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STATUTORY INTERPRETATION

Notes from *Smith & Bailey on the Modern English Legal System*, Third edition 1996, p351-403; cases in Jacqueline Martin, *The English Legal System*, chapter 3.

INTRODUCTION

The task of interpretation may vary in difficulty. F.A.R. Bennion (*Statute Law*, 1990), has identified a number of factors that may cause doubt:

1. The draftsman may refrain from using certain words that he or she regards as necessarily implied. The problem here is that the users may not realise that this is the case.
2. The draftsman may use a broad term ("a word or phrase of wide meaning") and leave it to the user to judge what situations fall within it.
3. Ambiguous words may be used.
4. There may be unforeseeable developments.
5. There are many ways in which the wording may be inadequate. There may be a printing error, a drafting error or another error.

It is notable that the general methods of statutory interpretation are not themselves regulated by Parliament, but have been developed by the judges. The Interpretation Act 1978, which from its title might seem to fulfil such a function, has the comparatively unambitious aim of providing certain standard definitions of common provisions, and thereby enables statutes to be drafted more briefly than otherwise would be the case.

Modern statutes commonly include "definition sections" in which the meaning of words and phrases found in the statute are explained, either comprehensively (X "means" ABC) or partially (X "includes" ABC).

(A) THE RULES OF STATUTORY INTERPRETATION

1. THE MISCHIEF RULE

The mischief rule is contained in *Heydon's Case* (1584) 3 Co Rep 7, where it was stated that for the true interpretation of all statutes four things are to be considered:

1st. What was the common law before the making of the Act.
2nd. What was the mischief and defect for which the common law did not provide.
3rd. What remedy Parliament resolved and appointed to cure the disease.
4th. The true reason of the remedy; and then the function of the judge is to make such construction as shall supress the mischief and advance the remedy.

An example of the mischief rule in use is:

Smith v Hughes (1960) 2 All ER 859.

The mischief rule was the product of a time when statutes were a minor source of law by comparison with the common law, when drafting was by no means as exact a process as it is today and before the supremacy of Parliament was established. The mischief could often be discerned from the lengthy preamble normally included.

The mischief rule was regarded by the **Law Commission**, which reported on statutory interpretation in 1969, as a "rather more satisfactory approach" than the other two established rules.

2. THE LITERAL RULE

The eighteenth and nineteenth centuries saw a trend towards a more literal approach. Courts took an increasingly strict view of the words of a statute: if the case before them was not precisely covered they were not prepared to countenance any alteration of the statutory language. One of the leading statements of the literal rule was made by Tindal CJ in the *Sussex Peerage Case* (1844) 11 Cl&Fin 85:

> "… the only rule for the construction of Acts of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver."

An example of the literal rule is:

> *Whiteley v Chappell* (1868) LR 4 QB 147.

What did Lord Esher MR state in *R v Judge of the City of London Court* [1892] 1 QB 273?

The literal rule was favoured by the **Law Commission** on a variety of grounds:

* It encouraged precision in drafting.
* Should any alternative approach be adopted, an alteration of the statutory language could be seen as a usurpation by non-elected judges of the legislative function of Parliament, and other statute users would have the difficult task of predicting how doubtful provisions might be rewritten" by the judges.

On the other hand the literal rule was criticised by the **Law Commission** (1969) on the ground that:

* Judges have tended excessively to emphasise the literal meaning of statutory provisions without giving due weight to their meaning in wider contexts.
* To place undue emphasis on the literal meaning of the words is to assume an unattainable perfection in draftsmanship.
* It ignores the limitations of language.

3. THE GOLDEN RULE

Some judges have suggested that a court may depart from the ordinary meaning where that would lead to absurdity. In *Grey v Pearson* (1857) 6 HL Cas 61, Lord Wensleydale said:

> "… the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther."

This became known as "Lord Wensleydale's golden rule". It only applies where the words are ambiguous. An interpretation that is not absurd is to be preferred to one that is. An example is:

> *R v Allen* (1872) LR 1 CCR 367.

The **Law Commission** (1969) noted that:

* The rule provided no clear means to test the existence of the characteristics of absurdity, inconsistency or inconvenience, or to measure their quality or extent.
* As it seemed that "absurdity" was in practice judged by reference to whether a particular interpretation was irreconcilable with the general policy of the legislature "the golden rule turns out to be a less explicit form of the mischief rule".

GENERAL APPROACHES TO STATUTORY INTERPRETATION

1. The rules of statutory interpretation were analysed by Professor John Willis in his influential article "Statutory Interpretation in a Nutshell" (1938). He suggested that:

> 'a court invokes whichever of the rules produces a result that satisfies its sense of justice in the case before it. Although the literal rule is the one most frequently referred to in express terms, the courts treat all three as valid and refer to them as occasion demands, but, naturally enough, do not assign any reason for choosing one rather than another.'

Thus, on some occasions the literal rule would be preferred to the mischief rule: on others the reverse would be the case. It was impossible to predict with certainty which approach would be adopted in a particular case.

2. Sir Rupert Cross, *Statutory Interpretation* (3rd ed, 1995), suggested that the English approach involves not so much a choice between alternative rules as a progressive analysis in which the judge first considers the ordinary meaning of the words in the general context of the statute, a broad view being taken of what constitutes the "context", and then moves to consider other possibilities where the ordinary meaning leads to an absurd result. This unified "contextual" approach is supported by dicta in decisions of the House of Lords where general principles of statutory interpretation have been discussed.

See Martin, *The English Legal System*, chapter 3.

3. Reference is now frequently made by judges to the concept of "purposive" statutory construction, ie one that will "promote the general legislative purpose underlying the provisions" (per Lord Denning MR in *Notham v London Borough of Barnet* [1978] 1 WLR 220). There will be a comparison of readings of the provision in question based on the literal or grammatical meaning of words with readings based on a purposive approach.

In *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, Lord Browne-Wilkinson referred to "the purposive approach to construction now adopted by the courts in order to give effect to the true intentions of the legislature". Lord Griffiths stated:

> "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."

However, a purposive interpretation may only be adopted if judges "can find in the statute read as a whole or in material to which they are permitted by law to refer as aids to interpretation an expression of Parliament's purpose or policy" (per Lord Scarman in *R v Barnet LBC* [1983] 2 AC 309).

The **Law Commission** (1969) emphasised the importance in interpretation of a provision of the general legislative purpose underlying it. The Renton Committee on the Preparation of Legislation (1975) approved this.

(B) RULES OF LANGUAGE

There are a number of so-called "rules of language" which "simply refer to the way in which people speak in certain contexts" (Rupert Cross, *Statutory Interpretation*).

1. EJUSDEM GENERIS

General words following particular ones normally apply only to such persons or things as are *ejusdem generis* (of the same genus or class) as the particular ones. For example:

Powell v Kempton Park Racecourse [1899] AC 143.

2. NOSCITUR A SOCIIS

This tag refers to the fact that words "derive colour from those which surround them" (per Stamp J. in *Bourne v Norwich Crematorium* [1967]). For example:

Inland Revenue Commissioners v Frere [1965]AC 402.

3. EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS

"Mention of one or more things of a particular class may be regarded as silently excluding all other members of the class" (Maxwell, *Interpretation of Statutes*). For example:

Tempest v Kilner (1846) 3 CB 249.

(C) INTERNAL AIDS TO INTERPRETATION

There is a wide range of material that may be considered by a judge both (1) in determining the primary meaning of the statutory words and (2) where there is ambiguity, in pointing the way to the interpretation that is to be preferred. Some of these aids may be found within the statute in question, others are external to the statute. We deal first with "internal aids".

1. OTHER ENACTING WORDS

An examination of the whole of a statute, or at least those Parts which deal with the subject matter of the provision to be interpreted, should give some indication of the overall purpose of the legislation. It may show that a particular interpretation of that provision will lead to absurdity when taken with another section.

2. LONG TITLE

It became established in the nineteenth century that the long title could be considered as an aid to interpretation. The long title should be read as part of the context, "as the plainest of all the guides to the general objectives of a statute" (per Lord Simon in *The Black-Clawson Case* [1975]).

3. PREAMBLE

When there is a preamble it is generally in its recitals that the mischief to be remedied and the scope of the Act are described. It is therefore clearly permissible to have recourse to it as an aid to construing the enacting provisions.

4. SHORT TITLE

There is some question whether the short title should be used to resolve doubt.

5. HEADINGS, SIDE-NOTES AND PUNCTUATION

Headings, side-notes and punctuation may be considered as part of the context.

(D) EXTERNAL AIDS TO INTERPRETATION

1. HISTORICAL SETTING

A judge may consider the historical setting of the provision that is being interpreted.

2. DICTIONARIES AND OTHER LITERARY SOURCES

Dictionaries are commonly consulted as a guide to the meaning of statutory words. Textbooks may also be consulted.

3. PRACTICE

The practice followed in the past may be a guide to interpretation. For example, the practice of eminent conveyancers where the technical meaning of a word or phrase used in conveyancing is in issue.

4. OTHER STATUTES IN PARI MATERIA

Related statutes dealing with the same subject matter as the provision in question may be considered both as part of the context and to resolve ambiguities. A statute may indeed provide expressly that it should be read as one with an earlier statute or series of statutes.

5. OFFICIAL REPORTS

Legislation may be preceded by a report of a Royal Commission, the Law Commissions or some other official advisory committee. This kind of material may be considered as evidence of the pre-existing state of the law and the "mischief" with which the legislation was intended to deal. However, it has been held that the recommendations contained therein may not be regarded as evidence of Parliamentary intention as Parliament may not have accepted the recommendations and acted upon them (*The Black-Clawson Case* [1975] AC 591).

6. TREATIES AND INTERNATIONAL CONVENTIONS

There is a presumption that Parliament does not legislate in such a way that the UK would be in breach of its international obligations.

7. PARLIAMENTARY MATERIALS

It was held by the House of Lords in *Davis v Johnson* (1979) that a court may not refer to Parliamentary materials for any purpose whatsoever connected with the interpretation of statutes. The prohibition covered such materials as reports of debates in the House and in committee, and the explanatory memoranda attached to Bills. Then in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593, the House of Lords significantly relaxed the general prohibition.

See Martin, *The English Legal System*, chapter 3, for the criteria for the rule and criticism.

(E) PRESUMPTIONS

There are various presumptions that may be applied:

(i) Presumption against changes in the common law
(ii) Presumption against ousting the jurisdiction of the courts
(iii) Presumption against interference with vested rights
(iv) Strict construction of penal laws in favour of the citizen
(v) Presumption against retrospective operation
(vi) Presumption that statutes do no affect the Crown
(vii) Others

See Martin, *The English Legal System*, chapter 3, for examples of the most important presumptions.