THE THEORY OF INTERPRETING STATUTES.

I

'A word is not a crystal, transparent and unchanged; it is the skin of a living thought and may vary greatly in colour and content according to the circumstances and the time in which it is used." Thus Mr. Justice Holmes summed up the elusive nature of words, which lies at the heart of the many problems of legal interpretation.[1] Throughout the centuries we find in the reported cases instance after instance of the difficulties which arise when a judge has to try to discover the living thought lying beneath this skin of words set out in a document placed before him for interpretation.

To-day the lawyer is constantly asked to indicate what effect a statute will have on a given factual situation—how the formula of words contained in the statute is to be related to a set of facts which has arisen in the external world. In attempting to interpret the statute, his task is a difficult one, for he at once encounters a number of principles and guides which conflict with each other, and has to try either to reconcile the irreconcilable or to guess which set of principles the court may decide to adopt.

How have these conflicting principles developed?[2] In the early days of English law the interpretation of a statute presented no great difficulty. The judges, as members of the King's Council, took part in the process of making statutes, and from the knowledge which they gained in so doing they were able to interpret the statutes with confidence. To counsel who endeavoured to distort the clear meaning of the words (for thus it must have appeared to them) they were able to retort," do not gloss the statute for we know better than you; we made it."[3] But by the end of the fourteenth century this method of interpretation (or perhaps lack of interpretation would be a better phrase) was already dying out. Parliament began to frame bills, and the judges ceased to take part in the process. Received tradition from the dead judges could be used to interpret those statutes which the judges had taken part in framing. But some other method had to be found for interpreting those statutes of whose purposes the judges had no direct knowledge.

The earliest theory of interpretation is that which has become known as the equitable theory. Its heyday was in the sixteenth century, when the King was regarded as a personal legislator (albeit with the

1. *Towne* v. *Eisner*, 245 U.S. 418, 425, 62 L. ed. 372, 376 (1918).
2. The evolution of the principles of statutory interpretation is traced in some detail by Corry in *Administrative Law and the Interpretation of the Statutes* in (1936) U. Toronto L.J. 1: 286-312. The following sketch is based on that article.
3. *Aumeye* v. *Anon.*, Y.B. 33 & 35 Edw. I., 82 (Rolls Series).

advice and consent of Parliament) and the judges as Royal servants. Since the statute merely expressed the King's will, in case of doubt all that the judge had to do was to find out his master's will and apply it to the situation before him. Equitable interpretation thus centred on the spirit or intent of the statute, and applied that spirit in disregard of the letter whenever necessary.[4] It was during this period that the first (in time) of the three great modern guides to statutory interpretation was formulated, in *Heydon's Case*.[5] The rule there framed did not treat the letter of the statute in quite so cavalier a fashion as did the equitable method of interpretation. But the task of the judge was still conceived as that of seeking to implement the King's will. It was accordingly laid down that the judge should consider the previous state of the law and the mischief for which it had failed to provide, the remedy given by the statute for that mischief, and the true reason for that remedy; and that thus equipped the judge should make such construction as should suppress the mischief and advance the remedy. Whether in this process the judge could run counter to the express words of the statute was not clear.

These principles sufficed for the interpretation of statutes during the seventeenth century. But the Revolution of 1688 put an end to the idea that the King's will was the deciding factor in the government of the country. Thereafter the doctrine of the separation of powers came into vogue, and it became the judge's function to counterbalance the legislature. Instead of enforcing his master's will on the people, he now stood between Parliament and the people. But the laws made by Parliament still had to be enforced, and the judges were bound, whenever the necessity arose, to find out the meaning of those laws. They at first met this new situation by developing various presumptions, such as that against the ouster of the jurisdiction of the courts. But as time went on, some wider statement of principle was needed. Then there arose, at the beginning of the nineteenth century, the remaining two guides to the interpretation of statutes—the literal rule and the golden rule. The literal rule declares that the literal or ordinary meaning of the words used must be followed, whatever the result;[6] the golden rule starts from the same premise, but allows the judge to depart from the literal meaning of the words to the extent necessary to avoid absurdity or inconsistency, but no farther.[7]

At the present time, the judge who has to construe a statute has several courses open to him. He may be able to apply one of the well-known canons of construction—*noscitur a sociis*, *expressio unius est exclusio alterius*, and so on. These canons are in reality no more than

4. See, for example, *Eyston* v. *Studd* (1574), 2 Plowd. 459, 464 *ff.*, 75 E.R. 688, 694 *ff.*
5. (1584), 3 Co. Rep. 7a, 7b, 76 E.R. 637, 638.
6. *Abley* v. *Dale* (1851), 11 C.B. 378, 391, 138 E.R. 519, 525.
7. *Grey* v. *Pearson* (1857), 6 H.L.C. 61, 106, 10 E.R. 1216, 1234.

a shorthand way of stating the ordinary use of the English language; they serve to decide many of the cases which come before the courts, but their utility is limited. If they do not suffice to solve the problem, the judge may resort to one of the presumptions. These are also of limited utility; as their name suggests, they are of presumptive force only. The reasoning is, " Parliament has not in the past legislated so as to oust the jurisdiction of the courts, and we may assume that on this occasion Parliament has not departed from its usual habits." The invasion by Parliament of many new fields of legislation during the last century has falsified the basic premise of almost every presumption.

But in any event the presumptions are somewhat vague, and they do not cover all the cases which may arise. When they do not serve as a guide, the courts are thrown back to the three great principles—the rule in *Heydon's Case*, the literal rule, and the golden rule. In recent times, the golden rule has been in less favour than it was in the nineteenth century, and the choice to-day is usually between the literal rule and the rule in *Heydon's Case*. Quite clearly, there must be a choice, for the two rules are in many cases incompatible. It is by no means rare to find that the literal sense of the words used leads to a result quite different from that which Parliament may be thought to have intended. An excellent example is furnished by the decision of the House of Lords in *Langford Property Co. Ltd.* v. *Batten*[8]. The House there had to construe sec. 3 (3) of the Rent and Mortgage Interest Restrictions Act, 1939, and in so doing followed the literal wording of the sub-section. The leading speeches were delivered by Lords Porter and Radcliffe. Each of them mentioned that he had been worried by the fear that his interpretation of the statute might deprive tenants of the protection which Parliament had intended to give them, but had eventually come to the conclusion (somewhat optimistically, it may be added) that this consequence would not follow. Lord Goddard, who was clearly influenced by the rule in *Heydon's Case*, uttered a short but vigorous dissent, as follows:—

> " My Lords, in my opinion the construction placed by the Court of Appeal on sub-s. 3 of s. 3 of the Act of 1939 was right. Indeed, I think this is the very class of transaction which the sub-section was intended to deal with and prevent, that is to say, one in which a landlord obliges a prospective tenant of a dwelling-house, hitherto subject to a controlled rent, to take with it something for which he has neither use nor desire, the object being to extricate the house from the operation of the Acts. But as the rest of your Lordships are of a different opinion it would serve no useful purpose to burden the Law Reports, already congested with decisions on these difficult and obscurely worded Acts, by expressing my dissent at length, and I accordingly say no more than that I would dismiss the appeal."[9]

8. [1951] A.C. 223.

9. *Ibid.*, at 235.

A few years earlier, the House had been faced with a similar problem in *Hickman* v. *Peacey*.[10] But the choice went the other way. By a narrow majority of three to two, the House decided to follow the line indicated by *Heydon's Case*, and to carry out the presumed intent of Parliament, although a strictly literal reading of the words of the statute involved (sec. 184 of the Law of Property Act, 1925) might have led to a different result. Of the nine judges who heard the arguments in this case—one at first instance, three in the Court of Appeal, and five in the House of Lords—five were in favour of the construction eventually adopted, the remaining four in favour of a literal construction. It is of interest to note that Goddard L.J., as he then was, had preferred the literal construction in the Court of Appeal. In the House of Lords, Lord Simonds was with the majority, though some six years later he stated very strongly his view that the duty of the court is to interpret the words that the legislature had used, and that the general proposition that it is the duty of the court to find out the intention of Parliament cannot by any means be supported.[11] In the case in which Lord Simonds uttered this recantation, Lord Radcliffe dissented, though in the earlier *Langford Property Case*, he had opted with the majority for a literal interpretation.[12]

These inconsistencies and fluctuations of opinion may be paralleled in every volume of the Law Reports. They may, it is suggested, be accounted for on the assumption that in each case the judge is anxious, on the one hand to do justice as he sees it in the instant case, and on the other not to legislate under colour of "interpreting" the statute. According as the one desire or the other is the stronger, he will follow the principle of *Heydon's Case* or adopt a literal construction. Even though he is still construing the same section, his opinion may from time to time fluctuate as he takes a different view of the facts of the case before him. One of the best-known examples of this is to be found in the changing opinions of Lord Blackburn on the construction of Sec. 74 of the Harbours, Docks and Piers Clauses Act, 1847. This great lawyer changed his opinion no fewer than four times, and finally came down in favour of a generous construction in a speech which, it has been said, reads like the writhing of a soul in torment.[13]

It is, however, of little value to the practising lawyer to know that the judges are pulled in opposite directions. What he wants to know, when he advises his client, is what the court will decide in this particular case, if it ever comes to court. But this is just what he cannot know, unless he has the good fortune to find a square holding of the House of

10. [1945] A.C. 304.
11. *Magor and St. Mellons R.D.C.* v. *Newport Corpn.*, [1952] A.C. 189.
12. For a full report of his speech see [1951] 2 The Times L.R. 943-5.
13. Allen, *Law in the Making* (4th ed., 1946), 417, referring to *Dennis* v. *Tovell* (1872), L.R. 8 Q.B. 10, and *River Wear Commissioners* v. *Adamson* (1877), 2 App. Cas. 743.

Lords on the meaning of the very provision which he now has to apply. And even then, he cannot be certain that a new set of facts will not lead the House to distinguish the earlier decision.

It would seem, then, that a new approach to the problems of statutory interpretation is urgently needed. It is arguable that this approach might be made by the courts themselves, and that no principle of interpretation has as yet achieved the status of being the *ratio decidendi* of a superior court. But even if legislation be needed before a fresh start can be made, the lines on which that legislation should proceed will have to be formulated, and to gain the acceptance of the legal profession, if they are to be accepted by Parliaments. It is for this reason that it is now proposed to examine the theory of statutory interpretation from first principles, and to harmonise that theory, if possible, with the theory of legal interpretation in general.

II

The starting-point of a rational theory of legal interpretation is a realisation of the fact that words are symbols, used to indicate a relationship between the thoughts of persons and the objects, facts, and situations of the external world. The speaker in using words indicates his thoughts regarding those objects, facts, and situations, and endeavours by means of the symbols to produce a similar relationship between the thoughts of his hearer and those same objects, facts, and situations. In short, words have no meaning in themselves; their "meaning" is what they symbolise, and this may vary from person to person. A particular word will symbolise one thing to A and another (and completely different) thing to B.

The fact that words are merely symbols is no recent discovery. Its practical effects were clearly expounded in the seventeenth century by the philosopher John Locke.[14] But Locke's work was for long neglected, and only in comparatively recent years has the peculiar nature of words, and the results of that nature, been explored. This has given rise to a study known as semantics. In recent years, short expositions of the main views of the semanticists, and the bearing of those views on legal problems, have appeared in a number of legal journals.[15]

One of the best-known studies of the nature of meaning is that by C. K. Ogden and I. A. Richards, in a book entitled *The Meaning of Meaning*.[16] In this book the authors make an extensive study of the bearings of the different possible meanings of words in relation to different disciplines, such as philosophy, psychology, and aesthetics.

14. *An Essay on Human Understanding*, Book III.
15. For example, Chafee, *The Disorderly Conduct of Words* (1941) Colum. L. Rev. 41: 381-404; Williams, *Language and the Law* (1945) Law Q. Rev. 61: 71-86, 179-195, 293-303, 384-406, and (1946) Law Q. Rev. 62: 387-406.
16. First published in 1923 and now in its sixth edition; references to this work are taken from the second edition (1927).

They list some sixteen different definitions of the "meaning" of a symbol (word), of which the last four are of interest to the lawyer. These define meaning as:—

> "(1) That to which the User of a Symbol actually refers.
> (2) That to which the user of a symbol Ought to be referring.
> (3) That to which the user of a symbol Believes himself to be referring.
> (4) That to which the Interpreter of a symbol (*a*) refers, (*b*) Believes himself to be referring, (*c*) Believes the User to be referring."[17]

The conflict between (1) and (3) is only too familiar to lawyers, especially in will cases; *Perrin* v. *Morgan*[18] provides an excellent example. The so-called plain or literal meaning of a word is the meaning assigned by (2), and is often imposed by the courts on the parties to a contract, who have respectively taken definitions (1) and (4) (*a*) or (4) (*c*) as their criteria and thereby produced a conflict.

Insofar as the literal rule of interpretation implies that words can have only one "proper" meaning, it is clearly based on a fallacy. The rule is the result partly of an earlier formalism in the law, and partly of the political changes which have already been outlined. Taken strictly, it is an insuperable obstacle to a proper theory of interpretation. Probably most of the judges who follow it to-day do not wish to imply that words have only one meaning, but merely use it to express the fact that they are adopting a particular standard of interpretation. The cause of legal interpretation would, however, be better served if they were to make this idea explicit.

Although much has been written on particular aspects and canons of interpretation, comparatively scant attention has been paid to the basic theory. The present writer knows of only two attempts to state a general theory of interpretation which could be applied to all legal writings, of whatever nature. These are by Hawkins[19] and Wigmore[20] respectively. It is submitted that neither of these attempts has received the attention which it deserves, although Wigmore's views were to some extent adopted in the American Law Institute's *Restatement of the Law of Contract*.[21] A brief outline of the two theories is therefore worthy of inclusion here.

Hawkins begins his paper by stressing the difference between the art of interpretation and the science of interpretation. The former collects and furnishes the practical rules and maxims for performing the

17. *Op. cit.* 187. The peculiar usage of capitals is that of the authors.
18. [1943] A.C. 399.
19. *On the Principles of Legal Interpretation, with Reference Especially to the Interpretation of Wills*, (1860) 2 Jurid. Soc. Pap. 298; reprinted in Thayer, *A Preliminary Treatise on Evidence*, App. C.
20. *A Treatise on the Anglo-American System of Evidence in Trials at Common Law* (3rd ed., 1940), Vol. 9, secs. 2458-2478.
21. Secs. 226-236.

task of interpretation in concrete cases. The latter analyses the nature of the process of interpretation, and attempts to discover the principles on which it rests and which ought to regulate the proceedings of the art. Hawkins then sketches the main principles of the science, as he conceives it. Broadly, he suggests that the interpreter of a legal writing has to perform two duties. He must discover the writer's intent and ideas from the language which he has used; and he must also see that that intent and those ideas have been expressed in such a way as to give them legal effect and validity. These two duties often pull in different directions, and the task of the interpreter is to balance the pulls by adopting a middle course.

Most of Hawkins' paper is taken up by first explaining the symbolic nature of words and showing that the so-called literal rule of interpretation is based on a fallacy. Having established that the main task of the interpreter is to discover the writer's intent, he then devotes the remainder of his paper to classifying and analysing the various sources from which that intent might be inferred. He concludes his analysis of the science by demonstrating that in certain cases the intent of the writer has to be disregarded because it has not been expressed in the manner required by law. Thus an intent which has not been expressed in writing and executed with due formality must be disregarded in construing a will, for the Wills Act requires that these formalities be observed.

Hawkins' analysis, though extremely valuable, was directed mainly to the problem of interpreting wills, although he did not expressly so limit it. But he disregarded those transactions in which the intent of more than one party may have to be considered. It is in this respect that Wigmore's analysis is of far greater value.

Wigmore begins by rejecting the traditional terms "intention" and "meaning." He points out that the term "intention" is ambiguous; it may refer either to what the party wished but failed to say, or to the associations which that party had in mind when he chose his particular words. Since the law can attach no importance to wishes which have not been expressed, but have remained hidden in the mind of a party, "intention" in the former sense must be disregarded; but "intention" in the latter sense is the proper object (within limits) of the court's search. Instead of "intention" and "meaning," Wigmore prefers to use the terms "will" or "volition" (of a party) and "sense" (of the words used).

Having thus established that the process of interpretation consists of finding the sense in which the words were used (*i.e.*, of associating those words correctly with the objects, facts, and situations of the external world), Wigmore shows that two distinct enquiries are here involved, as a rule. The first of these asks: what standard is to be adopted in interpreting the document? When this has been satisfactorily answered, the second enquiry is: from what sources are we to find the senses of words in accordance with that standard?

What Wigmore terms the "standard of interpretation" is a most useful concept. He defines it as the association between words and objects, considered with reference to the persons fixing that association. There are, broadly, four possible standards of interpretation which may be used in deciding the sense or meaning of a particular word or phrase. These are (*a*) the popular standard, or standard adopted by the community at large, (*b*) the local standard, which is adopted by members of a particular locality or trade, (*c*) the mutual standard, which is that adopted by the particular parties to the transaction in which the word is used, and (*d*) the individual standard, which is adopted by a given individual using the word. In interpreting a contract, for example, we use the popular standard if we give the words used the meaning which would be attributed to them by an ordinary member of the community using the language in question. We use the local standard if we think that certain words were used in a sense peculiar to people engaging in a particular trade or living in a particular locality. We may disregard both of these standards, and give the words a sense which is peculiar to the parties to the transaction; we are then using the mutual standard. Finally, if we disregard all these and decide to adopt the sense attached to the words by one party only, we are using the individual standard.

No one of these standards is to be used exclusively of the others. The interpreter of a writing should use that standard which is appropriate to the particular case; most commonly this will be the popular standard, because that standard is the one which has most probably been adopted by the authors of the writing. But if the circumstances lead us to the conclusion that some other standard has been adopted by the authors, then we must use that standard. It is at this point that the futility of the literal rule of interpretation appears, for that rule insists that the popular standard must alone be used for interpreting a writing, regardless of any enquiry whether it was the standard in fact used in making the writing. The law, however, cannot properly make such a requirement.

But if the law prescribes no standard for the interpreter's use, how is he to decide what standard to adopt? He has three guides. Firstly, he will provisionally adopt the widest standard, until he has been persuaded that it is not the correct one. Thus he will first consider the popular standard. When he is persuaded that the popular standard was not the one actually used, he will next consider the local standard; next the mutual standard, and finally (and then only in certain cases) the individual standard. This guide may be justified on grounds of probability.

The second guide is that no person taking part in a legal transaction can insist on the use by the interpreter of a standard which is not at least common to all the parties to the transaction. This is a requirement of common fairness, and indeed necessary if transactions are to have

legal validity and be capable of interpretation and enforcement. In effect, this guide rules out the individual standard except in interpreting a legal transaction by one party only, *i.e.*, a will or codicil.

In transactions involving more than one party, the situation may still arise that in fact the different parties have attached different meanings to the words used. Here the third guide comes into play. The interpreter looks at the surrounding circumstances, and adopts that standard which a reasonable person would have believed to be the standard used. For example, if the word "beerhouse" is used in a lease by a brewer to a publican, it is reasonable to conclude that that word should be interpreted according to the local standard—in this case, the standard adopted by the liquor trade. But if the same word is used in a lease between two persons who are not in the trade, it will be reasonable to interpret it according to the popular standard. If one of the parties is in the trade and the other not, the interpreter must decide whether a reasonable man would in the circumstances have thought that the popular or the local standard was being used.

Having decided on the standard to be adopted in interpreting a particular word or phrase, where does the interpreter find the meaning of the word or phrase according to that standard? What sources should he consult? This is the second enquiry which is needed in the process of interpretation.

In ascertaining the tenor of particular words according to the popular standard, no great difficulty arises. The interpreter would normally himself know the usage according to that standard. In case of doubt, he can refer to dictionaries and similar guides, which set out this usage. If the local standard is to be used, evidence can be taken from persons working in the trade or living in the locality. A mutual standard may be sought in other sources—the recitals in the document, the interpretation clauses included in it, and the usage of the parties under the document hitherto. An individual standard may be sought from the widest sources, including all the other transactions of the person concerned, which may well reveal that he has been accustomed to use a particular word or phrase in a way peculiar to himself.

But one point of interest arises here. In ascertaining a mutual or individual standard, how far are we entitled to consult sources which declare the will or intention of the persons concerned regarding the matter which has been embodied in the writing? If, for instance, we are construing a word in a will, are we entitled to look at the instructions given by the testator to the draftsman, or the testator's declarations that he intended to make a certain disposition, or that he had made it? It is well known that, generally speaking, we are not. This rule of law arises from the interplay of the process of interpretation with another and quite different rule of law, which we must now notice.

It is well settled that where parties to a legal transaction have embodied the transaction in a single document, the prior negotiations

are superseded by the document and become legally ineffective.[22] If the document has been incorrectly drawn up, the parties may be able to get it rectified by the court; when rectified, it will harmonise with their declared wishes and can be enforced. But in interpreting the document, rectified or untouched, the court must refuse to look at the negotiations; the parties have agreed that the document shall supersede the negotiations, and they are not permitted to blow hot and cold. The application of this rule is a constant feature of legal interpretation. The rule itself is often loosely summed up by saying that parole evidence must not be admitted to contradict or vary the terms of a written document.

There can be little doubt that the declarations of the writer are extremely valuable as a guide to the sense of the words which he used in his writing. But if they are freely received by the courts, there is always the danger that the terms of the written document may be overridden by them. In order, therefore, to protect the rule that the terms of the document alone govern the transaction, these declarations are excluded by the court from consideration in ascertaining the meaning of those terms. To this general principle, there are certain well-known exceptions, all of them cases where the terms of the document cannot be interpreted and enforced as they stand, so that the use of the writer's declarations of intention cannot be said to be overriding the written words. Thus, a testator's instructions to the draftsman of his will can be considered when the terms of the will are equivocal (*i.e.*, in cases of what Bacon termed latent ambiguity), when there is doubt whether some artificial presumption of law (such as the presumption of advancement) is to be applied to the provisions of the will, and perhaps in cases where the will contains an erroneous description which cannot be applied as it stands.[23] The same general principles would apply to the use of express declarations of the parties' wishes where the court is applying a mutual standard of interpretation, though examples of a mutual declaration of intention are not commonly found.

Wigmore completes his analysis of the interpretative process by pointing out that the canons of construction, being merely ways of summing-up the normal usage of the English language, are valuable when the popular standard of interpretation is being applied, but not otherwise. He adds that his analysis applies to statutes, which he calls "acts of expression by a legislative body." Beyond this remark, he does not consider the problems of statutory interpretation.

III

It would seem that Wigmore's analysis of the science of interpreting legal documents is valid, and it quite clearly accords with the results of the decided cases, except where the court has decided blindly to follow

22. *Angell* v. *Duke* (1875), 32 L.T. 320.
23. As in *Re Offner* [1909] 1 Ch. 60; but *cf. Charter* v. *Charter* (1874), L.R. 7 H.L. 364.

the literal rule of interpretation. It remains, therefore, to consider the bearing of this analysis on the problems of interpreting statutes.

We may begin by assuming that the analysis should apply to statutes as much as to other legal writings. It is true that there might well be a separate science of statutory interpretation, which would rest on different principles. But no one has as yet suggested that we should endeavour to devise a new and separate science for this task. The lawyer may here be content to follow the philosophical maxim known as Occam's razor, which requires that new concepts should not be introduced unless found to be necessary. It is submitted that there is no reason for treating the interpretation of statutes as demanding principles different from those employed in interpreting other legal writings, and that the existing principles will guide us to a satisfactory solution of the special problems which statutes present to the courts.

It is clear that one assumption has remained unchanged throughout the history of the law on this matter—namely, that the task of the court is to find out the intent of the legislator. Even those judges who insist on the literal rule do not deny this assumption, though they add that the intent must be sought within the four corners of the statute itself. If, however, the assumption is correct, then it must surely be conceded that in endeavouring to find out the intent or meaning of the legislator, the courts deliberately neglect one of the most valuable sources. For although there is no precedent *compelling* them to do so, the courts generally refuse to consider what was said during the debates in Parliament, while the statute was being enacted. This attitude may be traced back to a dictum of Willes J. in the case of *Millar* v. *Taylor*.[24] By contrast, in the Federal courts of the United States, free use is made of the Congressional debates, though this practice is of comparatively recent origin and has been much criticised.

What justification can there be for this refusal to consult the Parliamentary debates in case of doubt? The courts, in construing a statute by reference to the intent of the legislature, are in a position similar to that which they adopt when construing a will. They are seeking the tenor of an individual standard of interpretation—in the case of a will, that of the testator; in the case of a statute, that of Parliament.

But Parliament can legislate only according to a set form. Its wishes must be expressed in a formal manner, by statute passed with due formality; if it does not express them in this way, the law can take no account of them.[25] It follows that the courts must guard against giving the force of a statute to the wishes of Parliament (as shown by the Parliamentary debates), when Parliament has failed to express them in due form. If, in saying that the intention of Parliament is no concern

24. (1769) 4 Burr. 2302, 2332, 98 E.R. 201, 217.
25. *Stockdale* v. *Hansard* (1839), 9 Ad. & El. 1, 112 E.R. 1112. Of course, a statute may itself empower either or both Houses to change the law by simple resolution.

of the courts (except in so far as it is to be found within the four corners of a statute), the judges are merely asserting this principle, they are correct. But as we have seen, the word " intention " is ambiguous, and it is to be feared that the judges often mean that they are not concerned with the *sense* which Parliament attached to the words it used in the statute. This is, on the basis of our assumption, clearly wrong. In either case, an outright refusal to consider the Parliamentary Debates appears to be unjustified. There is no need to shut out this valuable source of information merely in order to avoid an obvious danger; in construing wills, the courts resort to the declarations of the testator in certain circumstances, and by analogy they might resort to the Parliamentary debates to resolve certain types of interpretative problems.

But is the basic assumption, that the duty of the courts is to find out the sense which Parliament attached to the words it used, correct ? It may be argued, with some justification, that the courts would be searching for what does not exist. Parliament is a composite body, consisting of a large number of individuals. Is it probable or possible that all those individuals attached the same sense to the words of each Bill which they considered ?

Moreover, to consider only the sense which Parliament attached to words of a statute is surely incompatible with modern ideas as to the proper bounds of democratic government. If we think of a legislator as an absolute despot, whose slightest whim must be obeyed on pain of punishment, then it behoves us to find out what is his will at all costs. In an earlier age, when the King's will, as expressed in a statute, was almost akin to that of an absolute despot, the judges were correct in assuming that the object of their search was the meaning of the legislator. To-day, we do not concede absolute powers to Parliament in practice, even though we may concede them in theory.[26]

Let us return for a moment to the theory of legal interpretation as applied to writings other than statutes. We have seen that the individual standard is used only in interpreting a unilateral document, *i.e.*, a document containing a transaction affecting one party only. It is significant that in expounding his analysis, Wigmore states that the will is the typical and almost the only instance of such a transaction.[27] Yet there are many other documents which at first blush might appear to merit a classification as unilateral—powers of attorney, for example. Is there any reason why these should not be interpreted according to the usage of the person who makes them ?

There is, it is submitted, a very good reason. A will is an expression of the testator's bounty, and nothing more than this. It is therefore reasonable that those who claim to be the objects of that bounty should

26. Subject, of course, to the requirements of written constitutions, where these are in force.
27. *Op. cit.*, sec. 2467.

establish their claim beyond doubt, and should be required to read the will in accordance with his usage of language. But a power of attorney stands on quite a different footing. It does not express the bounty of its maker; it may be used for the conferring of gifts on others, but it may also be used for the purpose of placing others under legal obligations to the maker. It may be said to be unilateral in form, but multilateral in operation. And since the judge, in interpreting a document, is seeking to ascertain what it means in operation, he must treat it as multilateral, and disregard the individual standard of the maker. For, as we have seen, where there is more than one party to a transaction, no one party can insist on the adoption of his individual standard; the standard of interpretation must be common to all parties involved. Hence in construing a power of attorney, it will usually be proper to adopt the popular standard, for the range of persons who may, on the faith of it, come into legal relations with the maker is almost unlimited.

This gives us a clue to the interpretation of statutes. If we assume that Parliament may be regarded as a single legislator (despite its composite nature), then a statute is certainly unilateral in form. But it is intended to affect the legal rights and duties of all, or a large part of, the citizens of the country concerned. Hence it is multilateral in operation, and the interpreter, who has to deal with it in operation, must treat it as a multilateral transaction. The individual standard of interpretation (the sense attached to the words used by Parliament itself) must be disregarded, and some other standard adopted. In fact, this will usually be the popular standard, though where a statute is designed to affect only individuals in a certain locality or trade, the local standard may be used. In either case, reference to Parliamentary debates is barred, because these only go to show the individual standard of Parliament.

We may then summarise the results of this discussion as follows. The duty of the court in interpreting a statute is to find out the sense of the words and phrases used. In so doing it must choose between the various competing senses which may be attached to those words and phrases. Its choice should be that sense which in its opinion would be attached to them by an ordinary reasonable citizen of the class of citizens affected by the statute.[28].

How does this affect our current doctrines of statutory interpretation? The rule in *Heydon's Case* runs counter to it, for it requires the adoption of a quite different principle; it is, as we have seen, a survival from a bygone age in which a very different theory of government prevailed. The literal rule must also go, at any rate as it is commonly used. For the ordinary citizen does not attribute absurdities and inconsistencies to the enactments of Parliament. It would seem that the golden rule is

28. This principle is similar to one recently advanced by Curtis; see his article *A Better Theory of Legal Interpretation*, in (1950) Vand. L. Rev. 3: 407-437 Curtis reaches his position by a different route, and adds certain qualification which are not here adopted.

perhaps the nearest of the current doctrines to that which is here advocated, though it is by no means identical.

The canons of construction, which are only guides to the usage of language, should continue to be used. They must, however, be treated as no more than guides, and discarded whenever they seem likely to lead to a wrong result. The presumptions, on the other hand, must be discarded. The ordinary citizen knows nothing of them, and we must not attribute to him knowledge which he does not in fact possess. If there is anything of value in the presumptions, then it should be given statutory force.

Above all, statutes must be read by the courts in a broad fashion, and as a whole. For that is the way in which the ordinary citizen would read them. It is wrong to concentrate on particular phrases and words, and interpret them with apparent disregard of the wider context in which they occur. It is even more wrong to attach an unusual sense to a particular word picked out of the statute, using for the purpose an etymological derivation.[29] The ordinary citizen does not carry the Oxford English Dictionary around with him, nor, as a rule, does he possess it in his library.

In reading a statute according to our suggested principle, it is proper to take account of the knowledge which the ordinary citizen will probably possess of the circumstances which led to its enactment. Hence we may properly continue to resort to what is usually termed the Parliamentary history of the statute. Indeed, we *should* resort to it, for it would be wrong to treat the statute as if it had suddenly appeared on the Statute Book, *in vacuo*.

Where a government department responsible for the administration of a statute has issued for the use of the public an explanation of what the statute provides, the courts should consider this explanation and give it due weight. The ordinary citizen will have done this, and the courts must place themselves in his position as far as possible. And when a settled course of administrative practice has grown up in regard to a statute (as occurs, for example, with taxing acts) the courts should enforce the practice; it has the same role in the interpretation of statutes as has the user of the parties in the interpretation of contracts.

It is submitted that the approach outlined above will, if adopted, lead to a better and more just interpretation of statutes than has hitherto prevailed. Perfection will of course not be achieved, but there will probably be an improvement. Yet one great difficulty will remain. This has been stated in a well-known work as follows:—

29. As was done, for example, by Bigham J. in *Cannan* v. *Earl of Abingdon*, [1900] 2 Q.B. 66, 71. In deciding that a bicycle was a carriage with less than four wheels within the meaning of a special Act of 1767, the learned judge said: "A bicycle is a thing which carries. It may carry a man, as a horse does, or a carriage does; it may carry luggage or goods as we know that tradesmen's tricycles do. It is, therefore, in my opinion, a carriage."

"A fundamental misconception prevails, and pervades all the books as to the dealing of the courts with statutes. Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that a judge had to do with a statute, interpretation of statutes, instead of being one of the most difficult of a judge's duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present."[30]

It would seem that here the writer is using the word "intention" to represent the will of Parliament. But we have seen that the task of the interpreter is to discover what is the sense of the words used, not what is or might have been the will of the legislator when that will has not been expressed in proper form. In truth, at this point we encounter a quite different problem.

In interpreting a statute, the sole task of the court is to find out its sense or meaning, in relation to the facts of the instant case. This is the whole of the interpretative process. If the statute applies to the case, nothing further remains to be done. But if the statute is found not to apply, there may be a further question, whether the judge should deal with the case on the analogy of the statutory provisions. Many judges resolutely decline even to consider this, on the ground that they would be usurping the legislative function. Yet it is suggested that a careful examination of the cases on interpretation would reveal that there is a respectable body of authority favouring the use of statutory precedent in deciding cases, in the same way as we use judicial precedent.

This second question has nothing to do with the process of interpretation. It is a question as to the proper limits of the judicial function. At present, when there is great pressure on Parliamentary time, and the opportunities of obtaining a fresh statute to deal with a *casus omissus* are few, there is much to be said for recognising frankly that the courts are entitled to decide cases by reference to statutory precedent. But there is nothing to be said for doing this under the guise of interpreting a statute. The problems of statutory interpretation will not cease to vex us until we resolve to separate these two issues and to decide what attitude we shall adopt with regard to the second.

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30. Gray, *The Nature and Sources of the Law*, 172-3.

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