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The Rule Against the Use of Legislative History: "Canon of Construction or Counsel of Caution"?

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I. *Introduction*

The question whether the rule against the use of legislative history is a "canon of construction or counsel of caution"[1] is only one, but perhaps the least explored,[2] aspect of the general problem of admissibility of extrinsic evidence in the interpretation of written documents. This general problem, in turn, is only one, but perhaps the most important,[3] aspect of interpretation at large, which is a problem of general jurisprudence. In fact, jurisprudence itself has been defined as the art of interpreting laws.[4]

Interpretation or construction of a statute, as of any written document, is an exercise in the ascertainment of meaning. On principle, therefore, everything which is logically relevant should be admissible. Since a statute is an instrument of government

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[1] *Per* Bowen L. J. in *Re Jodrell* (1890), L.R. 44 Ch.D. 590, at p. 614.

[2] Lauterpacht, Some Observations on Preparatory Work in the Interpretation of Treaties (1935), 48 Harv. L. Rev. 549, at p. 558.

[3] Frankfurter, Some Reflections on the Reading of Statutes (1947), 47 Col. L. Rev. 527, at p. 529: "I should say that the troublesome phase of construction is the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink discernable to the judicial eye".

[4] Heineccius, Elementa Juris Civilis, s. 26.

that "comes out of the past and aims at the future",[5] and since its legislative history forms an important part of that past, the principle of relevance would seem to argue in favour of the admissibility of its history.

Not only principle but also the general and time-honoured rules of interpretation are on the side of admissibility. The more famous rules laid down in *Heydon's* case were merely Lord Coke's generalization of the rules formulated four hundred years ago by the Barons of the Exchequer in *Stradling* v. *Morgan*.[6] Their modern restatement is that of Turner L.J. in *Hawkins* v. *Gathercole:*

> in construing Acts of Parliament, the words which are used are not alone to be regarded. Regard must also be had to the intent and meaning of the legislature. . . . we have therefore to consider not merely the words of this Act of Parliament, but the intent of the legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extrinsic) circumstances, so far as they can justly be considered to throw light upon the subject.[7]

This may be called the "surrounding circumstances" rule, for it permits the circumstances surrounding the passing of a statute to be considered. Certainly as an abstract proposition one would classify legislative history as part of the surrounding circumstances.

How then explain the unanimity of the leading texts that "it is unquestionably a rule that what may be called the Parliamentary history of an enactment is not admissible to explain its meaning"?[8] This proposition is what we have called the "legislative history" rule. Since it conflicts with both common sense and the common law of statutory interpretation, we may be repaid by a look at some law and some history in order to determine its precise content and origin.

II. *Content of the Rule*

(a) *Surrounding circumstances not included in the rule*

What surrounding circumstances are clearly outside the ambit of the legislative history rule and therefore admissible? Certainly the existing law, including what parliament is doing contemporaneously, together with the history of legislation upon the subject,

[5] Frankfurter, *op. cit.*, p. 535.
[6] (1560), 1 Plowd. 199.
[7] (1855), 6 De G. M. & G. 1, 20, 22. This restatement has often been cited as authoritative: see *Viscountess Rhondda's Claim*, [1922] 2 A.C. 339, at pp. 369, 397.
[8] Maxwell, Interpretation of Statutes (7th ed.) p. 24. See also Craies on Statute Law (5th ed.) p. 121; Halsbury's Laws of England (2nd ed.) vol. 31, s. 621.

may be admitted.[9] Even certain types of general history are admissible. With respect to acts some centuries old, courts have resorted to historical works to ascertain ancient facts of a public nature.[10] Similarly with respect to local acts, local history has been called in aid.[11] With contemporary acts the mischief which occasioned them is often so notorious that the courts take, and in fact must take, judicial notice of it.[12] Not content with the past, the courts have even projected the notion of surrounding circumstances into the future so as to include facts occurring subsequent to the passing of statutes in order to determine their effect in actual practice.[13]

(b) *Reports of commissioners*

It is customary to say that commission reports are inadmissible.[14] If this statement is true at all, it is a dangerous half truth. A more honest statement would be that, although such reports may be inadmissible to establish legislative intent,[15] they are admissible to ascertain the surrounding circumstances.[16] But since facts relevant for one purpose but not for another may still be received for the former,[17] it follows that commission reports should be admissible.

We have assumed that the expression "legislative intent" has a well defined meaning, so that a judge would have little difficulty in distinguishing between the use of reports for the one purpose and for the other. But what is meant by "legislative intent"? Is it not fallacious to assume that the author of ambiguous words had any definite intention as to their meaning? If he was aware of the ambiguity, then surely the assumption should be that he was being deliberately ambiguous. If he was not aware of the ambi-

[9] Craies, *op. cit.*, p. 120; Halsbury, *op. cit.*, s. 621.

[10] *Read* v. *Bishop of London*, [1892] A.C. 644, at pp. 652, 653; see also *Powell* v. *Kempton*, [1899] A.C. 143, at p. 157.

[11] Craies, *op. cit.*, p. 121.

[12] *Lumsden* v. *I.R.C.*, [1914] A.C. 877, at p. 922.

[13] *Lower Mainland Dairy Products Board* v. *Turner's Dairy, Ltd.*, [1941] S.C.R. 573, at p. 583.

[14] Craies, *op. cit.*, p. 122; Halsbury, *op. cit.*, s. 621.

[15] *Assam Railways* v. *I.R.C.*, [1935] A.C. 445, at pp. 458, 459.

[16] For many cases in which commission reports have been used see: *Fellowes* v. *Clay*, [1843] 2 Q.B. 313, at p. 354; *Farley* v. *Bonham* (1861), 30 L.J. Ch. 239; *Symes* v. *Cuvillier* (1880), 5 App. Cas. 138, at p. 158; *Curran* v. *Treleaven*, [1891] 2 Q.B. 545, at p. 551; *Eastman Photographic Materials Co. Ltd.* v. *Comptroller-General of Patents*, [1898] A.C. 571, at p. 575; *Taff Vale* case, [1901] A.C. 426, at pp. 435, 438; *Att. Gen. B.C.* v. *Att. Gen. Can.*, [1937] A.C. 368, at p. 376; *Home Oil* v. *Att. Gen. B.C.*, [1940] S.C.R. 444, at p. 447; *Earl Fitzwilliam's Wentworth Estates Co. Ltd.* v. *Minister of Town & Country Planning*, [1951] 2 K.B. 284, at p. 310.

[17] Wigmore on Evidence (3rd ed.) vol. IX, s. 2461.

guity, then the assumption is patently ridiculous. But even if there could be "legislative intent" is it not metaphorical to posit it of such a heterogeneous body as a legislature?

If, then, there is no such thing as legislative intent, what do the judges mean when they talk about it? Do they not mean that they can not abdicate the hard thinking job involved in interpretation by simply plagiarizing a commission report. In so far as they mean this, they are laying down a rule of practical wisdom. The trouble lies in the verbal formula used by the courts. Their object, according to the formula, is to ascertain the intent of the statute. If, then, commission reports could be admitted to show intent, they would be bound to give them effect. This would, as suggested, result in substituting somebody else's interpretation for their own. To avoid this dilemma, they say that the reports are inadmissible to show intent. Recognizing, however, that the reports contain very valuable information, they often admit them as part of the surrounding circumstances to be given whatever weight they deserve.[18] In short, for practical purposes, commission reports must be classified as outside the scope of the legislative history rule.

(c) *Debates in Parliament*

When one thinks of legislative history, one thinks primarily of speeches in parliament. It comes as no surprise then to find the commonly accepted rule to be that "in construing an Act of Parliament, we cannot go into what was said in either House of Parliament before the Act was passed".[19] And it is therefore with considerable deference that we challenge its accuracy.

In the first place there are not infrequent aberrations (if such they truly are). One example will do. In *In re Mew*, Lord Chancellor Westbury, discussing the Bankruptcy Act of 1861, referred to:

> the speech of the member of the House of Commons who introduced the bill of 1860, and then the bill that afterwards became law in 1861, . . . and the complaints made of it both on the one ground and on the other, were fully brought before the attention of parliament. Now, I advert to these matters for the purpose of abiding by that rule of interpretation which was approved of by Lord Coke, . . . I do this for the purpose only

[18] *Eg.* in *Symes* v. *Cuvillier* (1880), 5 App. Cas. 138, at p. 158, the Privy Council, in referring to the report of the commissioners who had proposed the Quebec Civil Code, said: "This authority is no doubt entitled to respect; but the opinion of the commissioners has not the weight of a judicial opinion, pronounced after discussion and argument".

[19] *Reg.* v. *Whittaker*, 2 C. & K. 636 (1848 N.P.).

> of putting the interpreter of the law in the position in which the legislature itself was placed:[20]

In these cases no excuses were offered for the use of Hansard.

But even when lip service is paid to the strict rule, apparently counsel may waive it. When counsel are so obliging, it is admitted that:

> the discussions and compromises which attended the passing of the act . . . may legitimately serve as hints for suggesting a point of view from which when the provisions of the act are once regarded those provisions will of themselves appear to be harmonious and clear.[21]

Another curiosity, which makes one think that the rule is used in a rather Pickwickian sense, permits one to read from Hansard, adopting the passages read as one's own. This is illustrated in the answer to counsel who sought to read the speech of the legal member of the legislative council, Sir James Stephen, proposing the enactment whose construction was in issue. Ruling the speech inadmissible, the court added:

> Mr. Pugh can, of course, read any passages from Sir James Stephen's speech as a part of his address, and as stating his own argument in words which he adopts as his own, but he cannot cite them as Sir James Stephen's opinion and as authority showing the construction to be put upon the section.[22]

Still another exception to the rule appears in the now notorious *Wheat Board* case. The events leading up to the litigation commenced when the Wheat Board issued its instructions to the grain trade, which contained an outline of government policy on windfalls accruing to dealers as a result of the roll-back of prices. The outline carried on its face the admission that it had been announced in Parliament on March 17th, 1947. Turning to Hansard of that date we find that the outline is in fact a verbatim excerpt from the speech of the Minister of Agriculture. The trial judge admitted the outline subject to objection of government counsel as to its relevancy. He subsequently upheld the objection and, since he purported to decide the case without reference to the outline, he attempted to show that it could not have influenced him since it should not have been admitted:

> Speeches made in parliament may not be referred to in the interpretation of a statute, and it would seem the same principle should apply to the interpretation of an order-in-council made under a statute. The statement

[20] (1862), 31 L.J. Bkcy. 87, at pp. 88, 89. Subsequent Chancellors were no less ready to use debates: see *Hebbert* v. *Purchas* (1871), L.R. 3 P.C. 605, at p. 648, and *Ridsdale* v. *Clifton* (1877), 2 P.D. 276, at pp. 326, 327.

[21] *Per* Byles J. in *Shrewsbury* v. *Scott* (1859), 6 C.B. (N.S.) 1, 213.

[22] *Queen-Empress* v. *Bal Gangadhar Tilak* (1897), 22 Ind. L. R. (Bomb.) 112, at pp. 126, 128.

> of government policy must have been made in the course of a speech in parliament: the 'outline' is at most a synopsis of it. In my opinion the 'outline' is not relevant or admissible and must be disregarded. The authorities down to 1939 are collected by Dean Vincent MacDonald in an article in (1939) 17 Can. Bar Review, p. 76, 'Constitutional Interpretation and Extrinsic Evidence'. I have found this article most helpful and I refer also to his recent article in (1948) 26 Can. Bar Review, 21, 'The Constitution in a Changing World'.[23]

It is interesting to notice how the judge relies upon one class of extra judicial authority (legal periodicals) and excludes another (declarations in parliament) without bothering to distinguish the two.

The report of the judgments in the Court of Appeal indicates that the point was argued rather strenuously. However, the only overt recognition the matter received was from Adamson J.A., who without citing any authority simply remarked that:

> This [outline] was objected to as being a statement in parliament and for that reason inadmissible as evidence. The fact that it was a statement made in parliament does not make it inadmissible. It was part of the order of the Canadian Wheat Board and, as such, is evidence against the board and against others who seek to rely on the order of the board, of which it was a part.

The frequent references to the outline by other judges in the upper courts indicate that they were of the same opinion. The conclusion seems to be that the trial judge was overruled and that speeches made in parliament are admissible so long as they have been published by a government agency which has adopted them as an expression of its official policy.

Further evidence of the collapse of the rule excluding debates is to be found where, as in England, judges may participate in the legislative process. What are the judges to do when called upon in their judicial capacity to interpret statutes which in their legislative capacity they or other judges have helped to create? Perhaps the best known instance occurred in *Queen* v. *Bishop of Oxford,* where counsel was permitted to read certain passages from the speech of Lord Cairns upon the third reading in the House of Lords of the act in question. Bramwell L.J. thought this was justified:

> I really do not know that there is any definite rule as to what may or may not be cited and acted on as authority. No doubt we must act on general principles, and I suppose they would exclude what is said in debate in either House of Parliament. But to reject the opinion of the head of the law as to what is the law given to advise the highest court of

[23] [1948] 2 D.L.R. 726, 765.
[24] [1949] 2 D.L.R. 537, at p. 556.

> judicature in the country sitting indeed in its legislative capacity, and at the same time admit the obiter dictum of a judge at nisi prius either in our own or an American court seems somewhat strange, more especially as it is certain that if it ought to be excluded, any judge knowing of it and excluding it, would as soon as he left the court consult the Hansard he had before rejected.[25]

When the case reached the House of Lords, *sub nom. Julius* v. *Bishop of Oxford,* the report[26] indicates that in the course of argument strong disapprobation was expressed by Lord Chancellor Cairns and Lord Selborne of the course taken by the Court of Appeal in allowing the speech to be cited as an authority. Since the order of the court below was affirmed, however, and Lord Cairns did not, like Lord Halsbury after him,[27] refrain from writing a judgment on the ground that he had participated in the passing of the Act being construed and the point was not mentioned in any of the judgments, the strength of the reporter's note seems greatly diminished.

Another and even more pedantic instance of the stress placed upon the rule when the judges participate in legislative activity arose in *Viscountess Rhondda's Claim.*[28] The question was whether the Act enfranchising women had thereby entitled a peeress to sit in the House of Lords. It came before the Committee for Privileges of the House of Lords, consisting of ten law and fourteen lay lords. Counsel proposed to introduce in evidence an entry in the Lords' Journals recording speeches in the Lords at the time the Act was passed, but Lord Chancellor Birkenhead suggested he postpone argument on the point. Although it was apparently unnecessary to return to the question, and in fact the evidence was never introduced, most of the judges dealt with the point.

Regretting that the debates were not admitted because he was thereby "debarred from the entertainment of speculating upon the grounds which have disabled a noble and learned friend of mine from discovering in his legislative capacity that which he so plainly discerns when he applies his judicial self to the same subject matter",[29] Lord Birkenhead nevertheless made it plain that he was "wholly unconvinced by any argument hitherto brought forward that a Committee of this House, . . . can or ought to be precluded from a reference to the Journal of this House in order to inform its mind upon any circumstances in the parliamentary history of that which is under investigation".[30]

[25] (1879), 48 L.J.Q.B. 609, at p. 640.
[26] (1880), 49 L.J.Q.B. 577, at p. 578.
[27] *Infra,* p. 776.
[28] [1922] 2 A.C. 339.
[29] *Ibid.,* p. 349.
[30] *Ibid.,* p. 349.

Of the ten law lords, four favoured the Lord Chancellor's views, two expressed no opinion, and three dissented. The split in the court was amusingly commented upon by one of the lay members:

> Noble and learned Lords were naturally sensitive on this subject, . . . it involves, I venture to say, a reductio ad absurdum, and is absolutely futile, to tell the very peers who passed the Act a short time ago that their declared intention and the construction on which they proceeded is not to weigh with them. . . . If we lay peers had to rely on the legal advice of our judicial colleagues, we should be in no slight perplexity.[31]

In view of the many exceptions to the ordinary rule excluding parliamentary debates, should the rule be scrapped? It may be that the truth of the matter was expressed by Lord Maugham L.C. when he said:

> It must be remembered that the object or purpose of the Act, in so far as it does not plainly appear from its terms and its probable effect, is that of an incorporeal entity, namely the Legislature, and generally speaking the speeches of individuals would have little evidential weight.[32]

This would mean that the question is one of weight rather than admissibility.

(d) *Judges as draftsmen*

When a judge has to construe a statute for the drafting of which he was responsible, the conflict between legislator and judge just noted becomes heightened. To reject his inner knowledge (which must mean to be uninfluenced by it) is virtually a psychological impossibility.[33] To admit it is to contradict the legislative history rule. It is not surprising therefore that judges have had trouble with the problem.

Lord Halsbury deliberately refrained from writing a judgment in a case involving the Companies Act on the ground that he was largely responsible for its drafting, "for in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed."[34] This example of judicial restraint would have been more convincing had the Lord Chancellor not

[31] *Ibid.*, p. 403.
[32] *Reference re Alberta Bills*, [1938] 4 D.L.R. 433, at p. 439.
[33] Witness the struggle of Lord Westbury in *In re Mew* (1862), 31 L.J. Bkcy. 87, at p. 89: "I have endeavoured, so far as it is possible for one who wrote the words and knew the meaning he intended to convey, to divest my mind of all impressions received from the past, and to consider the language as if it were now presented to me for the first time".
[34] *Hilder* v. *Dexter*, [1902] A.C. 474, at p. 477.

concurred in the construction arrived at by the other judges in the belief that it was "the intention of the statute. I do not say my intention, but the intention of the Legislature."[35]

Lord Halsbury's stricture is not always observed however.[36] For instance, when Turner L.J. was confronted with the question whether a particular statute warranted an order which had been drafted by a committee of judges of which he had been one, he freely drew upon his personal knowledge:

> It is within my personal recollection, that in the course of the many discussions which were held . . . the question whether the statute warranted the making of the 33rd Order was fully considered, and it was thought by the committee that it did.[37]

It is interesting to remember that Turner L.J. was the proponent of the "surrounding circumstances" rule in *Hawkins* v. *Gathercole*.

Perhaps the only honest conclusion is to admit that where a judge has participated in the drafting of a statute he himself becomes part of its legislative history and must therefore refuse to hear a case involving its interpretation if he wants to obey the rule. Since no judge has taken this drastic step, we must classify the judge-draftsman as part of the admissible surrounding circumstances.

(e) *Amendments in committee*

The first recorded formulation of the prohibition against legislative history[38] involved the extent to which changes during the passage of a bill bear upon its subsequent construction. In 1769 Willes J. in *Millar* v. *Taylor* said:

> The sense and meaning of an Act of Parliament must be collected from what it says when passed into a law; and not from the history of changes it underwent in the house where it took its rise. That history is not known to the other house, or to the Sovereign.[39]

Because of the reliance placed upon this generalization by subsequent generations of judges, it is interesting to observe that it was ignored both by Willes J. himself and by those of his brethren who delivered opinions in *Millar* v. *Taylor*. On the same page of the report Willes J. blithely remarked:

> But to go into the history of the changes the bill underwent in the House of Commons. It certainly went to the committee, as a bill to secure the

[35] *Ibid.*, p. 477.

[36] See Lord Nottingham in *Ash* v. *Abdy* (1678), 3 Swans. 664; Lord Westbury in *In re Mew* (1862), 31 L.J. Bkcy. 87, at p. 89; Lord Cairns in *Julius* v. *Bishop of Oxford* (1880), 49 L.J.Q.B. 577.

[37] *Drummond* v. *Drummond* (1866), 36 L.J. Ch. 153, at p. 160.

[38] Plucknett, A Concise History of the Common Law (4th ed.) p. 318.

[39] 4 Burr. 2303, at p. 2332.

> undoubted property of copies for ever. It is plain, that objections arose in the committee, to the generality of the proposition; which ended in securing the property of copies for a term; . . .

Of a piece with this was the contribution of Aston J.:

> This act was brought in at the solicitation of authors, booksellers and printers, but principally of the two latter; not from any doubt or distrust of a just and legal property in the works or copyright, (as appears by the petition itself, pa. 340, vol. 16, of the Journals of the House of Commons;) but upon the common law remedy being inadequate. . . . And this appears from the case they presented to the members at the time.[40]

Can this be the case which is the foundation of the whole rule against pre-natal history?[41] Surely the highest at which it can be put is that Willes J. fired off a dictum the whole court promptly side stepped.

Once again one is tempted to say that the dictum was directing attention to the important fact that as a general rule alterations in the bill are seldom conclusive and sometimes misleading.[42] In other words, they may not be entitled to much weight. On the other hand, they may be very valuable. The *Wheat Board* case affords an illustration.

Did the National Emergency Transitional Powers Act, 1945,[43] authorize the order in council under which Mr. Nolan's grain was appropriated? As originally introduced in the Commons, it contained a clause which gave the government power over the "appropriation, control, forfeiture and disposition of property and the use thereof . . .". There seems little doubt that, had this clause been left in, the litigation would never have started. However, the opposition strenuously objected. Mr. Diefenbaker asked:

> Why does this government ask for the power of forfeiture of property? If the only control that is necessary is one over prices in order to ensure a fair distribution of goods in scarcity, and to prevent inflation I ask again, why does the government ask for the power of forfeiture?[44]

The combined pressure of the opposition and the provincial premiers, who were convened at the time in Ottawa for a dominion-provincial conference, forced the government to amend the bill. It did so by deleting the forfeiture clause and substantially rewording some of the other powers.

In itself, the deletion of the forfeiture clause might tend to cast doubt on the recent decision of the Privy Council[45] reversing

[40] *Ibid.*, p. 2350.
[41] Lord Haldane in *Viscountess Rhondda's Claim*, [1922] 2 A.C. 339, at p. 383.
[42] *Herron* v. *Rahmires*, [1892] A.C. 498, at p. 522.
[43] Stats. Can. (1945), c. 25.
[44] Debates, House of Commons, 2nd sess., 1945, p. 2454.
[45] [1952] 3 D.L.R. 433.

the Canadian courts. How could a court find an implied power to appropriate property, as the Privy Council did, when the government had given up an express power to do so? Hansard furnishes a clue. Here is a sampling of comments by the opposition upon the bill as redrafted in the form finally enacted:

> *Mr. P. E. Gagnon:* Section 2, worded in terms somewhat different from those of the section formerly proposed, has the advantage, from the standpoint of the government, of being less explicit, more sentimental toward the starving people of Europe, as well as more vague and nebulous for the man in the street.[46]
>
> *Mr. Diefenbaker:* We raised strong objection to the power which the government was asking for of appropriation, control, forfeiture and disposition of property. . . . That subsection has been removed and in place of it another has been brought in namely 2, 1, (c), which in different terms and terminology still grants the absolute power the governor in council had asked for under the original bill.[47]
>
> *Mr. Macdonnell:* We . . . hoped that it was then going to get revision. . . . But I am bound to say that as I . . . read the extremely wide provisions of paragraphs (b) and (c), it seemed to me that a rose by any other name would smell as sweet, and that . . . the new words are about as wide as the old.[48]

Certainly the opposition feared that the government still had the power to forfeit property as a price-control measure, and, in the event, their fears have been fulfilled. Had this information been available it might not have taken four courts and five years of litigation to determine the issue.

Of course, the comments themselves do not determine the issue. Chance remarks, born in the heat of debate, can never do that. Determination of the issue is not the function of legislative history in any event. But in this case they are important for they suggest an attitude, or point of view, with which to attack the problem of statutory interpretation involved. They indicate the spirit of compromise (or want of it, according to the opposition) in which the governmental powers were created and the large and generous language in which they were expressed. Only the Privy Council saw this. They said: "Plainly, within the scope of its wide range of purposes, the Act is conceived in the most fluid and general terms, conferring deliberately the most extensive discretion". Having accepted this as their basic premise, the rest was easy.

(f) *Special acts*

Whatever the legislative history rule may be, there has been considerable relaxation in applying it to both private acts and

[46] Debates, House of Commons, 2nd sess., 1945, p. 2912.
[47] *Ibid.*, p. 2996.
[48] *Ibid.*, p. 3007.

acts of a constitutional nature. Certainly both amendments and debates have been utilized in the construction of private statutes.[49] And in arriving at the meaning of the British North America Act, the courts have frequently referred to speeches made during, and recommendations of, the constitutional conventions, as well as to the many drafts preceding its enactment. In the same category is the Statute of Westminster, from whose long prenatal history the Privy Council have often taken assistance, although not always with due recognition of their source material.[50]

(g) *Explanatory notes prefixed to bills*

There does not as yet seem to be any authority one way or the other on explanatory notes. But if the legislative history rule goes to weight and not to admissibility, then it is clear that no more powerful and authoritative evidence could be obtained than the draftsman's notes.[51]

Retracing our steps, what conclusions can be drawn at this point? The textbooks state a categorical proposition that legislative history is inadmissible. Despite this, the cases indicate many exceptions. Although these exceptions throw suspicion upon the rule as stated, the cases also indicate a reluctance on the part of the judges to depart from the words of statutes. Is it possible then to reformulate the rule to take account of the exceptions and at the same time to respect the hesitation of the judges to admit extrinsic evidence? A tentative solution is to say that the rule is really a counsel of caution rather than a rigid canon of construction. This would be consistent with the mischief rule and with the cases. Would it also be consistent with history?

III. *History of the Rule*

In tracing the origins of any doctrine, the choice of a starting point is inevitably arbitrary. This must be so, for who will say which causes are proximate and which too remote? In our case we know that the rule had been formulated by 1769. We also know, or feel fairly sure, that it was unknown in 1677 when the

[49] *Davis & Son* v. *Taff Vale Rly. Co.*, [1895] A.C. 542, at p. 561; *C.P.R.* v. *James Bay Rly. Co.* (1905), 36 S.C.R. 42, at pp. 93, 99.

[50] Cf. *Aviation* case, [1932] 1 D.L.R. 58, in which Lord Sankey L.C. quoted almost word for word from Lord Carnarvon's speech on the second reading of the British North America Act.

[51] Harrison, An Examination of the Main Criticisms of the Statute Book and of the Possibility of Improvement (1935), Jour. of Soc. Pub. Teachers of Law, 9, 21, 38; Laski, Annex V to the Report of the Committee on Ministers' Powers, 1932.

Statute of Frauds was enacted. In an early case on the statute, Lord Nottingham reported himself thus:

> . . . all acts which restrain the common law ought themselves to be restrained by exposition. And I said that I had some reason to know the meaning of this law; for it had its first rise from us, who brought in the bill in the Lord's House, though it afterwards received some additions and improvements from the Judges and the civilians.[52]

This is not the language of a man bound by a strict formula to exclude parliamentary history. What then were the forces which in these formative years between 1677 and 1769 converged to produce the rule?

(a) *Political considerations*

Throughout the middle ages and continuing into modern times there is a close connection between theological thought, on the one hand, and legal and political thought, on the other. The supreme model of law was the Lex Dei.[53] And Coke placed both God and the laws over the sovereign.[54]

The theological influence upon the "canons" of construction was patent. It was such that by the end of the fifteenth century the doctrine of the absolute, literal authority of statutes had settled itself in the law.[55] To catch the flavour of the period, listen to Keble J. in 1653:

> There is no law in England but is as really and truly the law of God as any Scripture phrase, that is by consequence from the very texts of Scripture: for there are very many consequences reasoned out of the texts of Scripture: so is the law of England the very consequence of the very Decalogue itself: and whatsoever is not consonant to Scripture in the law of England is not the law of England . . . . whatsoever is not consonant to the law of God in Scripture, or to right reason which is maintained by Scripture, whatsoever is in England, be it Acts of Parliament, customs, or any judicial acts of the Court, it is not the law of England, . . .[56]

Now this strict interpretation has political implications. For statutes are part of the apparatus of government and therefore the controversy between the letter and the spirit of a statute becomes something more: it becomes a political rather than a legal problem, and "resolves itself into the consideration of the proper line of demarcation to be drawn between the functions of the legislator and the judge".[57]

[52] *Ash* v. *Abdy* (1678), 3 Swans. 664.
[53] Radin, A Short Way with Statutes (1942), 56 Harv. L. Rev. 388, at p. 391.
[54] Coke, Reports XII, 65.
[55] Allen, Law in the Making (4th ed.) p. 366.
[56] *R.* v. *Love*, 5 St. Tr. 43, 172.
[57] Hawkins, On the Principles of Legal Interpretation (reprinted in Thayer, Preliminary Treatise on Evidence, Appendix C, 579); cf. Freund, On Under-

Superimposed upon the tradition of literal interpretation was the political ideology resulting from the Revolution of 1688. The Revolution produced a refined conception of the Montesquieuan separation of powers which had theretofore been alien to English political life. To this growing fact, the Augustan age, with characteristic rationalism, attached important consequences. For one thing, it provided theoretical justification for the sharp divorce between legislative and judical powers. And as the eighteenth century advanced, the sovereign and absolute power of parliament was generally conceded. Here, the theological influence reappears. It was a short step from the divinity of the crown to the divinity of parliament. And so it is not surprising that the interpretation of statutes should follow the pattern established by St. Augustine[58] for the interpretation of the law of God. This fact, according to at least one authority, was closely connected with the rule against parliamentary history for:

> the triumph of whig political theory in England meant the erection of parliament into a *terrestris deus*, an earthly divinity quite different from the chance collection of men who composed it at any one time: a divinity whose mind is unknowable save in its recorded utterances which must therefore be weighed word by word. . . . The historical method is not a reverent attitude in which to approach such a being, least of all when we know that . . . the legislature was in fact a mere gramaphone recording his master's voice.[59]

Thus a doctrine of the corporate personality and supremacy of parliament emerged. This had two important consequences. It prevented the judges from piercing the corporate veil to ascertain the best available evidence of that intent which it was their duty to ascertain and enforce. And it enabled them, in the name of logic, to assert their own ideas of the social purposes underlying the legislation which it was their lot to interpret. To this extent, a policy of literal interpretation amounted to an assertion of judicial freedom. It has been appropriately styled the Humpty Dumpty principle, whereby words mean just what the judges choose them to mean — neither more nor less.[60] Since the doctrine was acquired from the clergy, it is no surprise that the clergy best understood its true significance. In an oft quoted sermon, Bishop Hoadley said that "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the

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standing the Supreme Court, p. 36: ". . . the process of statutory construction has likewise become an aspect of political philosophy".

[58] Radin, *op. cit.*, p. 402.

[59] Vesey-Fitzgerald, The Interpretation of Codes in British India (1935), 68 Madras Law Journal 67, at p. 69.

[60] Harrison, *op. cit.*, pp. 9, 40.

law-giver to all intents and purposes, and not the person who first wrote or spoke them".[61]

In short, the political theory of separation of powers and the consequent deification of parliament, building up an already settled grammatical approach to interpretation, tended to keep the judges away from the disturbing and unruly influence of legislative history.

(b) *Practical considerations*

The eighteenth century was prolific of legislation, although it was of an ephemeral character.[62] The great parliamentarians were orators, not reformers. Burke's speeches may be immortal, but his contribution to social reform was negligible. Not until the House of Commons was reformed was there any social legislation of the kind which is the hallmark of the modern welfare state.

This spate of legislation was matched by its prolixity, tautological verbosity being as characteristic of the eighteenth century as telegraphic brevity was of the earliest statutes.[63] The excessive verbiage added to the obscurity surrounding their essential purpose. Nowadays the ideal is a minimum of words consistent with clarity, and to a certain extent this practice has eliminated the worst abuses of the old approach, for literal interpretation tends to break down where parliament rises to the "dignity of a general proposition".[64]

As to the manner in which these statutes were drafted, the main lines of parliamentary procedure had been laid down in the seventeenth century. The eighteenth merely stereotyped the rules and indeed often encumbered them with tedious formalities. The practice of reading bills three times dates as far back as the fifteenth century. The committee system had grown up under Elizabeth and her successor. Party politics and the development of the cabinet under Walpole were, however, peculiarly eighteenth century phenomena. All these factors are the very stuff of which statutes are made, and a better appreciation of them than we have time for would be necessary to fully understand the extent to which, in the eighteenth century, prenatal history was a reliable index of purpose.

Although the procedure under which the Commons functioned was much the same then as it is today, its composition was not.

[61] Quoted in Gray, Nature and Sources of the Law (2nd ed., 1921) p. 102.
[62] Ilbert, Parliament, p. 51.
[63] Allen, *op. cit.*, p. 397.
[64] Corry, Administrative Law and the Interpretation of Statutes (1935), 1 U. of Toronto L.J. 286.

Under the electoral system as it worked before 1832 a small number of powerful and wealthy men controlled parliament. It has been estimated that from about 1760 to 1832 nearly one half of the members owed their seats to patrons.[65] The system of county and borough representation was extremely chaotic and the franchise idiotic. At Droitwich the qualification of an elector was being "seised in fee of a small quantity of salt water arising out of a pit".[66] Seats were freely bought and sold. Although any great wave of feeling or opinion was sure to reach and affect it, the aristocratic eighteenth century House was far from representative.

If the House was not representative of the people, neither were its records representative of what actually transpired at Westminster. The journals of both Houses have a long and turbulent history going back to Tudor times. Underlying their development was the struggle of the Commons to secure freedom of debate. This had actually been obtained by Sir Thomas More, as Speaker, but the strong Tudor kings and queens had other methods of controlling the Commons. Elizabeth frequently warned them off the discussion of certain topics, particularly religion, trade and succession. When the Commons were exhorting her to marry, she peremptorily forbade any further proceedings in the matter.[67]

In fact, it was not until the constitutional battles with the Stuarts that the issue was finally determined. When James I presumed to deny the privilege, the Commons replied with the famous protestation which was afterwards torn out of their journal by the king's own hand.[68] This illustrates that freedom of debate was apt to be visited with sanctions so long as there was disclosure. Eventually resolutions of the House were passed in 1628 and 1640 directing the clerk not to "take any notes here without the precedent direction and commands of this house, but only of the orders and reports of this house".[69] Since then, the journals have been limited substantially to things done as distinguished from things said. In 1681, there was instituted the Votes and Proceedings, a daily record of the acts of the House, which has been published continuously from that day to this. The total effect of these orders was to divorce the official records of parliamentary proceedings from the records of parliamentary debates.

After the 1688 revolution, freedom of debate was secured by the Bill of Rights, which declared that "freedom of speech, and

[65] Ilbert, *op. cit.*, p. 43.
[66] *Ibid.*, p. 39.
[67] *Ibid.*, p. 180.
[68] Mackenzie, The English Parliament, p. 53.
[69] Ilbert, *op. cit.*, p. 182.

debates on proceedings in Parliament, ought not to be impeached or questioned in any court or place out of Parliament".[70] This freedom was fortified through the power given to parliament of prohibiting the publication of debates and proceedings, together with the power of excluding strangers and debating behind closed doors. Then, as sometimes happens, a curious inversion occurred. The prohibition against publishing debates had developed as a shield against the tyranny of the crown. Now it came to be used as a sword to strike down the public demand for information about parliamentary proceedings. Based originally on the possible intimidation the Crown might exercise if debates were reported, the prohibition came to rest on fear of misrepresentation and impatience of the pressure of public opinion.

But public curiosity persisted until satisfied. In the latter half of the seventeenth century, the newsletter writers supplied the demands of the county families for news. This trade was largely in the hands of parliamentary clerks and other officials with access to Westminster. Until 1694, when the House began to take objection,[71] it was plied quite openly. Thereafter, it was carried on by the regular press, their reports being based on notes taken surreptitiously and published in open defiance of parliamentary orders. In token recognition of the illegality of this action, the names of the speakers were distinguished by initials and publication was postponed until the end of the session. In 1738 there was a great discussion on the breach of privilege involved in these publications but, although the House prohibited further publication both in and out of session and resolved to proceed with the utmost severity against the offenders, the sanctions were ineffectual.

Samuel Johnson, one of the reporters of the day, has left us a revealing insight into the authenticity of the reports. At a dinner party, where he was present, the conversation turned on a remarkable speech made by Pitt towards the end of Walpole's administration. Johnson astonished the company by saying:

> I wrote it in Exeter Street. I never had been in the gallery of the house of commons but once. Cove had interest with the doorkeepers. He, and the persons employed under him, gained admittance: they brought away the subject of discussion, the names of the speakers, the side they took and the order in which they rose, together with notes of the arguments advanced in the course of debate. The whole was afterwards communicated to me, and I composed the speeches in the form which they now have in the parliamentary debates.[72]

[70] (1689), 1 Will. & Mary, c. 2, s. 2.
[71] Mackenzie, *op. cit.*, p. 61.
[72] Quoted in Ilbert, *op. cit.*, p. 188.

In 1771, only two years after *Millar* v. *Taylor,* Alderman Wilkes took up the cause. At his instigation several printers published debates without the customary precaution of disguising the names of the speakers. Exasperated, the House tried to arrest Wilkes, but he resisted all their efforts. A great popular demonstration ensued which effectively established the right of the press to report debates. Although the House formally continued its order, no attempt was made to enforce it. In 1803 reporters were assigned a bench of their own in the gallery. At this time William Cobbett undertook the reporting of the debates, which he continued until 1812, when T. C. Hansard, who gave his name to what in 1908 became the official reports, took over the work.

The important point to keep in mind is that from 1628 to 1908 the reporting of debates was forbidden. The compilation that later came to be made was derived from whatever fragmentary sources could be resurrected and, for the eighteenth century, with which we are chiefly concerned, the sources were mainly contemporary periodicals such as the one that employed Johnson. We can only surmise as to their accuracy and reliability. Certainly Johnson has not left us a very reassuring picture. Is it any wonder that the courts were loathe to admit or rely on debates to furnish indications of legislative purpose?

Our period then was characterised by the great bulk of local legislation it produced; by the tedious prolixity of its language; by the unrepresentative nature and somewhat Rabelaisian conduct of its parliament; and by the struggle between parliament and press over the right to publish reports of the proceedings at Westminster. All these factors tended to confine judges to a strict reading of statutes. To go beyond the words into their background would be not only engaging in the purest kind of speculation but also ignoring the express resolution of parliament that its proceedings be kept secret.

Nowadays conditions are different. Proceedings are officially published and widely distributed by the press. Most bills are public bills drafted by the government departments or agencies which will be responsible for their implementation. In these circumstances declarations of policy by the responsible ministers can furnish very valuable assistance to courts in search of guidance as to meaning. Of course, idle statements made in debate have the same doubtful value to-day as ever before. Generally speaking, the considerations which in the eighteenth century supported a policy of exclusion now merely suggest a policy of caution.

(c) *Legal considerations*

The parol evidence rule, like most other evidential topics, represents a gradual reversal of primitive doctrines.[73] Its evolution has been traced through several stages. Originally, it was a by-product of the symbolism surrounding the use of the seal. Later it was associated with the classification of evidence according to grade, matters of record being higher than writing, and both than matter of averment. Its modern recognition begins with the Statute of Frauds, which illustrates the contemporary attitude of mind in the provision requiring devises of land "to be in writing and signed . . . or else they shall be utterly void and of none effect".

By 1709 it had become possible to say that "if an agreement made by parol to do anything be afterwards reduced into writing, the parol agreement is thereby discharged; and if an action be brought for non-performance of the agreement, it must be brought upon the agreement reduced into writing and not upon the parol agreement, for both cannot stand together, because it appears to be but one agreement and that shall be taken which is later and reduced to the greater certainty of writing".[74] And it is perhaps more than coincidence that in 1771, the same year as the victory of the press over parliament, and only two years after Willes J. first gave expression to the legislative history rule, the old rule that matter of deed could not be controlled by matter of averment was extended to unsealed writings.[75] By the end of the century it was settled that words of a legal document inherently possessed a fixed and unalterable meaning.[76]

There can be little doubt that the parol evidence rule had a direct influence upon the development of the rule excluding legislative history. In some cases the latter was treated as merely a special instance of the former. Listen to this:

> I do not think it is competent to a court of justice to make use of the discussions and compromises which attended the passing of the act; for, that would be to admit parol evidence to construe a record;[77]

What else could be expected from judges who felt that statutes were to be construed in the same manner and by the same techniques as any other writings? Baron Bramwell has left a frank confession of the spirit in which the statutes were to be approached:

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[73] See Phipson on Evidence (8th ed.) p. 556.
[74] Viner's Abridg. Contr. G., 18.
[75] *Meres* v. *Ansell* (1771), 3 Wils. 275, at p. 276.
[76] Wigmore on Evidence, *op. cit.*, vol. IX, s. 2461.
[77] *Per* Byles J. in *Shrewsbury* v. *Scott* (1859), 6 C.B. (N.S.) 1, 213.

> It may be said, that this is a lawyer's mode of dealing with the question, merely looking at the words. It is so, and I think it right. A Judge, discussing the meaning of a statute in a Court of Law, should deal with it as a lawyer and look at its words. . . . Important as are the objects of this statute, it must be construed on the same principles as one regulating the merest point of practice or other trifling matter.[78]

Although the analogy between the two rules was a natural one in the circumstances, was it justifiable? To answer this, some further history may help. In the first place, rigid as the parol evidence rule was, it never excluded all extrinsic evidence. Evidence of surrounding circumstances was always admissible. This narrowed the scope of the rule considerably — narrowed it so that what was excluded was not parol evidence generally but only direct evidence of intention, and not even then in equivocation cases.

Now the purpose of resorting to expressions of intention is not to vary or contradict the written text but to give the words some meaning they can properly bear. Why then were they excluded? The reasons are partly historical and partly precautionary. Neither the Roman law nor early English equity courts knew the rule. But the common law courts, having to deal with juries, were necessarily stricter in matters of evidence. In addition, declarations of intention might be fabricated or misreported. And where the evidence was required by statute to be in writing there was the further formal reason that an oral utterance would not fulfill that formality. Eventually the common law rule prevailed.

Despite its chance origins, the rule is intelligible and its policy rational. Basically, declarations of intention were excluded from the interpretative process not because they were useless but because of the risk that they would dominate the words and the temptation to abuse would be too strong.[79] Do these same considerations apply when the rule is adapted for use in the interpretation of statutes? To a certain extent they probably would. Doubtless, if legislative history was freely admitted and indiscriminately used, there would be a tendency to give it an exaggerated place. In the United States its free admission has led to the quip that "only when legislative history is doubtful do you go to the statute".[80] However, it is not likely that such history could be fabricated. There might be a temptation to plant expressions of intention for the very purpose of having the courts find and

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[78] *Att. Gen.* v. *Sillem* (1863), 2 H. & C. 431, 537; note his candid reference to legislative history at p. 539. See also Channell B. at pp. 566, 567.

[79] Wigmore, *op. cit.*, s. 2471.

[80] Frankfurter, *op. cit.*, p. 543.

use them,[81] but that is a far different thing from deliberate falsification after the event. It is one thing to misrepresent the intentions of a deceased testator but quite another to forge passages from Hansard.

In short, the considerations which make the parol evidence rule rational when applied to wills, deeds and ordinary written documents lose much of their weight when the rule is applied to statutes. But there is another and overriding factor which makes the transformation inapt. This is that, although it is possible to postulate intention of a testator or even of parties to a contract it is, as we have suggested, quite impossible to do so with respect to a parliament. It is palpably false reasoning to take rules on declarations of intention and apply them to statutes with respect to which it is impossible to speak of intention.

These then were the forces which gave rise to the rule. Political considerations gave it theoretical justification; practical considerations made it a rule of wisdom; and the parol evidence rule provided a common law analogy. Of these only the practical considerations are relevant today, and they dictate a policy of restraint rather than rigid exclusion.

IV. *Conclusion*

To the extent that it is possible to do so, we have been endeavouring to ascertain what the legislative history rule is, not what it ought to be. We have been concerned with the present rather than the future.

Our starting point was the textbook statement of the rule as a fixed canon of construction excluding any reference to legislative history. This being contrary to the general principles of construction and of evidence, we were led to examine the cases. They disclosed many exceptions, which could only be explained on the theory that the rule was merely a counsel of caution. This hypothesis turned out not only to explain the cases but also to have historical support.

Our conclusion then is simply that the textbooks have misstated the rule. This and nothing more. Taking this to be correct, that the rule goes to weight rather than admissibility, we have said almost nothing about what weight legislative history deserves. This relates to the future of the rule, to a time when the courts are prepared to accept such evidence for what it is worth. Although this question has been given no place here, it is such an

[81] Curtis, A Better Theory of Legal Interpretation (1950), 3 Vand. L. Rev. 407, at p. 411.

important and really inseparable aspect of the problem that we cannot leave the subject without saying a few words about it.

In general, American courts freely admit legislative history.[82] In general, English and Canadian courts do not. It is arguable that as between the two extremes the English and Canadian practice is preferable. At least it prevents our judges turning themselves into an "historical society reading papers on what some past legislature might have done".[83] Advocates of the use of legislative history too often overlook the regressive effect that its indiscriminating use produces. It shoves the whole process of interpretation as far back into the past as possible.[84]

But the choice is not necessarily between the two extremes of unlimited use, on the one hand, and no use whatever, on the other. Although in the great majority of cases legislative history may have no weight, there will always be a few cases, such as the *Wheat Board* case, where its discriminating use will be of great assistance. It is important that in these cases the courts have workable rules of construction to permit them to get assistance where best they may.

Some two years ago Mr. Nicholls, the editor of this Review, said that the "law cannot be divorced from its social context, and especially where the court has a choice, where it is playing a creative rôle, it must turn wherever it can for assistance and by the discriminating use of aids supplementary to precedent and statute — one of which is the legal periodical — strive to make the law serve social ends".[85] We submit that, in the appropriate cases and with emphasis on the word "discriminating", legislative history deserves a place alongside legal periodicals among these supplementary aids.

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[82] Note, Trends in the Use of Extrinsic Aids in Statutory Interpretation (1950), 3 Vand. L. Rev. 586, at p. 596; but see recent criticisms of Mr. Justice Jackson in, The Meaning of Statutes: What Congress Says or What the Court Says (1948), 34 A.B.A.J. 535, at pp. 537-38, and in *Schwegmann Bros.* v. *Calvert Distillers Corp.* (1951), 341 U.S. 384.

[83] Curtis, *op. cit.*, p. 415.

[84] Of course, the orthodox theory of ascertaining legislative intent has the same effect.

[85] (1950), 28 Can. Bar Rev. 422, at p. 445.