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Statutes and the Intention of the Lawmaker as the Ultimate Guide to their Applicability: History and Prospects

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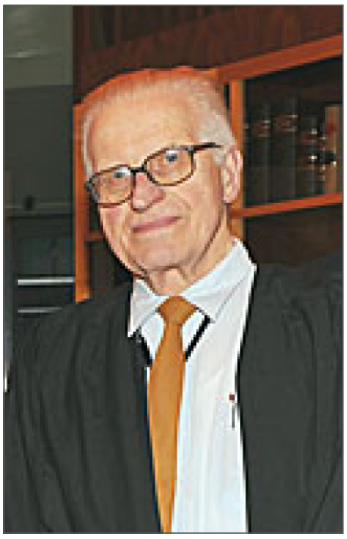
> [The] very old interpretation doctrine by which judges considered the 'equity' or 'spirit' of a statute … is the direct historical antecedent of modern theories of statutory interpretation. It survives in subtle and often unacknowledged ways … [There is] a deep and shared unity of interpretative and ethical principles between continental civil law jurisdictions and the common law.[1]

I Introduction



The great common lawyers of the age of Shakespeare, especially Thomas Egerton, Christopher Hatton, Edmund Plowden, Francis Bacon and Edward Coke, shaped some of the most important principles for the interpretation of statutes. Many have endured, others were buried under an avalanche of 19th century literalism but may yet return. Little will be said about the role played by the intention of the lawmaker as a tool to resolve patent ambiguities. That role has been substantial throughout all interpretative periods. Instead, this paper will focus upon the age-old tension between the letter of the law and the underlying legislative intent. Over the centuries jurists and philosophers have wondered whether the harshness which can flow from the literal application of statutes can and should be mitigated. Two thousand and three hundred years ago Aristotle pointed out that every statute is formulated in general terms, and that cases

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1 S Corcoran, 'Theories of Statutory Interpretation' in S Corcoran and S Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 11–2.

will arise which, though within the letter, may not have been within the lawmaker's intention.[2]

II The Interpretative Power

A. Justinian's Unity Doctrine

There was a time when the power to enact and the power to interpret were considered inseparable. In 529 AD the Emperor Justinian decreed in Constantinople that judges must apply but must not interpret the law, for 'the Emperor is the sole maker and interpreter of laws'.[3] Justinian's unity doctrine became very influential in the Christian world; popes, kings and emperors jealously guarded their legislative monopolies and prohibited the interpretation of ambiguous laws by courts.[4]

This approach to interpretation was bound to cause congestion, for innumerable ambiguities are bound to arise. Surely Justinian and his followers had better things to do with their time than attend to such a multitude of trivial matters. The *Corpus Juris* contained many rules of interpretation which suggests that Justinian merely reserved the right to interpret without exercising it on a regular basis. The doctrine might have been moribund in the early 18th century, but Montesquieu's insistence on the complete separation of powers caused it to be revived. Laws prohibiting judges from interpreting statutes were passed in France, Sweden, Prussia, Austria, Italy, Spain and Belgium.[5] State interpretation commissions were established to have such tasks performed at government rather than judicial level. Some improvements were made but they did not save the system and it was eventually abandoned as unrealistic.

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2 Aristotle, The 'Art' of Rhetoric (JH Freese trans, Heinemann, 1959) 315, 317 and 147 '… it is equitable to pardon human weaknesses, and to look, not to the law but to the legislator; not to the letter of the law but to the intention of the legislator.' Much the same argument was later put forward by civilian writers like St Thomas Aquinas and common lawyers like Christopher St German — S Vogenauer, *The Interpretation of Statutes in England and on the Continent. A Comparative Study of Judicial Jurisprudence and its Historical Foundations* (Mohr Siebeck, 2001) [trans of: *Die Auslegung von Gesetzen in England und auf dem Kontinent. Eine vergleichende Untersuchung der Rechtsprechung und ihrer historischen Grundlagen*] 771.

3 The *Constitutio* was included in the *Codex Justiniani*, the third part of the *Corpus Juris*. The whole passage reads as follows:
Explosis itaque huiusmodi ridiculosis ambiguitatibus tam condictor quam interpres legum solus imperator iuste existimabitur … — P Krueger (ed), *Corpus Juris Civilis, Editio Stereotypa Nona, Volumen Secundum, Codex Justinianus* (Weidmannos, 1915) 68 (C 1.14.12). The following translation is to be found in SP Scott (ed), *The Civil Law: including the Twelve Tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo* (SP Scott trans, AMS Press, 1973) 89: 'Therefore, these ridiculous doubts having been cast aside, the Emperor shall justly be regarded as the sole maker and interpreter of the laws.'

4 HJ Becker, 'Kommentier und Auslegungsverbot' in A Erler and E Kaufmann (eds), *Handwörterbuch zur Deutschen Rechtsgeschichte* (Erich Schmidt Verlag, 1978) vol 2, 963–74 (trans: *Concise Dictionary of German Legal History*).

5 Vogenauer, above n 2, 475–6.

B. Common Law Courts and Interpretative Power

The early common law was greatly influenced by the law of the church which was that 'only the maker of a statute could authoritatively explain it'.[6] In addition, Justinian's unity doctrine entered the early common law through Bracton's famous treatise, *On the laws and customs of England* (about 1250):[7]

> … as to ambiguities and uncertainties … the interpretation and pleasure of the lord king must be awaited … for he who establishes interprets.

Accordingly, when faced with ambiguous statutes, the judges made a practice of asking the authors what they had actually intended.[8] In 1366 two judges 'went to the council where there were a good two dozen bishops and earls, and asked those who made the statute what it meant'.[9] As late as in the second half of the 16th century, Thomas Egerton still affirmed that the authors of a statute were the best interpreters of it[10] and he repeated this view in 1615.[11] By the early 15th century the Commons had become co-legislators,[12] so that consulting all those involved in the making of statutes had become impracticable. Egerton conceded in his *Discourse* that it was difficult to know what the lawmakers had intended, because there were so many 'heads, wits, statute makers and minds',[13] but he also insisted that 'certen notes' would still yield the needed information.[14] However, the prevailing view was that the actual intention of Parliament had become unknowable and that a new approach was needed.

When the objective meaning differs from the lawmaker's actual intention, the former deserves priority, for that is how the statute is likely to be understood by the public. Thomas Egerton affirmed that 'common understanding and speech' determines the meaning of the

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6 TFT Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (Cambridge University Press, 1922) 21.

7 Henry de Bracton, *On the Laws and Customs of England* (Thorne trans, Mass 1968–1977) vol 2, 109 and 302 [trans of: *Tractatus de legibus et consuetudinibus Angliae*] .

8 'In its early stages it seems to have been the practice if not the theory of English law that the maker of a statute should also be its interpreter if need be. Only gradually was this power abandoned to the courts of law …' — Plucknett, above n 6.

9 P Brazil, 'Legislative History and the Sure and True Interpretation of Statutes in General and the Constitution in Particular' (1960) *University of Queensland Law Journal* 1, 4. Brazil relied on Plucknett for examples — TFT Plucknett, *Concise History of the Common Law* (Butterworth, 5th ed, 1956) 328–35. The Bangorian controversy is an interesting parallel to this doctrine in the sphere of theology — see JJ Spigelman, *Statutory Interpretation and Human Rights: The McPherson Lecture series* (UQ Press, 2008) vol 3, 101–3.

10 '… in our dayes, have those that were the penners & devisors of statutes bene the grettest lighte for exposicion of statutes.' — SE Thorne (ed), *A Discourse upon the Exposition and Understanding of Statutes. with Sir Thomas Egerton's additions* (Huntington Library, 1942) 151–2.

11 '… it is *Magis Congruum* that Acts of parliament should be corrected by the same penn that drew theym, thayn to be dasht in peeces by the opinion of a few Iudges.' — 'The Lord Chancellor Egertons Observacions vpon ye Lord Cookes Reportes' in LA Knafla, *Law and Politics in Jacobean England. The Tracts of Lord Chancellor Ellesmere* (Cambridge University Press, 1977) 297, 307.

12 HW Baade, 'The Casus Omissus: a Pre-history of Statutory Analogy' (1994) 20 *Syracuse Journal of International Law and Commerce* 45, 73.

13 '… it varie in so muche that in maner so manie heades as there were, so manie wittes; so manie statute makers, so man[ie] myndes' — Thorne, above n 10.

14 Ibid.

words of a statute[15] and in 1601, in a note appended to *The Lord Cromwel's Case*[16] Edward Coke announced that 'the best guide to the meaning of statutes is usage'.[17] The maxim is of Roman origin.[18] It was restated by Dwarris[19] and has endured to this day, for modern books put forward the same principle.[20]

The maxim gives priority to objective meaning rather than to the lawmaker's subjective intention and thus yields, quite apart from the difficulties in ascertaining the actual legislative intent, yet another reason why someone other than the lawmaker should take control of the interpretative process. In *Hilder v Dexter*[21] the Earl of Halsbury LC explained that he had been involved in the drafting of the Act and had chosen not to deliver a judgment:[22]

> … the worst person to construe [a statute] is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed.

Who was to take charge of the interpretative process if not the judges? As Sir Christopher Hatton stated in the mid-16th century:[23]

> For the Sages of the law whose wits are exercised in such matters, have the interpretation in their hands … and we seek these Interpretations as Oracles from their mouthes.

By 1615 the doctrine of full judicial control over interpretation was confidently pronounced from the Bench:[24]

> … it was by that liberty and authority that Judges have over laws, especially over statute laws, according to reason and best convenience, to mould them to the truest and best use.

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15 Ibid 125, n 55.

16 (1601) 2 Co Rep 69b, 81a.

17 *Optimus legum interpres est consuetudo*.

18 The correct version is '*optima est legum interpres consuetudo* (custom is the best interpreter of statutes). — Mommsen and Watson (eds), *The Digest of Justinian* (University of Pennsylvania Press, 1985) Dig 1.3.37.

19 'The words of a statute are to be taken in their ordinary and familiar signification and import, and regard is to be had to their general and popular use.' — Fortunatis Dwarris, *A General Treatise on Statutes: Their Rules of Construction and the Proper Boundaries of Legislation and Judicial Interpretation. Including a Summary of the Practice of Parliament, and the Ancient and Modern Method of Proceeding in Passing Bills of Every Kind* (1831) and (William Benning, 2nd ed, 1848) 573. Page references to Dwarris are to the 2nd edition.

20 'The essential rule is that words should generally be given the meaning which the normal speaker of the English language would understand them to bear in the context in which they are used.' — J Bell and G Engle (eds), *Cross on Statutory Interpretation* (Butterworths, 3rd ed, 1995) 1.

21 [1902] AC 474. The case was concerned with the interpretation of the *Company's Act*, 1900 (UK c 48).

22 Ibid 477.

23 Christopher Hatton, *A Treatise Concerning Statutes, or Acts of Parliament: and the Exposition Thereof* (Richard Tonson, 1677) 29–30. He added weight to the argument by pointing out that, after a parliamentary term had ended, the members of the lower house were *functi officio* and lacked interpretative authority. The passage is quoted by Thorne, above n 10, 64 n 134

24 *Lord Sheffield v Ratcliffe* (1615) Hob 334, 346; 80 ER475, 486.

The judicial take-over of interpretation was not inevitable. The courts could instead have sought to ascertain the actual, subjective intentions of the leading promoters of statutes and could have treated that as the best evidence of the intention of the whole Parliament. Such an approach is still alive in Continental systems. To quote Vogenauer:[25]

> The French courts and the Court of Justice of the European Communities have not yet expressly decided, whether they should rely, when laws are being interpreted, on the subjective intentions of the historical legislator or on the objective meaning of the legislation itself.

Speaking generally, judicial control of the interpretative process was not again seriously challenged in the common law which remained free of the Continental upheavals of the 18th century. Bentham entertained ideas similar to the ones which had gained acceptance on the Continent. He suggested that a judge who gave a statute a liberal interpretation should draw this up in the form of an amending statute and should place it before Parliament which might then veto it.[26] In the mid-19th century the Indian Law Commission recommended, no doubt under Bentham's influence, the establishment of a Legislative Commission charged with clearing up ambiguities in the Indian Criminal Code and inserting appropriate amendments without delay.[27] Such attempts to emulate Continental developments never gained a foothold in England and were fortunately not adopted in India.

III The Intention of the Lawmaker

A. Judicial Interpretation and the Nature of the Intention Concept

Many of Edward Coke's Latin maxims are derived from civilian sources, particularly from the *Corpus Juris*. His library contained the complete 1583 critical edition of the *Corpus Juris* by Gothofredus[28] and 56 titles on 'Civill Lawe', including five books with extracts from Justinian's *Digest*.[29] It was all part of his 'deep well'. 'Knowledge of the law', as he admonished law students, 'is like a deepe well out of which each man draweth according to the strength of his understanding … the sages of the law in former times … have had the deepest reach'.[30]

In his study of the *Digest*, Coke must have encountered the statement by the Roman jurist Paulus which declared the intention behind documents irrelevant in certain circumstances:[31]

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25 Vogenauer, above n 2, 1254, (Lücke trans).

26 Bell and Engle, above n 20, 36.

27 Vogenauer, above n 2, 896 at n 766.

28 Dionisius Gothofredus (ed), *Corpus iuris civilis romani* (Lyon, 1583) <http://encyclopedia.jrank.org/DEM_DIO/DENIS_GODEFROY_Dionysius_Gothof.html>.

29 W O Hassall, *A Catalogue of the Library of Sir Edward Coke* (Yale University Press, 1950) 38–41; there are also 292 titles on divinity, 62 on philosophy, rhetoric, grammar and logic, including four titles by Aristotle — W O Hassall, Ibid 59–64.

30 Edward Coke, *The First Part of the Institutes of the Laws of England; Or a Commentary upon Littleton* (E Brooke, W Clarke & Sons, W Reed and Fleming and Phelan, 1809) 71a.

31 *Cum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio*. — Mommsen and Watson, above n 18, Dig 32.1.25.

> When the words are unambiguous, the question what was intended must not be asked.

Coke must have been perplexed when he read it, for no common lawyer of the English Renaissance used the intention of the lawmaker as a genuine major premise as much as he did. He would have considered it unsafe to declare that intention irrelevant in any circumstances. Accordingly, he removed all reference to intention and transferred the following cleansed version to his Institutes:[32]

> When there is no ambiguity in the words, then no exposition contrary to the words is to be made.

Reinhard Zimmermann has suggested that the two maxims are virtually identical.[33] With respect, speaking of a merely verbal difference understates the distinction, for the two versions of the maxim have fundamentally different implications. Both purport to specify the legal consequences which attach to unambiguous words, but only the Paulus maxim, not Coke's modified version, insists that one can never escape from the letter of a statute if it is unambiguous. Coke's version is quite compatible with a finding that even a literally unambiguous text may suffer from doubtful applicability in particular cases.

This account of Coke's encounter with the Paulus maxim is admittedly rather speculative,[34] but there is no doubt that it was Coke's version which found its way into many common law and chancery decisions,[35] while the Paulus version, often quoted in civilian countries, remained unknown to common lawyers.[36] In due course, the interpretation of statutes in accordance with the lawmaker's intention became a dogma of the common law. As Justice Higgins has stated:[37]

> The fundamental rule of interpretation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it …

This pronouncement has its counterparts in the United Kingdom.[38] Vogenauer's *magnum opus* still proclaimed in 2001 that the English courts had not wavered from this principle

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32 *Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est*. — Coke, above n 30, 147a.

33 'In England this maxim … became the origin of the "plain meaning" rule and is thus to a large extent responsible for the expression-oriented approach of the English courts to contract interpretation.' — R Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Clarendon Press, revised ed, 1996) 622, n 7. The fact that Zimmermann deals with contracts does not make it irrelevant for our purposes. The interpretation of deeds, contracts and testaments used to be treated together with the interpretation of statutes and still follows very similar principles. Moreover, the English courts of the 19th and early 20th centuries are often accused of an unduly literalist approach in all these fields.

34 Whenever Coke's version is referred to in the literature, it is said to be in the first part of his Institutes (*Commentary upon Littleton*) at p 147 (sometimes 147a). The HeinOnline version of the book shows no such page. In addition, one cannot exclude the possibility that Coke found his own version in some other civilian source.

35 To give just one example: *Spencer v All Souls College* (1762) Wilmot 163, 166; 97 ER 64, 65 (Wilmot J).

36 The one exception I have found stems from the pen of an American lawyer with a European background — M Radin, 'Statutory Interpretation' (1930) 43 *Harvard Law Review* 863, 867.

37 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2.

38 'My Lords, 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.' — *Sussex Peerage Case* (1844) 11 Clark

during any of the interpretative periods.[39] Their adherence to it has had a steadying influence while interpretative fashions changed and has thus maintained some continuity. The *Human Rights Act 1998* (UK) has shaken the ancient principle in the United Kingdom. The High Court will shortly decide in the *Momcilovic* case[40] whether Australia should follow suit.

After the judicial take-over of the interpretation of statutes it was clear that the discovery of the actual, subjective intention of the lawmaker was no longer the exclusive objective of the process. In 1769 the Court of King's Bench emphasised the irrelevance of the lawmaker's subjective intentions by blocking judicial access to Parliamentary proceedings.[41] When that ruling was reversed in 1993 in *Pepper v Hart*,[42] an unholy row broke out in England which revived a dispute which had been settled satisfactorily centuries earlier.[43]

Academics have argued that concepts like the intention of Parliament are useless fictions because only individuals, not collective bodies like parliaments, can have intentions.[44] Had this been explained to 16th century common lawyers, they might have been tempted to jettison the intention concept and rely solely on their own unfettered judgment. However, the King might have seen such suggestions as an act of open rebellion, something which judges whose offices still depended on the King's pleasure could hardly afford. Instead of taking such a radical course, the judges began to make helpful assumptions about the considerations which might have been in the lawmaker's mind. Thorne has spelt out the assumption that 'the legislature acts according to reason and does not intend harsh or harmful results'[45] as the most important of these. It was on this basis that the courts were able to develop a common law bill of rights, often called the 'principle of legality'.[46] The 'rights of Englishmen', as Chief Justice Spigelman has recently reminded us, 'live on in the law of statutory interpretation'.[47] Basing himself on an extensive survey of mostly Australian cases, the learned Chief Justice has compiled a list of such rights/presumptions which all have the effect of giving meaning

& Finnelly 85, 143; 8 ER 1034, 1057 per Tindal CJ giving advice to the House of Lords. However, see *Ghaidan v Godin-Mendoza* [2004] 2 AC 557.

39 Vogenauer, above n 2, 669, 781, 964.

40 *Momcilovic v The Queen* [2010] HCA Trans 227 and 261 (3 September and 8 October 2010).

41 *Millar v Taylor* (1769) 4 Burr 2303 (KB).

42 *Pepper v Hart* [1993] AC 593.

43 Lord Steyn '*Pepper v Hart*; A Re-Examination' (2001) 21 *Oxford Journal of Legal Studies* 59; 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review* 5; A Kavanagh, *'Pepper v Hart* and Matters of Constitutional Principle' (2005) 121 *Law Quarterly Review* 98; S Vogenauer, 'A Retreat from *Pepper v Hart*? A Reply to Lord Steyn' (2005) 25(4) *Oxford Journal of Legal Studies* 629.

44 JF Manning, 'Textualism and the Equity of the Statute' in (2001) 101 *Columbia Law Review* 1, 23 n 91; S Vogenauer, 'What is the Proper Role of Legislative Intention in Judicial Interpretation?' (1997) 18 *Statute Law Review* 235, particularly n 1.

45 Thorne, above n 10, 82.

46 In *Al-Kateb v Godwin* [2004] HCA 37 n 19, Gleeson CJ stated: '… [the] principle of legality … governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.'

47 Spigelman, above n 9, 23.

to statutory provisions expressed in general or otherwise doubtful terms.[48] This stunning achievement of the courts would not have been possible had the common lawyers of the English Renaissance not taken charge of the interpretative process.

In 2009 in *Zheng v Cai* five High Court Justices explained that a judicial finding as to legislative intention is 'an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws'.[49] Their Honours were not unduly concerned by suggestions that such findings are redundant fictions; they saw them realistically as involving the attribution of an intention, an attribution, one might add, which implies that there was an intellect behind the statutory words, a purpose pursued by using them, and a will providing guidance and demanding compliance. Dispensing with such imagery would reduce the text, in the words of Edmund Plowden, to mere 'verberations of the air',[50] and would encourage judges to play fast and loose with legislation, thus placing at risk the delicate balance between the political and the judicial branches of government.

To the extent that the 'intention of the lawmaker' is an attributed intention, the nature of the phrase becomes an issue. Rupert Cross has said that it is 'an expression used by analogy … with the intention of an individual'.[51] With respect, the concept should be seen as one of the anthropomorphic expressions in common use which attribute an intention, a feeling, an attitude or an aspiration, normally entertained by an individual, to a collective. Random examples are Horatio Nelson's signal to his sailors: 'England expects that every man will do his duty!' or the many things which, according to election candidates, are 'wanted (felt or feared) by the Australian people'. Judges use the same anthropomorphic device when they tell us what the Parliament intended. Moreover, who is to say that the lawmaker's intention is always attributed and that the actual intention is always irrelevant? When there is no doubt that the legislative purpose and intention and the literal applicability of the legislative text to the case before the court are in complete harmony, the plain meaning rule is of continuing value and deserves to be applied.[52] With respect, Bennion was right when he decided to embody the plain meaning rule in one of his Code sections, although the language he chose is rather complex.[53] The plain meaning rule must not be equated with the literal rule[54] which demands application even when it is clear that meaning and legislative intent do not coincide.

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48 Ibid 27–9.

49 *Zheng v Cai* [2009] HCA 52 (9 December 2009) n 28.

50 'For words, which are no other than the verberation of the air, do not constitute the statute, but are only the image of it, and the life of the statute rests in the minds of the expositors of the words, that is, the makers of the statutes. And if they are dispersed, so that their minds cannot be known, then those who may approach nearest to their minds shall construe the words, and these are the (e) sages of the law whose talents are exercised in the study of such matters.' — *Partridge v Strange* (1553) 1 Plowden 77, 82; 75 ER 123, 130. Plowden was a common lawyer and legal scholar. His reports are the most reliable of the 16th century.

51 Bell and Engle, above n 20, p 24.

52 F Schauer, 'Statutory Construction and the Coordinating Function of Plain Meaning' [1990] *Supreme Court Review* 231.

53 '… where, in relation to the facts of the instant case, the enactment under inquiry is grammatically capable of one meaning only and, on an *informed* interpretation of that enactment the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator, the legal meaning of the enactment corresponds to that grammatical meaning, and is to be applied accordingly.' — FAR Bennion, *Bennion on Statutory Interpretation. A Code* (LexisNexis, 5th ed, 2008) 548 (section 195).

54 *Pace* Bell and Engle, above n 20, p 15.

B. Epichaia

1 Reading down (the restrictive epichaia)

In his Institutes Coke relates the case of a prisoner who had broken out of prison in order to escape a raging fire, suggesting that he would not be guilty under a statute which made it a felony 'to break prison'.[55] Coke also considered that the jurisdiction of a lord to adjudicate all disputes arising within his manor did not include disputes to which he himself was a party.[56] Many similar examples are to be found in early civilian and common law literature to demonstrate that cases which fall under the letter of a statute might be exempted because the lawmaker could not have intended that they should be caught. Aristotle himself had mentioned the case of a man wearing a ring who strikes another with his hand, and had suggested that he should not be found guilty under a law which penalises the wounding of another with an iron instrument.[57] A favourite hypothetical was the case of an assumed city law, intended to keep out the enemy at night, which makes it a capital offence 'to open the city gates before sunrise'. If a citizen opens a gate at night to allow townspeople, fleeing from the enemy, to enter, he has infringed the words of the prohibition, but the city owes him a debt of gratitude and putting him to death would be grotesque. St Thomas Aquinas,[58] Hugo Grotius,[59] Samuel von Pufendorf,[60] and many other lawyers and philosophers used such cases in support of Aristotle's plea for *Επιείχεια* (*Epichaia*, to use Plowden's transliteration) or the 'equity of the statute', as common lawyers came to call it.

Common lawyers supplied further illustrations. Christopher St German (early 16th century) suggested that the *Statute of Labourers 1349* which prohibited on pain of imprisonment the giving of alms to able-bodied beggars would not apply to a good Samaritan who had given clothing to a beggar in ice-cold weather to save his life, 'bycause it shall be taken that it was the intent of the makers of the statute to excepte suche cases'.[61] Edmund Plowden used a variation on the city gate theme (death decreed for non-citizens climbing the city wall; what of strangers climbing the wall to assist in the defence of the city?),[62] argued for acquittal and added to it a number of cases decided by the English courts in which the apparent scope of statutes had been restricted.[63] Again, his reason is that in such cases the departure from literal meaning accorded with 'the intent and meaning of the makers of the law'.[64]

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55 'In some cases it is lawfull for the prisoner to break prison … as if the prison be set on fire … he may break prison for safeguard of his life. — Edward Coke, *The Second Part of the Institutes of the Laws of England. Containing the Exposition of Many Ancient and Other Statutes* (E and R Brooke, 1797) 589.

56 Dwarris, above n 19, 484. As we know, Coke considered judging one's own cause to be against all reason.

57 Aristotle, *The 'Art' of Rhetoric* (JH Freese trans, Heinemann, 1959) 145, 147.

58 Of Lombard-Norman ancestry, lived in various parts of Europe, including Cologne and Paris — 13th century.

59 Dutch jurist and philosopher — 17th century.

60 German jurist and political philosopher — 17th century.

61 TFT Plucknett and JL Barton, *St German's Doctor and Student* (Selden Society, 1974) vol 91, 99, 101.

62 He had taken this hypothetical from the works of Gerald Odo (Geraldus Odonis), an Italian Franciscan (14th century) who wrote a commentary on Aristotle — *Expositio in Aristotelis ethicam* — see JJ Walsh, 'Teleology in the Ethics of Buridan' (1980) 18(3) *Journal of the History of Philosophy* 265, 267 n 7.

63 Edmund Plowden, Notes attached to *Eyston v Studd* (1574) 2 Plowden 465–7; 75 ER 696–8.

64 'The intent … is the only thing regarded by equity, as may appear to every one who pursues the method of enquiry by way of question and answer in the manner before intimated …' (*ie* by consulting the

2 Reading up (the expansive epichaia)

Edmund Plowden's *epichaia* not only allowed for the restriction of statutes, it also enabled the courts to apply them to similar cases not covered by their literal meaning (analogical application). The 'great diversity between these two equities' so Plowden explained, is that 'the one abridges the letter, the other enlarges it, the one diminishes it, the other amplifies it, the one takes from the letter, the other adds to it'.[65] The application of statutes to cases outside their literal reach was very popular at the time. Although Justinian had frowned upon judicial interpretation of Imperial laws, he regarded their analogical application almost as a compliment:[66]

> When his Imperial Majesty examines a case for the purpose of deciding it, and renders an opinion in the presence of the parties in interest, let all the judges in Our Empire know that this law will apply, not only to the case with reference to which it was promulgated, but also to all that are similar.

Vogenauer gives examples from Roman law. A resolution of the Senate which was intended to apply to 'sons' was applied also to grandsons.[67] A law concerning presents between spouses was applied also to presents between engaged couples.[68] When literalist practices gained ground in Continental systems during the 18th and 19th centuries, extensive interpretation by means of stretching the legislative text became controversial, while analogical application beyond linguistic limits remained largely unchallenged.[69]

In his *Treatise Concerning Statutes* Hatton mentions that a statute which gave the executor the right to sue for goods taken from the testator during his lifetime is extended to administrators, and that a statute forcing a valuer who has put an excessive value on goods to buy them himself at the inflated value is extended to valuers of real estate.[70] Statutes creating very serious criminal offences were not applied by analogy, but less serious offences were so applied. A statute imposing a penalty on the warden of the fleet for allowing prisoners to escape was extended by analogy to 'Sheriffs and Gaolers, or Keepers of Prisons'.[71]

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imaginary lawmaker — the method recommended by Aristotle) — Plowden, above n 63, 468; (ER 699). What Plowden means by 'intent' is 'the intent and meaning of the makers of the law' (as he calls it elsewhere — see ibid 466 (ER 697). See also G Behrens, 'Equity in the *Commentaries* of Edmund Plowden' (1999) 20(3) *Journal of Legal History* 25.

65 Plowden, above n 63, 467; (ER 699). Christopher Hatton spoke of statutes 'general in words and particular in intent' and statutes 'particular in words and general in intent'. — Baade, above n 12, 78.

66 SP Scott (ed), T*he Civil Law: including the Twelve Tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo* (SP Scott trans, AMS Press, 1973) 88. The Latin text read as follows: *Si imperialis maiestas causam cognitionaliter examinaverit et partibus cominus constitutis sententiam dixerit, omnes omnino judices, qui sub nostro imperio sunt, sciant hoc esse legem, non solum illi causae, pro qua producta est, sed omnibus similibus.* — Krueger, above n 3, 68 (C 1.14.12) Although this sounds like the institution of *stare decisis*, limited to judgments given by the Emperor himself, the civilians seem to have considered it applicable to statutes — Vogenauer, above n 2, 491.

67 Vogenauer, above n 2, 491.

68 Ibid.

69 Ibid, 497–502. There seems to have been some confusion in the civilian literature between these two methods of extending the scope of legislation.

70 Hatton, above n 23, 43.

71 Ibid 66–7.

To justify this practice, Hatton pointed out that cases similar to those expressly covered by the statute might be 'under the same necessity of Reformation'.[72] Plowden followed Aristotle: Imagine that the lawmaker is present, listen to his imagined advice and follow that advice.[73] This leads to the 'hypothetical intention' of the lawmaker, a concept popular in Continental countries. It has 'unreality' written all over it and is best avoided. Coke's study of the *Corpus Juris* enabled him to find a preferable formula:[74]

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

What is being attributed to the lawmaker is the intention that individual things mentioned in some statutes are to be regarded only as examples of a wider *genus*, to be amplified by the courts:[75]

> Sometimes the makers of a statute put the strongest case, and by construction the lesser shall be included. In these cases they are put by way of example, and not as excluding other things of similar nature. Thus, in the statute of Gloucester; trespass … is put for debt, detinue, and covenant.

The advantage of the formula is that it lacks the air of unreality of the Aristotle/Plowden approach; surely Parliament must have the power to make laws in the way envisaged by Coke. If Parliament insists on making such laws, who is to say that it cannot be done?

The culmination of the development of this (the expansive) aspect of *epichaia* was the famous mischief rule cast by Coke in the form of a complex formula,[76] which has survived the centuries, albeit in an emasculated form because it is used nowadays only for the resolution of ambiguities,[77] its role as the basis for the analogical application of statutes having been abandoned.

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72 '… some Statutes are expounded by Equities, to reach to things of Vicine nature and condition; and sometimes, because the one cometh in lieu of the other, and the things lie under the same necessity of Reformation that the cases expressed are under …' — Ibid 41–2.

73 Plowden, above n 63, 467; (ER 699).

74 Bennion, above n 53, 464; Baade, above n 12, 80.

75 Coke as quoted by Dwarris, above n 19, 586. Again, Coke's inspiration is likely to have been the Digest: *Nam, ut ait Pedius, quotiens lege aliquid unum vel alterum introductum est, bona occasio est cetera, quae tendunt ad eadem utilitatem, vel interpretatione vel certe jurisdictione suppleri.* ('… whenever some particular thing or another has been brought within the statute law, there is good ground for other things which further the same interest to be added in supplementation.') — Mommsen and Watson, above n 18, Dig 1.3.13. See also Vogenauer, above n 2, 703 n 211.

76 *Heydon's Case* (1584) 3 Co Rep 7a–7b; 76 ER 637–8.

77 DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (LexisNexis, 6th ed, 2006) 2.5.

IV Strict Literalism: The Burial of Epichaia

A. Fortunatus Dwarris

In the late 18th century judges began to treat the literal meaning of legislative texts as the only legitimate guide to what the lawmaker had intended.[78] Influential lawyers of the early 19th century shared Bentham's illusory notion that, to quote Rupert Cross, 'the laws of a sophisticated society [can be] formulated in terms of indisputable comprehensibility'.[79] They persuaded themselves that unintended consequences of legislation were unlikely to occur and that, if they did, the separation of powers demanded that they be fixed by the legislature. By 1848, when the second edition of the book by Fortunatus Dwarris was published,[80] the transformation was complete. In Chapter XI Dwarris published 200 pages on 'the Proper Boundaries of Legislation and Judicial Interpretation'.

'[I]n a land jealous of its liberties', so Dwarris wrote, it is the Judge's duty to apply statutory words 'according to their fair and ordinary import and understanding'.[81] Judges must obey the 'plain words of an act of Parliament' and must never assume that 'the Legislature did not mean what it has unequivocally expressed'.[82] Giving judges power over statute law meant that the legislature had abdicated and delegated all its functions to the judiciary.[83] For certain cases to be 'excepted out of statutes' was 'quite inconsistent with the sounder principles of judicial interpretation …'[84] Where the case, though within the mischief, is not clearly within the meaning; or where the words fall short of the intent or go beyond it; — in every such case the duty of the judge is to adhere to the legal text.[85]

Novel issues arising in the cracks of a statutory scheme cannot be filled by analogical application, for the filling of gaps is a legislative responsibility.[86] Where a case occurs which was not foreseen by the Legislature, it must be declared *casus omissus*; or 'where the intention, if entertained, is not expressed, the legislature must be told [what you intended, you have not stated]'.[87]

With new rules of construction came new drafting styles. Edward Coke's 'wisdome of ancient parliaments to comprehend much matter in few words'[88] no longer fitted the times. Dwarris called for 'an end to verbal generalities … and [for leaving] as little to construction

78 '… we are bound to take the Act of Parliament, as they have made it: a casus omissus can in no case be supplied by a Court of Law, for that would be to make laws …' — *Jones v Smart* (1785) 1 TR 44, 52; 99 ER 963, 967 (Buller J).

79 R Cross, 'Blackstone v. Bentham' (1976) 92 *Law Quarterly Review* 516, 520.

80 Dwarris, above n 19. The second edition was widely used, at least by the judges of the South Australian Supreme Court, during the second half of the 19th century.

81 Ibid 704.

82 Ibid.

83 Ibid 617.

84 Ibid 622.

85 Ibid 704.

86 Ibid 704–5.

87 Ibid. *Quod voluit, non dixit*.

88 Coke, above n 55, 401. Dwarris quoted Coke as having said: 'prudent antiquity included much matter in few words' — Dwarris, above n 19, 705.

as may be', for the best laws are those which leave as little room as possible to judicial discretion.[89] This is the origin of the very detailed drafting styles in common law countries which Continental lawyers find so exasperating.[90]

On the Continent, the movement to tie judges to the letter of the law was led by princes and politicians. In England, it was the judges themselves who freely abandoned the power of liberal interpretation and decided to 'look to the language and nothing else'.[91] Leading literalists among the English judges like Lord Tenterden were also staunch defenders of the cause of human liberty.[92] Perhaps Montesquieu had persuaded them that the judicial power was a potential menace to liberty which had to be controlled and strictly separated from the other powers of the state. To Montesquieu it followed that Judges must apply the law as written and refrain from adding to it or subtracting from it by interpretation, for that would be lawmaking; judges must be nothing more than 'the mouths that pronounce the words of the law'.[93] Such views were wide-spread in the 19th century. The revered German Jurist, Rudolf von Jhering, stated that 'form is the arch foe of arbitrariness, the twin sister of freedom'.[94]

Like most common lawyers Dwarris was committed to the ideal of the continuity of the common law, so he moderated his criticism of the older approach, seeking to reconcile older liberal precedents with the new literalist position. Many older English statutes were very laconic, while recent ones tended to regulate their subject matter in great detail, leaving little room for judicial creativity. The older statutes would have been productive of much unintended injury or oppression had they not been mitigated by the judiciary and thus

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89 Bacon's works and 'Aphorism' are invoked for these views: *Optima est lex, quæ minimum relinquit arbitrio judicis; optimus judex, qui minimum sibi.* ('… the best law is one which leaves least to the discretion of the judge, the best judge is one who adds least of his own.') — Dwarris, above n 19, 696.

90 'English statutes … go into great detail even on trivial points and often adopt a form of expression so complex, convoluted, and pedantic that the Continental observer recoils in horror.' — K Zweigert and H Kötz, *Introduction to Comparative Law* (T Weir trans, Oxford University Press, 3rd revised ed, 1998) 267.

91 *Seaford Court Estates Ltd v Asher* [1949] 2 KB 481, 499 (Lord Denning MR). Corry thought that, once parliamentary sovereignty had become securely established, the doctrine of literalness had become hard to resist. — JA Corry, 'Administrative Law and the Interpretation of Statutes' (1936) 1 *The University of Toronto Law Journal* 286, 298.

92 In *Brandling v Barrington* (1827) 6 Barnewall & Cresswell's Reports 467, 475; 523 ER 527 Lord Tenterden considered it dangerous to give effect to the equity of the statute: '… it is much safer and better to rely on and abide by the plain words, although the Legislature might possibly have provided for other cases, had their intention been directed to them.' See also J Campbell, *The Lives of the Chief Justices of England: From the Norman Conquest till the death of Lord Tenterden*, vol 3 (Elibron Classics, 2006).

93 Montesquieu, *The Spirit of the Laws* (Thomas Nugent trans, G Bell & Sons, 1914) [trans of: *L'Esprit des lois*] <http://www.constitution.org/cm/sol.htm>:
'Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.' — Book XI. (*Of the Laws Which Establish Political Liberty, with Regard to the Constitution*) n 6 [5];
'… the national judges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigour' — Book XI. (*Of the Laws Which Establish Political Liberty, with Regard to the Constitution*) n 12 [3].

94 '*Die Form ist die geschworene Feindin der Willkür, die Zwillingsschwester der Freiheit*' — R von Jhering, *Der Geist des Römischen Rechts auf den verschiedenen Stufen seiner Entwicklung* II (von Breitkopf und Härtel, 5th ed, 1898) 471. See also Zimmermann, above n 33, 88 n 125.

'gradually adapted to the free institutions of the country'.[95] Under the new approach to drafting, however, corrections of and adjustments to more recent statutes were no longer permissible. Explaining the new approach in terms of the changing character of statute law enabled the courts to invoke older precedents when the new approach overshot its target.[96]

B. The Absurdity Doctrine

It is a measure of the depth of the literalist views of the 19th century that judges were prepared to follow the letter of the law even if it led to absurd decisions. When Lord Reid stated in 1968 that 'it is always proper to construe ambiguous words in the light of the reasonableness of the consequences',[97] he affirmed a rule of construction already to be found in the *Corpus Juris*[98] and repeated in Coke's *Institutes*.[99]

A version not limited to ambiguity was affirmed by Bromley CJ in 1554 when he said that, when the text is contrary to reason, 'the intent of the makers of the statute could not be according to the letter'.[100] It was this radical version which was endorsed by Lord Ellesmere in 1615[101] and by Blackstone as late as 1765 (let us call it the 'Bromley/Blackstone solution').

The voice of common sense as evident in these pronouncements counted for nothing to the disciples of strict literalism. The literalist judges of the early 19th century thought that they would be involved in illicit law-making if they departed from the plain and ordinary meaning of the statutory text, however absurd the result. There was no escape whether by flexible use of statutory language or by invoking the statutory purpose.

The authority for this view was not only substantial, it also showed considerable endurance; prominent examples may be found in the 1820s,[102] the 1830s,[103] the 1850s,[104]

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95 Dwarris, above n 19, 706.

96 See, *eg*, the revival of *Stradling v Morgan* (1560) 1 Plowden 199, 75 ER 305 by the Committee for Privileges of the House of Lords in the *Viscountess Rhondda's Claim* [1922] 2 AC 339 (HL).

97 *Gartside v IRC* [1968] AC 553, 612.

98 *In ambigua voce legis ea potius accipienda est significatio, qua vitio caret, praesertim cum etiam voluntas legis ex hoc collogi posuit*. ('When there is an ambiguity in a statute, that sense is to be preferred which avoids the absurdity, especially when by this method the intendment of the act is also secured.') — Mommsen and Watson, above n 18, Dig 1.3.19 (Celsus).

99 *Talis interpretatio in ambiguis semper fienda est, ut evitetur inconveniens et absurdum*. ('When the words are ambiguous, one should always choose the interpretation which avoids the inconvenient and the absurd.') — Edward Coke, *The Fourth Part of the Institutes of the Laws of England. Concerning the Jurisdiction of Courts* (E and R Brooke, 1797) 328.

100 *Fulmerston v Steward* (1554) 1 Plowden 102, 109–10; 75 ER 160, 172. See also Plucknett, above n 9, 334.

101 'A breviate or direccion for the Kinges learned counsell collected by the Lord Chauncellor Ellesmere, Mense Septembris 1615' in LA Knafla, *Law and Politics in Jacobean England. The Tracts of Lord Chancellor Ellesmere* (Cambridge University Press, 1977) 319, 335. Egerton's *Discourse* already contained many examples of the construction of statutes contrary to the statutory text (Construction de Statute Conter les Parollz) — Thorne, above n 10, 61–70.

102 *R v Inhabitants of Barham* (1828) 8 Barnewall & Cresswell's Reports 99, 104; 108 ER 980.

103 'Where the language of the Act is clear and explicit, we must give effect to it whatever may be the consequences.' — *Warburton v Loveland* (1832) 2 Dow & Cl 480, 489, 6 ER 806 (Lord Tindal CJ).

104 'If the precise words used are plain and unambiguous, in our judgment, we are bound to construe them in their ordinary sense, even though it do (*sic*) lead, in our view of the case, to an absurdity or manifest injustice.' — *Abley v Dale* (1851) 11 CB 378, 391, 138 ER 519, 525 (Jervis CJ)

and the 1890s.[105] Corry added Lord Hewart CJ in 1931 and Lord Macmillan in 1933.[106] He might also have added Justice Higgins in 1920,[107] Lord Reid in 1960[108] and Lord Diplock in 1980.[109] The consequence was that absurdities hidden in the text and brought to light by the oddities of wholly unanticipated cases had to be inflicted on hapless litigants. Judges who subscribed to such views were not so perverse as to welcome unreasonable consequences; they simply regarded legislative intervention by Parliament as the only constitutionally legitimate remedy.

V Return of *Epichaia*?

Pronouncements in the House of Lords in 1971,[110] in 1975[111] and in 1995[112] recognised legislative purpose[113] as an indicator of meaning of increasing weight. In Australia a similar approach was ordained by legislation at all levels of government.[114] The statutory purpose

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105 'If the words of an Act are clear, you must follow them, even though they lead to a manifest absurdity. The Court has nothing to do with the question whether the Legislature has committed an absurdity.' — *R v Judge of City of London Court* [1892] 2 KB 273, 290, (Lord Esher MR (CA)).

106 Corry, above n 91, 300 n 83 and the cases there referred to.

107 'The fundamental rule of interpretation of legislation, to which all others are subordinate, is that a statute is to be expounded according to the intent of the Parliament that made it; and that intention has to be found by an examination of the language used in the statute as a whole. The question is, what does the language mean; and when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable.' — *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 161–2.

108 '… we must apply [words that are not capable of a more limited construction] as they stand, however unreasonable or unjust the consequences, and however strongly we may suspect that this was not the real intention of Parliament.' *IRC v Hinchy* [1960] AC 748, 767.

109 '… the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancy ambiguities as an excuse for giving effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient, or even unjust and immoral.' — *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 157 (Lord Diplock).

110 *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 879 (Lord Diplock).

111 'If one looks back to the actual decisions of [the House of Lords] on questions of statutory construction over the past 30 years one cannot fail to be struck by the evidence of a trend away from the purely literal towards the purposive construction of statutory provisions.' — *Carter v Bradbeer* [1975] 1 WLR 1204, 1206–7 (Lord Diplock).

112 '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 …' — *Pepper v Hart* [1993] AC 593, 617 (Lord Griffiths).

113 The OED lists 14 main and many subsidiary meanings of 'purpose', yet 'legislative purpose' is not fully explained by a single one of these. Legislation changes the law and consequentially thereby, it is hoped, the affairs of individuals and of the community at large. Thus purpose cannot be separated from the range of (usually future) situations to which a statute is meant to apply. Cases may reveal a likely divergence between the legislative text and the lawmaker's actual intent.

114 'In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.' — section 15AA of the *Acts Interpretation Act* 1901 (C'th), enacted in 1981. For similar legislation in the various states, see Pearce and Geddes, above n 77, 2.7.

has been used for centuries to resolve uncertainties of meaning and applicability. Moreover, the literal meaning of legislative texts is still of great importance while the courts still adhere anxiously to the view that they must never legislate, a dogma which restricts the potential of purposive thinking. Lord Devlin gave eloquent expression to that anxiety when he warned that dealing with statutes in a free and easy fashion would lead to the totalitarian state, 'however long and winding the path'.[115] May one be so bold as to suggest that some of that anxiety could be relaxed at least a little? Does the political culture of a country really depend on the finer points of statutory interpretation? Switzerland told its judges in 1907:[116]

> If a provision cannot be found in this Law, the court is to decide in accordance with customary law and, failing that, with the rule which the court would establish if it were the legislator.

On the Continent this is regarded as a particularly successful attempt to solve the problem of the *casus omissus* and Swiss democracy is sturdier now than it was one hundred years ago.

A. Return of the Restrictive Epichaia?

1 Linguistic usage: Stradling v Morgan

The extreme views expounded from the Bench during the early days of literalism had not removed the need for some flexibility. That need had already been met at least in part in the second half of the 16th century by a linguistic discovery made by the Barons of the Court of Exchequer. In 1560 they explained in *Stradling v Morgan*[117] that 'all things' may sometimes mean 'some things' and that 'every person' may sometimes mean 'some persons'. The Barons had discovered that linguistic usage often reads unspoken limitations derived from the context into widely expressed statements. An example from the philosophical literature is that of a babysitter who is told by parents to 'teach them a game' and, after their departure, proceeds to introduce the children to poker.[118] The context implied that 'game' meant 'children's game' and should have been so understood had the babysitter had a proper grasp of English. It followed that the 'reading down' of statutes was sometimes required by predominantly linguistic considerations. In 1868 Willes J called this linguistic practice the

> rule … of good sense and grammar and law, that general words are to be restrained to the subject matter with which the speaker or writer is dealing'.[119]

The legal systems of the common law, committed as they are to 'general and popular use' as the yardstick for the meaning of statutory language, can hardly fail to appropriate this linguistic insight.

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115 Lord Devlin, 'Judges and Lawmakers' (1976) 39 *Modern Law Review* 1, 16.

116 *Kann dem Gesetz keine Vorschrift entnommen werden, so soll das Gericht nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die es als Gesetzgeber aufstellen würde. — Civil Code* of 1907 (Switzerland)Art. 1 (2) <http://www.admin.ch/ch/d/sr/210/a1.html>.

117 (1560) 1 Plowden 199; 75 ER 305.

118 L Wittgenstein, *Philosophical Investigations* (G E M Anscombe trans, Aphorism 69, 1999) <http://users.rcn.com/rathbone/lw65–69c.htm>. See also Lord Steyn, 'The Intractable Problem of the Interpretation of Legal Texts' (2003) 25 *Sydney Law Review* 5.

119 *Chorlton v Lings* (1868) LR 4 CP 374, 387; *The Viscountess Rhondda's Claim* [1922] 2 AC 339; JJ Spigelman, 'Statutory Interpretation: Identifying the Linguistic Register' (1999) 4 *Newcastle Law Review* 1; *Repatriation Commission v Vietnam Veterans' Association of Australia NSW Branch Inc* (2000) 48 NSWLR 548, 577–8 (Spigelman CJ).

2 Stradling v Morgan: beyond linguistic usage

The extension of *Stradling v Morgan* to situations beyond purely linguistic considerations proved irresistible. Maxwell lists instances of the restrictive treatment of statutes, some at the very height of the literalist movement.[120] To give just one example: *R v Rose*,[121] decided in 1847, held that a statute which declared it piracy to 'make a revolt in a ship' was held not to have been infringed by a revolt intended to prevent the captain from unlawfully killing persons on board. Decisions of this kind appeal to common sense but under strict literalism there was no theoretical basis for them. Providing such a basis has proved difficult.

i Ruth Sullivan

In Canada, Ruth Sullivan has presented an extensive analysis of the absurdity problem. She tried to underpin the unduly emotive expression 'absurdity' with more sober and familiar alternatives:[122]

> Consequences judged to be unjust and unreasonable are judged to be absurd and are presumed to have been unintended.

She suggested that, since the defeat of literalism, courts have been free to avoid absurd consequences by departing from the plain and ordinary meaning of the text:[123]

> Even when the words are clear, the ordinary meaning may be rejected if it would lead to an absurdity.

It follows that Sullivan favoured what Bennion has called 'strained construction', distinguishing the grammatical or linguistic meaning of an enactment read 'in isolation from legal considerations' (Section 151) from the (legally relevant) meaning which has resulted from strained construction (Section 157). The crew in *Rose* might have avoided conviction by arguing that they did not 'revolt' but merely 'resisted' an illegal act.

A wide gulf separates strained construction from strict literalism with its insistence that the 'plain and ordinary meaning' is the only safe guide. Strained construction causes language to play a new role: it is no longer the sole guide to meaning but the perimeter of a linguistic field, variable with changing circumstances, within which interpretation is guided by considerations other than those derived from language. 'Strained construction' is hardly a theory of interpretation, for it leaves too much unstated which might serve as a justification.

ii Beyond strained construction

Sullivan favoured strained construction over the Bromley/Blackstone solution that Parliament could not have intended to legislate for absurd results and that statutes could and should be ignored to the extent that they gave rise to such consequences. She might have been inhibited by the dogma of Parliamentary sovereignty which does indeed rule out any approach to

120 P St Langan, *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 12th ed, 1969) 106–36.

121 *R v Rose* (1847) 2 Cox CC 329.

122 R Sullivan, *Driedger on the Construction of Statutes* (Butterworths, 3rd ed, 1994) 79. If so defined, the controversial decision of the High Court in *Al Katab* seems like a good example of an absurd result.

123 Ibid, 85–6.

construction which would make it impossible, in theory and/or practice, for Parliament to legislate for unjust or even absurd consequences. As Blackstone has said:[124]

> … if the parliament will positively enact a thing to be done which is unreasonable, I know of no power that can control it.

However, even if the Bromley/Blackstone solution cannot be an unyielding rule, Parliamentary sovereignty would be left intact if it were treated merely as a presumption, rebuttable by compelling counter-indications. An example would be the detention of children in migration detention camps, regarded by many as unjust and unreasonable. In 2004 in *Re Wolleys*[125] the High Court had to decide whether three children were being detained illegally in the Baxter Immigration Detention Facility under powers supposedly granted to the Minister for Immigration under the *Migration Act 1958* (C'th). One of the issues, as seen by Justice Gummow, was whether general expressions such as 'person', detainee' or 'person detained' should be read down so as to exclude children. The learned Justice noted that specific provisions of the Act dealt with detained children and concluded that the Parliament had intended that children were caught by the detention provisions. Arguments based on justice or absurdity could not prevail over the clearly expressed legislative intention.

In *Al-Kateb v Godwin*[126] a majority of the High Court (McHugh, Hayne, Callinan and HeydonJJ) felt forced by application of traditional methods of construction to apply the detention provisions of the *Migration Act 1958* (C'th) to Mr Al-Kateb who was due to be repatriated. The circumstances were such that no country could be found that would accept him so that, if legally detainable, he faced the prospect of detention for life — in view of the value the common law attributes to personal liberty and freedom of movement an unjust and unreasonable consequence if ever there was one. Whatever the policies of the government of the time, a Parliament which is presumed to 'act according to reason and does not intend harsh or harmful results'[127] could surely not be said to have intended such a consequence in an unusual and unanticipated case. In *Duport Steels Ltd v Sirs*[128] Lord Diplock insisted that judges may take notice of a parliamentary intent (or of its absence) only insofar as it can be deduced from the statutory words.[129] With respect, purposive thinking does not have to submit to such constraints.

The legislative purpose is the most important aspect of the lawmaker's intention. To form that purpose, the lawmaker must first identify the societal or personal circumstances, 'the mischief and defect' (to use the language of the mischief rule) to be targeted. Only

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124 W Blackstone, *Commentaries on the Laws of England* (Oxford, 1765) vol 1, 91.

125 [2004] HCA 49 n 129–30.

126 (2004) 219 CLR 562.

127 Thorne, above n 10, 82

128 [1980] 1 WLR 142.

129 The case involved the applicability of a statutory immunity of trade union organisers from certain types of tortuous liability. Lord Diplock observed:
'… for a judge (who is always dealing with an individual case) to pose himself the question, "Can Parliament really have intended that the acts that were done in this particular case [were to be caught by the Act]" is to risk straying beyond his constitutional role as interpreter of the enacted law and assuming a power to decide at his own discretion whether or not to apply the general law to a particular case. The legitimate questions for a judge in his role as interpreter of the enacted law are: "How has Parliament, by the words that it has used in the statute to express its intentions, defined the category of acts that are entitled to the immunity? Do the acts done in this particular case fall within that description?"' — [1980] 1 WLR 142, 158.

then can the lawmaker decide which form the legal intervention should take. Barring courts from taking notice of the situations the lawmaker envisaged means barring them from understanding fully the lawmaker's purpose. A judge who is convinced that the case before the court is not of the type envisaged by the lawmaker, is faced with what Francis Bacon called a 'latent ambiguity',[130] an ambiguity arising not from the text but from some 'collateral matter'. Bacon's distinction between the two ambiguities has not been forgotten. As Justice Branson has observed:[131]

> … *'equivocal'* or *'ambiguous'* [signifies] one of two possible things; either that its intended meaning is unclear or that, although its intended meaning is clear, its application in particular circumstances is uncertain.

If this is correct the justices in *Al-Kateb* were faced with doubtful applicability in the form of a latent ambiguity whatever a literalist might think of the legislative letter. A choice must then be made between the meaning as established by conventional rules and the (possibly conflicting) intention of the lawmaker. The purpose of the statute is only one of the yardsticks. If the purpose of the *Migration Act* is to secure Australia's borders, the more Al-Katebs are detained for life, the greater the deterrent effect. Is it not obvious that the legislative purpose must be tempered with other considerations, notably those derived from the principle of legality? Such limits were understood by the medieval writers who suggested that a law requiring the return of deposited objects did not mean that one had to return a sword to a madman or a revolutionary.[132] They were clear to Christopher St German when he affirmed that the *Statute of Labourers 1349* did not prevent a good Samaritan from saving the life of a beggar.[133] Why have these simple insights been buried under the debris left behind by the excesses of literalist simplifications? There is actually high authority from the heyday of literalism for the solution to *El-Kateb* which I have suggested. In 1857 Lord Wensleydale reaffirmed in *Grey* v *Pearson*[134] the Bromley/Blackstone solution:[135]

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

This 'golden rule' has unhappily been judicially emasculated by limiting its scope to cases in which the absurdity appears on the face of the statute.[136] Blackstone warned that it must be applied with restraint.[137] Greater restraint might well have been shown by the

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130 'There be two ambiguities of words, the one is *Ambiguitas Patens*, and the other *Latens*. *Patens* is that which appeareth to be ambiguous upon the deed or instrument, *Latens* is that which seemeth certaine, for any thing that appeareth upon the deed or instrument, but there is some collaterall matter out of the deed, that breedeth the ambiguity.' — Sir Francis Bacon, *The Elements of the Common Lawes of England*, Tract I (I More, 630) 90–1. Broome spoke of 'evidence of something extrinsic' — Broome, *Selection of Legal Maxims, Classified and Illustrated* (Philadelphia, 4th ed, 1854) 387.

131 *Universal Music Australia Pty Ltd v Sharman Networks Ltd* [2006] FCAFC 41, n 29.

132 This was one of the stock examples put forward by medieval philosophers — Vogenauer, above n 2, 539.

133 Plucknett and Barton, above n 61, vol 91, 99, 101.

134 (1857) 6 HLC 61, 106; 10 ER 1216, 1234.

135 Ibid 106; 10 ER 1234.

136 Pearce and Geddes, above n 77, 2.4; *President etc of Shire of Arapiles v Board of Land and Works* (1904) 1 CLR 679, 687 (Griffith CJ).

137 '… the liberty of considering all cases in an equitable light must not be indulged too far … which would make every judge a legislator.' — Blackstone, above n 124, vol 1, 61.

Bundesarbeitsgericht (the final court of appeal for industrial matters) when it dealt with a 1949 law which gave female workers who, on average, worked 40 hours per week, one day per month off to enable them to attend to their housework. The Court decided to exclude from this benefit female workers who happened to have domestic help.[138] It also imposed a further restriction:[139]

> In 1949 the legislature assumed that women did not have enough free time. Since then, … [t]he five-day week has become the rule and the work and health burdens on women have lessened. Had the legislature … foreseen this development, the Domestic Work Day would not have been granted. It follows that … women who have benefitted from the five-day week can no longer claim the Domestic Work Day even if they happen to work for more than 40 hours per week.

No Australian court would put forward such a justification, particularly not in the political minefield of industrial relations.

B. Return of the Expansive Epichaia?

In the early days of the common law, statutes were drafted with less care than they are now so that the need for analogical application has lessened. It has not disappeared entirely, for the hope of the early literalists that all such needs would be met promptly by the lawmaker was always unrealistic and has remained unfulfilled. However, the means for meeting the need has been removed. As Lord Reid has stated:[140]

> It is a cardinal principle applicable to all kinds of statutes that you may not for any reason attach to a statutory provision a meaning which the words of that provision cannot reasonably bear. If they are capable of more than one meaning, then you can choose between those meanings, but beyond that you must not go.

Allow me to introduce an instructive German example for the analogical application of a provision of the German Civil Code (*BGB*).[141] § 1709 (no longer in force) gave the mother and the maternal relatives of an illegitimate child an action against the child's procreator (the primary maintenance debtor) for reimbursement of the costs they had incurred in maintaining the child. The *Bundesgerichtshof* (the Federal Appeal Court) had to decide whether reimbursement could also be claimed by the mother's cuckolded husband who had maintained the child, a daughter, thinking she was his child. § 1709 made no mention of such a case. The *Bundesgerichtshof* stated:[142]

> The basic purpose of § 1709 is that the mother and the maternal relatives of an illegitimate child are to be liable for maintenance only in a subsidiary role, the procreator being the primary maintenance debtor. It is in their interest, but also to promote their willingness to maintain the child (*ie* for the child's benefit) that the child's maintenance claim against her procreator passes to the relatives when they pay maintenance to the child in pursuance of their legal duty. It would be inequitable and incompatible with this purpose and orientation (*Sinn und Zweck*)

138 BAGE (Decisions of the *Bundesarbeitsgericht*) vol 13, 1.

139 Vogenauer, above n 2, 69 (HK Lücke).

140 *Jones v DPP* [1962] AC 635, 662 (HL).

141 BGHZ 24/9 (trans HK Lücke) [translation of reports of Federal Appeal Court decisions (private law)].

142 Ibid 12 (Lücke trans).

> of § 1709 if the *prima facie* paternity of the mother's husband implied a legal liability to maintain the child, and if in relation to the procreator of the child who is, after all, primarily liable, the husband, were to be denied the advantages which the law affords to the maternal relatives, *ie* to persons who are in fact related to the child.

This analogy, based on purposive thinking, involves two elements: (1) the purpose of allowing reimbursement to the mother and her relatives also fits the mother's husband, and (2) the failure to include the mother's husband in § 1709 had not been deliberate — the Parliament had simply not considered such an atypical case. In 1970, the position adopted by the *Bundesgerichtshof* was given parliamentary sanction when § 1709 was amended to read as follows:

> If, in place of the father, another relative who was liable to maintain the child, or the husband of the child's mother, has paid maintenance, the child's claim against the father passes to such person.

English and Australian courts have moved a little closer to this kind of approach. In 1980, in *Wentworth Securities v Jones*[143] Lord Diplock specified three conditions which would justify 'reading into [an] Act words which are not expressly included in it':[144]

> First, it was possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was … ; secondly, it was apparent that the draftsman and Parliament had by inadvertence overlooked … an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted … had … attention been drawn to the omission …

This approach has since been accepted by the House of Lords[145] and also by Australian courts.[146] It is good to see the crumbling of the *casus omissus* tradition, but the rather technical approach to this new beginning does not amount to a full endorsement of analogical application. English Renaissance lawyers would have approved of the decision of the *Bundesgerichtshof*, but present-day common lawyers would regard it as involving impermissible judicial law-making. If the undoubted need for occasional analogical application is to be met, it will have to be done by other means.

1 Strained interpretation

The practice of strained interpretation has already been explained. It will come as no surprise to learn that it is used by common law courts just as much for the expansion of statutory provisions as it is for their contraction. It has been used *inter alia* to adapt statutes to changing circumstances. Until the second half of the 19th century it was the received wisdom that a

143 [1980] AC 74.

144 Ibid 105 (Lord Diplock).

145 *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586. The decision has met with disapproval in the literature — D Auchie, 'The Undignified Death of the *Casus Omissus* Rule ' (2004) 25(1) *Statute Law Review* 40. But see V Niranjan, 'Was the Death of the *Casus Omissus* Rule "Undignified"?' (2009) 30(1) *Statute Law Review* 73.

146 B Coxon, 'Open to Interpretation: The Implication of Words into Statutes' (2009) 30(1) *Statute Law Review* 1.

statute 'must be construed as if one were interpreting it the day after it was passed.'[147] Lord Thring, a well-remembered parliamentary draftsman,[148] initiated an important improvement in the law when he declared that statutes should be understood as 'always speaking'.[149] The significance of this somewhat cryptic phrase may be illustrated by *Chappell & Co Ltd v Associated Radio Co of Australia Ltd*.[150] The *Copyright Act 1912* (Vic) prohibited performance 'in public' of musical works without the permission of the copyright owner. When sued for having broadcast by radio the plaintiff's music without permission, the defendant argued that the Victorian parliament could not have intended radio broadcasts to be included in the prohibition because radio had not been introduced when the Act was passed. Cussen J found for the plaintiff:[151]

> … if things not known at the time of the coming into operation of an Act fall on a fair construction within its words, they should be held to be included.

The literalist approach is singularly ill-equipped to cope with this kind of problem, for linguistic usage is not a source of law so that the result cannot be explained simply by changes in the meaning of language. In *Royal College of Nursing of the UK v Department of Health and Social Security* Lord Wilberforce supplied a more convincing explanation:[152]

> … a new state of affairs, or a fresh set of facts bearing on policy … [may be considered to fall within the Parliamentary intention] if they fall within the same genus of facts as those to which the expressed policy has been formulated. They may also be held to do so if there can be detected a clear purpose in the legislation which can only be fulfilled if the extension is made.

The final sentence of Lord Wilberforce's dictum shows how similar such reasoning is to the Continental practice of analogical application. There is, however, one important difference: under the current common law the extent to which words can be stretched represents a limit based on language while German law, like the older common law, recognises no such restraint.

This is neatly illustrated by *Fitzpatrick* v *Sterling Housing Association*,[153] a 1999 decision of the House of Lords which involved the *Rent Act 1977* (UK). Fitzpatrick, a homosexual lover, had nursed his dying partner, the tenant of a rent-controlled flat, in the most selfless fashion. After his partner's death he claimed to be entitled to continue to live in the flat. The legislation gave such a right to members of the tenant's family who had lived with the deceased during his or her lifetime. The House accepted that the two lovers had been a 'family' within the legislation, justifying the decision by pointing out that 'family' was a broad and somewhat amorphous term with many meanings. As a family member Fitzpatrick had to pay market rent. Had he been a 'spouse', a term which had been extended by the legislation to include any person who was living with the original tenant 'as his or her wife

147 *The Longford* (1889) 14 PD 34, 36 (Lord Esher).

148 A Samuels, 'Henry Thring: The First Modern Drafter' (2003) 24(1) *Statute Law Review* 91–2.

149 H Thring, *Practical Legislation*: *The Composition and Language of Acts of Parliament and Business Documents* (J Murray, 2nd ed, 1902) 83; Bell and Engle, above n 20, 51–2.

150 [1925] VLR 350. For other cases concerned with technological change see JF Burrows, *Statute Law in New Zealand* (3rd ed, LexisNexis, 2003) 265–6.

151 [1925] VLR 350, 361.

152 [1981] AC 800, 822.

153 [1999] 3 WLR 113.

or husband', his rent would have been the lesser 'fair rent' payable under a statutory tenancy. The House of Lords held that 'spouse', 'wife' and 'husband' were not flexible enough to allow for the inclusion of homosexual lovers. Remaining within the statutory language, however flexibly that is applied, is, one supposes, meant to show that no new law is being made. However, by applying the word 'family' to this situation, their Lordships were making new law, for new content means new law. It was new law being created in disguise. Lord Devlin approved of such disguises:[154]

> It is facile to think that it is always better to throw off disguises. The need for disguise hampers activity and so restricts the power. Paddling across the Rubicon by individuals in disguise … is very different from the bridging of the river by an army in uniform and with bands playing.

The English courts have since put on their uniforms and their bands have begun to play, for in 2004 the House of Lords decided in *Ghaidan v Godin-Mendoza*[155] that a homosexual lover like *Fitzpatrick* could be considered to have been a 'spouse'. Admittedly, this was done under the impact of the *Human Rights Act 1998*, not in the name of analogical application. However, Continental legal thinking was an influence. The High Court will soon decide in the *Momcilovic* case,[156] at least for the Victorian legal system, whether the Australian courts will have to don their uniforms too.

2 Statutory analogy and the common law

If statute law itself is not open to analogical application, could the common law not be enlisted to perform the task? Responding to Pound's seminal article on this subject,[157] writers have suggested that 'from statute there may be derived some principle to be applied by way of analogy in fashioning the common law'.[158] Thus, the common law is expected to carry policies inherent in statutes beyond statutory words. Cross & Harris have tried to show that the common law has for many decades followed the course suggested by Pound.[159]

In Australia, the authority for the views put forward by Cross & Harris is not impressive. Writers have advocated ideas similar to Pound's,[160] although Australian writers have suggested some modifications to adjust them to Australia's federal system.[161] In their joint judgment in *Lamb v Cotogno*[162] Mason CJ, Brennan, Deane, Dawson and Gaudron JJ found some slight

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154 Devlin, above n 115, 11.

155 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557. For the situation in Victoria, see J Debeljak, 'Parliamentary Sovereignty and Dialogue under the Victorian *Charter of Human Rights and Responsibilities*: Drawing the Line between Judicial Interpretation and Judicial Lawmaking' (2007) 33(1) *Monash University Law Review* 9.

156 *Momcilovic v The Queen* [2010] HCA Trans 227 (3 September 2010).

157 R Pound, 'Common Law and Legislation' (1908) 21 *Harvard Law Review* 383.

158 WMC Gummow, *Change and Continuity. Statute, Equity and Federalism* (Oxford University Press, 1999) 11–8.

159 R Cross & J W Harris, *Precedent in English law* (Clarenden Press, 4th ed, 1991) 173–7.

160 P Atiyah, 'Common Law and Statute Law' (1985) 48 *Modern Law Review* 1; HF Stone, 'The Common Law in the United States' (1936) 50 *Harvard Law Review* 4.

161 Gummow, above n 158, 11–2; D StL Kelly, 'The Osmond Case: Common Law and Statute Law' (1986) 60 *Australian Law Journal* 513; V M Brand, *Common Law Expansion of Statutes* (Thesis, University of Adelaide, 1987).

162 (1987) 164 CLR 1, 10–2.

support for Pound's suggestion in the 'attenuated version' of it in a judgment of the House of Lords. However, their Honours also pointed out that Pound's idea had not found general acceptance. It appears that the jury is still out on this subject.

VI Conclusion

The great Frederick Maitland might have condemned this lecture as the kind of 'unsatisfactory compound' which often results from mixing 'legal dogma and legal history'.[163] As an Australian by adoption one feels entitled to defy the great man's authority by joining Enid Campbell who showed that older English precedents can be useful if they are invoked correctly.[164] This birdseye view of the evolution of some of our fundamental principles and practices of statutory interpretation will not help resolve modern controversies which have arisen from large numbers of recent, sometimes conflicting, judicial pronouncements and case outcomes. There might nevertheless be some value in tracing the origin of those fundamental principles which have endured, and in revisiting and re-examining those which were buried by the now discredited radical literalism of the 19th century. After all, many nooks and crannies of our new creed of purposive interpretation still await discovery and clarification. It might help to view these modern issues against the background of the beliefs and practices of our early common lawyers who laid the foundations on which the modern law has been built.

163 FW Maitland, 'Why the History of English Law is not Written' in HAL Fisher (ed), *The Collected Papers of Frederic William Maitland* (Cambridge, 1911) vol 1, 480.

164 'The contrast between the lawyer's "logic of authority" and the historian's "logic of evidence" should not, I think, be pressed too far, for the search for authority is in part a search for evidence.' — E Campbell, 'Lawyers' Uses of History' (1968) 6 *University of Queensland Law Journal* 1, 2.