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## STATUTE INTERPRETATION IN A NUTSHELL

### PRELIMINARY OBSERVATIONS

RULE I.—If you are trying to guess what meaning a court will attach to a section in a statute which has not yet been passed on by a court, you should be careful how you use *Craies' Statute Law* and *Maxwell on The Interpretation of Statutes*. As armouries of arguments for counsel they can be very useful: but you must know how to choose your weapon. In at least three respects these legal classics are very defective:

(a) Both books assume one great sun of a *principle*, "the plain meaning rule", around which revolve in planetary order a series of minor rules of construction: both assume that what courts do is unswervingly determined by that one principle. This is not so. Examine a few recent cases and you will find not a principle — nothing so definite as that — but an *approach*, a certain attitude towards the words of a statute. Look closer and you will see that there is not one single approach, but three, (i) "the literal rule", (ii) "the golden rule", (iii) "the mischief rule". Any one of these approaches may be selected by your court:<sup>1</sup> which it does decide to select may, in a close case, be the determining element in its decision.<sup>2</sup> Your guess should therefore be based on an application of all three approaches: you should not be misled by *Craies* and *Maxwell* into thinking there is only one to consider.

(b) Both books base their rules not on decisions, not on what the courts did in cases before them, but on dicta, the

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<sup>1</sup> Thus in *Vacher v. London Society of Compositors*, [1913] A.C. 107, Lords Macnaghten, Atkinson and Moulton were all agreed as to the result, but Lord Macnaghten stated and applied the "golden rule", Lord Atkinson stated and applied the "literal rule", Lord Moulton applied, but did not state, the "mischief rule".

<sup>2</sup> Thus, the only difference between *Re Linton & Sinclair Co. Ltd.*, [1937] 1 D.L.R. 137, and *Re Messervey's Ltd.*, [1924] 1 D.L.R. 1037, which it overruled, is that in *Re Linton* the "literal rule" was applied, while in *Re Messervey's* the "mischief rule" was applied.

remarks let fall by a heterogeneous collection of judges in an unrelated series of situations. This is unsound. Examine a few recent cases and you will find : that the judges sometimes apply the "mischief rule" without stating it or indeed any other rule of construction :<sup>3</sup> that it is quite possible for all the members of a court to agree that the meaning of a section is so plain that it cannot be controlled by the context and yet to disagree as to what that plain meaning is :<sup>4</sup> that it is by no means unusual for the majority to decide a case on the basis of one well-settled presumption, while the minority dissents on the basis of another no less settled.<sup>5</sup> You must not, therefore, be misled into believing that the theoretical acceptance by your court of the approach for which you are contending will automatically result in a decision in your favour. What will they do, and not what will they say, is your concern.

(c) Both books treat the "principles" and dicta with which they deal as if, having once been enunciated by a court, they remained equally valid at all times and in all places. Once again they are merely misleading. Turn now to the cases. Note the very different measure of authority accorded to the "golden rule" in England before and after the period 1825-1865;<sup>6</sup> contrast the recent growth and present popularity of the presumption against depriving persons of property without compensation<sup>7</sup> with the slow decline and present uncertainty of the presumption in favour of the requirement of *mens rea*;<sup>8</sup> "time when" is very important. Compare the faintly disapproving attitude of the present Alberta Court of Appeal to the requirement of *mens rea* with the approving attitude of the present English Divisional Court :<sup>9</sup> notice the widely differing degrees of respect at present accorded by the different English courts to the "mischief rule" :<sup>10</sup> "place where" is also very important.

<sup>3</sup> E.g., *R. v. Dubois*, [1935] S.C.R. 378.

<sup>4</sup> E.g., *Ellerman Lines v. Murray*, [1931] A.C. 126.

<sup>5</sup> *R. v. Halliday, ex parte Zadig*, [1917] A.C. 260.

<sup>6</sup> Corry, *Administrative Law and the Interpretation of Statutes* (1936), 1 Univ. of Tor. L.J. at pp. 299-300.

<sup>7</sup> Jennings, *Courts and Administrative Law* (1936), 49 Harv. Law Rev. 426.

<sup>8</sup> Jackson, *Absolute Prohibition in Statutory Offences* (1936), 6 Camb. L. J. 83, 90.

<sup>9</sup> Contrast *R. v. Piggly Wiggly Can. Ltd.* (1933), 60 Can. Crim. Cas. 105, with *London Passenger Transport Board v. Sumner* (1936), 52 T.L.R. 13 and dictum of Goddard J. in *Evans v. Dell* (1937), 53 T.L.R. 310, 313.

<sup>10</sup> "Some administrative lawyers have begun to lay down the proposition that (*Heydon's Case*) will be applied by the Chancery Division, the Probate, Divorce and Admiralty Division, and the House of Lords, while the King's Bench Division and the Court of Appeal will ignore it". W. [vor] Jennings in (1936), 52 L.Q.R. at 317.

RULE II.—If you are trying to guess what meaning your court will attach to a section in a statute which has already been passed on by the courts, when it comes to apply it to the facts of your case, you should beware of putting too implicit a trust in previously decided cases.

(a) Your court may decide to start by applying the bare words of the section to the facts of your case, and having done that, to see whether there is anything in the previously decided cases which would force them to take another view;<sup>11</sup> it may go as far as to “distinguish” those cases;<sup>12</sup> it may even deprecate their citation.<sup>13</sup>

(b) More usually it will interpret the section in the light of the cases previously decided upon it. Sometimes, and more especially in the case of old statutes like the Statute of Frauds, the Statute of Limitations and the Wills Act, it will even adopt a plainly erroneous judicial construction which is not binding upon it, if the precedents are of sufficiently long standing.<sup>14</sup>

(c) No court uniformly prefers one method to the other either at one time in reference to all statutes,<sup>15</sup> or over a long period of time in reference to a single statute.<sup>16</sup>

RULE III.—Do not be misled in your reading of cases by pious judicial references to “the intent of the Legislature”. The expression does not refer to actual intent—a composite body can hardly have a single intent: it is at most only a harmless, if bombastic, way of referring to the social policy behind the Act. If the court is following the “literal rule”, it will presently explain that the intent of the legislature can only be gathered from the words the legislature has used:<sup>17</sup> in

<sup>11</sup> As in *Barrel v. Fordree*, [1932] A.C. 676, 682, per Lord Warrington,

<sup>12</sup> As did all the members of the Court in *Fry v. Salisbury House Estate*, [1930] A.C. 432.

<sup>13</sup> As in *Shott's Iron Co. v. Fordyce*, [1930] A.C. 508, 511, 515.

<sup>14</sup> As in *Hanau v. Ehrlich*, [1912] A.C. 39. Compare the remark of Sir George Jessel, “I should not find any great difficulty in construing Acts of Parliament if I had no opinions to assist me” quoted in Graham-Harrison, *An Examination of the Main Criticisms of the Statute Book and of the Possibility of Improvement*, 1935 Journal Society Public Teachers of Law at p. 36.

<sup>15</sup> For recent English practice in this respect, see Davies, *Interpretation of Statutes in the Light of their Policy* (1935), 35 Col. L. Rev. at p. 526.

<sup>16</sup> For the fluctuations of the Judicial Committee in interpreting the British North America Act see MacDonald, *Judicial Interpretation of the Canadian Constitution*, 1 Univ. of Tor. L. J. at p. 281.

<sup>17</sup> “Intention of the Legislature is a common but very slippery phrase, which, popularly understood may signify anything from intention embodied in positive enactment to speculative opinion as to what the Legislature probably would have meant, although there has been an omission to enact it. In a Court of Law or Equity, what the Legislature intended to be done or, not to be done can only be legitimately ascertained from that which it has chosen to enact, either in express words or by reasonable and necessary

other words, that it is not concerned with the social policy behind the Act, but only with the "meaning" of words in a document, which document merely happens to be a statute. If the court is following the "mischief rule" and openly considers the question why the Act was passed, you should know that a rule of positive law debars it from referring to the only sources which can give a trustworthy answer to that question, *viz.*, Hansard or the Reports of Royal Commissions:<sup>18</sup> you should then conclude that the court's reference to "the intent of the Legislature" is a polite notice that it is about to speculate as to what *it* thinks is the social policy behind the Act. A court's speculation about the policy of statutes dealing with "lawyer's law" is very likely to be right:<sup>19</sup> about the policy of social reform statutes, of which it is almost certainly ignorant, and to which it is probably hostile,<sup>20</sup> very likely to be wrong.

#### A. JUDICIAL TECHNIQUE OF INTERPRETATION.

You will observe that your court always adopts a single uniform technique: it asks three questions; (1) what is the meaning of these words when read alone; (2) what is the meaning of these words when read together with the rest of the words of the Act; (3) what is the meaning of these words when read against the background of that part of human conduct with which the Act deals. Put more shortly it takes into account, (1) ordinary meaning, (2) context, (3) subject matter. You should not be too much impressed by this heartening phenomenon of judicial uniformity, or by the amount of space which judges devote to it in their opinions. No technique has much effect on final result—least of all this technique. If the court decides that the meaning of the words is "plain", then, of course, the "literal rule" is applied, "interpretation" is unnecessary and the technique is inapplicable.<sup>21</sup> If, on the other hand, the words are ambiguous enough to induce two people to spend good money in backing two opposing views

implication."—*Solomon v. Solomon & Co.*, [1897] A.C. 22, 38, per Lord Watson.

<sup>18</sup> *Gosselin v. R.* (1903), 33 S.C.R. 255; *Assam Rly. v. Commissioners of Inland Revenue*, [1935] A.C. 445, 457 per Lord Wright: the courts do, however, sometimes refer to these sources *sub silentio*, see Jennings, *The Statute of Westminster and Appeals to the Privy Council* (1936), 52 L.Q.R. 173, at pp. 174-177.

<sup>19</sup> See Davies, *op. cit.*, at pp. 528, 529.

<sup>20</sup> See Laski, *Report of Committee on Ministers' Powers* (1932), Appendix A.

<sup>21</sup> *Croxford v. Universal Insurance Co. Ltd.*, [1936] 2 K.B. 253, pp. 280-281, per Scott L.J.

as to their meaning, no man of sense would expect to find the question settled by a reference to such a vast and vague field as "the rest of the words of the Act" or "the part of human conduct with which the Act deals". Examine the cases and you will see that the court, after discussing "ordinary meaning", "context", and "subject matter", always concludes its opinion in one of two ways: either it refers to the "object" of the Act, *i.e.*, calls to its aid the "mischief rule" and speculates as to why the Act was passed, or else it invokes one of the "presumptions".<sup>22</sup>

If my court decides the meaning of the section is "plain" will it apply the "literal rule" and stop there? Or will it adopt the "golden rule" and find sufficient reason for departing under it from the "plain meaning"? If my court decides the section is ambiguous will it adopt the "mischief rule" or will it invoke one of the "presumptions"? If it invokes a "presumption", which one? These are the real questions you should ask—and they all deal not with judicial technique, but with judicial approach.

Before discussing the all-important matters of, first, judicial approach to all statutes, and second, judicial approach to particular types of statutes, it is convenient here to explain a little more fully the application by the courts of the three questions set out above. The problem before the court may be to fill up a gap left by the legislature, *e.g.*, as to the operation of the Act upon events which occurred previously to its passage; it may be to ascertain the precise significance of provisions which appear to be badly worded or even inconsistent when applied to the facts of the instant case; it may be to determine what limitations, if any, should be put on general words such as "person", "settlement", "beverage" and the like: the three questions are equally applicable whatever the problem. Here they will be applied to the problem of general words. This occurs so frequently, and its difficulty is so easily grasped, that it is there one finds the clearest illustrations of the way in which judges go through this routine, but, as explained above, merely preliminary, process.

There are three sources of inspiration to which the judges refer in order as they answer the three questions; (1) dictionaries, (2) context, (3) subject matter.

<sup>22</sup> If authority is needed for this proposition see *W. v. W.*, [1936] P. 187—("person")—which was decided on the "object of the Act", and *The King v. Shelley*, [1936] 1 D.L.R. 415—"manufacturer"—which was decided by the application of a series of presumptions.

(1) *Dictionaries*, answering the question "what is the meaning of this word when read alone"?

The court turns in the first place to its statutory dictionary, the interpretation section of the Act which it is construing and the general Interpretation Act.<sup>23</sup> If it finds no light there, it turns to the ordinary standard English dictionaries, such as Webster or the Imperial Dictionary, and disregarding the meaning by derivation,<sup>24</sup> it looks up the common speech meaning. If, however, the word is commonly used among lawyers or business men in a sense different from that of common speech, the professional meaning is usually (but not always) preferred to the common speech meaning, for that is the sense in which it is more commonly used.<sup>25</sup> Finally a court will sometimes refer to standard legal dictionaries, such as *Stroud's Judicial Dictionary* or "*Words and Phrases*" in *Corpus Juris* — but usually without much profit; for, as will presently appear, context and subject matter have so powerful an influence on meaning that it is almost useless to rely upon a previous judicial decision upon the meaning of a word unless the word construed both occurred in a statute dealing with a similar subject matter and was found in a similar context.

(2) *Context*, answering the question of "what is the meaning of this word when read together with the rest of the words of the Act"?

No one needs *Maxwell* or *Craies* to tell him that words, like people, take their colour from their surroundings. To say of a man that he is Jane's "friend" is very different from calling him Jane's "boy friend". A man who makes something for his own personal use is not usually called a "manufacturer", but when a section of the Act other than that which is being construed provides a special method of assessing sale price where "goods are for use by the manufacturer . . . . and not for sale", it becomes clear that throughout the Act "manufacturer" is being used in just that wider and unusual sense.<sup>26</sup> You should

<sup>23</sup> As in *Law Society v. United Service Bureau*, [1934] 1 K.B. 343.

<sup>24</sup> As in *The King v. Shelley*, [1936] 1 D.L.R. 415, pp. 417-418.

<sup>25</sup> As in *Chesterman v. Federal Comm. of Taxation*, [1926] A.C. 128 ("charitable"). Contrast *Brown v. Brown*, [1936] 2 All E.R. 1616, and *Re McIntyre Porcupine Mines Limited and Morgan* (1921), 49 O.L.R. 214, where the common speech meaning was preferred to the professional meaning.

<sup>26</sup> *The King v. Shelley*, [1936] 1 D.L.R. 415. In the same way the word "beverage" may well stand for any sort of a drink including milk, but when a section of the Criminal Code forbids the filling of any "bottle or syphon" with any "beverage", the presence of the word "syphon" calls up a picture of a scene to which "Liebfraumilch" or "Bristol Milk" is very appropriate but cow's milk is not, *R. v. Rouse*, [1936] 4 D.L.R. 797.

note here that the long title, the preamble, if any, the marginal notes and headings, indeed every bit of the Act that is printed — with the possible exception of punctuation — are just as much “surroundings” as are the other enacting portions: but like the enacting portions, they are disregarded if the court comes to the conclusion that the word being construed is not ambiguous, but has a “plain meaning”.<sup>27</sup>

It is from this obvious principle of common sense that spring the three familiar “grammatical” rules of construction, “*noscitur a sociis*”, “the *ejusdem generis* rule”, “*expressio unius, exclusio alterius*” — the Latin being used, in Ko-Ko’s words “to add an air of verisimilitude to an otherwise bald and unconvincing narrative”.

(a) “*Noscitur a sociis*” enunciates the obvious proposition that a general word takes its colour from the preceding specific words with which it is used: thus, a thrower of vitriol cannot be indicted for that he did “wound” under a section rendering it an offence to “shoot, cut, stab, or wound”, for the simple reason that the “wounding” contemplated by the section is obviously a wounding which involves the making of a hole or slice.<sup>28</sup>

(b) The “*ejusdem generis* rule” enunciates the same obvious proposition as “*noscitur a sociis*” and applies it to general phrases: a general phrase, such as “or other causes”, or “and all kinds of merchandise”, takes its colour from the preceding specific words or phrases, and really means “or other causes of the same sort”, or “and all kinds of merchandise of the same sort”. Naturally, if the specific words or phrases do not make a “sort”, the addition of the words “of the same sort” to the general phrase does not make sense, and the general phrase is given its ordinary meaning.<sup>29</sup>

(c) “*Expressio unius, exclusio alterius*” enunciates the obvious proposition that a general word or phrase takes its colour as well from the specific words or phrases which follow it as from

<sup>27</sup> Title: *R. v. Lane*, [1937] 1 D.L.R. 213, *Ellerman Lines v. Murray*, [1931] A.C. 126. Preamble: *Powell v. Kempton Park Race Course*, [1899] A.C. at p. 185. Headings and Marginal Notes: *R. v. Hare*, [1934] 1 K.B. 354.

<sup>28</sup> For this and other instances, see MAXWELL, INTERPRETATION OF STATUTES, 7th ed. 279.

<sup>29</sup> This is the only, but surely very obvious, difference between cases like *Tillman's Ltd. v. S.S. Knutsford Co.*, [1908] 2 K.B. 365, where the *ejusdem generis* rule was “applied”, and cases like *Heatherton Co-Op. v. Grant*, [1930] 1 D.L.R. 975 and *The King v. John Marais*, 56 N.S.R. 1, where it was not “applied”.

those which precede it.<sup>30</sup> If I have living in my house my wife, my children, two old aunts and my mother, and a friend says "Bring the family to our picnic, Sunday", what does he mean by "family"? — my wife and children only, or my whole ménage? If he adds "your mother comes under that heading, you know", by specially mentioning my mother he shews, it may be said, that he was using "family" in the narrow sense of "wife and children": result, the aunts are not invited—*expressio unius, exclusio alterius*, the express mention of one person or thing implies the exclusion of other persons or things of the same class not mentioned. But his remark is capable of a wholly different construction: he may have been using "family" in the wide sense of "whole ménage", and may have mentioned my mother's name only as the first instance that came into his head of a member of the wider class. He may, that is, have mentioned my mother with the express purpose of preventing me from understanding "family" in its narrow sense. The maxim is, therefore, most unreliable, and, unlike the two previous rules of construction, is continually relied on by despairing counsel, but very rarely applied by a court.<sup>31</sup>

(3) *Subject matter*, answering the question of "what is the meaning of this word when read against the background of that part of human conduct with which the Act is dealing"?

Not only do words take their colour from the words with which they are surrounded; they take it also from the background against which they are used. In the classic words of Brett M.R., "it is not because the words of a statute or the words of any document read in one sense will cover the case that that is the right sense. Grammatically they may cover it; but whenever you have to construe a statute or document you do not construe it according to the mere ordinary general meaning of the words, but according to the ordinary meaning of the words as applied to the subject-matter with regard to which they are used. . . ."<sup>32</sup>

<sup>30</sup> Putting aside (a) attempts to base upon it the rule that in interpreting a statute you should not go one inch beyond the actual words used in the statute, even if the result is a *casus omissus*: this rule really rests on the deeper foundations of the "literal rule" approach to statutes; (b) attempts to base upon it the rule that in attacking the decision of an administrative body you must exhaust your statutory remedies first: this rule really rests on considerations of administrative convenience.

<sup>31</sup> *Lowe v. Darling*, [1906] 2 K.B. 772, 784, 785: for recent cases see *Haslett v. Workmen's Compensation Board*, [1936] 2 D.L.R. 110, where the Court refused to apply it, and *Rowell v. Pratt*, [1936] 2 K.B. 226, where one side of the Court applied it and the other did not.

<sup>32</sup> *Lion Insurance Association v. Tucker* (1883), 12 Q.B.D. 176, 186.



In the case of words with double meanings, or words bearing complex connotations the background is naturally and necessarily of decisive importance. You can never confuse the "issue" of the Bills of Exchange Act with the "issue" of an Act dealing with intestate succession: the expression "in public" in the law of indecent exposure has connotations wholly different, of course, from those which it has in the law of an author's right to fees for dramatic performances.<sup>33</sup> The paramount influence of background does not stop there: it colours and controls the force even of words whose meaning is ordinarily single and precise. You may be compelled by it to read a word in a sense quite different from that which it normally bears (a bicycle, not a "carriage" for the purpose of liability to bridge tolls, being held without any inconsistency to be a "carriage" for the purpose of speed regulation),<sup>34</sup> or even, sometimes, in a sense diametrically opposed to the usual ("may", which normally implies discretion, being readily held to mean "shall" when used to describe the functions of an inferior court or an administrative tribunal).<sup>35</sup>

Having asked and answered the three questions, your court will in most cases still be undecided as to the issue of the case and will conclude its opinion in either one of two ways. It will either pass to consider the object of the Act (which for it can only be a matter for speculation) under the "mischievous rule" or it will apply to the ambiguous expression one of the "presumptions", or canons of fictitious legislative intent. Will it disregard the "presumptions" in favour of the "mischievous rule"? If so, what will be its guess as to the "object" of the Act? If it rejects the "object" test, which of the "presumptions" will it apply? This is the crucial moment in the case, and it is to these questions rather than to the familiar three that you should direct all your powers of guessing. The approach of the court is the deciding factor in the issue.

#### B. JUDICIAL APPROACH TO ALL STATUTES.

"Every school boy knows" that our law recognizes three main approaches to all statutes: their usual names are (1) the

<sup>33</sup> MAXWELL, *INTERPRETATION OF STATUTES*, 7th ed., pp. 46 ff. "In public", contrast *R. v. Keir* (1921), 54 N.S.R. 145, 58 D.L.R. 231 (indecent exposure), with *Jennings v. Stephens*, [1936] Ch. 469 (dramatic performance). As to the effect of the subject matter on the word "person" see *Law Society v. United Service Bureau*, [1934] 1 K.B. 343, and *W. v. W.*, [1936] P. 187.

<sup>34</sup> Contrast *Simpson v. Teignmouth Bridge Co.*, [1903] 1 K.B. 405 with *Taylor v. Goodwin*, 4 Q.B.D. 228.

<sup>35</sup> MAXWELL, *op. cit.*, pp. 206-215; *De Keyser v. British Railway Traffic and Electric Co. Ltd.*, [1936] 1 K.B. 224.

“literal (plain meaning) rule”; (2) the “golden rule”; (3) the “mischief (*Heydon’s Case*) rule”. Any one of these three approaches may legitimately be adopted by your court in the interpretation of any statute: which it does in fact adopt, and the manner of its application, will, if your case is a close one, be decisive of the result. It is important, therefore, to inquire into the difference between the three approaches; to discuss the manner in which each is applied; to discover which of them a court prefers, and when.

(1) *The “literal” or “plain meaning” rule* directs that “if the precise words used are plain and unambiguous . . . we are bound to construe them in their ordinary sense, even though it leads . . . to an absurdity or a manifest injustice”.<sup>36</sup> If it follows this rule your court will clear its mind of any knowledge it has about the social purpose of the Act before it, will disregard both context and subject matter, and will confine its attention strictly to the actual words it is asked to construe.

Whatever its philosophical shortcomings, the rule does at first sight seem to possess the practical advantage of producing certainty in the administration of law. All a court has to do, it says, is to adhere to the plain meaning of the words themselves, never deviating from them to speculate about what the legislature would have done about the situation before the court if it had ever been presented to it: yes, the rule may be harsh, it may produce a result that is shocking to one’s sense of justice—but is it not at least certain? It is not. In the first place this simple rule is obviously by its own terms inapplicable where the words in question are wide and general: words like “person”, “settlement” or “public” are not plain and unambiguous: which of many possible meanings they do bear can only be decided by first canvassing, in the manner outlined in Section A, context and subject matter and then applying “the mischief rule” or one of the “presumptions”. A hundred, even fifty, years ago it was unusual for statutes to be framed in wide and general terms, and the “literal” rule was consequently of great practical importance. Today it is a commonplace that the function of most modern statutes, *e.g.*, acts dealing with marketing or debt settlement, is to tell some layman, not some court, to do something. To this end statutes are now drafted

<sup>36</sup> *Abley v. Dale*, 11 C.B. 391, per Jervis C.J. The following short statement of the practical application of the literal rule is based almost wholly on J. A. Corry’s brilliant and pioneer discussion of it in his article, *Administrative Law and the Interpretation of Statutes* (1936), 1 Univ. of Tor. L. J. 286.

in intelligible, and hence wide and general language, and fall outside the proper scope of the literal rule.

The present growth of social reform legislation, addressed as it is to laymen, such as civil servants and commissions, is resulting in a decline of the practical importance of the literal rule: as the number of statutes not phrased in wide and general terms grows less, with it diminishes, of course, the number of "plain" meanings. In the second place the thus steadily diminishing area of its operation is still further restricted in practice by the difficulty of saying when a meaning is "plain" and when it is not, and by the power, and willingness, of courts to decide, without assigning any reasons, that an apparently plain meaning is not "plain" judicially.

When is a meaning "plain"? That is a difficult question. It is made still more difficult by the fact that unanimity as to the existence of a "plain meaning" is by no means necessarily accompanied by unanimity on what that "plain meaning" is. In the now notorious case of *Ellerman Lines v. Murray*,<sup>37</sup> all the judges were agreed that the meaning was "plain", but there were at least three different views as to what that "plain meaning" was. There is even one further complication: in those cases—and there are such—in which any fair-minded man must admit that the meaning of an expression is "plain" under the circumstances, it is not unusual to find a court, which is out of sympathy with the result which would follow from an application of the literal rule, demonstrating to its own satisfaction at least that the meaning is not plain and, having done that, departing from it.<sup>38</sup>

You will have gathered from this discussion that the "literal rule", the verbal approach, is a comparatively unimportant factor, and never a controlling factor in decisions today. Most cases are decided either by a guess at the "object" of the Act, or by the application of a presumption. What use, then, do the courts make of it? The answer is that they use it, as they use all other "rules of construction", as a device whereby to achieve some desired result—and that in two main classes of case. Where a statute is framed in terms apparently wide and general, a court which is unwilling to cut down the wide

<sup>37</sup> [1931] A.C. 126, where the opinions of Viscount Dunedin, Lord Blanesburgh and Slessor L.J. (discussed in the opinion of Lord Macmillan) should be contrasted. Cf. also *Croxford v. Universal Insurance Co. Ltd.*, [1936] 2 K.B. 253, especially at pp. 280-281, where Scott L.J. agreed with counsel that the meaning was plain but disagreed with him as to what that plain meaning was.

<sup>38</sup> See Corry, *op. cit.*, especially at pp. 302 and 308.

meaning by reference to the context, subject matter and object of the Act, will find it convenient to invoke the literal rule as preventing it from travelling beyond the "plain meaning" of the precise words under interpretation. Thus, in *Rex v. Hare*<sup>39</sup> in which the question was whether a woman could be convicted under a section which, though reading quite generally "whosoever . . . shall be guilty of . . . any indecent assault upon any male person", was preceded by the heading "Unnatural Offences", the court, being anxious to say that she could, pointed out that she came within the word "whosoever" and that the meaning of that word was too "plain" to permit of any reference to the context as controlling it. Where, on the other hand, a statute is framed in terms which are not wide and general (a comparatively rare situation in modern statutes), a court which is unwilling to "extend" the meaning of a word to cover a case which though not, perhaps, falling within the ordinary meaning of the word falls plainly enough within the scheme and common sense scope of the Act, will find it convenient to narrow the scope of the Act by invoking the literal rule as confining it to the precise words used by the legislature and debarring it from considering the sense intended to be conveyed thereby. Thus, in the long line of cases on the Married Women's Property Act 1882, which culminated in *Edwards v. Porter*,<sup>40</sup> the courts disregarded the scheme and narrowed the scope of the Act by holding that in the absence of a clause expressly relieving him a husband still remained liable for the torts of his wife.

(2) The "golden rule" directs that "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".<sup>41</sup> Except in one respect, the "golden rule" is exactly the same as the "literal rule", and the above discussion of the "literal rule" is applicable in every particular to the "golden rule": it rejects

<sup>39</sup> [1934] 1 K.B. 354. To the same effect, *Ellerman Lines v. Murray*, [1931] A.C. 126 (wages).

<sup>40</sup> [1925] A.C. 1 and see Amos, *The Interpretation of Statutes* (1934), 5 Camb. L. J. 163, 166-169: to the same effect, *R. v. Dyott* (1882), 8 Q.B.D. 57; *Ex parte Sharp* (1863), 5 B. & S. 322, both famous instances of *casus omissus*. Contrast, however, a recent case where the court deserted the literal rule in order to avoid creating a *casus omissus*: *Russian Bank v. Baring Bros.* (1936), 52 T.L.R. 393, commented on in *Interpretation Without Tears*, 10 Australian Law Journal, 139.

<sup>41</sup> *Gray v. Pearson*, 10 E.R. at p. 1234.

all consideration of the social policy behind the Act : it has no application to statutes framed in wide and general terms, for terms like that have no "ordinary sense" : equally it is readily evaded by a judicial finding that words with an apparently "ordinary sense" do not possess an "ordinary sense". The point of difference is that the golden rule expressly specifies one occasion under which a court is justified in openly departing from a "plain meaning", *viz.*, where to adhere to it would produce an "absurd" result. What is an "absurdity"? When is the result of a particular interpretation so "absurd" that a court will feel justified in departing from a "plain meaning"? There is the difficulty. "Absurdity" is a concept no less vague and indefinite than "plain meaning" : you cannot reconcile the cases upon it.<sup>42</sup> It is infinitely more a matter of personal opinion and infinitely more susceptible to the influence of personal prejudice.<sup>43</sup> The result is that in ultimate analysis the "golden rule" does allow a court to make quite openly exceptions which are based not on the social policy behind the Act, not even on the total effect of the words used by the legislature, but purely on the social and political views of the men who happen to be sitting on the case. To most people the way the courts have chipped away the Statute of Frauds with the doctrine of part performance and the implication of tenancies from year to year, and the Wills Act with the doctrines of incorporation by reference and "secret trusts" is merely amazing : but these are instances typical of the "golden rule" approach. Accordingly, ever since the first half of the nineteenth century, the courts have become increasingly chary of citing the "golden rule" and now prefer to state instead the "literal rule" as their initial method of approach.<sup>44</sup>

What use do the courts make of the "golden rule" today? Again the answer is the same — they use it as a device to achieve a desired result, in this case as a very last resort and only after all less blatant methods have failed. In those rare cases where the words in question are (a) narrow and precise, and (b) too "plain" to be judicially held not plain, and yet to hold them applicable would shock the court's sense of justice, the court will, if it wishes to depart from their plain meaning,

<sup>42</sup> Contrast *Vacher v. London Society of Compositors*, [1913] A.C. 107, 117, 118 and *Washington v. Grand Trunk Railway*, 28 S.C.R. 184, where the court refused to find an absurdity, with *Ex parte Walton*, 17 Ch.D. 746 and *The Ruapehu*, [1927] P. 47, where the court did find an absurdity.

<sup>43</sup> Corry, *op cit.*, pp. 302-303.

<sup>44</sup> Corry, *op. cit.*, pp. 299-301. See also Hopkins, *The Literal Canon and The Golden Rule* (1937), 15 Can. Bar Rev. 689.

declare that to apply them literally to the facts of this case would result in an "absurdity" of which the legislature could not be held guilty, and, invoking the "golden rule", will work out an implied exception. Thus, in *Re Sigsworth*,<sup>45</sup> where in the events which happened, section 46 of the English Administration of Estates Act 1925 provided that "the residuary estate of an intestate shall be distributed . . . . to the issue", A, the son of a woman whom he had murdered, was the sole "issue" and fell precisely within the "plain meaning" of that narrow term, but Clauson J., following the statement of the "golden rule" by Fry L.J. in *Cleaver's Case*, invoked the principle of public policy to create an exception and disinherit A.

(3) The "*mischief rule*" directs that "for the sure and true interpretation of all statutes in general . . . . four things are to be discerned and considered: (1) What was the common law before the making of the Act, (2) What was the mischief and defect for which the common law did not provide, (3) What remedy the Parliament had resolved and appointed to cure the disease of the Commonwealth, (4) The true reason of the remedy. And then the office of all the judges is always to make such construction as shall suppress the mischief (and) advance the remedy . . . . according to the true intent of the makers of the Act. . . .'"<sup>46</sup> The method of approach enjoined upon the courts by the "*mischief rule*" is entirely different from that of the "*literal*" and "*golden*" rules. While the "*literal*" and "*golden*" rules direct you to treat a statute no differently from any other written document and to approach its words with a mind empty of any preconceived notions of their object, *Heydon's Case* lays down a special rule for the interpretation of statutes and insists that you cannot interpret a statute properly until you know the social policy it was passed to effect. Before ever you look at the words of the Act you have to discover why the Act was passed; then, with that knowledge in your mind, you must give the words under interpretation the meaning which best accomplishes the social purposes of the Act. This approach seems so sensible and so thoroughly in accord with the constitutional principle of "the supremacy of Parliament", that it seems at first sight amazing to find the courts quoting and purporting to apply the "*literal*" and "*golden*" rules ten times for every once they quote the rule in *Heydon's Case*. Nevertheless, in the present state of the law,

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<sup>45</sup> [1935] Ch. 93.

<sup>46</sup> *Heydon's Case* (1584), 3 Co. 7b.

the rule is without doubt unworkable. You cannot interpret an Act in the light of its policy without knowing what that policy is: that you cannot discover without referring to all the events which led up to the legislation: but a well-settled rule of law forbids reference to any matters extrinsic to the written words of the Act as printed.<sup>47</sup> If ever legislatures take to including in the body of their Acts a statement of the purposes they have been passed to effect, the "mischief rule" will again take precedence of the "literal rule". Some recent Canadian Acts do include such a statement.<sup>48</sup> The judges do, indeed, always purport to construe wide and general words in accordance with the "object" of the Act, and do sometimes expressly refer to *Heydon's Case* in construing words which are precise and narrow: but since they never purport to discover the "purpose" or "object" except from the four corners of the printed Act, you will realise, of course, that they are not then really applying *Heydon's Case*, but merely speculating.

What use do the courts make of the "mischief rule" today? Once more the answer is that they use it to achieve a desired result, and this in two main classes of case. Where the words of an Act are precise and narrow (a comparatively infrequent situation in modern Acts) a court will, although in most cases holding itself to be bound down by the "literal rule", sometimes invoke the "purpose" of the Act and use it to extend the prima facie meaning to cover a situation which is within the spirit of the Act. The courts are reluctant thus to abandon the literal rule in favour of *Heydon's Case*, but they will occasionally do it. Thus, in *Duncan v. Aberdeen Council*,<sup>49</sup> Lord Atkin extended the meaning of the word "afforded" by remarking that "the trend of the legislation is unmistakeable . . . they are obviously remedial provisions intended to make the position of the person to whom they apply better than ordinary". Where, on the other hand, the words of an Act are wide and general (the usual situation in modern Acts), it is a mere commonplace that a court after referring to the "ordinary meaning", "context" and "subject matter" will always conclude its opinion either with one of the presumptions or with a discussion of the

<sup>47</sup> See note 18 *supra*, and Davies, *Interpretation of Statutes in the Light of their Policy by the English Courts* (1935), 35 Col. L. Rev. 519, 531-534.

<sup>48</sup> E.g., Maritime Freight Rates Act, R.S.C. 1927, c. 79, secs. 7 and 8: Nova Scotia Liquor Control Act, Acts of Nova Scotia, 1930, c. 2, sec. 151.

<sup>49</sup> [1936] 2 All E.R. 911, especially per Lord Atkin at pp. 914-915. Other instances of the same method of extension are *Powell Lane Co. v. Putnam*, [1931] 2 K.B. 305 (taxing Act), and *In re Draper and Pratt*, [1937] 1 W.W.R. 136, 141-142.

"object" of the Act. If it desires the situation before it to be covered by the Act it will apply the literal rule: if it desires it to fall outside the Act, it will cut down the *prima facie* meaning by reference to the object of the Act. Thus, in *Ledwith v. Roberts*,<sup>50</sup> Scott L.J. used the history of English poor law legislation to cut down the meaning of the word "loiter". The "mischief rule" is, that is, a convenient device which enables a court to take a wide view of an apparently narrow expression, or a narrow view of an apparently wide expression.

Having inquired into the difference between the three familiar approaches and discussed the manner in which each is applied, we are now in a position to ask the final question which was posed at the beginning of section B—which of these approaches does a court prefer and when? That question has already been answered in the course of the detailed discussion of the three approaches, and it will be enough if the result is summarized in a sentence or two. 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 reasons for choosing one rather than other. Sometimes a court discusses all three approaches.<sup>51</sup> Sometimes it expressly rejects the "mischief rule" in favour of the "literal rule".<sup>52</sup> Sometimes it prefers, although never expressly, the "mischief rule" to the "literal rule".<sup>53</sup> Often the difference between a majority and a dissenting minority is the difference between the adoption of the "literal rule" and the adoption of the "mischief rule".<sup>54</sup> Most frequently of all the "mischief rule" is used with and to back up, the "literal rule".<sup>55</sup> In short, the all-important practical question—which of the three approaches the court will adopt in my case—is a question which does not admit of an answer.

<sup>50</sup> [1937] 1 K.B. 232, 270 *ff.* Other instances of restriction by reference to the history of the legislation are *Banbury v. Bank of Montreal*, [1918] A.C. 626, especially at p. 691, per Lord Atkinson, and *The King v. Dubois*, [1935] S.C.R. 378. For a discussion and instances of restriction by the object generally see MAXWELL, *op. cit.*, Chapter III.

<sup>51</sup> As in *Vacher v. London Society of Compositors*, [1913] A.C. 107, and *The King v. Bank of Montreal* (1920), 49 D.L.R. at p. 293 *ff.*

<sup>52</sup> As in *Ellerman Lines v. Murray*, [1931] A.C. 126; *Washington v. Grand Trunk Railway*, 28 S.C.R. 184; *Law Society v. United Service Bureau*, [1934] 1 K.B. 343; *Re Linton and Sinclair*, [1937] 1 D.L.R. 137.

<sup>53</sup> As in *Powell Lane Co. v. Putnam*, [1931] 2 K.B. 305; *Duncan v. Aberdeen Council*, [1936] 2 All E.R. 911.

<sup>54</sup> As in *Rowell v. Pratt*, [1936] 2 K.B. 226.

<sup>55</sup> As in *Briscoe v. Canadian and Yorkshire Trust Co.*, [1936] 3 W.W.R. 513; *In re Draper and Pratt*, [1937] 1 W.W.R. 136.



## C.—JUDICIAL APPROACH TO PARTICULAR TYPES OF STATUTE

Where the meaning of an expression is not clear, neither the literal rule nor the golden rule can have any application; for both of them do no more than assume a clear meaning and indicate what a court may do when the meaning is clear. Modern statutes, being for the use of laymen, are framed in wide and general language and consequently fall outside the ambit of these rules as to clear meaning: in dealing with them a court will, after it has exhausted the device of its ordinary technique, usually find itself faced with the necessity of choosing between the "mischief rule" and the presumptions. The presumptions are of particular importance in three classes of statutes, which together account for almost the whole of contemporary legislation: they are social reform Acts, Act imposing penalties and taxing Acts. It becomes important, therefore, to say something about the origin of the presumptions, and the way in which they are used by the courts today.

In origin the presumptions were, as the name indicates, canons of legislative intent. When the courts leaned against construing a section so as to exclude the subject from the courts or so as to bring him within a taxing section, they did so because shutting up the courts or imposing new taxes was something legislatures were not in the habit of doing. The doctrine of *stare decisis* erected this leaning of the courts into rules of the common law relating to the interpretation of statutes. But times have changed and today finality of administrative decrees and a whole host of taxes are mere commonplaces. If, in 1937, a court resorts to these old presumptions, it is doing something very different from attempting to ascertain the probable intention of the legislature, it is flying in the face of the legislature. Only one conclusion can be drawn from the present judicial addiction to the ancient presumptions and that is that the presumptions have no longer anything to do with the intent of the legislature; they are a means of controlling that intent. Together they form a sort of common law "Bill of Rights". English and Canadian judges have no power to declare Acts unconstitutional merely because they depart from the good old ways of thought; they can, however, use the presumptions to mould legislative innovation into some accord with the old notions. The presumptions are in short "an ideal constitution" for England and Canada.<sup>56</sup>

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<sup>56</sup> KEIR AND LAWSON, CASES IN CONSTITUTIONAL LAW (1928), p. 3.

By origin devices for ascertaining the intent of the legislature, by present practice devices for controlling it, the presumptions are affected by all the uncertainty in application which is inherent in a device, and in addition by further uncertainties derived from their present dual position as canons of legislative intent and weapons of judicial control. Hence comes a variety of problems. First, the effect of a change in legislative practice on the status of a presumption — will a court meet the reversal of a legislative policy with a weakening of the relevant presumption, or with a more rigorous application of it, or with no change at all? What effect, for instance, will the recent increase in the number of taxing Acts have upon the traditional attitude of the courts towards them? Second, what will a court do in a case in which there is a conflict of presumptions: what, for instance, will it do when the leaning of the courts in favour of personal liberty is met by their desire to protect the existence of the state in wartime, or when the leaning in favour of the constitutionality of legislative Acts conflicts with their desire to protect the subject from taxation? Third, on what occasions, if ever, will a court disregard a conventional canon of legislative intent in favour of an attempt to effectuate the actual social purpose of the Act; when, that is, will it counter a presumption with the "mischief rule"?

In guessing what your court will do with an ambiguous expression you should therefore always ask yourself three questions; (1) is the relevant presumption coming into increasing use, declining, or is it in a state of uncertainty: (2) are there any circumstances in your case which might make the judges desert the ordinarily relevant presumption in favour of another: (3) are the members of your court aware of the purpose for which the Act was passed, and if so are they in sympathy with it? Since the first of these questions needs a rather extensive illustration from the three great classes of modern statutes mentioned above, the questions will be discussed in inverse order.

*Question 3.*—Are the members of your court aware of the purpose for which the Act was passed: if so, are they in sympathy with it? It has often been remarked that in cases to which a presumption is applicable the courts are reluctant to apply the mischief rule and seem to prefer the presumptions;<sup>57</sup> but the practice is by no means invariable. In the 1931 case of *Powell Lane Co. v. Putnam*,<sup>58</sup> which involved a section of the

<sup>57</sup> *E.g.*, by Dr. W. I. Jennings in discussion noted at p. 6 of 1935 Journal of Society of Public Teachers of Law.

<sup>58</sup> [1931] 2 K.B. 305.

ordinary annual Finance Act, one would have expected the court to approach the section in the rather wary manner it usually adopts towards taxing Acts : this was, of course, the line adopted by counsel for the importer who wished to escape duty, and ordinarily he would have been successful, for the product certainly did not fall within the words of the Act. Scrutton L.J., however, met his argument by setting out the "Civil Service" history of the section and describing the procedure which led up to its passage; he concluded therefrom that the purpose of the Act was to protect English manufacturers of a similar product from competition, and after finding as a fact that English manufacturers did put out some product which was more or less similar to it, he applied the "mischief rule" and held the product taxable. Again, in *Astor v. Perry*,<sup>59</sup> an Income Tax case, the House of Lords so far departed from its usual practice of giving the person sought to be taxed the benefit of the doubt as to discover a "scheme" or purpose in the legislation. Striking as the cases are, they are rather unusual, and it must be admitted that the general rule is the other way.

*Question 2.* Are there any circumstances in your case which might make your court desert the ordinarily relevant presumption for another? As to when a court will adopt this particular "device in dealing with a device", no rule can be laid down: all that can be done is to cite a few instances where it was done. *Rex v. Halliday*<sup>60</sup> involved a conflict between the ordinary presumption in favour of the liberty of the subject, which had the support of Lord Shaw, and the desire of a court not to tie the hands of the government in a time of emergency, which found favour with the majority of the House of Lords. In a very recent case counsel sought to argue that legislation taking away a common law right should be strictly construed: thereupon Slessor L.J. interjected: "The Landlord and Tenant Acts and the Workmen's Compensation Acts must be construed in favour of the classes of persons for whose benefit they were passed."<sup>61</sup> When in the notorious *Edwards Case*<sup>62</sup> the Privy Council wished to decide that for the purpose of admission to the Canadian Senate women were "persons", they turned aside the English cases, which were unanimous against any such emancipation of women by implication, by remarking at the

<sup>59</sup> [1935] A.C. 398: see comments in 1935 Annual Survey of English Law, 59.

<sup>60</sup> [1917] A.C. 260.

<sup>61</sup> *Croxford v. Universal Insurance Co. Ltd.*, [1936] 1 All E.R. 151, 155.

<sup>62</sup> *Edwards v. Attorney-General for Canada*, [1930] A.C. 124, 143.

end of their judgment that the British North America Act was "a constitution for Canada, a responsible and developing State". When a taxpayer attacks an ambiguous section in a taxing Act as *ultra vires*, the court has a choice between adopting the presumption in favour of the subject and so holding the section *ultra vires*, or adopting the presumption in favour of constitutionality and so holding the section *intra vires*.<sup>63</sup>

*Question 1.* Is the relevant presumption coming into increasing use, declining, or is it in a state of uncertainty? Viewed as a device for controlling the innovations of legislatures, a change of legislative policy will be accompanied by an increasing use of the relevant presumption. Thus, the recent growth of confiscatory legislation has resulted in an increasing use by the judges of the presumption against taking away property without compensation. Viewed as a device for carrying out the probable but unexpressed intent of legislatures, a change of legislative policy will be accompanied by a decline of the relevant presumption. Thus, the present decline of the presumption in favour of the requirement of *mens rea* dates from the period when the typical penal Act ceased to be the Criminal Code and became a batch of local health by-laws. Which of these viewpoints will your court adopt in dealing with a given presumption? A tentative answer to that question can best be attempted by discussing the present vitality of the most important presumptions which are relevant to (a) Social Reform Acts, (b) Acts imposing penalties and (c) Taxing Acts.

(a) *Presumptions relevant to Social Reform Acts.*

(1) *Presumption against taking away a common law right.* Any scheme of reform involves the taking away of "common law rights" from somebody. A hundred years ago legislatures interfered as little as possible with the fundamental traditions of society, and the courts were but carrying out the legislative purpose when they invoked this presumption in order to confine the operation of an Act within narrow bounds. Modern legislatures are active in social reform. What then is the present status of this presumption? It still appears in the text books, of course;<sup>64</sup> otherwise it seems to be falling into disuse. When the courts do make use of it, they tend to emblazon it with rhetorical glorification of the rights of Englishmen.<sup>65</sup> Today

<sup>63</sup> MANNING, RATING AND ASSESSMENT, (1928), pp. 37-38.

<sup>64</sup> E.g., MAXWELL, *op. cit.*, Chapter III, p. 70.

<sup>65</sup> E.g., *R. v. Leach*, [1912] A.C. 305, 311, per Lord Halsbury; *Rowell v. Pratt*, [1936] 2 K.B. 226, 238, per Slessor L.J.

they seem to have recourse to it only when the legislation threatens those institutions which are most characteristic of our way of life. During the years 1909 to 1922 the House of Lords used it three times as a sure shield against the claims of the feminists,<sup>66</sup> and it cropped up again in 1936 in the Court of Appeal as a defence against departmental secrecy.<sup>67</sup>

(2) *Presumption against taking away property without compensation.* Almost all social legislation involves redistribution of property in one way or another; English slum clearance Acts compulsorily deprive the landlord of his common law liberty to charge what he can get for his dirty dwellings; Canadian Marketing Acts deprive the predatory individual at least of his common law liberty to break his marketing agreement and get rich at the expense of his neighbours with no more cost to himself than inadequate and hardly proved damages. Ours is an age of social legislation, and modern democratic legislatures are not particularly tender towards the property of others. The restrictive presumption, however, grew up at a time when legislatures were composed of wealthy men who had a very healthy respect for property—for nobody but they and their friends owned any.

These conditions have passed away, but *stare decisis* has preserved the presumption. No longer is it a canon of legislative intent: it is a means whereby the judges control any confiscatory legislation of which they disapprove. It is coming into increasing use: for as legislation grows more confiscatory, the need for judicial control becomes greater; and the result is that the harder the legislatures strive to take away property without compensation, the harder do the courts protest, through their use of the presumption, that the legislative intent is the opposite. Thus, throughout the long history of English housing legislation the presumption was never applied by the courts till the time, about ten years ago, when the government began to make serious attempts to make the legislation effective.<sup>68</sup> Today the courts are so far open about the way they use it that they tend to introduce it with a criticism of the policy of the legislature.<sup>69</sup>

<sup>66</sup> *Nairn v. University of St. Andrews*, [1909] A.C. 147; *R. v. Leach*, [1912] A.C. 305; *Viscountess Rhonda's Claim*, [1922] 2 A.C. 339.

<sup>67</sup> *Rowell v. Pratt*, [1936] 2 K.B. 226; reversed [1937] 3 All E.R. 660.

<sup>68</sup> *Jennings, Courts and Administrative Law* (1936), 49 Harv. L. R. 426, 443 ff., where the application of the presumption against taking away property without compensation to modern English housing Acts is thoroughly discussed.

<sup>69</sup> *E.g., Briscoe v. Canadian and Yorkshire Trust*, [1936] 3 W.W.R. 513; *R. v. Minister of Health, ex parte Yaffe*, [1930] 2 K.B. 90, judgment of Scrutton L.J.

(3) *Presumption against barring the subject from the courts.* Since the courts have shown little sympathy with modern social legislation, legislatures have generally transferred the administration of new social services from the courts to government departments or independent commissions, and have tended to make the decisions of these bodies final and immune from control by the courts. No Canadian needs to be reminded of the Alberta debt and code legislation or the Ontario hydro legislation; no admirer of Lord Hewart is likely to forget the "conclusive evidence clause".<sup>70</sup> The presumption that the legislature does not intend to oust the jurisdiction of the courts dates from the eighteenth century, a period when the belief in the intelligent amateur and consequently the belief in judicial administration of all departments of human life was at its highest. Those conditions have passed away and the tendency of legislatures today is to restrict rather than enlarge the jurisdiction of the courts: the presumption, however, has remained part of our law and is now used by the courts as a check on this tendency. This presumption accordingly has come into increasing use; it is usually accompanied by oratory about justice and the rule of law, and by denunciations of despotism and bureaucracy.<sup>71</sup> In recent years it has been pressed very far. In 1930 the Court of Appeal held that a section which provided that "the order of the Minister when made shall have effect as if enacted in this Act" did not bar the courts from inquiring into the power of the Minister to make the order.<sup>72</sup> In 1936 the House of Lords held that a section which empowered the Wheat Board to provide by regulations for the "final" settlement of disputes by an arbitrator did not authorise the Board to say that the right of appeal to the courts on questions of law given by the general Arbitration Act, 1889, should not obtain in wheat arbitrations.<sup>73</sup>

(4) *Presumption against interfering with the personal liberty of the individual.* Personal liberty is no mean part of our common law heritage, and legislatures are ordinarily chary of interfering with it: in ordinary cases the presumption always has been, and still is, a sound canon of legislative intent.

<sup>70</sup> THE NEW DESPOTISM, pp. 70-80.

<sup>71</sup> E.g., *Chester v. Bateson*, [1920] 1 K.B. 829, judgment of Darling J.; *Briscoe v. Canadian and Yorkshire Trust*, [1936] 3 W.W.R. 513, 517-520. For after-dinner expositions of the same theme, see the remarks of the late Chief Justice of Ontario in 12 Can. Bar Rev. 38, and of the new Chief Justice in 15 Can. Bar Rev. 65.

<sup>72</sup> *Minister of Health v. R., ex parte Yaffe*, [1930] 2 K.B. 90; affirmed, [1931] A.C. 494.

<sup>73</sup> *R. W. Paul Ltd. v. Wheat Commission*, [1937] A.C. 139, 153-155.

There are, however, two special classes of persons, persons of enemy origin in wartime, and foreign born immigrants in peacetime with whose personal liberty legislatures, for quite intelligible reasons, do notoriously intend to interfere: to apply the presumption to the War Measures Act or the Immigration Act is to run directly counter to the intent of the legislature.

With a few exceptions,<sup>74</sup> the courts have refused to recognize the distinction between the ordinary and extraordinary legislation and have unflinchingly applied the presumption at all times and in all cases. The courts regard themselves as the guardians of freedom and use the presumption to nullify, as far as possible, the policy behind the War Measures Act and the Immigration Act. It is in cases involving personal freedom that judicial hostility to executive action is most marked.<sup>75</sup> Lord Shaw's ode to liberty in the wartime internment case of *R. v. Halliday*,<sup>76</sup> and Duff C.J.'s caustic protest against "hugger-nugger under the name of legal proceedings" in the deportation case of *R. v. Samejima*,<sup>77</sup> are too well known to need more than passing reference. This is the most firmly established of the "intent controlling" presumptions.

What conclusion emerges from this brief discussion of the presumptions relevant to social reform Acts? Although English and Canadian courts have not the power of the Supreme Court of the United States to check the activities of legislatures, the combined use of the four presumptions does go some distance to establishing a sort of fourteenth amendment to the British North America Act, and any litigant who makes use of them today is likely to obtain a favourable hearing from the court.

(b) *Presumptions relevant to Acts imposing penalties.*

The class of legislation next in importance to reform Acts consists of Acts regulating conditions which have been produced by changes in our way of living. The invention of the motor vehicle has resulted in traffic regulations, the growth of the large city in public health by-laws. These Acts are made effective by imposing a penalty for their breach which is

<sup>74</sup> *E.g.*, dicta of Scrutton L.J. in *Ronnfeldt v. Phillips* (1918), 35 T.L.R. at p. 47 and of Greer J. in *Hudson's Bay Co. v. MacLay* (1920), 36 T.L.R. at p. 475, quoted in KEIR AND LAWSON, CASES IN CONSTITUTIONAL LAW (1928) at pp. 20-21.

<sup>75</sup> For an exposition of this judicial attitude as exemplified in deportation cases see Hancock, *Discharge of Deportees on Habeas Corpus* (1936), 14 Can. Bar Rev. 116 at pp. 119-121.

<sup>76</sup> [1917] A.C. 260 at pp. 276-303.

<sup>77</sup> [1932] S.C.R. 640, 642.

recovered in courts of subordinate jurisdiction. They, and not the criminal code, are the typical penal Acts of today.

(1) *Strict Construction*. "Penal statutes should be strictly construed" runs the old maxim. To construe a statute strictly means so to restrict its meaning that it does not go beyond the very narrowest meaning that can be given to the words in question; it means, in short, to "manhandle" it. The maxim grew up at a time when the typical penal Act was an Act which added a new offence, punishable by death or transportation, to a system of criminal law already harsh enough; it was used by the judges as a device to mitigate any added harshness. Today the typical Act imposing a penalty is not an amendment to the Criminal Code, carrying with it a moral flavour and a punishment of imprisonment or death, but a regulation established by a municipality or a government department, which is not felt to be of any moral significance and is enforced by fine only. The occasion for the device having passed away the attitude of the courts has changed. Penal Acts are now given their "ordinary meaning"—just like any other Act—with the exception, that in any case of doubt there is a bias in favour of the subject.<sup>78</sup>

(2) *Mens rea*. Under what circumstances is the defence of an honest and reasonable belief in the existence of facts which, if true, would have made the act innocent, a defence to a statute which absolutely prohibits the act in question? Here again the law is not the same today as it was a hundred years ago. Then the presumption of *mens rea* being required in a statute was firmly settled; today the presumption is probably on the decline: at any rate its application is very uncertain. One reason for its decline is the same as the reason for the decline of the strict construction rule. Another is the present reluctance of the courts to work out common law exceptions to the "plain" words of an Act, a reluctance which began with the adoption of the "literal rule" about 1850 and is still resulting in the obsolescence of many of the older decisions on *mens rea*, "waiver" and "estoppel".<sup>79</sup> As to the decline of *mens rea*, it will be sufficient to contrast the 1889 case of *R. v. Tolson*,<sup>80</sup> where it was held that D's reasonable belief in the death of his

<sup>78</sup> Jackson, *Absolute Prohibition in Statutory Offences* (1936), 6 Camb. L. J. 83, 84-85 and authorities there cited.

<sup>79</sup> As to "waiver" of statutory provisions see *Admiralty Commissioners v. "Valverda" (Owners)*, [1937] 1 All E.R. 49, especially at pp. 66-68, per Scott L.J.; as to "estoppel" against setting up a statutory provision, see *Maritime Electric Co. v. General Dairies, Ltd.*, [1937] 1 All E.R. 749, especially at 753-754, per Lord Maugham.

<sup>80</sup> 23 Q.B.D. 168.



first wife was a good defence to an indictment under a section reading "whosoever being married shall marry another in the life time of his wife . . . .", with the 1921 case of *R. v. Wheat*,<sup>81</sup> where it was held that D's reasonable belief in the validity of a divorce from his first wife was no defence to the very same section. The cases can only be reconciled on the assumption that between those dates the presumption in favour of the requirement of *mens rea* had weakened very considerably. The presumption still appears to be in existence<sup>82</sup> but it is worth noting that some Canadian Acts expressly render it inapplicable,<sup>83</sup> while at least one Canadian court has stated that generally speaking *mens rea* is not required today in semi-criminal Acts.<sup>84</sup>

(c) *Presumptions relevant to taxing Acts.*

The last important class of modern Acts to which the courts have a special approach is that of taxing Acts. As much social reform has been, and is still being effected, by the use of the taxing power as by openly reformatory measures. Lloyd George's famous budget of 1909 started the movement which for better or for worse has completely changed the English social scene: the purpose of the Canadian Tariff in taxing the importation of goods manufactured abroad is not so much to raise a revenue as to encourage the growth of "infant industries" in Canada: the heavy taxation of liquor in both England and Canada is expressly designed to discourage drinking. This was not always so. Traditionally, and hence in the eyes of the common law, first Kings and then legislatures taxed the masses in order to benefit a few court favourites; the judges therefore leaned against taxing Acts. As long as the purpose of taxing Acts was merely to raise money for the general purposes of government, the judges held to their attitude: since a taxing Act had no particular "object" their final resort had to be some presumption. Today legislatures do often tax with social objects. What effect have these changes had upon the attitude of the courts towards taxing Acts?

(1) *Strict construction.* Once upon a time taxing Acts, like penal acts, were construed as narrowly as possible. Today it is undoubted law that they are to be construed in just the

<sup>81</sup> [1921] 2 K.B. 119. See as to these cases, Jackson, *op. cit.*, at p. 90.

<sup>82</sup> It was applied by the English Divisional Court in *London Passenger Transport Board v. Sumner* (1936), 52 T.L.R. 13. See also dictum of Goddard J. in *Evans v. Dell* (1937), 53 T.L.R. 310, 313.

<sup>83</sup> E.g., Nova Scotia Liquor Control Act, Acts of 1930, c. 2, sec. 153.

<sup>84</sup> *R. v. Piggly Wiggly Can. Ltd.* (1933), 60 Can. C. C. 105.

same way as any other Act.<sup>85</sup> The cases are, no doubt, agreed that the benefit of the doubt still goes to the subject and not the Crown; but the fact that a recent Canadian case found it necessary to collect from previous cases no less than three different reasons why this was so, does seem to indicate that the presumption in favour of the subject is felt to rest on no solid ground and that it will tend to disappear.<sup>86</sup> Indeed, within the last six years the English courts have in one case rejected the presumption in favour of the subject and adopted instead the "mischief rule";<sup>87</sup> in another they have gone so far as to discover in the English Income Tax Acts what they call "the scheme of the legislation".<sup>88</sup>

(2) "*Evasion*". The attitude of the courts towards tax evasion is rather remarkable. The House of Lords has solemnly ruled it not only legal but moral to dodge the Inland Revenue.<sup>89</sup> Time and again courts have decided that Acts should not be construed so as to permit evasion of them, but by a series of sophistries about the word "evasion" they have succeeded in satisfying themselves that evasion of a taxing statute is not "evasion" at all but is "keeping within the permissible limits".<sup>90</sup> The results of this curious attitude were until recently thought to be mitigated by a rule that the question whether the financial arrangements of a tax payer fell outside the Act or not was to be determined by looking not at the precise legal effect but at the substance of those arrangements. In 1936, however, the House of Lords rejected the "substance doctrine" in no uncertain terms and permitted the Duke of Westminster to deduct from his taxable income as an annuity an annual payment made to a servant as wages, merely because the Duke's solicitor had been clever enough to draw up a deed under which the Duke bound himself in law to pay the servant, irrespective of service rendered, an annual sum which neither party ever intended to be in fact anything but a remuneration for services rendered.<sup>91</sup>

The conclusion seems to be that the attitude of the courts towards taxing Acts is at present uncertain; but in spite of an

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<sup>85</sup> See MANNING, RATING AND ASSESSMENT, pp. 16-21, where the whole matter is discussed.

<sup>86</sup> *R. v. Crabbs*, [1934] 4 D.L.R. 324.

<sup>87</sup> *Powell Lane Co. v. Putnam*, [1931] 2 K.B. 305.

<sup>88</sup> *Astor v. Perry*, [1935] A.C. 398.

<sup>89</sup> *Inland Revenue Commissioners v. Levene*, [1928] A.C. 217, at p. 227, per Lord Sumner.

<sup>90</sup> See MAXWELL, *op. cit.*, pp. 99-108.

<sup>91</sup> *Inland Revenue Commissioners v. Duke of Westminster*, [1936] A.C. 1. For a long overdue criticism of this judicial attitude see Book Review in 53 L.Q.R. at p. 136.

occasional "liberal" decision, the general tendency is still to "give the taxpayer the breaks" by ignoring the "object" of the Act, if any, in favour of the old restrictive approach.

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