Francis Forbes Society For Australian Legal History
Introduction To Australian Legal History Tutorials

Development of principles of statutory interpretation – 1 October 2013

Justice Ashley Black

A review of the development of principles of statutory interpretation must overlap to some extent with a review of the development of statutory law. There was, in the earliest period we will address, little scope for sophisticated principles of statutory interpretation because the form of statutes was somewhat rudimentary. Conversely, the extent to which Courts have focused on developing principles of statutory interpretation has increased as statutes have come to have a more substantial, and in some areas an overwhelming, significance.

I will adopt an approach that is common in the commentaries of identifying particular cases as supporting particular approaches to interpretation. I have a degree of nervousness about that approach, since it seems to me that much will turn upon the representativeness of the cases that are cited. There must be room for such an approach to legal history to be somewhat misleading if there is greater diversity in cases decided within a particular period than the reference to the particular cases would suggest.

The 13th and 14th centuries

In the time of Edward I (1272-1307), statutes came into existence in several ways. Plucknett notes that a statute in the reign of Edward I means:

> "…something established by Royal authority: whether it is established by the King in Council, or a Parliament of nobles and commons as well, is completely immaterial. It is equally immaterial what form the statute takes, whether it be a charter or a statute enrolled and proclaimed, or merely an administrative expression of the royal will notified to the judicial authorities."[1]

In his chapter in *Historical Foundations of Australian Law*, Mr J.S. Emmett similarly observes that:

> "There was no notion in the 13th century that statutes needed to come from two houses of Parliament. Rather, there was a range of different statutory instruments by which the King might give law, including charters (by which the King "conveyed" certain liberties to his subjects), writs or statutes emanating from the King and Council alone, others enacted by the King in Parliament (that is, the Lords) but apparently without the Commons, and others made on advice of the Lords and the Commons. These instruments were applied by the Courts without any suggestion that difference in form should reflect a difference in effect or authority. Further, there

[1] TFT Plucknett, *A Concise History of the Common Law,* 5th ed, 1956, 322

> was no sense that the Judges who applied these statutes were administering a different arm of Government."[2]

Plucknett notes that Parliament could ratify decisions reached by the King in Council, but could also request the Crown to legislate upon particular matters, with the Council subsequently considering those requests and drafting the relevant legislation.[3]

There was an increase in the level of statutory activity in the reign of Edward I, including a degree of movement to facilitating trade and credit by the *Statute of Merchants* (1285).[4] The second *Statute of Westminster* (13 Edw 1 stat 1) (1285) included provisions permitting enforcement of conditions imposed by donors on gifts of land, so that a recipient would not be free to dispose of the land inconsistently with the condition.[5] Edward I also enacted the third *Statute of Westminster*, the *Statute of Quia Emptores* (1290), described by Emmett as follows:

> "First, it prohibited subinfeudation of a fee simple, which was the process by which the holder of a feudal tenure might grant a lesser interest, thereby placing the grantee one level down the same chain of tenures. Second, it affirmed alienation by substitution, where the interest-holder assigns the whole of his or her interest in the land. This seriously weakened the personal element of feudalism, shaped the common law's concept of estates and of alienation, and was a major step towards land ownership being a purely economic matter."

However, until the end of 13th century, there was no established procedure for recording public parliamentary statutes, with an incomplete role being kept in Chancery and statutes also recorded in the Exchequer from about that time.

Until the beginning of the 14th century, judges were typically members of the King's Council and statutes largely reflected decisions of the Council. In these circumstances, judges had a degree of direct knowledge that they applied without reference to any interpretative approach. Commentators often refer to an observation of Hengham CJ to Counsel to the effect:

> "Do not gloss the statute; we understand it better than you do, for we made it …."[6]

Emmett suggests that, in its somewhat complicated context, this observation may amount to a "momentary loss of temper" (no doubt, not for the last time in the history of judicial interpretation of statutes) and that "it would probably be unwise to regard it as reflecting a considered judicial view about the combined role of legislator and interpreter".

Plucknett suggests that a division between making the law and interpreting it was not generally accepted in the 14th century, with civilian law taking the view that

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[2] J.S. Emmett, "Early Statutes shaping the Common Law" in J.T. Gleeson, J.A. Watson and R.C.A. Higgins, *Historical Foundations of Australian Law*, Vol 1, 115–138 at 116
[3] Plucknett, *A Concise History of the Common Law*, 323.
[4] Emmett 120.
[5] Emmett 120-121
[6] *Aumeye's Case* (1305) YB 33–35 ed 179,82; Plucknett, *Statutes & Their Interpretation in the First Half of the Fourteenth Century,* 1922, 95.

interpretation was a matter for the authority that made the law.[7] He points to occasions early in the reign of Henry III (1216–1272) where the King resolved disputes as to the interpretation of charters[8] and notes that approach was later challenged by the rise of Parliament and its increased participation in law-making.[9] Emmett suggests that the specific role of judge as interpreter of statutes was not firmly developed until around the mid 14th century.[10] Sir John Dyson, in his paper "The Shifting Sands of Statutory Interpretation" also refers, as an example of judges consulting with legislators to determine the meaning of a statute, to *Bygot v Ferrers* YB 33 & 35 Edw. I 585 (1305-1307). In that case, Brabazon CJ was considering a question in respect of the second Statute of Westminster (13 Edw 1 stat 1 cap 45) (1285), and observed that:

> "We will advise with our companions who were at the making of the statute."[11]

Plucknett also points to the range of interpretation of statutes in the 14th century, observing that:

> "Sometimes there wording is strictly applied; sometimes it is stretched very considerably; sometimes the Court finds it necessary to restrict the operation of a statute which was too widely drawn; on other occasions the Court simply refuses to obey the statute at all."[12]

He notes that, during the 14th century, judges extended statutes further than their words permitted, to the point of "virtual legislation by the judges".[13] He suggests that:

> "The 14th century was in urgent need of good law, firmly enforced … The judges' great preoccupation was to apply the best law they knew as courageously as they could, and … Our modern difficulties, whether political or juridical, to them would have seemed, if not unintelligible, at least irrelevant and pedantic."[14]

In "The Shifting Sands of Statutory Interpretation", Sir John Dyson also refers to *Belyng v Anon* YB 5 Edw II, I 176-177 (1311-1312), where Bereford CJ had to construe a provision in *De donis conditionalibus,* part of the second Statute of Westminster (13 Edw 1 stat 1 cap 1) (1285) that lands that were given upon "condition", that is entailed, could not be alienated by the recipient so as to disinherit his issue. Bereford CJ accepted that the literal meaning of the statute applied that prohibition only to the first generation, but disregarded its terms by reference to the (subjective) intention of the legislator and observed that:

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[7] Plucknett, *A Concise History of the Common Law*, 328–329.
[8] Plucknett, *A Concise History of the Common Law*, 329.
[9] Plucknett, *A Concise History of the Common Law*, 331.
[10] Emmett cites Plucknett, *Statutes & Their Interpretation in the First Half of the Fourteenth Century*, 167 for this observation.
[11] Sir John Dyson, "The Shifting Sands of Statutory Interpretation", paper presented at Statute Law Society Conference, Legislation and the Supreme Court, 9 October 2010, p 4
[12] Plucknett, *A Concise History of the Common Law*, 332.
[13] Plucknett, *Statutes & Their Interpretation in the First Half of the Fourteenth Century*, 71–81; Emmett 125.
[14] Plucknett, *Statutes & Their Interpretation in the First Half of the Fourteenth Century*, 65–71; Emmett 126.

> "He that made the statute meant to bind the issue in fee tail as well as the feoffes until the tail had reached the fourth degree, and it was only through negligence that he omitted to insert express words to that effect in the statute; therefore we shall not abate by this writ."[15]

However, there is little consistency of approach at this time. Sir John Dyson also points to occasions in this period where a statute was interpreted literally; for example, *Stirkeland v Brunolfshed* YB 3 Edw II, 108 (1310), where Bereford CJ dismissed a writ not consistent with the statute, and *Waughan v Anon* YB 20 Edw III, ii, 198 (1346-1347) where Shareshulle J denied an amendment to a writ on the basis that:

> "[T]he statute says only that the process shall be amended in respect of such mistakes and it does not say that mistakes in writs are to be amended in such manner, and therefore we cannot carry the statute further than the words expressed in it."[16]

Other commentators have noted that judges in that period carried the King's will into effect "in a commonsense way" in the 14th century without a close focus on the statutory text.[17] The lack of focus on the terms was of a statute was perhaps inevitable where copies of the statute would be handwritten and might differ. Plucknett also points to uncertainty in the 14th century as to whether particular texts were statutes and what their words were and notes that judges would not always have a copy of the statute at hand.[18]

Plucknett suggests that the "free and easy" attitude to the interpretation of the statutes began to disappear in the mid 14th century, at the time that judges also ceased to be members of the King's Council.[19] He suggests that a greater strictness of approach to interpretation in the Court of Common Pleas is paralleled by the development of Chancery as a Court exercising the discretion of the King's Council.[20] Other commentators also points to a tendency towards greater literalism emerging in the mid 14th century, reflecting the fact that judges no longer had direct knowledge of the reason for a statute where they were no longer part of the King's Council and also influenced by a view imported from Europe that "statute law is strict law".[21]

Plucknett also notes that a distinction between statutes and ordinances developed in the latter part of the 14th century, distinguishing between acts that received the consent of the Kings, the Lords and the Commons and those which did not.[22] By the end of the 14th century statues were also cited by the regnal year and the legislation

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[15] Quoted Sir John Dyson, "The Shifting Sands of Statutory Interpretation", p 2.
[16] Quoted Sir John Dyson, "The Shifting Sands of Statutory Interpretation", p 5.
[17] J Evans, "Sketch of a Theory of Statutory Interpretation" (2005) *NZ L Rev* 453; JH Baker, *An Introduction to English Legal History*, 4th ed, 2002, 236.
[18] Plucknett, *A Concise History of the Common Law*, 327.
[19] Plucknett, *A Concise History of the Common Law*, 332.
[20] Plucknett, *A Concise History of the Common Law*, 333.
[21] E. Tucker, "The Gospel of Statutory Rules requiring liberal interpretation according to St. Peter's" (1985) 35 *UTLJ* 113 at 117–123; Evans, "Sketch of a Theory of Statutory Interpretation", 453.
[22] Plucknett, *A Concise History of the Common Law*, 322.

of one Parliament was commonly published in one document which would contain unrelated matters divided into Chapters.[23]

The 15th and 16th centuries

The legislative procedure by which the House of Lords and the House of Commons debated propositions separately and submitted matters to the King once they had reached agreement was recognised in 1407 by Henry IV (1399-1413).[24] Greater focus on statutory interpretation was facilitated by printing of statutes which began in 1481, and also by more detailed drafting of statutes. Bills also began to include the proposed wording of the statute, although one commentator dates this development to the early 15th century[25] and another to the reign of Henry VII (1509–1547).[26] Statutes were also first written in English rather than Latin (as in the 13th century) or French (as in the 14th century).[27]

At least from the Tudor period, statutory texts included preambles setting out the object of the legislation, and drafting technique also developed to include provisos and qualifications to obligations imposed under the statute, and there was also a substantial increase in legislative activity in the reign of Henry VIII (1509-1547). Plucknett notes that the Tudor period also saw regulation of commercial and professional life transferred from guilds and ecclesiastical authorities to the Crown.[28] It has been suggested that the Tudor period saw the first consideration of principles of statutory interpretation and the emergence of at least the beginnings of modern principles of interpretation.[29]

The "equity" of a statute and recognition of legislative intent

By the late 16th century, a concept of legislative intention was also recognised. Sir John Dyson, in his paper "The Shifting Sands of Statutory Interpretation", suggests that a shift to interpretation in accordance with parliamentary intention had developed by the mid 16th century and gives, as an example, the observation of Serjeant Saunders in *Partridge v Straunge* (1553) Plowd 77v at 82, that:

> "[T]he efficacy of statutes is not solely in the wording of the statutes but in the intent of the statutes, which ought always to be greatly weighed, and the words ought to be bent thereto; and upon like reason a penal statute shall be extended by the equity if the makers thereof may be so perceived."[30]

In his commentary on *Eyston v Studd* (1574) 2 Plowd 459; 75 ER 688 at 694, Plowden referred to the opinion of the Court that:

> "the intent of the statutes is more to be regarded and pursued than the precise letter of them, for oftentimes things, which are within the words of statutes, are out of the purview of them, which purview extends no further than the intent of the makers of

[23] Plucknett, *A Concise History of the Common Law*, 326.
[24] J.H Baker, *An Introduction to English Legal History*, 3rd ed, 205–206; Emmett 126.
[25] Baker, *An Introduction to English Legal History*, 236.
[26] Plucknett, "Ellesmere on Statutes" (1944) 60 *LQR* 242 at 247–248, cited Emmett 127.
[27] Plucknett, *A Concise History of the Common Law*, 324.
[28] Plucknett, *A Concise History of the Common Law*, 325.
[29] Emmett, 115.
[30] Quoted Sir John Dyson, "The Shifting Sands of Statutory Interpretation", p 5.

> the Act, and the best way to construe an Act of Parliament is according to the intent rather than according to the words".

Plowden then adds commentary (at ER 695) that:

> "it often happens that when you know the letter, you do not know the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. And equity, which in Latin is called equitas, enlarges or diminishes the letter according to its discretion …".

Plowden similarly observes that:

> "And in order to form a right judgment, when the letter of statute is restrained, and when enlarged, by equity, it is a good way, when you peruse a statute, to suppose that the law-maker is present, and that you have asked him the question you want to know regarding the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present. … [W]hile you do no more than the law-maker would have done, you do not act contrary to the law, but in conformity to it."[31]

Emmett notes that this approach is directed to an actual inquiry into the intention of the legislature, as distinct from the focus on an objective inquiry into the legislature's intention as adopted in current Australian law. There is also reference in the quotations from *Partridge v Straunge* and *Eyston v Studd* to the "equity" of a statute, to which I will refer below. Emmett also refers to Sir Christopher Hatton's *Treatise concerning Statutes, or Acts of Parliament*, probably written between 1576 and 1591. Sir Christopher Hatton gives priority to the intent rather than the words of the legislature, noting that:

> "When the intent is proved, that must be followed … For the words are the Image of the law, and the meaning is, the substance or body of the matter; but whensoever there is a departure from the words to the intent, that must be well proved that there is such meaning."[32]

Hatton also distinguishes between interpretation according to the precise words and according to the equity.[33]

Still in the 16th century, Emmett also refers to the *Discourse upon the exposicion and understandinge of statutes*, which he notes was probably written around 1567 and is attributed by Plucknett to Sir Thomas Egerton, later Lord Ellesmere. Emmett notes that there is a difference between these commentaries as to whether interpretation according to the equity is applicable to penal statutes and, in particular, whether the operation of such statutes may be extended on that basis.

In the 16th century, reference to the "equity" of the statute, to which I have referred above, allowed interpretation according to the broader spirit of the statute, reflecting a belief that the general words of a statute would inevitably not deal with every case

[31] See also Baker, *An Introduction to English Legal History*, 240; Tucker, "The Gospel of Statutory Rules requiring liberal interpretation according to St. Peter's", 118; Emmett 132.
[32] Cited Emmett 132.
[33] Hatton, *Treatise concerning Statutes, or Acts of Parliament*, 28; quoted Emmett 133.

and directing attention to the spirit rather than the letter.[34] The reference to the "equity" of a statute was not to equity in the sense of the body of law administered by Chancery, but to the sense adopted in *Aristotle's Ethics*, which contemplated that any defect in the law "should be reformed by equity, which is no part of the law, but a moral virtue which corrects the law".[35] The principle of the "equity" of a statute, in its widest form, could be used both to limit the application of a statute by not applying it in a particular situation that was not within its "spirit" or alternatively to expand its application to apply to situations which were not within its language but were within its perceived "spirit".[36] Emmett also notes that the approach of interpretation of a statute "by equity" differs from the modern approach in that it will extend the application of statutes beyond the scope of their words on the basis of the perceived equity or spirit of the legislation.[37]

The width of this approach is illustrated by Plowden's commentary on *Stradling v Morgan* (1560) 1 Plowd 199 at 205; 75 ER 305 at 315, where he noted that statutes that referred to all things had been treated as referring to some things, and statutes which generally prohibited acts had been interpreted to permit some persons to do those acts. He observed that several authorities had been:

> "founded upon the intent of the legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes b foreign circumstances so that they have been guided by the intent of the legislature, which they have always taken accordance to the necessity of the matter, and according to that which is consonant to reason and good discretion."

In that case, the Court held that a statute of Edward VI (1547-1553) referring to receivers and treasurers was confined to officials appointed by the King and not those appointed by private persons, whether statutory dealt generally with royal revenue. Into the 17th century, Coke's *Institutes* (published 1628-1644) still referred to the principle of the "equity" of a statute as treating cases that were outside the terms of a statute, but within the same mischief, as within the scope of the statutory remedy by reason that "the law-makers could not possibly set down all cases in express terms".[38] The broad discretion reserved to judges by the principle of the "equity" of the statute later came to be regarded as inconsistent with principles of parliamentary supremacy, which treated judges as required to give effect to the legislative will.[39]

The "equity of the statute" was in turn invoked by Deane and Gummow JJ in *Nelson v Nelson* (1995) 174 CLR 538, which concerned the question whether a declaration of resulting trust should be made, arising from a transfer of a property that was made to allow the plaintiff falsely to claim a subsidy under the *Defence Service Homes Act* 1918 (Cth) when she purchased a second property. The majority declared that

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[34] Baker, *An Introduction to English Legal History*, 1222, 1240.
[35] S. Corcoran, "Theories of Statutory Interpretation" in S. Corcoran and S. Bottomley, *Interpreting Statutes*, 2005, p 11.
[36] Emmett 131–132.
[37] Emmett 134.
[38] J Evans, "A Brief History of Equitable Interpretation in the Common Law System" in J Goldsworthy & JT Campbell, *Legal Interpretation in Democratic States*, 2002, 9.
[39] S Corcoran & S Bottomley, *Interpreting Statutes*, 2005, 14.

property was held on resulting trust for the plaintiff, but on basis that denied her the benefit of her unlawful conduct. Deane and Gummow JJ observed (at 552–555) that:

> "In earlier times, effect was given to what the courts perceived to be 'the equity of the statute'. This doctrine had the support of the common law judges led by Sir Edward Coke, who looked back to a time before the rise of the doctrine of parliamentary sovereignty and the subjection to it of the common law. The notion of the equity of the statute operated in two ways. First, the policy of the statute, as so perceived, might operate upon additional facts, matters and circumstances beyond the apparent reach of the terms of the statute. In addition, cases within the terms of the statute but not within its mischief might be placed outside its operation. …
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> Further it was said that, although courts of equity did not differ from those of law in the exposition of statutes, they did so in the remedies given and the manner of applying them. …
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> The doctrine of the equity of the statute has analogies in civil law systems. It is said that the search for the statute's equity "has become indispensable for civil code readers". However, the doctrine of the equity of the statute attracted the ire of Bentham. He described it as a further breach of customary law which struck its roots into the substance of the statute law and infected statute law "with its own characteristic obscurity, uncertainty and confusion". The doctrine fell deeply into disfavour in England and the United States, with the rise of legal positivism in the last century. (Footnotes omitted)[40]

Judicial invalidation of statutes against the law of reason and the "mischief" rule

There was also some support in the 16th century for a view that a Court could disregard a statute where it was against natural law or the law of reason[41] and there are examples of that view into the 17th century. That view was taken in *Dr Bonham's case* (1610) 8 Co Rep 113b; 77 ER 638 by Sir Edward Coke (1552-1634), who Blackstone was later to describe as "a man of infinite learning … although not a little affected with the pedantry and quaintness of the times he lived in".[42] Sir Edward Coke there observed (at ER 659) that:

> "It appears in our books that in many cases the common law will controul Acts of Parliament and sometimes adjudge them to be utterly void; for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it and adjudge such Act to be void."

On the other hand, in *Observations on Coke's Reports*, Thomas Egerton (later Baron Ellesmere, 1540 – 1617) challenged that approach and observed that:

> "Acts of Parliament should be corrected by the pen that drew them [rather] than to be dashed to pieces by the opinion of a few judges".[43]

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[40] I thank Adjunct Professor J Campbell of the University of Sydney for drawing my attention to this decision.
[41] St German, *Doctor and Student*, quoted Baker, *An Introduction to English Legal History*, 240.
[42] Blackstone, *Commentaries*, 17th ed, Vol 1, 71.
[43] Plucknett, *A Concise History of the Common Law*, 330; Emmett 125.

Emmett notes that the view that the Court could invalidate unreasonable statutes did not survive the recognition of parliamentary sovereignty following the Glorious Revolution (1688), the Bill of Rights (1689) and the Act of Settlement (1700).

By the end of the 16th century there was also reference to the "mischief rule", often seen as a progenitor of purposive construction, in *Heydon's case* (1584) 3 Co Rep 7a; 76 ER 737 at 638. The Barons of the Exchequer there resolved that:

> "For the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive of enlarging of the common law), four things are to be discovered and considered:
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> First, what was the common law before the making of the Act;
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> Second, what was the mischief and defect for which the common law did not provide;
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> Third, what remedy the Parliament hath reserved and appointed to cure the disease of the Commonwealth; and
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> Fourth, the true reason of the remedy;
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> and then the office of all the Judges is always to make such construction as shall suppress the mischief and advance the remedy, and to suppress subtle inventions and evasions for the continuance of the mischief … and to add force and life to the cure and remedy, according to the true intent of the makers of the Act, pro bono publico."

The 18th century

By the 18th century, there were further developments in the accessibility of statutes. The *Statutes of the Realm* in the period to 1713 were published in 9 volumes in the period between 1810 and 1825.[44] From the 18th and early 19th centuries, statutes were also drafted in greater detail, reflecting an expectation that a more literal approach to construction would be adopted by the Courts.

Also in the 18th century, Blackstone delivered the first course of lectures on English law at an English university at Oxford, following his appointment as the first Vinerian Professor of law, in 1753. In his *Commentaries on the Laws of England* (1st ed 1765–1770, 9th ed 1783, 17th ed 1830)[45] expressed the view, in respect of the Roman approach to statutory interpretation, that "to interrogate the legislature to decide particular disputes is not only endless, but affords great room for partiality and oppression".[46] Blackstone instead observed that:

> "The fullest and most rational method to interpret the will of the legislator, is by exploring his intentions when the law was made, by *signs* the most natural and probable. And these sign are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law."[47] (emphasis in original)

[44] Plucknett, *A Concise History of the Common Law*, 326.
[45] See also W Priest, "Antipodean Blackstone: The *Commentaries* 'Down Under'" (2003) *FILR* 151; JJ Spigelman, "Blackstone, Burke, Bentham and The Human Rights Act 2004" (2005) 26 *ABLR* 1.
[46] Blackstone, *Commentaries*, 17th ed, Vol 1, 58; Emmett 125.
[47] Blackstone, *Commentaries*, 17th ed, Vol 1, 59; Emmett 125.

He supported a purposive approach to interpretation, reflected in his view that:

> "… the most universal and effective way of discerning the true meaning of a law, when the words are dubious, is by considering the *reason* and *spirit* of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law ought itself likewise to cease with it."[48] (emphasis in original)

Blackstone also referred to the principle of the "equity" of a statute, and to Grotius' definition of that principle as "the correction of that, wherein the law (by reason of its universality, is deficient." He went on to note that:

> "… since in laws all cases cannot be foreseen or expressed, it is necessary that when the general decrees of the law come to be applied in particular cases, there should be somewhere a power vested of defining those circumstances which (had they been foreseen) the legislator himself would have expressed." [49]

Blackstone also recognises the relevance of identification of the "mischief" in the interpretation of remedial statutes, observing that:

> "There are three points to be considered in the construction of remedial statutes: the old law, the mischief, and the remedy: that is, how the common law stood at the making of the act; what the mischief was, for which the common law did not provide; and what remedy the parliament have provided to cure this mischief. And it is the business of the judges so to construe the act, as to suppress the mischief and advance the remedy." [50]

Blackstone also takes the view that the Court may, with qualifications, read down unreasonable statutes, but recognises limits to that approach reflecting parliamentary supremacy, observing that:

> "If there arise out of [Acts of Parliament] collaterally any the absurd consequences, manifestly contradictory to common reason, they are, *with regard to those collateral consequences* [emphasis added], void. I lay down the rule with these restrictions; though I know it is generally laid down more largely, than Acts of Parliament contrary to reason are void. But if the Parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with an authority to control it … but where some collateral matter arises out of the general words and happens to be unreasonable; there the Judges are in decency to conclude that this consequence was not foreseen by the Parliament, and therefore they are at liberty to expound the statute by equity, and only quad hoc disregard it."[51]

Emmett also suggests that it is a short step from that approach to the contemporary view described as the "principle of legality", that there is a rebuttable presumption that Parliament does not intend to invade fundamental rights, privileges or principles of the common law unless an intention to do so is clearly discernible.[52] Chief Justice Spigelman has in turn formulated the interests currently within the scope of that rebuttable presumption as common law rights, access to the courts, the protection of legal professional privilege, the right to resist self-incrimination, protection of vested

[48] Blackstone, *Commentaries*, 17th ed, Vol 1, 60.
[49] Blackstone, *Commentaries*, 17th ed, Vol 1, 61.
[50] Blackstone, *Commentaries*, 17th ed, Vol 1, 87.
[51] Blackstone, *Commentaries*, 17th ed, Vol 1, 90-91; Emmett p 135.
[52] Emmett 135.

property rights, at least against alienation without compensation, equality of religion, the entitlement to procedural fairness, the availability of claims for damages and compliance with principles of international law.[53]

Emmett suggests that the principle of interpretation by reference to the equity of the statute continued to be adopted during the 18th century, but suggests that it did not survive the rise of legal positivism in the 19th century.[54] Tucker notes that, at the beginning of the 18th century, courts began to strictly construe penal statutes and statues that interfered with common law rights and a stricter and more literal approach to construction was applied.[55] Another commentator observes that, by 1790, Courts were less likely to make corrective extensions to statutes. For example, in *Varley* (1795) 101 ER 639, a statute gave a power to seize leather offered for sale under the *Tanning Act* 1604 if it was not sufficiently dried, and liability for trespass was found where the leather was not in fact insufficiently dried, notwithstanding a bona fide belief in the fact justifying the seizure.

I should also say something as to the influence of Jeremy Bentham (1748–1832) at this point. Bentham had attended Blackstone's lectures at Oxford and had responded critically to the first publication of Blackstone's *Commentaries* in 1776 in a work titled *Fragment on Government* published in the same year. In *The principles of Morals and Legislation* (1789), he argued that law was the product of the exercise of sovereign power rather than reflecting principles of natural law (the "command theory"), the basis of the law should be up to date legislation, the value of legal and other rules and institutions must be assessed by reference to a test of utility and reform should be undertaken by planned legislative reform.[56] Bentham also promoted the codification of legal principles, which had at least some impact, particularly in the criminal law. Chief Justice Spigelman has noted that Bentham's emphasis on law as the product of the exercise of sovereign power and on utilitarian values had continuing influence on leading academic lawyers in England and in Australia, including Professor John Austin at University College London, Professor Albert Dicey at Oxford and Professor William Hearne at the University of Melbourne.[57] Bentham incidentally also had at least some interest in the legal basis of settlement in New South Wales, having criticised the lack of constitutional foundation for the position in New South Wales in 1803.

The 19th century

Legislative drafting styles became more consistent and more precise after an office of Parliamentary Counsel was established in the United Kingdom in 1869 and given responsibility for drafting legislation, The first edition of *Statutes Revised* appeared

[53] Spigelman, "Blackstone, Burke, Bentham and The Human Rights Act 2004" at 3-4; and see *Bropho v Western Australia* (1991) 171 CLR 1 at 17-18; *Coco v R* (1994) 179 CLR 427 at 436-438; *Al-Kateb v Godwin* (2004) 219 CLR 562 (where that presumption was excluded by a clear statement of legislative intent); *Lacey v Attorney-General (Qld)* (2011) 242 CLR 573 at [17].
[54] Emmett 136.
[55] Tucker, "The Gospel of Statutory Rules requiring liberal interpretation according to St. Peter's", 123.
[56] Plucknett, *A Concise History of the Common Law*, p 74 suggests that Bentham invented the words "utilitarian" and "codification", now commonly adopted.
[57] Spigelman, "Blackstone, Burke, Bentham and The Human Rights Act 2004" at 3-4.

in 1870, identifying the Acts passed in the relevant period and the extent to which they had been repealed.

Emmett also points to the 19th century approach that interpretation cannot go beyond the statutory text. In *Becke v Smith* (1836) 2 M&W 191; 150 ER 724 at 726, Parke B (before he became Lord Wensleydale) observed:

> "It is a very useful rule on the construction of a statute, to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature to be collected from the statute itself, or leads to any manifest absurdity of repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further."

In *Sussex Peerage* (1844) 11 Cl & Fin 85 at 143; 8 ER 1034 at 1057, Tindal CJ observed that:

> "The only rule for the construction of an Act of Parliament is, that they should be construed according to the intent of the Parliament which passed the Act. If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expand those words in that natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the law giver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble …".

However, principles of literal construction were qualified by the so-called "golden rule", described by Lord Wensleydale in *Grey v Pearson* (1857) 6 HLC 61; 10 ER 1216 at 1234 with effect 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 the absurdity and inconsistency, but no further."

In *Lowther v Bentinck* (1874) LR 19 Eq 166 at 169, Jessel MR in turn observed that:

> "Now in construing instruments, I have always followed the rule laid down by the House of Lords in *Grey v Pearson* which is to construe the instrument according to the literal import, unless there is something in the subject or context which shows that that cannot be the meaning of the words".

That rule allowed a Court to depart from the ordinary grammatical sense of the words of a statute where it produced absurdity or inconsistency: *The River Wear Commissioners v Adamson* (1877) 2 App Cas 743 at 764 per Lord Blackburn. In *Eastman Photographic Material Co Ltd v Comptroller-General of Patents, Designs and Trademarks* [1898] AC 571 at 575, Lord Halsbury LC observed that:

> "We have therefore to consider not merely the words of this Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject."

Modern case law would treat the use of context permitted by these statements as too narrow.

English law in Australia

Turning to Australia, the effect of the view that Australia was a "settled" rather than a "conquered" colony was that the laws of England, including the common law, applied to all persons within the colony to the extent that it was suitable to the colony's conditions.[58] The *Australian Courts Act* 1828 (9 Geo IV c 83) provided that all British laws and statutes in force at that time should be applied in the administration of justice in the Courts of New South Wales and Van Diemen's Land so far as they could be applied.[59] The Governor could declare by ordinance whether a law should extend to the colony, local legislation might not be enrolled if the colonial judges determined it repugnant to the laws of England and the Supreme Court could determine whether a law applied in any proceedings before it, subject to that ordinance.[60] Laws subsequently passed by the New South Wales legislature were void to the extent that they were inconsistent with the law of England.

The *Colonial Laws Validity Act* 1865 (28 & 29 Vic c 63) further addressed issues of inconsistency between colonial and imperial law. Section 1 defined "colonial law" as a law made for any colony either by a colonial legislature or by Her Majesty in Council and recorded that an Act of the Parliament extended to a colony when it was "made applicable to such Colony by the express words or necessary intendment" of the Act. Sections 2 and 3 provided that a colonial law was not void or inoperative because it was inconsistent with the common law of England, and a colonial law that was inconsistent with an English Act that extended to the colony was only void and inoperative to the extent of the inconsistency.[61] In *Phillips v Eyre* (1870) LR 6 QB 1 at 20–21, that provision was interpreted as directed to

> "repugnancy to an Imperial Statute or order made by the authority of such statute, applicable to the colony by express words or necessary intendment".

Section 63 in turn provided that an Act of Parliament extended to a colony when it was "made applicable to such Colony by the express words or necessary intendment" of the Act; laws applied in that manner applied by "paramount force". For example, the *Merchant Shipping Act* 1894 (UK) had continued application by paramount force even after federation. By the late 19th century the Privy Council held that the Colonial Parliaments had the legislative powers of the same extent and quality as the British Parliament within their sphere of responsibility.[62]

The *Statute of Westminster* 1931 (22 Geo c 5) in turn qualified the operation of the *Colonial Laws Validity Act*. By s 2, the *Colonial Laws Validity Act* did not apply to any law made after commencement of the Statute of Westminster by the Parliament of a Dominion, and no statute passed after that date was void or inoperative on the

[58] *Cooper v Stewart* (1889) 14 AC 286 at 291; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 35–38 per Brennan J; A Twomey, *The Australia Acts 1986: Australia's Statutes of Independence*, 2010, p 6.
[59] A. Castles, "The Reception and Status of English Law in Australia" (1963) 2 *Adelaide LR* 1; Twomey, p 7.
[60] *Australian Courts Act* ss 22, 24.
[61] A Twomey, *The Australia Acts 1986: Australia's Statute of Independence*, 2010, 8–9.
[62] *Powell v Apollo Candle Co* (1885) 10 App Cas 282.

ground that it was repugnant to the Law of England. By s 4, the British Parliament could not legislate in relation to a Dominion without its express request and consent. That provision was adopted by the *Statute of Westminster Adoption Act* 1942 (Cth), with effect from the date of Australia's entry into World War II on 3 September 1939, in respect of Commonwealth legislation but did not apply to Australian States. The position in New South Wales was addressed by the *Imperial Acts Application Act* 1969 (NSW).

The 20th century

A literal approach to construction continued, at least to some extent, in Australia into the 20th century, although not without qualification as I will note below. In *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 161–162, Higgins J observed that:

> "The fundamental rule of interpretation, to which all others subordinate, is that a statute has 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."

However, literalism was not unqualified in the mid 20th century. In *Re Wilson; ex parte Kisch* (1934) 52 CLR 234, the question was whether Scottish Gaelic was a "European language" in which a dictation test could be administered under the *Immigration Restriction Act* 1901 (Cth), and the High Court rejected that proposition, with Dixon J noting that:

> "The rules of interpretation require us to take expressions in their context, and to construe them with a proper regard to the subject matter with which the instrument deals and the object it seeks to achieve, so as to arrive at the meaning allowed to them by those who use them".

A shift toward purposive interpretation occurred in the United Kingdom after World War II. In *Carter v Bradbeen* [1975] 1 WLR 1204 at 1206–1207, Lord Diplock commented that that shift had occurred during the previous 30 years.

Emmett points to the emphasis in the 20th century that the words of a statute cannot be divorced from their context and purpose.[63] Prior to the introduction of s 15AA of the *Acts Interpretation Act* in 1981, a purposive construction could be adopted in Australia at least where there was ambiguity or doubt as to the meaning of a statute.[64] In *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, decided after the enactment of the amending Act but before s 15AA took effect, the High Court by majority adopted a purposive construction to s 80C(3) of the *Income Tax Assessment Act*, by disregarding a drafting error in that section to achieve a result that was characterised as reflecting a Parliamentary intent. Mason and Wilson JJ observed (at 320) that:

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[63] Emmett 138.

[64] *Wacal Developments Pty Ltd v Realty Developments Pty Ltd* (1978) 140 CLR 503 at 513 per Stephen J; *Wacondo v Commonwealth* (1981) 148 CLR 1 at 17 per Gibbs CJ

> "Generally speaking, mere inconvenience of result in itself is not a ground for departing from the natural and ordinary sense of the language [of a statute] read in its context. But there are cases in which inconvenience of result or improbability of result assist the Court in concluding that an alternative construction which is reasonably open is to be preferred to the literal meaning because the alternative interpretation more closely confirms to the legislative intent discernible from other provisions in the statute."

Mason and Wilson JJ also observed at 320 that:

> "The fundamental object of statutory construction in every case is to ascertain the legislative intention by reference to the language of the instrument viewed as a whole."

Their Honours also observed at 320–321 that "[d]eparture from the ordinary grammatical sense cannot be restricted to cases of absurdity and inconsistency."

Gibbs CJ took a narrower view (at 305) than Mason and Wilson JJ as to the circumstances in which the Court could depart from the literal meaning of the statute, observing that:

> "If the language of a statutory provision is clear and unambiguous, and is consistent and harmonious with the other provisions of the enactment, and can be intelligibly applied to the subject matter with which it deals, it must be given its ordinary and grammatical meaning, even if it leads to a result that may seem inconvenient or unjust."

Stephen J observed (at 310) that:

> "If literal meaning is to be departed from, it must be clear beyond question both that the literal meaning does not give effect to the intention of the legislature and that some departure from literal meaning will fulfil that intent."

Section 15AA of the *Acts Interpretation Act* 1901 (Cth), introduced by the *Statute Law Revision Act* 1981 (Cth) in turn brought us to the present position, providing that:

> "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."

That section required Courts to take account of the purpose or object underlying the Act at the commencement of analysis, and not only at the later stage at which ambiguity or doubt as to meaning had become apparent.[65]

In *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408, the High Court observed that:

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[65] *Mills v Meeking* (1990) 169 CLR 214 at 238 per Dawson J; *Thompson v Byrne* (1999) 161 ALR 632 at 646 per Gaudron J

> "The modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise; and (b) uses 'context' in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy. Instances of general words in statutes being so construed by their context are numerous. … Further, inconvenience or improbability of result may assist the Court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent."

In *Project Blue Sky* (1998) 194 CLR 335, the majority of the High Court summarised the process of statutory construction as follows:

> "The duty of a Court is to give the words of a statutory provision the meaning that the legislature is taken to have intended them to have. Ordinarily, that meaning (the legal meaning) will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the cannons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning."

In that case, the Court held that a reference to "Australian programs" in an Australian content standard made under the *Broadcasting Services Act* 1992 (Cth) would include New Zealand programs, so as to achieve a result consistent with the Australian New Zealand Closer Economic Relations Trade Agreement.

The current orthodoxy is that the Court must have regard to the purpose and object of a statute as soon as the process of interpretation begins, and that contextual factors and extrinsic materials are relevant without first finding ambiguity.[66] In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27 at [47], the joint judgment observed (references omitted) that:

> "This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language that has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy."

In *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* [2012] HCA 55 (2012) 293 ALR 257; (2012) 91 ACSR 359 at [39], the joint judgment of the High Court quoted the first sentence of the passage cited above from *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* and again emphasised the primacy of the text in statutory interpretation, observing that:

> "'This Court has stated on many occasions that the task of statutory construction must begin with a consideration of the [statutory] text.' So must the task of statutory construction end. The statutory text must be considered in its context. That context

[66] *Newcastle City Council v GIO* (1997) 191 CLR 85; *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384 at 407–409

> includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself." (Footnotes omitted)

There may be no difference between the result of a literal and purposive approach if the statutory drafting is effective to express the relevant legislative purpose.

Section 15AB of the *Acts Interpretation Act* 1901 (Cth) and s 34 of the *Interpretation Act* 1987 (NSW) in turn provides for the Courts to have resort to extrinsic material in interpreting statutes.

Current issues

I should also note that there has been something of a, possibly forced, resurgence of Australian academic interest in statutory interpretation in the recent past, although there is a current debate as to whether the area should be addressed by separate courses dealing with statutory interpretation or by (possibly aspirational) integration into subject matter-based courses.

In 2007 the Victorian Chief Justice and the then President of the Court of Appeal, with the support of the then Chief Justices of the High Court of Australia and the Supreme Court of New South Wales, wrote to the Law Admissions Consultative Committee ("LACC") of the Law Council of Australia suggesting that it should:

> "review the present academic requirements in the light of the prevailing practices in Australian law schools, in order to ensure that statutory interpretation is given the prominence and priority which its daily importance to modern legal practice warrants."

The LACC subsequently produced a discussion paper seeking to identify the knowledge and competence relevant to statutory interpretation that could be expected of law graduates. The LACC noted in its discussion paper that it was advised by the Council of Australian Law Deans that many law schools, law teachers and students might view any proposal for a subject relating to statutory interpretation as "distasteful". Not deterred by that, the LACC's discussion paper sought comments on objectives for education in respect of statutory interpretation, which contemplated that a law graduate should:

- "be familiar with the structure of legislative instruments and confident in analysing their constitute parts;
- be able to identify the salient contextual elements which may influence the interpretation of a provision from the outset;
- be aware of significant presumptions employed by the Courts, and types of clear legislative statements necessary to displace them;
- understand, and be able to use appropriately, the various intrinsic guides to interpretation offered by the text of a legislative instrument; and

- understand, and be able to use appropriately, the common law and statutory regimes which govern recourse to the purpose of a legislative instrument, and to extrinsic materials to discover that purpose."

The LACC subsequently published a Statement on Statutory Interpretation (February 2010) which contemplates that law graduates should have particular skills, including in making use of appropriate aids to statutory interpretation, deploying appropriate interpretative techniques and dealing with particular issues in statutory interpretation (for example retrospectivity and excess of power).