THE TREATMENT OF STATUTES BY LORD DENNING

CASE LAW DERIVED FROM WHAT JUDGES SAY

In this article I am concerned with a description of what one of our foremost judicial thinkers *says* about the manner in which statutes should be treated by courts of law. I am not seeking to probe into any unstated grounds for his decisions of cases, to discover how far his expressed reasons are but rationalizations of pre-determined decisions. I am not seeking to discover any pattern of behaviour which will enable predictions to be made about what he will do or say in the future. On the basis of a common sense approach I consider that what judges say in one case influences what they, or other judges, will do and say in later cases. That is why the examination of judicial opinions is of importance in a description of the practice of the courts. This is, of course, in no way inconsistent with the doctrine, so often insisted on by "realist" jurists, that what judges *do* is of perhaps greater importance. Indeed it is worth emphasizing one aspect of that doctrine. Judges do not continue to say the same things: the judicial doctrines (the principles they enunciate, or which may be logically derived from what they say) with regard to some subjects are long-lived; others change more rapidly. Some change may be explained as the result of changed social circumstances: indeed this is part of judicial doctrine. [1] Thus, when the House of Lords in the *Maxim-Nordenfeldt* case said that general restraints of trade could be valid the judges themselves pointed out that they were not really over-ruling old cases in which it was said that general restraints were invalid: they were taking note of the relation of the old statements to the commercial practices and communications systems of the times, and of the impact on those statements of modern commerce and communications. But other changes occur which do not appear to be accounted for by such an explanation.[2] We may not, for example, entirely ignore a "great man" theory in consideration of legal history.

1. It is this type of change to which Lord Radcliffe referred when he said "No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society in which it lives...I do not think we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place." *Lister* v. *Romford Ice Co., Ltd.* [1957] 1 All E.R. 142E. He had spoken of the "implication in a society which has been almost revolutionised by the growth of all forms of insurance."

2. Glanville Williams suggests changes brought about by changes in policy notions when he says: "to support the doctrine of precedent by reference to precedent is to suspend it on its own boot-straps. How far the courts will follow precedent is a matter of judicial practice founded on notions of policy: but the interpretations of this policy may change with the times." 70 *L.Q.R.* p. 471.

JUDICIAL DOCTRINE AS THE DOMINANT PATTERN OF OPINIONS

It will be noted that I have not been severely "realistic" in talking about judges and judicial doctrines. My statement that "judges do not continue to say the same things" referred not only to different statements by the same judge but to statements by different judges: a judge of a later period does not say the same things as a judge of an earlier period. But, moreover, this latter statement involves the abstraction of "a judge," as if one judge is interchangeable with another. And this, I believe, is largely true: we do have in considerable measure a government of laws and not of men. Judges do not all speak with the same voice, but, nevertheless, it is often possible with regard to a particular topic to discern a dominant pattern of judicial opinion in the reported cases. This may be styled the judicial doctrine of that subject. Thus, for a considerable period most judges dealing with "frustration" cases spoke of an "implied term" theory: and it was possible to describe the judicial doctrine as involving that theory. But because of the speeches in *Davis Contractors Ltd.* v. *Fareham U.D.C.*[3] it is no longer possible to speak with such assurance. There may be in process a change in the judicial doctrine of frustration. In the treatment of statutes a change of judicial opinion appears definitely to have occurred within the last few years. This is not to say that there is complete uniformity now, any more than there was fifty years ago. Some judges do sometimes make statements which repeat the judicial doctrine of the past, just as some judges fifty years ago made statements in line with the judicial doctrine of today. [4]

3. [1956] A.C. 696. *Cf.* the remarks of McNair J. in the *Suez Canal* case, [1958] 3 All E.R. at 120D.

4. The view has been advanced that no pattern of judicial opinion can be discerned. Jennings and Llewellyn, writing in 1936 and 1946, saw only a chaos of contradictory rules: "Courts and Administrative Law," 49 *Harvard L.R.* at p. 435; "Counselling and Advocacy," 46 *Columbia L.R.* at p. 181. Some of the contradiction between so-called "rules" of interpretation is due to the expression as mandatory rules of what are not even "directory rules," but only reminders of the ways in which words may be used. Many of the "cases of construction" only state *possibilities* of the meaning of words. A canon which says that it is possible that general words may have a meaning restricted by the context of particular words is not contradicted by one which says that they may not be restricted: a canon which says that every word may have special significance, and there should be construction u*t res magis valeat quam pereat*, is not contradicted by a canon which reminds one of the use of words "ex abundanti cautela." *Cf.* Lord du Parcq, *Cutler* v. *Wandsworth Stadium Ltd.* [1949] 1 All E.R. at 550A: "not rigid rules but principles which have been found to afford some guidance"; Frankfurter J., *U.S.* v. *Universal Credit Corporation* 344 U.S. at 227: "Generalisations about statutory construction are not rules of law but merely axioms of experience." Even if a canon expresses a "presumptive" rule it is not contradicted by the existence of exceptions. Of course, there is a contradiction between the proposition which says that there is no "presumption" that general words are to be construed *ejusdem generis*, and a proposition that there is such a "presumption." *Cf.* Devlin J., [1950] 1 All E.R. at 771H, with the dictum of Lord Tenterden cited with apparent approval by Lord Evershed, [1958] 1 All E.R. at 213F. But there are many unresolved

GENERAL DOCTRINE OF "STATUTORY INTERPRETATION"

In quite a short time judicial doctrine with regard to the "interpretation" of statutes has changed twice. The development of Baron Parke's "golden rule" had resulted in the doctrine of the first quarter of this century being approximately this: (i) courts were to give the words of statutory clauses their ordinary meaning; (ii) if this first procedure did not resolve difficulties then aid was to be sought in the policy of the statute, the "intention of Parliament," which, however, was to be sought only in the words of the statute including, of course, other statutes *in pari materia;* (iii) if difficulties still remained the judges were to select that meaning, consistent, however, with the words, which achieved more desirable consequences than alternative meanings: this generally meant choosing the narrower meaning of words so that the statute departed least from the common law. The canons of construction might also be invoked as if they were mandatory and provided mechanical solutions.

It was perhaps the political development of democracy and the social development of welfare legislation, combined with juristic criticism, which brought about new attitudes to the interpretation of statutes. By the end of the second quarter of the century judges were more aware than previously that it was quite ordinary for words to be "ambiguous," and more ready to co-operate with government by resolving ambiguities in the light of the policy of the statute, to be discovered by an examination of the social context of the statute: they no longer restricted themselves to the verbal context or mechanically applied "canons of construction." The judicial doctrine could be approximately described as this: (i) words in one part of a statute were to be read in the light of the statute as a whole;[5] (ii) if, so read, ambiguities existed, then they were

contradictions particularly at a higher level than that of the minor canons of construction, *viz*., at the level to which Lord Radcliffe perhaps referred when he distinguished "a rule of construction" from "a rule of policy": see *Galloway* v. *Galloway* [1955] 3 All E.R. 437A. The *Rule in Heydon's Case* is contradicted by the principle that the intention of Parliament is to be gathered from the words of the statute alone; the "rule" that penal statutes are to be construed strictly contradicts the words in *Heydon's* case that its rule applies to all statutes "be they penal or beneficial." I have elsewhere suggested that the basic conflict is between a policy of protecting the citizen against government, and of co-operating with government in achieving its constitutionally approved objects: see "Judicial Implementation of Legislative Policy," 3 *Univ. of Queensland L.J*., p. 146. *The Rule in Heydon's Case*, it should be noted, may protect the citizen against a claim by the executive that a statute has a wider operation than that intended by the legislature.

5. It was not until 1957 in the *Prince Ernest Augustus* case that it was "conclusively" determined that the preamble forms part of the statute for the purpose of this principle. Even in that case there are indications in some of the opinions that the preamble is only to be considered if the enacted words to be interpreted are ambiguous when considered in isolation from the preamble. It is not easy to say what the present doctrine is with regard to cross headings, marginal notes and punctuation.

to be resolved by reference to the intention of Parliament: the *Rule in Heydon's Case* was to be implemented; the mischief to be cured sought for in the social history of the statute;[6] and the remedy for the mischief was to be advanced, rather than the attempt made to maintain the harmony of the legal system by reading the statute in the light of the common law it was designed to alter;[7] (iii) if, however, the ambiguity was not resolved by consideration of the intention of Parliament then Blackstone's "tenth rule" was still to be applied, and the judges were to select the meaning considered the more desirable in the light of their view of justice; for example, penal statutes might still be construed "strictly;"[8] the rule still prevailed that statutes were not to be construed so as to take away the property of the subject without compensation.[9]

A powerful influence in the creation of the newer doctrine was that of Lord Wright.[10] The doctrine also appears in comprehensive fashion in the speech of Viscount Simon in *Nokes* v. *Doncaster Railway Co.*[11] It is this now conservative, and perhaps outdated, doctrine which appears in the judgment of Denning L.J. (as he then was) in *Seaford Court Estates* v. *Asher.*[12] As he himself said: "The English language is not

6. The phrase "social history of the statute" is used to refer to a concept distinct from the parliamentary history: the judicial doctrine is clear that parliamentary history is not admissible in interpretation. The term "parliamentary history" covers a number of different processes, but the distinctions do not appear in judicial discussion. A second reading statement of the social origins of a bill is, *e.g.,* in a different category from parliamentary exposition of the meaning of the clauses in a bill: the strongest arguments against admission of parliamentary history are concerned with the latter type of history. The former is hardly "parliamentary history" at all. Why should a historian's account of the reasons for the introduction of a measure be admissible and not the minister's account? The historian may well take his account from Hansard, or the minister become the historian.
7. *Cf.* Lord Wright's strictures on "a tendency common in construing an Act which changes the law, that is, to minimise or neutralise its operation, by introducing notions taken from, or inspired by, the old law which the words of the Act were intended to abrogate and did abrogate:" *Rose* v. *Ford* [1937] 3 All E.R. 370G.

   In *Rowell* v. *Pratt* [1937] 3 All E.R. Lord Wright said at 662A: "if the words of an enactment are fairly capable of two interpretations, one of which seems to be in harmony with what is fact, reasonable and convenient, while the other is not, the law will prefer the former." But it is clear that, as he said in *Rose* v. *Ford* [1937] 3 All E.R. 367H, there has first to be considered "the existing law, and the existing mischief, in view of which the measure was enacted."
8. See the speeches in *London & N.E. Rly. Co.* v. *Berriman* [1946] A.C. 278: followed in *Howell* v. *Falmouth Boat Construction Co., Ltd.*, particularly by Viscount Simonds [1951] 2 All E.R. 281C.
9. *e.g. Bond* v. *Nottingham Corporation* [1940] Ch. 249; *Billings* v. *Reeve* [1945] 1 K.B. 11.
10. See his speeches in *Rose* v. *Ford* [1937] 3 All E.R., 370G; *Rowell* v. *Pratt* [1937] 3 All E.R. 662A; *Pratt* v. *Cook* [1940] A.C. 452.
11. [1940] A.C. 1022.
12. [1949] 2 K.B. 481.

an instrument of mathematical precision,"[13] and it is possible to interpret what he said, as Lord MacDermott did in the House of Lords, in such a way that "the principles applicable to the interpretation of statutes... are stated rather widely."[14] There are references to sets of facts not foreseen by the draftsman, and these might contemplate legislative as opposed to linguistic gaps. This matter is dealt with in the next section. In what immediately follows I have endeavoured to "iron out the creases."

There are two elements in the passage. The first is that it is not within human powers to provide for all the manifold sets of facts which may arise in terms free from all ambiguity.[15] Ambiguities are part of the ordinary meaning of words. The second principle comes into operation when the judge finds that different meanings are consistent with an ordinary reading of the words. To resolve the ambiguity there is required the constructive task of finding the intention of Parliament in accordance with the procedure of the *Rule in Heydon's Case.* This may involve qualifying the actual words of the statute so as to bring out the specific meaning intended, but this is the time-honoured practice of "necessary implication." "Necessary" has never been rigidly construed, and Lord Denning avers that the "implication" is from the statute read in its social context.[16]

13. [1949] 2 All E.R. 164E.

14. *Asher* v. *Seaford Court Estates Ltd.* [1950] 1 All E.R. 1029H.

15. "Whenever a statute comes up for consideration it must be remembered that it is not within human powers to foresee the manifold sets of facts which may arise, and, even if it were, it is not possible to provide for them in terms free from all ambiguity. The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were. This is where the draftsmen of Acts of Parliament have often been unfairly criticised. A Judge, believing himself to be fettered by the supposed rule that he must look to the language and nothing else, laments that the draftsmen have not provided for this or that, or have been guilty of some or other ambiguity. It would certainly save the judges trouble if Acts of Parliament were drafted with divine prescience and perfect clarity." [1949] 2 All E.R. 164E. The remainder of the quotation is in the next footnote.

16. "In the absence of it, when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament and he must do this not only from the language of the statute, but also from a consideration of the social conditions which gave rise to it and of the mischief which it was passed to remedy, and then he must supplement the written word so as to give 'force and life' to the intention of the legislature. That was clearly laid down (3 Co. Rep. 7b) by the resolution of the judges [Sir Roger Manwood, C.B., and the other barons of the Exchequer] in *Heydon's* case, and it is the safest guide to-day. Good practical advice on the subject was given about the same time by Plowden in his note (2 Plowd. 465) to E*yston* v. *Studd.* Put into homely metaphor it is this: A judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they would have straightened it out? He must then do as they would have done. A judge must not alter the material of which the Act is woven, but he can and should iron out the creases." [1949] 2 All E.R. 164G.

LINGUISTIC AND LEGISLATIVE GAPS

The above account of the views of Denning L.J. in the *Seaford* case presents the task of discerning the intention of Parliament as one which arises after an ambiguity has been discerned when the words of the statute alone have been considered. When a year later in the *Magor* case he came to repeat what he said in *Seaford Court Estates Ltd.* v. *Asher*, he gave primacy of place to finding out the intention of Parliament. [17] This appears to mark a change in judicial doctrine, which will be later considered. What is proposed for present consideration is the reference to "filling in the gaps," which is the language substituted for the previous talk about straightening rucks and ironing creases.

The phrase "gap in the law" has long been used to describe the situation which exists where no rule appears to exist for a particular topic. The "sense of wonder" described by Cardozo at "the gaps in the system" of law[18] is being continually stimulated. Rules have recently been framed by trial judges to answer such "elementary" questions in the law of infancy as whether an infant intervener can be guilty of adultery, [19] whether an infant beneficiary is entitled on marriage to the capital of a trust fund to which she was entitled "when she shall attain the age of twenty-one years or shall marry." [20] In a recent case the very words "supplying a gap" were used in relation to a proposed interpretation of statutory rules which would have made them deal specifically with a state of affairs for which otherwise no specific provision would have been made.[21] The notion of judicial legislation for a particular topic on the analogy of a statutory provision for similar topics has often been advanced.[22] This is the conservative method of developing law in countries where a code exists: *Au-dela du Code civil*, *mais par le Code civil.*[23]

It would appear that Lord Simonds thought that Denning L.J. had in mind such a "filling in the gaps" when in the appeal before the House of Lords he said of the dictum of the Lord Justice: "It appears to me

17. "I would repeat what I said in *Seaford Court Estates*, *Ltd.* v. *Asher.* We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do, and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis." *Magor R.D.C.* v. *Newport Corp.* [1950] 2 All E.R. 1236A.
18. *Paradoxes of Legal Science*, pp. 76-77.
19. *Barnett* v. *Barnett* [1957] 1 All E.R. 389G.
20. *Re Somech* [1956] 3 All E.R. 5241.
21. Viscount Kilmuir L.C. in *Canadian Pacific Ltd.* v. *Bryers* [1957] 3 All E.R. 577A.
22. It is suggested by Roscoe Pound as the law of the future in *Common Law and Legislation*, 21 *Harvard L.R.* at pp. 385-6. See also p. 407.
23. Saleilles: Preface to the first edition of Geny: *Methode d'Interpretation.*

to be a naked usurpation of the legislative function under the thin disguise of interpretation." [24] But the phrase "filling in the gaps" may refer to a gap in the wording in the sense that the actual words are ambiguous — it is not absolutely clear whether or not they apply to a particular state of affairs — and additional words are used merely in order to make clear whether the existing words do or do not apply.[25] Their function is to resolve an ambiguity, not to deal with a *casus improvisus*. Romer L.J. calls this procedure "filling a hiatus," which is, of course, but a latinized form of "gap." He said: "When we find... that the legislature has expressed itself elliptically...then that is a hiatus which the court is entitled to fill, and in doing that to have regard to the purpose of the Act as a whole, the history of the matter and the probabilities." [26]

That Denning L.J. had in mind a linguistic and not a legislative, a formal and not a substantial gap, is indicated by his metaphor "A judge must not alter the material of which an Act is woven." [27] He has himself specifically repudiated a doctrine of legislation by analogy, citing for this purpose Lord Simond's criticism in the *Magor* case, and using the language of "filling in of gaps." "...[A] fundamental principle in all Acts...is this — the judges have no right to fill in gaps which they suppose to exist in an Act of Parliament, but must leave it to Parliament itself to do." [28]

24. [1951] 2 All E.R. 841G. He also expressed in relation to the earlier part of the passage from Denning L.J. the "out of date" doctrine: "the general proposition that it is the duty of the court to find out the intention of Parliament...cannot by any means be supported. The duty of the court is to interpret the words that the legislature has used. Those words may be ambiguous, but, even if they are, the power and duty of the court to travel outside them on a voyage of discovery are strictly limited." *ibid.*, 841E.

25. See also my discussion in *Judicial Implementation of Legislative Policy*, *op. cit.*, p. 142.

26. *British Transport Co.* v. *L.C.C.* [1953] 1 All E.R. 813D.

27. Geoffrey Marshall, in an unpublished comment on my paper "Judicial Implementation of Legislative Policy," rightly says that it is not always possible clearly to distinguish between linguistic and legislative gaps. He thinks that the metaphor of Denning L.J. is not precise enough to decide which kind of gap is in question. "One can darn a hole perhaps without altering the material." He draws attention to other passages in the judgment which suggest a legislative gap, *e.g.*, "I cannot help feeling that the legislature had not specifically in mind a contingent burden such as we have here. If it had, would it not have put it on the same footing as an actual burden?" [1949] 2 All E.R. 165A.

28. *London Transport* v. *Betts* [1958] 2 All E.R. 655D. The gap seen by Lord Denning was the case of "a single hereditament which was not part of a larger whole." In his opinion the section "envisaged a place within a factory," and could only be extended to an isolated place by a rewriting which was, in effect, an additional clause dealing with a different subject matter: see [1958] 2 All E.R. 652I *et seq.*

JURISTIC CRITICISM

It is noteworthy that Lord Denning, in common with English judges generally, makes little reference in his judgments to juristic writings. He has neither called in aid of his advocacy of the *Rule in Heydon's Case* juristic approval of historical interpretation,[29] nor been deterred from speaking of the intention of Parliament by juristic criticism of its fictional character.[30] The scope of this article does not require me to enter into explanations of this "neglect," nor does it require me to examine the juristic writings on the subject of interpretation of statutes.[31] But some "jurisprudential" analysis cannot be avoided of the key terms used by Lord Denning in his judgments. It is perhaps desirable that it be presented at this stage before entering on the description of his later thought which has been influential in the creation of current judicial doctrine.

The words selected for consideration are "intention of Parliament," "ambiguity" and "interpretation," and their associated concepts. The problems involved are interrelated, and are connected with fundamental problems of the meaning and function of words. It is not suggested that more is done than to "stir up" some semantic considerations, and ultimate solutions are left to "wiser heads than mine."

If a speaker describes a feature of the surroundings to a hearer it is useful to discuss this situation, in the terms of Ogden and Richards, [32] by saying that the words of the speaker are but symbols for the thought of the speaker which refers to a referent, the thing which is the particular feature. It is "word-magic" to believe that a speaker's word is in some way directly linked with the thing. "Between the symbol and the referent there is no relevant relation other than the indirect one, which consists in being used by someone to stand for a referent." If in the surroundings there is a cup and a painting of a ship, and the speaker remarks on "the beautiful silver of that vessel," [33] it is appropriate in the above language to say that the symbol "vessel" was used by the

29. Outstanding in English writing have been Eastwood: *Pleas for Historical Interpretation of Statute Law* (1935) *J.S.P.T.L.* 1, and Laski's note on *Judicial Interpretation of Statutes* appended by him to the Donoughmore Committee Report: Cmd. 4060, p. 35.

30. It is perhaps sufficient to refer for English criticism to Payne, "The Intention of the Legislature in the Interpretation of Statutes," (1956) *Current Legal Problems*, p. 96.

31. In view of the great importance of the subject there has been remarkably little writing on the subject in the United Kingdom.

32. *Meaning of Meaning* (10th ed.), p. 11.

33. The example is suggested by Hart in an unpublished comment on my paper on *Judicial Implementation* where he says "if in a will a testator 'gives all my vessels to X...' the question whether this means his boats or his drinking cups shows its ambiguity." He also shows that the word "vessel" is *vague:* does it include flying-boats?

speaker to refer to the silver cup, and understood by the hearer to refer to the cup, and not to the blue ship. But the "reference" was not made by pointing or by the use of a proper name. It was by means of a descriptive phrase; and "the thing which a description describes" is not "what the description means." [34] The meaning of the word "vessel" is not identical with the silver cup. "Description is by kinds and sub-kinds" says Sedgwick,[35] and the word "vessel" is a general word which can be said to "refer" to a class of objects of which the silver cup is but a member. Indeed it can be used to refer to more than one class. A dictionary tells us that "current English" gives to the word "vessel" four "meanings" of which the first two are "1. Hollow receptacle esp. for liquid, *e.g.*, cask, cup,... (2) Ship, boat, esp. large one." [36] The existence of several possible meanings for a word entitles us, according to the dictionary, to say that it has "ambiguity." [37] Though perhaps stilted, we could say of the above situation that the speaker used an ambiguous word, but that the hearer had no difficulty, in the context of the actual surroundings, in giving to the statement an interpretation of "receptacle" in accordance with the speaker's intention, and, moreover, of applying the statement to the silver cup.[38] We could note that, though the word "vessel" has a number of dictionary meanings, in the actual use of it by the speaker there was no ambiguity. But, of course, we can easily imagine a situation in which there would be ambiguity in actual user, as, for example, if the ship in the picture were painted silver: in such a situation the hearer might ask the speaker whether he was referring to the cup or the ship.

How far are the terms and concepts "interpretation," "ambiguity," "intention" appropriate in discussion of the very different problem of the words of the general rules contained in statutes? A full discussion would proceed through consideration of particular commands, like a sergeant-major's orders to troops, and general descriptive statements, like those of scientific laws. We have to bear in mind that statutory rules are not often considered in isolation from particular facts. In ordinary litigation the question is concerned with the legal position of the parties arising from particular facts, and the statutory rule is brought in as the law

34. Ryle: *Systematically Misleading Expressions*, p. 26. (Flew: *Logic and Language*, First Series). This is the nominalistic error of reducing "connotation" to "denotation."

35. "Rules and Interpretation," 37 *Mind* 161.

36. *Concise Oxford Dictionary of Current English* (4th ed.).

37. *ibid.*

38. "The audience is expected to fill in part of the meaning from the context, from their own previous knowledge or from the nature of the occasion. The context helps us to see the purpose of the statement, and so appreciate its intended purport." Sedgwick, *op. cit.*, p. 154. In this article the problem of application is considered: but the terminology employed makes it part of "meaning." It is consistent with this that "ambiguity" in the article includes "vagueness."

governing the situation.[39] It is asked whether the statute applies to the facts — do they fall within the provision? The particular facts most likely had not occurred when the statute was passed, and though it is possible, like a sergeant-major on the barrack square, to foresee and command future movements, it is not likely that the particular facts were in contemplation of anybody at the time the statute was passed.[40]

Despite the great differences between descriptive and normative sentences some similarities exist and in consequence some of the terminology appropriate in the one case is appropriate to the other. The word "vessel" in our example is a common noun, a general word, and only an extreme nominalism holds that it has no "meaning" other than that it is applied in fact, without rhyme or reason, to various objects.[41] Even if the speaker used the word as a token[42] to refer to a specific object, it is not absurd to conceive of the hearer receiving it as a type word in fact related to a common mode of user, which he applies to the specific object, and this without embarking on an inquiry into the problem of universals. It is appropriate to say that the words of a statute may be potentially ambiguous, that the ambiguity may be resolved by consideration of a context, or remain unresolved.[43] We can draw the distinction made by De Sloovere between interpretation and application. "Interpretation may be defined as the making of a choice from several possible meanings. Application is the process of determining whether the facts of the case are within the meaning."[44]

39. Procedures do exist for determining the general meaning of a statute: *e.g.*, the reference of sections of the Government of Ireland Act, 1920, to the Judicial Committee of the Privy Council; see s. 51 thereof.
40. The distinction between the commands of a sergeant and those of a legislator is perhaps one of degree only: the sergeant's "contemplation" when he says "right turn" has elements of generality; he is not likely to picture precisely the specific men executing the movement in a specific manner.
41. It would appear that it is this extreme nominalism which, according to Woozley *(Theory of Knowledge*, p. 89), "has never been seriously held by anybody except Humpty Dumpty," which is adopted by Payne when he says of general words "we apply them to this particular and that particular not by reference to any general idea, but simply because we find them so applied by others:" (1956) *Current Legal Problems*, p. 100.
42. A token refers to the actual word on a specific occasion: it is opposed to a "type," the class of similar shapes. Each time "vessel" has appeared in these pages a different "token" has been used, but it has been the same type word. See, *e.g.*, Woozley, *op. cit*., p. 90.
43. Stebbing confines the use of the term "ambiguity" to ambiguity within a context. "Reference to the context within which the word is being used is necessary in order to ascertain whether a word is ambiguous or not. No word in isolation is properly ambiguous." *Modern Introduction to Logic* (6th ed., 1948), p. 204. *Cf.* Schiller, *Logic for Use* (1924), p. 63.
44. 46 *Harvard L.R.* at p. 1095. Lord MacDermott has indicated the existence of this distinction. "A precise definition of a regular minister appears impossible, and to search for one is to wander about between the realms of interpretation and application." *Walsh* v. *Lord Advocate* [1956] 3 All E.R. 135B. What is more, he relates questions of interpretation to issues of law, and questions of application to issues of fact.

It is not, however, possible to draw a precise parallel between a speaker's intention and an intention of a legislature. In one case we have a psychic reality, in the other we have none in the sense of a single mind or a set of identical states of mind unless we refer perhaps to the actual draftsmen, or the minister responsible for the bill. But ambiguous as the phrase "intention of Parliament" is, rarely, indeed, is it used to refer to a real intention. What is involved is not so much a fiction in the sense of an assertion that some non-existent phenomenon does exist, but a fiction only in the sense of something to be created by following a stipulated procedure.[45] The question to which the courts are directed by the formula of the intention of Parliament is what do the words mean having regard to the actual circumstances in which they were enacted, to the historical conditions of the times, to the realities of social mischiefs and proposed remedies. The parallel may perhaps be drawn not with the speaker of the descriptive statement, but with the hearer. We assumed in our example that the hearer had eyes as well as ears, and used them. In a consideration of the meaning of the words of a statute it is not fantastical to ask the interpreter to inform himself of the actual social history in the context of which the statute was passed. This is what the *Rule in Heydon's Case* requires: and the phrase "intention of Parliament," whether regarded as metaphor or fiction, is often but a means of invoking that rule. [46]

It would appear that judges when speaking of "ambiguity" have generally referred to the situation described above of a range of possible

45. This apparently represents juristic and judicial doctrine in the United States. While Kocoureck *(Science of Law*, p. 201) and Radin (43 *Harvard L.R.* 870) are not alone in denying the reality of legislative intent, and its relevance, Neuman and Surrey *(Case Book on Legislation*, 1955) say that view "has generally been rejected both by judges and by scholars." For the judicial doctrine they cited Judge Learned Hand: "When we ask what Congress 'intended' usually there can be no answer, if what we mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete situation. He who supposes that he can be certain of the result, is the least fitted for the attempt." *U.S.* v. *Klinger* (1952) 199 F.2d. 648, cited approvingly by Jackson and Frankfurter JJ. in *U.S.* v. *Henning*, (1954) 344 U.S. 79.

46. Lord Watson's well known reminder of the ambiguity of the phrase, nevertheless, postulates the Legislature as having a mind: " 'Intention of the Legislature' is a common but very slippery phrase, which properly understood, may signify anything from intention embodied in a positive enactment to speculative opinion as to what the Legislature would properly have meant, though there has been an omission to enact it." [1897] A.C. at p. 38.

meanings which may be limited by the context.[47] It is by no means so clear that the term "interpretation" has been limited to the resolving of such ambiguities. The linguistic analysts have shown that a major difficulty in the use of words is *vagueness.* There may be agreement about the application of words to some particulars, but doubt about their application to others. There is said to be a central core of clear meaning and a peripheral zone of doubt.[48] Some words are clearly vague, like few, many, crowd, or reasonable man, bolshevik, fascist: but most, if not all, ordinary general words have an "open texture," and border line cases which resemble the central instances in some respects but differ in others may be imagined. Even chemists may have difficulty in classifying some particular substance as an isotope of an existing element or as a new element.[49] Some words are both ambiguous and vague: such, for example, as Hart has shown, is the word "vessel:" in addition to the ambiguity we have already considered we may ask whether a flying-boat is a vessel.[50] The distinction between "ambiguity" and "vagueness" is itself not too clear as we sometimes think of meaning in relation to connotation and sometimes in relation to denotation.[51] When we say "three is a crowd" are we doing so because of the vagueness of the term, or because we are using a different "meaning" of the word, *viz.*, too many people for the purpose in hand?[52]

47. Thus Lord Reid: "A provision is not ambiguous merely because it contains a word which in different contexts is capable of different meanings. It would be hard to find anywhere a sentence of any length which does not contain such a word. A provision is...ambiguous only if it contains a word which in that particular content is capable of having more than one meaning." *Kirkness* v. *John Hudson & Co., Ltd.* [1955] 2 All E.R. 366D. *Cf.* n. 43, above.

48. *Cf.* Glanville Williams, "Language and the Law," 61 *L.Q.R.*, p. 181: Payne, (1956) *Current Legal Problems*, p. 98.

49. Waismann *(Verifiability: Logic and Language*, First Series, p. 120) says: "Vagueness should be distinguished from open texture," but he says also: " 'open texture' is something like possibility of vagueness." It appears to me that the difference may be one of degree, depending on the size of the 'central core." Though Mill does not use the term "vagueness," he in effect points out that some words may be completely vague and have no central core at all. "A name not unfrequently passes by successive links of resemblance from one object to another until it becomes applied to things having nothing in common with the first things to which the name was given; so that at last it denotes a confused huddle of objects, having nothing in common whatsoever; and connotes nothing not even a vague and general resemblance." *Logic* (8th ed.), p. 173. "Justice" is given as an example.

50. See n. 33, above. "Cat" is ambiguous and vague: it is ambiguous because sometimes it refers to the domestic pet: sometimes it refers to the whole genus of which the domestic animal is a species, *e.g.*, to tigers and lions as well as "cats:" it is vague because, as Waismann says, we would be in doubt whether to apply the term to freak examples.

51. So Payne, whose nominalism presents the meaning of general words solely in terms of their extension, discusses only vagueness and not ambiguity: *op. cit.*, p. 98 *et seq.*

52. Stebbing (*op. cit.*, p. 21) says that "ambiguity is to be carefully distinguished from vagueness." She also suggests that sometimes different words that have

It is suggested that problems arising from the vagueness of words are related to the application of statutes. The matter will be further considered in considering Lord Denning's views on the application of the doctrine of precedent to the "interpretation" of statutes. It would indeed be an aid to certainty if one could say that interpretation is related to ambiguity and is a question of law, and application is related to vagueness and is a question of fact.

THE PRIMACY OF PARLIAMENTARY INTENTION

I have submitted that the judicial doctrine of the second quarter of this century was that if the words of any section read in the verbal context of the statute were ambiguous then recourse might be had to the entire social context at the time the statute was passed. It is very likely that the judicial doctrine of today is that the statute has to be read *ab initio* in the light of such social context.[53] This, at any rate, is the view of Lord Denning: "A statute is not passed in a vacuum, but in a framework of circumstances, so as to give a remedy for a known state of affairs. To arrive at its true meaning, you should know the circumstances with reference to which the words were used: and what was the object appearing from those circumstances which Parliament had in view." [54] "If I were to look at the words of the statute alone and take the word 'by' literally I might be of the same opinion as Romer L.J. But when I look at the mischief this section was passed to remedy, I come to a different conclusion... It is not so much a choice between a literal and a liberal construction. It is rather a case of remembering that every statute must be read in the light of the circumstances in which it was

the same spellings are considered ambiguous. Certainly words of different etymologies may come to be spelt the same but are different type words: her example of "vice" can be so explained: as moral disposition it comes from *vitium*, as carpenter's instrument it comes from *vitis*. Dictionaries note this fact. But "fair" is etymologically the same word when "standing for the colour of a person's complexion: and for a just bargain." (as "market" it is etymologically different). Is every shift of meaning by means of metaphor to be called the creation of a new word? This seems a matter of degree.

53. Even Viscount Simonds, who in *Smith* v. *East Elloe R.D.C.* [1956] 1 All E.R. 859D said "the first of all principles of construction that plain words must be given their plain meaning," may be included as one of the creators of this doctrine. See the *Prince Ernest Augustus* case [1957] 1 All E.R. 53H and the *Parliamentary Privilege* case [1958] 2 All E.R. 334D. Lord Evershed was prepared to say that the true meaning of "language precise and express" when considered in isolation was different "having proper regard to the historical matters:" *British Transport Co.* v. *L.C.C.* [1953] 1 All E.R. 813D. Lord Radcliffe is probably another creator: see *Re MacManaway* [1951] A.C. 178. Judges have generally found Little difficulty in referring to history, *ab initio*, when dealing with "private law" statutes: see, *e.g.*, the speeches in *Hickman* v. *Peacey* [1945] A.C. 305.

54. *Escoigne Properties Ltd.* v. *I.R. Cssrs.* [1958] 1 All E.R. 414E.

made, and the object it was passed to achieve." [55] The opening words of a later judgment are "My Lords, in order to understand s. 8 of the Rating and Valuation (Miscellaneous Provisions) Act, 1955, it is well to know the background against which it was enacted." [56] Of course, considerations of administrative efficiency dictate that in most cases statutes will be applied without first embarking on a historical investigation of their origin,[57] but the newer doctrine is that when it is suggested that a problem of meaning exists then it is legitimate, and perhaps his duty,[58] for the judge to read the statute in the light of its social context without having first to discover an ambiguity in the verbal context.

The problem of how a court is to be informed of the history and policy of a statute has long been debated.[59] Lord Denning's view is: "All that the courts can do is to take judicial notice of the previous state of the law and of other matters generally known to well informed people." [60] He states, without comment, the rule excluding the use of legislative history including "the explanatory memoranda which preface the Bills before Parliament." But he does say: "Thus one of the best ways I find of understanding a statute is to take some specific instances, which by common consent, are intended to be covered by it... When the draftsman is drawing the Act he has in mind particular instances which he wishes to cover. He frames a formula which he hopes will embrace them all with precision. But the formula is as unintelligible as a mathematical formula to anyone except the experts: and even they have to know what the symbols mean. To make it intelligible you must know the sort of thing Parliament had in mind. So you have to resort to particular instances to gather the meaning." [61] Two processes are combined in this passage. One is that of interpretation in the sense of translation from a set of symbols not understood by the reader to a set

55. [1958] 1 All E.R. 416A, D.
56. *National Deposit Co.* v. *Skegness* [1958] 2 All E.R. 610F.
57. And nearly always the words will be read before anything else is done. *Cf.* "While literalness of construction does not conclude ascertainment of a statute's meaning, it certainly is the beginning." Frankfurter J.: *Master Plastics Corp.* v. *N.L.R.B.* (1956) 350 U.S. 287.
58. The older doctrine said it was the *duty* of the judge to apply the *Rule in Heydon's Case* when an ambiguity was disclosed. The language of Viscount Simonds is not that of duty, nor, indeed, is the language of Lord Denning in the *National Deposit* case: but the logic of the *Escoigne Properties* judgment is that of duty.
59. *Cf.* the debate over the "Brandeis Brief," the collection of extracts from various reports of government committees, bureaus of statistics, commissioners of hygiene, inspectors of factories, presented to the Supreme Court in *Muller* v. *Oregon* (1908) 208 U.S. 412.
60. *Escoigne Properties Ltd.* [1958] 1 All E.R. 414G. *Cf.* "It is legitimate to take notice of matters generally known to well-informed people." [1958] 2 All E.R. 610F.
61. [1958] 1 All E.R. 414H; followed by him: *Shell-Mex and B.P. Ltd.* v. *Holyoak* [1959] 1 All E.R. 401H.

of symbols which are understood, like translation from a foreign language with the help of a dictionary. The other, relevant for the present purpose, is that of ascertainment of the object of a statute. The "instance" which the judge uses may be an example of the mischief under the old law, and drawn from the "history" of the matter. Such were the instances in fact used by Lord Denning in the *Escoigne Properties Ltd.* case. He said they "by common consent, are covered by the section."[62] Presumably "common consent" refers not to the agreement of the parties to the case, but to the common consent of judicial notice.

As has been previously stated, Lord Denning constantly uses the language of parliamentary intention, and asks what Parliament had in mind, or in view, or intended, or meant. Nevertheless, though it may not represent his thought accurately, it is true that so far as results are concerned it would make no difference if one substituted for his references to the intention of the legislature references to the meaning of the words in their actual context: the same mental processes would have to be performed by the interpreter. Indeed it may be that Lord Denning is merely giving to the state of mind of the interpreter who performs the operations required by the *Rule in Heydon's Case* the name of "intention of Parliament." It is true that he asks whether specific instances were in the mind of Parliament, and also how Parliament would have dealt with them had it then the mind.[63] But, again, the same effect is produced by asking what do the words mean in their full context having regard to their possible application to the specific instances.

PRIMACY OF THE STATUTORY WORDS

In *Shell-Mex and B.P. Ltd.* v. *Holyoak*, the question of the rateability of the underground petrol tanks of an ordinary roadside filling station depended on whether they were "tanks...in the nature of a...structure" within the meaning of the relevant statute and order. Lord Denning used the "method of instances" to discover "what Parliament meant." He said: "To take illustrations is, I find, the most helpful way of understanding what an Act of Parliament means." [64] His purpose here was to elucidate the meaning of the statutory words, to make them more "intelligible," as he explained in the *Escoigne Properties* case. We are here in the realm of the picture book and the parable as modes of understanding, rather than in the realm of resolving ambiguities. It is not that there is doubt as to which of the different clearly apprehended

62. [1958] 1 All E.R. 414I.
63. Payne appears to have overlooked the remarks of Denning L.J. in *Seaford Court Estates* v. *Asher* (see notes 16 and 27, above) when he says: "So far as I am aware no English Court has ever suggested that the duty of a court construing general words in a statute is to speculate upon what the legislature would have done had the problem occurred to it." *op. cit.*, p. 102.
64. [1959] 1 All E.R. 401H. He took as a specific instance one found in the statute itself: "water towers with tanks."

meanings is to be stated, but difficulty in comprehending any meaning. In this latter process of clarifying meaning an alternative method to the illustration is the paraphrase. Lord Denning deals with this method at the beginning of his opinion in the *Escoigne Properties* case. "What is the meaning of these words 'the effect thereof. Various interpretations are suggested. Do they mean 'the only effect thereof or 'the substantial effect thereof, or 'an effect thereof'? I do not think they mean any of these things. It is a mistake to dignify these suggestions by calling them 'interpretations'. They are only substituted words... I look on the suggested interpretations only as attempts to elucidate it. When searching for the meaning of a statute, it is natural to try to put it into your own words — so as to express its meaning as it appears to you."[65]

It is not made absolutely clear why it is a mistake to call "substituted words" by the name of "interpretation," but I suggest that the distinction may be between the paraphrase or translation on the one hand and the resolution of an ambiguity on the other. However, the matter is not one of semantic analysis alone. Lord Denning states that no one has a right of "altering the words of a statute:" "the function of the court is to apply not its own words, but the words of the statute to the given situation," [66] and he quotes Lord Reid's words in *Goodrich* v. *Paisner:* "No court is entitled to substitute its words for the words of the Act." [67] The point is whether a later court is bound by the substituted words; are they but guides to assist it in its own elucidation of the meaning of the words of the statute?

It would appear that Lord Denning is doing more than merely pointing out that the words of a judgment can never have the binding force of a statute.[68] It must also follow from what he says that where the problem before the court was that solely of "elucidation," of making clear what was not fully intelligible, the paraphrase into more easily understood words is not authoritative.[69] Again, if the task before a court is that of resolving an ambiguity, a translation into unambiguous words does not replace the statutory provision: it may have other effects than those of resolving the ambiguity, such as introducing different areas

65. [1958] 1 All E.R. 413I and 414B.

66. [1958] 1 All E.R. 414A and C.

67. [1956] 2 All E.R. 185F: cited again by Lord Denning in *London Transport* v. *Betts* [1958] 2 All E.R. 655D. *Cf.* Lord Wright: "the danger of superseding the words of the Legislature by language used by judges." *Harris* v. Associated *Portland Cement Co.* [1939] A.C. at p. 89.

68. *Cf.* Lord MacDermott in *Horton* v. *London Graving Dock* [1951] 2 All E.R. 14C.

69. *Cf.* "Those are various phrases that have been used in the Court of Appeal or the House of Lords as glosses on the words of the Act. Judges of necessity have to find synonyms for the words they construe, but other judges' synonyms do not bind their brothers." Harman J., *Espresso Coffee* v. *Guardian Assurance* [1958] 2 All E.R. 694B.

of vagueness. This would appear to be in line with Lord Denning's words, particularly in view of the fact that the problem in the *Escoigne Properties* case may well be considered as that of ambiguity. But it does not follow that a later court is not bound by the resolution of the ambiguity. Current judicial doctrine is clear that the doctrine of precedent does apply to such a type of interpretation.[70] The later court applies the words of the statute to the situation before it, but it reads those words in the sense given them by the precedent court.

One more species of interpretation may be considered: *viz.*, where a court fills in a linguistic gap. Here Lord Denning's dictum has perhaps no application: the statutory words are applied, though they are applied together with those added by necessary implication. Judicial doctrine does not permit a later court to deny the "necessity" of the implication of the additional words: the words are added for the purpose of resolving an ambiguity.

However, though the doctrine of not substituting for the words of a statute the words a court has used in interpreting the statute, as expounded by Lord Denning in the *Escoigne Properties* case, does not take interpretation out of the embrace of precedent, there is another exposition of that doctrine by him in which he does apparently seek to limit the operation of the doctrine of precedent. It is to that exposition I now turn. I believe that the explanation here is to be found in the distinction between interpretation and application.

THE APPLICATION OF STATUTES AND THE DOCTRINE OF PRECEDENT

It is in *Paisner* v. *Goodrich* that we find Lord Denning expressly linking the doctrine of the primacy of statutory words with the doctrine of precedent. He said : "when interpreting a statute, the sole function of the court is to apply the words of the statute to a given situation. Once a decision has been reached on that situation, the doctrine of precedent requires us to apply the statute in the same way in any similar situation: but not in a different situation. Whenever a new situation emerges, not covered by previous decisions, the court must be governed by the statute and not by the words of the judges."[71] If this dictum be read in isolation it would appear to be far reaching. The later court apparently may ignore the consideration given by the earlier court to the meaning of the words of the statute: what a judge has said about the resolution

70. Sec Lord Shaw: *G.W.R.* v. *The Mostyn* [1928] A.C. 82; Lord Wright: *Cull* v. *I.R.C.* [1940] A.C. 68. In the recent case of *Brown* v. *Jamieson* [1959] 1 Q.B. 338, the court divided on the question of how a statute had been interpreted in the precedent case.

71. [1955] 2 All E.R. 332I.

of an ambiguity, though "one of the links in the chain of reasoning" [72] fashioned by him, leading to his conclusion about the facts of the case, is not of binding authority: it is as if the *ratio decidendi* is to be deemed restricted to the invocation of the statutory rule. But it is by no means certain that this is the true interpretation of the dictum. The dictum is preceded by the statement: "When the judges give a decision on the interpretation of an Act of Parliament, the decision itself is binding on them and their successors: see *Cull* v. *Inland Revenue Comrs*., *Morelle*, *Ltd.* v. *Wakeling.* But the words which the judges use in giving their decision are not binding." There is here, of course, an ambiguity: "a decision on the interpretation of an Act of Parliament" could possibly refer to the decision of the case in which a question of interpretation was mooted. But it surely means, in view of the authorities cited, determination of the question of interpretation : and, if so, this statement says that the judge's *ratio decidendi*[73] dealing with the resolution of an ambiguity is binding.

Since *Paisner* v. *Goodrich* Lord Denning has not restated a doctrine of non-applicability of precedent to statutory interpretation. It is true that in *London Transport* v. *Betts* he cites Lord Reid's dictum "No court is entitled to substitute its words for the word of the Act" in support of an argument for limiting the effect of a precedent House of Lords case. Moreover, he says "The decision (about the paint shop) may be binding on your Lordships if there is another such paint shop elsewhere but it is not, in my opinion, binding for anything else." [74] This may at first sight appear to be an echo of the *Paisner* v. *Goodrich* dictum limiting interpretation precedents to cases with "similar" situations. But fuller examination results in a different conclusion. Lord Denning said of the earlier case "That is a decision on the particular facts of the paint shop and nothing else." He was thus basing his opinion on the generally accepted doctrine of *ex facto non oritur jus*, and denying that in the earlier case there was to be found a *ratio decidendi* dealing with the interpretation of the statute.[75] He continued: "If your Lordships were to elevate that particular precedent into a binding decision on the meaning of "maintenance" you would, I believe, carry the doctrine of precedent

72. This is the criterion used by Denning L.J. in *Korner* v. *Witkowitzer* [1950] 1 All E.R. 573D to determine what is *ratio decidendi* as opposed to *obiter dictum.* In this article I shall use the phrase *ratio decidendi*, as the judges use it, to signify a legal principle propounded by a judge as the basis of his decision. Despite the criticism to which this "definition" has been subjected in recent controversy (which I have not yet had a proper opportunity of considering), I find no difficulty in what I consider to be the judicial usage.

73. See n. 72, above, for my use of this phrase.

74. [1958] 2 All E.R. 655A.

75. For a decision of the general doctrine, see my "Judicial Law Making and Law Applying," (1956) *Butterworths' South African Law Review*, p. 202. The article also contains a discussion of *Paisner* v. *Goodrich.*

further than it has ever been carried before." This is a denial of authority to "that particular precedent," and by implication an affirmation of the doctrine that other precedents on the meaning of statutory words may be binding on later courts.

One further dictum of Lord Denning's may be cited to show his support for the doctrine of precedent in relation to "true interpretation." In *Shell Mex and B.P. Ltd.* v. *Holyoak* he said: "That involves in this case a question of law, for the solution of it depends on the true interpretation of an Act of Parliament and the order made thereunder... It is, moreover, a test case which will decide, once and for all, the rateability of all wayside filling stations." [76]

It is suggested that the dictum in *Paisner* v. *Goodrich* can nevertheless be supported provided that it be regarded as confined to that type of "interpretation" where the function of the court is limited to that of applying the words of the statute. There is a temptation, at any rate for counsel, to argue that the doctrine of precedent applies to the mode of applying a statute, as indeed they may argue that a precedent concerned with the application of a rule of the common law may generate a new rule of law. Judicial doctrine recognizes that the doctrine of precedent does not treat a case as of binding authority for the manner in which a rule of law has been applied.[77] The manner of application is in the language of the courts a question of fact and degree and not a question of law.[78]

This approach to the dictum of Denning L.J. may perhaps not be doing very much violence to the language, for it should be remembered that the basis of the judgment of Denning L.J. was that the problem

76. [1959] 1 All E.R. 401C. Of course, all wayside filling stations may be considered sufficiently "similar" to come within the *Paisner* v. *Goodrich* dictum.

    Before *Paisner* v. *Goodrich* there is no indication that Denning L.J. might have thought that the doctrine of precedent did not apply to determination of problems of interpretation of statutes. On the contrary, his judgment in *Royal Derby Porcelain Co.* v. *Russell* [1949] 1 All E.R. 755C, is based on the assumption that, subject to the limitations arising from the hierarchy of courts, one court is bound to follow "a previous decision on the interpretation of statutes."

77. The "leading case" for common law rules is now *Qualcast (Wolverhampton) Ltd.* v. *Haynes* [1959] 1 All E.R. 38. For statutory rules it is perhaps sufficient to refer to Lord Radcliffe's opinions in *Edwards* v. *Bairstow* and *Goodrich* v. *Paisner:* see particularly [1955] 3 All E.R. 58F; [1956] 2 All E.R. 186I. The problems of law applying are discussed in my article on *Judicial Law Making and Law Applying:* see n. 75, above.

78. The dichotomy of judicial language which recognizes only the two categories, "fact" and "law," obscures the difficulties involved in law applying. Thus Austin: "The difficulty is in determining not what the law is, or what the fact is, but whether the given law is applicable to the given fact." *Jurisprudence* I: 273. A stronger view is Sedgwick's: "All disputable matter...turns upon the uncertainty of applying rules to cases." 37 *Mind* 167.

for the court was one of application as opposed to interpretation. It will be remembered that the case concerned a claim by a "landlord" to possession where the tenancy agreement covered four rooms of which the tenant had exclusive possession and a further room, "the back bedroom on the first floor," in respect of which the agreement gave the tenant "the use in common with the landlord." The landlord's claim failed if the rooms constituted "a house or part of a house let as a separate dwelling" within the meaning of the relevant statute. The statutory words had often been considered in relation to various circumstances, and the judges had considered that there was no "separate dwelling" if the tenant shared with the landlord any of the essential living rooms: [79] and in applying the statute this preliminary test as to sharing was first used. In the Court of Appeal in *Paisner* v. *Goodrich* the majority assumed that they were bound by this test. It was from this view that Denning L.J. dissented. In his view it was "a misuse of the doctrine of precedent" to substitute the judicial test of "sharing a living room" for the statutory words "let as a separate dwelling." [80] This was the view of Lord Radcliffe and Lord Somervell, and possibly also of Viscount Simonds, in the House of Lords, where the decision of the Court of Appeal was reversed.[81] It is, however, Lord Radcliffe who made articulate what appears to have been the assumption of all the judges that the test was concerned with answering the question of degree which the words of the statute themselves raised, *viz*., what constituted separateness. He said "What circumstances amount to such a sharing of the house as to negative the constitution of a separate dwelling must be a question of degree...[the] test may be very helpful in deciding the question of degree that has to be solved afresh in every individual case."[82] In other words, he is saying that the problem for the court was one of application, and that the test was concerned with a manner of application, so was not binding on later courts. Lord Radcliffe makes this even clearer by saying "it seems to me impossible to say that such a test can be presented as a construction of the statutory phrase." [83]

79. When first formulated by Morton L.J. in *Cole* v. *Harris* the word "essential" did not appear, but nothing very much appeared to turn on the distinction. See Lord Morton in *Goodrich* v. *Paisner* [1956] 2 All E.R. 180E,
80. See [1955] 2 All E.R. 332G.
81. [1956] 2 All E.R. 176.
82. [1956] 2 All E.R. 186I.
83. In my opinion, however, it is very possible that the judges had considered the test as one determining the interpretation of the statutory phrase. On the one hand, the words "let as a separate dwelling" may be considered as deriving their meaning from their use by laymen as part of the ordinary English language: but, on the other hand, they may be considered as deriving their meaning from the technical usages of property lawyers dealing with leases. The test of sharing is surely attributable to the notion of exclusive possession associated in property law with leases. Is it purely coincidental that Scott L.J. and Morton L.J. were largely the creators of the test? One of the common sources of ambiguity in statutes (and other documents) is the existence of technical words of English legal language identical in shape and sound with

It is submitted, therefore, that the doctrine of Denning L.J. in *Paisner* v. *Goodrich* is that the problem of the application of statutory words to particular instances, arising from the vagueness of the words, is one of "fact." The reasoning of the court in arriving at its categorisation of the instance, as within or without the words, does not constitute a rule of law, and so does not create a binding precedent. But he denies that a later court is free to categorize the facts before it unrestricted by previous decision. Where the facts before a later court are similar to those before the precedent court then a similar categorisation of the facts in relation to the statutory words must be made. One leading case before *Paisner* v. *Goodrich* had dealt with the sharing of a kitchen, and another with the sharing of a bathroom. Denning L.J. said: "I accept that the decisions of this court bind us to hold that the sharing of a kitchen or kitchenette takes away the protection of the Act, whereas the sharing of a bathroom or W.C. does not." [84]

APPLICATION OF STATUTES AND APPELLATE COURTS

In *Paisner* v. *Goodrich* there were two problems for Denning L.J. The first was that which we have been considering, to what extent was he bound by what earlier judges had said about the statutory words. The second was whether he agreed with the decision of the lower court. An appellate court follows earlier cases so far as questions of law are

words of the ordinary English language. It is a problem of interpretation, in the stricter sense, and thus a question of law, whether such words in a statute are to be considered as technical legal words or words of ordinary language. Once that problem has been solved then a problem of vagueness may arise.

The situation is illustrated by *Edwards* v. *Bairstow*. There the issue was whether a certain transaction was an "adventure...in the nature of trade" within the meaning of the Income Tax Act, 1918. Viscount Simonds emphasizes that "it is a question of law, not of fact, ...what the statutory language means." [1955] 3 All E.R. 54F. Lord Radcliffe makes the same point but continues: "the law does not supply a precise definition of the word 'trade'; much less does it prescribe a detailed or exhaustive set of rules for application to any particular set of circumstances." [1955] 3 All E.R. 55I. But here the relation between technical legal words and ordinary words is a little more complex than outlined above. Lord Radcliffe says: "Here we have a statutory phrase involving a charge of tax, and it is for the courts to interpret its meaning, having regard to the context in which it occurs, and to the principles which they bring to bear on the meaning of income." An ordinary word is incorporated into a legal rule with much of its ordinary vagueness, but legally coloured to harmonize with its legal surroundings. The problem of vagueness is one of fact, the problem of colour one of law. An excellent illustration of this is to be found in the *Shell-Mex* case: see n. 87, below.

84. [1955] 2 All E.R. 333B. This view may be compared with Viscount Dunedin's as to the effect of a decision where no "*ratio decidendi*" has been propounded. *The Mostyn* [1928] A.C. at p. 73: discussed by me, "Judicial Law Making and Law Applying," p. 203.

concerned, it will not disturb the decision of a lower court where questions of "fact" are concerned. Thus, whether a particular problem in relation to a statute is one of law or one of fact is related to both functions of an appellate court. There are a number of cases in which Lord Denning has dealt with the problem of application of statutes when considering the relation of an appellate court to the tribunal of first instance. The general doctrine expounded by him in these cases recognizes a distinction between interpretation as a question of law and application as a question of fact. Accordingly, it supports the view previously stated that he recognizes such a distinction in relation to the doctrine of precedent.

The case in which Lord Denning, perhaps, best expounds his views is *B.P. Refinery Ltd.* v. *Walker.* It was concerned with the rateability of the components of certain plant, and this turned on whether they could be said to be "in the nature of a...structure" within the meaning of an order made under the Rating and Valuation Act, 1925. The problem is, of course, typical of the very large number of cases arising under all sorts of statutory provisions in which the problem is whether some particular is to be classified as within the category designated by statutory words. [85] The Land Tribunal had considered the matter in detail and held that some of the components were rateable and others were not. The matter was taken to the Court of Appeal. There, in the words of Denning L.J., "Counsel for ratepayers submitted that the findings of the tribunal were findings of fact which could not be challenged in this court." But Denning L.J. thought that the concept of "fact" in that proposition required analysis, and this he supplied. In the first place, he distinguished between particular facts and their classification within the category of the statutory words. "The primary facts are all found by the tribunal and are not in dispute. The only question is what is the proper inference or conclusion from the primary facts."[86] The nature of the category depends on the interpretation of the statutory words. "If the tribunal in coming to its conclusion, discloses by its reasoning that it has misunderstood or misinterpreted the words of the statute then it falls into error in point of law." [87] But there is a problem

85. For a general discussion see Hart: *Aristotelian Society:* Supp. vol. 29, p. 259.

86. [1957] 1 All E.R. 715F. The terms "primary facts" and "inference from facts" have also been used in connection with the different problem, within the realm of evidence, of inferring one set of particular facts from another set: *e.g.* inferring an intention to dedicate a right of way from failure to obstruct people walking openly over a path: *Chivers Ltd.* v. *Cambridge C.C.* [1957] 1 All E.R. 885H, where counsel considered this type of inference was identical with that of statutory application: see *ibid.*, 888B. The evidence problem was discussed in the House of Lords in *Benmax* v. *Austin Motor Co., Ltd.* [1955] 1 All E.R. 326, using the language of "simple" and "specific" facts.

87. [1957] 1 All E.R. 715G. This was the view Lord Denning took of the situation in *Shell Mex and B.P. Ltd.* v. *Holyoak* [1959] 1 All E.R. 402F. That was a case where the same words "in the nature of a structure" fell to be construed as in the *B.P. Refinery* case. Lord Denning considered that the Land Tribunal

of application as well as of interpretation. "There is, however, a considerable area where two reasonable men, each of whom properly understood the statute, could come to different conclusions. In such cases the mere fact that the tribunal comes to a different conclusion from that to which some of the members of this court might come does not mean that the tribunal falls into error in point of law. The question is then one of degree in which the tribunal of fact is supreme so long as it does not step outside the bounds of reasonableness."[88]

The general doctrine thus propounded needs two glosses. The first is to note the legal parallel between the separate processes of categorisation of facts and establishment of facts, which arises from confining the discretion of the tribunal of fact to the "bounds of reasonableness." Just as an appellate court may reverse a finding of "primary" fact on the ground that there was no evidence to sustain such a finding, so too it may reverse a categorisation of fact on the ground that "no person acting judicially...could have come to the determination."[89]

The second gloss is also concerned with a limitation on the discretion of the tribunal of first instance. In 1948 Denning L.J. propounded a

had used an improper test in the determination of the nature of the statutory category. The full question, it will be remembered (see n. 76, above), was whether an underground petrol tank was a "tank...in the nature of a structure." Lord Denning attached no importance to the interpretation of the word "tank" (403B), but Lord Reid did. He asked "What then is the 'tank' within the meaning of the order? It has not been argued that any technical meaning attaches to the word 'tank' in the order, and it must therefore be taken as an ordinary word of the English language to be construed in the light of the context in which it is found." (399B). The majority of the House of Lords considered that the Land Tribunal were dealing solely with the application of the word "tank."

88. [1957] 1 All E.R. 715H. The distinction between "interpretation" and "application" was adverted to by Denning L.J. in *British Paste and Cement Manufacturers Ltd.* v. *Thurrock U.D.C.* (1950) 114 J.P. 582, where he said: "Once the principles of interpretation have been settled...the particular application of them to any particular set of facts is essentially a matter for quarter sessions."

Denning L.J. asserted that authority for his doctrine was to be found in *Edwards* v. *Bairstow*, which, he said, "seems to confirm authoritatively the principles laid down in "a series of cases in which he had participated:" see [1957] 1 All E.R. 715I.

89. The citation is from Lord Radcliffe in *Edwards* v. *Bairstow* [1955] 3 All E.R. 57H. But his analysis appears inadequate. He refers to "primary facts" and inferences from them, and speaks of "no evidence to support a conclusion." He does not distinguish as clearly as does Denning L.J. between unreasonable classification within a properly interpreted category, and a classification which must be deemed to be based on an improperly interpreted category. The latter situation is thus described by Denning L.J.: "Even if [the tribunal] does not disclose its reasoning, but asserts a conclusion which could not reasonably be entertained by a man who properly understood the meaning of the statute, then again it falls into error of law." [1957] 1 All E.R. 716G.

test of what matters would be left by an appellate tribunal to such discretion, and it was in terms of the distinction between primary facts and the conclusions from them. In *British Launderers Association* v. *Middlesex Assessment Committee* he classifies the matters for the inferior tribunal under two heads. (1) Primary facts: "facts which are observed by witnesses and proved by oral testimony, or facts proved by the production of a thing itself...the only question of law that can arise on them is whether there was any evidence to support the finding."[90] (2) Conclusions from primary facts, "if and in so far as those conclusions can as well be drawn by a layman (properly instructed on the law) as by a lawyer...the only questions of law that can arise on them is whether there was a proper direction in point of law and whether the conclusion is one which can reasonably be drawn from the primary facts."[91] In my opinion the qualification suggested under the second head is too indeterminate, and seems to involve the notion that a lawyer is a better "logician" than a layman. I consider this dictum as superseded by the fuller analysis provided in *B.P. Refinery Ltd.* v. *Walker.*[92] But the Court of Appeal in a yet later case has left open the question of the validity of the dictum.[93]

CONCLUSION

This conclusion is only a whimpered substitute for the word "finis." I wish to emphasize the inconclusive character of my discussion, and to point out that I have not referred to the whole of Lord Denning's thought on the judicial treatment of statutes. In particular, I have not referred to his doctrine of liberal interpretation, nor to his doctrine of rejection of absurdities.

J. L. MONTROSE. *

90. [1949] 1 All E.R. 25H.

91. [1949] 1 All E.R. 26A.

92. This is supported by the statement in the *Launderers* case of what matters a lawyer can do better than a layman: "If and insofar, however, as the correct conclusion from primary facts, requires for its correctness determination of a trained lawyer — as for instance, because it involves the interpretation of documents, or because the law and the facts cannot be separated, or because the law on the point cannot properly be understood or applied except by a trained lawyer — the conclusion is a conclusion of law on which an appellate tribunal is as competent to form an opinion as a tribunal of first instance." [1949] 1 All E.R. 26A.

93. *Chivers Ltd.* v. *Cambridge* C.C. [1957] 1 All E.R. 888G. The dictum was applied by Diplock J.: *Tsakiroglou Noblee* v. *Thorl* [1959] 1 All E.R. 50B.

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