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Negligent Misstatements in the Privy Council

TO THE EDITOR:

The case comment on *M.L.C.* v. *Evatt* of your March 1972 issue[1] raises once more the ancient question whether the *mens auctoris* or the *mens actoris* should prevail in interpretation. In this recent Privy Council decision, the majority put a restrictive interpretation on a salient passage in the *Hedley Byrne* decision[2] of the House of Lords. The authors of this passage formed the minority in the Judicial Committee which heard the *M.L.C.* v. *Evatt* appeal.

The learned commentator professes his astonishment "that judges, who can tell their fellow members of a bench what they meant by certain statements, can pointedly be ignored".[3] One could share the astonishment better if it were evident that an author's interpretation determines the meaning of a statement. This conclusion finds here support in the readiness to grant a high degree of credibility to the testimony of a judge on his recollection of the meaning he intended to convey by his statement.

Three considerations speak against this conclusion: In normative statements, the interactions between intention and attention are more difficult to trace than they are in descriptions. One of the reasons for it is the strength of cultural tradition. Further, one consequence of the plasticity of language is the instability of the relation between the rule as content of a thought and its formulation. Terms of art reduce but do not abolish this instability. Lastly, there is the gap between the rule and its application in the case, which widens with the ambit of the rule.

It is significant that the protest of the minority did not take the form of a claim for author's privileges. It was made in these terms:[4]

> We are unable to construe the passage from our speeches cited in

[1] P. 128.
[2] [1964] A.C. 465, [1963] 2 All E.R. 575.
[3] P. 133.
[4] *Mutual Life and Citizens' Assurance Co. Ltd. and Another* v. *Evatt* (1970), 44 A.L.J.R. 478, at p. 486 (P.C.).

the judgment of the majority in the way in which they are there construed.

The predicate "unable" is inscrutable enough to permit the denial of the implication that the *mens auctoris* is controlling.

In favour of the opposite theory speaks the widely held belief that the interpreter understands the author better than the latter understands himself. The disadvantage of this preference for the *mens actoris* is its emphasis on the logical structure of language in disregard of its innate ambiguity. It would be too much to ask judges to lend their authority to the establishment of a universal theory of interpretation. Ultimately, this depends on the kind of metaphysics one subscribes to and on how much circularity one is willing to tolerate. It is a field, in which judges would wish to appear as uncommitted as possible. In *M.L.C.* v. *Evatt*, the majority was able to stay silent because it was the majority, and the minority refrained from making the grounds of its protest explicit. Where a stand becomes unavoidable, recourse is had to rhetorics. The "expressed intention" of *Perrin* v. *Morgan*[5] is the leading example.

Stripped of its drama of confrontation, *M.L.C.* v. *Evatt* is best read as another cautionary tale against expecting too much from rule or theory. Beyond it, the decision offers food for thought on the role of authority in the administration of justice.

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[5] [1943] A.C. 399.

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