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DILEMMAS OF THE USE OF LEGISLATIVE HISTORY IN THE UNITED
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INTRODUCTION

It seems to be a tradition in the Old World to introduce any discussion of the use of legislative history with an historical exposition. As I am in the New World - and for other reasons to which I will come - I will be offering only a cursory acknowledgement of that tradition.

One reason for passing quickly over the early history is that the institutions and culture of the legislative process were markedly different from the modern state. So, it is interesting, but not very illuminating for contemporary purposes, to know that in the fourteenth century the prevailing tradition appears to have been that legislation was best interpreted by those who made it (1). Similarly, the seventeenth century case of *Ash v. Abdy* (2) is often, and correctly, cited as an early example of the use of legislative history, but it is an example of such use only in a sense that Lord Nottingham in his judgment drew on his own knowledge of introducing the Statute of Frauds 1677 in referring to its subsequent parliamentary history.

Secondly, excluding parliamentary history, as an element of the parole evidence rule, is a principle which was somewhat inconsistently applied in the eighteenth and nineteenth centuries, no doubt because courts, then and now, have a residual competence to regulate their own procedure which is only loosely controlled by superior courts. Even in *Millar v. Taylor* (3), which is regarded as the first English judicial expression of the exclusionary rule in its absolute form, Willes J having stated the rule then departed from it, as did Aston J sitting with him (4). In the late nineteenth and the present century - perhaps the high point of the application of the exclusionary rule - there are examples of judicial departure from the rule to be

found. These exceptions to the general rule may be direct, as for example in admitting Hansard as an aid to the construction of delegated legislation (5) or admitting a Law Commission report for the purpose of drawing an inference as to parliamentary intention from the fact that parliament had not expressly implemented one of the Law Commissions recommendations (6). Sometimes the exceptions might be described as indirect, for example admitting parliamentary material to establish legislative purpose rather than for statutory interpretation. This distinction has been carefully drawn in the past by the judiciary and commentators, although personally I have not always been able to see it as clearly as others (7).

So by November 1992, when *Pepper v. Hart* was decided by the House of Lords, in the United Kingdom, as is broadly the present position in Canada (8), there were firm judicial pronouncements of the highest authority (9) excluding parliamentary material as an aid to statutory interpretation with numerous exceptions, some more clearly defined than others.

PEPPER V. HART AND ITS CONTEXT

The issue in *Pepper (Inspector of Taxes) v. Hart* (10) was the tax liability of teachers employed at a private school, Malvern College, under a concessionary fee scheme which allowed members of the staff of the school to have their sons educated at the school at 20% of the fees charged to the public. The relevant legislation was the Finance Act 1976, ss. 61 and 63. Section 61 provided that "...where a person is employed...and...by reason of his employment there is provided for him...any benefit...and the cost of providing the benefit is not...chargeable to tax...there is to be treated as emoluments...chargeable to income tax...an amount equal to whatever is the cash equivalent of the benefit". Section 63(1) provides that "the cash equivalent of benefit chargeable to tax...is an amount equal to the cost of the benefit...". Consequently the issue revolved around the word "cost" in section 63(1).

After the original hearing before the Appellate Committee of the House of Lords, but before judgment, it was decided that there should be a further hearing before an enlarged Appellate Committee of seven Law Lords, the Lord Chancellor presiding, to consider the argument which had been raised that parliamentary debates should be admissible as an aid to interpretation of the statutory provisions before the court. The enlarged panel, Lord Mackay of Clashfern LC dissenting, held that, in limited circumstances, reference might be made to parliamentary material as an aid to statutory construction. They also held, unanimously, that this exception to the exclusionary rule did not amount to questioning or impeaching proceedings in Parliament contrary to Article 9 of the Bill of Rights 1688. Having examined the parliamentary history of section 61 and 63 of the Finance Act 1976, it was held that the parliamentary intention was that in-house benefits should be assessed for income tax on the basis of marginal costs to the employer and not as a proportion of the total costs incurred in providing the service both for the public and the employee; that this effect applied to the education of the children of teachers who were employees; and that section 63 of the 1976 Act should be construed accordingly. The Lord Chancellor reached the same construction of section 63 without the aid of reference to the parliamentary material.

Pepper v. Hart was not devoid of political context. One of the counsel for the Revenue in the case has suggested that the Appellate Committee facilitated hearing argument on the admissibility of parliamentary material because some Law Lords suspected that there was a pattern of Revenue officials resiling on ministerial statements made in Parliament as to the effect of provisions of tax legislation (11). Leading counsel for the taxpayer may have been encouraged in making his submission by indications by one of the Law Lords, Lord Griffiths, in judicial (12) and extra judicial (13) contexts. It could also be plausibly argued that the statutory provisions before the Appellate Committee raised questions of statutory application rather than statutory interpretation. It has been argued that the Parliamentary

material which was admitted in the case was merely an element of a rather complex legislative history (14) or, more critically, was simply selective (15).

However, without pursuing those issues further at present, the manner in which the exceptions to the exclusionary rule were formulated and their relationship to other rules of statutory interpretation create enough difficulties in themselves. The exceptions to the exclusionary rule were most concisely expressed in the judgment of Lord Browne-Wilkinson:

"..subject to any question of Parliamentary privilege, ..the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear" (16).

As is evident from this formulation (17), and certainly from the subsequent reported cases which have considered it, the application of this relaxation of the exclusionary rule is uncertain. Furthermore having relaxed the exclusionary rule, *Pepper v. Hart* gives no guidance as to the relationship between reference to parliamentary material as an aid to statutory construction and other aids to construction. It has entered a judicial m elange of aids to construction to which unregulated weight may be given. So, for example, there is no guidance on the weight which will be given to an admissible ministerial statement that a situation is not covered by one clause but is covered by another where that statement is in conflict with a construction based on a textual examination of the legislation as a whole. Similar difficulties could arise where an admissible ministerial statement on the effective provision would lead to

one result and a construction based on the punctuation of the provision, or on prior or subsequent legislative provisions, would lead to another. Neither is it clear what effect *Pepper v. Hart* would have on rebuttable judicial presumptions on the intention of Parliament; for example, that Parliament cannot have intended to oust the jurisdiction of the courts or the presumption that Parliament does not intend to legislate in breach of international or European Union law (18). There are, of course, also implications in admitting parliamentary material for Parliament itself, the Executive, (including the drafter) and the practitioner. I turn now to some of these difficulties, as identified in *Pepper v. Hart* and elsewhere, before looking at how many of the difficulties have been exacerbated by the subsequent judicial application of *Pepper v. Hart* over the last couple of years.

IMPLICATIONS OF *PEPPER V. HART*

Implications for Parliament

The major implications for Parliament may broadly be divided into the effect on the constitutional relationship between the legislature and the judiciary, the implications for parliamentary privilege and the practical effect on parliamentary proceedings.

One of the traditional arguments for excluding legislative history in the interpretation of legislation is that Parliament is only "sovereign" in respect of what it expresses by the words used in the legislation it has passed; Parliament legislates and it is for the courts to construe the meaning of the legislative text (19). In *Pepper v. Hart* Lord Browne-Wilkinson justified relaxing the exclusionary rule by suggesting that it is legitimate for the courts to seek parliamentary intention by circumscribed reference to parliamentary material. He observed,

" the court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not Parliament's true intention be enforced rather than thwarted?" (20).

Parliamentary privilege is a more intractable problem. Article 9 of the Bill of Rights 1688, which the Judicial Committee of the Privy Council has recently held to apply in the United Kingdom and throughout the Commonwealth (21), provides:

"that the freedom of speech and debates or proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament".

Before the final hearing of *Pepper v. Hart* in the Appellate Committee of the House of Lords the Clerk of the House of Commons wrote to the Attorney General, who had by then been instructed for the Inland Revenue, drawing his attention to a 1980 resolution of the House which gave leave for reference to be made in court to the Official Report [Hansard] without requiring a petition to the House for leave. The Clerk expressed his opinion that admitting Hansard as an aid to statutory construction was beyond the meaning of "reference" as contemplated in the resolution of the House. He suggested that a petition would be required to avoid any question of the House regarding its privileges as having been breached. The Attorney General adopted this argument and submitted that admission of Parliamentary material would be a "questioning" of freedom of speech or debate, contrary to Article 9, and that this would inhibit ministers in what they said in the House by attaching legislative effect to their words. This argument was unanimously rejected by the Appellate Committee. Lord Browne-Wilkinson observed:

"in my judgement, the plain meaning of Article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal, for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed. Relaxation of the rule will not involve the courts in criticising what is said in Parliament. The purpose of looking at Hansard will not be to construe the words used by the minister but to give effect to the words used so long as they are clear. Far from questioning the independence of Parliament and its debates, the courts will be giving effect to what is said and done there" (22).

Interestingly, in the later case of *Prebble v. Television NZ Limited* (23), before the Judicial Committee of the Privy Council, Lord Browne-Wilkinson, giving the judgment of the Board, suggested that a narrow construction of Article 9, derived from the historical context in which it was originally enacted, was inappropriate. He said:

"the important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say. If there are any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect" (23).

Although *Prebble* was a libel action by a Member of the New Zealand House of Representatives in which the plaintiff parliamentarian sought to strike out elements of a defence of justification based on parliamentary material, on the grounds of

parliamentary privilege, the different approach taken to the principle underlying Article 9 is not without significance. Clearly - and this is one of the practical implications for parliamentary proceedings - it could be argued that a minister would be inhibited at the time he speaks from describing fully and freely, with broad examples, the effect of a statutory provision if he or she knew that the speech might subsequently be admissible in the interpretation of the provision (24).

Another implication of *Pepper v. Hart* on parliamentary proceedings will probably be a decline in the use of private correspondence between ministers and members to explain the effect of a provision, or to correct mis-statements as to the effect of a provision. This has been a common practice in the UK Parliament, but clearly now ministers will need to ensure that such information is on the record. There may also be an increase in members determination to pursue ministers on the effect of legislation in debate, particularly in standing committees on Bills. The general effect may then be for parliamentary proceeding to become even more formal, and more protracted, and for ministers to be less forthcoming.

There may also be implications for parliamentary procedure, where that procedure is based on statute. One such example has already arisen in the Isle of Man. The Presiding Officer of Tynwald, the President of Tynwald, is a creature of statute. The Constitution Act 1990, s.6(2) provides that in certain circumstances he has a casting vote. The provision does not limit his discretion in exercising that vote. At the October 1993 sitting of Tynwald, (where the House of Keys and the second chamber, the Legislative Council, sit together but vote separately), the President exercised his casting vote contrary to the majority in the House of Keys. During the March 1994 sitting of Tynwald, the President made a statement, on advice, that his future intention was to exercise his casting vote in accordance with the intention of the Keys. On the basis of *Pepper v. Hart* he had considered Parliamentary statements made during the passage of the Constitution Act which indicated that there was an

intention that the casting vote of the Presiding Officer should be exercised in accordance with existing parliamentary usage. He considered that existing parliamentary usage was reflected in Tynwald Standing Order 69 which provides, "in the case of an equality of votes in the [Legislative] Council, the President should have a casting vote, but should only exercise such vote to ensure that the vote of the Council is the same as that of the Keys".

Implications for the Executive

There are clearly implications for the Executive, and particularly the parliamentary drafter, arising from *Pepper v. Hart* (25). From the drafter's perspective, it may be that *Pepper v. Hart* assists in resisting requests from anxious officials to include specific legislative response to specific problems rather than rely on a wider legislative proposition. This would have the effect of keeping legislation simpler in form, although there would no doubt be the temptation to address a difficult problem by a vague legislative proposition which could be explained informally by the promoting minister in the legislature.

On the other hand, as a result of *Pepper v. Hart*, the drafters may well have to play a more active role in vetting notes on clauses and amendments, Ministers' speaking notes and other supplementary material. They will also have to keep a wary eye on the need to correct ministerial misstatements which can occur in the heat of parliamentary debate. Christopher Jenkins, now First Parliamentary Counsel in England, tells of a ministerial error which arose in promoting the short but contentious Sea Fish (Conservation) Act 1992. The Government put forward a number of amendments to the Bill in the House of Lords and among them was one which gave right of appeal from the decisions of the Sea Fish Licence Tribunal. Unfortunately when he came to move it, the minister in charge of the Bill read out

his note on an entirely separate amendment, which dealt with the House of Commons Disqualification Act. Mr Jenkins remarks:

"no one noticed, and at the end of this surprising speech the amendment was agreed to. Presumably the House did not regard the Minister's remarks as misrepresenting the intention of Parliament. We can only hope that this particular provision will never be the subject of litigation" (26).

Implications for the Practitioner

In their speeches in *Pepper v. Hart*, the Law Lords considered the familiar arguments against relaxing the exclusionary rule as they affect the practitioner: the lack of ready availability of parliamentary materials, the practitioner's lack of familiarity with parliamentary procedure, the time absorbed in researching parliamentary materials and the court time absorbed in hearing submissions on admissible parliamentary materials. Lord Browne-Wilkinson accepted that parliamentary materials were not widely available, but considered that "such practical difficulties could easily be overstated" (27). He acknowledged that lawyers do not have the same familiarity with parliamentary procedure as parliamentarians, but considered that the difficulty of knowing what weight to attach to statements made by a minister or other promoter of a Bill was "not overwhelming" (28). He accepted that the cost of research was a practical objection of "real substance" and that often the research will reveal nothing of significance, but observed that "it is easy to overestimate the cost of such research" (29). He accepted that the relaxation of the exclusionary rule would involve an increase in court time but considered that this need "not be significant" (30). With the exception of the Lord Chancellor, the other Law Lords broadly agreed with these benign conclusions (31). Lord Mackay of Clashfern was not so sanguine, perhaps with a sharper appreciation of the likely cost to the public purse (32).

The majority of the Law Lords may have considered these various difficulties would have a limited practical effect because the relaxation of the exclusionary rule was thought to have been carefully circumscribed and would, in any event, be policed by orders for costs. Lord Browne-Wilkinson observed in his speech that:

"attempts to introduce material which does not satisfy those tests [*for the admissibility of parliamentary material*] should be met by orders for costs made against those who have improperly introduced the material" (33).

However that may be, the assessment of the majority of the Law Lords as to these difficulties has not been shared by the experienced practitioner nor is it borne out by practice. For example James Goudie QC has observed that Standing Committee debates, where much relevant material is likely to be found, are not held at all by the (English) Law Society, by the Supreme Court Library or by the libraries of three of the Inns of Courts and only partially by the fourth; and a few other libraries in London have incomplete sets on closed access or in store requiring advance notice. He describes the position outside London as "dire almost to the point of being non-existent" (34). In times of economic stringency the position of academic law libraries may be even worse. On a recent visit to Cambridge, I was told that in 1991, as an economy measure, the University Law Library ceased even to take the Hansard of proceedings on the floor of the Commons and the Lords, let alone Standing Committee debates, although they are still held by the main University Library.

A startling post *Pepper v. Hart* example of the cost of research for little reward is to be found in *London Regional Transport Pensions Fund Trust Company Limited v. Others* (35) where the effect of a Private Act, the London Regional Transport Act 1989, on two London regional transport pension funds was in issue. Counsel conducted research into what was said by or on behalf of the promoters, LRT. Knox J observed, "that produced one sentence spoken at the Committee stage in the House of Commons by

LRT's Parliamentary Agent in introducing the unopposed parts of the Bill and before calling a witness formally to prove the preamble. That sentence was as follows: 'clause 19 provides for the machinery for amalgamating two pension schemes, on which I do not think it necessary to provide any further information'. As I have already found, the first part of that sentence was accurate, but it did not need the research that was conducted to establish it and I derive no help from that evidence".

Another post *Pepper v. Hart* case, *R v. London Borough of Wandsworth ex parte Hawthorne* (36) provides an example of the lack of both practitioner and judicial awareness of parliamentary procedure in evaluating material which is potentially admissible. In that case Sir Louis Blom-Cooper referred to, and subsequently relied on for limited purposes, an extract from a speech by Mr Hugh Rossi MP in the House of Commons during consideration of a House of Lords amendment to the Housing (Homeless Persons) Bill on 27th July 1977. Various Members during the Commons proceedings were critical of the late availability of the Lords' amendments, some of which contained handwritten amendments. The relevant proceedings took place a little before 4.00 a.m. The Bill was a Private Member's Bill; Mr Rossi was an Opposition spokesman; the question was put on the amendment some 3 minutes after Mr Rossi resumed his seat; only one other Member spoke thereafter, also an Opposition MP (Mr Sainsbury), and neither he nor Mr Rossi was the promoter of the Bill nor moving the amendments. Sir Louis does not appear to have taken account of any of these factors, but he did observe that "no one demurred, and the Bill proceeded to enactment".

The concerns of the practitioner are further exacerbated by the possibility that if there is a failure to research the full parliamentary material in advising a client on a question of statutory interpretation the practitioner may be liable for a breach of professional duty (37). Indeed some members of the English Bar have adopted the practice in their opinion work, both to avoid liability and reduce costs for the client,

of including a disclaimer that the opinion has not involved researching the parliamentary material which as a result of *Pepper v. Hart* may be relevant to a question of interpretation. The client, for a further fee, may then presumably request the research to be undertaken.

THE JUDICIAL APPLICATION OF *PEPPER V. HART*

The reported cases in which *Pepper v. Hart* has been considered or applied are a serious complicating factor. As might be expected, these cases raise a number of issues which were not specifically addressed in *Pepper v. Hart* and disclosed some inconsistencies (38). There are now over seventy of these cases, in both public and private law (39).

Before turning to the manner in which *Pepper v. Hart* has been applied, it should be said that quite often there has been informality associated with the consideration of parliamentary material. From time to time the courts, from the Employment Appeal Tribunal to the House of Lords, refer to parliamentary material without quoting it or even giving the Hansard reference (40), or indicating that only a selection of the material which has been considered is cited (41). Secondly, the parliamentary material comes before the court by a variety of routes. The simplest case is that it forms part of the submissions of counsel and the court determines its admissibility. In some cases, it is the court that has proposed that the parliamentary material be examined and counsel supply what they believe to be admissible material (42). In one case the court's proposal was, in the words of the judge, "not very warmly received" because the party for which one counsel appeared was anxious to get a repossession order and did not wish this objective to be delayed by the adjournment which would have been necessary to examine the parliamentary material, and there were additional listing difficulties (43). The outcome was that Hansard was not consulted. The court has sometimes examined parliamentary material on its own

initiative without benefit of submissions from counsel (44). There are also a significant number of cases where the court has indicated in judgment that the question of interpretation did not meet the *Pepper v. Hart* threshold for admitting parliamentary material but, as the material has been submitted by counsel, it was examined *de bene esse* (45), or in case the judges had misdirected themselves on *Pepper v. Hart* (46).

Some elements of this informality may be seen as a re-alignment of the roles of counsel and the court, or even perhaps tending to touch the authority of the court. Certainly it may have forensic implications. *DPP v. Bull* (47) concerned the scope of the Street Offences Act 1959. Mr Bull had been charged with being a common prostitute under s.1(1) of the Act, but at first instance it was held that there was no case to answer because the provision applied only to female prostitutes. Before the Court of Appeal, counsel for the DPP conceded in opening and reply that if appropriate reference were made to Hansard during the passage of the 1959 Act it would be plain that the Act was intended to be applicable only to women. The Court of Appeal decided that the provision was neither ambiguous, obscure nor productive of absurdity and that parliamentary material was admissible. As Mann L.J. remarked,

"had I concluded as a matter of interpretation that section 1(1) applied to male prostitutes, then a curious situation would have arisen. The judicially ascertained expressed intention of Parliament would have been at variance with what the Court had been told was the actual intention of the promoters".

THE PEPPER V HART GUIDELINES

Ambiguous, obscure or apparently absurd legislation

Pepper v. Hart admits reference to Parliamentary material where legislation is "ambiguous or obscure, or leads to an absurdity". The Opinions in *Pepper v. Hart* suggest that this test related to the legislative text as evaluated by the court considering it, although a more extensive approach may have been taken in its subsequent application.

Of these three legislative characteristics, obscurity and apparent absurdity are, at first blush, relatively straightforward. An obscure statutory provision is, arguably, one from which the court is unable to extract an interpretation. Legislation which leads to an absurdity is that where its construction by the court may either result in a clear interpretation, or an ambiguity; but, in either case it does not, in the view of the court, lead to a sensible meaning.

Although the notion of absurdity may be seen by inventive counsel to offer more than that. In *R. v. Archbishop of Canterbury and another ex p. Williams*, a case making a challenge to ecclesiastical legislation authorising the ordination of women as priests in the Church of England, David Pannick Q.C. unsuccessfully sought to introduce parliamentary material in the interpretation of a statutory provision giving very wide competence to enact ecclesiastical legislation on the grounds that the statute was so wide that it "permitted a change which would substitute some figure other than Jesus Christ as the central figure of worship of the Church of England" and so this would lead to absurdity (48).

On the other hand, ambiguity is, on any view, a complex notion and goes to the heart of statutory interpretation. Various aspects of the notion have appeared in the *Pepper v. Hart* cases. They may be considered within four rather loose, and I hope not too idiosyncratic, categories.

(i) *Textual Ambiguity*

Lord Lowry in *Attorney-General v. Associated Newspapers Limited* (49) in a slightly different context, examined some of the forms of textual ambiguity. So, a word may be given a primary meaning (A^1) or a secondary meaning (A^2); or it may be given one of two meanings (A or B); or it may be given an interpretation which encompasses either one or two meanings (A or A and B). Such examples of textual ambiguity would all seem to fall within *Pepper v. Hart*. Indeed its application in the extreme case might lead a court after the examination of admissible Parliamentary material to prefer a third meaning (C) which had not been raised by other techniques of statutory interpretation.

(ii) *Structural Ambiguity*

A provision may be ambiguous as a consequence of its relationship with another provision in the same or related legislation. This also seems to be an ambiguity which falls within *Pepper v. Hart* (50).

In the context of *Pepper v. Hart*, an analogous problem may arise where two inter-related statutory provisions have a bearing on the case, one of which is ambiguous and the other is unambiguous but may be determinative. This effectively arose in the Court of Appeal decision of *Walters (Inspector of Taxes) v. Tickner* (51) where Nolan L. J.

admitted Parliamentary material on an ambiguous provision (A), but observed that the provision: "even with assistance of recourse to Parliamentary materials may still be in some respects ambiguous and obscure". He held, however, that another provision (B), was unambiguous and determinative. The effect of provision (B) could only be ousted by plain words to that effect in provision (A), but provision (A) did not contain such words.

(iii) *Ambiguity in the context of the case*

In *Sheppard v. IRC (No.2)* Aldous J. adopted the analysis of Lord Diplock in *IRC v. Joiner (52)* of an ambiguous statutory provision as one which may or may not be construed to apply to the factual situation before the court (53). He suggested that this was indeed the form of ambiguity with which the House of Lords was faced in *Pepper v. Hart*; on that basis, such ambiguity must be treated as a form of ambiguity falling within the *Pepper v. Hart* guidelines. It does, however, have the difficulty that it may allow a drift into a fourth category of ambiguity.

(iv) *Uncertainty over consequences of statutory application*

In this category are cases where the court shows itself prepared to examine, or contemplate the examination of, Parliamentary material on the basis of being uncertain about the policy implications of the effect of legislation as construed. In *Laing v. Keeper of the Registers of Scotland and Another (54)*, before the First Division of the Inner House of the Court of Session, Lord President Hope appears to have adopted this approach. He observed: "the potential disadvantage to creditors is a

serious one. Even when weighed in the balance against the disadvantage to lenders on heritable security, such as banks or other financial institutions, of the weakening of the system of the registration of title in the Land Register if decrees of reduction were held to be automatically registerable, there is sufficient substance in the petitioners argument for it to be appropriate to look for further guidance to such Parliamentary material as is available".

A similar approach, this time on the basis of absurdity, was adopted in the less august forum of the Edinburgh VAT Tribunal in *Robert Gordon's College v. Commissioners of Customs and Excise* (55) . A construction placed on schedule 6A, para. 5(4) to the Value Added Tax Act 1983 by counsel for the respondents would have required the College to pay VAT in the form of a self-supply charge and also on the sum payable for the licence back from a wholly owned subsidiary of the College. In effect, there would be double VAT chargeable. The Tribunal observed: "if this was the interpretation to be placed on the bald wording of paragraph 5 it amounted to an absurdity and in such circumstances the Tribunal were entitled [under *Pepper v. Hart*] to look behind the legislation to what was the intention of Parliament when the legislation was enacted".

The approach adopted in the both of these cases to the notion of ambiguity for the purposes of *Pepper v. Hart* appears to be an exorbitant, and in some respects dangerous, application of the guidelines.

There are three other practical aspects of ambiguity, whatever its parameters, arising from the *Pepper v. Hart* cases which are worthy of consideration.

(i) *Ambiguous to whom?*

It might be assumed for *Pepper v. Hart* to operate, a legislative provision must be considered ambiguous, obscure or leading to an absurdity by the court considering it. Apparently this need not necessarily be so. In *Chief Adjudication Officer v. Foster*, after the oral arguments Lord Bridge of Harwich, on the basis of a construction of certain enabling provisions, had formed an opinion, stated to be shared by all of his colleagues sitting with him, that the appellant must fail on a *vires* issue. However, following the decision in *Pepper v. Hart*, the respondents invited the Appellate Committee to consider Parliamentary material related to the enabling provisions. Their Lordships agreed to do so and Lord Bridge observed that one of the enabling provisions was "undoubtedly ambiguous, as a difference of opinion in the courts below clearly shows" (56).

The notion that ambiguity, obscurity, or apparent absurdity can be based on the views of others appears to have been expanded by the Court of Appeal. In *Van Dyck & Another v. Secretary of State for the Environment & Another*, Simon Brown L.J. was prepared to consider, amongst other founts of ambiguity, the fact that "various experienced judges at first instance have reached different conclusions upon the point" (57); in fact, of the three judgments to which he was alluding, only two were under appeal in the proceedings before him. In *Reed v. Department of Employment*, the Court of Appeal appear to have gone further. Stuart-Smith L.J., observed, on the authority of *Chief Adjudication Officer v. Foster* that: "perhaps it may be said that the difference of judicial opinion between the judges in the courts below and this Court shows there is an ambiguity" (58).

This approach would appear to admit otherwise appropriate Parliamentary material, on the grounds of ambiguity, whenever there was a prospect of an appellate court departing from the interpretation of a statutory provision by an inferior court in the same, or perhaps other, proceedings.

In *Elf Enterprise Caledonia Ltd v. Inland Revenue Commissioners*, Sir Donald Nichollas V.C. appears to have accepted the even more startling proposition that the ambiguity threshold of *Pepper v. Hart* would be satisfied by an argument from counsel that the statutory construction urged by the other side would create ambiguity (59).

(ii) *Ambiguity, obscurity and precedent*

A statutory provision cannot be ambiguous or obscure to a court which is bound by precedent as to its interpretation. So, in *Sheppard v. IRC* (No. 2) Aldous J. was not prepared to consider Parliamentary material in support of a submission that the House of Lords decision in *Greenberg v. IRC* (60), that a payment of a dividend was a transaction in securities, had been decided *per incuriam* (61).

However, binding precedents on matters of construction may be expressed in less absolute terms. In *Dawkins v. Department of the Environment*, before the Court of Appeal, the meaning of "ethnic origins" in the Race Relations Act 1976, s.3, was in issue (62). The phrase had been construed by the House of Lords in *Mandla v. Dowell Lee* (63). In *Mandla*, Lord Fraser of Tulleybelton (64) and Lord Templeman (65) held that the phrase could be construed by reference

to a variety of characteristics, although there was some divergence in their speeches in the way the characteristics were expressed and as to which of them might be considered to be essential. Their three colleagues sitting with them concurred, Lords Roskill and Brandon of Oakbrook expressing agreement with the speeches of both Lord Fraser and Lord Templeman (66). Counsel for the appellant in *Dawkins* submitted that the phrase "ethnic origins" was obscure or ambiguous, that the obscurity or ambiguity had not been resolved by the decision in *Mandla* but, in consequence the difference in approach adopted by Lords Fraser and Templeman, had been aggravated. He submitted that it was appropriate for reference to be made to statements by the Home Secretary on the meaning of the word "ethnic" during the House of Commons consideration in 1965 of the Race Relations Bill, from which the provision in issue was derived.

The principal judgment in the Court of Appeal was delivered by Neill L.J. He characterised *Mandla* as giving "authoritative guidance" on the meaning of "ethnic origins" in the 1976 Act. He observed "though Lord Fraser and Lord Templeman used different language and speeches, the guidance given by the speeches read together was clear and unambiguous for the purposes of deciding the present appeal. Furthermore, it is to be noted that both Lord Roskill and Lord Brandon agreed with the reasons given by both Lord Fraser and Lord Templeman and did not detect any difference between them. In addition Lord Edmund-Davies found the two speeches to be in conformity with the conclusion at which he ultimately arrived" (67). Consequently, Neill L.J. was satisfied that "in these circumstances this was not a case where it would have been appropriate for the courts to be referred to statements in Hansard", but he observed that, in the

absence of the decision in *Mandla*, "it may be that we would have been persuaded that this was a suitable course to take".

A court may, of course, depart from its reasoning in its own earlier decision on a matter of construction. So, after reference to Parliamentary material, in *Sunderland Polytechnic v. Evans* (68) the Employment Appeal Tribunal departed from its own earlier reasoning in *Home Office v. Ayers* (69) in construing the Wages Act 1986, s.1(5).

(iii) *Ambiguity and confirmation of a construction*

In *Pepper v. Hart*, Lord Mackay of Clashfern L.C. observed that counsel for the tax-payers submitted that Parliamentary material should be admitted "to confirm the meaning of a provision as conveyed by the text, its object and purpose" (70), but the other speeches do not refer to the submission. Indeed the formulation of the rule in *Pepper v. Hart* might suggest that it would be inappropriate to refer to Parliamentary material merely to confirm a construction reached by other means. However, subsequently reported House of Lords cases suggest that reference may be made to Parliamentary material for that purpose.

One analysis of the speech of Lord Roskill in *Ex p. Johnson* would suggest that the Parliamentary material was examined to confirm a construction which had already been firmly reached (71). In *Stubbings v. Webb* Lord Griffiths stated that he would have construed the legislative provision in a manner decided by the Appellant Committee "even without reference to Hansard" (72). In *Chief Adjudication Officer v. Foster*, Lord Bridge of Harwich observed that the Parliamentary material which the Appellate Committee considered, "unequivocally

endorses the conclusion I had reached as a matter of construction independently of that material" (73).

Parliamentary Material

The second element of the rule in *Pepper v. Hart* as expressed by Lord Browne-Wilkinson, limits the categories of Parliamentary material to which reference may be made to "one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect". The purpose of this formulation was to discourage "combing through reports of Parliamentary proceedings in the hope of unearthing some perhaps incautious expression of opinion in support of an improbable secondary meaning" (74); to avoid construing Parliamentary statements rather than identifying clear Parliamentary statements as to the effect of the legislation (75), and in the belief that it is likely to be statements by the promoters of legislation which, if they are not withdrawn or varied, will demonstrate Parliamentary intention (76).

(i) *Whose statements are admissible?*

The category of Members of Parliament whose statements were to be admissible under *Pepper v. Hart* was obviously too narrowly drawn. The purposes for which Parliamentary material is to be admitted would require the category to be extended to statements of Members of Parliament who have successfully moved amendments or new clauses. In *Chief Adjudication Officer v. Foster*, reference was made to the observations of the mover of a successful amendment in the

House of Lords, although they may have been considered as contextual material (77). In *R v. London Borough of Wandsworth ex p. Hazorthorne* (78), Sir Louis Blom-Cooper made a rather cautious reference to a successful amendment introduced in the House of Lords to the Housing (Homeless Persons) Bill in 1977 by Baroness Young, but emphasised that she was not the promoter of the Bill. It would, of course, be rather curious at that stage of Parliamentary proceedings for the promoter of a Bill to be moving amendments to it.

Statements of others may well also be admissible. As we have seen, the statement of a parliamentary agent on a Private Bill before a House of Commons Committee was admissible (79). It also seems likely that a statement by a Minister on the effect of a provision of a Private Member's Bill would also be treated as admissible as at least in one case the Court of Appeal has, no doubt accepting political reality, tended to equate Parliamentary intention with the expressed view of the Government (80).

It should though be noted that all statements by the promoter of a Bill will not necessarily be treated as admissible. In *Van Dyck & Another v. Secretary of State for the Environment & Another* (81), statements made by a Minister promoting a Bill were excluded, partly on the ground of lack of clarity, but also because they were in part "final remarks [which] were necessarily *extempore* responses to various points raised by [a Member] during the debate". The latter ground of exclusion by Simon Brown L.J., based as it was on an unverifiable assumption about a Parliamentary debate 24 years previously, seems curious. It

would be unusual for ministers promoting legislation to respond to points raised in a debate other than after taking advice from their officials (82).

In this context it is perhaps worth noting that in *R v. Secretary of State for Foreign and Commonwealth Affairs, ex p. Rees Mogg*, a submission that a Parliamentary statement by the Foreign Secretary could not be relied on because it was explicitly based on the advice of the Attorney General was rejected by Lloyd L.J.. He observed that, if the argument were to prevail, it would "undermine the utility of *Pepper v. Hart* in every case to which it would otherwise apply" (83).

(ii) *Scope of Admissible Parliamentary Material*

The scope of Parliamentary material admitted under *Pepper v. Hart* has been surprisingly wide. In *R v. Jefferson & Others* (84) the Court of Appeal considered the commission of statutory offences flowing from what must be a rare criminological phenomenon, namely drunkenness associated with an England victory in a football World Cup match.. Auld J., on the basis of *Pepper v. Hart*, considered a Law Commission report, a White Paper and provisions in legislation analogous to that before the court (85).

At the other extreme, temporally speaking, of the legislative process is the Court of Appeal case of *Islwyn Borough Council & Another v. Newport Borough Council* (86). One issue before the Court was whether an agreement had been frustrated by the

coming into force of the Education (No.2) Act 1986, s.42. Glidewell L.J., in respect of the submission that the statutory provision had frustrated the agreement, was prepared to consider Parliamentary material relating to the 1993 Education Bill, then before the House of Lords. A provision of the Bill was to amend s. 42 of the 1986 Act and it had been argued that the amendment would not be necessary if s.42 did not frustrate the agreement. Although Glidewell L.J. does not appear to have relied on the Parliamentary material, and Hirst L.J. held that as there was no ambiguity in the 1986 legislation recourse to Hansard would not be justified, it is difficult to see how, on the authority of *Pepper v. Hart*, Parliamentary material relating to another Bill, still before Parliament, could be admissible as an aid to statutory construction.

There is some difficulty in determining the scope of admissible Parliamentary material because the courts have not drawn a very sharp distinction between such material and contextual parliamentary material to which reference may be made as is "necessary to understand [admitted] statements and their effect". Certainly, a more informal approach is taken to contextual material; so for example in *Pepper v. Hart*, Lord Browne-Wilkinson referred to a press release issued contemporaneously with an admitted ministerial Parliamentary statement (87), although this has not been followed where the press release was not contemporaneous with the Parliamentary proceedings (88). Also, it must be said that it is sometimes difficult to see why it has been necessary to refer to the contextual Parliamentary material (89).

Clear Statements

The third element of the rule in *Pepper v. Hart* as expressed by Lord Browne-Wilkinson, is that "the statements relied upon are clear". To satisfy this requirement a statement must be clear in two respects. First, the statement must be one which "clearly distinguishes the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words" (90). Secondly, it must be clear in the sense that the legislative intention which it reveals must be shown to be attributable "to Parliament as a whole"; this is satisfied by demonstrating that there has been no subsequent inconsistent amendment to the Bill, and that the statement has not been subsequently withdrawn or varied (91). This second requirement may place an onerous burden on the practitioner but it has an obvious constitutional importance. It is surprising then that in very few of the *Pepper v. Hart* cases is there an express reference in the judgments to this requirement having been satisfied, although of course it may have been.

Whether a statement is clear will depend on the context of the case, including the construction of the statutory provision which may tentatively have been reached by other means. There are, however, factors which may influence whether a statement is characterised as clear, or which may go to the weight to be given to a clear statement.

(i) *Clear but inaccurate statements*

A clear statement may nevertheless be inaccurate. A statement may be inaccurate as to the scope of a legislative provision, although it is likely that such a statement will be characterised as unclear in the context of the case. So, for example, in *Griffin (Inspector of Taxes) v. Craig-Harvey* (92), it was submitted that observations by the Financial Secretary to

the Treasury in respect of two amendments which he moved to a Bill were inaccurate. However, it was held that the observations were not directed to the question on which the submission of inaccuracy was based. However in the Court of Appeal case of *MacDougall & Others v. Wrexham Maelor Borough Council* (93), Ralph Gibson L.J. held that a Ministerial statement, which was considered but not admitted, was in one respect wrong in law.

(ii) *Parliamentary privilege and clear statements*

In rejecting the submission that admitting Parliamentary material for the purposes of statutory interpretation could amount to questioning proceedings in Parliament contrary to Article 9 of the Bill of Rights, Lord Browne-Wilkinson observed that " the purpose of looking at Hansard could not be to construe the words used by the Minister but to give effect to the words used so long as they are clear" (94). Nevertheless, the courts will find it difficult to resist submissions which seek to apply close linguistic analysis to admissible Parliamentary material if the material may influence the construction or interpretation of a statutory provision. So in *Van Dyck & Another v. Secretary of State for the Environment & Another* (95), the Court of Appeal heard submissions on what the Minister of Housing and Local Government meant in Parliament by "multi-occupation" and "multiple dwelling house" by reference to the debate as a whole. In *R v. Secretary of State for the Home Department ex p. Okello* (96), the interpretation of Immigration Rule 111 was in issue. The Rule provided that "subject to paragraph 115, a person who is a foreign national or Commonwealth citizen specified in the appendix who did not enter the United Kingdom with an entry clearance as a student or prospective student

should be refused an extension of stay for the purpose of studying". Counsel sought, on the basis of *Pepper v. Hart* to rely on the speech by the Home Secretary when he laid a Statement of Changes in the Immigration Rules (which included Rule 111) before Parliament. In his speech the Home Secretary referred to "curtailing the ability of visa nationals to switch after arrival from visitor to student status" (emphasis supplied). Counsel submitted that the use of the word "curtailing" indicated an intention in the rule-maker to impose a less rigid requirement than a mandatory one in fixing the conditions in which there might be a change from visitor to student status. Laws J. held that the Rule was not ambiguous and in any event was not prepared to accept the submission, as a matter of language.

(iii) *Negative implications of Parliamentary Material*

One implication of the requirement that statements must be clear is that, unlike some other jurisdictions, only positive statements are admissible, and not submissions based on analysis of Parliamentary material which reveal no reference to the question of statutory construction in issue. It may prove difficult for the courts to maintain this position where, for example, they are faced with submissions that Parliamentary material reveals a clear Parliamentary intention that construction (A) is intended, which is supported by argument that there is no reference in the Parliamentary material to alternative construction (B). In *Hamilton v. Fife Health Board* (97), the submissions apparently went further than that. The Inner House of the Court of Session heard submissions that in the Parliamentary debates on the Damages (Scotland) Act 1976, s.1, "there was nothing in the Ministerial or other statements to indicate that Parliament had any intention to

legislate on the matter of ante-natal injuries at all" and "there was nothing specific said about what clause 1(1) (later enacted as section 1(1)) was intended to effect in relation to a child injured before birth and dying of his injuries after birth" (98).

SOME FURTHER APPLICATIONS OF PEPPER v. HART?

Pepper v. Hart and Enabling Powers

In *Chief Adjudication Officer v. Foster*, the Appellant Committee, in addition to construing the primary legislation itself, examined parliamentary material relating to the enabling provision in determining the *vires* of regulations made under it.

From this examination, Lord Bridge of Harwich concluded that "Parliament, having enacted the two sub-sections with full knowledge of how the regulation-making power was proposed to be used must clearly have intended that it should be effective to authorise such use" (99). *Pepper v. Hart* facilitates establishing Parliamentary intention, which commonly flows from Executive intention, to determine the meaning of a statutory provision. This maintains a clear correlation between intention and text. In *Chief Adjudication Officer v. Foster*, Parliamentary intention is used to construe an enabling power by reference to expressions of Executive intention as to how it will be exercised. Thus, there is arguably less correlation between intention and text, and again there is the possibility that, in respect of statutory powers, *Pepper v. Hart* may acquire a non-textual dimension (100).

Pepper v Hart and the Hierarchy of Rules

To some extent, the status of rules - both statutory and non-statutory - may be determined by reference to Parliamentary material admitted under *Pepper v. Hart*.

In *R v. London Borough of Wandsworth ex p. Hawthorne* (101), Sir Louis Blom-Cooper determined that the circumstances under which the deliberate act or inaction of a person renders the person intentionally homeless for the purposes of the Housing Act 1985, s.60, was a matter for local authorities acting with reference to the code of guidance prepared by the Secretary of State under s.71 of the same Act. In reaching this conclusion he relied in part on a Parliamentary statement made in the course of consideration of what became the Housing (Homeless Persons) Act 1977.

CONCLUSION

Admitting Parliamentary material as an aid to statutory interpretation may have fundamental constitutional consequences, and certainly has implications for politicians and lawyers. The weight to be given to these considerations can be debated. However, the experience of the United Kingdom from November 1992 strongly suggests to me that if such material is to be introduced there should be a statutory basis for it. Changing the procedure, with all the forensic pressure which is placed on the innovation, by rather general common principles has proved as inequitable as informal judicial reference to Hansard. Also, there is a "Chinese Whispers" element to the development of the common law. So, by 1993 Russell J. in the Alberta Court of Queen's Bench is citing *Pepper v. Hart* for the proposition that "if there is more than one possible interpretation, and one is absurd, the alternative is to be preferred" (102). This is good law in the U.K., and no doubt in Canada, but *Pepper v. Hart* does not appear to be the most obvious authority for it.

Sometimes the operation of the common law is more disturbing. I take a home-grown example. In *R v. Inland Revenue Commission, ex p. Barker and another* (103), decided in June 1994, Latham J offered this observation:

"I accept that in the light of *Pepper v. Hart*, the court can, where there has been a ministerial assurance that a particular statutory provision will or will not operate in a particular way relevant to the specific question in front of the court, strive to ensure that the words of the statute are construed in a way consistent with what was said".

Here, the guidelines in *Pepper v. Hart* may have been judicially assumed, but there is no express reference to them.

FOOTNOTES

- (1) T R F Plucknett, *Statutes and their Interpretation in the First Half of the Fourteenth Century* (1980) p. 70.
- (2) (1678) 3 Swann 644
- (3) (1769) 4 Burr 2303
- (4) On the history of the exclusionary rule, see F A R Bennion, *Statutory Interpretation (2nd ed) Supplement* (1993) pp. A57-A71; P Brazil, "Legislative History and the sure and true interpretation of statues in general and the Constitution in particular" 4 U of Queensland L.J. (1961-64) 1; *Pepper (Inspector of Taxes) v. Hart* [1993] AC 593, 630-6. For a nineteenth century example of inconsistency of judicial application of the exclusionary rule, compare *R v. Hertford College* (1878) QBD 693, *R v. Bishop of Oxford* (1879) 4 QBD 525, *Julius v. Bishop of Oxford* (1880) 49 LJQB 577, 578.
- (5) *Pickstone v. Freemans plc* [1989] AC 66; see also *Owens Bank Ltd v. Bracco* [1992] 2 AC 443.
- (6) *R. v. Secretary of State for Transport, ex p. Factortame Ltd* [1990] 2AC 85
- (7) e.g. *Sagnata Investments Ltd v. Norwich Corporation* [1971] 2QB 614, 624 per Lord Denning M.R..
- (8) *Attorney General of Canada v. Readers' Digest Association (Canada) Ltd* [1961] SCR 775; cf. *Canadian Wheat Board v. Manitoba Pool Elevators* [1949] 2 DLR 537, 556, *R. v. Vasil* [1981] 1 SCR 469, 487, *Reference re Anti-Inflation Act* [1976] 2 SCR 373, *Lyons v. The Queen* [1984] 2 SCR 633, *British Columbia Telephone Co. v. The Queen* [1992] 1 CTC 26, *Canadian Pacific Railway v. James Bay Railway Co.* (1905) 36 SCR 42, 93, 99, cf. A.F. Bisson, "La Diffusion du Droit: Sa Lettre et son Esprit" (unpublished paper to the CIAJ Drafting Seminar, Ottawa, September 1994).
- (9) e.g. *Davis v. Johnson* [1979] AC 264
- (10) [1993] AC 593
- (11) Alan Moses Q.C., "Pepper v. Hart: Why it happened" (unpublished paper presented to the Administrative Law Bar Association/Statute Law Trust Conference on *Pepper v. Hart*, Balliol College, Oxford, April 1994).
- (12) *J H Rayner v. Dept. of Trade* [1990] 2 AC 418, 483-4.
- (13) 503 *H L Debs.* cols. 278 ff (18 Jan 1989)
- (14) Rt. Hon. Sir Nicholas Lyell Q.C. MP: "Pepper v. Hart: The Government Perspective" 15 Stat. L.R. (1994) 1.

- (15) Cited at Note 11
- (16) At 641
- (17) T. St. J. N. Bates, "Parliamentary Material and Statutory Construction: Aspects of the Practical Application of *Pepper v. Hart*" 14 Stat. L.R. (1993) 46
- (18) Dawn Oliver, "*Pepper v. Hart*": a suitable case for reference to Hansard?" [1993] P.L. 5
- (19) *Black -Clawson International Ltd v. Papierwerke Waldhof-Aschaffenburg A.G.* [1975] AC 591; for comment on the prospects for the future relationship of legislature with the courts and the executive see T. St. J. N. Bates, "The Legislative Future of Parliaments" (1995) *The Parliamentarian*.
- (20) At 635
- (21) *Prebble v. Television NZ Ltd* [1994] 3 ALL ER 407, 414
- (22) At 638
- (23) Cited at Note 21, 415 (words italicised in the judgment).
- (24) For illustrations of this, see F A R Bennion "Law Texts and Legislative History" (unpublished paper circulated at the CIAJ Seminar, "Communicating the Law: Getting the Message Across", Ottawa, September 1994) pp.20-23.
- It was also argued in *Pepper v. Hart* that admitting Parliamentary material might be a breach of parliamentary privilege which existed independently of the Bill of Rights, but no such privilege was identified and the argument was rejected: at 645-6.
- (25) Sir Nicholas Lyell, "*Pepper v. Hart*: The Government Perspective" 15 Stat. L. R. (1994) 1; J. C. Jenkins, "*Pepper v. Hart*: A Draftsman's Perspective", *ibid*, 23, *cf.* Bennion, *op. cit*, at Note 24, p.23.
- (26) Jenkins, *op. cit* at Note 25, pp 25-6.
- (27) At 636
- (28) At 637 B
- (29) At 637 G
- (30) At 637 D
- (31) At 616-620

- (32) At 615-616
- (33) At 637 E
- (34) James Goudie Q.C., "*Pepper v. Hart*: what does it mean in practice? (unpublished paper presented to the Administrative Law Bar Association/Statute Law Trust Conference on *Pepper v. Hart*, Balliol College, Oxford, April 1994) p.7
- (35) LEXIS
- (36) LEXIS
- (37) B. J. Davenport, 109 LQR (1993) 149
- (38) See generally, T. St. J. N. Bates, "Judicial Application of *Pepper v. Hart*" (1993) *Journal of the Law Society of Scotland* 251; T. St. J. N. Bates, "An Overview of Developments Since *Pepper v. Hart*" (unpublished paper presented to the Administrative Law Bar Association/Statute Law Trust Conference on *Pepper v. Hart*, Balliol College, Oxford, April 1994); F A R Bennion, "*Pepper v. Hart* in its context" (*ibid.*).
- (39) *AIB Finance Ltd v. Bank of Scotland and another* 1993 SCLR 851 (Ct. of Session, Inner House (Second Division));
- Arrows Ltd (No.4)* [1993] 3 WLR 513 [1993] 3 All ER 861 (C of A, Civil Div.);
- Attorney-General v. Associated Newspapers Ltd.* [1994] 2 WLR 277, [1994] 1 All ER 556 (H.L. (E.));
- Bishopsgate Investment Management Ltd and another* [1993] Ch 452, [1993] 3 All ER 861, (C of A, Civil Div.);
- Busby and another v. Co-operative Insurance Society Ltd*, LEXIS (20 September 1993);
- Cardiff City Council v. Destrack*, LEXIS, (14 April 1994) (Q.B.D.)
- Chief Adjudication Officer and another v. Foster* [1993] AC 754 , [1993] 1 All ER 705 (H.L. (E.));
- Chung v. Wigtown District Licensing Board* 1993 SCLR 256 (Ct. of Session. Inner House (First Division));
- Connolly v. Secretary of State for Northern Ireland*, LEXIS (4 February 1994) (C of A.);
- Customs and Excise Commissioners v. Kingfisher plc* [1994] STC 63 (Q.B.D.);

Customs and Excise Commissioners v. Robert Gordon's College [1994] STC 698, (Ct. of Session, Inner House, Second Division);

Dawkins v. Dept of the Environment [1993] ICR 517 (C of A, Civil Div.);

Deposit Protection Board v. Dalia and another [1994] 2 WLR 732, [1994] 1 All ER 539 (C of A, Civil Div.);

Devon and Somerset Farmers Ltd [1993] 3 WLR 866, [1994] 1 All ER 717 (Ch. D.);

Elf Enterprise Caledonia Ltd v. Inland Revenue Commisioners; [1994] STC 785;

Director of Public Prosecutions v. Bull, LEXIS, *The Times*, 1 June 1994, (C of A, Civil Division);

Ford Motor Co. Ltd and another [1993] RPC 399 (Ch. D (Patents Ct.));

Griffin (Inspector of Taxes) v. Craig-Harvey [1994] STC 54 (Ch. D.);

Guerney (Her Majesty's Inspector of Taxes) v. Petch, [1994] 3 All ER 731, [1994] STC 689, *The Times*, 27 May 1994, (C of A, Ch. Division);

Hamilton v. Fife Health Board 1993 SCLR 534 (Ct. of Session, Inner House (Extra Division));

I.C.I. plc v. Colmar (Inspector of Taxes) [1993] 4 All ER 705 (C of A, Civil Div.);

Islwyn B.C. and another v. Newport B.C., LEXIS, *The Times*, 28 Jun. 1993, *The Independent*, 19 Aug. 1993 (C of A, Civil Div.);

Joint (Inspector of Taxes) v. Bracken Developments Ltd. [1994] STC 300 (Ch. Div.);

Laing v. Keeper of the Registers of Scotland and another, 1994 SCLR 135 (Ct. of Session, Inner House (First Division));

London Regional Transport Pension Fund Trust Co. Ltd. and others, LEXIS, *The Times*, 20 May 1993 (Ch. D.);

MacDougall and others v. Wrexham Maelor B.C. [1993] RVR 141 (C of A, Civil Div.);

Massmould Holdings Ltd v. Payne (Inspector of Taxes) [1993] STC 62 (Ch. D.);

McDonald and another v. Graham, LEXIS, *The Times*, 12 Jan 1994 (C of A, Civil Div.);

Mendip D.C. v. Glastonbury Festivals Ltd., LEXIS (18 Feb. 1993) (Q.B.D.);

Mullan and others v. Anderson 1993 SCLR 506 (Ct. of Session, Inner House);

NAP Holdings UK Ltd v. Whittles (Inspector of Taxes) [1993] STC 592 (C of A, Civil Div.);

National Rivers Authority (Southern Region) v. Alfred McAlpine Homes East Ltd. LEXIS, *The Times*, 3 February 1994, *The Independent*, 3 February 1994, (QBD);

R. v. Archbishop of Centerbury and Another, ex p. Williams, LEXIS, *The Independent*, 9 March 1994, (C of A, Civil Division);

R. v. The Bakerwell Magistrates' Court and the Derbyshire Crown Prosecution Service ex p. Brewer, LEXIS, (QBD) (20 July 1994);

R. v. Canons Park Mental Health Review Tribunal, ex p. A, [1994] 2 All ER 659, (C of A, Civil Division);

R v. Dorest C.C. ex p. Rolls and Another, LEXIS, *The Times* 1 Feb. 1994, 26 HLR 381 (Q.B.D.);

R. v. Inland Revenue Commisioners, ex p. Barker and Another [1994] STC 731 (QBD);

R v. Jefferson and others [1994] 1 All ER 270 (C of A, Crim Div.);

R v. London Borough of Newham ex p. London Borough of Barking & Dagenham, LEXIS (18 Feb. 1993);

R v. London Borough of Wandsworth, ex p. Hatthorne, LEXIS (Q.B.D.) (21 Jan 1994);

R. v. Registered Design Appeal Tribunal ex p. Ford Motor Co Ltd., LEXIS, *The Times*, 9 March 1994, (QBD);

R v. S. of S. for Employment, ex p. NACODS, LEXIS (Q.B.D.) (16 Dec. 1993);

R v. S. of S. for Foreign and Commonwealth Affairs, ex p. Rees-Mogg [1994] 2 WLR 115, [1994] 1 All ER 457;

R v. S. of S. for Home Dept., ex p. Mehari and others, [1994] 2 WLR 349, [1994] 2 All ER 494;

R v. S. of S. for the Home Dept. ex p. Okello, [1994] Imm. A.R. 261 (Q.B.D.);

R v. S. of S. for Social Security, ex p. Rouse and Another, LEXIS, *The Times*, 1 Feb 1993 (Q.B.D.);

R. v. Stipendiary Magistrates ex p. Director of the Serious Fraud Office, LEXIS, (QBD), *The Independent*, 24 June 1994;

- R. v. Surrey County Council ex p. B.*, (QBD) 13 May 1994;
- R. v. Thompson and Another*, LEXIS, (5 May 1994) (C of A, Criminal Division);
- R v. Warwickshire C.C., ex p. Johnson* [1993] AC 583, [1993] 1 All ER 299 (H.L. (E.));
- Reed v. Department of Employment*, LEXIS, *The Times*, 3 Dec 1993, 143 NLJ 1712 (C of A, Civil Div.);
- Restick v. Crickmore*, [1993] 1 WLR 420, [1994] 2 All ER 112, (C of A, Civil Division);
- Robert Gordon's College v. Commissioners of Customs and Excise*, LEXIS (23 Mar. 1993) (VAT Trib.);
- Scher and others v. Policyholders Protection Board and others* [1993] 3 WLR 357 (H.L. (E.));
- Scher and others v. Policyholders Protection Board and others (No.2)* [1993] 4 All ER 840 (H.L. (E.));
- Sheppard and another (Trustees of the Woodland Trust) v. I.R.C. (No.2)* [1993] STC 240 (Ch. D.);
- Stubbings v. Webb* [1993] 2 WLR 120 (H.L. (E.));
- Sunderland Polytechnic v. Evans* [1993] IRLR 196 (E.A.T.);
- Walters (Inspector of Taxes) v. Tickner* [1993] STC 624 (C of A, Civil Div.);
- Welby and Another v. Casswell*, LEXIS, *The Times*, 1 April 1994, (QBD)
- Westdeutsche Landesbank Girozentrale v. Council of the London Borough of Islington*, LEXIS, *The Times*, 23 Feb 1993, *The Independent* 25 Feb 1993 (Commercial Ct.);
- WF (Trustees) Ltd. v. Expo Safety Systems Ltd.*, LEXIS, *The Times*, 24 May 1993;
- Wren and others v. Eastbourne B.C. & UK Waste control Ltd.*, [1993] IRLR 425 (E.A.T.);
- Van Dyck and another v. S. of S. for the Environment and Another* [1993] PLR 124 (C of A, Civil Div.);
- (40) *Scher and others v. Policyholders Protection Board and others (No.2)* [1993] 4 All ER 840; *Wren and others v. Eastbourne B.C. & U.K. Waste Controls Ltd* [1993] IRLR 425; *ICI plc v. Colmar (Inspector of Taxes)* [1993] 4 All ER 705; *NAP Holdings UK Ltd v. Whittle (Inspector of Taxes)* [1993] STC 592.

- (41) *R. v. London Borough of Wandsworth, ex p. Hawthorne*, LEXIS.
- (42) *ibid.*
- (43) *R. v. Dorset CC, ex p. Rolls and another*, LEXIS
- (44) *Re Ford Motor Co. Ltd and another* [1993] RPC 399.
- (45) *R. v. S of S for Home Dept, ex p. Okello*, LEXIS; *R. v. S of S for Employment, ex p. NACODS*, LEXIS; *Griffin (Inspector of Taxes) v. Craig-Harvey* [1994] STC 94; *R. v. S of S for Foreign & Commonwealth Affairs, ex p. Rees-Mogg* [1994] 2 WLR 115; *Arrows Ltd (No.4)* [1993] 3 WLR 513; *DPP v. Bull*, LEXIS; *R. v. Registered Designs Appeal Tribunal, ex p. Ford Motor Co. Ltd.*, LEXIS; *R. v. Archbishop of Canterbury and another, ex p. Williams*, LEXIS; *R. v. Canons Park Mental Health Review Tribunal, ex p. A* [1994] 2 All ER 659; *cf. Attorney General v. Associated Newspapers Ltd and others* [1994] 1 All ER 556; *Welby and another v. Casswell*, LEXIS.
- (46) *Busby and another v. Co-operative Insurance Society Ltd*, LEXIS.
- (47) LEXIS
- (48) LEXIS
- (49) [1994] 1 All ER 556, 565-6.
- (50) See *R. v. London Borough of Wandsworth, ex p. Hawthorne*, LEXIS.
- (51) [1993] STC 624.
- (52) [1975] 1 WLR 1701, 1710.
- (53) [1993] STC 240, 255; see also *R v. London Borough of Wandsworth ex p. Hawthorne*.
- (54) LEXIS
- (55) LEXIS
- (56) [1993] 2 WLR 292, 306; see also at 303-4.
- (57) LEXIS
- (58) LEXIS; see also *Restick v. Crickmore* [1994] 1 WLR 420.
- (59) LEXIS; *cf. Customs and Excise Commissioners v. Robert Gordon's College* [1994] STC 698

- (60) [1972] AC 109.
- (61) [1993] STC 240, 255; see also *National Rivers Authority (Southern Region) v. Alfred McAlpine Homes East Ltd*, LEXIS, *Bishopsgate Investment Management Ltd and another* [1993] Ch. 452; cf. *R. v. Thompson and another*, LEXIS.
- (62) [1993] ICR 517.
- (63) [1983] 2AC 548.
- (64) At 562-3.
- (65) At 569-70.
- (66) At 568.
- (67) It may be observed that if A agrees with both B and C it does not necessarily follow that the reasoning of B and C is consistent; nor does it necessarily follow that if A does not refer to the reasoning of B and C that A has not detected any difference in their reasoning; A may, for example, have detected a difference but not considered it relevant to the decision to be made.
- (68) LEXIS
- (69) [1992] 1CR 175
- (70) At 1037
- (71) [1993] 2 WLR 1,7, 8.
- (72) [1993] 2WLR 120, 128.
- (73) [1993] 2 WLR 292, 306; see also *Massmould Holdings Ltd v. Payne* [1993] STC 62, 74, and *Re Ford Motor Co. Ltd and another* [1993] RPC 399, *Cardiff City Council v. Destrick*, LEXIS.
- (74) At 1043, *per* Lord Oliver of Aylmerton
- (75) At 1060 (Lord Browne-Wilkinson)
- (76) at 1056 (Lord Browne-Wilkinson)
- (77) [1993] 2 WLR 292, 304
- (78) LEXIS
- (79) *LRT Pension Fund Trust Co. Ltd & others*, LEXIS

- (80) In *I.C.I. plc v. Colmar (Inspector of Taxes)* [1993] 4 All ER 705, Dillon L.J. observed (at 709) when counsel for the Crown sought to introduce an interpretative statement by an Opposition spokesman, "that does not help [counsel], as he does not establish that the **government** of the day shared the view" (emphasis supplied).
- (81) LEXIS
- (82) Cf. *Re Ford Motor Co. Ltd and Another* [1993] RPC 399, where Mr. J. Jeffs Q.C. (sitting as a Deputy High Court judge) referred to a Minister's winding up speech at second reading in the House of Commons.
- (83) [1994] 1 All ER 457, 466.
- (84) LEXIS
- (85) See also *Mullan and others v. Anderson* [1993] SCLR 256 (consideration of Grant Committee Report on the Sheriff Court); *Customs and Excise Commissioners v. Kingfisher plc* [1994] STC 63 (consideration of White Paper); cf. *Joint (Inspector of Taxes) v. Bracken Developments*, LEXIS. Northern Ireland courts will admit parliamentary material on English legislation which is applied by Order to Northern Ireland; see *R. v. Thompson and another*, LEXIS, *Connolly v. S of S for Northern Ireland*, LEXIS.
- (86) LEXIS. In *Mendip D.C. v Glastonbury Festivals Ltd*, the court heard a submission that reference should be made not only to Parliamentary material during the passage of the Local Government (Miscellaneous Provisions) Act 1982, but also to such material in respect of the Entertainments (Increased Penalties) Act 1990, which amended the 1982 Act. Watkins J, decided to refer Parliamentary material relative to the 1990 Act 'because (a) the Act post-dated the commission of the offence or offences in the present case and (b) I doubt, in the circumstances of this case, that it is permissible to endeavour to construe an earlier statute, that in question, by reference to a later statute'.
- (87) At 1050.
- (88) *Elf Enterprise Caledonia Ltd v. Inland Revenue Commissioners* [1994] STC 785.
- (89) In *Ex p. Johnson*, Lord Roskill quoted a sentence from a speech by Lord Denning. Given the reference to other contextual material, the quotation was unnecessary, more particularly as Lord Denning was referring to an implication of the statutory provision which was not in issue in the appeal. In *Stubbings v Webb*, Lord Giffiths quoted from a second reading speech by Lord Tucker, who had been the chairman of a Government committee. The recommendations of the Committee had largely been implemented by legislation. However, one recommendation of the Committee had been modified in the Bill. In the passage of the speech which was quoted, Lord Tucker merely explained how his Committee had reached a conclusion on

that recommendation by a compromise and that he was inclined to favour a solution such as that in the Bill.

- (90) [1992] 3 WLR 1032, 1056; cf. *NAP Holdings U.K. Ltd v. Whittles (Inspector of Taxes)* [1993] STC 592.
- (91) *Ibid.*, At 1058 and 1063
- (92) [1994] STC 54
- (93) [1993] RVR 141; see also *R v. S of S for Foreign and Commonwealth Affairs, ex p. Rees-Mogg* [1994] 1 All ER 457, 466.
- (94) At 1060.
- (95) LEXIS
- (96) LEXIS
- (97) 1993 SLT 624.
- (98) LEXIS, *per* Lord McCluskey.
- (99) [1993] 2 WLR 292, 306.
- (100) The narrower issue of whether reference to Parliamentary material in the construction of delegated legislation (for which *Pickstone v. Freemans plc* [1989] A.C. 66 is authority) is subject to the *Pepper v. Hart* guidelines was addressed, but not decided, by Laws J. in *R v. Secretary of State for the Home Department, ex p. Okello* [1994] 1mm. A.R. 261 (Q.B.D.).
- (101) LEXIS
- (102) *R. v. STC* 81 CCC 3d 407
- (103) [1994] STC 731