

Introductory Note by FB

The article below is a further addition to my writings on understanding legislation. Others are included within the Topic 'Understanding legislation'. The Topic can be found on this website at www.francisbennion.com/topic/understandinglegislation.htm.

Threading the Legislative Maze - 11

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In this, the penultimate article of the series,¹ I explain the third of the four categories of guides to legislative intention or interpretative criteria, namely presumptions based on the nature of legislation. The final article will deal with the fourth category, general linguistic canons applicable to any piece of prose, and the methodology to be used in applying the four categories.

Interpretative presumptions

An interpretative presumption is laid down at common law, that is by the judges. It affords guidance, arising out of the essential nature of legislation, as to the legislator's prima facie intention regarding the legal meaning of an enactment. The common law has laid down various presumptions about what Parliament is likely to intend regarding the operation of an Act, for example that it is not to be evaded. The presumptions are not distinct from general rules and principles of law, but are drawn from them. At the same time they recognise the essential nature of legislation, and aim in particular to further its effective working. There are many of these presumptions. I shall briefly describe the main ones.

Presumptions regarding the text

It is presumed that in construing an enactment its text, in its setting within the Act or other instrument containing it, is to be regarded as the pre-eminent indication of the legislator's intention. When called upon to construe an Act, the court regards its primary duty as being to look at the text and say what, in itself, it means in law. "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."² So 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 construed.

It is then presumed that the literal meaning of the text is to be followed. 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 semantically obscure, then the clear grammatical meaning likely to

¹ Previous articles are in volume 162 (1998) at pages 356, 436, 516, 596, 696, 856 and 995 and in volume 163 (1999) at pages 264, 364 and 484.

² *Barrell v Fordree* [1932] AC 676, per Lord Warrington of Clyffe at 682.

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 (for the purpose of arriving at the overall legal meaning of the enactment), it may be found necessary to depart from the literal meaning and adopt a strained construction. In general, the weight to be attached to the literal meaning is far greater than applies to any other interpretative criterion. It may occasionally be overborne by other factors, but they must be powerful indeed to achieve this. It follows that where a form of words is laid down by statute for use in certain circumstances it is safest to adhere to this, even though to do so may not be essential. The Police and Criminal Evidence Act 1984 s. 77 requires the trial judge to instruct the jury to bear in mind the special need for caution in relation to a confession made by a mentally handicapped person. Stuart Smith L.J. said that although the judge did not have to follow any specific wording, he would be wise to use the statutory phrase “special need for caution”.³

The coercive, often penal, nature of a statutory *power* means that the court will prefer to give it a literal, rather than expansive, construction. “A power conferred by Parliament in general terms is not to be taken to authorise the doing of acts by the donee of the power which adversely affect the legal rights of the citizen, or the basic principles on which the law of the United Kingdom is based, unless the statute conferring the power makes it clear that such is the intention of Parliament.”⁴

It will be seen that there is no literal *rule* of interpretation in the sense that the literal meaning must invariably be followed. Determining when it is to be departed from is perhaps the interpreter’s most difficult task.⁵

Other presumptions as to interpretation

A well-known presumption arises under the rule in *Heydon’s Case*.⁶ Here the Barons of the Exchequer resolved-

“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).”

³ *R v Campbell* (1994) *The Times* 13 July.

⁴ *Pierson v Secretary of State for the Home Department* [1997] 3 WLR 492, *per* Lord Browne-Wilkinson at 502.

⁵ Literal construction was fully explained in the third article in this series.

⁶ (1584) 3 Co. Rep. 7a.

This resolution, which is still highly relevant (particularly in relation to tax avoidance), gave rise to what is sometimes known as the mischief rule; and later to what is today perhaps the most important presumption of all, that a purposive construction is to be given.⁷

There is a presumption that a *consequential* construction is to be given. 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. As Mustill J. said, "a statute or contract cannot be interpreted according to its literal meaning without testing that meaning against the practical outcome of giving effect to it".⁸

Next there is a presumption that a *rectifying* construction is to be given where necessary.⁹ It is presumed that the legislator intends the court to apply a construction which rectifies any material error in the drafting of the enactment, where this is required in order to give effect to the legislator's intention. Drafting errors frequently occur.¹⁰ There are occasions when, as Parke B. said, the language of the legislature must be modified, in order to avoid inconsistency with its manifest intentions.¹¹ R.S.C. Ord. 29 r. 11(2)(a) (made under the Supreme Court Act 1981 s. 32) as amended allows an interim payment of damages in respect of a person "whose liability will be met by . . . an insurer concerned under the Motor Insurers' Bureau agreement". The drafting of this is defective in two ways: (1) the name of the agreement is actually the Uninsured Drivers' Agreement, and (2) the words should also cover the case where the liability will be met by the Motor Insurers' Bureau itself, which is not an "insurer". It was held that this was a *casus omissus* and the court should rectify the wording.¹² Millett LJ said that "if possible" the rule should be given the correct construction. It was only "possible" to do this by giving a strained construction. This decision is of interest in relation to the Human Rights Act 1998 s. 3(1), which states that primary and subordinate legislation must be construed in a way which is compatible with the Convention rights "[s]o far as it is possible to do so".

It is presumed that an *updating* construction is usually to be given to an obsolescent enactment. Here Acts can be divided into two categories. There is the normal case of the Act that is intended to develop in meaning with developing circumstances (called an ongoing Act) and the comparatively rare case of the Act that is intended to be of unchanging effect (a fixed-time 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. While it remains law, it is to be treated as always speaking. This means that 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.¹³ Relevant changes since the original Act was passed may be in social conditions and values, use of words, surrounding law, judicial outlook, economic conditions, technology, medical science, or other factors.

⁷ Purposive construction was explained in the third article in this series.

⁸ *R v Committee of Lloyd's, ex p Moran* (1983) *The Times* 24 June.

⁹ *R v Moore* [1995] 4 All ER 843 at 850.

¹⁰ For an account of the various types of drafting error see Bennion, *Statute Law* (3rd edn, 1990) chapter 19.

¹¹ *Miller v Salomons* (1852) 7 Ex Ch 475 at 553.

¹² *Sharp v Pereria* [1998] 4 All ER 145.

¹³ *Fitzpatrick v Sterling Housing Association Ltd* [1997] 4 All ER 991 at 1009-1010.

Here is an example. Under the enactments dealing with distress it was formerly assumed that if a person's outer door was found locked it had been deliberately locked to exclude the sheriff's officer or bailiff, so that the enactments meant that he could lawfully break in. Social practices are different today, so the enactments must be reinterpreted. "It is not [nowadays] wrong for a tenant, without more, to lock the door . . . if he does not know of the bailiff's intended re-entry at any particular time then to leave his door locked and to absent himself about his normal affairs is his right".¹⁴

A fixed-time Act is one which, contrary to the usual presumption, 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, and not to an ongoing Act, that the oft-quoted words of Lord Esher apply: "the Act must be construed as if one were interpreting it the day after it was passed".¹⁵ Thus it was held that the statute 39 Geo. 3 c. 6 (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.¹⁶ Here is another example of a fixed-time enactment, somewhat far-fetched.

"More than 100 years ago, when divorce in the modern sense was possible only by Act of Parliament, an unhappily married Town Clerk was promoting a Waterworks Bill for his town; and in clause 64, mingled with something technical about filter beds and stopcocks, appeared the innocent little phrase 'and the Town Clerk's marriage is hereby dissolved'. Nobody could explain how those words got there, and, in fact, nobody ever noticed them while the Bill was going through Parliament . . . In due course the Royal Assent was given, and the Town Clerk lived happily ever after".¹⁷ It is said that when the Town Clerk's successor came to be appointed, the question arose whether section 64 had a continuing effect in relation to the marriages of successive Town Clerks, or was spent on its initial operation. Since, so far at least as concerned the words in question, it was clearly a fixed-time enactment, the latter was the correct view.

Absurdity

It is presumed that Parliament does not intend "absurd" consequences to flow from the application of its Act.¹⁸ The presumption leads to avoidance by the interpreter of six types of undesirable consequence: an unworkable or impracticable result, an inconvenient result, an anomalous or illogical result, a futile or pointless result, an artificial result, and a disproportionate counter-mischief. The courts thus give "absurd" a far wider import than it has in modern English, where it simply means foolish, ridiculous or silly. Judges keep to the older meaning, which the Oxford English Dictionary gives as: "out of harmony with reason or propriety; incongruous, unreasonable, illogical." It was in such a sense that Claudius told Hamlet that his excessive mourning for a dead father was "To reason most absurd".¹⁹ The derivation is from the Latin *surdus*, deaf. We commonly speak even today of a person being deaf to reason.

Here is an example of a decision avoiding an unworkable or impracticable result. Where an enactment refers to a thing it is presumed that it means a thing which is capable of existing, so the reference to "another legal estate not in existence" in the Law of Property Act 1925 s.

¹⁴ *Khazanchi v Faircharm Investments Ltd* [1998] 2 All ER 901, *per* Morritt LJ at 912-913.

¹⁵ *The Longford* (1889) 14 PD 34, at 36.

¹⁶ *Lord Colchester v Kewney* (1866) LR 1 Ex 368 at 380.

¹⁷ Sir Robert Megarry, *Miscellany-at-Law* (1955), p. 345.

¹⁸ This is one aspect of the presumption favouring a consequential construction, described above.

¹⁹ *Hamlet* I ii 103.

65(2) “can only have been intended to refer to a legal estate which was capable of existence”.²⁰

The following is an example of avoiding a construction that causes unjustifiable inconvenience to persons who are subject to the enactment. Section 8 of the Shops Act 1950 empowered a local authority to make orders fixing the time at which shops, or any specified class of shops, are to be closed for serving customers. By s. 74(1) of the Act “shop” was defined as including any premises where a retail trade or business is carried on. It was held that this did not empower a local authority to make an order by which different “premises” within one department store had to close at different times, since this would cause the owner of the store unjustified inconvenience.²¹

The court seeks to avoid a construction that creates an anomaly or otherwise produces an irrational or illogical result. If the Vagrancy Act 1824 s 6 (powers of arrest) were treated as partially repealed by the Police and Criminal Evidence Act 1984 s. 26(1) “the absurd position would arise that a citizen would be entitled to arrest a person under [s. 6] whereas a constable would not”.²² It was therefore held that this construction would not be followed.

The presumption against avoiding a futile or pointless result is illustrated by a case where Clauson J based his decision on the fact that the effect of an alleged disqualification of a councillor would be that there would have to be an immediate election and the disqualified man would be eligible for re-election to the vacant office. The learned judge said: “I cannot think that the legislature intended such a whimsical result”.²³

The law can deem anything to be the case, however unreal, but it brings itself into disrepute if it dignifies with legal significance a wholly artificial hypothesis. When 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 C.J. said: “We do not believe that this tortuous process, leading in some cases to such an artificial verdict, could have been the intention of Parliament”.²⁴

The last of the six categories of presumption against “absurdity” is concerned with avoiding 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.²⁵

Summary

- An interpretative presumption is laid down at common law, that is by the judges. It affords guidance, arising out of the essential nature of legislation, as to the legislator’s prima facie intention regarding the legal meaning of an enactment.

²⁰ *Ingram and another (executors of the estate of Lady Ingram (deceased)) v Inland Revenue Commissioners* [1997] 4 All ER 395, per Nourse LJ at 402.

²¹ *Fine Fare Ltd v Aberdare UDC* [1965] 2 QB 39.

²² *Gapper v Chief Constable of Avon and Somerset Constabulary* [1998] 4 All ER 248, per Swinton-Thomas LJ at 250.

²³ *Bishop v Deakin* [1936] Ch 409 at 414.

²⁴ *R v Cash* [1985] QB 801 at 806.

²⁵ *The Beta* (1865) 3 Moo PCCNS 23 at 27.

- It is presumed that in construing an enactment its text, in its setting within the Act or other instrument containing it, is to be regarded as the pre-eminent indication of the legislator's intention.
- It is then presumed that the literal meaning of the text is to be followed.
- 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 semantically obscure, then the clear grammatical meaning likely to have been intended (or any of them in the case of ambiguity) is taken as the literal meaning.
- A well-known presumption arises under the rule in *Heydon's Case*. This gave rise to what is sometimes known as the mischief rule; and later to what is today perhaps the most important presumption of all, that a purposive construction is to be given.
- There is a presumption that a *consequential* construction is to be given.
- There is a presumption that a *rectifying* construction is to be given where necessary.
- It is presumed that an *updating* construction is usually to be given to an obsolescent enactment, at least where it is in an "ongoing Act" (it is otherwise with a "fixed-time Act").
- It is presumed that Parliament does not intend "absurd" consequences to flow from the application of its Act.
- This leads to avoidance by the interpreter of six types of undesirable consequence: an unworkable or impracticable result, an inconvenient result, an anomalous or illogical result, a futile or pointless result, an artificial result, and a disproportionate counter-mischief.

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