THE
CAMBRIDGE LAW JOURNAL

VOLUME 52, PART 3 NOVEMBER 1993

CASE AND COMMENT

STATUTORY INTERPRETATION AND PARLIAMENTARY INTENTION

Pepper v. *Hart* [1992] 3 W.L.R. 1032 has achieved some public notoriety as a result of adverse comments by the Speaker of the House of Commons, but much of the comment has focused on side issues such as parliamentary freedom of speech and the academic response has been rather reserved. The controversial decision was the outcome of a revenue appeal in which the appellant taxpayer invited the courts to interpret a provision of the Finance Act 1976 by reference to what the Financial Secretary to the Treasury was reported in Hansard to have said when introducing the Bill in the House of Commons. Reference to Hansard for the purpose of ascertaining the intention of Parliament has been firmly forbidden, both by common law and by rulings of the House of Commons, for over two centuries. The House of Lords nevertheless declared that it is now permissible, at any rate for the purpose of construing an enactment which is ambiguous or obscure, or which if literally construed might give rise to an absurdity, and provided that the statement in question was made by a government minister or other promoter of a Bill.

It appears that two principal objections were considered. One was based on parliamentary privilege, and rested on a strained argument which it is not the purpose of this note to pursue. The other was that it would be practically inconvenient (that is, expensive for clients) if lawyers were obliged to consult Hansard before giving advice on the meaning of legislation. This has sometimes been given as the main objection in the past: *e.g.* in *Beswick* v. *Beswick* [1968] A.C. 58, 73, by Lord Reid. Their Lordships in the present case admitted that the point had some weight. The Lord Chancellor himself pointed out that the only

published investigations of the potential cost of such a change (by the Law Commission in 1969, and by the Renton Committee in 1975) had both resulted in conclusions supporting the exclusionary rule, and he for one had no inclination to increase the cost of litigation. The majority differed. Their response was that times have changed since 1975, especially in that Hansard is now accessible in electronic form. There was, however, no evidence before the House as to the cost, or the general availability, of access to Hansard in either hard copy or on line. Moreover, it seems to have been overlooked that the practical problem is not confined to litigation and is not solely financial. Every legal adviser, not to mention teachers of law, will be forced when interpreting statutes to grapple not only with expensive technology but with the troublesome metaphysical problem of assessing in each particular case whether a statement in Hansard would or would not be admitted in court were the matter to become contentious.

These are familiar practical objections to changing the received rule. Yet there is also a legal objection which was not explicitly considered by the House at all. The objection is, quite simply, that the admission of evidence of speeches in the House of Commons in order to interpret legislation is contrary to the basic principles which govern the construction of written instruments. For one thing, it is not relevant evidence, and for another (unless this is considered a particular application of the first principle) it falls foul of the rule excluding evidence of intention in the form of statements extrinsic to the instrument itself. These are not technical rules, if properly applied, but sensible logical principles operating on a different plane from the principles of historical evidence. Hansard is useful to the historian because it may throw light on why and how a statute was promoted and what its promoters said it meant. Whatever our historical curiosity, the task of establishing what a statute means is a different kind of exercise.

It is submitted that evidence of ministerial statements is not relevant evidence because, allowing that statutes should be interpreted according to the intention of Parliament, no individual member of Parliament is in a position to state what that intention is or to speak for the silent majority. Parliament acts as a corporate body and the only expression of its common intention is the text to which the Queen and both Houses have given their unqualified assent. What passes in one House is not formally known to the other, or to the sovereign. Even if it is thought that the intention of Parliament is the same thing as the common

intention of the greatest number of its members, what one individual member says in debate cannot be cogent evidence of what every other member intends. His remarks may be based on a sound and impartial legal understanding of the issues, but they may not. They may persuade some, but they may not persuade others. There is no debate in which every member speaks, or even a majority of members, and so the prevailing view cannot be ascertained from the speeches. Nor does the fact that a Bill secured the necessary assents enhance the evidentiary value of previous statements. It is not uncommon to vote for motions even when one disagrees with some of the statements and arguments of the person proposing them, because one is satisfied with the wording and one is voting for the wording and its effect rather than for the sentiments expressed orally by its proposer. In other cases one may be persuaded to vote in favour by the different reasoning of a speaker following the first mover, though any consideration of such speeches is apparently excluded under the new rule. Certainly there is no procedure for members of Parliament to register assent to a Bill coupled with dissent from all or some of the reasons given by its promoters. Silence by members is therefore equivocal.

This evidentiary principle was the main reason given for the "salutary rule" in the past. It may be traced from the words of Willes J. in the great copyright case of *Miller* v. *Taylor* (1769) 4 Burr. 2303, 2332, via those of Viscount Haldane in *Viscountess Rhondda's Claim* [1922] 2 A.C. 339, 383, to those of the unanimous House of Lords in *Davis* v. *Johnson* [1979] A.C. 264. Lord Scarman in the last case also pointed out that "such material is an unreliable guide to the meaning of what is enacted. It promotes confusion, not clarity. The cut and thrust of debate and the pressures of executive responsibility . . . are not always conducive to a clear and unbiased explanation of the meaning of statutory language." It is on exactly the same principle that evidence of what parties to a written contract said or did before executing the writing is inadmissible to explain the written terms which in the end they jointly settled on: *Inglis* v. *Buttery* (1873) 3 App. Cas. 552, 577 (Lord Blackburn); *Prenn* v. *Simmonds* [1971] 1 W.L.R. 1381, 1384 (Lord Wilberforce); *Schuler* v. *Wickman Machine Tool Sales* [1974] A.C. 235, 261 (Lord Wilberforce). Lord Blackburn has said that these principles applying to the construction of written instruments apply equally to statutes, because statutes are written instruments: *River Wear Commissioners* v. *Adamson* (1877) 2 App. Cas. 743, 763. The logic certainly looks the same. The written text embodies the

only common assent that was ever given; previous statements may be evidence of individual opinions and objectives, but not of collective intention. "The reason for not admitting evidence of these exchanges is not a technical one, or even mainly one of convenience . . . It is simply that such evidence is unhelpful . . . It is only the final document which records a consensus" (Lord Wilberforce, in *Prenn* v. *Simmonds*). So also of a statute.

It is remarkable that these well-known principles were not properly discussed in *Pepper* v. *Hart*. The nearest we find to an implied response is the argument that the courts now take a purposive rather than a literal approach to construction. But that very argument was put forward, and rejected by the House of Lords, as a reason for modifying the extrinsic evidence rule in its application to contracts: see *Schuler* v. *Wickman*. The question is not whether the approach to interpretation is or should be purposive, which is not disputed, but how the purpose behind a document may properly and logically be established. In the case of statutes, it is axiomatic that the purpose to be sought is that of Parliament, not that of the government. A minister speaks for the government, but not for Queen, Lords and Commons all at once. If the words of a minister are to be considered as evidence of parliamentary intention, should the minister be called as a witness so that he may be cross-examined? Apparently not. Again and again in their Lordships' speeches, the intention of the minister is equated with the intention of Parliament and is not regarded as a matter of evidence: the minister's words are to be read as a source of law, attached as it were to the Act. The exclusionary rule is consequently treated merely as a form of blindfold which for purely technical reasons serves to conceal the truth from the court. Yet what is in fact being concealed from the court is not the intention of Parliament, which can only be expressed in written form, but rather the policy of the government, which should be of no concern to the courts. It is, of course, a notorious fact that while a government remains in power it may whip in a majority of members of the House of Commons to vote in favour of its Bills. This may underlie a remark by Lord Browne-Wilkinson: "If a minister clearly states the effect of a provision and there is no subsequent relevant amendment to the Bill or withdrawal of the statement, it is reasonable to assume that Parliament passed the Bill on the basis that the provision would have the effect stated". But why is this assumption reasonable? It does not follow from *de facto* recognition of our party system, and is not a fact, that members belonging to the party in power may be whipped in to support

the legal reasoning of a government minister, or the interpretation which he places on a particular Bill. The whip drives members' bodies into the lobby but is not used to correct their states of mind or to teach them law. It is surely an unwarranted assumption that a minister's interpretation of an ambiguous Bill indicates the intention even of the House of Commons, let alone of Parliament.

The government-centred approach of the House of Lords is, with respect, rather chilling. It is true that in the instant case it operated in favour of the taxpayer, but it must obviously work either way. In future, when an Act is unclear, the intention of Parliament is apparently to be equated with the policy of the government or with what a minister chose to say about that policy in the House of Commons. It took many centuries of constitutional struggle to eliminate the notion that the policy of the government should have the force of law; now, it seems, something very like it is slipping through the back door.

There may, admittedly, be persuasive answers to these objections. Certainly some distinguished jurists (such as Sir Carleton Allen) have taken the view that statutes differ so much in character from other written instruments that the traditional evidentiary rule ought not to apply to them. But there is a weighty case for the contrary opinion, supported as it is by almost all judicial pronouncements from 1769 down to the present, and it is remarkable that it should have been ignored. The conflicting arguments ought surely to be fully canvassed in the House of Lords before so drastic and potentially troublesome a change of practice is firmly settled.

J.H. BAKER

PUBLIC INTEREST IMMUNITY AND SENSITIVE MATERIAL

THE painstaking evolution of Public Interest Immunity in Criminal cases referred to in [1993] C.L.J. 1 continues apace. At least, there have been several glosses upon what was said in the decision there noted (*Ward* [1993] 1 W.L.R. 619) that answer some of the questions posed earlier. In particular, in *Davis* [1993] 1 W.L.R. 613, the Lord Chief Justice has outlined procedures to be followed when the Crown contemplates making use of the privilege available to it in the name of PII and is reluctant to disclose sensitive material to the defence.

Counsel in *Davis* had been placed in an awkward position in the course of an appeal against convictions of murder. Crown counsel had handed the Court of Appeal a document—which