[HOUSE OF LORDS]

PEPPER (INSPECTOR OF TAXES) . . . . . RESPONDENT

AND

HART . . . . . APPELLANT

1991 Nov. 4 — Lord Bridge of Harwich, Lord Emslie, Lord Griffiths, Lord Oliver of Aylmerton and Lord Browne-Wilkinson

1992 June 8, 9, 10, 11, 17, 18; Nov. 26 — Lord Mackay of Clashfern L.C., Lord Keith of Kinkel, Lord Bridge of Harwich, Lord Griffiths, Lord Ackner, Lord Oliver of Aylmerton and Lord Browne-Wilkinson

Parliament—Privilege—Proceedings in Parliament—Reference to Parliamentary material as aid to construction of statute—Whether questioning or impeaching proceedings in Parliament—Bill of Rights 1689 (1 Will. & Mary, sess. 2, c. 2), art. 9

Revenue—Income tax—Employment—Benefits of directors and higher-paid employees—Concessionary scheme for education of sons of school's staff—Quantification of cash equivalent of benefit—Whether cash equivalent of benefit made good by payment of reduced fees—Finance Act 1976 (c. 40), ss. 61(1), 63(2)

Statute—Construction—Hansard—Rule prohibiting reference to Parliamentary proceedings as aid to construction—Legislation ambiguous, obscure or leading to absurdity—Clear ministerial statement as to purport of legislation—Whether to be relaxed

The taxpayers who were members of staff of a fee-paying public school, were higher-paid employees for the purposes of section 61 of the Finance Act 1976.[1] The school operated a concessionary fees scheme that enabled the taxpayers, as members of the staff, to have their sons educated at one-fifth of the fees charged to parents of other pupils. Under the terms of the scheme the school had an absolute discretion whether to admit any boy and it could withdraw the concession at any time. During the relevant years the school had surplus pupil capacity and was thus able to take the sons of the taxpayers without turning away other boys able to satisfy the educational entry requirement. The taxpayers were assessed to Schedule E income tax for the years from 1983–84 to 1985–86 on the basis that under the concessionary scheme they had received benefits that were to be treated as "emoluments" of their employment under section 61 of the Act of 1976, the cash equivalent of such benefit being chargeable to income tax in accordance with the provisions of section 63 of the Act. On appeals against the assessments, the taxpayers having conceded that they had received an emolument as a result of participating in the concessionary fees scheme but maintaining that the cash equivalent of the benefit had to be determined under the principle of marginal costing, the special commissioner found that the school incurred no additional expenditure in educating the taxpayers' sons other than on certain items of equipment and

[1] Finance Act 1976, s. 61(1): see post, p. 621H–622A.
S. 63(1)(2): see post, p. 622B–C.

on food that together cost less than the concessionary fees paid and allowed the appeals. The judge allowed an appeal by the Crown, holding that the cash equivalent of the benefit was a rateable proportion of the overall expenditure incurred by the school on providing its facilities to all of the pupils. On appeal by the taxpayers the Court of Appeal dismissed the appeals.

On appeal by the taxpayers, the Appellate Committee having heard the appeal but before judgment referred it to an enlarged Appellate Committee to determine the question whether the existing exclusionary rule relating to the construction of statutes should be relaxed so as to enable Hansard to be consulted as an aid to construction:—

Held, allowing the appeal, (1) (Lord Mackay of Clashfern L.C. dissenting) that, subject to any question of Parliamentary privilege, the rule excluding reference to Parliamentary material as an aid to statutory construction should be relaxed so as to permit such reference where (a) legislation was ambiguous or obscure or led to absurdity, (b) the material relied upon consisted of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as was necessary to understand such statements and their effect and (c) the statements relied upon were clear (post, pp. 616D–E, 617A, F–G, 619E–G, 620C–D, 634C–E, 640B–C, 642E).

Pickstone v. Freemans Plc. [1989] A.C. 66, H.L.(E.) and *Reg. v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696, H.L.(E.) applied.

Davis v. Johnson [1979] A.C. 264, H.L.(E.) and *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191, H.L.(E.) considered.

Reg. v. Secretary of State for Trade, Ex parte Anderson Strathclyde Plc. [1983] 2 All E.R. 233, D.C. overruled.

(2) That the use of clear ministerial statements as an aid to the construction of ambiguous legislation did not amount to questioning or impeaching the proceedings in Parliament or otherwise contravene article 9 of the Bill of Rights 1689 (post, pp. 614D–E, 616D–E, 617G–H, 619E–G, 621B–C, 639F–G).

(3) That (*per* Lord Mackay of Clashfern L.C. and Lord Griffiths) on the true construction of section 63 of the Finance Act 1976 the taxpayers were assessable on the extra cost of providing the benefit, and from the point of view of expense incurred it could not be said that its provision involved significant extra cost to the school; that (Lord Mackay of Clashfern L.C. dissenting) reference should be made to Hansard to resolve the ambiguity in section 63, and that the Parliamentary history disclosed that the Act of 1976 was passed on the basis that the effect of sections 61 and 63 thereof was to assess in-house benefits, and particularly concerning education for teachers' children, on the marginal costs to the employer and not on a proportion of the total costs incurred in providing the service both for the public and the employee; and that section 63 should be construed accordingly (post, pp. 613B–E, 616D–E, 617A, 618B–C, 619A–B, E–G, 641G–642D, F–G, 643B, 646A–B).

Per Lord Mackay of Clashfern L.C. I regard it as crucial that on the facts as found the taxpayers' sons occupied only surplus places and their right to do so was entirely discretionary (post, p. 613A–B).

Decision of the Court of Appeal [1991] Ch. 203; [1991] 2 W.L.R. 483; [1991] 2 All E.R. 824 reversed.

The following cases are referred to in their Lordships' opinions:

Ash v. Abdy (1678) 3 Swans. 664

Assam Railways and Trading Co. Ltd. v. Commissioners of Inland Revenue [1935] A.C. 445, H.L.(E.)

Beswick v. Beswick [1968] A.C. 58; [1967] 3 W.L.R. 932; [1967] 2 All E.R. 1197, H.L.(E.)

Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G. [1975] A.C. 591; [1975] 2 W.L.R. 513; [1975] 1 All E.R. 810, H.L.(E.)

Church of Scientology of California v. Johnson-Smith [1972] 1 Q.B. 522; [1971] 3 W.L.R. 434; [1972] 1 All E.R. 378

Davis v. Johnson [1979] A.C. 264; [1978] 2 W.L.R. 553; [1978] 1 All E.R. 1132, H.L.(E.)

Eastman Photographic Materials Co. Ltd. v. Comptroller-General of Patents, Designs and Trademarks [1898] A.C. 571, H.L.(E.)

Fothergill v. Monarch Airlines Ltd. [1981] A.C. 251; [1980] 3 W.L.R. 209; [1980] 2 All E.R. 696, H.L.(E.)

Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191; [1982] 2 W.L.R. 322; [1982] 1 All E.R. 1042, H.L.(E.)

Mew and Thorne, In re (1862) 31 L.J.Bank. 87

Millar v. Taylor (1769) 4 Burr. 2303

Owens Bank Ltd. v. Bracco [1992] 2 A.C. 443; [1992] 2 W.L.R. 621; [1992] 2 All E.R. 193, H.L.(E.)

Pickstone v. Freemans Plc. [1989] A.C. 66; [1988] 3 W.L.R. 265; [1988] 2 All E.R. 803, H.L.(E.)

Practice Statement (Judicial Precedent) [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77, H.L.(E.)

Reg. v. Secretary of State for the Home Department, Ex parte Brind [1991] 1 A.C. 696; [1991] 2 W.L.R. 588; [1991] 1 All E.R. 720, H.L.(E.)

Reg. v. Secretary of State for Trade, Ex parte Anderson Strathclyde Plc. [1983] 2 All E.R. 233, D.C.

Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd. [1990] 2 A.C. 85; [1989] 2 W.L.R. 997; [1989] 2 All E.R. 692, H.L.(E.)

Reg. v. Warner [1969] 2 A.C. 256; [1968] 2 W.L.R. 1303; [1968] 2 All E.R. 356, H.L.(E.)

Salkeld v. Johnson (1848) 2 Exch. 256

The following additional cases were cited in argument:

Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223; [1947] 2 All E.R. 680, C.A.

Attorney-General's Reference (No. 1 of 1988) [1989] A.C. 971; [1989] 2 W.L.R. 729; [1989] 2 All E.R. 1, H.L.(E.)

Auckland City Council v. Minister of Transport [1990] 1 N.Z.L.R. 264

Bolton, In re; Ex parte Beane (1987) 162 C.L.R. 514

Bradlaugh v. Gossett (1884) 12 Q.B.D. 271, D.C.

Brown & Doherty Ltd. v. Whangarei County Council [1990] 2 N.Z.L.R. 63

Cabell v. Markham (1945) 148 F.2d 737

Chandler v. Director of Public Prosecutions [1964] A.C. 763; [1962] 3 W.L.R. 694; [1962] 3 All E.R. 142, H.L.(E.)

Commissioner of Taxation (Cth) v. Whitfords Beach Pty. Ltd. (1982) 150 C.L.R. 355

Conerney v. Jacklin (unreported), 25 January 1985; Court of Appeal (Civil Division) Transcript No. 19 of 1985, C.A.

Director of Public Prosecutions for Northern Ireland v. Lynch [1975] A.C. 653; [1975] 2 W.L.R. 641; [1975] 1 All E.R. 913, H.L.(N.I.)

Duport Steels Ltd. v. Sirs [1980] 1 W.L.R. 142; [1980] 1 All E.R. 529, H.L.(E.)
Ealing London Borough Council v. Race Relations Board [1972] A.C. 342; [1972] 2 W.L.R. 71; [1972] 1 All E.R. 105, H.L.(E.)
Garland v. British Rail Engineering Ltd. [1983] 2 A.C. 751; [1982] 2 W.L.R. 918; [1982] 2 All E.R. 402, H.L.(E.)
Green v. Bock Laundry Machine Co. (1989) 109 S.Ct. 1981
Heydon's Case (1584) 3 Co.Rep. 7a
Lithgow v. United Kingdom [1986] E.H.R.R. 329
Luke v. Inland Revenue Commissioners [1963] A.C. 557; [1963] 2 W.L.R. 559; [1963] 1 All E.R. 655, H.L.(Sc.)
Lyons v. The Queen [1984] 2 S.C.R. 633
Mandla (Sewa Singh) v. Dowell Lee [1983] 2 A.C. 548; [1983] 2 W.L.R. 620; [1983] 1 All E.R. 1062, H.L.(E.)
Marac Life Assurance Ltd. v. Commissioner of Inland Revenue [1986] 1 N.Z.L.R. 694
New Zealand Educational Institute v. Director-General of Education [1982] 1 N.Z.L.R. 397
Padfield v. Minister of Agriculture, Fisheries and Food [1968] A.C. 997; [1968] 2 W.L.R. 924; [1968] 1 All E.R. 694, H.L.(E.)
Pickin v. British Railways Board [1974] A.C. 765; [1974] 2 W.L.R. 208; [1974] 1 All E.R. 609, H.L.(E.)
Public Citizen v. United States Department of Justice (1989) 109 S.Ct. 2558
Race Relations Board v. Charter [1973] A.C. 868; [1973] 2 W.L.R. 299; [1973] 1 All E.R. 512, H.L.(E.)
Race Relations Board v. Dockers' Labour Club and Institute Ltd. [1976] A.C. 285; [1974] 3 W.L.R. 533; [1974] 3 All E.R. 592, H.L.(E.)
Reg. v. Immigration Appeal Tribunal, Ex parte Antonissen (Case C-292/89) [1991] 2 C.M.L.R. 373, E.C.J.
Reg. v. Murphy (1986) 5 N.S.W.L.R. 18
Reg. v. Parole Board, Ex parte Wilson [1992] Q.B. 740; [1992] 2 W.L.R. 707; [1992] 2 All E.R. 576, C.A.
Reg. v. Secretary of State for Employment, Ex parte Equal Opportunities Commission [1992] I.C.R. 341, D.C.
Reg. v. Secretary of State for the Environment, Ex parte Nottinghamshire County Council [1986] A.C. 240; [1986] 2 W.L.R. 1; [1986] 1 All E.R. 199, H.L.(E.)
Rhondda's (Viscountess) Claim [1922] 2 A.C. 339, H.L.(E.)
Rost v. Edwards [1990] 2 Q.B. 460; [1990] 2 W.L.R. 1280; [1990] 2 All E.R. 654
Rowe v. Law [1978] I.R. 55
Stoke-on-Trent City Council v. B. & Q. Plc. [1991] Ch. 48; [1991] 2 W.L.R. 42; [1991] 4 All E.R. 221
United States v. Johnson (1966) 383 U.S. 169
Varghese (K.P.) v. Income Tax Officer, A.I.R. 1981 S.C. 1922
Warumungu Land Claim, In re; Ex parte Attorney-General (NT) (1987) 77 A.L.R. 27
Wavin Pipes Ltd. v. Hepworth Iron Co. Ltd. [1982] F.S.R. 32

APPEAL from the Court of Appeal.

These were consolidated appeals by the taxpayers, Mr. J. T. Hart, Mr. M. J. P. Knott, Mr. T. Southall, Mr. H. J. Campbell-Ferguson, Dr. D. M. Penter, Mr. B. B. White, Mr. J. P. Knee, Mr. W. J. Denny, Mr. A. J. Hunter and Mr. C. Nicholls (since deceased), who were in 1983 all

employed as members of the staff of Malvern College, from the judgment dated 13 November 1990 of the Court of Appeal (Slade, Nicholls and Farquharson L.JJ.) dismissing the appellants' appeals from the judgment dated 24 November 1989 of Vinelott J., who had allowed appeals by the Crown from a decision dated 10 August 1988 by a single special commissioner in favour of the taxpayers. The appeals raised originally a point of interpretation of the statutory provisions governing the valuation of benefits for the purpose of income tax under Schedule E, in particular, the interpretation and application to the facts found of section 63(1) and (2) of the Finance Act 1976.

Stephen Oliver Q.C. and *Jeremy Woolf* for the appellants.
Alan Moses Q.C. and *Timothy Brennan* for the Crown.

After the original hearing but before judgment it was decided that there should be a further hearing before an Appellate Committee of seven Law Lords to determine the issue whether, and in what circumstances, Parliamentary debates on a Bill might be used as an aid to construction of the ensuing Act: in particular, the relevance of certain extracts from Hansard to the construction of the provisions of the Finance Acts at issue in the consolidated appeals.

Anthony Lester Q.C., *Jeremy Woolf* and *Clive Sheldon* for the appellants at the second hearing. Both as a matter of principle and of practical common sense, the courts should depart from previous authority excluding reference to Parliamentary debate on a Bill as an aid to statutory construction. But it is *not* contended that a recourse to Parliamentary debate should be permitted to become frequent or commonplace, whenever a problem of statutory interpretation arises in our courts. On the contrary, the courts should lay down clear conditions *limiting* the circumstances in which it is permissible to refer to the Parliamentary record, so as to ensure that this happens only exceptionally and only where there is real controversy about the meaning of the text, that is, only where the statutory language cannot itself be relied upon, either because it is ambiguous or obscure, or because the ordinary meaning is manifestly absurd or unreasonable. The strongest case for an exception is where an examination of the proceedings in Parliament will almost certainly settle the matter one way or the other: see *Reg. v. Warner* [1969] 2 A.C. 256, 279E, *per* Lord Reid.

If the decision is made to modify the exclusionary rule, it will, of course, be entirely for the courts to decide upon the relevance and weight of Parliamentary material. And the courts will rightly condemn any party which unreasonably increases legal proceedings by unnecessary recourse to Hansard by ordering that party to pay the costs wasted in this way, a sanction not available to the courts in the United States.

Whatever may be the position of other types of legislation, it is particularly appropriate to have regard to what the Minister responsible for a *taxing measure* has officially and explicitly informed the House of Commons about its meaning, whether on second reading or during the committee stage, when the courts have to construe a provision in a

Finance Act which exhibits any of the foregoing defects. This is mainly because (i) the Crown has exclusive responsibility for the introduction of financial measures, including taxing statutes, in the Commons; and (ii) the Financial Secretary, as the Minister in charge of the Finance Bill in the Commons, has special departmental knowledge of the approach adopted by the Inland Revenue, and through them, of the confidential decisions of the general and special commissioners interpreting and applying the law in individual cases. This means that explicit and official statements made by him about the intended meaning of provisions of a Finance Bill are statements of expert opinion, carrying particular authority and importance for Members of Parliament, in deciding whether to give their support to the measure, and to members of the public and their advisers in arranging their financial affairs in accordance with their reasonable expectations of what is intended by the measure.

There are four specific issues for determination: (1) whether the House of Lords should depart, under the *Practice Statement (Judicial Precedent)* [1966] 1 W.L.R. 1234, from previous authority which precludes reference to Parliamentary debates on a Bill as an aid to the construction of any provision of the Bill which is in due course enacted; and, if so, (2) to what extent and in what circumstances should the courts refer to Parliamentary debates as an aid to statutory construction; (3) whether the appeals raise an appropriate case in which your Lordships should refer to Parliamentary debate as an aid to construction; and, if so, (4) the relevance to the appeals of the particular passages in Hansard to which your Lordships have directed the parties' attention.

It is the exclusive province of Parliament to exercise its sovereign powers to make legislation; and it is the exclusive province of the judiciary to decide what legislation means, by interpreting and applying Acts of Parliament. The courts are not bound by any statement of Parliamentary opinion outwith a statute as to what the statute means. An Act of Parliament takes effect through the language in which its principles and rules are expressed and through their proper interpretation by the courts. It is essential therefore for reasons of legal certainty and respect for the rule of law, that legislation should be drafted as clearly as possible and in a manner which reflects the object and purpose of Parliament. A literal interpretation encourages excessive statutory detail and complexity; together they may breed legalism. For observations on the growing complexity of modern legislation, see the Renton Committee Report on the Preparation of Legislation 1975 (Cmnd. 6053), pp. 19–26, para. 5, pp. 27–34, para. 6, pp. 35–42, para. 7 and the joint Report of the Law Commissions of England and Scotland on the Interpretation of Statutes (1969) (Law Com. No. 21), pp. 3–4, para. 5.

There is no constitutional principle which prevents the courts from using Parliamentary debates as an extrinsic aid to statutory interpretation. It is plain from the resolution passed by the House of Commons on 31 October 1980 that Parliament does not regard the reference to Parliamentary debates in court proceedings as inconsistent with article 9 of the Bill of Rights 1689.

The rule excluding any reference to the record of Parliamentary debates for the purpose of assisting the interpretation of statutes is a

judge-made rule of practice, originating in the middle of the 18th century. The courts had previously been willing to make free use of any means available for the interpretation of statutes, including references to Parliamentary history: see *Heydon's Case* (1584) 3 Co.Rep. 7a.

The first explicit statement of the exclusionary rule is by Willes J. in *Millar v. Taylor* (1769) 4 Burr. 2303, 2332: see *Plucknett, A Concise History of the Common Law*, 5th ed. (1956), p. 335. The rule was extended by Pollock C.B., speaking for the Court of Exchequer Chamber, in *Salkeld v. Johnson* (1848) 2 Exch. 256, 273, when he refused to admit the Report of the Real Property Commissioners, to elucidate the legislation based upon it.

Subsequently the rule was somewhat relaxed as regards official reports: see *Eastman Photographic Materials Co. Ltd. v. Comptroller-General of Patents, Designs and Trademarks* [1898] A.C. 571, where the report of a Royal Commission was admitted in evidence not directly to ascertain the intention of the words used in the statute, but to illuminate the subject matter with which Parliament was dealing: see also *Assam Railways and Trading Co. Ltd. v. Commissioners of Inland Revenue* [1935] A.C. 445. But the exclusionary rule with respect to the Parliamentary history of a Bill and the debates upon it was upheld by the House of Lords in *Viscountess Rhondda's Claim* [1922] 2 A.C. 339, 383.

The British Law Commissions recognised in 1969 that in principle there was much to be said in favour of replacing the rule as to the exclusion of Parliamentary reports (p. 36, para. 61), accepting that, in principle, proceedings in Parliament may be relevant to ascertain Parliamentary intention. But on the grounds, inter alia, of the lack of availability and accessibility of Parliamentary material they recommended that the exclusionary rule should be maintained. The Renton Committee observed in 1975 that almost all their witnesses had come to a similar conclusion. However, the Law Commission of New Zealand, who in December 1990 published a report, A New Interpretation Act (Report No. 17), came to a different conclusion and approved of the developing practice in common law jurisdictions of referring to Parliamentary material.

The rule prohibiting the use of official reports was reconsidered in the House of Lords in *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, where a majority held that an official report upon which the legislation was based was admissible as evidence of the "mischief" at which the Foreign Judgments (Reciprocal Enforcement) Act 1933 was aimed, but was not admissible, however, as direct evidence of the intention of Parliament.

In *Davis v. Johnson* [1979] A.C. 264 the House of Lords affirmed the absolute exclusionary rule: see also *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191. Subsequent decisions, and one earlier decision, have relaxed the rule in certain fields of law: see *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251, 278B–D; *Pickstone v. Freemans Plc.* [1989] A.C. 66, 121–123; *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 85, 149 and *Owens Bank Ltd. v. Bracco* [1992] 2 A.C. 443.

The absolute prohibition against any reference to the Parliamentary record as an extrinsic aid to statutory interpretation ought to be abolished for the following main reasons. (1) The purpose of using the Parliamentary record is to help give better and informed effect to the legislative outcome of Parliamentary proceedings: see the Law Commission of New Zealand Report 1990 (Report No. 17), p. 45, para. 113. It is irrational for the courts to maintain an absolute rule depriving themselves of access to potential relevant evidence or information for this purpose.

(2) The history of a statute, including the Parliamentary debates, may be relevant (i) to confirm the meaning of a provision as conveyed by the text, its context and purpose; (ii) to determine the meaning where the provision is ambiguous or obscure; or (iii) to determine the meaning where the ordinary meaning is manifestly absurd or unreasonable.

(3) The Parliamentary record may be of real assistance to the court (a) by showing that Parliament has considered and suggested an answer to the issue of interpretation before the court, (b) by showing the object and purpose of the legislation and the mischief which the Act was designed to remedy, (c) by explaining the reason for some obscurity or ambiguity in the wording of the legislation and (d) by providing direct evidence of the origins, background and historical context of the legislation.

(4) Where a statutory provision has been enacted following an authoritative ministerial statement as to the understanding by the Executive of its meaning and effect, such a statement may provide important evidence about the object and purpose of the provision and the intention of Parliament in agreeing to its enactment, and may create reasonable expectations among Members of Parliament and those affected by the legislation.

(5) Such ministerial statements are of particular relevance and weight in relation to financial matters which may only be introduced on behalf of the Crown by a Minister.

(6) The courts do not consider themselves confined exclusively by the text for the purpose of interpreting a statute. There is no basis in principle or logic for the courts to be willing to have regard to extrinsic aids contained in White Papers, reports of official committees, and the travaux préparatoires to international treaties, while rigidly excluding any recourse to Parliamentary debates, except for "special" categories of legislation. The reports of Parliamentary debates, and especially of authoritative statements by Ministers or other Members of Parliament responsible for the introduction of legislation, are as much matters of public knowledge and as much to be taken as shared by those whose conduct the statute regulates and as influencing their understanding of the meaning of ambiguously enacting words, as are White Papers, reports of official committees, or travaux préparatoires: see *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591, 638F–H, *per* Lord Diplock. Parliament is as likely to legislate on the faith of a ministerial assurance of a provision's meaning, as on the basis of a statement of its purpose in a White Paper.

It is illogical to have regard to Parliamentary debate and ministerial assurances for the purpose of directly construing regulations (*Pickstone*

v. Freemans Plc. [1989] A.C. 66), introduced without amendment, and for interpreting consolidation Acts (*Beswick v. Beswick* [1968] A.C. 58, 73D–74C) but to refuse to consider them at all for the purpose of construing other legislation.

(7) It is artificial for the courts to continue to draw a distinction between mischief and remedy in defining circumstances in which reference may be made to extrinsic aids to interpretation. In *Attorney-General's Reference (No. 1 of 1988)* [1989] A.C. 971 the House considered a White Paper to ascertain the mischief in need of a remedy, but not the remedy itself. The New Zealand Law Commission rightly points out (Report No. 17, p. 43, para. 103) that in that case, "the remedy is probably clearly identified by the statement of the mischief."

The principal arguments in favour of maintaining the prohibition have been summarised by the New Zealand Law Commission (Report No. 17), p. 45, para. 110 as follows. (i) The text of the statute as enacted is the law; those affected by the statute should be able to rely on the text passed by the House, assented to by the Crown and appearing in the statute book. (ii) Use of the material may involve an improper, even an unconstitutional, examination of the proceedings of Parliament. (iii) The Parliamentary material may be unreliable and indeed may be created to support a particular interpretation. (iv) The Parliamentary material is not likely to help since the issue in dispute may not have been anticipated. (v) The process may cause delay and increase the cost of litigation.

The New Zealand Law Commission, at p. 45, para. 111, were correct in their considered view that, although there is force in each of the foregoing points, they do not lead to the conclusion that the material cannot or should not be used in appropriate cases.

Objection (i) is not disputed but as the New Zealand Law Commission observed, at p. 45, para. 112, the issue arises only where there is real controversy about the meaning of the text so that the statutory language cannot itself be relied upon. In these circumstances the courts are not confined exclusively to the text for the purposes of interpretation, and the Parliamentary record would be one more extrinsic source of assistance.

Judicial use of the Parliamentary record would not alter the constitutional relationship between Parliament, the Executive, and the judiciary, or the nature of the judicial process of statutory interpretation. The courts would not become a reflecting mirror of what some other interpretation agency might say: *Black-Clawson* [1975] A.C. 591, 629. It would be for the courts to determine whether to consider Parliamentary materials, and to decide what weight and value to attach to them: cf. *In re Bolton; Ex parte Beane* (1987) 162 C.L.R. 514, 522, 523. As the New Zealand Law Commission also observed, at p. 46, para. 113, this does not involve the impeaching or questioning of the proceedings in Parliament, in breach of article 9 of the Bill of Rights 1689.

As the New Zealand Law Commission observed, at p. 46, para. 114, care must be taken in assessing Parliamentary material. It is for the courts to exercise their judgment in determining the relevance of the material and its evidential weight. Recent practice in other common law jurisdictions indicates that reference to the Parliamentary record has

proved useful in a number of ways: see *Burrows, Statute Law in New Zealand* (1992), pp. 17 et seq. and *Geddes, Statutory Interpretation in Australia,* 3rd ed. (1988), ch. 3.

The record of Parliamentary debates is no less accessible than White Papers, reports of official committees, or the travaux préparatoires of international treaties. If the exclusionary rule were abolished it is probable that there would be greater use of legislative history in legal text books. As the New Zealand Law Commission have observed, at p. 46, para. 115, accessibility can be facilitated in various practical ways.

The argument based upon delay and the increased cost of litigation applies to the use of any extrinsic aid to statutory interpretation. It is only the rare case which might call for a comprehensive reference to legislative history.

Experience in other common law jurisdictions indicates that the advantages of permitting reference to the Parliamentary record outweigh the disadvantages, provided that the court ensures that there is no unnecessary use of this (or any other) extrinsic aid to interpretation.

Australian courts traditionally adopted the strict exclusionary rule. However, at common law, Parliamentary debates are now frequently referred to in the High Court of Australia, the Federal Court and in the state courts, to establish the mischief of the Bill and its general background: see, for example, *In re Warumungu Land Claim; Ex parte Attorney-General (NT)* (1987) 77 A.L.R. 27.

In 1984 Australia enacted Commonwealth legislation expressly permitting reference to Hansard, and in particular the statement of the Minister during the second reading of a Bill. Similar legislation has been enacted in several of the states. Thus, in New South Wales after the decision in *Reg. v. Murphy* (1986) 5 N.S.W.L.R. 18 there was passed the Parliamentary Privileges Act 1987, section 16.

Traditionally, the strict exclusionary rule was upheld by Canadian courts in all types of cases. The courts have recently had regard to exclusive materials where the constitutionality of a statute is in issue, although the extent to which Hansard is admissible is not clear. In ordinary cases, there has been some relaxation of the exclusionary rule. [Reference was made to *Lyons v. The Queen* [1984] 2 S.C.R. 663.]

The strict exclusionary rule is not adhered to in the Indian courts. On several occasions in recent years, the Supreme Court of India has expressly referred to the speech of the responsible Minister to ascertain the object of the disputed legislation: see *K. P. Varghese v. Income Tax Officer*, A.I.R. 1981 S.C. 1922.

Traditionally, Irish courts adopted the exclusionary rule rigidly. In recent years some High Court judges have been prepared to look at the Parliamentary history and debates for direct assistance in construing the statutory language. The relaxation of the exclusionary rule has not been accepted by the Supreme Court. [Reference was made to *Wavin Pipes Ltd. v. Hepworth Iron Co. Ltd.* [1982] F.S.R. 32 and *Rowe v. Law* [1978] I.R. 55.]

It was generally assumed that the courts in New Zealand followed the English exclusionary rule, although the prohibitive rule was never clearly established. Since 1984, the New Zealand courts (without guidance from

Parliament) have expressly stated that they will refer to Parliamentary debates to interpret legislation, but only when they are of obvious and direct importance. [Reference was made to *Marac Life Assurance Ltd. v. Commissioner of Inland Revenue* [1986] 1 N.Z.L.R. 694 and *Brown & Doherty Ltd. v. Whangarei County Council* [1990] 2 N.Z.L.R. 63.]

The use of legislative materials in United States courts is nowadays both frequent and extensive. The Supreme Court takes as its starting point the statutory language employed by Congress. Where the language of the statute is plain, the court is hesitant to consult legislative materials and would only refer to it if the result suggested by the plain meaning is difficult to fathom or seems inconsistent with the legislative intent. Where the statute is ambiguous or unclear on its face, the court will not be so cautious and will make extensive use of legislative materials to construe the legislation. The current practice of the courts is not unanimous, and there has been forceful criticism by individual members of the Supreme Court of the excessive use of legislative history. [Reference was made to *Public Citizen v. United States Department of Justice* (1989) 109 S.Ct. 2558; *Green v. Bock Laundry Machine Co.* (1989) 109 S.Ct. 1981 and *Southill, Statutory Construction*, 4th ed. (1991), ch. 48.]

In conclusion, on the first issue it is submitted that your Lordships should now decide that the courts may refer to Parliamentary debates on a Bill as an aid to the construction of any provision of the Bill which is in due course enacted.

On the second issue, the exclusionary rule should be modified as follows. (i) A party may refer to extrinsic Parliamentary material as an aid to the interpretation of a statutory provision only with leave of the court, and where the court is satisfied that such reference is justifiable, (a) to confirm the meaning of a provision as conveyed by the text, its object and purpose; (b) to determine the meaning where the provision is ambiguous or obscure; or (c) to determine the meaning where the ordinary meaning is manifestly absurd or unreasonable. (ii) Reasonable written notice must be given by any party seeking to rely upon extrinsic Parliamentary material as an aid to statutory interpretation to the other party and to the court. (iii) The notice must identify (a) the particular passage relied upon, (b) any passage which supports a different or contrary view, (c) the context within the legislative process in which the statement was made and (d) the relevance of the material relied upon. (iv) As regards the last criterion, the notice must indicate whether it is contended that the material is relevant in any one or more of the following respects, namely, because (a) it reveals that Parliament considered and answered the precise question of interpretation facing the court; (b) it is consistent with the interpretation contended for by the relying party; (c) it contains a statement of the purpose and object of the legislation in relation to it; (d) it indicates the reason for some particular obscurity of wording of the legislation; (e) it indicates that the statute owes its origin to an international treaty (to which the United Kingdom is a party) or to a European Community principle or rule. (v) In considering the relevance and weight to be given to extrinsic Parliamentary material, the court should have regard to such matters as (a) the *authority* of the maker of the statement in relation to the passage of the legislation

or amendment concerned; for example, whether the maker of the statement is the proposer of a Bill or of an amendment; (b) the *nature* of the statement, and whether it accords with the general object and purpose of the legislation; for example, the proposer's second reading speech, or answers to a question upon the object and purpose of the Bill or of a provision; whether the statement relates to special departmental knowledge of the state of existing law and practice; (c) the degree of *consensus* in the House about the statement; (d) the *context* of the statement in the legislative process. (vi) The parties in their submissions and the court in its judgment shall not in any way impeach or question the freedom of speech of debates or proceedings in Parliament. [Reference was also made to *Cabell v. Markham* (1945) 148 F.2d 737; *Ash v. Abdy* (1678) 3 Swans. 664; *New Zealand Educational Institute v. Director-General of Education* [1982] 1 N.Z.L.R. 397; *Race Relations Board v. Charter* [1973] A.C. 868; *Commissioner of Taxation (Cth) v. Whitfords Beach Pty. Ltd.* (1982) 150 C.L.R. 355; *Conerney v. Jacklin* (unreported), 25 January 1985, Court of Appeal (Civil Division) Transcript No. 19 of 1985; *Reg. v. Parole Board, Ex parte Wilson* [1992] Q.B. 740; *Stoke-on-Trent City Council v. B. & Q. Plc.* [1991] Ch. 48; *In re Mew and Thorne* (1862) 31 L.J.Bank. 87; *Reg. v. Secretary of State for the Environment, Ex parte Nottinghamshire County Council* [1986] A.C. 240; *Sewa Singh Mandla v. Dowell Lee* [1983] 2 A.C. 548; *Chandler v. Director of Public Prosecutions* [1964] A.C. 763; *Director of Public Prosecutions for Northern Ireland v. Lynch* [1975] A.C. 653; *Lithgow v. United Kingdom* [1986] E.H.R.R. 329; *Reg. v. Secretary of State for Employment, Ex parte Equal Opportunities Commission* [1992] I.C.R. 341; Frankfurter J., "Some Reflections on the Reading of Statutes" [1947] 47 Columb.L.R. 527 et seq.; Kilgour, "The Rule Against the Use of Legislative History: Canon of Construction or Counsel of Caution?" (1952) 30 Canadian Bar Review 769 et seq.; *Allen, Law in the Making*, 7th ed. (1964), pp. 493 et seq.; *Cross, Statutory Interpretation*, 2nd ed. (1987), pp. 153, 165; *Bennion, Statute Law*, 3rd ed. (1990), p. 113; Brazil, "Reform of Statutory Interpretation" (1986) 62 A.L.J. 503 et seq.]

Sir Nicholas Lyell Q.C., A.-G., Alan Moses Q.C., Timothy Brennan and *Rabinder Singh* for the Crown at the second hearing. I appear as Attorney to assist the House on the important question raised concerning reference to Hansard and on the practical effect of any change. I do not contend for any particular result on the tax issue. Mr. Moses will make submissions on that aspect.

The issue is whether the House should depart from the long standing view of its predecessors that precludes reference to Parliamentary debates on a Bill as an aid to construction, and, if so, to what extent and in what circumstances. In the present case the issue could arise in the context of words spoken by the Financial Secretary to the Treasury in Committee between 10.30 p.m. and midnight in exceptionally difficult circumstances. The Government of the day had just withdrawn one of its main Budget proposals to the effect that there should be an arm's length valuation of in-house benefits provided by an employer to an employee. The Financial Secretary was responding to a wide variety of questions not about new

provisions which the Government sought to put before the House but as to how the existing basis of valuation contained in language already enacted in previous legislation (section 39(1) of the Finance Act 1948) in a form which had stood largely unaltered since 1948 would apply to those benefits. A number of contentious questions had been dealt with over the years, e.g. benefits by way of free travel for employees of British Rail and of airlines, and concluded sometimes by negotiation and on other occasions following a decision of the special commissioners. His officials would have been drawing on these experiences. He was not therefore really commenting on the intended meaning of any new provision in the Bill at all.

The current rule excluding reference to Parliamentary debates has a sound constitutional, practical and legal basis which has stood the test of time. It is important to remember that this rule has been endorsed by two reports of commissions in recent years. Departure from the rule poses the question as to how does one ascertain a consensus: *Ealing London Borough Council v. Race Relations Board* [1972] A.C. 342, 361C–E. Parliament does not proceed by consensus but by the vote of the majority. It can be very hard to know whether there is a consensus. The fact that an amendment is withdrawn may or may not indicate a consensus. Amendments are withdrawn for a variety of reasons often unspoken.

The rule precluding reference to Hansard is of very long standing, has been much considered and frequently re-asserted by the House of Lords and is based on sound constitutional and practical reasons which remain as valid as ever. Only in rare cases will a "crock of gold" be found. There is a serious problem in identifying such cases. It is difficult to lay down rules governing selection. This is made more difficult since committee stages are now taken upstairs in Standing Committee and not on the floor of the House and are therefore not to be found in the ordinary Hansard. The Committee Hansards are not indexed and are not widely available.

To change the rule could have a significant effect on the procedures in Parliament and might well be objected to by Parliament. It could involve "questioning" the debates and proceedings in the House of Commons (and the Lords) contrary to article 9 of the Bill of Rights.

The rule has been supported in recent decades by both Law Commissions looking at a much more limited change and by the Renton Committee (a committee of Parliamentarians). The Appellate Committee should not lightly change such an important rule without further consultation by an appropriate committee allowing all interested parties to express views and without giving an opportunity for its ramifications to be thoroughly examined by lawyers and experienced Parliamentarians.

The change is one which, even if it can lawfully be made without legislation, is one which it is more appropriate to leave to Parliament. Parliament would then have the opportunity to consider and define in legislation the nature and extent of the use which could be made of its debates and other legislative material, to provide for consequential changes to its own practice and procedures and for the publication and

indexing of its reports and records of legislative material. In Australia the rules have been laid down carefully and legislatively.

The argument that Hansard can be read where the apparent meaning is ambiguous, absurd, or "unreasonable" could give rise in the latter case to judicial review of legislation. This is a very far reaching concept. The proposition that a combination of "official and explicit" ministerial statements plus press releases should affect the construction of legislation fits badly with the legislative process. Such statements and press releases will not be on the order paper before the House and could not conveniently be made available to members.

There is a real distinction between the use of White Papers and reports of commissions and specific committees and the use of Hansard. The former are finite and available and do not involve any questioning of proceedings in Parliament.

As to the respective roles of the courts and Parliament, two propositions are fundamental. (i) Acceptance of the rule of law requires that its sources are predictable, identifiable and publicly accessible. (ii) In interpreting statutes the task of the courts is not to look for the intention of parliamentarians, still less for the intention of the Executive, but rather to seek the true meaning of words used in the legislation itself.

The citizen ought to be able to order his affairs on the basis of the meaning of the words enacted by Parliament. He is entitled to rely on the words of the statute alone or, where it is judicially interpreted, on an interpretation based on what he, or his advisers, might reasonably understand by those words.

Parliament is sovereign only in respect of what it expresses by the words in the legislation as passed: *Black-Clawson* [1975] A.C. 591, 638E. The rule prevents the Executive from exercising control over the citizen by expressions of intent. Abandonment of the rule may not always be to the citizen's advantage. It may lead to the imposition of liability not clearly imposed by statute. In *Black-Clawson* [1975] A.C. 591, 615B–C Lord Reid starts from the proposition that expressions of intention in Parliament cannot be considered and a fortiori expressions of intent by committees should be disregarded. The appellants seek to stand this argument on its head. But they have ignored the constitutional impropriety of permitting expressions of intent either in Parliament or in committee to govern the conduct of the citizen.

The interpretation of legislation is for the courts alone and not for the legislature or members of the Executive. The courts stand as the mediator between the state in the exercise of its legislative power and the private citizen. To do so the courts must preserve the distinction between the courts' function and the function of Parliament. They must do so in cases where the Crown is a party as well as where it is not: see the *Black-Clawson* case [1975] A.C. 591, 613G, 614H–615A, 629E–630B, 630D–F, 645C–H; *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251, 279F–280B and *Duport Steels Ltd. v. Sirs* [1980] 1 W.L.R. 142, 157B–D, 158A–C.

Relaxation of the rule would have a direct effect on the rights and privileges of Parliament. The courts are rightfully careful not to act so as to cause conflict with Parliament and are sensitive to the rights and

A privileges of Parliament: see *Pickin v. British Railways Board* [1974] A.C. 765, 788B and Lord Hailsham of St. Marylebone, Hamlyn Lectures, *Hamlyn Revisited: The British Legal System* (1983), p. 69.

The current rule fits well with the realities of the legislative process. The legislator has his mind on the words in the Bill or on the order paper. An explanation which is appropriate for the needs of Parliament is not necessarily appropriate for the purposes of the courts in construing B the detailed words of the statute. Parliament is a political forum and not an interpretative agency. Those speaking to a Bill speak as advocates and politicians; they speak for the purpose of persuasion, not interpretation. They may well deal only briefly with controversial aspects, or omit them altogether: see the Report of the Renton Committee on the Preparation of Legislation 1975, p. 56, para. 10.1. Moreover, C Parliamentary business is subject to a strict timetable. A Minister has to respond very quickly to proposed amendments tabled at short notice. Briefing papers may have to be prepared in relation to amendments, although no one will know until the last minute which amendment will be taken or in which order or in which group. A Minister may not have time to respond fully—or at all—to a question based upon a particular interpretation. His silence cannot be taken as an indication that he agrees D with what was said.

A change in the rule is likely to necessitate changes in Parliamentary procedures. Ministers may be pressed to explain the meaning of the statute in more detail than they do at present so that the statement can be taken into account in construing the statute. If an earlier statement can affect the meaning of a provision then each House might have to E consider such a statement during the later stages of the passage of a Bill. It is not for the courts to impose such a burden on Parliament. At the present time a statement in Parliament which requires later correction may be corrected informally, for example, by a letter from the Minister to the relevant Member of Parliament. There is no method by which the courts can properly ensure that such a correction is brought to their attention. It is possible that Ministers would be less willing to be F committed to a formal explanation, and so be inhibited from providing any such explanation. Others may seek to mould, confine or limit the interpretation of the statute in ways on which the House has no opportunity to vote.

Article 9 of the Bill of Rights 1689 provides "that the freedome of speech and debates or proceedings in Parlyament ought not to be G impeached or questioned in any court or place out of Parlyament." [Reference was also made to *Blackstone's Commentaries on the Laws of England*, 4th ed. (1770), vol. 1, p. 131.] Analysis in the courts, both in argument and by way of decision, of what was said in the course of proceedings in Parliament, can easily lead to questioning whether the explanation of the application of an intended Act of Parliament reveals an imperfect understanding of the words used or of the particular H situation in question. Any consideration of what is said in Parliament will require the context of statements, the reliability of those statements, and even the identity of the speaker, to be considered for the purpose of assessing relevance and weight. Adoption of a method of interpretation

which might affect free speech or the dignity of Parliament amounts to "questioning" proceedings in Parliament within the meaning of article 9: see also the broad construction adopted by the courts, consistent with the approach in *Pickin v. British Railways Board* [1974] A.C. 765; *Reg. v. Secretary of State for Trade, Ex parte Anderson Strathclyde Plc.* [1983] 2 All E.R. 233, 239B–C; *Church of Scientology of California v. Johnson-Smith* [1972] 1 Q.B. 522, 531F–G and *Rost v. Edwards* [1990] 2 Q.B. 460, 477E, 478A–C. Particular reliance is placed on *Bradlaugh v. Gossett* (1884) 12 Q.B.D. 271, 278–279.

The appellants seek to dismiss all constitutional arguments. But when the House of Commons passed the resolution of 31 October 1980 discontinuing the practice of presenting petitions it reaffirmed the status of proceedings in Parliament and declared that that status was confirmed by article 9 of the Bill of Rights 1689. The resolution was made in the context of the courts' refusal to use Parliamentary debates as an aid to construction and did not abolish that rule. The resolution was passed in the light of the fact that only in one case had leave been refused (in 1975) between 1818 and 1980; but when leave was given it was not for the purpose of using debates in Parliament as aids to construction.

The question of comity is of great importance. The sub judice rule is often questioned by members of the House of Commons but its importance in relation to the issue of comity with the courts is always pointed out.

Any change to the rule should be a matter for Parliament. The rule has stood unchanged in an "unbroken line" of cases in which it has been repeatedly reaffirmed. Such a central principle which directly affects the conduct of Parliamentary business ought not to be changed by the courts. Such a change would be particularly inappropriate where the rule has been considered by the Law Commissions and by Parliament, where it has been debated in Parliament, and where Parliament has not undertaken a change. The Law Commissions and the Renton Committee rejected any change in the rule after extensive consultation: see the Joint Report of the Law Commission and the Scottish Law Commission on the Interpretation of Statutes (1969) (Law Com. No. 21), pp. 52–54 and the Renton Committee Report on the Preparation of Legislation (1975) (Cmnd. 6053), pp. 161–162.

The House of Commons would regard a decision to use Hansard to construe a statute as a grave step and might well report that its views were not sought on such a matter before a decision was reached. I can only reserve the position of the House of Commons in defence of its own privileges.

The suggested advantages of a change in the rule would be far outweighed by the burden imposed on users of statutes and in the courts. In relation to suggested advantages, only in a small number of cases will resort to Hansard be of practical use—that is, either relevant or reliable—but the litigant and his advisers could not proceed on the assumption that nothing of use would be found in Parliamentary debates: see *Beswick v. Beswick* [1968] A.C. 58, 74A–B; *Davis v. Johnson* [1979] A.C. 264, 329G, 337D–E, 350A and the Joint Report of the Law Commissions, pp. 31–32, paras. 53–54 and p. 36, para. 61.

A It will not be easy to identify in advance those cases where reference to Hansard will be of real assistance. Issues of relevance and reliability will themselves give rise to extensive argument. Those issues arise inevitably from the nature of the Parliamentary process. A requirement that the leave of the court would be necessary before Hansard could be cited would itself require argument, and would do nothing to reduce the burden and cost of research. Any perceived advantage must be weighed B against the burden on the users of statutes.

There are particular problems in relation to access. The relevant materials are not readily available. Thus, of the most readily available material, Hansard, only the largest libraries hold copies. The relaxation of the rule would therefore increase expense and uncertainty in litigation.

The burden on the courts would be likely to be increased by citation C of Parliamentary debate and discussion of its context and the weight to be given to particular words. Citation cannot realistically be restricted to the higher courts. Practical considerations particularly influenced the Law Commissions in rejecting relaxation of the rule. [Reference was made to the Joint Report of the Law Commissions, p. 34, para. 59, p. 35, para. 60 and the Report of the Renton Committee, p. 142, para. 19.23 and p. 143, para. 19.26.]

D The general rule has stood as part of the common law for well over 100 years. No compelling reasons exist for introducing such a fundamental change to the principles, procedures and practice of the common law. The overwhelming weight of judicial authority has been against any change to the rule: see *Beswick v. Beswick* [1968] A.C. 58, 74A–C; *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* E [1975] A.C. 591, 613G–615C, 623F–G, 629E–630B, 638D–F, 645C–H; *Davis v. Johnson* [1979] A.C. 264, 265, 329D–330B, 337A–E, 345B–C, 349H–350D; *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251, 279E–280B, 281A–D and *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191, 232F–233B.

Pickstone v. Freemans Plc. [1989] A.C. 66 does not represent a relaxation of the rule for the following reasons. (a) The European F Communities Act 1972 required the United Kingdom to implement Community legislation. The House of Lords was essentially involved in the task of reaching a construction which would fulfil that obligation and achieve conformity between United Kingdom and Community legislation. (b) The European Communities Act 1972 provided sufficient authority for the interpretation adopted by the House of Lords of the Regulations. G There was no need to look at what the Minister said in order to reach that conclusion. (c) Parliament had power to reject but not to amend the draft Regulations: see *per* Lord Keith of Kinkel, at p. 112C, and *per* Lord Templeman, at p. 121H.

In Australia reference to external material is governed by statute. The Acts Interpretation Act 1901 was amended in 1981 and 1984. By an amendment of 1981 courts are directed to seek a purposive construction H of all Acts. But the Australian legislation does not merely render Hansard admissible as an aid. There is an hierarchy of extrinsic material prescribed and there are a number of hurdles which have to be surmounted. In particular, there must be ambiguity in the statutory

provision, or there must be some unreasonable result arising from the literal meaning of that provision. The Australian courts treat these hurdles seriously. The courts do not merely accept any argument that ambiguity exists.

It is noteworthy that in Australia there has been a division of judicial opinion as to whether analysis and construction of what is said in Parliament would involve a breach of article 9 of the Bill of Rights 1689. This led to the Parliamentary Privileges Act 1987, which by section 16(5) enacted that nothing stated in the Bill of Rights was to be taken to prevent the use in court of Hansard as an aid to interpretation. If, as does appear to be the position, the Australian system is working well, I suggest that this is because time and trouble have been taken to secure change only after the matters have been thoroughly debated in Parliament.

In adopting a purposive approach to the construction of the Treaties and legislation, the European Court of Justice applies the principle of "effet utile" to make an instrument as effective as possible in achieving its purpose. But it is a mistake to assume that the intention of the authors of a text is relied upon with any frequency. Commission proposals and the opinions of the European Parliament in the Economic and Social Committee (where these bodies have been consulted) are available but are not frequently considered by the Court. Actual discussions in the Commission and Council are secret. For an example of the approach adopted by the court, see *Reg. v. Immigration Appeal Tribunal, Ex parte Antonissen* (Case C-292/89) [1991] 2 C.M.L.R. 373, 400 and *Brown and Jacobs, The Court of Justice of the European Communities*, 3rd ed. (1989), pp. 277, 278.

Reference to Hansard to explain an exercise of ministerial discretion (see *Reg. v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696) or to justify domestic legislation where it appears to be contrary to Community law or Treaty obligations (see *Ex parte Equal Opportunities Commission* [1992] I.C.R. 341 and *Lithgow* [1986] E.H.R.R. 329) is quite different from the use to which it is now sought to put such references. Use in the examples given above could not give rise to constitutional problems. None of the problems as to the separation of powers or touching on freedom of speech in Parliament arise. Nor do the practical problems arise to the same extent because when action is justified by reference to statements in Parliament those statements will be readily identifiable and identified in an affidavit or written memorial. Questions of reliability and relevance are unlikely to arise.

In summary, the conclusions of the Law Commissions and the Renton Committee are as sound today as they were when they were reached. The constitutional and practical basis for the reasoning of the courts in supporting the current rule remains compelling. [Reference was also made to *Race Relations Board v. Dockers' Labour Club and Institute Ltd.* [1976] A.C. 285.]

Lester Q.C. in reply. For the origin of article 9 of the Bill of Rights 1689 see *United States v. Johnson* (1966) 383 U.S. 169, 177 et seq. The Attorney-General's submission gives too broad an interpretation to article 9 which could have a serious effect on the ambit of judicial review. It is to

be noted that in *Reg. v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696, it was the Crown which relied on Hansard to show that the Secretary of State's approach in that case was reasonable. That was a perfectly proper application of the principle for which the appellants contend. If it were not it would have serious consequences for the application of *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* [1948] 1 K.B. 223 and *Padfield v. Minister of Agriculture, Fisheries and Food* [1968] A.C. 997 in cases of judicial review: see *Auckland City Council v. Minister of Transport* [1990] 1 N.Z.L.R. 264, 293.

On the question of ambiguity, great reliance is placed on *Garland v. British Rail Engineering Ltd.* [1983] 2 A.C. 751. Just as in that case the House of Lords had recourse to the extrinsic aid of Community law to construe a statutory provision capable of bearing two meanings, in the instant appeal the House should have recourse to the extrinsic aid of the Parliamentary history of the provision in question to decide which of the two meanings is correct.

The appeal is an appropriate case in which the House should refer to Parliamentary material as an aid to the proper construction of section 63(2) for the following reasons. (a) Hansard confirms the ordinary meaning of the statutory words as contended for by the appellants; (b) if the statutory words are considered to be ambiguous, Hansard provides assistance to resolve that ambiguity; (c) if it is considered that the ordinary meaning of the words is that contended for by the Crown, this produces consequences which are manifestly absurd and unreasonable. Hansard provides assistance in determining a meaning of the statutory words which accords with the true object and purpose of Parliament.

The central issue is whether the expense in question has been "incurred in or in connection with" the provision of the benefit to the employee or his family. There must be a causal connection between the provision of the benefit to the employee and the incurring of the expense of its provision. The phrase "in or in connection with" creates a bond of causality between the expenses incurred and the provision of the benefit. The second limb of section 63(2), which enables expenses to be apportioned between the benefit and other matters, does not widen the meaning of the phrase "expense incurred in or in connection with its provision." The "expense" is the same under both limbs. The second limb merely enables expenses which relate to the benefit to be apportioned, and the relevant relationship is that the expense is incurred in or in connection with the provision of the benefit.

In the circumstances of the present case, the cost of the benefit is limited to the additional costs over and above those incurred in providing, maintaining and running the undertaking as a going concern, i.e., the sum of the direct additional costs incurred by Malvern College in providing for the education and maintenance of the taxpayers' sons. Those are the expenses which would not have been incurred but for such provision to them. This construction accords with the understanding of the man in the street. When asked how much the provision of an in-house benefit would cost an employer operating with surplus capacity, "his answer would be 'nothing:'" *per* Nicholls L.J. [1991] Ch. 203, 212F–G.

This construction accords with what the special commissioner described as "the commercial realities of the situation:" [1990] S.T.C. 6, 11F. It also avoids injustice and absurdity and administrative inconvenience which would otherwise result.

Reference should therefore be made to the debates in Hansard in seeking to construe section 63(2) in a manner which will accord with the intention of the legislation and which will avoid a wholly unreasonable result. In *Luke v. Inland Revenue Commissioners* [1963] A.C. 557 the House of Lords was prepared, in construing section 161(1) of the Income Tax Act 1952, to do what Lord Reid described, at p. 577, as "some violence to the words" so as to achieve the legislative intention and to produce a reasonable result. This was because to apply the words literally was to defeat the obvious intention of the legislation and to produce a wholly unreasonable result. In the present case it is not necessary to do violence to the statutory language, and in any event, the Parliamentary record should be referred to to achieve the intention of the legislation and to produce a reasonable result.

Moses Q.C. on the issue of statutory construction. This is a pure question of the construction of section 63(2) of the Finance Act 1976. The issue turns on the meaning of the words "in or in connection with" but this expression has to be read in the context of the series of sections as a whole in which section 63 occurs. But the relevant expense is not limited by section 63(2) to expense incurred exclusively for the benefit of the taxpayer. Subject to apportionment, where necessary, any expense which is of benefit to or results in benefit to him falls to be taken into account in measuring the cash equivalent of the benefit, even if it is a benefit also to others: see *per* Slade L.J. [1991] Ch. 203, 216E. The argument for the taxpayers ignores the words "in connection with." They are of the widest ambit. They are to be contrasted with such expressions as "pursuant to" or "by reason of" or "for the purpose of." The taxpayers' argument is primarily the same as before the Court of Appeal and is summarised in the judgment of Slade L.J.

The taxpayers contend that the expenditure in question is incurred in any event and therefore that this benefit should be left out of account. But this argument ignores the words "in connection with." The apportionment provision in section 63(2) clearly demonstrates the need for an apportionment between any expense relating partly to the benefit and partly to other matters. Moreover, the taxpayers' argument involves an inconsistent construction of section 63 with section 61 whereas the Crown's argument is consistent throughout this series of sections.

As to expenditure on external benefits, see the judgment of Nicholls L.J. [1991] Ch. 203, 211C–F. As to the argument relating to surplus places in the school the judgment of Nicholls L.J., at pp. 212H–213A, is adopted.

As to *Luke v. Inland Revenue Commissioners* [1963] A.C. 557 the House of Lords was seeking to avoid injustice: see pp. 573, 581, 585, 589. But the House, with the possible exception of Viscount Dilhorne, reached its conclusion without doing violence to the words "in connection with."

Their Lordships took time for consideration.

26 November. LORD MACKAY OF CLASHFERN L.C. My Lords, I have had the advantage of reading in draft the speech of my noble and learned friend, Lord Browne-Wilkinson. I respectfully adopt his narrative of the proceedings in this appeal and his account of the statutory provisions by reference to which it falls to be decided.

A fact which I regard as crucial to the decision of these appeals is stated by the special commissioner [1990] S.T.C. 6, 11F–G, as follows: "on the facts, the taxpayers' sons occupied only surplus places at the college and their right to do so was entirely discretionary." I regard it as important in considering the benefit which is to be subject to taxation that the benefit should be identified. The benefit which the taxpayers in this case received was the placing of their children in surplus places at the college, if as a matter of discretion the college agreed to do so. As I read the stated case there was no question of the taxpayers being entitled to have their children educated at the school. They were in a similar position to the person coming along on a standby basis for an airline seat as against the passenger paying a full fare, and without the full rights of a standby passenger, in the sense that the decision whether or not to accommodate them in the college was entirely discretionary. If one regards the benefit in this light I cannot see that the cost incurred in, or in connection with, the provision of the benefit, can properly be held to include the cost incurred, in any event, in providing education to fee paying pupils at the school who were there as a right in return for the fees paid in respect of them. The expenses incurred by the college were all incurred necessarily in order properly to provide for these pupils. No further expense over and above that was incurred in, or in connection with, the provision of surplus places to the taxpayers' children. Although the later words of section 63(2) provide that the expense incurred in, or in connection with, the provision of a benefit includes a proper proportion of any expense relating partly to the benefit and partly to other matters, I consider that the expenses incurred in provision of places for fee paying pupils were wholly incurred in order to provide those places. The benefit conferred upon the taxpayers was one which logically followed only when it was determined that there were surplus places and the authorities of the college in their discretion agreed to admit the taxpayers' children to these places. This decision was the decision to provide the benefit to the taxpayers' children and this decision involved no further expense on the college. I conclude that looking at the matter from the point of view of expense incurred and not from the point of view of loss to the employer no expense could be regarded as having been incurred as a result of the decision of the authorities of the college to provide this particular benefit to the taxpayer.

Notwithstanding the views that have found favour with others I consider this to be a reasonable construction of the statutory provisions and I am comforted in the fact that, apart from an attempt to tax airline employees, which was taken to the special commissioners who decided in favour of the taxpayer, this has been the practice of the Inland Revenue in applying the relevant words where they have occurred in the Income Tax Acts for so long as they have been in force, until they initiated the present cases.

At the very least it appears to me that the manner in which I have construed the relevant provisions in their application to the facts in this appeal is a possible construction and that any ambiguity there should be resolved in favour of the taxpayer.

For these reasons I would allow these appeals. I should perhaps add that I was not a member of the committee who heard these appeals in the first hearing since I became involved only when your Lordships who sat in the first hearing suggested a second hearing under my chairmanship and accordingly I have not been asked to consider this matter apart from the discussion of the extracts from Hansard which have been put before us in this appeal. However, this is the conclusion that I would have reached apart altogether from considering Hansard.

But much wider issues than the construction of the Finance Act 1976 have been raised in these appeals and for the first time this House has been asked to consider a detailed argument upon the extent to which reference can properly be made before a court of law in the United Kingdom to proceedings in Parliament recorded in Hansard.

For the appellant Mr. Lester submits that it should now be appropriate for the courts to look at Hansard in order to ascertain the intention of the legislators as expressed in the proceedings on the Bill which has then been enacted in the statutory words requiring to be construed. This submission appears to me to suggest a way of making more effective proceedings in Parliament by allowing the court to consider what has been said in Parliament as an aid to resolving an ambiguity which may well have become apparent only as a result of the attempt to apply the enacted words to a particular case. It does not seem to me that this can involve any impeachment, or questioning of the freedom of speech and debates or proceedings in Parliament, accordingly I do not see how such a use of Hansard can possibly be thought to infringe article 9 of the Bill of Rights 1689 and I agree with my noble and learned friend's more detailed consideration of that matter.

The principal difficulty I have on this aspect of the case is that in Mr. Lester's submission reference to Parliamentary material as an aid to interpretation of a statutory provision should be allowed only with leave of the court and where the court is satisfied that such a reference is justifiable: (a) to confirm the meaning of a provision as conveyed by the text, its object and purpose; (b) to determine a meaning where the provision is ambiguous or obscure; or (c) to determine the meaning where the ordinary meaning is manifestly absurd or unreasonable.

I believe that practically every question of *statutory* construction that comes before the courts will involve an argument that the case falls under one or more of these three heads. It follows that the parties' legal advisors will require to study Hansard in practically every such case to see whether or not there is any help to be gained from it. I believe this is an objection of real substance. It is a practical objection not one of principle, and I believe that it was the fundamental reason that Lord Reid, for example, considered the general rule to be a good one as he said in the passage my noble and learned friend has cited from *Beswick v. Beswick* [1968] A.C. 58, 74A. Lord Reid's statement is, I think, worthy of particular weight since he was a parliamentarian of great

A experience as well as a very distinguished judicial member of your Lordships' House. It is significant that in the following year, in his dissenting speech in *Reg. v. Warner* [1969] 2 A.C. 256, 279, he, while agreeing with the general rule, was prepared to consider an exception from it although not that the time was right to do so. But the exception he contemplated was in respect of a particular type of statute, namely, a statute creating criminal liability in which the question was whether or B not a guilty intention was required to create liability. Now that type of exception would mean that the practical difficulties to which he referred would not arise except in the comparatively few cases that arise of the particular type. The submission which Mr. Lester makes on the other hand is not restricted by reference to the type of statute and indeed the only way in which it could be discovered whether help was to be given is C by considering Hansard itself. Such an approach appears to me to involve the possibility at least of an immense increase in the cost of litigation in which statutory construction is involved. It is of course easy to overestimate such cost but it is I fear equally easy to underestimate it. Your Lordships have no machinery from which any estimate of such cost could be derived. Two inquiries with such machinery available to them, namely, that of the Law Commission and the Scottish Law Commission, D in their Joint Report on the Interpretation of Statutes (1969) (Law Com. No. 21) (Scot. Law Com. No. 11) and the Renton Committee Report on the Preparation of Legislation (1975) (Cmnd. 6053), advised against a relaxation on the practical grounds to which I have referred. I consider that nothing has been laid before your Lordships to justify the view that their advice based on this objection was incorrect.

E In his very helpful and full submissions Mr. Lester has pointed out that there is no evidence of practical difficulties in the jurisdictions where relaxations of this kind have already been allowed, but I do not consider that, full as these researches have been, they justify the view that no substantial increase resulted in the cost of litigation as a result of these relaxations, and, in any event, the Parliamentary processes in these jurisdictions are different in quite material respects from those in the F United Kingdom.

Your Lordships are well aware that the costs of litigation are a subject of general public concern and I personally would not wish to be a party to changing a well established rule which could have a substantial effect in increasing these costs against the advice of the Law Commissions and the Renton Committee unless and until a new inquiry demonstrated that G that advice was no longer valid.

I do not for my part find the objections in principle to be strong and I would certainly be prepared to agree the rule should no longer be adhered to were it not for the practical consideration to which I have referred and which my noble and learned friend agrees to be of real substance. Reference to proceedings in Parliament has already been allowed in *Pickstone v. Freemans Plc.* [1989] A.C. 66 without, I think, H any argument upon whether or not it was permissible, for ascertaining the purpose of subordinate legislation and also in other cases for ascertaining the purpose for which a power to make subordinate legislation was used. I believe that such statements are likely to be

readily identified in Parliamentary proceedings and the cases in which they are relevant will be determined by the nature of the subject matter. Allowing reference to Hansard in such cases does not have the large practical consequences to which I have referred. If reference to Parliamentary material is permitted as an aid to the construction of legislation which is ambiguous, or obscure or the literal meaning of which leads to an absurdity, I believe as I have said that in practically every case it will be incumbent on those preparing the argument to examine the whole proceedings on the Bill in question in both Houses of Parliament. Questions of construction may be involved on what is said in Parliament and I cannot see how if the rule is modified in this way the parties' legal advisers could properly come to court without having looked to see whether there was anything in the Hansard Report on the Bill which could assist their case. If they found a passage which they thought had a bearing on the issue in this case, that passage would have to be construed in the light of the proceedings as a whole.

I fully appreciate and feel the force of the narrowness of the distinctions which are taken between what is admissible and what is not admissible, but the exception presently proposed is so extensive that I do not feel able to support it in the present state of our knowledge of its practical results in this jurisdiction. For these reasons, I agree that these appeals should be allowed, although I cannot agree on the main issue, for the discussion of which this further hearing was arranged.

LORD KEITH OF KINKEL. My Lords, for the reasons set out in the speech to be delivered by my noble and learned friend, Lord Browne-Wilkinson, which I have had the opportunity of considering in draft and with which I agree, I would allow this appeal.

LORD BRIDGE OF HARWICH. My Lords, I was one of those who were in the majority at the conclusion of the first hearing of this appeal in holding the opinion that section 63 of the Finance Act 1976, construed by conventional criteria, supported the assessments to income tax made by the revenue on the appellants which had been upheld by Vinelott J. and the Court of Appeal. If it were not permissible to take account of the Parliamentary history of the relevant legislation and of ministerial statements of its intended effect, I should remain of that opinion. But once the Parliamentary material was brought to our attention, it seemed to me, as, I believe, to others of your Lordships who had heard the appeal first argued, to raise an acute question as to whether it could possibly be right to give effect to taxing legislation in such a way as to impose a tax which the Financial Secretary to the Treasury, during the passage of the Bill containing the relevant provision, had, in effect, assured the House of Commons it was not intended to impose. It was this which led to the appeal being re-argued before the Appellate Committee of seven which now reports to the House.

Following the further arguments of which we have had the benefit, I should find it very difficult, in conscience, to reach a conclusion adverse to the appellants on the basis of a technical rule of construction requiring me to ignore the very material which in this case indicates unequivocally

which of the two possible interpretations of section 63(2) of the Act of 1976 was intended by Parliament. But, for all the reasons given by my noble and learned friend, Lord Browne-Wilkinson, with whose speech I entirely agree, I am not placed in that invidious situation.

It should, in my opinion, only be in the rare cases where the very issue of interpretation which the courts are called on to resolve has been addressed in Parliamentary debate and where the promoter of the legislation has made a clear statement directed to that very issue, that reference to Hansard should be permitted. Indeed, it is only in such cases that reference to Hansard is likely to be of any assistance to the courts. Provided the relaxation of the previous exclusionary rule is so limited, I find it difficult to suppose that the additional cost of litigation or any other ground of objection can justify the court continuing to wear blinkers which, in such a case as this, conceal the vital clue to the intended meaning of an enactment. I recognise that practitioners will in some cases incur fruitless costs in the search for such a vital clue where none exists. But, on the other hand, where Hansard does provide the answer, it should be so clear to both parties that they will avoid the cost of litigation.

I would allow the appeal.

LORD GRIFFITHS. My Lords, I have long thought that the time had come to change the self-imposed judicial rule that forbade any reference to the legislative history of an enactment as an aid to its interpretation. The ever increasing volume of legislation must inevitably result in ambiguities of statutory language which are not perceived at the time the legislation is enacted. The object of the court in interpreting legislation is to give effect so far as the language permits to the intention of the legislature. If the language proves to be ambiguous I can see no sound reason not to consult Hansard to see if there is a clear statement of the meaning that the words were intended to carry. The days have long passed when the courts adopted a strict constructionist view of interpretation which required them to adopt the literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted. Why then cut ourselves off from the one source in which may be found an authoritative statement of the intention with which the legislation is placed before Parliament? I have had the advantage of reading the speech of Lord Browne-Wilkinson and save on the construction of the Act, without recourse to Hansard, I agree with all he has to say. In summary, I agree that the courts should have recourse to Hansard in the circumstances and to the extent he proposes. I agree that the use of Hansard as an aid to assist the court to give effect to the true intention of Parliament is not "questioning" within the meaning of article 9 of the Bill of Rights. I agree that the House is not inhibited by any Parliamentary privilege in deciding this appeal.

I cannot agree with the view that consulting Hansard will add so greatly to the cost of litigation, that on this ground alone we should refuse to do so. Modern technology greatly facilitates the recall and

display of material held centrally. I have to confess that on many occasions I have had recourse to Hansard, of course only to check if my interpretation had conflicted with an express Parliamentary intention, but I can say that it does not take long to recall and assemble the relevant passages in which the particular section was dealt with in Parliament, nor does it take long to see if anything relevant was said. Furthermore if the search resolves the ambiguity it will in future save all the expense that would otherwise be incurred in fighting the rival interpretations through the courts. We have heard no suggestion that recourse to Parliamentary history has significantly increased the cost of litigation in Australia or New Zealand and I do not believe that it will do so in this country.

As to the question of statutory construction I should myself have construed the section in favour of the taxpayer without recourse to Hansard. The crucial question is the meaning of the words "the cost of a benefit is the amount of any expense incurred in or connection with its provision." Do these words refer to the actual expense incurred by the school in providing the benefit or do they refer to the hypothetical expense incurred by the school arrived at by the formula of dividing the total cost of running the school by the number of pupils attending it or to put it more shortly do they refer to the additional or the average cost of the provision of the benefit.

I concede at once, the language is ambiguous and I see the strength of the linguistic argument in favour of the average cost construction. Nevertheless I could not believe that Parliament intended such a construction because it will produce what I regard as such unfair and absurd results.

If what I will call the hypothetical cost test is adopted it will come very close to a market value test. In the case of independent schools which for the most part are not run as independent profit making institutions and which set the fees to raise enough money to cover the cost of running the school, the test is virtually indistinguishable from a market value test. In the case of passenger transport undertakings such as railways and airlines which allow free travel to employees the test would provide mind-boggling difficulties of calculation and when the undertaking was running at a loss would result in a charge to tax that exceeded the fare charged to the general public; this would also be the case where school fees were heavily subsidised by endowments. I could not believe that this was the intention of Parliament. Nor could I believe that it was the intention to bring in at a single stroke a charge to tax that would be calculated to interrupt the education and expectations of so many parents and children, for it is surely common knowledge that the provision of free or subsidised education for the children of those teaching in independent schools was part of their usual terms of employment and that the salaries paid would be wholly insufficient to meet a charge to tax based on the full fees of the school. By the same token, bearing in mind that the salary level at which the tax bit was £5,000 a year, it will put the travel facilities attached to their employment out of the reach of many airline and rail employees. Probably the most universally provided "perk" is the company car. Parliament has introduced taxation of this "perk" but upon a gradually increasing scale—

A still short of the true value of the use of the car—no doubt because to have introduced it at its full value would have been seen as an unfair and unacceptable increase in the burden of taxation in one year on those who enjoyed the "perk" and of course the future of the British motor industry would be taken into account. It is against this background that I approached the construction and which led me to prefer the interpretation which bases the assessment to tax upon the actual cost to the employer B rather than the hypothetical cost arrived at by dividing the number of pupils into the total cost of providing full facilities.

I should make it clear that my construction did not depend upon the children of the staff taking up surplus places in the sense that if there were sufficient fee paying pupils, the staff's children would not be given a place. The crucial question, as I see it, is whether accepting the staff C children involved the school in extra expenditure. Absorbing the few staff children only involves the school in small extra costs such as food and laundry. All the main facilities of the school such as staff, buildings, playing fields and so forth are already provided for the fee paying pupils and no additional expenditure is incurred in respect of these costs by accepting a few children of the staff. This, as I understand it, is now the construction accepted by the majority of your Lordships in the light of D the Parliamentary history.

On this question of construction I was in a judicial minority of one at the end of the first hearing of this appeal. It was as a result of the discovery that the Parliamentary history of the legislation gave conclusive support to the construction I preferred that your Lordships agreed that the matter should be re-argued to determine whether it was permissible E to use the Parliamentary history as an aid to the interpretation of the legislation. In my view this case provides a dramatic vindication of the decision to consult Hansard; had your Lordships not agreed to do so the result would have been to place a very heavy burden of taxation upon a large number of persons which Parliament never intended to impose.

I agree that this appeal should be allowed.

F LORD ACKNER. My Lords, I entirely agree that for the reasons set out in the speech of my noble and learned friend, Lord Browne-Wilkinson, which I have had the advantage of reading in draft, this appeal should be allowed.

LORD OLIVER OF AYLMERTON. My Lords, I have had the advantage G of reading in draft the speech prepared by my noble and learned friend, Lord Browne-Wilkinson. I agree with it in its entirety and would, in the ordinary way, be content to do no more than express my concurrence both in the reasoning and in the result. I venture to add a few observations of my own only because I have to confess to having been a somewhat reluctant convert to the notion that the words which Parliament has chosen to use in a statute for the expression of its will may fall to be H construed or modified by reference to what individual members of Parliament may have said in the course of debate or discussion preceding the passage of the Bill into law. A statute is, after all, the formal and complete intimation to the citizen of a particular rule of the law which

he is enjoined, sometimes under penalty, to obey and by which he is both expected and entitled to regulate his conduct. We must, therefore, I believe, be very cautious in opening the door to the reception of material not readily or ordinarily accessible to the citizen whose rights and duties are to be affected by the words in which the legislature has elected to express its will.

But experience shows that language—and, particularly, language adopted or concurred in under the pressure of a tight Parliamentary timetable—is not always a reliable vehicle for the complete or accurate translation of legislative intention; and I have been persuaded, for the reasons so cogently deployed in the speech of my noble and learned friend, that the circumstances of this case demonstrate that there is both the room and the necessity for a limited relaxation of the previously well-settled rule which excludes reference to Parliamentary history as an aid to statutory construction.

It is, however, important to stress the limits within which such a relaxation is permissible and which are set out in the speech of my noble and learned friend. It can apply only where the expression of the legislative intention is genuinely ambiguous or obscure or where a literal or prima facie construction leads to a manifest absurdity and where the difficulty can be resolved by a clear statement directed to the matter in issue. Ingenuity can sometimes suggest ambiguity or obscurity where none exists in fact, and if the instant case were to be thought to justify the exercise of combing through reports of Parliamentary proceedings in the hope of unearthing some perhaps incautious expression of opinion in support of an improbable secondary meaning, the relaxation of the rule might indeed lead to the fruitless expense and labour which has been prayed in aid in the past as one of the reasons justifying its maintenance. But so long as the three conditions expressed in the speech of my noble and learned friend are understood and observed, I do not, for my part, consider that the relaxation of the rule which he has proposed will lead to any significant increase in the cost of litigation or in the burden of research required to be undertaken by legal advisers.

So far as the merits of the instant appeal are concerned, I, like my noble and learned friends, Lord Bridge of Harwich and Lord Browne-Wilkinson, was in favour of dismissing the appeal at the conclusion of the first hearing. Were it not for the material in the reports of Hansard to which your Lordships have been referred, I, too, would still be of that view, for although I recognise that in popular parlance the provision to one individual of a service which is, in any event, being provided for reward to many others may be said to cost the provider little or nothing, "cost" in accountancy terms is merely a computation of outgoing expenditure without reference to receipts. Where, however, the cost of providing a service is balanced or overtopped by amounts received for the service from others to whom it is provided, the man in the street might well, and probably would, say that the provider had incurred no expense in providing the particular benefit under consideration. Certainly he incurs no additional cost or expense. I accept, therefore, that, in referring to the "the cost of the benefit" and the "expense incurred in its provision," subsections (1) and (2) of section 63 of the Finance Act 1976

introduced an element of ambiguity. That is underlined by the absurdity which would result from a literal construction of the word "cost" in the case of a loss-making concern such as British Rail or a heavily endowed institution, where the employee's benefit would have to be valued at a figure in excess—indeed, it may be many times in excess—of the market price of the service provided. The references to Hansard which are set out in the speech of my noble and learned friend, Lord Browne-Wilkinson, put it beyond doubt that that could not have been the intention of Parliament in enacting the section.

Accordingly, I, too, would allow the appeal. I would add only that I find myself quite unable to see how referring to the reports of Parliamentary debates in order to determine the meaning of the words which Parliament has employed could possibly be construed as "questioning" or "impeaching" the freedom of speech or debate or proceedings in Parliament or as otherwise infringing the provisions of article 9 of the Bill of Rights.

LORD BROWNE-WILKINSON. My Lords, the underlying subject matter of these tax appeals is the correct basis for valuing benefits in kind received by the taxpayers who are schoolmasters. However in the circumstances which I will relate, the appeals have also raised two questions of much wider importance. The first is whether in construing ambiguous or obscure statutory provisions your Lordships should relax the historic rule that the courts must not look at the Parliamentary history of legislation or Hansard for the purpose of construing such legislation. The second is whether, if reference to such materials would otherwise be appropriate, it would contravene article 9 of the Bill of Rights 1689 or Parliamentary privilege so to do.

The facts are fully set out in the judgments of Vinelott J. [1990] 1 W.L.R. 204 at first instance and of the Court of Appeal [1991] Ch. 203. Shortly stated, the taxpayers are nine masters and the bursar employed by Malvern College ("the school"). For many years the school has run a concessionary scheme under which members of the staff are entitled to have their children educated at the school on payment of only one-fifth of the sum charged to members of the public. In the relevant tax years, 1983–84, 1984–85 and 1985–86, children of one or more of the taxpayers were educated at the school on payment of the concessionary fees only. It is common ground that the concessionary fees more than covered the additional cost to the school of educating the taxpayers' children.

The school had a capacity to accept 625 boys but in the relevant years the school was not full to capacity. The admission of the taxpayers' children to the school therefore did not involve the school in losing full fees which would otherwise have been paid by members of the public for the places which the taxpayers' children occupied.

It is common ground that the education of the children at reduced fees was a taxable benefit under section 61(1) of the Finance Act 1976 which provides:

> "[Subject to section 63(A)(*b*)] where in any year a person is employed in director's or higher-paid employment and—(*a*) by reason of his employment there is provided for him, or for others

being members of his family or household, any benefit to which this section applies; and (*b*) the cost of providing the benefit is not (apart from this section) chargeable to tax as his income, there is to be treated as emoluments of the employment, and accordingly chargeable to income tax under Schedule E, an amount equal to whatever is the cash equivalent of the benefit."

The crucial question relates to the amount which is to be treated as an emolument, i.e., what is "the cash equivalent of the benefit." These words are defined by section 63(1) and (2) as follows:

"(1) The cash equivalent of any benefit chargeable to tax under section 61 above is an amount equal to the cost of the benefit, less so much (if any) of it as is made good by the employee to those providing the benefit. (2) Subject to the following subsections, the cost of a benefit is the amount of any expense incurred in or in connection with its provision, and (here and in those subsections) includes a proper proportion of any expense relating partly to the benefit and partly to other matters."

The taxpayers contend that the only expense incurred by the school "in or in connection" with the education of their children is the additional, or marginal, cost to the school. The school was, in any event, up and running so as to provide its educational facilities for 625 boys. All the costs of running the school (staff salaries, provision of buildings and grounds etc.) would have had to be incurred in any event: the admission of the taxpayers' children did not increase these basic expenses in any way. The only expense attributable to the education of the taxpayers' children (additional food, laundry, stationery etc.) was fully covered by the one-fifth concessionary fee paid by the taxpayers. Therefore "the cash equivalent of the benefit" is nil.

The revenue on the other hand contend that the "expense incurred in or in connection with" the provision of education for the children of the taxpayers was exactly the same as the expense incurred in or in connection with the education of all other pupils at the school and accordingly the expense of educating any one child is a proportionate part of the cost of running the whole school.

These provisions regulate the taxation of all benefits in kind. As Nicholls L.J. pointed out in the Court of Appeal, for present purposes such benefits can be of two kinds. First, the benefit may be of a kind bought in from outside the employer's business, such as a car or medical insurance ("external benefits"). Second, the benefit may consist of the enjoyment by the employee of services or facilities which it is part of the employer's business to sell to the public, for example concessionary travel for railway or airline employees or concessionary education for the children of schoolteachers ("in-house benefits"). In both cases the benefit falls to be quantified by reference to the expense of providing the benefit. In the case of external benefits this does not normally raise any major problems because such cost is an isolated expenditure. But in the case of in-house benefits there is an obvious problem, since the employer is, for the purpose of selling the facility to the public, incurring the cost of running the train, airline or school the use of which is provided on a

A concessionary basis to the employee. What then is the cost to the employer of providing the in-house benefit for the employee? Is it only the additional or marginal cost to the employer providing the service for the employee, or is it a proportionate part of the total costs incurred by the employer in providing the facility to be used both by the public and by the employee?

B The special commissioner held in favour of the taxpayers. That decision was reversed by Vinelott J. [1990] 1 W.L.R. 204, whose decision was affirmed by the Court of Appeal [1991] Ch. 203. The taxpayers appeal to your Lordships' House.

The case was originally argued before your Lordships without reference to any Parliamentary proceedings. After the conclusion of the first hearing, it came to your Lordships' attention that an examination of C the proceedings in Parliament in 1976 which lead to the enactment of sections 61 and 63 might give a clear indication which of the two rival contentions represented the intention of Parliament in using the statutory words. Your Lordships then invited the parties to consider whether they wished to present further argument on the question whether it was appropriate for the House (under *Practice Statement (Judicial Precedent)* D [1966] 1 W.L.R. 1234) to depart from previous authority of this House which forbids reference to such material in construing statutory provisions and, if so, what guidance such material provided in deciding the present appeal. The taxpayers indicated that they wished to present further argument on these points. The case was listed for rehearing before a committee of seven members not all of whom sat on the original E committee.

At the start of the further hearing, the Attorney-General, who appeared for the Crown, drew our attention to a letter addressed to him by the Clerk of the House of Commons suggesting that any reference to Hansard for the purpose of construing the Act might breach the privileges of that House. Until 31 October 1980, the House of Commons took the F view that any reference to Hansard in court proceedings would constitute a breach of its privileges and required a petition for leave to use Hansard to be presented in each case. On 31 October 1980 the House of Commons resolved as follows:

> "That this House, while re-affirming the status of proceedings in Parliament confirmed by article 9 of the Bill of Rights, gives leave G for reference to be made in future court proceedings to the Official Report of Debates and to the published Reports and evidence of Committees in any case in which, under the practice of the House, it is required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to Parliamentary papers be discontinued."

H The letter of 5 June 1992 from the Clerk of the House of Commons starts by saying, "My attention has been drawn to the fact that the House of Lords may be asked to hear argument in this case based on the meaning or significance of words spoken during proceedings on a Bill in

the House of Commons." The letter then sets out the text of the resolution of 31 October 1980, and continues:

> "In my opinion, the use proposed for the Official Report of Debates in this case is beyond the meaning of the 'reference' contemplated in the Resolution of October 1980. If a court were minded in particular circumstances to permit the questioning of the proceedings of the House in the way proposed, it would be proper for the leave of the House to be sought first by way of petition so that, if leave were granted, no question would arise of the House regarding its privileges as having been breached."

The reference in that letter to "questioning" the proceedings of the House of Commons plainly raised the issue whether the proposed use of Parliamentary materials without the leave of the House of Commons would breach article 9 of the Bill of Rights 1689 which provides:

> "That the freedome of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament."

The Attorney-General, while submitting that such use of Parliamentary material would breach article 9, accepted that it was for the courts to determine the legal meaning and effect of article 9. However, the Attorney-General warned your Lordships that, even if reference in this case to Parliamentary materials did not infringe article 9, the House of Commons might take the view the House enjoyed some wider privilege which we would be infringing and might well regret that its views on the point had not been sought before a decision was reached by your Lordships. Whilst strictly maintaining the privileges of the House of Commons, the Attorney-General used the Parliamentary materials in this case as an illustration of the dangers of so doing. Moreover, in order to assist us, whilst still maintaining the privileges of the House of Commons, he made submissions as to the effect of such material on the construction of section 63 if, contrary to his contentions and advice, we decided this appeal with the assistance of such material.

In the result, the following issues arise. 1. Should the existing rule prohibiting any reference to Hansard in construing legislation be relaxed and, if so, to what extent? 2. If so, does this case fall within the category of cases where reference to Parliamentary proceedings should be permitted? 3. If reference to Parliamentary proceedings is permissible, what is the true construction of the statutory provisions? 4. If reference to the Parliamentary proceedings is not permissible, what is the true construction of the statutory provisions? 5. If the outcome of this case depends upon whether or not reference is made to Hansard, how should the matter proceed in the face of the warnings of the Attorney-General that such references might constitute a breach of parliamentary privilege?

I will consider these issues in turn, but first I must set out the Parliamentary history of sections 61 and 63 by reference to which the case was argued before us.

The Parliamentary material

For reasons which will appear it is necessary first to refer to the legislation affecting the taxation of benefits in kind before 1975. Under the Finance Act 1948, section 39(1), directors and employees of bodies corporate earning more than £2,000 per annum were taxed under Schedule E on certain benefits in kind. The amount charged was the expense incurred by the body corporate "in or in connection with the provision" of the benefit in kind. By section 39(6) it was provided that references to expenses "incurred in or in connection with any matter includes a reference to a proper proportion of any expense incurred partly in or in connection with that matter." Employment by a school or charitable organisation was expressly excluded from the charge: sections 41(5) and 44. These provisions were re-enacted in the Income and Corporation Taxes Act 1970.

Those provisions covered in-house benefits as well as external benefits. We were told that after 1948 the revenue sought to tax at least two categories of employees in receipt of in-house benefits. Higher paid employees of the railways enjoy free or concessionary travel on the railways. The revenue reached an agreement that such employees should be taxed on 20 per cent. (later 25 per cent.) of the full fare. Airline employees also enjoy concessionary travel. We were told that in the 1960s the revenue sought to tax such employees on that benefit on the basis of the average cost to the airline of providing a seat, not merely on the marginal cost. The tax commissioners rejected such claim: the revenue did not appeal. Therefore in practice from 1948 to 1975 the revenue did not seek to extract tax on the basis of the average cost to the employer of providing in-house benefits.

In 1975 the Government proposed a new tax on vouchers provided by an employer to his employees which could be exchanged for goods or services. Clause 33(1) of the Finance (No. 2) Bill 1975 provided that the employee was to be treated, on receipt of a voucher, as having received an emolument from his employment of an amount "equal to the expense incurred by the person providing the voucher in or in connection with the provision of the voucher and the money, goods or services for which it is capable of being exchanged." The statutory wording of the Bill was therefore similar to that in the Act of 1948 and in section 63(2) of the Finance Act 1976. On 1 July 1975 in the Standing Committee on the Bill (Standing Committee H), the Financial Secretary was asked about the impact of the clause on railwaymen. He gave the following answer (Hansard, column 666):

> "Similarly, the railwayman travelling on his normal voucher will not be taxable either. The clause deals with the situation where a number of firms produce incentives of various kinds. In one or two instances, there is likely to be some liability concerning rail vouchers of a special kind, but in general, the position is as I have said and they will not be taxable."

He was then asked to explain why they would not be taxable and replied:

> "Perhaps I can make clear why there is no taxable benefit in kind, because the provision of the service that he provides falls upon the

employer. Clearly, the railways will run in precisely the same way whether the railwaymen use this facility or not, so there is no extra charge to the Railways Board itself, therefore there would be no taxable benefits."

Later he explained that by the words "no extra charge" he meant "no extra cost." Clause 33(1) of the Bill was enacted as section 36(1) of the Finance (No. 2) Act 1975.

The Finance Bill 1976 sought to make a general revision of the taxation of benefits in kind. The existing legislation on fringe benefits was to be repealed. Clause 52 of the Bill as introduced eventually became section 61 of the Act of 1976 and imposed a charge to tax on benefits in kind for higher paid employees, i.e., those paid more than £5,000 per annum. Clause 54 of the Bill eventually became section 63 of the Act of 1976. As introduced, clause 54(1) provided that the cash equivalent of any benefit was to be an amount equal to "the cost of the benefit." Clause 54(2) provided that, except as provided in later subsections "the cost of a benefit is the amount of any expense incurred in or in connection with its provision." Crucially, clause 54(4) of the Bill sought to tax in-house benefits on a different basis from that applicable to external benefits. It provided that the cost of a benefit consisting of the provision of any service or facility which was also provided to the public (i.e., in-house benefits) should be the price which the public paid for such facility or service. Employees of schools were not excluded from the new charge.

Thus if the 1976 Bill had gone through as introduced, railway and airline employees would have been treated as receiving benefits in kind from concessionary travel equal to the open market cost of tickets and schoolmasters would have been taxed for concessionary education on the amount of the normal school fees.

After second reading, clause 52 of the Bill was committed to a committee of the whole House and clause 54 to Standing Committee E. On 17 May 1976, the House considered clause 52 and strong representations were made about the impact of clause 52 on airline and railway employees. At the start of the meeting of Standing Committee E on 17 June 1976 (before clause 54 was being discussed) the Financial Secretary to the Treasury, Mr. Robert Sheldon, made an announcement (Hansard, columns 893–895) in the following terms:

> "The next point I wish to make concerns services and deals with the position of employees of organisations, bodies, or firms which provide services, where the employee is in receipt of those services free or at a reduced rate. Under clause 54(4) the taxable benefit is to be based on the arm's length price of the benefit received. At present the benefit is valued on the cost to the employer. Representations have been made concerning airline travel and railway employees. . . . It was never intended that the benefit received by the airline employee would be the fare paid by the ordinary passenger. The benefit to him would never be as high as that, because of certain disadvantages that the employee has. Similar considerations, although of a different kind, apply to railway

A employees. I have had many interviews, discussions and meetings on this matter and I have decided to withdraw clause 54(4). I thought I would mention this at the outset because so many details, which would normally be left until we reach that particular stage, will be discussed with earlier parts of the legislation. I shall give some reasons which weigh heavily in favour of the withdrawal of this provision. The first is the large difference between the cost of B providing some services and the amount of benefit which under the Bill would be held to be received. There are a number of cases of this kind, and I would point out that air and rail journeys are only two of a number of service benefits which have a number of problems attached to them. But there is a large difference between the cost of the benefit to the employer and the value of that benefit C as assessed. It could lead to unjustifiable situations resulting in a great number of injustices and I do not think we should continue with it. . . .

"The second reason for withdrawing clause 54(4) is that these services would tend to be much less used. The problem would then arise for those who had advocated the continuation of this legislation that neither the employer nor the employee nor the Revenue would D benefit from the lesser use of these services. This factor also weighed with me. The third reason is the difficulty of enforcement and administration, which both give rise to certain problems. Finally, it was possible to withdraw this part of the legislation as the services cover not only a more difficult area, but a quite distinct area of these provisions, without having repercussions on some of the E other areas. . . .

"A member: I, too, have talked to many airline employees about this matter, and I am not completely clear as to the purport of my Hon. Friend's remarks. Is he saying that these benefits will remain taxable but that the equivalent cost of the benefit will be calculated on some different basis? Or is he saying that these benefits will not be taxable at all?

F "Financial Secretary: The existing law which applies to the taxation of some of these benefits will be retained. The position will subsequently be unchanged from what it is now before the introduction of this legislation."

The Financial Secretary was then asked to elucidate the impact of this G on airline employees. At column 930, he is reported as saying:

"There is a difference between the provision of services to an employee earning less than £5,000 and an employee earning more than £5,000, or one who is a director. The position is quite clear. What we are withdrawing is the arm's-length valuation of benefit under clause 54(4) where an employer is providing services to the employee at a cost which may be very little. The employee earning H more than £5,000 or the director will be assessed on the benefit received by him on the basis of the cost to the employer rather than the price that would generally be charged to the public. That is the position that we have now brought in, as opposed to the original

one in the Bill where it would be assessed on the cost to a member of the public. That position now is the same as it stands before this legislation is passed."

After being further pressed, the Financial Secretary said, at column 931:

"The position is as I have enunciated it. If a company provides a service to the kind of employee which we have been talking about, and the company subsidises that service, the benefit assessable on the employee is the cost to the employer of providing that service. This was to have been changed by clause 54(4) under which the benefit received was to be assessed at the arm's length price which an ordinary member of the public would have paid for that service. Some companies provide services of a kind where the cost to them is very little. For example, an airline ticket, allowing occupation of an empty seat, costs an airline nothing—in fact, in such a case there could be a negative cost, as it might be an advantage to the airline to have an experienced crew member on the flight. The cost to the company, then, would be nothing, but the benefit assessable under clause 54(4) could be considerable. We are reverting to the existing practice."

He further said:

"If the company provides services to such people at a subsidised rate, the employee will be assessed on the benefit received on the basis of the cost to the employer. That is the position as it was before this Bill and as it will be if the whole of the Bill is passed, because subsection (2) only restates the existing position. It does not produce anything new (column 931)."

Simultaneously with the announcement to the Standing Committee, a press release was issued announcing the withdrawal of clause 54(4). It referred to the same matters as the Financial Secretary had stated to the Committee and concluded:

"The effect of deleting this subclause will be to continue the present basis of taxation of services, namely the cost to the employer of providing the service."

The point was further debated in committee on 22 June 1976.

A member is reported as saying, at column 1013, that

"Like many others, I welcome the concession that has been made to leave out the airline staff and the railway employees and all the others that are left out by the dropping of clause 54(4)."

Another member, after referring to the particular reference in the Financial Secretary's statement to airline and railway employees, asked whether the same distinction applied to services provided by hotel companies to their employees—that is, to rooms which are freely available for the general public in hotels being offered at a concessionary

rate to employees of the hotel group. In response, the Financial Secretary said of the position of such employees:

> "The position is, as he probably expected, the same as that which, following my announcement last week about the withdrawal of clause 54(4), applies to other employees in service industries; the benefit is the cost to the employer. It is a good illustration of one of the reasons why I withdrew this subsection, in that the cost to the employer in this instance could be much less than the arm's-length cost to the outside person taking advantage of such a service."(Column 1024.)

The question of the taxation of merchant seamen in respect of travel concessions to their families on their employers' ships was raised by another speaker and an amendment (No. 299) was tabled to meet their position. The Financial Secretary said, at column 1100:

> "Perhaps I may discuss a closely allied problem under Amendment No. 299, to which a number of Hon. Gentlemen spoke. This proposal concerns the employee of a company and his wife, or the spouse, and the concession of a free passage or voyage in a company ship 'once in each calendar year' according to the amendment. I think that I can satisfy the Hon. Gentlemen that these voyages will not now be subject to tax as a result of the withdrawal of subsection (4), apart from the nominal charge for food which is normally made and which would be assessable. The current position more than meets the amendment. As I understand the matter, there could be a fair number of such voyages, and the only basis for charge would be on the cost to the employer, and in the example that we are considering that would be very small."

The very question which is the subject matter of the present appeal was also raised. A member said, at columns 1091–1092:

> "I should be grateful for the Financial Secretary's guidance on these two points. . . . The second matter applies particularly to private sector, fee-paying schools where, as the Financial Secretary knows, there is often an arrangement for the children of staff in these schools to be taught at less than the commercial fee in other schools. I take it that because of the deletion of clause 54(4) that is not now caught. Perhaps these examples will help to clarify the extent to which the Government amendment goes."

The Financial Secretary responded to this question as follows:

> "He mentioned the children of teachers. The removal of clause 54(4) will affect the position of a child of one of the teachers at the child's school, because now the benefit will be assessed on the cost to the employer, which would be very small indeed in this case."(Column 1098.)

Thereafter, clause 54 was not the subject of further debate and passed into law as it now stands as section 63 of the Act.

The position can therefore be summarised as follows. The Bill as introduced sought by clause 54(4) to tax in-house benefits on a different

basis from other benefits, i.e., not on the cost of the in-house benefit to the employer but on the open market price charged to the public. On the deletion of clause 54(4), in-house benefits were to be taxed on the same basis as external benefits, i.e., on the cost to the employer of providing the benefit. Numerous inquiries were made of the Financial Secretary to elucidate the resulting effect of the Bill on in-house benefits, i.e., concessionary travel for airline, railway and merchant navy employees, on benefits for hotel employees and on concessionary education for the children of teachers. In responding to each of these requests for information (save that relating to teachers), the Financial Secretary stated that the effect of the Bill would be to leave their position unchanged from the previous law. He explained that in each case (including that of teachers) the charge would be on the cost to the employer of providing the services and that in each case that cost would either be nil or very small. After these statements were made by the Financial Secretary the Bill passed into law without further discussion on this aspect of the matter.

Against that background I turn to consider the various issues which I have identified.

1. Should the rule prohibiting references to Parliamentary material be relaxed?

Under present law, there is a general rule that references to Parliamentary material as an aid to statutory construction is not permissible ("the exclusionary rule"): *Davis v. Johnson* [1979] A.C. 264 and *Hadmor Productions Ltd v. Hamilton* [1983] 1 A.C. 191. This rule did not always apply but was judge made. Thus, in *Ash v. Abdy* (1678) 3 Swans. 664 Lord Nottingham took judicial notice of his own experience when introducing the Bill in the House of Lords. The exclusionary rule was probably first stated by Willes J. in *Millar v. Taylor* (1769) 4 Burr. 2303, 2332. However, the case of *In re Mew and Thorne* (1862) 31 L.J.Bank. 87 shows that even in the middle of the last century the rule was not absolute: in that case Lord Westbury L.C. in construing an Act had regard to its Parliamentary history and drew an inference as to Parliament's intention in passing the legislation from the making of an amendment striking out certain words.

The exclusionary rule was later extended so as to prohibit the court from looking even at reports made by commissioners on which legislation was based: *Salkeld v. Johnson* (1848) 2 Exch. 256, 273. This rule has now been relaxed so as to permit reports of commissioners, including law commissioners, and white papers to be looked at for the purpose solely of ascertaining the mischief which the statute is intended to cure but not for the purpose of discovering the meaning of the words used by Parliament to effect such cure: *Eastman Photographic Materials Co. Ltd. v. Comptroller-General of Patents, Designs and Trademarks* [1898] A.C. 571 and *Assam Railways and Trading Co. Ltd. v. Commissioners of Inland Revenue* [1935] A.C. 445, 457–458. Indeed, in *Reg. v. Secretary of State for Transport, Ex parte Factortame Ltd.* [1990] 2 A.C. 85 your Lordships' House went further than this and had regard to a Law Commission report not only for the purpose of ascertaining the mischief

A but also for the purpose of drawing an inference as to Parliamentary intention from the fact that Parliament had not expressly implemented one of the Law Commission's recommendations.

Although the courts' attitude to reports leading to legislation has varied, until recently there was no modern case in which the court had looked at parliamentary debates as an aid to construction. However, in *Pickstone v. Freemans Plc.* [1989] A.C. 66 this House, in construing a B statutory instrument, did have regard to what was said by the Minister who initiated the debate on the regulations. My noble and learned friend, Lord Keith of Kinkel, at p. 112B, after pointing out that the draft Regulations were not capable of being amended when presented to Parliament, said that it was "entirely legitimate for the purpose of ascertaining the intention of Parliament to take into account the terms in C which the draft was presented by the responsible Minister and which formed the basis of its acceptance." My noble and learned friend, Lord Templeman, at pp. 121–122, also referred to the Minister's speech, although possibly only by way of support for a conclusion he had reached on other grounds. My noble and learned friends, Lord Brandon of Oakbrook and Lord Jauncey of Tullichettle, agreed with both those speeches. This case therefore represents a major inroad on the D exclusionary rule: see also *Owens Bank Ltd. v. Bracco* [1992] 2 A.C. 443.

Mr. Lester, for the taxpayers, did not urge us to abandon the exclusionary rule completely. His submission was that where the words of a statute were ambiguous or obscure or were capable of giving rise to an absurd conclusion it should be legitimate to look at the Parliamentary E history, including the debates in Parliament, for the purpose of identifying the intention of Parliament in using the words it did use. He accepted that the function of the court was to construe the actual words enacted by Parliament so that in no circumstances could the court attach to words a meaning that they were incapable of bearing. He further accepted that the court should only attach importance to clear statements showing the intention of the promoter of the Bill, whether a Minister or private F member: there could be no dredging through conflicting statements of intention with a view to discovering the true intention of Parliament in using the statutory words.

In *Beswick v. Beswick* [1968] A.C. 58, 74 Lord Reid said:

> "For purely practical reasons we do not permit debates in either House to be cited: it would add greatly to the time and expense G involved in preparing cases involving the construction of a statute if counsel were expected to read all the debates in Hansard, and it would often be impracticable for counsel to get access to at least the older reports of debates in Select Committees of the House of Commons; moreover, in a very large proportion of cases such a search, even if practicable, would throw no light on the question before the court."

H In *Black-Clawson International Ltd. v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591 Lord Reid said, at pp. 613–615:

> "We often say that we are looking for the intention of Parliament, but that is not quite accurate. We are seeking the meaning of the

words which Parliament used. We are seeking not what Parliament meant but the true meaning of what they said. . . . I have more than once drawn attention to the practicial difficulties . . . but the difficulty goes deeper. The questions which give rise to debate are rarely those which later have to be decided by the courts. One might take the views of the promoters of a Bill as an indication of the intention of Parliament but any view the promoters may have about the questions which later come before the court will not often appear in Hansard and often those questions have never occurred to the promoters. At best we might get material from which a more or less dubious inference might be drawn as to what the promoters intended or would have intended if they had thought about the matter, and it would, I think, generally be dangerous to attach weight to what some other members of either House may have said. . . . in my view, our best course is to adhere to present practice."

In the same case Lord Wilberforce said, at p. 629:

"The second [reason] is one of constitutional principle. Legislation in England is passed by Parliament, and put in the form of written words. This legislation is given legal effect upon subjects by virtue of judicial decision, and it is the function of the courts to say what the application of the words used to particular cases or individuals is to be. . . . it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say."

In *Fothergill v. Monarch Airlines Ltd.* [1981] A.C. 251, 279, Lord Diplock said:

"The constitutional function performed by courts of justice as interpreters of the written law laid down in Acts of Parliament is often described as ascertaining 'the intention of Parliament;' but what this metaphor, though convenient, omits to take into account is that the court, when acting in its interpretative role, as well as when it is engaged in reviewing the legality of administrative action, is doing so as mediator between the state in the exercise of its legislative power and the private citizen for whom the law made by Parliament constitutes a rule binding upon him and enforceable by the executive power of the state. Elementary justice or . . . the need for legal certainty demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him) by reference to identifiable sources that are publicly accessible."

In *Davis v. Johnson* [1979] A.C. 264, 350, Lord Scarman said:

"such material is an unreliable guide to the meaning of what is enacted. It promotes confusion, not clarity. The cut and thrust of debate and the pressures of executive responsibility, the essential features of open and responsible government, are not always conducive to a clear and unbiased explanation of the meaning of statutory language. And the volume of Parliamentary and ministerial utterances can confuse by its very size."

A Thus the reasons put forward for the present rule are first, that it preserves the constitutional proprieties leaving Parliament to legislate in words and the courts (not Parliamentary speakers), to construe the meaning of the words finally enacted; second, the practical difficulty of the expense of researching Parliamentary material which would arise if the material could be looked at; third, the need for the citizen to have access to a known defined text which regulates his legal rights; fourth, B the improbability of finding helpful guidance from Hansard.

The Law Commissions of England and Scotland in their joint Report on the Interpretation of Statutes in 1969 and the Renton Committee on the Preparation of Legislation both recognised that there was much to be said in principle for relaxing the rule but advised against a relaxation at present on the same practical grounds as are reflected in the C authorities. However, both bodies recommended changes in the form of legislation which would, if implemented, have assisted the court in its search for the true Parliamentary intention in using the statutory words.

Mr. Lester submitted that the time has come to relax the rule to the extent which I have mentioned. He points out that the courts have departed from the old literal approach of statutory construction and now adopt a purposive approach, seeking to discover the Parliamentary D intention lying behind the words used and construing the legislation so as to give effect to, rather than thwart, the intentions of Parliament. Where the words used by Parliament are obscure or ambiguous, the Parliamentary material may throw considerable light not only on the mischief which the Act was designed to remedy but also on the purpose of the legislation and its anticipated effect. If there are statements by E the Minister or other promoter of the Bill, these may throw as much light on the "mischief" which the Bill seeks to remedy as do the white papers, reports of official committees and Law Commission reports to which the courts already have regard for that purpose. If a Minister clearly states the effect of a provision and there is no subsequent relevant amendment to the Bill or withdrawal of the statement it is reasonable to assume that Parliament passed the Bill on the basis that the provision F would have the effect stated. There is no logical distinction between the use of ministerial statements introducing subordinate legislation (to which recourse was had in the *Pickstone* case [1989] A.C. 66) and such statements made in relation to other statutory provisions which are not in fact subsequently amended. Other common law jurisdictions have abandoned the rule without adverse consequences. Although the G practical reasons for the rule (difficulty in getting access to Parliamentary materials and the cost and delay in researching it) are not without substance, they can be greatly exaggerated: experience in Commonwealth countries which have abandoned the rule does not suggest that the drawbacks are substantial, provided that the court keeps a tight control on the circumstances in which references to Parliamentary material are allowed.

H On the other side, the Attorney-General submitted that the existing rule had a sound constitutional and practical basis. If statements by Ministers as to the intent or effect of an Act were allowed to prevail, this would contravene the constitutional rule that Parliament is "sovereign

only in respect of what it expresses by the words used in the legislation it has passed:" *per* Lord Diplock in *Black-Clawson* [1975] A.C. 591, 638E. It is for the courts alone to construe such legislation. It may be unwise to attach importance to ministerial explanations which are made to satisfy the political requirements of persuasion and debate, often under pressure of time and business. Moreover, in order to establish the significance to be attached to any particular statement, it is necessary both to consider and to understand the context in which it was made. For the courts to have regard to Parliamentary material might necessitate changes in Parliamentary procedures to ensure that ministerial statements are sufficiently detailed to be taken into account. In addition, there are all the practical difficulties as to the accessibility of Parliamentary material, the cost of researching it and the use of court time in analysing it, which are good reasons for maintaing the rule. Finally, to use what is said in Parliament for the purpose of construing legislation would be a breach of article 9 of the Bill of Rights as being an impeachment or questioning of the freedom of speech in debates in proceedings in Parliament.

My Lords, I have come to the conclusion that, as a matter of law, there are sound reasons for making a limited modification to the existing rule (subject to strict safeguards) unless there are constitutional or practical reasons which outweigh them. In my judgment, subject to the questions of the privileges of the House of Commons, reference to Parliamentary material should be permitted as an aid to the construction of legislation which is ambiguous or obscure or the literal meaning of which leads to an absurdity. Even in such cases references in court to Parliamentary material should only be permitted where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words. In the case of statements made in Parliament, as at present advised I cannot foresee that any statement other than the statement of the Minister or other promoter of the Bill is likely to meet these criteria.

I accept Mr. Lester's submissions, but my main reason for reaching this conclusion is based on principle. Statute law consists of the words that Parliament has enacted. It is for the courts to construe those words and it is the court's duty in so doing to give effect to the intention of Parliament in using those words. It is an inescapable fact that, despite all the care taken in passing legislation, some statutory provisions when applied to the circumstances under consideration in any specific case are found to be ambiguous. One of the reasons for such ambiguity is that the members of the legislature in enacting the statutory provision may have been told what result those words are intended to achieve. Faced with a given set of words which are capable of conveying that meaning it is not surprising if the words are accepted as having that meaning. Parliament never intends to enact an ambiguity. Contrast with that the position of the courts. The courts are faced simply with a set of words which are in fact capable of bearing two meanings. The courts are ignorant of the underlying Parliamentary purpose. Unless something in other parts of the legislation discloses such purpose, the courts are forced to adopt one of the two possible meanings using highly technical rules of construction. In many, I suspect most, cases references to Parliamentary

materials will not throw any light on the matter. But in a few cases it may emerge that the very question was considered by Parliament in passing the legislation. Why in such a case should the courts blind themselves to a clear indication of what Parliament intended in using those words? The court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not Parliament's true intention be enforced rather than thwarted?

A number of other factors support this view. As I have said, the courts can now look at white papers and official reports for the purpose of finding the "mischief" sought to be corrected, although not at draft clauses or proposals for the remedying of such mischief. A ministerial statement made in Parliament is an equally authoritative source of such information: why should the courts be cut off from this source of information as to the mischief aimed at? In any event, the distinction between looking at reports to identify the mischief aimed at but not to find the intention of Parliament in enacting the legislation is highly artificial. Take the normal Law Commission Report which analyses the problem and then annexes a draft Bill to remedy it. It is now permissible to look at the report to find the mischief and at the draft Bill to see that a provision in the draft was *not* included in the legislation enacted: see the *Factortame* case [1990] 2 A.C. 85. There can be no logical distinction between that case and looking at the draft Bill to see that the statute as enacted reproduced, often in the same words, the provision in the Law Commissions's draft. Given the purposive approach to construction now adopted by the courts in order to give effect to the true intentions of the legislature, the fine distinctions between looking for the mischief and looking for the intention in using words to provide the remedy are technical and inappropriate. Clear and unambiguous statements made by Ministers in Parliament are as much the background to the enactment of legislation as white papers and Parliamentary reports.

The decision in *Pickstone v. Freemans Plc.* [1989] A.C. 66 which authorises the court to look at ministerial statements made in introducing regulations which could not be amended by Parliament is logically indistinguishable from such statements made in introducing a statutory provision which, though capable of amendment, was not in fact amended.

The judicial antipathy to relaxing the rule has been far from uniform. Lord Reid, who in the passage I have quoted from the *Black-Clawson* case [1975] A.C. 591, 613–615, supported the maintenance of the rule, in his dissenting speech in *Reg. v. Warner* [1969] 2 A.C. 256, 279 said:

> "the layman may well wonder why we do not consult the Parliamentary Debates, for we are much more likely to find the intention of Parliament there than anywhere else. The rule is firmly established that we may not look at Hansard and in general I agree with it, for reasons which I gave last year in *Beswick v. Beswick*. This is not a suitable case in which to reopen the matter but I am bound to say that this case seems to show that there is room for an exception where examining the proceedings in Parliament would almost certainly settle the matter immediately one way or the other."

Lord Wilberforce (whose words I have also quoted) had second thoughts in an extra-judicial capacity at a seminar in Canberra (*Symposium on Statutory Interpretation*, Canberra, 1983, p. 13) where he referred to a case in which the Minister on two occasions during the passage of a Finance Bill stated expressly that the provision was not intended to tax a particular class of beneficiary. Yet subsequently beneficiaries of that class were sought to be taxed under the statutory provision. Lord Wilberforce suggested that there should be a relaxation of the exclusionary rule so that where a Minister promoting a Bill makes an explicit and official statement as to the meaning or scope of the provision, reference should be allowed to that statement.

Text books often include reference to explanations of legislation given by a Minister in Parliament, as a result of which lawyers advise their clients taking account of such statements and judges when construing the legislation come to know of them. In addition, a number of distinguished judges have admitted to breaching the exclusionary rule and looking at Hansard in order to seek the intention of Parliament. When this happens, the parties do not know and have no opportunity to address the judge on the matter. A vivid example of this occurred in the *Hadmor* case [1983] 1 A.C. 191 where Lord Denning M.R. in the Court of Appeal relied on his own researches into Hansard in reaching his conclusions: in the House of Lords, counsel protested that there were other passages to which he would have wished to draw the court's attention had he known that Lord Denning M.R. was looking at Hansard: see the *Hadmor* case at p. 233. It cannot be right for such information to be available, by a sidewind, for the court but the parties be prevented from presenting their arguments on such material.

Against these considerations, there have to be weighed the practical and constitutional matters urged by the Attorney-General many of which have been relied on in the past in the courts in upholding the exclusionary rule. I will first consider the practical difficulties.

It is said that Parliamentary materials are not readily available to, and understandable by, the citizen and his lawyers who should be entitled to rely on the words of Parliament alone to discover his position. It is undoubtedly true that Hansard and particularly records of Committee debates are not widely held by libraries outside London and that the lack of satisfactory indexing of Committee stages makes it difficult to trace the passage of a clause after it is redrafted or renumbered. But such practical difficulties can easily be overstated. It is possible to obtain Parliamentary materials and it is possible to trace the history. The problem is one of expense and effort in doing so, not the availability of the material. In considering the right of the individual to know the law by simply looking at legislation, it is a fallacy to start from the position that all legislation is available in a readily understandable form in any event: the very large number of statutory instruments made every year are not available in an indexed form for well over a year after they have been passed. Yet, the practitioner manages to deal with the problem albeit at considerable expense. Moreover, experience in New Zealand and Australia (where the strict rule has been relaxed for some years) has

not shown that the non-availability of materials has raised these practical problems.

Next, it is said that lawyers and judges are not familiar with Parliamentary procedures and will therefore have difficulty in giving proper weight to the Parliamentary materials. Although, of course, lawyers do not have the same experience of these matters as members of the legislature, they are not wholly ignorant of them. If, as I think, significance should only be attached to the clear statements made by a Minister or other promoter of the Bill, the difficulty of knowing what weight to attach to such statements is not overwhelming. In the present case, there were numerous statements of view by members in the course of the debate which plainly do not throw any light on the true construction of section 63. What is persuasive in this case is a consistent series of answers given by the Minister, after opportunities for taking advice from his officials, all of which point the same way and which were not withdrawn or varied prior to the enactment of the Bill.

Then it is said that court time will be taken up by considering a mass of Parliamentary material and long arguments about its significance, thereby increasing the expense of litigation. In my judgment, though the introduction of further admissible material will inevitably involve some increase in the use of time, this will not be significant as long as courts insist that Parliamentary material should only be introduced in the limited cases I have mentioned and where such material contains a clear indication from the Minister of the mischief aimed at, or the nature of the cure intended, by the legislation. Attempts to introduce material which does not satisfy those tests should be met by orders for costs made against those who have improperly introduced the material. Experience in the United States of America, where legislative history has for many years been much more generally admissible than I am now suggesting, shows how important it is to maintain strict control over the use of such material. That position is to be contrasted with what has happened in New Zealand and Australia (which have relaxed the rule to approximately the extent that I favour): there is no evidence of any complaints of this nature coming from those countries.

There is one further practical objection which, in my view, has real substance. If the rule is relaxed legal advisers faced with an ambiguous statutory provision may feel that they have to research the materials to see whether they yield the crock of gold, i.e., a clear indication of Parliament's intentions. In very many cases the crock of gold will not be discovered and the expenditure on the research wasted. This is a real objection to changing the rule. However again it is easy to overestimate the cost of such research: if a reading of Hansard shows that there is nothing of significance said by the Minister in relation to the clause in question, further research will become pointless.

In sum, I do not think that the practical difficulties arising from a limited relaxation of the rule are sufficient to outweigh the basic need for the courts to give effect to the words enacted by Parliament in the sense that they were intended by Parliament to bear. Courts are frequently criticised for their failure to do that. This failure is due not to cussedness but to ignorance of what Parliament intended by the obscure words of

the legislation. The courts should not deny themselves the light which Parliamentary materials may shed on the meaning of the words Parliament has used and thereby risk subjecting the individual to a law which Parliament never intended to enact.

Is there, then, any constitutional objection to a relaxation of the rule? The main constitutional ground urged by the Attorney-General is that the use of such material will infringe article 9 of the Bill of Rights as being a questioning in any court of freedom of speech and debates in Parliament. As I understood the submission, the Attorney-General was not contending that the use of Parliamentary material by the courts for the purposes of construction would constitute an "impeachment" of freedom of speech since impeachment is limited to cases where a Member of Parliament is sought to be made liable, either in criminal or civil proceeding, for what he has said in Parliament, e.g., by criminal prosecution, by action for libel or by seeking to prove malice on the basis of such words. The submission was that the use of Hansard for the purpose of construing an Act would constitute a "questioning" of the freedom of speech or debate. The process, it is said, would involve an investigation of what the Minister meant by the words he used and would inhibit the Minister in what he says by attaching legislative effect to his words. This, it was submitted, constituted "questioning" the freedom of speech or debate.

Article 9 is a provision of the highest constitutional importance and should not be narrowly construed. It ensures the ability of democratically elected Members of Parliament to discuss what they will (freedom of debate) and to say what they will (freedom of speech). But even given a generous approach to this construction, I find it impossible to attach the breadth of meaning to the word "question" which the Attorney-General urges. It must be remembered that article 9 prohibits questioning not only "in any court" but also in any "place out of Parliament." If the Attorney-General's submission is correct, any comment in the media or elsewhere on what is said in Parliament would constitute "questioning" since all Members of Parliament must speak and act taking into account what political commentators and other will say. Plainly article 9 cannot have effect so as to stifle the freedom of all to comment on what is said in Parliament, even though such comment may influence Members in what they say.

In my judgment, the plain meaning of article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed. Relaxation of the rule will not involve the courts in criticising what is said in Parliament. The purpose of looking at Hansard will not be to construe the words used by the Minister but to give effect to the words used so long as they are clear. Far from questioning the independence of Parliament and its debates, the courts would be giving effect to what is said and done there.

Moreover, the Attorney-General's contentions are inconsistent with the practice which has now continued over a number of years in cases of

judicial review. In such cases, Hansard has frequently been referred to with a view to ascertaining whether a statutory power has been improperly exercised for an alien purpose or in a wholly unreasonable manner. In *Reg. v. Secretary of State for the Home Department, Ex parte Brind* [1991] 1 A.C. 696 it was the Crown, at p. 741F, which invited the court to look at Hansard to show that the Minister in that case had acted correctly. This House attached importance to what the Minister had said: see pp. 749D and 755B. The Attorney-General accepted that references to Hansard for the purposes of judicial review litigation did not infringe article 9. Yet reference for the purposes of judicial review and for the purposes of construction are indistinguishable. In both types of case, the Minister's words are considered and taken into account by the court: in both, the use of such words by the courts might affect what is said in Parliament.

As to the authorities, in *Church of Scientology of California v. Johnson-Smith* [1972] 1 Q.B. 522, the plaintiff sued the defendant, a Member of Parliament, for an alleged libel on television and sought to introduce evidence of what the defendant had said in the House of Commons as proof of malice. Browne J. held, rightly in my view, that such use would breach article 9 as questioning the motives and intentions of a Member of the House. To the extent that he went further so as to suggest that in no circumstances could the speeches be looked at other than for the purposes of seeing what was said on a particular date, his remarks have to be understood in the context of the issues which arose in that case. Those issues included an allegation that the defendant acted improperly in Parliament in saying what he did in Parliament. That plainly would amount to questioning a member's behaviour in Parliament and infringe article 9.

In *Reg. v. Secretary of State for Trade, Ex parte Anderson Strathclyde Plc.* [1983] 2 All E.R. 233 an applicant for judicial review sought to adduce Parliamentary materials to prove a fact. The Crown did not object to the Divisional Court looking at the materials (see p. 237G–H) but the court itself refused to do so on the grounds that it would constitute a breach of article 9. In view of the Attorney-General's concession and the decision of this House in *Ex parte Brind*, in my judgment *Reg. v. Secretary of State for Trade, Ex parte Anderson Strathclyde Plc.* [1983] 2 All E.R. 233 was wrongly decided on this point.

Accordingly in my judgment the use of clear ministerial statements by the court as a guide to the construction of ambiguous legislation would not contravene article 9. No doubt all judges will be astute to ensure that counsel does not in any way impugn or criticise the Minister's statements or his reasoning.

The Attorney-General raised a further constitutional point, namely, that for the court to use Parliamentary material in construing legislation would be to confuse the respective roles of Parliament as the maker of law and the courts as the interpreter. I am not impressed by this argument. The law, as I have said, is to be found in the words in which Parliament has enacted. It is for the courts to interpret those words so as to give effect to that purpose. The question is whether, in addition to other aids to the construction of statutory words, the courts should have

regard to a further source. Recourse is already had to white papers and official reports not because they determine the meaning of the statutory words but because they assist the court to make its own determination. I can see no constitutional impropriety in this.

Finally on this aspect of the case, the Attorney-General relied on considerations of comity: the relaxation of the rule would have a direct effect on the rights and privileges of Parliament. To the extent that such rights and privileges are to be found in the Bill of Rights, in my judgment they will not be infringed for the reasons which I have given. I deal below (at 5) with any other Parliamentary privileges there may be.

I therefore reach the conclusion, subject to any question of Parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear.

Further than this, I would not at present go.

2. Does this case fall within the relaxed rule?

(a) Is section 63 ambiguous?

I have no hesitation in holding that it is. The "expense incurred in or in connection with" the provision of in-house benefits may be either the marginal cost caused by the provision of the benefit in question or a proportion of the total cost incurred in providing the service both for the public and for the employee ("the average cost").

In favour of the marginal cost argument, it is submitted by the taxpayer that there has to be a causal link between the benefit in kind taxed under section 61(1) and its "cash equivalent:" section 63(1) defines the cash equivalent of the benefit as being an amount equal to the cost of the benefit. Therefore, it is said, one is looking for the actual cost of providing that benefit for the employee. The basic expense of providing and running the school would have been incurred in any event: therefore that expenditure is not caused by the provision of the benefit for the employee. The test is whether the cost would have been incurred but for the provision of the benefit. Therefore, when one comes to section 63(2) one is looking for the additional expense incurred in or in connection with the provision of the benefit.

The taxpayers' contention is supported by certain unfair consequences which could ensue if the cost of the benefit is to be taken as the average cost. Take a railway running at a loss: the average cost of providing concessionary travel would be a sum greater than the fare charged to the public. In the case of a heavily endowed school, the fees charged to the public may be less than sufficient to cover the total cost of running the school, the shortfall being made good by the endowment. On the average cost basis, the taxpayer would be treated as receiving a benefit greater than the amount charged to the public.

On the other side, the revenue contend that once one has identified the benefit under section 61, section 63 contains a code for establishing

its cash equivalent. Section 63(1) defines the cash equivalent as the cost of the benefit and section 63(2) defines "the cost of a benefit" as being the expense "incurred in or in connection with" its provision. The benefit in this case consists of the enjoyment of the facilities of the school. What is the cost of providing those facilities? It must be the total cost of providing the school. However the total cost of providing the school is incurred not only in connection with the provision of the benefit to the employee but also in providing the school with fee paying boys. This provision is expressly covered by the final words of section 63(2) "and includes . . . a proper proportion of any expense relating partly to the benefit and partly to other matters." Therefore, says the revenue, the cost of the benefit is a proportion of the total cost of providing the services. The revenue has no answer to the anomalies which arise when the cost of providing a loss-making facility means that the average cost basis results in the taxpayer being treated as receiving a sum by way of benefit greater than the cost of buying that benefit on the open market.

I find these arguments nicely balanced. The statutory words are capable of bearing either meaning. There is an ambiguity or obscurity.

(b) Are the words of the Financial Secretary clear?

It is necessary by way of preface to emphasise that in no circumstances can in-house benefits give rise to no taxable benefit or only a small taxable benefit if that benefit is to be assessed on an average cost basis. The average cost basis means that the cost will approximate to the open market charge (less any profit element) and therefore must in all circumstances be substantial.

The 1976 Finance Bill as introduced proposed to charge in-house benefits on a different basis from that applicable to external benefits, i.e., on the open market price charged to the public: clause 54(4). Once the Government announced its intention to withdraw clause 54(4) a number of Members were anxious to elucidate what effect this would have on classes of taxpayers who enjoyed in-house benefits: concessionary transport for railwaymen, airline employees and merchant seamen; concessionary accommodation for hotel employees; concessionary education for the children of teachers. In answer to these inquiries the Financial Secretary gave similar answers in relation to each class namely (1) that in all the cases (except that of the teachers' concessionary education) that the benefits would be taxed on the same basis as under the existing law and (2) that in all cases the amount of the charge would be nil, small or, in the case of the schoolteachers, "very small indeed." In my view these repeated assurances are quite inconsistent with the Minister having had, or communicated, any intention other than that the words "the expense incurred in or in connection with" the provision of the benefit would produce a charge to tax on the additional or marginal cost only, not a charge on the average cost of the benefit.

It may be said that the Financial Secretary's reference to the taxpayers being liable to tax as under the pre-existing law (i.e., under the Finance Act 1948, section 39 as re-enacted by the Income and Corporation Taxes Act 1970) shows that he was saying that the position was unchanged:

nothing the Minister said could effect the proper construction of legislation already on the statute book. To this contention there are, in my judgment two answers. First the old Acts were repealed by the Act of 1976: the provisions were re-enacted in different language, albeit that the phrase "incurred in or in connection with the provision of the benefit" appeared in both statutes. In this case the court is concerned to construe the Act of 1976: what is relevant is the ministerial statement as to the effect of that Act. Second, the existing practice of the revenue under the pre-1976 law was not to tax benefits in kind on the average cost basis and those who were asking questions on behalf of their constituents would have been well aware of this fact. For example in the case of the airline employees the revenue had sought to tax concessionary travel on the average cost basis but their claim had failed before the commissioners and they had not persisted in that claim. The Minister's answer in Parliament that the cost to the airlines of providing concessionary travel for airline employees would be nothing was exactly what in practice had been happening under the old law.

The question then arises whether it is right to attribute to Parliament as a whole the same intention as that repeatedly voiced by the Financial Secretary. In my judgment it is. It is clear from reading Hansard that the Committee was repeatedly asking for guidance as to the effect of the legislation once subclause (4) of clause 54 was abandoned. That Parliament relied on the ministerial statements is shown by the fact that the matter was never raised again after the discussions in Committee, that amendments were consequentially withdrawn and that no relevant amendment was made which could affect the correctness of the Minister's statement.

Accordingly, in my judgment we have in this case a clear statement by the responsible Minister stating the effect of the ambiguous words used in what became section 63 of the Act of 1976 which the Parliamentary history shows to have been the basis on which that section was enacted.

3. If reference to Hansard is permissibile, what is the true construction of clause 63?

In my judgment there can be no doubt that, if Parliamentary privilege does not prohibit references to Hansard, the Parliamentary history shows that Parliament passed the legislation on the basis that the effect of sections 61 and 63 of the Act was to assess in-house benefits, and particularly concessionary education for teachers' children, on the marginal cost to the employer and not on the average cost. Since the words of section 63 are perfectly capable of bearing that meaning, in my judgment that is the meaning they should be given.

I have had the advantage of reading in draft the speech of my noble and learned friend on the Woolsack. In construing the Act without reference to the Parliamentary proceedings, he treats it as decisive that in this case the taxpayers' children were only occupying surplus accommodation and that it lay in the discretion of the school whether to grant such benefit to the taxpayers. This approach draws a distinction which is not reflected in the Parliamentary proceedings. Concessionary

travel for railwaymen is not discretionary nor is it dependent on there being surplus seats on any train. Similarly, in many cases the education of teachers' children at concessionary rates is neither discretionary nor dependent on there being surplus capacity. Yet in both cases in Parliament the section was put forward as providing that only the marginal cost would be treated as taxable. I can therefore find no ground for drawing the narrow distinction and would hold that in the case of all in-house benefits the same test applies, viz. the cost of the benefit to the employer is the additional or marginal cost only.

Therefore if reference to Hansard is permissible, I would allow the appeal.

4. If reference to Hansard is not permissible, what is the true construction?

Having once looked at what was said in Parliament, it is difficult to put it out of mind. I have the advantage that, after the first hearing and before seeing the Parliamentary materials, I had reached the conclusion, in agreement with Vinelott J. and the Court of Appeal, that the revenue's submissions were correct. If it is not permissible to take into account what was said by the Financial Secretary, I remain of the same view.

My reasons are the same as those given by the Court of Appeal. I accept Mr. Lester's submission that there must be a causal link between the benefit provided for the taxpayers and the cost of the benefit referred to in section 63(1). But in my judgment section 63(2) provides a statutory formula for quantifying such cost: it requires one to find "the amount of any expense incurred in or in connection with" the provision of the benefit, such expense to include "a proper proportion of any expense relating partly to the benefit and partly to other matters."

To apply section 63(2) it is first necessary to identify "the benefit." It has throughout been common ground that the benefit in this case to each taxpayer is that "his son is allowed to participate in all the facilities afforded by the school to boys who are educated there." These facilities are exactly the same as those afforded to every boy in the school, whether his parents are paying the full or concessionary fees. Therefore the relevant question is "what is the expense incurred in or in connection with providing those facilities." On the literal meaning of the words, the expense to the school of providing those facilities is exactly the same for each boy in the school, i.e., a proportion of the total cost of running the school.

Even if it could be said that, because the school would have incurred the basic expense of running the school in any event, such expense was not incurred "in" providing the facilities for the taxpayer's child, on the literal meaning of the words such expense was in any event incurred "in connection with" the provision of such facilities. The words "in connection with" have the widest connotation and I cannot see how they are to be restricted in the absence of some context permitting such restriction.

The strongest argument in favour of the taxpayers is the anomaly which would arise if the employer's business were running at a loss or was subsidised by endowment. As I have explained, in such a case the

adoption of the literal meaning of the statutory words would lead to a result whereby the taxpayer is assessed at an amount greater than that charged by the employer to the public for the same service. The Crown have no answer to this anomaly as such. But there are other anomalies which arise if the taxpayer's argument is correct. For example if, unlike the present case, the school could have been filled with boys paying the full fee, the school would have lost the fee income from the places occupied by the children of the taxpayers for whom only the concessionary fee was payable. Without deciding the point, it seems to me arguable that, on the taxpayer's argument, such loss or part of it would be an expense incurred by the school in providing the concessionary places. If so, the amount on which the taxpayer would be assessed to tax would vary from year to year depending upon the success of the school in attracting applicants. To my mind such a variation on a year by year basis by reference to an extraneous factor would be a most anomalous result, and would involve great difficulties in quantifying the cost to the employer in each case.

In the circumstances, if I could detect from the statute any statutory purpose or intention pointing to one construction rather than the other, I would certainly adopt it. But the statute yields no hint. The basic problem is this. What is taxable is the benefit to the employee and one would have expected the quantum of that benefit to be assessed by reference to the value of the benefit to the employee. But the statutory formula does not seek to value the benefit to the employee as such, but requires the quantum of the benefit to be fixed by reference to the cost to the employer in providing it. Given this dislocation between the benefit which is assessable to tax and the basis on which its value is to be assessed it is impossible to gain any guidance in the statute as to the Parliamentary intention. In the circumstances there is in my judgment no option but to give effect to the literal meaning of the words as did the Court of Appeal. In the result, the revenue's argument should succeed and the appeal should be dismissed.

5. Parliamentary privilege

It follows from what I have said that in my view the outcome of this appeal depends upon whether or not the court can look at Parliamentary material. If it can, the appeal should be allowed. If it cannot, the appeal should be dismissed. For the reasons I have given, as a matter of pure law this House should look at Hansard and give effect to the Parliamentary intention it discloses in deciding the appeal. The problem is the indication given by the Attorney-General that if this House does so, your Lordships may be infringing the privileges of the House of Commons.

For the reasons I have given, in my judgment reference to Parliamentary materials for the purpose of construing legislation does not breach article 9 of the Bill of Rights. However, the Attorney-General courteously but firmly warned your Lordships that this did not conclude the question. He said that article 9 was an illustration of the right that

the House of Commons had won by 1688 to exclusive cognisance of its own proceedings. He continued:

> "I remain convinced . . . that the House of Commons would regard a decision by your Lordships to use Hansard to construe a statute as a grave step and that the House of Commons may well regret that its views were not sought on such an important matter before your Lordships reached a decision."

My Lords, this House and the courts have always been, and I trust will always continue to be, zealous in protecting Parliamentary privileges. I have therefore tried to discover some way in which this House can fulfil its duty to decide the case before it without trespassing on the sensibilities of the House of Commons. But I can find no middle course. Although for a considerable time before the resumed hearing it was known that this House was to consider whether to permit Hansard to be used as an aid to construction, there was no suggestion from the Crown or anyone else that such a course might breach Parliamentary privilege until the Attorney-General raised the point at the start of the rehearing. Even then, the Attorney-General did not ask for an adjournment to enable the House of Commons to consider the matter. Your Lordships therefore heard the case through to the end of the argument.

Although in the past the courts and the House of Commons both claimed the exclusive right to determine whether or not a privilege existed, it is now apparently accepted that it is for the courts to decide whether a privilege exists and for the House to decide whether such privilege has been infringed: see *Erskine May on Parliamentary Practice*, 21st ed. (1989), pp. 147–160. Thus, *Erskine May* says, at p. 150:

> "In the 19th century, a series of cases forced upon the Commons and courts a comprehensive review of the issues which divided them, from which it became clear that some of the earlier claims to jurisdiction made in the name of privilege by the House of Commons were untenable in a court of law: that the law of Parliament was part of the general law, that its principles were not beyond the judicial knowledge of the judges, and that it was the duty of the common law to define its limits could no longer be disputed."

Again it is said, at p. 154:

> "Though events have revealed no single doctrine by which all issues of privilege arising between Parliament and the courts may be resolved, many of the problems of earlier years which are dealt with above have been substantially solved. Neither House is by itself entitled to claim the supremacy over the courts of law enjoyed by the undivided medieval High Court of Parliament. Since neither House can by its own declaration create a new privilege, privilege may be considered to be capable of being ascertained and thus judicially known to the courts."

Accordingly, if the nature of the privilege going beyond the Bill of Rights had been identified, your Lordships could have determined whether or not such privilege exists, although it would be for the House of Commons

to determine whether or not there was an infringment of any privilege found to exist. In fact, neither the letter from the Clerk of the Commons nor the Attorney-General have identified or specified the nature of any privilege extending beyond that protected by the Bill of Rights. In the absence of a claim to a defined privilege as to the validity of which your Lordships could make a determination, it would not in my view be right to withhold from the taxpayers a decision to which, in law, they are entitled. I would therefore allow the appeal.

I trust when the House of Commons comes to consider the decision in this case, it will be appreciated that there is no desire to impeach its privileges in any way. Your Lordships are motivated by a desire to carry out the intentions of Parliament in enacting legislation and have no intention or desire to question the processes by which such legislation was enacted or of criticising anything said by anyone in Parliament in the course of enacting it. The purpose is to give effect to, not thwart, the intentions of Parliament.

Appeal allowed with costs.

Solicitors: Kenwright & Cox for Jagger Son & Tilley, Birmingham; Solicitor of Inland Revenue.

J. A. G.

[HOUSE OF LORDS]

REGINA . . . . . RESPONDENT

AND

GOUGH . . . . . APPELLANT

1992 May 14, 15; 22 — Farquharson L.J., Alliott and Cazalet JJ.

1993 Jan. 27, 28; May 20 — Lord Goff of Chieveley, Lord Ackner, Lord Mustill, Lord Slynn of Hadley and Lord Woolf

Crime—Jury—Bias—Juror next door neighbour of defendant's brother—Juror unaware of connection until after trial—Whether real danger of bias—Whether irregularity affecting trial

The appellant was indicted on a single count of conspiring with his brother to commit robbery. At the trial the brother, who had been discharged on the application of the prosecution at the committal hearing, was referred to by name and a photograph of him and the appellant was shown to the jury and