

## Aspects of the Legal Meaning

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### Introductory

In 2009 I shall (if spared) celebrate sixty years of professional working in the field of statute law – as parliamentary draftsman, academic, adviser, advocate and writer. This may seem a lengthy period for one man, but I find that the longer I go on the more I discover about the subject.

One of my discoveries that seems to have been accepted by the profession is the concept of the legal meaning of an enactment. Since my textbook *Statutory Interpretation* was first published in 1984 the key provision on this has remained unaltered:

“The interpreter’s duty is to arrive at the legal meaning of the enactment, which is not necessarily the same as its grammatical meaning. This must be done in accordance with the rules, principles, presumptions and canons which govern statutory interpretation (in this Code referred to as the interpretative criteria, or guides to legislative intention).”<sup>1</sup>

Long ago I found that this rule had been laid down in a nineteenth-century case.<sup>2</sup> The courts now regularly apply it.<sup>3</sup> However there is still more to discover, as I found when recently looking again at the 1951 case of *Willcock v Muckle*<sup>4</sup>, hereinafter referred to as *Willcock*.

Reflecting on *Willcock*, in the light of comments in a book I shall presently describe, made me realise that in presenting the legal meaning rule in my writing I had failed to stress two important aspects. One is that it may not be the entire meaning of a word or phrase that is involved, but only an incident of it (“the partial meaning point”). The other is that the pronouncement of the legal meaning by a court may be affected by the time at which that pronouncement is made (“the time point”).

I would have liked to develop these aspects fully in the forthcoming fifth edition of *Statutory Interpretation*. It is too late to do this however. The book has gone to press, and it is only possible to make limited alterations to it. So the next best thing is to make those limited alterations in the book and set out the full story in this article. In due course it will be put on my website [www.francisbennion.com](http://www.francisbennion.com). I shall insert the website URL of the article into the fifth edition text, so that readers of the book will be able to find it on the website.<sup>5</sup>

### The Kent book

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<sup>1</sup> F A R Bennion, *Statutory Interpretation* (4th edn, 2002), s 2(1). This edition is hereinafter referred to as “Code”. The section numbers are unchanged in the fifth edition.

<sup>2</sup> *A-G v Sillem* (1864) 2 H & C 431, per Pollock CB at 513.

<sup>3</sup> See eg *Hourigan v Secretary of State for Work and Pensions* [2002] EWCA Civ 1890, [2003] 3 All ER 924, at [33].

<sup>4</sup> [1951] 2 KB 844.

<sup>5</sup> In the fifth edition this has been done with many of my books and articles, thus widening its scope without increasing its already monstrous size (around 1,500 pages).

The book I mentioned above is the only modern account I know that describes the people and workings of the Westminster Parliamentary Counsel Office from the inside and is written by one of its staff. The author was the late Sir Harold Kent, who after being a Parliamentary Counsel for thirteen years was promoted in 1953 to the post of Treasury Solicitor. The title is *In on the Act: Memoirs of a Lawmaker*.<sup>6</sup>

*Willcock* concerned a body of wartime emergency legislation some of which Kent had drafted himself, and he discussed the matter at length in his book.<sup>7</sup> Apart from the Defence Regulations, there were nearly a hundred “emergency” Acts of Parliament dealing with the impact of the Second World War on various matters affecting the running of the country. Each Act was given temporary duration by variations on a formula devised by one of the Parliamentary Counsel, J. St C. Lindsay:

“This Act shall expire on such date as His Majesty may declare by Order in Council to be the end of the emergency that was the occasion of the passing of this Act.”

With hindsight it would have been wise to make it clear that different dates could be prescribed for different emergency Acts, but this was not done. If it had been, the case of *Willcock* would never have been taken to the High Court because the law would have been clear. As it was there was a respectable argument, advanced by Mr Willcock, for saying that there was only one emergency (the war) and therefore the same date must be prescribed in every case.

The emergency Act under which Mr Willcock got into trouble was the National Registration Act 1939. Section 12(4) said: “This Act shall continue in force until such date as His Majesty may by Order in Council declare to be the date on which the emergency that was the occasion of the passing of this Act came to an end . . .” No such order had been made in respect of the National Registration Act 1939. However such an order had been made under the similar provision in the Courts (Emergency Powers) Act 1939. This provided that the date on which the relevant . . .

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. . . emergency came to an end was 8 October 1950.<sup>8</sup>

Mr Willcock’s alleged offence was that on 7 December 1950 he had contravened the National Registration Act 1939 s 6(4) by failing to produce his national registration identity card when required to do so by Police Constable Muckle. (According to Kent, before the outraged gaze of Constable Muckle he tore his card into pieces and flung them on the ground.)

It was not disputed that Mr Willcock had failed to produce the card; the sole question was whether the Act remained in force on that date. Archibald Marshall KC appeared on behalf of Mr Willcock. In Kent’s words:

“He argued that the same emergency (the outbreak of war) had been ‘the occasion of the passing’ of both Acts, and asked how it could have endured for one and not the other. It was a good question.”

It was also a vitally important question nationally. Kent continued:

“If Willcock was right, an abyss opened before us. There were many important Emergency Acts still in force . . . and these would immediately expire. But it was worse than that. All the Acts in the emergency group which were passed were passed in the early stages of the European war, and the first of them was terminated in 1945. If there were one emergency for all, everything done since then under more than eighty Acts of Parliament would have been unlawful.”

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<sup>6</sup> London, Macmillan, 1979.

<sup>7</sup> See pp. 157-158 and 220-224.

<sup>8</sup> Courts (Emergency Powers) (End of Emergency) Order 1950 (SI 1950/1647).

Because of the national importance of *Willcock* a court of seven Judges under Lord Goddard LCJ was hearing the case. Goddard remarked gleefully: “There will be quite a bonfire of controls, Mr Marshall, if you succeed in this case”.

One of the sitting Judges was Somervell LJ, who as Attorney General had in 1945 advised the government officially that different dates could be prescribed as the end of the emergency under different Acts.<sup>9</sup> Kent was unperturbed by this irregularity; in fact rejoiced in it. Today it would be regarded as a grave abuse for an ex-Law Officer to sit as a Judge on a case where he had previously advised.

Sir Frank Soskice, who was now the Attorney General, led for the Crown. Kent wrote:

“Almost at once [the Judges] were on to him, interrupting him and peppering him with questions. Fortunately Somervell . . . threw him an occasional lifeline . . .”

Next morning the hearing continued. Kent was told by the Crown lawyers that except for Somervell and one other Judge the court were against them. Kent said:

“. . . the vital thing was to bring the Lord Chief Justice round. If we did, Hilbery, his old friend and contemporary, would come with him, and we would have a majority.

The next day Frank Soskice was a new man . . . He addressed himself particularly to the presiding judge. Goddard’s reaction was interesting to watch. At first he continued his barrage of questions as on the night before.

Then he became quieter, but moved restlessly in his seat, like a man listening against his will. There was nothing that he would have liked better than to have his bonfire of controls, but his conscience wouldn’t allow it. The bench of judges all fell silent now as Soskice’s voice went on and on. The Lord Chief Justice of England was pondering on the public interest.”

In the end it was five to two in favour of the Crown. Mr Willcock had lost. I give Kent’s conclusion.

“From that day I have been an admirer of Lord Goddard, although he sometimes gave us the stick when I was Treasury Solicitor. I always felt that we would have a fair hearing on any issue that really mattered to the country. He was a strong man and a champion of law and order, and since his long reign ended things have deteriorated sadly.”

I turn to consider the two points mentioned above which arise from *Willcock*. Neither is mentioned in the report of the case or in Kent’s book, but they are there in the background when you think about it.

### **The Partial Meaning Point**

Dissertations on statutory interpretation in books and articles are often confined to the meaning of a particular word or phrase. This is too narrow. In my discussion of the way litigation usually turns on opposing constructions put forward by either side I do go wider, but still not widely enough:

“The usual circumstance in which a doubtful enactment falls to be construed is where the respective parties each contend for a different legal meaning of the enactment in its application to the facts of the instant case (in this Code referred to as the opposing constructions).”<sup>10</sup>

So I shall insert in the fifth edition text of s 149 the following addition:

“Although subsection (1) above refers to an enactment, the doubt may lie not in the entire wording of the enactment but in a part only of it. Alternatively the doubt may

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<sup>9</sup> *In on the Act*, p. 158.

<sup>10</sup> Code, s. 149(1).

arise because of the combined effect of two or more enactments, or may be caused by surrounding circumstances rather than the wording of the enactment itself.”

In *Willcock* the point at issue did not turn on the facts of the defendant’s episode with Constable Muckle or the legal meaning of the provision he was accused of contravening, the National Registration Act 1939 s 6(4). It turned on a different provision of the Act, s. 12(4).

As I have said, that subsection provided that the Act should continue in force until such date as His Majesty might by Order in Council declare to be the date on which the emergency that was the occasion of the passing of the Act came to an end. The vital question was whether an implication arose that this date had to be 8 October 1950, which was two months before the incident when Mr Willcock refused Constable Muckle’s request to produce his identity card. Or was there a contrary implication that each Act related to an emergency whose length might vary according to the purposes of the Act?

There used to be a fallacious idea among the judiciary, which I have done my best to dispel, that in construing an enactment it is illegitimate to draw implications. Rowlatt J said:

“... in a taxing Act one has to look at what is clearly said . . . Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used.”<sup>11</sup>

Lord Goddard himself applied this to Acts generally when in 1953 he remarked that a court cannot add words to a statute or read words into it that are not there.<sup>12</sup> These dicta are erroneous, and no longer regarded as good law. I have stated the true position as:

“The legislator is presumed to intend that the literal meaning of the express words 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.”<sup>13</sup>

In giving the judgment of the court in *Willcock* Lord Goddard did not use the word implication. Instead he said that

“... on the true construction of [the formula used in s 12(4)] it is contemplated that to bring any one of these Acts to an end, there must be an Order in Council concerning that particular Act. It follows from this that an Order in Council is required to terminate each of the Acts in which this formula is used, and that such orders may do so on different dates.”

The phrase “It follows from this” is merely another way of describing an implication. Although their Lordships did not say so, this was an example of consequential construction.<sup>14</sup> While the decision can be looked on as being concerned only with a single enactment (s 12(4)), it is more realistic to regard it as turning on the whole complex of wartime emergency legislation and the varying situations to which that applied.

## **The Time Point**

This brings us to the other aspect I have mentioned, which I am calling the time point. The decision in *Willcock* might have been different if the court had been swayed by the changed political climate.

Kent indicated this by saying that the Law Officers’ opinion on the point, which had looked so convincing in 1945, seemed rather shaky in 1951 when a Conservative government

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<sup>11</sup> *Cape Brandy Syndicate v IRC* [1921] 1 KB 64 at 71; approved *Canadian Eagle Oil Co v R* [1946] AC 119 at 140.

<sup>12</sup> *R v Wimbledon Justices, ex p Derwent* [1953] 1 QB 380 at 384.

<sup>13</sup> Code, s. 172.

<sup>14</sup> See Code, s. 286.

dedicated to a bonfire of controls had taken over from Labour. He praised Lord Goddard for resisting the temptation to follow the Conservative Party line. A different presiding Judge might have done that.

This shows that the legal meaning is not an abstraction, but fact-related. The court is not required to determine the legal meaning of an enactment in the abstract, but only when applied to the relevant facts of the case before it.<sup>15</sup>

Under the presumption that a consequential construction is to be given, or that an updating construction is to be given in some cases,<sup>16</sup> or that an ‘absurd’ result is not intended,<sup>17</sup> we discover that the legal meaning of an enactment may vary over time.

This is disconcerting to those who make the discovery having previously thought it beyond question that an enactment could have only one legal meaning throughout its existence. Prominent among those thus surprised are the plain language reformers, about whom I wrote in a recent article.<sup>18</sup> I did not mention that point in the article because it had not then occurred to me, just as it has not yet occurred to most (if any) of the plain language campaigners.

However it forms a serious obstacle to their campaign. The complicated reasons for which the legal meaning of an enactment may change over time are obviously beyond the reach of non-lawyers (and of some lawyers also, I suspect). Assessing what the legal meaning is when the point has not yet come before a court for its pronouncement can in any case be a matter of great difficulty and nice judgment for legal advisers.

Even where there has been a judicial pronouncement it may be difficult to be sure that a different court, perhaps of higher ranking, would not take a different view. To add as a complicating factor the question whether a change of circumstances renders it likely that the legal meaning would be held to have changed can only add to the difficulties of interpretation.

Another group who may be surprised are the computer experts. I recently received a communication from Phil Bowles, a former police officer, IT consultant and forensic computer analyst, now in his third year as an LLB student. He told me:

“My final year project has a working title of ‘language, . . .

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. . . logic and law’. It explores, compares and contrasts the development of statute with that of IT systems . . . At its core is the translation of the logic of the Criminal Justice Act 1988 s 139 into a digital electronic circuit, the use of De Morgan’s theorem to reduce the complexity of the logic while maintaining its ‘correctness’, and the subsequent reverse translation into a ‘simple’ s 139 that has half the words while maintaining the same legal effect!”<sup>19</sup>

In reply I said that his project sounded fascinating. Expressing the hope that we could keep in touch on it, I added: “I am sceptical that your ‘reverse translation’ will really have the same legal effect as s 139”.

I hope to write more about Mr Bowles’ project in these columns.

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<sup>15</sup> See Code, s. 136.

<sup>16</sup> See Code, s. 288.

<sup>17</sup> See Code, s. 312.

<sup>18</sup> F A R Bennion, ‘Confusion Over Plain Language Law’, 16 *Commonwealth Lawyer* (Aug 2007), p. 61, [www.francisbennion.com/2007/018.htm](http://www.francisbennion.com/2007/018.htm).

<sup>19</sup> Reproduced by permission of Mr Bowles.