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LAW COMMISSION AND SCOTTISH LAW COMMISSION

Published Working Paper on

THE INTERPRETATION OF STATUTES

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THE INTERPRETATION OF STATUTES

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INTERPRETATION OF STATUTES

Joint Working Paper

I INTRODUCTION

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

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

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

> "Interpretation of Statutes
>
> "20. We recommend that the law relating to the interpretation of statutes should be examined by us.
>
> "21. We would propose to examine the recognised rules for the interpretation of statutes in relation to their consistency with each other, and their adequacy for the ascertaining of the intention of the Legislature. Clearly, we must be in close consultation with the Law Commission about this proposal."

2. The aim of this Working Paper is to indicate for the purpose of inviting comment some of the preliminary lines of enquiry, which we have followed in carrying out the examination referred to in Item XVII of the Law Commission's First Programme and in paragraphs 20 and 21 of the First Programme of the Scottish Law Commission, and some of the questions to which they have given rise.

3. To the extent that the Working Paper suggests answers to the questions which it raises, these answers should not be regarded as expressing our concluded or even, in every particular, agreed views. They have been formulated in order to stimulate and concentrate comment on the issues which appear to us most relevant to any proposals for reform.

Questions Raised and Tentative Answers

4. The questions raised, and tentative answers suggested, by the Working Paper may be summarized as follows:-

	QUESTION	TENTATIVE ANSWER
A. (see paragraphs 1 to 17)	What is the general nature of the criticism which may be made of the British system of interpretation of statutes?	Occasional failure of communication between the legislature and the courts; an imperfectly co-ordinated body of legal principles causing difficulty to judges and litigants. The suggested lines of enquiry are into charges of excessive literalism, of over strict limitation on extraneous aids to interpretation and of inadequacy of available aids.
B. (see paragraphs 22-27, 40, 46-47 and 68-72)	How far, if at all, should general rules for the interpretation of statutes be laid down by legislation?	It would not be desirable to codify the rules in any comprehensive way. It would be desirable to reformulate and clarify certain guiding principles.
C. (see paragraphs 41-45 and 71)	Should any change be made in the status of short and long titles, preambles, headings, side-notes and punctuation?	It should be stated that punctuation should be treated in the same way as the enacted words, and that long titles, preambles, headings and side-notes should be available as context of the enacting material

	QUESTION	TENTATIVE ANSWER
D. (see paragraphs 28-33)	Should legislative action be taken in respect of (a) canons of construction; (b) presumptions of intent?	(a) Canons of construction are rules of language, not rules of law and it would be inappropriate to change their status. (b) It would in general not be desirable to deal with presumptions of intent by legislation, although there may be a case for statutory presumptions of legislative intent in certain areas.
E. (see paragraphs 34-39, 48-60 and 71)	How far should the rules against admissibility of extraneous aids to interpretation be modified:- (a) with respect to the reports of Royal Commissions and similar committees and in regard to conventions and treaties (b) with respect to reports of parliamentary proceedings - in so far as they are relevant to the mischief intended to be remedied or to the intended nature and scope of the remedy?	(a) and (b) are inter-related. Mischief or remedy indicated by (a) may be modified by (b). Strong arguments and comparative evidence can be produced in favour of the view that there is no justification for the continuance of exclusionary rules and that as in many other jurisdictions any such available material should be admissible, subject to its relevance being left to the discretion of the court. On the other hand it can be persuasively argued, in respect of (b), that the admission of such material would impose an unreasonable burden on those to whom the statute is directed. It may be that the need for this extraneous material would be reduced if reference could be made to an explanatory memorandum as suggested by the answer to question F. below.
F. (see paragraphs 61-67)	Should material be produced giving the reasons for and commenting on Bills, which would be available for interpretative purposes?	The experience of other countries suggests that such material would be of value. The material, which might take the form of a memorandum on the pattern of Notes on Clauses, might be published with the Bill and amended, if necessary, during its course through Parliament.

	QUESTION	TENTATIVE ANSWER
G. (see paragraphs 73-74)	Should special provision be made for legislation implementing international conventions, either enacted as statutes in their actual terms or relevant as part of the context of the enacting statutory provisions?	So far as the admissibility of relevant conventions and treaties is concerned, see the answer to E. above. The further question as to what principles of interpretation should apply to such conventions or treaties when a court has to deal with them as enacted law or as part of its context, should be deferred pending the outcome of the work which has been carried out by the International Law Commission on the Law of Treaties. A number of points may eventually arise for consideration.

II THE PROBLEM STATED

5. The interpretation of statutes as a subject for consideration by a law reforming body presents special difficulties. It is manifest at the outset that it is not a topic where there are clear-cut defects for which, once diagnosed, legislative intervention can promise a dramatic cure. Sir Carleton Allen, after a very full discussion of the problems of statutory interpretation, wrote that although "it cannot be pretended that the principles of statutory interpretation form the most suitable, consistent or logically satisfying part of our jurisprudence ,......... we are driven in the end to the unsatisfactory conclusion that the whole matter ultimately turns on the impalpable and indefinable elements of judicial spirit and attitude".[1] Justice Frankfurter said: "Though my business throughout most of my professional life has been with statutes, I bring no answers. I suspect the answers to problems of an art lie in its exercise."[2] Much the same approach was reflected in the remarks of Lord Reid[3] in the debate on the

(1) Law in the Making, 7th ed., at pp. 526 and 529.

(2) "Some reflections on the reading of statutes", Proceedings of the Bar of the City of New York (1947) 213 at pp. 216-7.

(3) Official Report, Lords, 16th November 1966, Cols 1277-1279.

Law Commission's First Report when, after referring to the difficulties and dangers of innovations in this field founded upon "the spirit of the Act", he remarked: "I am not going to pronounce in advance that it will not work. I am waiting with avidity to see what these new ideas are, but I am not waiting with any optimism." A similar scepticism was expressed by Lord Wilberforce on the same occasion when he said: "I have always doubted whether statutory interpretation is a genuine subject for the Law Commission at all. I suspect it is what is nowadays popularly called a non-subject. I do not think that law reform can really grapple with it. It is a matter for educating the judges and practitioners and hoping that the work is better done."(4)

6. It is true that in the great majority of cases in our, as in other, developed legal systems the decisions of the courts on questions of statutory interpretation do not cause the courts themselves particular difficulty or, once made, give rise to the criticism that the statutes under consideration have been wrongly interpreted. But even if there is only a small number of cases where legislation fails to achieve its purpose this failure may be important where Parliamentary time for remedial amendment is not available. Moreover, if in the exceptional difficult case which reaches the higher courts principles of interpretation are enunciated which appear unduly technical, obscure or hard to reconcile with each other, they may have an unwelcome effect on statutory interpretation by lower courts and by legal advisers in dealing with statutes which without such guidance would probably present no serious problems. Unsatisfactory principles of statutory interpretation may also affect the form of future statutes; to avoid doubt it may seem necessary to qualify or particularize in a way which adds to the length and complexity of the statute book. The indirect consequences of the principles of interpretation

(4) Ibid, Col. 1294

enunciated by the courts may still be unsatisfactory even if the actual decisions, as distinguished from the reasons which support them, in general produce satisfactory results. We would wish to emphasize this last point, in view of the not infrequent suggestion that what is important is not what the courts say about statutory interpretation but what they in fact decide in regard to the statutes which come before them.(5)

7. Sir Carleton Allen and Justice Frankfurter, while emphasizing the intractable nature of the problem created by statutory interpretation, have nevertheless passed critical judgment on our rules. The difficulties of even a great nineteenth century judge, Lord Blackburn, in River Wear Commissioners v. Adamson,(6) where he had to decide whether the Harbours, Docks and Piers Act 1847 imposed liability for damage irrespective of negligence on the owner of a vessel which was thrown by a stormy sea against a pier, have been described by Sir Carleton Allen in the following terms:-

> "His speech is often quoted as a classical exposition of our principles of statutory interpretation, but it is no disrespect of one of the greatest common lawyers of the Nineteenth Century to say that it reads like the writhings of a soul in torment. When the mind of a Blackburn thus vacillates, it is not surprising if lesser lawyers suffer and struggle in the attempt to do justice according to statute law."(7)

Justice Frankfurther has written:-

> "The current English rules of construction are simple. They are too simple. If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded. The rigidity of English courts in interpreting language merely by reading it disregards the fact that enactments are, as it were, organisms, which exist in their environment. One wonders whether English judges are confined psychologically as they purport to be legally. The judges deem themselves limited to reading the words of a statute. But can they really escape placing the words in the context of their minds, which after all are not automata applying legal logic but repositories of all sorts of assumptions and impressions?"(8)

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

(6) (1877) 2 App. Cas. 743.

(7) op. cit. (n.1) at p. 506.

(8) op. cit. (n.2) at pp. 231-2.

And in justifying generalized restatements from time to time of the rules of statutory construction he added:-

> "Out of them may come a sharper rephrasing of the conscious factors of interpretation; new instances may make them more vivid but also disclose more clearly their limitations. Thereby we may avoid rigidities which, while they afford more precise formulas, do so at the price of cramping the life of the law. To strip the task of judicial reading of statutes of rules that partake of the mysteries of a craft serves to reveal the true elements of our problem. It defines more accurately the nature of the intellectual responsibility of a judge and thereby subjects him to more relevant criteria of criticism. Rigorous analysis also sharpens the respective duties of legislature and courts in relation to the making of laws and to their enforcement."(9)

More recently an outstanding American work on the problems of lawmaking and interpretation(10) has characterized the refusal of the House of Lords in Assam Railways and Trading Company Limited v. Commissioners of Inland Revenue(11) to permit counsel to refer to the recommendations in the Report of the Royal Commission on Income Tax (1920) as revealing "sterile verbalism" and "a true wasteland of legalism".

8. One line of criticism explains what it conceives to be the excessive literalism of the judicial approach to statutes as a surviving but now outdated product of our constitutional development:-

> "Abandoning the mediaeval idea that there was a fundamental and immutable law, the common law recognised the legislative supremacy of Parliament. But to the words of the Parliament whose literal authority it thus recognised it accorded none of that aura of respect and generosity of interpretation with which it surrounded its own doctrines. The courts never entered into the spirit of the Benthamite game, but treated the statute throughout as an interloper upon the rounded majesty of the common law. The tendency still persists; the courts show a ripe appreciation of institutions of long standing, whether founded by statute or in the common law, but they inhibit themselves from seizing the spirit of institutions and situations which are in substance the creation of modern legislation. By repercussion draftsmen tend to concern themselves with minutiae, so that their intention may be

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(9) Ibid at p. 236.

(10) The Legal Process: Basic Problems in the Making and Application of Law by Professors Hart and Sacks. Cambridge, Mass. Tentative ed., 1953, at p. 1265.

(11) [1935] A.C. 445.

"manifest in every particular instance to upset the hydra-headed presumptions of the courts in favour of the common law." (12)

9. We do not think that, whatever may have been the position at some periods of our legal history, the above criticisms fairly represent the present theory and practice of the British courts in regard to the interpretation of statutes. We recognise that there have been in recent years in the courts important clarifications of the principles of statutory interpretation interpretation. That the so-called "literal rule" (13) does not confine the judge to a sterile grammatical analysis of the actual words which he is called upon to interpret has been emphasized by Lord Somervell in Attorney General v. Prince Ernest of Hanover (14) where he said:-

> "It is unreal to proceed as if the court looked first at the provision in dispute without knowing whether it was contained in a Finance Act or a Public Health Act. The title and general scope of the Act constitute the background of the context. When a court comes to the Act itself, bearing in mind any relevant extraneous matters, there is, in my opinion, one compelling rule. The whole or any part of the Act may be referred to and relied on. It is, I hope, not disrespectful to regret that the subject was not left where Sir John Nicholl left it in 1826. 'The key to the opening of every law is the reason and spirit of the law - it is the 'animus imponentis', the intention of the law-giver, expressed in the law taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed detached from its context in the statute: it is to be viewed in connection with the whole context - meaning by this as well the title and preamble as the purview or enacting part of the statute' (Sir John Nicholl in Brett v. Brett (15))."

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(12) Professor E.C.S. Wade in Dicey, Law of the Constitution, 10th ed., 1061, Introduction, pp. c-ci, n.1, citing R.T.E. Latham in "The Law and the Commonwealth" in Survey of British Commonwealth Affairs, Vol.i (1937) pp. 510-11. He also refers to the opinion of Lord Wright in 9 C.L.J. 3 that the so-called principle that an Act of Parliament should be construed so as not to change the common law more than seemed to be unavoidable has now been discredited.

(13) See paragraphs 27 and 40 below.

(14) [1957] A.C. 436 at p. 473.

(15) (1826) 3 Add. 210 at p. 216.

In the same case[16] Lord Simonds said:-

> "The contention of the Attorney-General [that the generality of the enacting words conferring the status of a natural born subject on the lineal descendants of Princess Sophia, Electress of Hanover was limited by the preamble to persons born in the lifetime of Queen Anne] was, in the first place, met by the bald proposition that where the enacting part of a statute is clear and unambiguous, it cannot be cut down by the preamble, and a large part of the time which the hearing of this case occupied was spent in discussing authorities which were said to support that proposition. I wish at the outset to express my dissent from it, if it means that I cannot obtain assistance from the preamble in ascertaining the meaning of the relevant enacting part. For words, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in pari materia, and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."

And in a later passage[17] Lord Simonds referred to:-

> "the elementary rule ... that no one should profess to understand any part of a statute or of any other document before he 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 or unambiguous."

10. In our view, however, the charges made against the interpretation by the British courts of statutes cannot, so far as modern times are concerned, be altogether dismissed. What we appear to lack is a coherent and internally consistent body of interpretative principles. Thus, even if it is conceded that words in question in a statute must be read in the wider context of the statute as a whole, there is at present the authority of the House of Lords in Ellerman Lines v. Murray, etc.[18] that, where a draft international convention is referred to in the long and short titles of an Act, which also contains a preamble stating that the purpose of the Act is to give effect to the convention and sets out the relevant part of the convention in a schedule, it is nevertheless not proper to resort to the convention in order to give a section other than its "natural meaning".[19] This is difficult to reconcile with

(16) at pp. 460-1.

(17) at p. 463

(18) [1931] A.C. 126.

(19) See Lord Tomlin at p. 147.

the above-cited passages from the Prince Ernest of Hanover case,
which was decided when the House of Lords was bound by its previous decisions. It may be that the House of Lords with its present powers may have the opportunity of clarifying the law in this field. Meanwhile, however, the Court of Appeal in Salomon v. Commissioners of Customs and Excise[20] has stated that where there is cogent extrinsic evidence of a connection between an international convention and an Act under interpretation, a court may look at the convention to elucidate the Act, although the Act nowhere makes mention of the convention. Here too there is some uncertainty, as one Lord Justice[21] was doubtful whether the opinion expressed could be more than obiter dicta, in view of the fact that relevant parts of the Act in question were a mere re-enactment of earlier provisions which had had a cross heading stating that they were to give effect to an agreement. Moreover, another Lord Justice[22] implied that if the meaning of the words in the Act had been "clear and unambiguous" reference to the convention would not have been permissible.

11. Salomon v. Commissioners of Customs and Excise is one of a number of cases[23] which show the awareness of the courts of the importance of securing uniform interpretation of laws forming part of an international legislative pattern. Where this factor is not present the courts are more reluctant to elucidate the meaning of a statute by reference to material which is not contained in the statute itself. In the result the courts are frequently presented with the task of interpreting complex and perhaps novel legislation with very little assistance from extraneous aids. They may acknowledge the good sense and authority of Heydon's Case[24] which stated that the four things

(20) [1966] 3 W.L.R. 1223 at pp. 1232, 1234 and 1241.
(21) Russell L.J. at p. 1241.
(22) Diplock L.J. at pp. 1234-5.
(23) e.g., Samuel Montagu v. Swiss Air Transport Ltd. [1966] 2 W.L.R. 854 where however the terms of the relevant convention were incorporated in the Act in question.
(24) (1584) 3 Rep. 7a.

to be considered in the interpretation of a statute are the preceding common law, the mischief and defect for which the common law did not provide, the remedy chosen by Parliament to cure the mischief and the true reason for the remedy; but they are very limited in the means they may employ to ascertain this mischief, remedy or reason. If there is a fairly evenly balanced weight of argument for two competing constructions, assistance will be sought from the remainder of the Act, with possibly some consideration of the law at the time when the Act was passed and the pattern of legislation into which the Act falls, but of very little else. Those before the court will, sometimes, be able to give the background and context of the act from the findings of a Royal Commission or a departmental committee but will not be able to rely on its recommendations. It may very well be, however, that there is no such admissible source of background material which it may be possible to put directly before the court. There may, therefore, be a considerable gap in the information at the disposition of the court about the context and background of an enactment, as compared with the information available to those before the court. In so far as it may be material to take into account the purpose of the enactment this will, generally speaking, have to take the form of argument based upon general knowledge of which the court takes judicial notice, combined with hypotheses, for which some support will be sought in the words of the Act itself. This process can be highly casuistical and speculative. A government department for example which has been responsible for promotion of an Act, may be seeking to argue for a particular construction in relation to a situation about which no specific intention was expressed in the statute and which, indeed, was perhaps not contemplated at the time of its enactment. It may have to base its arguments as to the general policy of the Act almost entirely upon the choice and pattern of the language employed. This may, in fact, be entirely adventitious

in relation to the point being argued, but there may be no means to bring before the court any admissible statement of the relevant objectives or policy which might serve as a guide.

12. The difficulties which may face the courts in the circumstances described in the preceding paragraph may be illustrated by reference to Section 16 of the Betting and Gaming Act 1960. This required that all stake moneys must be disposed of to the players as winnings and that no other payment should be required for a person to take part in gaming, with the exception of an annual subscription for membership of a club, or a fixed sum of money determined before the gaming began. From such indications as there are in the Parliamentary history relating to these provisions,[25] it would seem that they were part of a group of enactments designed to prevent the commercial organisation of gaming and to ensure that casinos in their Continental form would not be profitable. The examples given by the Lord Chancellor in the Second Reading debate in the House of Lords[26] of the kind of charges intended to be covered by the fixed charge provision were card money which is charged for the use of a card room at a social club or a charge made for an evening session at a bridge club. In the case of J. M. Allan (Merchandising) Ltd. v. Cloke[27] it had been held that in a game similar to roulette the charge of sixpence for each spin of the wheel was a contravention of the section. On the other hand, in the case of Mills v. Mackinnon[28] it was held that a charge of £5 per shoe of chemin de fer was permissible on the ground that a shoe was a natural and conventional break in play. It had been found as a fact at Quarter Sessions that the charge in the case of the particular club in question was not excessive but in the the view of the Divisional Court[29]

(25) See Official Report, Commons - 5th May 1960, cols. 1294 and 1298. See also Report of Standing Committee D, 22nd March 1960, pp. 1004 and 1050 and Official Report, Lords, 23rd May 1960, cols. 1132-3.
(26) Official Report, 23rd May 1960, col. 1133.
(27) [1963] 2 Q.B. 340.
(28) [1964] 2 Q.B. 96.
(29) At p. 108.

Parliament was not concerned with the amount of the charge. Yet if any charge may be made for play which as in Mills v. Mackinnon lasts for roughly forty-five minutes to one hour it is clearly possible for gaming to continue to be profitable in a way which would appear inconsistent with the general intention expressed in the Parliamentary history.

13. The decision in Mills v. Mackinnon has been referred to as "one of the more bizarre interpretations of the Act"(30), but this criticism underestimates the difficulty facing the Divisional Court in deciding what meaning was to be given to the expression: "a fixed sum of money determined before the gaming began". The apparent intention of Parliament might however have been more effectively realized had it been possible to combine a statutory formula with some admissible statement of purpose illustrated by examples of permitted and prohibited charges.

14. Difficulties of communication between the legislator and the courts are perhaps most acutely experienced where the former is legislating in a field in which the courts are particularly conscious of basic principles of the common law (to which different judges may give a different weight) and for this reason have developed presumptions of intent which they attribute to Parliament and which may influence their interpretation of the relevant statutes. Thus, in London and

(30) The Guardian, 13th Sept., 1966.

North-Eastern Railway Company v. Berriman[31] the task before the House of Lords was to interpret the meaning of "repairing" in the Prevention of Accidents Rules 1902. In holding that "repairing" should not include oiling and cleaning, and therefore that the respondent had no claim under the Fatal Accidents Acts in respect of the death of her husband, when engaged in oiling signalling connections without the lookout required by the Rules where men were "working singly or in gangs on or near lines of railway ...... for the purpose of re-laying or repairing the permanent way", Lord Macmillan said:[32]

> "It must be borne in mind that while the statute and rule have the beneficent purpose of providing protection for workmen, their contravention involves penal consequences under Section 11 of the Act. Where penalties for infringements are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language."

Yet in the same case Lord Wright, dissenting with Lord Jowitt, came to the "clear conclusion"[33] that "repairing" included maintaining in good working order and hence the oiling with

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(31) [1946] A.C. 278. See also Price v. Claudsen [1967] 1 W.L.R. 575 in which the House of Lords (affirming the Court of Session 1966 S.L.T. 64) were concerned with the meaning of "building" in the Building (Safety, Health and Welfare) Regulations 1948. It was held that a workman joining broken wires of a neon lighting installation on the face of a building held in place by clamps attached to pins driven into the building was not engaged on "repair or maintenance of a building", and the absence of adequate guards to the working platform or place, which were prescribed by the Regulations, did not therefore give rise to liability. The decision raises the question whether the makers of the Regulations intended to make a distinction between the workman in the case and a workman engaged in pointing the brickwork of the building. If they did not, considering that both fell within the social purpose of the Regulations, it might further be asked why there was a failure of communication between the makers of the Regulations and the courts.

(32) At p. 295.

(33) At pp. 299-300.

which the case was concerned, Lord Wright[34] said:

> "I cannot see any difference in this context between repair and maintenance. Prevention we are told is better than cure but either process is repair. Such I think is the natural and ordinary use of words: the plain man would not, I am convinced, regard the distinction between maintenance and repair as other than unpractical and arbitrary. This is particularly true when applied to a measure like this. Its object is to protect and save human life ...... It is however said that as the Act imposes a penalty for a breach, it must be construed as strictly as possible in favour of the offender. There is some authority in support of this argument but none so far as I know in the case of measures like the present. Such a measure must be construed fairly, no doubt, but still, as far as is reasonable and proper so as to achieve the declared object of the measure. Most measures of a remedial character, such as Factory Acts and a great many others, have penalty clauses, but I have never known that circumstance being regarded as a ground for a narrow and pedantic construction. What is paramount is the protection or benefit of the worker, whose right to claim damages is governed by a fair and liberal interpretation of the enactment."

Where eminent judges at the level of the House of Lords can thus differ as to the "ordinary" meaning of a regulation and when counsel in the case think it necessary to refer to the Oxford English Dictionary, a will of 1577, Milton's "Paradise Lost" and Dr. Johnson to determine the meaning of "repair", it is hard to avoid the conclusion that the protagonists are engaged in a somewhat unreal verbal contest. The diverging meanings contended for would seem ultimately to depend on different concepts of the policy underlying the regulation which, for whatever reason, has not communicated itself with sufficient clarity. Even if the decision of the House of Lords (contrary to the views of the two Law Lords and a unanimous Court of Appeal) is assumed to be the correct interpretation of the regulation, the result cannot be regarded as altogether satisfactory, involving as it does the time and expense of hearings at three instances.

15. We would not wish to suggest that the courts are not themselves aware that sometimes there may be a lack of correspondence between what in a general sense may be called the

(34) At p. 301.

intention of Parliament and the interpretation which a court feels bound to give to a particular statute. Indeed, part of the evidence in favour of the view that there is a problem regarding the interpretation of statutes justifying investigation is to be found in the observations of judges to this effect. Thus in Inland Revenue Commissioners v. Hinchy[35] Lord Reid said:

> "What we must look for is the intention of Parliament and I also find it difficult to believe that Parliament ever really intended the consequences which flow from the appellant's contention [that the treble tax which the taxpayer 'ought to be charged under this Act' in Section 23 (3) of the Income Tax Act 1952 meant the whole tax chargeable for the relevant year and not treble the tax on the amount understated] but we can only take the intention of Parliament from the words that they have used in the Act."[36]

16. A somewhat similar observation to that of Lord Reid in the Hinchy case was made by Lord Parker C.J. in Wright v. The Ford Motor Company Limited.[37] This case raised the question whether an occupier could be liable by reason of the combined effect of Section 14 (1) and Section 155 (1) of the Factories Act 1961 for a contravention of the Act in respect of which an employee could be liable by the combined effect of Section 143 (1) and Section 155 (2) or whether by virtue of Section 155 (2) he had a defence unless the prosecution could show that the occupier had failed to take all reasonable steps to prevent the contravention by the employee. In holding that the occupier was not liable Lord Parker said:

> "It may be, to put it loosely, that Parliament's intention was as Mr. Webster has interpreted the Section in his argument. But what this court is concerned with is the intention of Parliament as evinced by the words used. In my judgment, whatever their motive was, they have failed to use words to express an intention which would lead to this appeal being allowed."[38]

To understand the problem of interpretation raised by Wright v. The Ford Motor Company Limited it is necessary to go back to

(35) [1960] A.C. 748.
(36) At p. 767.
(37) [1967] 1 Q.B. 230.
(38) At p. 237.

Section 130 (2) of the Factories Act 1937, which provided:

> "In the event of a contravention by an employed person of the provisions of Part X of this Act [of which Section 119 (1) provided that no person employed in a factory should wilfully interfere with or misuse or fail to use any means or appliance provided in pursuance of this Act, being for the health, safety or welfare of the other employees] ..... that person shall be guilty of an offence and the occupier or owner, as the case may be, shall not be guilty of an offence <u>in respect of that contravention</u> unless it is proved that he failed to take all reasonable steps to prevent the contravention."

The preceding Section 130 (1) of the same Act provided that:

> "In the event of any contravention in or in connection with or in relation to a factory of the provisions of this Act, or of any regulation or order made thereunder, the occupier ...... of the factory shall, subject as hereinafter in this Act provided be guilty of an offence."

In 1947 in <u>Carr v. The Decca Gramophone Company</u>(39) Lord Goddard C.J., giving the judgment of a Divisional Court had held that the occupiers of a factory within the meaning of the Factories Act 1937, and as such bound to observe the Woodworking Machine Special Regulations 1922-1945 were by reason of Section 130 (2) not guilty of an offence under Section 130 (1) of the Factories Act 1937, where the contravention of the regulations was that of a workman, whose duty it was to use and maintain the machine in proper adjustment, unless it were proved by the prosecution that the occupiers failed to take all reasonable steps to prevent the contravention. However, by Section 10 of the Factories Act 1948, the emphasized phrase, <u>in respect of that contravention</u>, in the above-cited Section 130 (2) of the Factories Act 1937, was altered so that it read, as far as here relevant:-

> "by reason only of the contravention of the said provisions of Part X of this Act ......"

And at the end of Section 130 (2) were added the words:-

> "But this Section shall not be taken as affecting any liability of the occupier ...... in respect of the same matters by virtue of some provision other than the provisions ...... aforesaid"

Section 130 (2) of the 1937 Act, as amended by the 1948 Act, was

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(39) [1947] K.B. 728.

re-enacted as Section 155 (2) of the Factories Act 1961; the latter Act also re-enacted Section 119 (1) of the 1937 Act as Section 143 (1), which remained within Part X of the 1961 Act. Lord Parker C.J. in the Wright case, which concerned the 1961 Act, conceded that the "undoubted" inference was that the Factories Act 1937, was amended in 1948 was a result of the Carr case, and it follows that this inference was equally relevant in any consideration of the re-enacting 1961 Act. Nevertheless, the Court in the Wright case rejected the view that the only defence open to the occupier, where Section 114 (1) (not being a provision of Part X of the Act) had been contravened, was under Section 161, which required the occupier to bring before the Court the actual offender and to prove the latter and not the offender was to blame for the contravention. It in effect recognized that there might have been a failure of communication between Parliament and the courts and the case therefore again illustrates a conflict between the apparent social objectives of the legislature and the established attitudes of the courts (in Wright a disinclination to accept a "novel" concept of vicarious criminal liability in respect of an offence for which on the face at all events of one provision the employee alone is made liable) and raises the question whether in such cases some further measure of interpretative assistance, which may help to resolve the conflict, should be available to the courts.

Preliminary Conclusions and Lines of Enquiry

17. The conclusions which we would tentatively draw from a preliminary survey of the interpretation of statutes under the British system are as follows:-

(a) There is evidence of occasional failure of communication between Parliament (or other authorities exercising legislative powers under Parliament) and the courts; this failure, when it occurs, may be serious in its direct consequences but it is likely also to have wider harmful repercussions on the legal system as a whole.

(b) It is unrealistic to suggest the only moral to be drawn from these difficulties is that statutes should be better drafted.(40) The inherent

(40) It might be suggested, for example, the "repairing" which caused the difficulty in Berriman's Case (see n. (31) above), would have been better expressed by a more general reference to "carrying out any duty on or near the permanent way."

limitations of language, the difficulty of foreseeing and providing for all contingencies and the imperfections which must result in some degree from the pressures under which modern legislation has so often to be produced make the achievement of uniformly perfect statutes impossible. The test of a sound interpretative process is its ability to take account of, and cope with, these factors.

(c) Even where - as in the great majority of cases - the intention of the legislator is, as far as can be ascertained, correctly interpreted by the courts, the process may well be one of some difficulty to the judges, involving consideration of a complex and imperfectly co-ordinated body of law, and a considerable burden to litigants.

(d) As far as the practical possibilities of improvement in this field are concerned, the three most promising lines of enquiry are:

  (i) whether the combined effect of the rules of interpretation and of the presumptions of intent developed by the courts has, in spite of some important contrary developments in recent years, been to emphasize to an undue extent the literal interpretation of legislative instruments and correspondingly to lessen the importance attached to their purpose,

  (ii) whether the courts have made their task unnecessarily difficult by self-imposed limitations on the material which they may consult in interpreting a legislative instrument, and

  (iii) whether, apart from the propriety of any exclusionary rules, the available material

which might throw light on an otherwise difficult piece of legislation is at present inadequate.

III THE RELEVANCE OF COMPARATIVE MATERIAL

18. In pursuing these lines of enquiry we have attached great importance to comparative studies, for the difficulties which our courts have faced in dealing with the immense scope and complexity of modern legislation have been experienced in some degree in every advanced community. It is of course true that in this field any comparison with another legal system must take due account of a variety of extraneous factors which may underlie differences in the theory and practice of statutory interpretation. It must not be assumed, for example, that the freedom to adopt a very broad and liberal interpretation of statutes which is assigned to, or taken by the courts in one country would be acceptable to the legislative body in another. It must also be borne in mind, particularly in any comparisons made between the attitude of British Courts towards the interpretation of statutes and that of courts in Civil Law systems, that the latter have not, generally speaking, been faced with the problem of reconciling statute law with an extensive body of common law. They conceive their role, at all events as far as the development of non-penal law is concerned, rather as one of fitting the statute into the general legislative scheme, or where the details of that scheme are lacking, of asking themselves in what way the legislators would have filled the gap. Similarly the courts in one country may in the interpretation of statutes be able to make use of committee reports of the legislature in the course of the passing of the legislation in question, because they are prepared in a way which generally gives a reliable impression of its background, general purpose and specific intentions; in another country, on the other hand, committee reports of the legislature may be much less informative from the point of view of the courts concerned

with the legislation which eventually emerges from their deliberations.

19. While recognizing the caution with which any conclusions regarding the interpretation of statutes drawn from comparative studies should be applied to the English and Scottish legal systems, we think that much can be learned from experience and theoretical analysis of its problems in the United States and Commonwealth and the Civil Law countries. In their literature the topic is commonly considered from four different aspects:- (a) the textual aspect - i.e., the grammatical and literal study of the material to be construed; (b) the contextual aspect - i.e., the logical and systematic examination of the context, with particular reference to the intention of the communication in regard to the width of the context and the reasonable expectations of the persons to whom it is directed in respect of that context; (c) the teleological aspect - i.e., interpretation directed to the purpose of legislation; and (d) the historical aspect - i.e., study of the process by which the enactment became law, including its origin in a committee report or other source, its formulation as a legislative proposal and its passage through the legislature. In contrast there is a remarkable dearth in our legal literature of writing on the general theory of statutory interpretation, and, to the limited extent that our courts have dealt with the matter systematically, it would seem that attention has been mainly directed to the first and, to a rather lesser extent, to the second of these four aspects, and that at all events until recently the latter two have been neglected or given insufficient attention.

20. In the United States the topic has been a vital one, both because of the range and importance of the questions which have turned upon the interpretation of the constitution itself and because of the immense importance of the social and economic legislation which has been enacted in a fast developing and complex society. In the Civil Law countries, where the law has

been largely codified, both the courts and the body of jurists, whose writings form an important source of authority, have tested and developed theories of interpretation; they seek to clarify the function of the judiciary in applying the codes and in extending or restricting the scope of their language; they discuss the bounds of a judge's authority to correct manifest errors, and generally try to reconcile the roles of the judiciary and the legislature. The constitutional stimulus, and a somewhat greater degree of codification than at present exists in England, have also provoked interest in the problems of statutory interpretation in some Commonwealth countries, particularly Canada, Australia and New Zealand. If, as we envisage, our own law becomes increasingly codified, our courts will have to give greater attention to many of the problems which the courts of other countries have had to face, and it may well be that different techniques of interpretation will have to be developed.

21. We have therefore thought it useful to add in the appendices some of the comparative material, and bibliographical references to some of the published studies, which we have considered. In this connection we have consulted and been greatly assisted by judges, academic and practising lawyers and government draftsmen in a number of countries.

IV THE PRINCIPLES OF STATUTORY INTERPRETATION

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

22. The locus classicus of the mischief rule is the following statement by Barons of the Court of Exchequer in Heydon's Case:-(41)

> "And it was resolved by them that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law,) four things are to be discerned and considered:-
>
> 1st. What was the common law before the making of the Act.
>
> 2nd. What was the mischief and defect for which the common law did not provide.
>
> 3rd. What remedy the Parliament hath resolved and appointed to cure the disease of the commonwealth.

(41) (1584) 3 Rep. 7a.

"And, 4th. The true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

This approach was already to be found in a note to Eyston v. Studd:-(42)

"As a nut consists of a shell and a kernel so every statute consists of the letter and the sense, and as the kernel is the fruit of the nut, so the sense is the fruit of the statute."

And Coke himself later referred to the same approach in his Institutes:-(43)

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

23. A parallel approach to statutes is to be found in Scottish decisions. Thus in Campbell v. Grierson(44) the Lord Justice Clerk in dealing with an old Act of 1669 referred to "the real object of the enactment" as one of the rules to be applied. And in Magistrates of Glasgow v. Police Commissioners of Hillhead(45) it was said that "it is a settled principle that the court should so construe an Act of Parliament as to apply the statutory remedy to the evil or mischief which it is the intention of the statute to meet".

24. In the nineteenth century, although Heydon's Case continued to be cited, the English courts began to describe their powers in increasingly guarded terms. Thus in 1827 Lord Tenterden C.J. in Brandling v. Barrington(46) could not -

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

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(42) (1574) 2 Plowden 463.

(43) 1 Inst. 24 (b).

(44) (1848) 10 D. 361.

(45) (1885) 12 R. 864.

(46) 6 B. & C. 467 at p. 475.

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

> "I believe that it is not disputed that what Lord Wensleydale used to call the golden rule is right, viz., that we are to take the whole statute together and construe it all together, giving the words their ordinary signification, unless when so applied they produce an inconsistency, or an absurdity or inconvenience so great as to convince the Court that the intention could not have been to use them in their ordinary signification, and to justify the Court in putting on them some other signification, which, though less proper, is one which the Court thinks the words will bear."(47)

Although Lord Blackburn speaks of resulting "absurdity or inconvenience" as a possibility separate from "inconsistency", which suggests that a court might refuse to adopt the plain meaning of words if it thought that the plain meaning was absurd or inconvenient, nevertheless it is clear from the concluding words of his statement above that he only envisages the operation of the golden rule where the words in question have an ordinary signification and a "less proper" but permissible one. A comparable attitude was apparently taken independently by the Court of Session in Scotland[48].

26. A somewhat bolder statement is that of Mackinnon L.J. in Sutherland Publishing Co. Ltd. v. Caxton Publishing Co. Ltd.:[49]

> "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, and of which the plain meaning would defeat the obvious intention of the Legislature. It may even be necessary, and therefore legitimate, to substitute for an inept word or words that which such intention requires. The most striking example of this I think is one passage in the Carriage of Goods by Sea Act, 1924, where to prevent a result so nonsensical that the Legislature cannot have intended it, it has been held (50) necessary and legitimate to substitute the word 'and' for the word 'or'. The violence of this operation has I think been minimised by saying that in this place the word 'or' must be taken to mean 'and'. This is a cowardly intention in truth where one word is substituted for another. For 'or' can never mean 'and'."(51)

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(47) (1877) 2 App. Cas. 743 at pp. 764-5.
(48) See Caledonian Railway Co. v. North British Railway Co. (1881) 8 R.(H.L.) 23 at p. 31.
(49) [1938] Ch. 174.
(50) Apparently a reference to Brown & Co. v. Harrison (1927) 96 L.J. K.B. 1025.
(51) At p. 201.

27. There was, however, a strong current of judicial opinion in favour of an approach rather stricter than that of the golden rule, which is commonly given the label of the literal rule. Lord Bramwell in Hill v. East and West India Dock Co.(52) rejecting the notion that the court can legitimately be concerned with the question whether a particular construction leads to absurdity, said:-

> "I should like to have a good definition of what is such an absurdity that you are to disregard the plain words of an Act of Parliament. It is to be remembered that what seems absurd to one man does not seem absurd to another ...... I think it is infinitely better, although an absurdity, or an injustice, or other objectionable result may be evolved as a consequence of your construction, to adhere to the words of an Act of Parliament and leave the legislature to set it right than to alter those words according to one's notion of an absurdity." (53)

Lord Esher in R. v. City of London Court,(54) is equally forthright:-

> "If the words of an Act are clear you must follow them, even though they lead to a manifest absurdity. The court has nothing to do with the question whether the Legislature has committed an absurdity."(55)

The following well-known passage from the speech of Lord Atkinson in Vacher & Sons Ltd. v. London Society of Compositors(56) is formally consistent with a restricted form of the golden rule, as it presupposes language which is completely unambiguous. In spirit, however, it challenges the rationale of any rule permitting the courts to correct an absurdity. Lord Atkinson said:-

> "If the language of a statute be plain, admitting of only one meaning, the Legislature must be taken to have meant and intended what it has plainly expressed and whatever it has in clear terms enacted must be enforced though it should lead to absurd or mischievous results. If the language of this sub-section be not controlled by some of the other provisions of the statute, it must, since its language is plain and unambiguous, be enforced, and your lordships' House sitting judicially is not concerned with the question whether the policy it embodies is wise or unwise, or whether it leads to consequences just or unjust, beneficial or mischievous."(57)

(52) (1884) 9 App. Cas. 448.
(53) At p. 464-5.
(54) [1892] 1 Q.B. 273
(55) At p. 290.
(56) [1913] A.C. 107.
(57) At pp. 121-2.

(ii) Presumptions of Intent and Canons of Construction

28. Whatever interpretation might be thought to emerge from the application of the rules discussed above, the final decision of a court may in fact be greatly influenced by presumptions of intent and, to some extent, by canons of construction. Discussion of these presumptions and canons take up a large proportion of Maxwell on the Interpretation of Statutes and Craies on Statute Law.

29. Canons of construction are not in any real sense rules of law. They are "axioms of experience"(58) which may be applied by way of guidance in the elucidation of language. They are by no means confined to the legal sphere, but they are valuable tools in the work of interpreting statutes and other legal documents if properly used. They do not bind the interpreter; they only indicate to him what is linguistically permissible in attributing a meaning to a particular word pattern. A typical example is the so-called *ejusdem generis* rule, under which it is permissible to restrict the meaning of a general word to things of the same class or kind indicated by particular preceding words.(59)

30. Presumptions of intent have been called "policies of clear statement"(60) i.e. in effect announcements by the courts to the legislature that certain meanings will not be assumed unless stated with special clarity. Legislation is made not only against the background of an existing body of law but also within the framework of a society with particular social and economic values which, it can legitimately be assumed in the absence of evidence to the contrary, the legislature intended to

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(58) Justice Holmes in Boston Sand Co. v. U.S. 278 U.S. 41 at p. 48.

(59) Canons of construction as conventional rules of language should be distinguished from interpretation clauses whether tailored to a particular Act or included in a general Act, such as the Interpretation Act, 1889. In this paper the question of the desirability and character of a new Interpretation Act is not directly considered but the matter is being examined in conjunction with Parliamentary Counsel.

(60) Hart and Sacks, op. cit., (n.10).

respect. "Over the years", it has been said, "the courts have laboured to discern and articulate a great number of principles of social relations. In an almost literal sense these represent a distillation of the experience and wisdom of society."[61] A court will, for instance, cut down the generality of certain enactments both in order to adjust them to the existing law and to give effect to prevailing values - e.g. in restricting the apparently unfettered generality of those provisions in planning legislation which entitle a Minister to impose upon a planning permission "such conditions as he thinks fit".[62] Particular presumptions of intention will however be modified or even abandoned with the passage of time, and with the modification of the social values which they embody.

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

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

(b) The individual presumptions are often of doubtful status, being the subject of seemingly contradictory judicial pronouncements.

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

(d) There is no accepted test for resolving a conflict between a presumption of intent - e.g. that penal statutes should be construed restrictively - and giving effect to the purpose of a statute (the "mischief" of <u>Heydon's Case</u>) - e.g. the purpose of factory legislation to secure safe working conditions.

(61) Hart and Sacks, <u>op. cit.</u>, p. 1240
(62) See <u>Mixnam's Properties v. Chertsey U.D.C.</u> [1964] 1 Q.B. 214, [1965] A.C. 735; <u>Hall v. Shoreham U.D.C.</u> [1964] 1 W.L.R. 240.

32. It has been suggested[63] that the difficulties and uncertainties which arise in regard to presumptions of intent might be avoided by the statutory classification of legislation with appropriate presumptions. We doubt however the practicability of a classification of this kind, as we consider that any comprehensive statutory directives would either have to be so generalized as to afford little guidance to the courts or so detailed that they would lead to intolerable complexity and rigidity of the law.

33. In rejecting this approach we recognize that a case may be made for dealing specifically with particular matters by means of statutory presumptions. For example, it has been suggested that statutory presumptions should govern the question whether statutory offences require mens rea and whether the breach of a penal provision gives rise to a civil remedy. Examination of the first of these questions would necessitate a complex legal analysis of the nature of the mental element in crime, the second involves difficult legal problems concerning the possible beneficiaries of the civil remedy, and both raise wide-reaching issues of social policy. They would require fuller treatment than would be appropriate in this Working Paper.

(iii) Extraneous Aids to Construction

34. Attorney General v. Prince Ernest of Hanover,[64] and especially the observations of Lords Somervell and Simonds[65] in that case, have emphasized that particular words in a statute must be put in the context of the statute as a whole. It is true that there are a number of relatively minor points of difficulty which arise in regard to what for this purpose may be regarded as the context of the statute; it is clear from the Ernest of Hanover case that the preamble is included, but there is some uncertainty regarding, for example, the status of headings and sidenotes. We deal separately with these matters

(63) Professor W. Friedman, Law and Social Change, pp. 252-265.
(64) [1957] A.C. 436.
(65) At pp. 460-1, 463, 473. See paragraph 9 above.

in paragraphs 41-45 below. We are here concerned with the extent to which a court may in its interpretative task take account of certain material [66] outside the statute, in particular reports of Royal Commissions and similar bodies and parliamentary proceedings connected with the statute in question.

35. It is, we think, helpful to consider the extraneous material which a judge might consider in interpreting words in a statute under three headings. In the first place he might wish to inform himself about the general legal and factual situation in the field in which the statute is to operate. Secondly, he might wish to know about the mischief within that legal or factual situation which it is the purpose of the statute to remedy. Thirdly, he might look to extraneous information to fix the nature and scope of the remedy provided by the statute.

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

37. The admission of certain material under the second heading - i.e., to ascertain the mischief at which the statute aimed - has been allowed by the courts. In Eastman v. Comptroller General of Patents[67] Lord Halsbury admitted a report of a Commission "as a source of information as to what was the evil or defect which the Act of Parliament now under construction was intended to remedy".[68] And in Pillai v. Mundanyake[68] the Judicial Committee of the Privy Council held that "judicial notice ought to be taken of such matters as Parliamentary Commissions and of such other facts as must be assumed to have been within the contemplation of the legislature when the Acts in question were passed".[69] Although it is conceivable that

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(66) We do not deal in this paper with extraneous material of which the admissible status is undoubted - with, for example, earlier statutes on the same subject-matter as the statute being interpreted and case-law in which there is judicial interpretation of the word or words in question as used in earlier legislation. With regard, however, to the weight to be attached to such case-law, see n. (137) below.

(67) [1898] A.C. 571.

(68) At p. 575.

(68) [1953] A.C. 514.

(69) At p. 528.

the inference drawn from a committee report as to the mischief which Parliament had in mind in regard to a statute might require modification in the light of statements subsequently made in Parliament, it is doubtful whether the courts can refer to parliamentary statements even to ascertain the mischief at which a Bill under debate is aimed. It is true that in South Eastern Railway Co. v. The Railway Commissioners[71] Cockburn C.J. spoke of matters which could be "safely asserted" not to "enter into the measure as contemplated nor [to be] present in the mind of the legislature in the Act",[72] having regard to a speech of the Lord Chancellor in the House of Lords and of the introducer of the Bill in the Commons. But his views were disapproved of by Lord Selborne on appeal.[73] However, Lord Westbury in Re Mew & Thorne,[74] after referring to the report of the commission that led to the legislation and to the speech of the member who introduced it in the Commons, said:-

> "Now, I advert to these matters for the purpose of abiding by that rule of interpretation which was approved by Lord Coke, that in the interpretation of a statute it is desirable first to consider the state of the law existing at the time of its introduction, and then the complaints or the evils that were existing or were supposed to exist, in that state of the law. I do this for the purpose only of putting the interpreter of the law in the position in which the legislature itself was placed; and this is done properly for the purpose of gaining assistance in interpreting the words of the law, not that one will be warranted in giving to those words any differing meaning from that which is consistent with their plain and ordinary signification, but at the same time it may somewhat assist in interpreting those words and in ascertaining the object to which they were directed."(75)

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(71) (1880) 5 Q.B.
(72) At pp. 236-7.
(73) (1881) 50 L.J.Q.B. 201 at p. 203.
(74) (1862) 31 L.J. Bkcy. 87. The issue was whether the enactment excluded a discretion as to the discharge of bankrupts; the defect revealed by the materials looked at was the evils attendant upon the existence of a discretion under the pre-existing law and the conclusion drawn was that Parliament meant to exclude the discretion. See P. Brazil, "Legislative history and the Interpretation of Statutes", (1961) 4 Univ. of Queensland L.J. pp. 1-22 and similar Australian cases there cited.
(75) At p. 89. A later instance of a reference to Parliamentary proceedings at second-hand is to be found in the argument of Sir Charles Russell Q.C. in In re Castioni [1891] 1 Q.B. 149 at p. 153:- "This view is supported by the extract from Lord Stanley's speech in the House of Commons, of August 3, 1886, cited in Clarke on Extradition, 3rd Edition, Appendix, pp. cclix, cclx, to which it may be admissible to refer for the purpose of illustration; and on the same occasion Mr. J.S.Mill suggested the following definition: 'Any offence committed in the course of or furthering of civil war, insurrection or political commotion'. If this definition is correct, it certainly includes the present case."

38. Material under the third heading - i.e., to ascertain the particular remedy which the statute provides to deal with the mischief - would appear to be excluded by the courts. In Assam Railways v. Commissioners of Inland Revenue (76) the question was raised of the admissibility of certain recommendations of a Royal Commission on Income Tax which had preceded the Act before the House of Lords and which counsel for the appellants sought to cite as part of the context of intention of Parliament in relation to a particular section of the Act. Lord Wright said:

> "It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible, and the Report of the Commissioners is even more removed from value as evidence of intention." (77)

39. It should however be added that some judicial observations since the Assam case show a rather equivocal attitude towards even the recommendations of a committee which have been followed by legislation. Thus in Letang v. Cooper (78) Denning L.J. (as he then was), having said that it was legitimate to look at the report of a committee to see the mischief at which a statute was directed, went on to say:

> "But you cannot look at what the Committee recommended, or at least, if you do look at it, you should not be unduly influenced by it. It does not help you much, for the simple reason that Parliament may, and often does, decide to do something different to cure the mischief. You must interpret the words of Parliament as they stand, without too much regard to the recommendations of the Committee." (79)

And in Cozens v. N. Devon Hospital Management Committee and Hunter v. Turners (Soham) Ltd. (80) Thompson J., while stating that counsel had correctly maintained that a Report of the Committee on Limitation of Actions in Cases of Personal Injury (81) could not be looked at to interpret the Limitation Act 1963, apparently permitted counsel to refer to the report for the negative purpose of showing that there was nothing in the recommendations inconsistent with a particular construction of certain provisions of the Act. (82)

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(76) [1935] A.C. 445.

(77) At p. 458.

(78) [1965] 1 Q.B. 232.

(79) At p. 240.

(80) [1966] 2 W.L.R. 1134.

(81) 1962 Cmnd. 1829.

(82) See Cozens (n. 79) at p. 1137.

(iv) Assessment and Suggestions for Improvement

40. The literal rule assumes the existence of "plain words", taking no account of the intrinsic frailty of language, which is not infrequently demonstrated at the level of the House of Lords when Law Lords differ as to the so-called "plain meaning" of words.[83] It tends to discourage the interpreter from testing the validity of possible constructions in the broader context of the intention of Parliament.

41. It is true that there is today a greater emphasis on the necessity of reading the immediately relevant enacting words of a statute in a wider context, as was emphasized in Attorney General v. Prince Ernest of Hanover.[84] The contextual significance of other enacting provisions of the statute, the long title and the preamble (which were specifically mentioned in that case) is now undoubted. But the short title although enacted by Parliament, has no interpretative weight; it provides only a mode of citation.[85]

42. Headings have been held by the courts to form part of the context in which the enacting sections may be read,[86] but there is authority for the proposition that where the words of a section are in themselves clear in the context of everyday usage they must be accepted in that sense by the court, even if the heading under which they come suggests a different meaning,[87] though it is doubtful how far these statements can stand against the general tenor of the remarks of Lords Somervell and Simonds in the Prince Ernest of Hanover case.[88]

(83) See, e.g. London and North-Eastern Railway Company v. Berriman referred to in paragraph 14 above.
(84) See paragraph 9 above.
(85) Re Boaler [1915] 1 K.B. 21 at p. 27.
(86) Qualter Hall & Co. Ltd. v. Board of Trade [1961] Ch. 121 at p. 131. See also Magistrates of Buckie v. The Dowager Countess of Seafield's Trs. 1928 S.C.526, in which it was held that certain words in the statute "fell to be construed in the light of the context and of the heading of the group of sections in which they occurred".
(87) See Farwell L.J. in Fletcher v. Birkenhead Corporation [1907] 1 K.B. 205 at p. 218 and Lord Goddard C.J. in R. v. Surrey (N.E. Area) Assessment Committee [1948] 1 K.B. 28 at p. 32.
(88) See paragraph 9 above.

43. It is not clear how far, if at all, marginal notes can be used to elucidate the intention of Parliament.(89) The view that they cannot be used is supported by the argument that amendments to side-notes are not made by either House but that any necessary alterations are made by officials of Parliament in consultation with Parliamentary Counsel.(90) But if this is the reason for the exclusion of side-notes from consideration, it would equally justify the exclusion of headings, which are similarly treated in Parliament.

44. In old cases the exclusion from consideration by the courts of punctuation in statutes appears to have been justified on the grounds that no punctuation was normally to be found in the Parliament Roll.(91) It has been said to be very doubtful whether in modern Acts account can be taken of punctuation.(92) In <u>Alexander v. Alexander</u> (93) the High Court of Justiciary, however, seems to have considered it legitimate in Scotland to give effect to punctuation in the construction of modern statutes. Its exclusion might today be justified on the grounds that amendments in Parliament to punctuation would not in practice be accepted, but we have already pointed out that this factor has not excluded headings from consideration by the courts.

45. Our impression is that some other jurisdictions are not to the same extent preoccupied with drawing precise lines of demarcation in the matters referred to in paragraphs 41-44 above. The question is generally speaking one of weight and authority rather than of specific inclusion or exclusion.(94)

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(89) See Maxwell on <u>Interpretation of Statutes</u>, 11th ed., pp. 41-2. In <u>Gosling v. Gosling</u> [1967] 2 W.L.R. 1219 at p. 1236 Sachs L.J. declined to be influenced by a marginal note both because it differed from the marginal note to a corresponding section of an earlier Act and because, for the reasons given in Maxwell, "marginal notes are normally not regarded for purposes of interpretation, though they may be in certain cases".

(90) See Lord Reid in <u>Chandler v. Director of Public Prosecutions</u> [1964] A.C. 763 at pp. 789-90.

(91) See <u>Craies on Statute Law</u>, 6th ed., pp. 197-9.

(92) Per Lord Reid in <u>Inland Revenue Commissioners v. Hinchy</u> [1960] A.C. 748 at p. 765.

(93) 1947 J.C. 155.

(94) We understand that in the United States both headings of the the character of side-notes in United Kingdom statutes and punctuation are taken into account. S.1-109 of the Uniform Commercial Code provides that section captions shall be treated as part of the Act; some States have omitted this section in adopting the Code.

We suggest that our own law governing all these borderline matters should be simplified. We think that punctuation, which in modern usage plays an essential part in the conveyance of meaning, should be treated in the same way as the enacted words and that long titles, preambles, headings and side-notes should be all part of the context of the enacted material, with which the latter should be read in the manner laid down in the Prince of Hanover case.(94)

46. When we turn from the literal rule to the golden rule, we find that the rule sets a purely negative standard by reference to the absurdity, inconsistency or inconvenience, but provides no clear means to test the existence of these characteristics or to measure their quality or extent. When a court decides that a particular construction is absurd, it implies, although often tacitly, that the construction is absurd because it is irreconsil-able with the general policy of the Act. Thus in R. v. Oakes(95) (where the Court read "aids and abets and does any act preparatory to the commission of an offence" in s. 7 of the Official Secrets Act 1911 as "aids and abets or does any act preparatory to the commission of an offence") the underlying assumption was that the Act was framed to fit in with the general pattern of the criminal law. Similarly, in Riddell v. Reid(96) (where the majority of the House of Lords held that the words "outside the area of the building under construction" in the Building Regulations 1926 made under s. 79 of the Factory and Workshop Act 1901 could be read in effect as "outside the area used in the building operations"), the finding that any other construction would be "narrow and unprofitable"(Lord Thankerton)(97) "illogical and inexplicable"

(94) See paragraph 9 above.

(95) [1959] 2 Q.B. 350.

(96) 1942 S.C. (H.L.) 51; sub nom. Potts or Riddell v. Reid [1943] A.C.1.

(97) At p. 9.

(Lord Russell of Killowen)[98] and "paradoxical" and "generally inconvenient and unworkable" (Lord Wright)[99] can only be explained by reference to the purpose of the Building Regulations and their parent Act. In fact the golden rule on closer examination turns out to be a disguised and unsatisfactory form of the mischief rule.

47. The mischief rule as expressed in Heydon's Case[100] comes closer to a satisfactory statement of principle. It was however enunciated before the rules excluding certain material which might bear on the mischief and "the true reason of the remedy" had been developed. It is not surprising therefore that, with the limitation on the means to give it effect and having regard to the strength of a tradition of literal interpretation which has developed since it was decided, Heydon's Case, while often praised, is widely neglected in practice.

48. Turning to the rules governing the admissibility of material which might bear on the mischief or remedy, it appears established that, to ascertain the mischief at which a statute is aimed, it is permissible to consult reports of committees, although not in all probability to refer to their recommendations to elucidate the remedy provided by the statutes. One suggested reason for excluding the latter is the fact that particular recommendations of a committee may not have been incorporated in the Bill subsequently presented to Parliament or may have been incorporated only with material modifications. But if, as we have suggested[101] the concept of the mischief of a statute involves not merely neutral information about a state of facts or law but some implications as to the intention of Parliament it is also possible that Parliament may in the relevant statute have not had in mind precisely the same mischief as the committee which reported prior to the statute.

(98) At p. 16.
(99) At p. 22.
(100) See paragraph 22 above.
(101) See paragraph 35 above.

However, it seems clear that Parliamentary proceedings cannot be consulted to ascertain the nature and scope of an intended remedy, nor in the modern law can it be confidently asserted that they may be referred to for the purpose of ascertaining the mischief. If the objections to reference to Parliamentary proceedings could be surmounted, we see no valid reason why the mischief found by, or specific recommendations of, committees should not be taken into account by the courts.

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

50. If the intention of Parliament is not to be treated as a mere figure of speech, it can hardly be denied that proceedings in Parliament may be relevant to ascertain that intention. It is however a matter of controversy (102) whether there is a legislative intent capable of discovery apart from the language of the statute. In Salomon v. Salomon (103) Lord Watson said:

> "Intention of the legislature is a common but very slippery phrase, which, popularly understood, may signify anything from intention embodied in positive enactment to speculative opinion as to what the legislature probably would have meant, although there has been an omission to enact it. In a court of law or equity, what the legislature intended to be done or not to be done can only be legitimately ascertained from what it has chosen to enact either by express words or by reasonable or necessary implication." (104)

And in Magor and St. Mellons R.D.C. v. Newport Corporation (105)

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

(103) [1897] A.C. 22.

(104) At p. 38.

(105) [1952] A.C. 189.

in which Denning L.J. (as he then was) had said in the Court of Appeal:

> "We sit here to find out the intention of Parliament and of Ministers [the case concerned <u>inter alia</u> the interpretation of an Order made by the Minister of Health] and to carry it out and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis." (106)

Lord Simonds in the House of Lords made the reply:

> "The general proposition that it is the duty of the court to find out the intention of Parliament - and not only of Parliament but of Ministers also - cannot by any means be supported." (107)

51. The apparent difficulties which arise in the analysis of the concept of the legislative intent may however be clarified if a distinction is drawn between legislative intent in the sense of the <u>intended meaning</u> in which the legislature intended particular words to be understood and legislative intent in the sense of the <u>purpose</u> which the legislature intended to achieve. (108) Thus it is possible to agree with Lord Simonds that there are many occasions when it would be unrewarding to seek for the legislative intent in the sense of the intended meaning of particular words, when for example Parliament has laid down certain consequences which are to follow an "accident arising in the course of the employment" (109) while leaving the courts to decide what lies within the course of employment; but it is also possible to accept Denning L.J's view that it is the duty of the courts in such a case "to find out the intention of Parliament ...... and carry it out by filling in the gaps and making sense of the enactment", if the intention of Parliament is here understood to mean the purpose of Parliament in referring to accidents arising out of or in the course of employment in the Workmen's Compensation Act 1897. As regards the reality of legislative intent in the sense of the purpose of the legislature

(106) [1952] 2 All E.R. 1226 at p. 1236.
(107) [1952] A.C. 189 at p. 191.
(108) See Gerald C. MacCallum Jr., "Legislative Intent", (1966) 75 <u>Yale L.J.</u> 754.
(109) S.1(1) of the Workmen's Compensation Act 1897.

in respect of a statute we see force in the statement that:

> "If [legislative intent] is looked upon as a common agreement on the purposes of an enactment and a general understanding of the kind of situation at which it is aimed, to deny the existence of a legislative intention is to deny the existence of a legislative function." (110)

We would add that the same reasoning would apply in many but not all situations where the legislative intent in the sense of the intended meaning of particular words is in issue.

52. We do not think that a rule excluding Parliamentary proceedings cannot be supported solely on the grounds that they can have no relevance to the statute which emerges from them. The problem of the reliability of Parliamentary material when used for this purpose is more complex.

53. The reliability of Parliamentary history has had many severe critics. It has been said that the purpose of debating a Bill is to secure consent to its terms and to explain the intent and meaning of its precise language only to the extent that the explanation will further the object of getting consent to its passage; that the process of enacting legislation is not "an intellectual exercise in the pursuit of truth but an essay in persuasion or perhaps almost seduction". In these circumstances it is suggested that "to appeal from the carefully pondered terms of the statute to the hurly-burly of Parliamentary debate is to appeal from Philip sober to Philip drunk." (111) Justice Jackson (112) and Professor Henri Capitant (113) have alike pointed out the disadvantages of this extrinsic aid from which so many diverse constructions can find support somewhere in the varying statements made during the

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(110) "A Revaluation of the Use of Legislative History in the Federal Courts", (1952) 51 Columbia L.R. 125 at p. 126.

(111) See J. A. Corry "The Use of Legislative History in the Interpretation of Statutes", (1954) 32 Canadian B.R. 624 at pp. 621-2.

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

(113) "L'interprétation des Lois d'après les travaux préparatoires" in Receuil d'Etudes sur les Sources du Droit en l'Honneur du Doyen Francois Gény, Sirey, 1935, p. 204, in which the author refers to the superiority of the English approach.

progress through the stages of its enactment. Another American critic (114) has put the matter in this way:

> "The courts used to be fastidious as to where they looked for the legislative intention. They used to confine the enquiry to reports by committees [of the legislature] and statements by the member in charge of the Bill, but now the pressure of the orthodox doctrine has sent them fumbling about in the ashcans of the legislative process for the shoddiest unenacted expressions of intention." (115)

Apart from these general dangers, there is the particular danger that if Parliamentary history can be appealed to as evidence of intention, such evidence can be deliberately manufactured during the legislative process by those with an axe to grind. (116)

54. In most countries outside the Commonwealth, however, legislative material is admissible before the courts for the purposes of statutory interpretation. In the United States it is noteworthy that much of the criticism of American judges and writers has been directed not so much against its use in principle as against its abuse in practice. For example, Justice Frankfurter (117) has said:

> "Spurious use of legislative history must not swallow the legislation so as to give point to the quip that only when legislative history is doubtful do you go to the statute. While courts are no longer confined to the language, they are still bound by it. Violence must not be done to the words chosen by the legislature unless no doubt can be left that the legislature has in fact used a private code, so that what appears to be violence to language is merely respect to special usage. In the end, language and external aids, each accorded an authority deserved in the circumstances, must be weighed in the balance of judicial judgment." (118)

Where legislative material is admissible the courts become accustomed to the ways of the legislators and learn to discriminate between the value of different kinds of material. Thus, in general, Parliamentary debates are much less frequently used than the reports presented by Parliamentary committees.

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(114) Charles P. Curtis in "A Better Theory of Legal Interpretation" in the (1948-9) 3-4 Record of the Association of the Bar of the City of New York 321.

(115) At pp. 327-8.

(116) See Curtis, op. cit. (n. (114) above) at p. 328.

(117) Op. cit. (n. (2) above).

(118) At p. 234.

In so far as debates are used, their unevenness, from the point of view of the courts, is recognized and distinctions are commonly drawn between the leading speeches of ministers or others who introduce or have the carriage of legislation and other speeches made in the general debate.

55. The practice in the use of legislative materials varies from country to country, particularly having regard to relative usefulness for statutory interpretation of the material. In a comparison of the situation in this respect in France, Germany and Sweden it has been pointed out (119) that the procedures in Germany and Sweden produce more material, particularly reports by committees, which is suitable for interpretative purposes than do the corresponding procedures in France. Accordingly, the French courts are not able to derive as much assistance from this category of travaux préparatoires as do the courts of the other countries. It will be observed from Appendices C and D that this material is given a high value by the courts in the Scandinavian countries and that its use does not appear to give rise to any special difficulty.

56. It must be acknowledged that our existing legislative procedures are not especially well adapted for the use of Parliamentary material because of the absence of committee reports of the kind which are found most useful in other countries. Nevertheless we have come to the conclusion that the strictness of the rule excluding the use of such material cannot be justified merely because at present it may sometimes be unreliable. One consideration is that we cannot assume that the procedure of Parliament is immutable. Secondly, even if it is only in the exceptional case that Parliamentary material could be of value, it may be said that, so great is the burden of

(119) See Professor Stig Strömholm, "Legislative Material and Construction of Statutes: Notes on the Continental Approach", Scandinavian Studies in Law, 1966 pp. 175-218.

statutory interpretation on the courts, whatever measure of assistance can be derived from this source should be made available to them. The third consideration is that, as we have indicated above,[120] the admission of legislative material would make possible a more satisfactory and consistent treatment by the courts of pre-legislative material such as committee reports.

57. In countries where legislative material is used, it is recognized that old enactments raise special problems. It is generally admitted that the value of this material tends to lessen with the passage of time and with changes in the situations to which the law applies. The extent to which it may be profitable to look at the Parliamentary history of old enactments is connected in a number of countries with the much debated issues between the "subjective" and "objective" theories of interpretation, the former emphasizing the role of the historical legislator, the latter emphasizing that a statute once promulgated develops its own momentum.[120] In practice the problem tends to be solved by a compromise view whereby Parliamentary material is used for guidance during the period following the promulgation of the law but with the passage of time greater stress is laid on other considerations bearing on its interpretation.[121] In this way the subjective and objective theories have been adapted to the practical working of the courts. This problem however would not arise in our system as one of immediate consideration, if, as we envisage, any relaxations of the rule, excluding legislative material, if they were to be made at all, would only govern future statutes. When the latter eventually become old, we think that British courts when dealing with Parliamentary material (if it were admitted), and indeed with Committee reports bearing on them, would find it necessary to adopt a similar approach to that taken by Continental courts. In this connection it must be borne in mind that what is being discussed is

(120) See paragraph 48 above.

(121) See Appendix B.2.

the use of extraneous material only as an available aid to a court in the construction of a statute; it must be within the court's discretion to determine whether and how far the material should affect the meaning to be given to the statute.

58. We recognize that there is considerable weight in the objections which may be raised to the admission of legislative material by reference to the third criterion which we have suggested, namely its availability to those to whom the statute is directed. Thus in the United States Justice Jackson has said:

> "I, like other opinion writers, have resorted not infrequently to legislative history as a guide to the meaning of statutes. I am coming to think it is a badly overdone practice, of dubious help to true interpretation and one which poses practical problems for a large part of the legal profession ...... only the lawyers of the capital or the most prosperous offices in the large cities can have all the legislative material available. The average law office cannot afford to collect, house and index all this material. Its use by the Court puts knowledge of the law practically out of reach of all except the Government and a few law offices." (122)

On the other hand, as appears from the material in the Appendices to this paper, availability has not, generally speaking, appeared to have caused serious difficulties in practice in those European countries in which Parliamentary material is admissible for interpretative purposes.

59. In the setting of our own system it may well be said that some legal practitioners, notably small firms of solicitors in places where library facilities are not conveniently available, may find it difficult to refer to the volumes of Hansard, and in particular to those volumes, not to be found in many libraries, which contain the reports of Parliamentary Standing Committees. But in practice a such solicitor will be cautious in advising upon a point of difficulty in new legislation by reference only to a Queen's Printer's copy of the Act, without seeking guidance from a specialized commentary which law publishers are normally not

(122) Cited by Curtis (op. cit. n. (113) above) at pp. 328-9 from A.B.A. Journal, 1948, 535. It should be added that this criticism is not emphasized to the same extent by other American writers on the subject.

slow in producing or from the advice of counsel. The text book writer[123] and counsel would both, as far as may be necessary on points of difficulty, be in a position to refer to the relevant Parliamentary material, and reference systems and facilities would in practice tend to be adapted and increased to meet the requirements which experience showed to be necessary. And if it were considered that use of the material might involve unfair surprise to an opponent in legal proceedings, the objection might be met by Rules of Court requiring suitable notice to be given of an intention to use particular material of this kind.

60. The view may be taken that the difficulties in regard to reliability and availability of Parliamentary material do not on balance justify their total exclusion from consideration by the courts as a strict principle of law. We recognize however that this is a matter for further consideration. One possible view is that the function of legislative material in the interpretative process could be better performed by specially prepared explanatory material presented to Parliament when a Bill is introduced and modified, if necessary during its passage through Parliament.[124]

V. EXPLANATORY MATERIAL TO ACCOMPANY BILLS

61. Material which is used in some legal systems to assist in statutory interpretation has been divided into three main categories namely, descriptive, motivating and expounding texts[125] Descriptive text comprise those documents which record the deliberations and debates of the legislature or of other bodies such as codification commissions (in the case of international instruments, conferences

(123) An example of a text-book, making use of Parliamentary material, is that by Magnus & Estrim on the Companies Act 1947.

(124) See paragraphs 61-67.

(125) See Professor Stig Strömholm, op. cit. (n. (119) above) at pp. 186-7.

and similar bodies). Motivating texts are those which are prepared in connection with a specific legislative proposal and indicate the reasons for it. Expounding texts are those which comment upon a law or proposed law, section by section. We have, so far, in this paper dealt with the possible use of texts of the first category but only in part with texts of the second category. We revert to texts of the last two categories which come into existence in direct connection with the legislation itself.

62. Under our system there used to be a somewhat primitive motivating text in the shape of a preamble. There are also comparatively short expounding texts of a transitory and often rudimentary nature to be found in the Explanatory and Financial Memorandum which is attached to a Bill on its introduction in the House of Commons and in the Explanatory Memorandum which accompanies a Bill on its introduction in the House of Lords. There are finally brief expounding texts in the shape of the Explanatory Notes attached to most statutory instruments. Explanatory Memoranda or Explanatory Notes cannot be cited in the courts as aids to the construction of statutes. Fuller expounding texts, namely, Notes on Clauses, are prepared by Government Departments for the use of Ministers or others who have the task of piloting legislation through the various Parliamentary stages, and these texts are amended as necessary for each House. They are intended to explain the purpose and effect of each clause and often include practical examples of its application. They contain a proportion of confidential material and are not published outside the government organisation.

63. It is the practice in a number of European countries to annex explanatory memoranda of both a motivating and expounding character to Bills, and these are available for use by the courts as authoritative (although not binding) guides in the elucidation and interpretation of the laws. Denmark is one of the countries in which this practice obtains and the purpose and character of the

explanatory memoranda accompanying Bills have recently been the subject of directives issued by the Danish Government: the relevant material is set out in Appendix D.2. The adoption of a somewhat similar device in this country was suggested in a Note to the 1932 Report of the Committee on Ministers' Powers.(126)

64. We think that in principle the provision of motivating and explanatory material could be of substantial assistance to our courts in their interpretative task. It might be helpful where the courts have to deal with ambiguous, obscure or difficult language or with provisions of a generalized character. It would also have an even more important function in connection with the various codification projects which feature prominently in the First Programme of the Law Commission and of the Scottish Law Commission and which are likely to form a vital part of the work of both Commissions in the future. The object of a code is, in our understanding, to set out the essential principles which are to govern a given branch of the law. The degree of particularity in which the applications of these principles to specific situations are stated in the code may vary, but even where detailed application is lacking a court is expected to discover in the code the principles from which the answer to a particular problem can be worked out. In such a situation we think that our explanatory and illustrative commentary on the code could provide authoritative, but not compelling guidance on the interpretation of the code, which, if incorporated in the code itself, would both overload it and import an undesirable element of rigidity.

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(126) The note was by Professor Harold J. Laski who at pp. 136-7 (Annexe V) of Cmd. 4060 said that a memorandum of explanation might set forth the purposes of a Bill, that authority could be conferred on the courts to utilize the memorandum as an aid in the work of interpretation, a judge not being bound thereby but having it available as "an invaluable guide ...... in his task of discovering what a statute is really intended to mean".

65. It may be suggested that material of this kind may include statements which compete with the statements in the enactment itself, and that the danger of confusion, if not of conflict, will increase with the specificity of the motivating and explanatory material, more particularly the latter, even though the courts would not be bound by the explanatory material if clearly at variance with the statute read in its total context. We recognize this risk, but we think that it could be minimized by safeguards imposed at the time when the explanatory material is prepared: and it does not appear that in countries where such explanatory material is used by the courts undue difficulties have resulted.

66. We envisage that the material accompanying, and published with, the Bill in its introduction in Parliament would be prepared by its promoters (in the case of government legislation by the appropriate department) under the supervision of officials of Parliament or other appropriate authority designated by and responsible to Parliament.(127) The same arrangements would apply to any alterations in the material made necessary by changes in the Bill in the course of its passage through Parliament. The precise form of material of this kind would be for consideration. But in the case of difficult provisions, a general statement of purposes combined with explanations of the situations which are envisaged as being covered and those which are envisaged as not being covered, might well render possible a clearer and more effective communication between Parliament, the Courts and the citizen. We would envisage as the motivating and explanatory document a memorandum in the nature of Notes on Clauses as at present used by Ministers and officials, excluding material of a confidential nature.

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(127) It will be recalled that when Explanatory Notes were first introduced for subordinate legislation, an Authority was appointed to ensure the observance of standards.

67. It might be that, apart from ultimate interpretative use, such a memorandum might be of great assistance to the legislature in dealing with complex legislation. It might avoid some of the misunderstanding which may occur under the present arrangements, whereby normally Ministers and officials alone have access to Notes on Clauses, considerably lighten the burden of exposition on those having the carriage of legislation and, perhaps, in some cases, enable more time to be spent upon points of real difficulty. These considerations are, of course, matters for Parliament and not for the Law Commission, but we draw attention to them as possible additional advantages of what is here canvassed. It would, doubtless, continue to be the case that Ministers would have their own special briefing in addition to the document made generally available.

VI THE PRACTICAL PROCESS OF CHANGE

68. We now consider what practical steps might be taken to effect the changes which we have so far suggested. One possibility is to recognize that ultimately whatever general principles may be laid down by statute, interpretation is dependent upon the attitudes of the judges, and indeed upon the quality of thinking about the subject of interpretation both in the courts and in legal writings and to conclude that the matter is best left to be dealt with by the judges themselves. A second alternative is to endeavour to state comprehensively the principles of interpretation in statutory form. In effect this would involve codifying the rules of interpretation, and we have little hesitation in suggesting this is a field not suitable for codification; even in countries with the most highly codified systems the principles of interpretation rest on a body of flexible doctrine developed by legal writers and by the practice of the courts. A third course would involve a limited degree of statutory intervention in this field, laying down broad guide lines by way of a corrective to a tendency to an undue degree

of literalism, which, we have suggested, has largely persisted under the English and Scottish systems.[128]

69. In effect some Commonwealth countries have made an attempt on the lines of the third alternative. Section 5 (j) of the Acts Interpretation Act 1924 of New Zealand, which resembles provisions in some Canadian and Australian legislation, reads as follows:-

> "5 (j) Every Act and every provision or enactment thereof shall be deemed remedial, whether its immediate purport is to direct the doing of anything Parliament deems to be for the public good, or to prevent or punish the doing of anything it deems contrary to the public good, and shall accordingly receive such fair, large and liberal construction as will best insure the attainment of the object of the Act and of such provision or enactment according to its true intent, meaning and spirit."(129)

The above provision in the Act of 1924 re-enacted a provision in the New Zealand Interpretation Act of 1888, and Mr. Denzil Ward, the New Zealand Law Draftsman, pointed out in 1963[130] that although the provision had been in force for 75 years the courts had paid little attention to it, being "so busy cultivating the trees they have lost sight of the pathway provided by Parliament in the Acts Interpretation Act".[131] If this is true, one reason may be because exhortations to the courts to adopt "large and liberal" interpretations beg the question as to what is the real intention of the legislature, which may require in the circumstances

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(128) But not apparently in the United States, where the American version of the literal rule - the "plain meaning" rule - has been modified. See "The Plain Meaning Rule and its Overthrow", Hart & Sacks, op. cit. (n. (10) above) at p. 1267 et seq.

(129) S.15 of the Canadian Interpretation Act 1952 has an identical text.

(130) New Zealand L.J., 4th June, 1963, 293.

(131) At p. 296.

either a broad or narrow construction of language.[132] Another reason may be that although the New Zealand provision attempts to embody the mischief approach of Heydon's Case in more modern language, it makes no contribution to the problem of how the mischief and the remedy envisaged by the legislature are to be ascertained. An attempt to meet this latter deficiency has been made in s. 19 of the Interpretation Act 1960 of Ghana which reads as follows:

> "19. (1) For the purpose of ascertaining the mischief and defect which an enactment was made to cure, and as an aid to construction of the enactment, a court may have regard to any text-book or other work of reference, to the report of any commission of enquiry into the state of the law, to any memorandum published by authority in reference to the enactment or to the Bill for the enactment and to any papers laid before the National Assembly in reference to it, but not to the debates in the Assembly.
>
> (2) The aids to construction referred to in this section are in addition to any other accepted aid."

70. We think the question should be asked whether there is need for an authoritative statement setting out certain general principles of interpretation, taking account of Commonwealth experience. We have tentatively reached the view in the light of the considerations set out in this paper, that there is such a need. If this need were admitted, it would seem that some matters would require statutory enactment, while others might be left to the courts. On the other hand, it might be thought desirable to

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(132) Section 8 (5) of the Nova Scotia Interpretation Act does not refer to a "liberal" interpretation and has an unusual form which deserves to be set out in full:

> "Every enactment shall be deemed remedial and interpreted to insure the attainment of its objects by considering among other matters:
>
> (a) the occasion and necessity for the enactment;
> (b) the circumstances existing at the time it was passed;
> (c) the mischief to be remedied;
> (d) the object to be attained;
> (e) the former law, including other enactments upon the same or similar subjects;
> (f) the consequences of a particular interpretation;
> (g) the history of legislation on the subject."

include all the matters to be dealt with in an enacted statement. Such a statement would provide, to quote the late Master of the Rolls, Lord Evershed,(133) "a decent burial ...... for those so-called 'rules', which have outlived the circumstances which gave them birth"(134) and which can at present only be ascertained by reference to a body of difficult and often conflicting case-law. We do not mean by this, however, that the statement would not be built upon the experience of the judges from Heydon's Case onwards in dealing with statutes. It would be intended to provide a re-formulation and clarification of the most valuable elements in that experience, offering some assistance to the judges in the present situation, where they may be "embarrassed by the heritage of a multiplicity of so-called 'rules'" and faced with an accretion of case-law in which "some judicial utterance can be cited in support of almost any proposition relevant to the problems of statutory interpretation."(135)

Outline of a Suggested Re-formulation

71. The statement might well start from the basis that the function of the courts is to give as far as possible a workable(136) meaning to provisions of a statute as formally enacted and give effect to the following propositions:

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(133) "The Impact of Statute on the Law of England", Maccabaean Lecture in Jurisprudence, Proceedings of the British Academy, vol. XLII (1956), p. 247.

(134) At p. 262.

(135) Lord Evershed, op. cit. (n. (133) above) at pp. 260 and 258.

(136) See Lord Dunedin in Whitney v. I.R.C. [1926] A.C. 37 at p. 52, cited by Lord Evershed, op. cit. at p. 259; "A statute is designed to be workable, and the interpretation thereof by a court should be to serve that object unless crucial omission or clear direction makes that end unattainable."

(a) that the meaning cannot be regarded as clear or unambiguous until the language (including the punctuation) of the provision has been read in its context;

(b) that the context for this purpose includes all other enacted provisions of the statute (including schedules but excluding the short title), headings and, in respect of future statutes, side-notes;

(c) that the context also includes *inter alia*[137] the reports of Royal Commissions and of similar committees, conventions and treaties and explanatory material of the

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(137) As emphasized in paragraph 68 we are not suggesting a comprehensive restatement of the principles of statutory interpretation. Thus earlier statutes on the same subject matter as a statute being interpreted and case-law in which there is judicial interpretation of the word or words in question may under clearly established present practice form part of the context to be taken into account by the Court. Whether such material has the necessary relevance to entitle it to be regarded as part of the context is a question which in our view should be decided by the Court according to the circumstances, unfettered by any rigid presumptions as to the intent of Parliament. In this connection we have considered whether the rule enunciated in *Ex parte Campbell* (1870) 5 Ch. 703 at p. 706 (that "where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, - the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given to them") should be modified by statute. We doubt if this is desirable in spite of the apparent approval given to the rule by three of the Law Lords in *Barras v. Aberdeen Steam Trawling and Fishing Co.* 1933 S.C. (H.L.) 21; [1933] A.C. 402. Apart from the fact that it is now open to the House of Lords to review its own decisions, and the cautious treatment of the rule by the courts, which, if they accept it at all", do so "only with considerable qualifications which may in time render it obsolete" (Allen, *op. cit.* (n. (1) at p. 509), we think that any legislative guidance in this field would run the danger of causing rigidity in the rules of statutory interpretation, which it is our general purpose to remove.

kind envisaged in paragraph 66 of this paper,[138] which in the opinion of the Court are relevant to ascertain -

the purpose or purposes intended by Parliament to be achieved by the Act in which the provision occurs and

the particular sense in which Parliament intended the language of the provision to be understood in its application to the facts before the Court;

(d) that where it appears to the Court that Parliament had no intention as regards the application of the provision to the particular facts of the case before the Court, or has failed to express any clearly ascertainable intention in relation to those facts, the Court, having regard to the character and subject matter of the legislation, shall impute a meaning to the provisions in its application to those facts which best gives effect to the intended purpose or purposes of the Act.

72. We envisage that the suggestions referred to in the two preceding paragraphs would apply *mutatis mutandis* to subordinate legislation.

VII TREATIES AND THE INTERPRETATION OF STATUTES

73. In Item XVII of the Law Commission's First Programme, set out in paragraph 1 above, we referred to difficulties which may arise

(138) Having regard to the considerations discussed in paragraph 48 *et seq.* above, it might also be considered desirable to include in the "admissible material" reports of Parliamentary proceedings, at least to the extent that they throw light upon the relevance of the material mentioned in (c). If reports of Parliamentary proceedings were to be admitted, this would presumably be only in respect of future statutes.

when the courts are called upon to interpret legislation implementing international conventions. The general principles of statutory interpretation which we have elaborated should ensure that such conventions, whether contained in, referred to or even omitted from the implementing legislation, will receive due consideration from the courts, and that the difficulties which arose in Elleman Lines v. Murray,(139) the authority of which may have restricted the scope of the helpful decision in Salomon v. Commissioners of Customs and Excise,(140) do not recur. There remains however the question what rules of interpretation a court is to apply to an international convention, when it finds it necessary to deal with it either as part of the enacting provisions of a United Kingdom statute or as part of the admissible material relevant to the enacting provisions of a statute. Recent decisions as noted above,(141) have emphasized the importance of ensuring that our rules of interpretation are not such as to produce undesirable differences between the meanings given to treaty provisions by our courts and those given to the provisions by the courts of other participating States. The modifications in English practice in regard to interpretation which might result from the adoption of the suggestions made in this paper would, in our opinion, considerably lessen the gap between the interpretative approach of our courts and that of the courts of most non-Commonwealth countries. But some special problems would remain for consideration including the following:

(i) The resolution of difficulties which may arise when the ordinary meaning of the text of a treaty appears to conflict with its objectives.

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(139) See paragraph 10 above.

(140) Paragraph 10 above. As there noted (p. 10, n. (22)) Diplock L.J. found it necessary to keep within the ruling in the Ellerman case by limiting the principle enunciated in the Salomon case to situations where the words were unclear or ambiguous.

(141) See paragraph 11 and n. (23) above.

(ii) The relevance of a treaty's preamble, annexes and related instruments, including in particular any protocols of agreed interpretation, and any material indicating that an expression was intended to carry a special meaning.

(iii) The relevance of preparatory work and of subsequent practice.

(iv) The interpretation of treaties which have more than one authoritative language.

(v) The way in which the courts would determine a question of international law.

(vi) The question of what text of a treaty (or of another international instrument, e.g. a resolution) is admissible in evidence.

(vii) The weight to be attached to decisions of international tribunals or foreign courts interpreting the treaty in question.

(viii) Whether there is a need to exclude any of the provisions of the Interpretation Act 1889, in relation to Treaty-Acts.

74. We have taken the view, however, that these important questions should be deferred for the time being, pending the outcome of the work on the Law of Treaties which has been carried out by the International Law Commission.[142]

(142) See Report of the 18th Working Session of the International Law Commission, A/CN.4/191 and 6th Report of the Rapporteur, Sir Humphrey Waldock, A/CN.4/196.

10th August, 1967.

Law Commission, London;

Scottish Law Commission, Edinburgh.

APPENDIX A (FRANCE)

(A note by M. Manfred Simon, a former President of the Court of Appeal, Paris)

Methods of Interpretation of Statutes in use by French Courts*

A. Introduction

1. It should immediately be noted that French codified law does not contain any specific provision concerning its interpretation.

2. There are however some rules the French Courts must observe:

(a) article 2 of the Civil Code states that the law has no retroactive effect;

(b) article 4 declares that a judge, who refuses to give judgment under the pretext of silence, obscurity or insufficiency of the law, may be prosecuted for denial of justice;

(c) article 5 forbids judges to lay down general provisions or rules when pronouncing judgment on a case submitted to to them.

3. It should further be added that the Cour de Cassation, the Supreme Court of France, has the task of "defending" the law, of insuring uniformity of "jurisprudence" (case-law) and of maintaining unity of enforcement of the law. In other words its principal mission is to set aside, when requested to do so, all judgments having in its view violated the law or essential rules of procedure. (By "violation of the law" one must understand "wrongful interpretation".) But the effect of the court's decision is limited to the case referred to it. When censuring an award

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* List of abbreviations:
D. = DALLOZ
D.H. = DALLOZ HEBDOMADAIRE
D.P. = DALLOZ PERIODIQUE
CHR. = CHRONIQUE
S. = SIREY

rendered by a lower court, it cannot and does not establish general rules applicable in similar cases. Its decision is binding only if and when the Court of Appeal, to which the case is sent after "cassation" adopts its ruling. Should the Court of Appeal itself decide in the same way as the first Court which was originally censured or not conform in some other way to the ruling, the party may return before the Supreme Court which pronounces then in plenary session. The sentence thus given is binding on the lower Court, but only as far as the case in question is concerned (Gerard Cornu & Jean Foyer, Procédure Civile, Presses Universitaires de France, p. 189 et seq.)

4. It follows that French courts have no strictly binding rules on how they should proceed when interpreting a statute. Case-law on the subject is comparatively restricted, a fact to be explained by the above-quoted principle, i.e., courts must not ~~not~~ proceed by enunciating generally applicable rules. (arrêts de règlement)

5. Academic writings, however, have exercised a significent influence on the practice of Courts; the most important theories will hereafter be summarized.

B. Summary of some Doctrines

6. The classical theory on interpretation of statutes has been developed by the so-called "School of the Exegetists" whose predominance lasted approximately during the lifespan of the first generation of lawyers born during and immediately after the Napoleonic régime.

7. Gény in his great work Méthodes d'Interprétation et Sources

en Droit privé positif, Librairie Générale de Droit et de Jurisprudence, Paris, Vol. I, page 68, has described as follows the classical method (approximate and summarized translation):

> "Under a codified civil legislation as ours, all juridical solutions must be connected directly or indirectly with the written law."

> "Application of elements of a decision derived from the text can only be the result of a strict and principally deductive method, supposing as the bases of the law itself a limited number of abstract concepts, considered to be mandatory *a priori* to the interpreter not less than to the legislator himself";

and further (p. 256) he goes on to say:

> "This concept is linked to the rationalist illusion of the XVIIIth Century with regard to the power of written legislation, considered to be a divine work, self-sufficient, a revelation perfect and complete of positive law poured into the mould of a system of mathematical precision. Consequently it is interpreted with the conviction that purely logical, so to speak mechanical procedures, can extract from it with certainty all solutions required by juridical life; so that one should never hesitate to draw every consequence included in the legal formula, but at the same time in such a manner that, if the text refused its help, the interpreter must take care not to substitute his own solution; rather must he sacrifice to the cult of the law the pressing demands of facts."

8. This theory attached great importance to the *travaux préparatoires*, which according to its protagonists makes it possible to ascertain, in case of doubt, the true intention of the legislator. If the *travaux préparatoires* do not clarify sufficiently the problem involved, reference is made to legal history and, finally, to academic writings. Recourse is also made to so-called "logical processes" such as argument *a fortiori* (Cass. Civ., 23 May 1856, D.P. 1856.1.208), to reasoning by analogy (Cassation, Chambres Réunies, 23 May 1845, D.P. 1845. 1.225) or to argument *a contrario* (Cass. Civ., 7 January 1852, D.P. 1852.1.75).

9. Furthermore, induction and deduction are used: legal solutions applying to different hypotheses will be studied, a general principle will be established by induction and this principle will then be applied by deduction to the particular case in question. (Colin & Capitant, Traité de Droit Civil, new edition by Julliot de la Morandière, Vol. I, No. 398 et seq.)

10. The method is criticised by Gény on several accounts, e.g.,: it leaves little scope to science; it stagnates legislation; it prevents ab initio the development of new ideas; it opens the door to the widest subjectivism. "Under the pretext of better respecting the law, one perverts its essence" (op. cit., p. 66). To show the limits to be assigned to the effectiveness of codified legislation, Gény refers to Portalis, one of the authors of the Civil Code, who in his "Discours Préliminaire" has stated:

> "To foresee everything is an unattainable goal. Whatever we do, positive law could never entirely replace the use of natural reason in matters of life. The needs of society are so varied, communications amongst men so active, their interests so manifold, their relations so widespread, that it is impossible for the lawgiver to provide for everything." (Fenet, Recueil complet des Travaux préparatoires du Code Civil).

11. Gény's own theory, which exercised a profound influence on the practice of French Courts (and that is the reason why we quote him perhaps too extensively here), is summarized by him approximately as follows (op. cit., Vol. II. p. 221-223).

> "This guiding principle I can enunciate as follows: Even in its positive form law appears to us as a body of rules, flowing from the nature of things, and to be drawn, by more or less free interpretation, from social elements."

Law above all must remain a "living matter". He wishes the interpreter (the legislator, in civil matters, cannot regulate all and sundry) to be free:

"to investigate the nature of things under the conditions of life, unless he is prevented from doing so ....."

by mandatory injunction of the law, which is to say that the judge, within the limits of his mission, remains his own master and is free to take his inspiration from:

"the great source of justice and social usefulness, which nourishes the organic life of the law." (Vol. I, p. 207).

The author therefore sustains (Vol. II, pp. 229-230) the need for the interpreter to reduce to its just proportions the interpretation of the texts and to be aware of the vast field of "free scientific investigation" remaining to him.

12. Even nowadays, Gény's theories exercise a powerful influence on administrative tribunals, administrative law being to a great extent judge-made law. It would be going too far in the framework of this study to go into details. Gény's actualness may however be gathered from: "Essai sur les méthodes juridictionnelles du Conseil d'Etat" by R. Latournerie and "De la méthode et de la technique du droit privé positif à celles du droit administratif" by Bernard Gény (the son of the author) in Conseil d'État, Livre Jubilaire, Paris, Recueil Sirey.

13. Planiol & Ripert (Traité élémentaire de Droit civil, 6th edition, Vol. I, Paris, 1911) go even further than Gény. For them, law cannot be conceived in its fullness independently from case-law (jurisprudence) which corresponds in fact to a customary law of recent formation, the dicta of which have become mandatory rules. Case law is the only one according to these authors, the decisions of which are

in fact enforceable and therefore of the utmost importance for the parties. These eminent scholars think that in the exercise of his office, the judge may well refer to decisions formerly rendered in similar cases.

> "The judiciary" they state, "is never bound by its former case-law, but, in fact, it frequently conforms to it and the constancy of its decisions represents for the parties the equivalent of mandatory legislation." (op. cit. p. 6 in fine).

Case law, for these authors, is an essentially fluent customary law, a precious stability being however derived from the Judiciary's strong tendency to create a tradition and from the control entrusted to the Cour de Cassation, which maintains on the whole uniformity of interpretation. (Compare on this point: A. Colin & H. Capitant, Cours élémentaire de Droit civil, pp. 35-40, Paris, Editions Dalloz).

C. Influence of this school of thought on judicial decisions

14. The school of thought represented by Gény, Planiol and Ripert as well as others has exercised significant influence on the practice of the Courts. Under their impact jurisprudence between the end of the XIXth and the first decades of the XXth centuries has produced a more precise statement of the law; it has completed, and, it may be said, modified, in some cases even, created it.

15. A few examples will illustrate these results:

    (i) The Civil Code is silent concerning the consequences of a breach of promise. The Courts, taking as the basis of their argument article 1382 of the Civil Code, which prescribes that the author of a tort must repair the prejudice caused, have derived the right of the victim of the breach to be indemnified, provided the prejudice is the direct consequence of

the fault (faute) committed by the author of the breach. (Cass. Req. 12 November 1901, D.P. 1902.146; Cass. Civ., 2 March 1926, D.H. 1926.286; Cass. Civ., 3 July 1944, D. 1945. 2.671 and so on). Breach of promise aggravated by seduction is considered by the Courts a civil offence entitling the victim to pecuniary compensation for the damage suffered. The Courts had at first reasoned on the basis of article 1142, which obliges the contracting party who fails to carry out his obligation to pay damages to the other party. This theory was abandoned, a marriage engagement not being a "contract".

(ii) The Courts have restricted by interpretation the cases of nullity of a marriage. Article 180 of the Civil Code, accords the right to the partner led into error as to the person whom he has married to ask for annulment. The Chambres Réunies of the Cour de Cassation in an already old decision (24 April 1862, D.P. 1862.1.153) have declared: "Error concerning the person, susceptible to cause annulment of the marriage, is understood to be only error as to the physical or civil identity of the marriage-partner, but not error relating to his qualities." Consequently "the husband cannot argue (when asking for annulment) that he did not know of the former marriage and subsequent divorce of his wife" (Court of Appeal of Bordeaux, 21 December 1954, D.1955.242. Compare also Paris, 12 June 1957, D.1957.571.)

(iii) The Courts also have widened the concept of putative marriage as compared to the text of article 201 of the Civil Code by giving for instance the benefit derived from it to children issued from a bigamous union (Cass. Civ., 5 January 1910, D.P. 1911.1338).

(iv) They have rendered less stringent the incapacity of the married woman, by affirming that the husband gives a "tacit mandate" to his wife for household expenditures (Cass. Req. 1905, D.P. 1906.1.14.) Their jurisprudence in this domain has taken account of the evolution of customs in the whole field of a married woman's rights and has contributed to modern legislation establishing almost complete equality of the wife with the husband.

(v) In matters of divorce they have given a large interpretation to article 232 of the Civil Code which enumerates "injure grave" as a divorce cause, so that nowadays divorce can in fact be obtained by mutual consent.

(vi) Absolute property rights, as stated in article 544 Civil Code (property is the right to benefit and to dispose of things in the most absolute manner, provided one does not make use of it in a way prohibited by laws and regulations), have been limited by case law which has introduced the concept of "abuse of rights". (Cass. Civ., 4 December 1935, D.H. 1936.70; notes on this subject matter, Ripert D.P. 1907.1.385.)

(vii) In matters of life insurance for instance, the courts have recognised the validity of such insurance contracts for the benefit of third persons by a wide interpretation of article 1121 of the Civil Code which allows stipulation for the benefit of a third person "if such is the condition of a stipulation one makes for oneself or of a donation one makes to another"; From this paragraph the Courts have drawn the conclusion that "there exists a stipulation for the benefit of a third party in a life or damages insurance which the insured has taken out for the

profit of his family, or of a third party or for the benefit of whom it may concern." (Cass. Civ., D.P.1889. 2.153) and that the beneficiary has by such stipulation acquired a right, which does not at any moment belong to the stipulant (Cass. Civ., 16 January, 6, 8 and 22 February 1888, D.P. 1888.1.77 and 193).

(viii) Starting from the provision of the first paragraph article 1384 which states: "One is responsible not only for the prejudice caused by oneself, but also for the damage caused by those for whom one is responsible or by things under one's guardianship," the Courts have established the very elaborate theory of torts, which may be best resumed by quoting Cass., Chambres Réunies, 13 February 1930, D.P. 1930.1.57, which declares: "The presumption of responsibility established by the first paragraph of article 1384 against the guardian of an inanimate thing, which has caused damage, can only be refuted by proving the existence of circumstances out of one's control, or of an act of God or of an extraneous cause not imputable to the guardian; it is not sufficient for the guardian to prove that he has committed no fault or that the cause of the damage has remained unknown."

16. Thus by reversing the burden of proof (which, as the law was originally drafted, should have remained on the victim) the Courts have been able to take into account, without changing the law, modern development of communications and modern industry. It might be added that the judicial rules developed on the basis of article 1121 quoted above have been incorporated in the law of 13 July 1930 on Insurance Contracts which has now become article 1983 of the Civil Code.

Judicial theories on responsibility for torts have also paved the way to the Workmen's Compensation Act of 9 April 1898.

17. We may stop here the analysis of various academic theories and of their practical consequences. One might however consult: Ripert & Boulanger, Traité de Droit Civil d'après le Traité de Planiol, Paris, 1956; Beudant, Cours de Droit civil, 2nd ed., 1934, Vol. I; Aubry et Rau, Droit civil francais, 7th ed., by E. Esmein and A. Ponsard, 1964; Baudry-Lacanterie-Houcques Fourcade, Traité théorique et pratique de Droit civil, 2nd ed., 1912 and the general repertories of Dalloz and Juris-Classeurs Civils.

D. General Principles governing modern Interpretation

18. The foregoing lengthy exposé enables us to reply more succinctly to the specific questions asked.

19. Nowadays French Courts distinguish three main hypotheses as regards interpretation of the law. 1° The text is clear and unambiguous; 2° it is obscure or ambiguous; 3° it is insufficient or silent.

20. If the text is clear and unambiguous, no consultation of or rather reference to travaux préparatoires is, in principle admitted.

> "Although in principle, reference may be made to the travaux préparatoires if and when a statute is in need of interpretation, the judge must abstain from this reference, when the meaning of the law as drafted is neither obscure nor ambiguous and consequently must be held for certain." (Cass. Civ., 22 November 1932, D.H. 1932.2).

This confirms a long standing and still valid principle.

21. This theory has been supported by Prof. Henry Capitant in an article published under the title "L'interprétation de la loi d'après les travaux préparatoires" (D.H. 1935, Chr. 77). According to the learned scholar, reference to *travaux préparatoires* or preliminary reports has produced very poor results. He strongly prefers the British doctrine of strict textual interpretation and would allow recourse to *travaux préparatoires* only when it is possible to find there some indication concerning hypotheses not expressly provided for by the statute. Otherwise the interpreter has strictly to abide by the text which he cannot amend under the pretext that the law does not conform to the *exposé des motifs* or other parts of the *travaux préparatoires*.

22. In a recent case, however, (Tribunal des Conflits 22 November 1965, D.1966.195), the *Commissaire du Gouvernement** expressly referred to the *travaux préparatoires* of the relevant statute, although, according to his statements, the text is clear - and its apparent meaning different from the one resulting from these *travaux préparatoires* (page 198 *op. cit.*, last para.). The Court followed the opinion of the *Commissaire du Gouvernement* perhaps because he appears to have belonged to the drafting committee and is therefore supposed to know "the will of the legislator". (The *Tribunal des Conflits* is the highest Court of France. It is composed of members of the *Cour de Cassation* and of the *Conseil d'État*. It deals exclusively with conflicts of jurisdiction between administrative and ordinary courts. If no majority is found, the Minister of Justice, who theoretically presides, has a casting vote.)

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* The *Commissaire du Gouvernement* does not in spite of his title represent the viewpoint of the government. He is an officer of the Court who expresses an entirely independent opinion upon the question for decision.

23. May the Court correct drafting errors of a statute?

Case law is hesitant on the subject. Some decisions state that the judge must accept the text as it stands; (Cass. Crim., 11 March 1831, Sirey 1831.1.147). In other cases it has been said that in the absence of parliamentary discussions on the specific point of law, it would be impossible to say whether a drafting error had been committed, or whether the correction would be adding to the law a provision it failed to contain. (Cass. Civ., 20 October 1891, Sirey 1891.1.505).

24. In certain other decisions the Courts have stated the - according to their opinion - correct meaning of the law, such as the legislator intended it to be, especially when the text contained provisions obviously in contradiction with the Act as a whole. (Cass. Req., 11 May 1897, D.P. 1897.1.367; Cass. Crim., 14 December 1832, Sirey 1833. 1.510; Cass. Crim., 7 July 1854, D.P. 1855.1.266; Cass. Req., 25 November 1865, D.P. 1866.1.100).

25. Other opinions distinguish between penal statutes, prohibitive provisions, acts establishing lapse of rights, laws concerning the jurisdiction of various courts, retroactive laws, fiscal laws.

26. Penal and fiscal statutes as well as in general prohibitive provisions have to be strictly interpreted. The Judge must neither add nor detract to or from them.

27. <u>If the law is obscure or ambiguous</u>, the judge will attempt to find out the "true will of the legislator".

(Cass., 11 May 1897, D.P. 1897.1.367, already quoted above). The judge will at first proceed by "grammatical interpretation", that is, he will have recourse to the usage of the language and its syntax. Regard should however mainly be had to the technical significance of the terms used by the statute. If the result should not be satisfactory, the judge proceeds by "logical interpretation", i.e., he will compare the text to others dealing with the same subject matter; the more recent text will supercede the older one; the judge may also refer to the purpose pursued by the statute. The statute mentioned in the preamble of the obscure draft may be used to explain, but not to restrict its meaning. The title given to the statute is without authority at all for the purpose of its interpretation. An ancient statute may help to explain a more recent one or vice versa. An old established usage adopting a particular application of the statute may also be consulted; but a regulation promulgated by the Executive may not be relied upon for interpretation of a statute and is in no way binding on the Judiciary. (Cass. Req., 23 May 1843). See however the new borderline drawn between the law and executive orders, vastly extending the legislative and interpretative power of the Government, by application of articles 34 and 37 of the 1958 Constitution. It would go too far to discuss this matter here. The case-law of the Conseil Constitutionnel and the numerous comments on its awards by Professor Léon Hamon, generally published in Dalloz, may be usefully consulted on this matter.

28. In case of silence of the law, the judge by virtue of article 4 of the Civil Code, must nevertheless give judgment.

In penal cases he must absolve by virtue of the principle "nulla poena sine lege." Otherwise he may decide by analogy. He may by extending them, apply the principles stated in the Statute although they do not apply directly but only virtually to the point at issue. Thus the Cour de Cassation (Cass. Civ., 9 June 1856, D.P. 1856.1.233) has decided that "general rules contained in a law will also apply to specific matter, when there is parity of motive and provided that the specific law does not contain any express derogation of the general rule or is not irreconcilable with that general rule."

29. The judge may therefore proceed by analogy, unless the statute in question contains exceptional provisions which always must be strictly interpreted; he may also reason a contrario, a reasoning admitted only if by starting from the exception, it leads back to the general rule, and so on.

30. As already stated these methods are forbidden as far as penal statutes are concerned. The Cour de Cassation (Cass. Crim., 22 December 1898, D.P. 1898.1.489) has stated that the judge cannot generalize the terms of the law by interpretation of a penal provision the special character of which results from its drafting; in no case may he substitute himself for the legislator; but in another decision already quoted (Cass. Req., 11 May 1897, D.P. 1897.1.367) the Supreme Court added that the judge may ascertain the purpose of the law and give it the meaning it was intended to have. The judge may also (Cass. Crim., 8 March 1930, D.H. 1930.253) rectify by interpretation a drafting error lending to a penal statute a meaning

obviously different from the one it was intended to have.

E. Material available to the Courts

31. The preceding paragraphs have, I think, largely answered this question. In practice the French judge will not make use, if he can possibly avoid it, of material extraneous to the statute itself, especially not to the *travaux préparatoires*, which all too often are misleading. French judges, like their British colleagues, are inclined to feel that statements made by one or several members of Parliament or even of the Executive do not necessarily embody the intention of the legislator as a whole. Even the report of the *Comité des Lois* of Parliament is in no way binding or decisive, although, quite obviously, it may be consulted and even quoted in support of the findings of the Court or by the *Ministère Public*(representing the public interest) to sustain the opinion he desires the Court to express. But generally such references are seldom made and do not ordinarily carry/ too much weight. In my own experience, I remember only two or three cases where I found it necessary and useful to consult the *travaux préparatoires.*

32. I am also prepared to say that in France as in England Courts when the drafting is clear, feel that they must give effect to the words, even if such strict ruling may lead sometimes to untoward results. When however specific social or economic developments prevail, and under exceptional circumstances, they have been led to disregard by interpretation specific words written into the statute, thus adapting the law to conditions the legislator could not possibly foretell. They follow then the /teachings of the "Historical School" (Savigny and others) according to

which the law, once it has been published, detaches itself from its originators and their intentions to take its own course according to the evolution of the social context.

33. Lawyers arguing on the interpretation of the statute in defence of their clients' interests, may appeal to any material they deem fit: case law, <u>travaux préparatoires</u>, academic writings, opinions of eminent jurists and so on. French civil procedure is "accusatory"; it leaves the parties free to establish their rights and to prove them as they deem appropriate, the judge acting as a kind of umpire. He is free however to adopt the legal grounds which he thinks will sustain his decision and finally the <u>Cour de Cassation</u> will, by several awards in similar cases, establish the interpretation that must prevail.

34. A veritable dialogue is constantly engaged between the Courts and academic writers. The latter comment in professional periodicals on significant decisions, try to establish the doctrine followed by the Courts, to find out whether or not their former case law is about to be abandoned and so on. On the other hand, the Courts, especially the <u>Cour de Cassation</u>, pay great attention to these academic writings, and it happens quite frequently that the rapporteur of the Court refers to these writings and even quotes them either to accept the learned author's reasons or to refute them. The lower Courts do not always follow blindly the rulings of the <u>Cour de Cassation</u>. Quite often they resist and try to gain acceptance for their own interpretation of the law. Recently, in the

matter of torts the *Chambres Réunies*, after a long struggle during which the lower Courts opposed constantly their interpretation to that of the Supreme Court, have finally adopted the views prevailing in the majority of the lower Courts. It seemed to me important to underline this, in order to show that in France judges are quite free to admit for the interpretation of a statute material extraneous to the latter.

E. Conclusion

35. In conclusion, I may say that French judges act and react very similarly to their British colleagues in similar situations, with the proviso, however, that precedents have much less authority than they appear to have in England. But even in our country "judge-made law" is not unknown. Our methods, mainly because of the existence of the *Cour de Cassation* with its regulatory power and of a vast body of codified law, are different; the end result is the same: a reasonable adaptation of the law to the ever changing needs of a society in constant movement. Thus in this domain too, the similarity of philosophy and method of thinking of our two nations is apparent.

APPENDIX B.1 (GERMANY)[1]

(Translated excerpt from a note by Professor G. Leibholz of the Federal Constitutional Court)

As regards the interpretation of statutes in Item XVII of the Law Commission's First Programme, I may most usefully refer to the principles that the court to which I belong has developed for the interpretation of laws in general, in view of the fact that these principles have prevailed in German decisions as a whole. These decisions lay down the following points:

What is decisive for the interpretation of a legislative provision is the "objectivised" will of the legislator, as obtained from the text of the legislative provision and from the contextual meaning in which it is placed (see Collection of Decisions of the Federal Constitutional Court 1.312; 8, 307; 10,244; 11,130 *et seq.*) This aim of interpretation is served by textual (grammatical) interpretation, by contextual (systematic) interpretation, by interpretation directed to the purpose of the legislation (teleological and by interpretation by reference to the legislative material and to the historical origin of the law (historical).

In order to ascertain the objective will of the legislator all these methods of interpretation are permissible. They do not exclude but supplement one another (Collection of Decisions 11,130).

The subjective conception held by the organs involved in the legislative process or by their individual members as to the meaning of a provision has significance for its interpretation only in so far as it confirms an interpretation reached by the already stated principles or in so far as it removes doubts which by reference only to these principles cannot be removed. (Collection of Decisions 1, 127, 312; 8, 307; 10,244; 11,130 *et seq.*) The legislative material can only be employed in so far as it permits

(1) For more detailed treatment, particularly concerning the interpretation of constitutional statutes, see Publication 20 of the Association of German Teachers of Constitutional Law, with a comprehensive bibliography in n.4 at p. 54.

a conclusion to be reached as to the object or content of the law. It must always be assessed with a certain reserve and generally used only by way of support. In particular its use must not result in the conceptions of the lawgiving organs being treated as equivalent to the objective content of the law. In any event the will of the legislator can only be taken into account in the interpretation of the law in so far as it has received an adequately clear expression in the law itself (Collection of Decisions 11,130, 13,268).

As understood by the Federal Constitutional Court, a law cannot be declared void, when it is possible to interpret it in accordance with the constitution; it is not only a question of there being a presumption that a law is consistent with the constitution but that the principle which finds expression in that presumption also requires an interpretation favouring the constitutionality of law in cases of doubt (Collection of Decisions 2.82). So far as the purpose and the text of the law do not stand in the way, the courts must give preference to that interpretation which is in accord with the "Basic Law" (Collection of Decisions 8.41).

If there are two different possible meanings which may be given to a rule, then the one is to be preferred which is more in accord with a value judgment of the constitution. (Collection of Decisions 8,221). The same principle also applies if, by means of an interpretation in conformity with the constitution, only such maximum part of the will of the legislator will be preserved as, according to the constitution, can be preserved. (Collection of Decisions 9,200).

Interpretation in conformity with the constitution, however, finds its limits, when the text and meaning of a law is unequivocal. (Collection of Decisions 2,398). Every interpretation in conformity with the constitution finds its limits at the point at which the text and clearly recognizable will of the legislator would come into conflict (Collection of Decisions 18,111). If an interpretation in accordance with the constitution would result in the substitution of the legislative provision by another provision with a different context, this would step over the boundaries of legality

and involve a law-making process which belongs only to the legislator (Collection of Decisions 2,406). In any event such an interpretation must in no circumstances fail to give effect to or falsify the aim of the legislator. In seeking to reach an interpretation in accordance with the constitution a text which is clear must not be given in effect the opposite meaning. (Collection of Decisions 8,34; 9,200).

I have given the decisive proposition laid down by the Federal Constitutional Court with references to the cases, because they govern today the entire case law and broadly speaking are accepted by legal writers.

APPENDIX B.2 (GERMANY)

(Translated excerpt from observations by Professor Karl Larenz of the University of Munich.)

There are in Germany no statutory rules about the interpretation of statutes and also no provision of the type of Article 1 of the Swiss Civil Code which tells the judge what he has to do when the statute gives no answer regarding a question of law to be decided by him. The entitlement of the judge to interpret the statutes and to fill in "gaps" in the statutes and thereby to develop the law is recognised by customary law and is never doubted. It is also the assumption of the statutes dealing with procedure for example Article 137 of the German Statute governing the Constitution of the Courts, which concerns the jurisdiction of the so-called "Great Senate" of the Supreme Court. This reads as follows:-

> "A Senate which considers a question before it to be of fundamental importance can refer the decision to the 'Great Senate', when in its opinion the development of the law or the assurance of consistent legal decisions so demands."

The principles according to which the courts act in the interpretation of the statutes have for a long time been developed in Germany from the scientific study of law. Up to the present time the theory of interpretation of Savigny has been of great influence. Savigny's theory is contained in the first volume of his work System of Modern Roman Law, 1840. Savigny distinguishes four elements in juristic interpretation: the grammatical, logical, historical and the systematic. To explain this I must emphasize that the interpretation theory of Savigny relates to the interpretation of the legal works of the Byzantine Emperor Justinian

As we here have to deal with texts which, coming from the writings of the classical Roman jurists, were put together and drawn up almost 1300 years ago and moreover in a foreign language, namely Latin, it is easy to understand why in their interpretation the linguistic (the

grammatical) and historical elements were of particular importance. The texts must first be examined from the point of view of their linguistic meaning and then with a view to discovering what factual circumstances and what legal conceptions lay in origin behind them. When Savigny further drew attention to the logical and systematic elements in interpretation, this rested on his assumption that the texts to be incorporated were logically free from contradictions and that the Byzantine legislator in bringing them together was concerned to provide rules which could be welded together as far as possible in a gapless system. The continental codifications already existing in the time of Savigny such as the Austrian General Civil Code, Prussian General Code and the Code Civil, had similar intentions. In the further course of the 19th century contemporary German legal science, which was based on the historical school founded by Savigny, regarded, apart from the philosophical-historical elucidation of the texts, the systematization of the legal material which they contain as its primary task.

The theory of interpretation developed by Savigny for understanding the Roman legal sources was after 1900 carried over in the interpretation of the German Civil Code and other modern laws. In this of course the linguistic (grammatical) element took a less prominent place as modern laws in this regard cause few difficulties. Under the "historical" element one understands nowadays regard to the historical origin of statutes and of the conceptions of the people involved in the preparation of the laws and in their passing, such as members of preparatory commissions, those who draft the laws and members of the Parliamentary bodies. Furthermore the logical and systematic elements play an important role in interpretation. A further element neglected by Savigny, namely the teleological, also comes into play. Under this conception originally was understood only regard to the purpose of the legislator as emerging in the law itself or in the preparatory work for the law. Today, however, the concept is understood in a wider sense. The

teleological interpretation is directed both to the purpose of the historical legislator and to the general purposes of the legal order, such as justice, certainty of the law, freedom of the person and protection of confidence in legal relations. It is also directed to the underlying principles of a system of rules such as exists in the law of inheritance, and again to the social task or function of certain legal institutions, as well as finally to the scale of values which are contained in the Fundamental Rights Section of the Bonn Basic Law. A doubtful expression will be understood in a sense which agrees with these above-mentioned purposes, principles and scales of values. With regard to agreement with the scales of values of the Basic Law we speak of a "constitutionally conforming interpretation".(1) Contemporary German legal science, and even more so the courts, strive less to achieve logical consistency and systematic completeness (as was the case in the 19th. century) than to achieve a "factual appropriateness" of decisions, having regard both to the conditions of life to be regulated and to conformity with the legal scales of value moulding the legal order as a whole. The single statutory provision will not be considered in isolation but in its relationship to other norms and the general legal order of which it is a part.

As will appear from these short remarks, regard to the earlier history of a statute, with a view to discovering the conceptions and intentions of the legislator in accord with the ideas of German legal science and of the courts, is only one of the different methods which are used in the interpretation of statutes. The courts in Germany are neither forbidden in the interpretation of a statute to draw support from its history and the then opinion of the legislator in this respect nor bound on the other hand by the results of such an historical interpretation. The courts are "bound" to a much greater extent to the text of the statute itself, that is to say, every interpretation

(1) See BVerfGE 2, 266

must remain within the framework of the text and be consistent with the sense of the words in the text. Where several meanings of the text exist or where there are gaps in the law, (1) the German judge uses simultaneously the different methods of interpretation described, that is to say, the historical, the logical-systematic, and the teleological-value judging, and decides, if these methods lead to different results, generally what he regards according to his legal conviction as "right", that is to say what he thinks to be right in the circumstances. A fixed order in which the different methods of interpretation are to be applied has not until now been established - although there have been plenty of attempts to find such an order. (2) One can say, however, that with increasing lapse of time since the origin of a statute the "historical" element in interpretation loses significance and other methods become more important. German legal decisions have regard also, in the interpretation and still more in the filling out and development of a statute, to a profound change in conditions of life. Interpretation is also influenced by new legal theories or a changed use of language.

Concerning the question as to the significance to be given in interpretation to the preliminary work on a statute there arose at the end of the last century a prolonged literary dispute which appears in the present age at last to have died down. Savigny and other representatives of 19th century legal theory as for example, Windscheid and Bierling, (3) regarded it as the task of interpretation to discover the "will of the legislator" by historical-philological methods and to give effect to this will so far as the text allows. The interpreter ought, such was the teaching of Savigny, to put himself in the position of

(1) On the problem of gaps in the law cf. the most recent work by Canaris, Die Feststellung von Lücken im Gesetz, 1964.

(2) Cf. on this point my Methodenlehre der Rechtswinsenschaft, 1960, p. 257 et. seq.; Engisch, Einführung in das juristische Denken, 3rd Edition, 1964, p. 82 et seq.

(3) Cf. Savigny op. cit., p. 213; Windscheid, Lehrbuch des Pandektenrechts, 5th Edition, 1879, p. 20 et seq.; Bierling, Juristische Prinzipienlehre, volume 4, 1911, p. 230 et seq.

legislator and to repeat his thoughts. When this standpoint is adopted the "historical" element preponderates in interpretation. In accordance with this point of view - the so-called subjective theory of interpretation - some of its representatives gave predominant significance to the preliminary work. For example, Bierling said:- "Knowledge of the history of the origin of a statute is the outstanding means to determine what those who were called upon to make the law as a whole and particular words of the law".[(1)] from the history of the origin of the statute it appears that those who took part in the legislation clearly associated a particular meaning with a particular expression then this meaning should prevail. As against this those who belonged to the so-called objective school of interpretation, among others, Kohler, Wach, Binding and Radbruch,[(2)] drew attention to the fact that a statute once promulgated and freed from its originator develops its own momentum; that with a change in conditions of life, to which it is directed, and in the whole legal order, of which it is a part, it must with the progress of legal decisions and the insights of legal science be seen in a new aspect; that as law having effect _today_ it can say more and different things of which its originator was not aware and of which with the outlook of his time he could not be aware. The final aim of interpretation should therefore be not the discovery of the will and the opinions of the historical legislator but the realisation of the prevailing significance of the statute _today_. For those who take this view the preliminary work of the statute has naturally a lesser value.

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(1) _Loc. cit._, p. 175.

(2) Cf. Kohler, _Grünhuts Zeitschrift_, Volume 13, p. 1 _et. seq._; Wach, _Handbuch des deutschen Zivilprozessrechts_, 1885, Volume I, p. 2 _et seq._; Binding, _Handbuch des Strafrechts_, 1885, Volume I, p. 450 _et seq._; Radbruch, _Rechtsphilosophie_, 3rd Edition, 1932, p. 110 _et seq._

The "objective" theory of interpretation can be regarded as the one which both in Germany and in Switzerland [1] is the dominating theory. Supporters of the "subjective" theory [2] can be set against the objectivists in so far as the former would take into account not only the will of the original legislator but also what a present day legislator would supposedly lay down if he had to regulate the same question. A compromise view which the present writer supports [3] sees the statute both as a product of the historical legislator, as an expression of his will and also as the laying down of a rule which once made has to justify itself afresh with the progress of time and with the change of time and with the change of ideas and so is for its part subject to a change in meaning. This intermediate view regards the preliminary work, and the history of the origin of the statute, as a significant aid in order to understand the statute as an expression of the will of its originator; it does not stop at this point but requires that the present day significance of the statute, with the help also of other methods, in particular the teleological, should be determined.

This view in the opinion of the present writer best takes account of the fact that courts immediately after the promulgation of the law tend first to guide themselves by reference to

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(1) Cf. for example, Germann, Probleme und Metheden der Rechtsfindung, 1965, p. 69 et seq. and p. 79 et seq.

(2) In addition to the reference in n.4, p.81 cf. in particular Heck, Gesetzesauslegung und Interessenjurisprudenz, 1914 p. 1 et seq., 23, 59 et seq., 250 et seq.; Nawiasky, Allgemeine Rechtslehre, 2nd Ed., 1948, p. 126 et seq. who regards as decisive the hypothetical will of the present day legislator and in that way leaves far behind the subjective method of interpretation; Enneccerus-Nipperdey, Allgemeiner Teil des Bürgerlichen Rechts, 15th Ed., 1959, para. 54 II, where, however, objective elements such as for example the "Value of Events" are also given considerable weight, cf. loc. cit., para. 56 III.

(3) Cf. op. cit. (n. (2), p. 78 above) p. 237 et seq.; Engisch, op. cit. (n. (2), p. 78 above) p. 91 et seq.

the preliminary work whereas with an increasing lapse of time other points of view such as the objective purpose of the law, the intrinsic factual consistency of a norm with other norms and with the fundamental principles of value of the whole legal order become more significant, with the result that other methods of interpretation gradually suppress the "historical" method.

The German courts have never declared their allegiance to either of these theories of interpretation, but have in fact used all methods of interpretation and in doing so not infrequently taken account of change of meaning of the norm.(1) They have in many cases supported their interpretation by reference to the history of the origin of the statute, in other cases on the other hand they have relied on a different point of view.(2) They have kept for themselves a very wide freedom. But the furthermost limit of interpretation is predominantly regarded as the possible meaning to be extracted from the text of the statute itself.(3) What goes beyond this is not any longer "interpretation" but development of the law. I do not need here to go into the principles which the courts follow in the latter respect.(4)

If after this short survey about the present position I may express my personal opinion it is that the German legislator has been right not to lay down codifying rules for interpretation; since having regard to the many points of view which can be taken-in the interpretation of statutes, any attempt to fix the rules of interpretation in a rigid form brings the danger that the courts will consider themselves bound in a particular way, and they will therefore be deprived of the necessary freedom in developing the law, in particular as far as adaptation of statutory rules to a change in conditions of life and to the rest of the legal order is

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(1) See my <u>Methodenlehre</u>, <u>loc. cit.</u>, p. 261 <u>et seq.</u>

(2) See my <u>Methodenlehre</u>, <u>loc. cit.</u>, p. 237 <u>et seq.</u>

(3) Cf. Heck, <u>loc. cit.</u> (n. 2, p.80), p. 33; my <u>Methodenlehre</u>, <u>loc. cit.</u>, p. 243 <u>et seq.</u>; Engisch, <u>loc. cit.</u> (footnote 3) p.146.

(4) Cf. on this point my <u>Methodenlehre</u>, p. 273 <u>et seq.</u>

concerned. If it were decided to remove the existing ban in Great Britain on the use of preliminary work of a statute then in my opinion this could best be brought about by a provision in very broad terms saying more or less that the courts are authorised in the interpretation of statutes to use all aids and methods which further the understanding of the statutes. The more detailed carrying out (the concretization) of such a provision would then be left for the courts.

With regard to the question whether the removal of such a ban on the use of preliminary work would put lawyers especially in smaller towns at a disadvantage, as they might have difficulty in obtaining access to this preliminary work, I may say that these doubts do not arise in Germany. First instance courts to which lawyers in small towns are admitted do not concern themselves in general with difficult and doubtful questions of interpretation of statutes but follow the interpretation which the statutes have been given in the legal decisions of the highest courts or in the opinions of the writers of the commentaries. The courts of higher instance and lawyers admitted thereto have on the other hand in general no difficulty in obtaining the preliminary work of statutes when they come into question. The preliminary work of the German Civil Code is published in five comprehensive volumes; these volumes can be found in every large legal library and every lawyer can get them for himself. The preliminary work for other laws, the Bills, official explanations, proposed amendments and decisions of Parliamentary commissions are contained in the printed documents of Parliament (formerly the Reichstag, today the Bundestag) or of the Parliaments of the Länder, and these also are available in large libraries. As far as the misgiving is concerned that the layman cannot make much of this preliminary work, this is a matter which is being gone into in detail by Bierling.[1] Modern laws are for the most part drawn up in legal technical language and assume much in many legal texts

(1) Loc. cit. (Footnote 4), p. 264 et seq.

which the layman in general cannot understand. In any event, whatever aids for the interpretation of laws are brought into play, the layman in general cannot completely understand the laws without legal advice. In the interpretation of laws the previous decisions of the courts play a major role apart from academic opinion. These decisions are just as difficult for the layman to consult as the preliminary work of statutes.

APPENDIX C. (SWEDEN)[1]

(Excerpt from observations by

Mr. Karl Sidenbladh a Swedish appeal judge.)

As regards the question, whether the use of legislative history etc. as aids to statutory interpretation works well in practice in Sweden, I have to make the general reservation, that it is very difficult for me to compare our system with any other system. In our country we have since days long back in history wanted to have at least the more important legal rules in codes or other statutory form. We have, however, understood that it is undesirable and impracticable to try to regulate in every detail and to give rules for every complication imaginable. Should questions as to such details or complications appear, and should not the statute itself give a clear answer to these questions, we are allowed to go to the legislative history to try to find something to guide us. And for a long time - I cannot say how long, but it is a question of generations - our legislators have worked with knowledge that lawyers will look for guidance in the legislative history of the statute. The Minister of Justice, when presenting a Bill to the Parliament, is anxious to ascertain not only that the statute proposed is a good one but also that the comments presented in the course of developing the draft are correct and coincide with the text. It happens that the Minister in his Bill says that a certain comment is not acceptable, but that a certain paragraph without being changed in its wording should be construed in another way. And the Parliament also scrutinizes the comments made. Throughout the legislative procedure there is, as I see it, a clear desire to make sure that the legislative history as a whole will give a fully reliable picture of what the statute is intended to express. This is the case even if in principle our courts, or at least our

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(1) For more detailed treatment see the articles by Folke Schmidt, Thornstedt and Strömholm in Scandinavian Studies in Law, Vol.1 (1957), pp.157-198, Vol.2 (1958), pp.75-117, Vol.4 (1960), pp.211-246, Vol.10 (1966), pp.173-218 respectively.

Supreme Court, is not bound by what has been said during the legislative procedure, only by the statute itself.

Under such circumstances I have great difficulty in understanding how we could manage without the right to refer to the legislative history as an aid to statutory interpretation. The legislative history is as important as the cases to our courts and our lawyers in general. We have no experience of any other system.

However, there is much criticism of the fact that our legislators now and then have left important rules which should have been incorporated in the text of the statute to be ascertained by reference to the comments made on the statute. In my opinion this criticism is justified to a great extent, but not altogether. Such a course is sometimes justifiable, for example when the comments merely complete the statute with illustrations of how it is to apply in certain cases, if such a completion is consistent with the spirit of the statute. I remember, however, for example, that I raised strong objections on a certain occasion many years ago. We had a case before the court, and I considered the possibility of applying to the case a certain rule in an Act of 1930, the text of which indicated no exceptions. I was, however, rather unhappy over the result of such an application. Fortunately I checked with the legislative history of the Act to find out that the committee that had worked out the draft had found it necessary to make an exception for just such a case; but it also appeared that this exception was so reasonable as to be considered self-evident and not necessary to express in the text of the Act, a course to which there was no objection in the final legislative history of the Act. I still think that this was a little too bold of the legislators.

In order to be quite clear I would like to add, that I do not recall having read or heard of any statement to the effect that we should change our system. We think that our system is a good one and an indispensable one, but that even a good system might be abused.

I understand that it has been said, with regard to the English and Scottish legal systems, that the admission of legislative history etc., might lead to greater uncertainty as to the scope of particular enactments. Such might perhaps appear justified in cases which the legislators wished to be unclear. It might also happen, I concede, that the legislators might draft a statute in imprecise terms on the assumption that it could be understood through study of its legislative history. The reason for this generally is, I would suppose, to arrive at a statute that can more easily stand the test of time and the changes of development. It might, however, also happen that the legislators have other reasons for not being as clear as possible. It can even be imagined that the legislators for lack of time have been forced to perform their work somewhat carelessly, taking into account that those who have to apply the statute also have the possibility to look into its legislative history. In such cases, however, as well as when the statute in question is a first class piece of legislation, the fact that it is permissible to use the legislative history adds considerably to the certainty of what is intended. I take it that even in the English systems a statute has been found unclear and has required a few leading cases before the implications of the statute have been established.

It happens frequently in Sweden that parties in their legal arguments before courts discuss the legislative history of a statute, just as they discuss cases that they consider important. Of course, they sometimes make mistakes as to the relevance of certain parts of the legislative history, just as they might be mistaken in thinking that it is important to refer to a certain case. My impression is, however, these mistakes do not happen more often with regard to legislative history than in respect of cases. In general, I find it interesting to listen, when a party starts to illustrate a statute by its history.

Every practising lawyer in Sweden has a set of the more common

volumes of what we call "comments" to statutes, which in fact means books containing everything of importance from the legislative history of one or more statutes. Such books are well known to everybody and not very expensive or voluminous. And through the service of public libraries every lawyer may easily borrow such books as he will use; only a few times perhaps once or twice in his whole life. The Parliamentary Acts are also accessible all over the country. It has in my experience sometimes happened that a party during the preliminary stages of the case has asked for more time in order to get an opportunity to study certain books or to do so more thoroughly, but I cannot remember that any of our "comments" has been mentioned in such a connection. I cannot see why the admission of legislative history should be a burden on or disadvantage to any lawyer, even in the smallest town. On the contrary, I think it would be to the general advantage. However, in making this observation, I must emphasize that my knowledge of English and Scots law is very limited.

[The above note is supplemented by the observations of Mr. Ulf. K. Nordenson of the Royal Ministry of Justice, Sweden:
"I only want to stress that as regards at least recent enactments the travaux préparatoires are given the greatest attention by courts of all degrees. It is no exaggeration to say that the use of such material as an aid to statutory interpretation works very well in practice in this country. I do not share the fear that such a system might lead to uncertainty as to the scope of particular enactments. A mainly teleological interpretation based on the legislative material has - as regards civil law - in our practice proved to be the best way of supplementing the lexicographic-grammatical method. And as in our country the essential parts of the legislative material are published each year in a handy semi-official publication the system has not involved any disadvantages to lawyers in small towns.

A strong argument in favour of admitting the use of legislative history might be found in the need for uniform interpretation of the enactments based on international agreements. The meaning of a certain expression in a convention or a uniform law is very often impossible to ascertain without access to the preparatory documents. The use by judges of such legislative material will secure uniformity in the application of the international agreement."]

APPENDIX D.1 (DENMARK)

(Excerpt from observations by
Mr. Per Federspiel, Advocate (Copenhagen)

The main theme of discussion appeared for a long period in the 19th century to be whether interpretation should be objective or subjective, the former giving absolute predominance to the literal meaning of the text, the latter endeavouring to determine the "will of the legislator". Later this distinction was found less relevant and attention was diverted to the priorities to be given to different aids to interpretation, there being general agreement that absolute priority must be given to the exact linguistic and logical interpretation of the text;

only - as is too frequently the case - when the text was not absolutely clear would the secondary aids to interpretation be applicable. There is no real order of precedence which can be given to these secondary aids, but roughly speaking they can be listed as follows:

1. The analogy from established interpretation of similar texts (sometimes described as the coherence of legislation);
2. The legislator's motives in the widest sense covering all official preparations bearing on the drafting of the text.

In the context it might be useful to describe the normal course of more important legislation in Denmark.

When a new departure in legislation is contemplated it is usual to set up a select committee of experts who examine the subject matter and usually draft the proposed legislation in collaboration with the Law Office of the Ministry of Justice. The function of this latter body is largly comparative and technical. The report and the text are submitted to the government department concerned, examined and commented on by the officials concerned. In the course of their examination the opinions of organisations representing the

interests directly affected by the legislation will normally be heard and examined. Sometimes outside experts may be asked to give an opinion. The conclusion of this procedure is the final text to be submitted to Parliament.

Before the tabling of a Bill the matter has to be approved by the Cabinet. The meetings of the Cabinet are secret and the record is curiously enough considered the private property of the Prime Minister.

The text when presented to Parliament is accompanied by explanatory notes. The first reading in Parliament will then be followed by an examination in the parliamentary committee and in the course of this interested parties will have an opportunity to state their opinions and recommendations to the committee. The committee will present a report before the second reading, and particularly in the event of amendments being tabled the explanatory notes to these amendments will have the same status as the explanatory notes to the original text.

Sometimes the bill is sent back to committee between the second and third reading and the same procedure will then apply.

All the material referred to above - with the exception of the Cabinet minutes which will not be available - may be used as aids to interpreting the text.

3. The history of legislation especially legislation which has been amended at intervals can similarly be argued, and further

4. Danish law operates with a common sense concept which can best be translated as the "nature of things".

A typical example was quoted by the grand old man of Danish jurisprudence A.S. Orsted in the early 19th century: if a text could be interpreted in a way which would make the law inoperative and in a way which would make it operative, preference must be given to the latter sense. But in this

concept "the nature of things" lies a great deal more which escapes precise definition, but which involves legal tradition, the social order, etc.

5. Also the opinions of writers on jurisprudence, particularly university professors, can be, and are frequently argued as aids to interpretation.

In the following I shall only deal with the second point, which I understand is of particular interest to the work of the Law Commission.

Arguments based on the "will of the legislator" do not appear to have been common practice in the courts up to the first World War, at least insofar as this can be ascertained from cases recorded. During the last two generations, however, it appears that this practice has been growing, not least as a result of the increasing volume of legislation of a complicated technical and economic nature. It is, therefore, logical to conclude that attention is more likely to be given to the "motives" of new legislation rather than to the preliminaries of earlier legislation where the historical background is more difficult to evaluate.

It would, however, be an exaggeration to say that the courts will consider themselves bound to follow an interpretation solely based on travaux préparatoires. On the other hand there is nothing which will bar the application of such aids to interpretation in the discretion of the Court.

An interesting case was decided by the Eastern Provincial Court in 1929. The issue was whether the receipt for motor car tax must be physically present in the car itself. It was quite clear from the proceedings in Parliament that this had been the legislators' intention. The court found that this was highly unpractical and was not in fact observed and consequently interpreted the relevant provision to mean that the receipt should follow the car in the case of a change of owner. In this case,

therefore, the common sense argument was found more important than an interpretation based on the "will of the legislator".

A good deal of modern legislation, particularly in the economic field, will delegate powers to the ministers sometimes without specific restrictions. A recent typical example has been an Act empowering the Minister of Agriculture to make regulations for the marketing of agricultural products generally. In P rliament the opposition wished to limit these powers in certain specific respects. It was found technically impracticable to write such limitations into the Act. Instead the minister at the committee stage made a formal declaration that he did not intend to use the act in the specific direction to which the opposition had taken exception. This statement was included in the report of the parliamentary committee and there is no question that this statement, although no indication of its existence appears in the text of the act, is an integral part of the law.

A similar limitation was placed on the minister's powers in connection with a renewal of the foreign exchange control Act, the minister undertaking not to use his powers to introduce new restrictions without the consent of the standing committee concerned.

It should be noted, however, that there may be a fine distinction between definite undertakings of a quasi statutory nature and statements of policy which will involve the minister's political responsibility rather than have concrete legal effect.

Generally speaking the use of aids to statutory interpretation is in harmony with the principles of the Danish legal system. The administration of justice is not to any great extent bound by formalities. In matters of evidence e.g. the courts have almost unlimited discretion in admitting or refusing to hear evidence and the same applies to the arguments of counsel. It is inconceivable that a judge e.g. would cut short arguments based on the history of a legislative act except in cases where a definite interpretation had previously been established by unchallengeable precedent.

In the practice of law the availability of material does not appear to have presented any problem e.g. to provincial lawyers. It is true that the material will not be on hand at every small town, but if a major question of interpretation is involved the normal practice for such lawyers would be to ask for an opinion from a leading lawyer in the capital on the specific point involved. In Copenhagen the travaux préparatoires of any law can be found in the parliamentary library, where on the file of the Act concerned the complete material will have been collected including all that has been said in the public sessions of Parliament on the matter.

APPENDIX D. 2 (DENMARK)

(Excerpt from observations by
Mr. M. N. Madsen)

(Legal Adviser to the Minister of Justice, Denmark)

I may first mention that in Denmark we have no rules for the interpretation of statutes. In fact, our courts are in a very unrestricted position as regards interpretation.

In practice certain kinds of material are taken especially into account by the judges when interpreting statutes.

In the first place the so-called "explanatory statements" to the Bills should be mentioned in this respect. These are general statements - as to the background and the purpose of the Bill - as well as comments upon the various articles of the Bill. The statements are worked out in the Ministry which introduces the Bill in Parliament.

Secondly the speech made by the Minister in introducing the Bill as well as the parliamentary debates in general are a frequently used source of information. (The Bills, the explanatory statements, the introductory speech as well as the debates are published in "Folketingets forhandlinger").

Finally use as _travaux préparatoires_ is often made of the reports made by special commissions, appointed _ad hoc_ by the different Ministries in order to study and make recommendations regarding an area where new legislation may be needed.

I mentioned this in order to give the background of the circular on explanatory statements to Bills (see below).

The circular has been worked out in co-operation between the Prime Minister's office and the Ministry of Justice.

The aim of the circular is not in any way to alter the rule of free interpretation which exists in practice at present. Neither is our primary aim to provide more exhaustive interpretative material for the courts.

The purpose of the circular is primarily to meet a desire which has been expressed in Parliament to obtain more complete information as to the financial and administrative consequences of new statutes as well as to the background material of the Bill, e.g. statistical information and statements made by other authorities or private organizations or experts during the preparation of the Bill. In this connection I wish to draw attention to ss 2, 3 and 5 of the circular.

We did however at the same time take the opportunity to give a more general instruction as to the formulation of "explanatory statements" to Bills. As general guidance it is mentioned in s.1 that such statements should serve the aim of making the contents of the Bill more easily understandable for members of Parliament and the public as well as giving them information regarding the background and general sequence of events concerning the Bill. It is further mentioned that due account should be taken of the fact that the statements can be expected to be a guide to the authorities which are going to administer the statute, and to the courts.

Translation

THE PRIME MINISTER'S OFFICE

Circular of 16th. September, 1966.

CIRCULAR ON EXPLANATORY STATEMENTS ACCOMPANYING BILLS

It is recommended that the directions set out below be followed in the preparation of explanatory statements accompanying Bills.

1. (1) The explanatory statement accompanying a Bill should be so drafted as to amplify, for the members of Parliament and the public, the subject matter of the Bill and provide an adequate basis for evaluating the reasons underlying the Bill and its expected effects.

(2) In the preparation of the explanatory statement account should be taken of the fact that it is likely to be a guide to the authorities which will administer the Act or co-operate in its administration, and to the courts.

2. (1) The explanatory statement should contain an estimate of the financial consequences of the Act in the fiscal year in which it will come into force, as well as in the next following fiscal years.

(2) In so far as possible, the explanatory statement should also contain an estimate of any financial consequences of the Bill to the local authorities.

3. (1) The explanatory statement should, as far as possible, contain an estimate of the consequences of the Bill for Government administration, notably whether it will be necessary to establish new administrative bodies or largely extend existing ones. In that case, an estimate should be given of the expected additional expenditure on administration, *inter alia* on personnel and premises.

(2) In so far as possible, an estimate should also be given of the administrative consequences of the Bill to local authorities and other local administrative bodies. Where

such administrative changes will involve expenditure to the Exchequer, then, if the amount of such expenditure is already capable of being estimated, separate information should be given hereof.

(3) If the Bill is supposed to restrict or extend the demands made on trade and industry or private individuals in connection with the administration of the legislation concerned, a detailed account should be given thereof in the explanatory statement.

4. If during the reading of a Bill laid before Parliament an amendment is moved by the Government, information of the nature referred to in sections 2 and 3 should be given in connection therewith.

5. (1) If, as a basis for the Bill, investigations have been made, inter alia examination of administrative practice, statistical analyses, economic calculations, etc., that are relevant in evaluating the reasons underlying the Bill and its effects, an account should be given of the investigations in the explanatory statement or in an annex thereto.

(2) The explanatory statement should indicate the authorities, organisations, etc., which have submitted opinions in the preparation of the Act. Where such opinions are of particular importance for evaluating the Bill, they should normally be included as an annex to the Bill. In case the Bill is based on a report submitted by a committee or a commission, the report should be communicated to Parliament in a number of 250 copies not later than the date of introduction of the Bill.

6. As regards information in the explanatory statement on the subject matter of legal provisions in force, etc., inter alia on their inclusion as annexes to the Bill, and as regards the technical drafting of the explanatory statement, the guidance given in the annex to this Circular should be followed.

7. This Circular shall apply to Bills laid before Paliament subsequent to 1st. January 1967.

The Prime Minister's Office, 16th. September, 1966.

J.O. Krag,
Ruth Bruun-Pedersen.

ANNEX

GUIDANCE RELATING TO THE ELABORATION OF EXPLANATORY STATEMENTS ACCOMPANYING BILLS

I. Information on the contents of legal provisions

1. (1) Explanatory statements accompanying Bills amending, abolishing or superseding an Act in force should indicate former Acts amending that Act. In case a notification of the Act has been issued, however, it will be sufficient to state the amending Acts that have been passed subsequent to the notification of the Act, and such former amending Acts as are particularly relevant to the evaluation of the Bill.

(2) In respect of the original Act and of all former amending Acts that are particularly relevant to the evaluation of the Bill, references should normally be made to the relevant columns of the Records of Parliamentary Proceedings relating to the discussion of these Acts by Parliament. The references should include the debates of Parliament as well as supplements A, B and C.

(3) If otherwise a Bill relates to questions that have previously been discussed by Parliament, e.g. in connection with the discussion of other Bills including the Finance Bill, in the course of an opening debate or in connection with questions or inquiries, a reference to the records of Parliamentary Proceedings on the subject will often be appropriate.

2. (1) Amending Bills should generally in an annex include parallel texts so that the text of the provisions to be amended is quoted in the left-hand column of the page, while the proposed amendments are indicated in the right-hand column.

(2) In Bills amending, abolishing or superseding an Act in force, that Act, possibly together with the Bill in a parallel text, should be included as an annex, unless by reason of the extent of the Act this is thought to entail disproportionate printing costs.

(3) Where a parliamentary committee is set up to consider a Bill amending, abolishing or superseding an Act in force, and if that Act is not included as an annex to the Bill, reprints of the Act should, as far as possible, be communicated to the committee immediately after its appointment.

3. In explanatory statements accompanying amending Bills it will often be necessary to give a brief, general account of the scheme in force in that particular field in order to illustrate the context in which the amending Bill shall be evaluated.

4. In Bills relating to the application of treaties, the text of the treaty should normally be included as an annex. Where Danish is not an authentic language of the treaty, a Danish translation should be included parallel to the authentic text of the treaty.

5. If reference is made in the Bill or in the explanatory statement to provisions of other Acts or of regulations, the explanatory statement shall contain a quotation of the provisions or such particulars about their contents as are required to understand the contents of the bill and of the explanatory statement accompanying it.

II Technical drafting of the explanatory statement

6 Efforts should be made to give the explanatory statements the linguistic and systematic form that is most conducive to facilitating the assimilation of their contents. A mode of expression pre-supposing the possession of special expert knowledge in order to understand the explanatory statement should be avoided, if possible.

7 The explanatory statement should as a rule be divided into two main parts: "General comments" and "Comments on the individual provisions of the Bill".

8 (1) The part "General comments" should give an account of the principal points of the Bill, the reason for its introduction, and the general lines of the legislative preparation (committee work, recommendations from authorities, organisations, etc.).

(2) It will generally be most appropriate for the information referred to in sections 2-3 and sections 5 (1) and (2) of the Circular and in sections 1 and 3 of this Guidance to be given under "General Comments".

9 In the part "Comments on the individual provisions of the Bill" the comments should, in the typographical layout, be attached to the individual chapters and sections. Very often, comments should also be made on the individual subsections of a section and on any paragraph of a subsection. It will often be appropriate to make certain common comments on a chapter before comments are made on the individual sections and, similarly, to make common comments on a section before comments are made on the individual subsections of the section.

10 The comments on the individual provisions should normally contain information on the contents of the provisions in force relating to the particular question, on the amendments to be provided by the Bill, on the reasons underlying the proposed amendments and, in this context, possibly an estimation of their likely effects. Hence, statements merely recording the contents of the proposed provision must be considered insufficient.

11 (1) Where a Bill is based on a draft Bill included in a committee or commission report, and there is no substantial difference between the Bill and the draft included in the report, it will often be sufficient to replace the comments, in whole or in part, by a reference to the report, provided the comments on the draft Bill of the report are drawn up on the lines of this Circular.

(2) In such cases, however, an account should be given of and comments made on the particulars in which the Bill differs from the draft Bill of the report. In the case of any change in the numbering of sections, this should be indicated.

12 Explanatory statements accompanying Bills that are re-introduced should contain reference to the columns of the Records of Parliamentary Proceedings relating to the previous introduction and discussion of the Bill. Any differences from the previous Bill should be pointed out in the General Comments on the Bill. If the differences are of a more extensive nature, the Bill should be provided with new, full comments.

APPENDIX E

A selective list of material on the interpretation of statutes published in Australia and New Zealand, Canada and the United States of America.

1. Australia and New Zealand

("A.L.J." refers to Australian Law Journal

("U.Q.L.J." refers to University of Queensland Law Journal)

A.L. Turner, "An Approach to Statutory Interpretation", (1948-1950) 4 Res Judicatae 237

Eric C.E. Todd, "Statutory Interpretation and the Influence of Standards", (1951-1953) 2. Annual Law Review 526.

W.N. Harrison, "Methods of Statutory Interpretation in the House of Lords" (1955) 2 U.Q.L.J. 349.

The Hon. Sir Herbert Mayo, "The Interpretation of Statutes", (1955) A.L.J. 204 (followed by a discussion of the article on pp. 215-223).

Peter Brett, "The Theory of Interpreting Statutes", (1956) 2. U.Q.L.J. 99

Graham L. Hart, Q.C., "An Attempt at the Meaning of Statutes", (1956) 2. U.Q.L.J. 264

J.L. Montrose, "Judicial Implementation of Legislative Policy", (1959) 3. U.Q.L.J. 139

P. Brazil, "Legislative History and the Interpretation of Statutes", (1961) 4. U.Q.L.J. 1.

Sir Garfield Barwick, "Divining the Legislative Intent", (1961) 35 A.L.J. 197.

Denzil Ward, "A Criticism of the Interpretation of Statutes in the New Zealand Courts, (1963) New Zealand Law Journal 293.

2. Canada

("C.B.R." refers to Canadian Bar Review)

J. Corry, "Administrative Law; Interpretation of Statutes" (1935) University of Toronto Law Journal 286

E. Russell Hopkins, "The Liberal Canon and the Golden Rule", (1937) 15 C.B.R. 689

Bora Laskin, "Interpretation of Statutes - Industrial Standards Act Ontario", (1937) 15 C.B.R. 660

J. Willis, "Statute Interpretation in a Nutshell", (1938) 16 C.B.R. 1

Vincent MacDonald, "Constitutional Interpretation and Extrinsic Evidence", (1939) 17 C.B.R. 77

G. Sanagan, "The Construction of Taxing Statutes", (1940) 18 C.B.R. 43

W. Friedmann, "Statute Law and its Interpretation in the Modern State", (1948) 26 C.B.R. 1277

E. A. Driedger, "A New Approach to Statutory Interpretation", (1951) 29 C.B.R. 838

D.G. Kilgour, "The Rule against the use of Legislative History: Canon of Construction or Counsel of Caution?", (1952) 30 C.B.R. 769
(see also on this article letter from John MacQuarrie, Q.C. at (1952) 30. C.B.R. 958 and letter from D.G. Kilgour at (1952) 30 C.B.R. 1087)

Kenneth Davis, "Legislative History and the Wheat Board Case", (1953) 31 C.B.R. 1

(See also on last two mentioned articles letter by J. Milner at (1953) 31 C.B.R. 228)

J. Corry, "The Use of Legislative History in the Interpretation of Statutes", (1954) 32 C.B.R. 624

Gwyneth McGregor, "Literal or Liberal? Trends in the Interpretation of Income Tax Law", (1954) 32 C.B.R. 281

E.C.E. Todd, "Statutory Interpretation; Literal v. Context", (1956) 34 C.B.R. 458

3. United States of America

("Co.L.R." refers to Columbia Law Review)

("H.L.R." refers to Harvard Law Review)

Max Radin, "Statutory Interpretation", (1930) 43 H.L.R. 863

James Landis, a Note on "Statutory Interpretation", (1930) 43 H.L.R. 886

Justice Felix Frankfurter, "Some Reflections on the Reading of Statutes", Proceedings of the Bar of the City of New York (1947) 213; (1947) 47 Co.L.R. 527

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

Justice Jackson, "The Meaning of Statutes: What Congress says or what the Court says", (1948) American Bar Association Journal 535

Professors Henry M. Hart, Jr. and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law, Cambridge, Mass. Tentative Ed. 1953. [Unpublished but available in certain libraries]

"A Revaluation of the Use of Legislative History in the Federal Courts", (1952) 52 Co.L.R. 125

Gerald C. MacCallum, Jr., "Legislative Intent", 75 Yale Law Journal 754