linguistic assumption. It does not affect the possibility that on balance the interpretative factors may call for a strained construction of the enactment.

The chief application of the principle *expressum facit cessare taciturn* lies in the so-called *expressio unius* principle. This is dealt with next.

Expressio unius est exclusio alterius

The maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another) is an aspect of the principle *expressum facit cessare taciturn*. Known for short as the *expressio unius* principle, it is applied where a statutory proposition might have covered a number of matters but in fact mentions only some of them. Unless these are mentioned merely as examples, or *ex abundanti cautela*, or for some other sufficient reason, the rest are taken to be excluded from the proposition.

The *expressio unius* principle is also applied where a formula which in itself may or may not include a certain class is accompanied by words of *extension* naming only some members of that class. The remaining members of the class are then taken to be excluded. Again, the principle may apply where an item is mentioned in relation to one matter but not in relation to another matter equally eligible.

Section 16 of the Licensing Act 1872, an imperfectly-drafted Act, laid down three separate offences against public order. In the statement of the first offence the word 'knowingly' was included, but it was omitted in the case of the other two. This gave rise to the logical implication that these could be committed with or

without knowledge, and it was so held in *Mullins v Collins* (1874) LR 9 QB 292, 295. However in *Somerset v Wade* [1894] 1 QB 574, which concerned the contrast between 'permitting' in s 13 of the Act and 'knowingly permitting' in s 14, the decision went against the application of the *expressio unius* principle (see also *Dean v Wiesengrund* [1955] 2 QB 120).

Words of designation

The *expressio unius* principle applies where some only out of a possible series of substantives or other items are expressly designated. The application of the principle therefore turns on these words of designation.

The Diplomatic Privileges Act 1964 gave the force of law to certain provisions of the Vienna Convention on Diplomatic Relations 1961. These protected, in relation to a foreign mission, what were defined as the 'premises of the mission'. In *Intpro Properties (UK) Ltd v Sauvel* [1983] QB 1019 it was alleged that a private dwelling occupied by a financial counsellor at the French embassy in London was the subject of diplomatic immunity as being 'premises of the mission'. The definition of this phrase in art 1 of the Convention is 'the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purposes of the mission including *the residence of the head of the mission*'. It was held that the specific mention of the residence of the 'head' of the mission made it clear that the residences of other members of the mission could not form part of the premises of the mission. (See also *R v Caledonian Railway* (1850) 16 QB 19).

Words of extension

Where it is doubtful whether a stated term does or does not include a certain class, and words of extension are added which cover some only of the members of the class, it is implied that the remaining members of the class are excluded. The most common technique of extending the indisputable meaning of a term is by the use of an enlarging definition, that is one in the form 'A includes B' (see p 134 above). Where B does not exhaust the class of which it is a member, the remaining class members are taken to be excluded from the ambit of the enactment. The Immigration Act 1971, s 2(3) states that for the purposes of s 2(1) of the Act the word 'parent' includes the *mother* of an illegitimate child. The class to which this extension relates is the *parents* of an illegitimate child. In *R v Immigration Appeals Adjudicator, ex pane Crew* (1982) *The Times*, 26 November, Lord Lane CJ said: 'Under the rule *expressio unius exclusio alterius*, that express mention of the mother implies that the father is excluded'.

The *expressio unius* principle is often applied to words of exception. An excepting provision may except certain categories either from the Act in which the provision is contained, or from the law generally. It is presumed that these are the only exceptions of the kind intended. The Road Traffic Regulation Act 1967, s 79 states that no statutory provision imposing a *speed limit* on motor vehicles shall apply to any vehicle on an occasion when it is being used for fire brigade, ambulance or police purposes. Speed limits are not the only statutory restrictions which might hinder such vehicles in an emergency, yet under the *expressio unius* principle these other restrictions, such as the duty to stop at a red light, would continue to apply (see *Buckoke v Greater London Council* [1971] 1 Ch 655).

Words providing remedies etc

Where an Act sets out specific remedies, penalties or procedures it is presumed that other remedies, penalties or procedures that might have been applicable are by implication excluded (eg *Felix v Shiva* [1983] QB 82 90-91; *Payne v Lord Harris of Greenwich* [1981] 1 WLR 754, 767).

Where other cause for the expressio unius principle

The *expressio unius* principle does not apply where it appears that there is a reason for singling out the words of designation other than an intention to exclude other terms. Thus they may be used merely as examples, or be included *ex abundanti cautela*, or for some other purpose. By the Poor Relief Act 1601, s 1 a poor-rate was imposed on occupiers of 'lands, houses, tithes and *coal mines*'. In *R v Inhabitants of Sedgley* (1831) 2 B & Ad 65 the argument that other mines were also intended to be rated, and that coal mines were mentioned merely as an example, was rejected (see also *C Maurice & Co Ltd v Minister of Labour* [1968] 1 WLR 1337, 1345; *Prestcold (Central) Ltd v Minister of Labour* [1969] 1 WLR 89).

As to items mentioned *ex abundanti cautela* see *McLaughlin v Westgarth* (1906) 75 LJPC 117, 118 (savings in private Acts); *Duke of Newcastle v Morris* (1870) LR 4 HL 661, 671 (peers' privilege of freedom from arrest) and the Canadian case of *Dockstader v Clark* (1903) 11 BCR 37. For an example of a case where there was some other reason for singling out the item in question for express mention see *Dean v Wiesengrund* [1955] 2 QB 120.

If an item which on the application of the *expressio unius* principle would be excluded is of a class which came into existence only after the passing of the enactment, it is probably right to disregard the principle as an aid to construction (*A-G for Northern Ireland's Reference (No 1 of 1975)* [1977] AC 105, 132).

Implication by oblique reference

Uncertainty in one part of a proposition may be resolved by implication from what is said in another part, even though that other part is not directly referring to the first part. Accordingly account is to be taken of a meaning of one provision in an Act that logically if obliquely arises from what is said elsewhere in the Act. Equally an express statement in an enactment may carry oblique implications respecting the legal meaning of other Acts, or of unenacted rules of law. It often happens that what is expressed in one place throws light on the meaning intended elsewhere. Thus doubt as to whether treason was a felony was settled by a passage in the Treason Act 1351 which, speaking of some dubious crimes, directed a reference to Parliament that it may there be adjudged 'whether they be treason, or other felony' (Blackstone 1765, iv 82).

Doubt as to whether 'interest' was confined to annual interest in the phrase 'interest, annuities or other annual payments' occurring in the Income Tax Act 1952 was set at rest by the necessary implication arising from the reference to *other* annual payments (*IRC v Frere* [1965] AC 402). An Act requiring Members of Parliament to swear 'on the true faith of a Christian' was held by necessary implication to exclude Jews from Parliament (*Miller v Salomons* (1853) 7 Ex 475; *Solomons v Miller* (1853) 8 Ex 778). When it was expressly enacted that an offence triable by magistrates might be committed within territorial waters, an implied jurisdiction to *try* that offence was held to be created (*R v Kent JJ, ex pane Lye* [1967] 2 QB 153, 178). The requirement in the Firearms Act 1968, s 26 that an application for a firearm certificate must be made to the chief constable for the area in which the applicant resides was held in *Bur din v Joslin* [1981] 3 All ER 203, where the applicant was a British army officer resident in Germany, to imply that a person who is not resident in an area which has a chief constable is not entitled to a certificate.

In making orders, following divorce, for financial provision or property adjustment, the court is required by the Matrimonial Causes Act 1973, s 25(1) 'to have regard to all the circumstances of the case'. The House of Lords held in *Jenkins v Livesey (formerly) Jenkins* [1985] AC 424 that by implication this placed a duty of disclosure on the parties, and empowered the court to set aside an order obtained without due disclosure.

Implication where statutory description imperfectly met

Where the facts of the instant case substantially though not entirely correspond to a description in the relevant enactment, it is presumed that the enactment is intended to apply in the same way as it would if they did entirely correspond. Where on the other hand the statutory description is partly but not substantially met, it is presumed that

the enactment is intended to apply in the same way as it would if the description were not met at all.

Where a statutory description is only partly met on the facts of the instant case, the question whether the enactment nevertheless applies is usually one of fact and degree. Necessary compression of statutory language makes it difficult for the drafter to use all the words needed to supply adequate connotation. This principle assists by providing guidance in the frequent cases where the statutory description is only partially complied with. Thus an Act prohibiting the making of 'wooden buttons' was held to be infringed by making buttons of wood notwithstanding that they had a shank of wire (*R v Roberts*) (1701) 1 Ld Raym 712). A car minus its engine was held to be within the statutory description 'mechanically propelled vehicle' (*Newberry v Simmonds* [1961] 2 QB 345). A policeman not wearing his helmet was held to be a 'constable in uniform' (*Wallwork v Giles* [1970] RTR 117; *Taylor v Baldwin* [1976] Crim LR 137).

Where on the other hand the facts do not substantially answer to the required description, the enactment does not apply. Thus a car bought for scrap, of which the engine was rusted up, the tyres were flat, and the gearbox and electrical apparatus were missing was held not to be a 'mechanically propelled vehicle' in *Smart v Allan* [1963] 1 QB 291, 298, where Lord Parker CJ said 'It seems to me as a matter of common sense that some limit must be put, and some stage must be reached, when one can say: "This is so immobile that it has ceased to be a mechanically propelled vehicle"'. There may be substantial correspondence with a statutory description even though on a quantitative basis the correspondence appears slight. Thus in *Hayes (Valuation Officer) v Lloyd* [1985] 1 WLR 714 it was held that certain agricultural land complied with the description 'land used as a racecourse' within the meaning of the General Rate Act 1967, s 26(3) even though racing took place on one day a year only. The racing took place at Easter and was attended by some 10,000 people.

Multi-purpose cases

Where a public authority reaches a decision for two purposes, only one of which is within its statutory powers, the validity of the decision depends on whether the other purpose is one of the main purposes or is merely subsidiary (eg *R v Inner London Education Authority, ex pane Westminster City Council* [1986] 1 WLR 28).

(Further discussion of linguistic canons of construction will be found in Part III below)