

UNCOMMON STATUTORY INTERPRETATION
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Introduction

In *Byrnes v Kendle*,¹ an otherwise unexceptional case concerning breach of duty by a trustee, Heydon and Crennan JJ set out a far reaching hermeneutic thesis. Their Honours said that ‘matched’ approaches apply in relation to the interpretation of words in a contract, in a statute, in a constitution, and in a deed of trust. At a broad level of generality, the point made is that a common legal approach should be taken in any case where courts are concerned with the meaning of words. The search is for objective meaning; that is, the meaning which the words would convey to a reasonable person.

At this high level of generality, there has been vast academic and judicial discussion concerning the appropriate interpretivist methodology. Some of the apparently different views are false contrasts. For instance,

¹ *Byrnes v Kendle* [2011] HCA 26 [95] - [116].

sometimes it is suggested that there is a conflict between an approach which searches for a literal meaning of words and one which searches for the meaning of those words in their context. *Context* is simply a matter considered 'together with' text. Even apart from the philosophical difficulty of a notion of a single shared meaning, an immediate glance at any dictionary reveals that there are very few words which have only a single, literal meaning. The meaning of almost every word depends on context.

This paper explores the underlying premise of much of the debate about the proper approach to interpretation. The usual assumption in the debate is that interpretation is the quest to uncover the best, or most appropriate, meaning of words. Hence, interpretation of a contract, a deed, a statute, or a constitution is an exercise in determining the meaning of the words used. But there is a long line of cases where this premise appears to be rejected. Usually described as 'the equity of the statute' these cases permit results to be reached which are acknowledged not to be consistent with the words of the statute. In other words, it is acknowledged that the words have one meaning but the result is something different. As will be seen, these cases are not merely a historical anachronism. I describe them in this paper, in neutral terms, as uncommon statutory interpretation, although as I explain in the conclusion this 'interpretive' approach is not one which has been confined to statutes.

Two methodological difficulties of interpretation

Before I turn to uncommon statutory interpretation, let me say a few words about the current debate on statutory interpretation, particularly in Australia.

There are at least two fundamental difficulties of methodology in conventional statutory interpretation. The first difficulty of methodology is that the search for objective meaning of words can lie in contested external rules which impose the techniques of interpretation. The second is that the interpretation of words often involves an underlying question concerning the weight which should be given to context in contrast with text.

In relation to the first difficulty, two instances in which external legal rules are important in the interpretation of the meaning of words of a legal instrument are (1) the external legal rules concerning which aspects of context are relevant to the question of objective meaning of words and, (2) the external legal rules imposing restrictions upon the use of contextual materials other than a written instrument in which the words appear.

These external legal interpretative rules can differ according to the type of instrument being interpreted. For example, in interpretation of a contractual agreement or lease agreement, 'evidence of surrounding circumstances is admissible to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning'.² But if the agreement is one which has been registered in the Torrens system of title then '[t]he third party who inspects the Register cannot be expected, consistently with the scheme of the Torrens system, to look further for extrinsic material which might establish facts or circumstances existing at the time of the creation of the registered dealing'.³

² *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337, 347, 352 (Mason J). It may be that the qualification, 'ambiguous or susceptible of more than one meaning' will exclude very few cases: *McCourt v Cranston* [2012] WASCA 60 [18]; *Manufacturers' Mutual Insurance Ltd v Withers* (1988) 5 ANZ Ins Cases 60-853, 75,343 (McHugh J).

³ *Westfield Management Ltd v Perpetual Trustee Company Ltd* [2007] HCA 45; (2007) 233 CLR 528, 539 [39] (Gleeson CJ, Gummow, Kirby, Hayne & Heydon JJ).

Another example is the doctrine of rectification which permits the words of a written agreement to be given a different meaning by reference to materials which would otherwise have been inadmissible. These materials include pre-contractual negotiations between the parties.⁴ In contrast, evidence concerning the negotiations between parliamentarians prior to passage of a statute is never admissible. The exercise is never one of psychoanalysis of the views of the members of parliament.⁵

It might be thought odd that these legal rules should differ according to the nature of the instrument being interpreted, or that they should differ according to whether the instrument is written or oral. But the different approaches are longstanding. They are based on strong arguments that seek to justify different legal rules of interpretation in the examination of the common question of the objective meaning of words according to the different legal situations in which the words are used. Even within statutory interpretation there are tensions. For instance, compare the following two approaches. On one hand it has been said that it is important that 'context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise'⁶ and that '[t]he consideration of context in the exercise of statutory interpretation 'includes the general purpose and policy of a provision' which might be thought to involve considering extrinsic materials.⁷ On the other hand, it has been emphasised that in the

⁴ In England see the decision in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] UKHL 38; [2009] 1 AC 1101 [42]. It is true that the wider the context and permissible materials for interpretation the more superfluous a doctrine of rectification: A Burrows 'Construction and Rectification' in Burrows and Peel (eds) *Contract Terms* (2007, OUP).

⁵ *United States v Public Utilities Commission of California* [1953] USSC 60; 345 US 295, 319 (1953) (Jackson J)

⁶ *CIC Insurance Ltd v Bankstown Football Club Ltd* [1997] HCA 2; (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey & Gummow JJ)

⁷ *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27, 47 [47] (Hayne, Heydon, Crennan & Kiefel JJ). The *Interpretation Act 1984* (WA) s 18 also requires that an

construction of statutory words it is 'erroneous to look at extrinsic materials before exhausting the ordinary rules of statutory construction'.⁸

The former Chief Justice of New South Wales, borrowing from T S Eliot, extra-judicially described the process of statutory interpretation as an 'intolerable wrestle'. Illustrating his point, he referred to a contrast between two joint judgments in a decision in the High Court.⁹ The then Chief Justice explained¹⁰ that

- One joint judgment referred to the need to begin the task of interpretation with the ordinary meaning of the words "having regard to their context and legislative purpose" (at [5]);
- The other joint judgment referred to the "context, general purpose and policy" of the statutory provision being "the surest guide to construction" (at [47])
- One joint judgment referred to *CIC Insurance* for the proposition that departure from the literal or natural and ordinary meaning is permitted if the result would be "irrational" (at [9]);
- The other joint judgment referred to *CIC Insurance* for the proposition that "the modern approach to statutory interpretation uses context" in its widest sense (at [47]).

The article concluded by observing that the basic principles do not appear to be in dispute but differences emerge in the application of those principles.

It may be that the weight to be given to various aspects of context, in the interpretation of text, is an impossible question to answer. The answer will also be heavily affected by the external rules which determine matters such as the stage at which extrinsic materials can be considered in assessing context.

interpretation which promotes the purpose or object of a written law should be preferred over one which would not. Further, reference to extrinsic materials capable of assisting in interpretation can be made simply to 'confirm' the 'ordinary meaning' of that provision: *Interpretation Act (WA)* s 19(1)(a).

⁸ *Saeed v Minister for Immigration and Citizenship* [2010] HCA 23; (2010) 241 CLR 252, 265 [33] (French CJ, Gummow, Hayne Crennan & Kiefel JJ).

⁹ *Minister for Immigration & Citizenship v SZJGV* [2009] HCA 40; (2009) 238 CLR 642. The joint judgments are French CJ and Bell J on the one hand, and Crennan and Kiefel JJ on the other.

¹⁰ J Spigelman 'The intolerable wrestle: Developments in statutory interpretation' (2010) 84 ALJ 822, 831.

However one approaches these difficult questions of interpretation, they all share a common premise. That premise is that the search is for the objective meaning of the words which are used. The focus of this paper is upon circumstances in which departure occurs from that premise.

Uncommon statutory interpretation

As I have explained, underlying both of the methodological difficulties to which I have referred is a common premise that the task of interpretation is one of construing the meaning of words usually of a written instrument. On one view, this basic premise is fundamental to legitimate adjudication and interpretation.

But there have been numerous instances historically where the approach of the courts to statutory interpretation has not involved this fidelity to the text. And, recent decisions in the High Court of Australia and the Supreme Court of the United Kingdom might be thought to suggest that those decisions are not merely historical anachronisms of an age before the rise of notions of parliamentary sovereignty.

The controversial approach where a result can be reached which is acknowledged to be contrary to the words of the statute, or 'not within' the words of the statute, has been described as 'the equity of the statute'. My focus in this paper begins with one of the most famous instances where this type of 'interpretation' occurs, namely in consideration of the *Statute of Frauds*. I then turn to the origins of the approach and its application in modern decisions.

An historical example: the Statute of Frauds

The draftsmanship

In 1677, the Cavalier Parliament passed *An Act for Prevention of Frauds and Perjuries* which was said to be designed to prevent fraud and perjury in oral testimony. Of those statutes in the seventeenth century concerned with private law, Holdsworth described this statute, the *Statute of Frauds*, as 'the most important'.¹¹ And at the end of his life, Lord Kenyon described it as 'one of the wisest laws in our Statute Book'.¹²

The draftsmanship of the statute is not known for sure. The first draft was probably by Lord Keeper Finch (the later Lord Nottingham), with the subsequent drafts by Francis North (who succeeded Lord Nottingham as Attorney General; later Chief Justice in Common Pleas and, as Lord Guilford, the Lord Keeper) and the Secretary of State and sometime Principal of Jesus College, Oxford, Leoline Jenkins.¹³

It was once thought that the brilliant Sir Matthew Hale had drafted this statute. John Campbell described Sir Matthew as 'not merely by far the best Common Law Judge, but by far the best Equity Judge of his time'.¹⁴ The great Lord Nottingham regarded Hale as 'his great master'.¹⁵

But the perception of Hale's draughtsmanship did not last long. In *Wyndham v Chetwynd*,¹⁶ counsel relied on the stature of Lord Hale as part of a submission that the word 'credible' would not have been used in a superfluous sense. Lord Mansfield, during argument, expressed doubt about the generally received opinion that Lord Hale was the draftsman of the Act,

¹¹ W Holdsworth *A History of English Law* (1966) vol VI, 379.

¹² *Chaplin v Rogers* (1800) 102 ER 75, 76; 1 East 192, 194.

¹³ C Hening 'The Original Drafts of the Statute of Frauds and their authors' (1913) 61 U Penn Law Rev 283. Sir Leoline Jenkins is referred to by Hening as 'Lionel Jenkins'.

¹⁴ J Campbell *The Lives of the Chief Justices of England vol 1* (1979 reprint) 551.

¹⁵ J Campbell *The Lives of the Chief Justices of England vol 1* (1979 reprint) 552.

¹⁶ *Wyndham v Chetwynd* (1746) 1 Black W 96, 97; 93 ER 53, 54.

pointing out that Lord Hale had died the year before the Act had been drafted.

The interpretative methodology applied to the Statute of Frauds

An example of the application of the equity of the statute approach is the discussion of Lord Mansfield in *Simon v Motivos*.¹⁷ In that case, Lord Mansfield suggested that the provisions of the *Statute of Frauds* might not apply to a sale by auction. Although there was nothing in the provisions which could have revealed this exclusion, Lord Mansfield said that the 'key' to construction of the *Statute of Frauds* is 'the intent of the Legislature; and therefore many cases, though seemingly within the letter, have been let out of it'.¹⁸ In the same case, Wilmot J remarked that '[h]ad the Statute of Frauds always been carried into effect according to the letter, it would have done ten times more mischief than it has done good, by protecting rather than preventing, frauds'.

Although this view did not prevail,¹⁹ Lord Mansfield's approach exemplifies an approach which might be described as the 'equity of the statute'. The reference to the 'letter of the statute' was understood to mean the meaning which was borne by the statutory words. To reiterate, the doctrine therefore permitted results which it was acknowledged could not be borne by the words of the statute.

Perhaps the most common application of this approach in relation to the *Statute of Frauds* was where courts acknowledging that the words of the *Statute* would have required an action to fail, would permit it to succeed by

¹⁷ *Simon v Motivos* (1746) 1 Black W 599, 600-601; 96 ER 347, 347-348.

¹⁸ *Simon v Motivos* (1746) 1 Black W 599, 600; 96 ER 347, 347.

¹⁹ See *Kenworthy v Schofield* (1824) 2 B & C 945; 107 ER 633 and the discussion of Lord Blackburn in *Maddison v Alderson* (1883) 8 App Cas 467, 488.

reference to the notion that a statute cannot be allowed to be used as an instrument of fraud. The concept of fraud, or sometimes 'unconscionability', was given a broad meaning.

The leading example of this approach is the decision of the English Court of Appeal in *Rochefoucauld v Boustead*.²⁰ That case concerned section 7 of the *Statute of Frauds*. That section provided that ‘... all declarations or creations of trusts or confidences of any lands... shall be manifested and proved by some writing signed by the party who is in law entitled to declare such trust... or else they shall be utterly void and of none effect’.

In *Rochefoucauld*, the litigation concerned the Delmar coffee estates in what was then Ceylon. Comtesse Rochefoucauld owned the estates and mortgaged them. When she could not meet the mortgage repayments, she arranged for the defendant, who was the manager of the estates, to buy the titles from the mortgagee. She alleged that the defendant had orally declared a trust of the estates, subject to her promise to repay to him the purchase price which he had paid to the mortgagee. The defendant (or his mortgagees) subsequently sold the land without her knowledge. She sought to recover the excess of the price received by him, less the amount which she said was owed to him. The defendant was now bankrupt and his trustees in bankruptcy pleaded that the *Statute of Frauds* had the effect that the declaration of trust, which was not manifested or proved in writing, was void. Consistent with the words of s 7 of the *Statute of Frauds*, the trial

²⁰ [1897] 1 Ch 196.

judge, Kekewich J, heard the oral evidence of the declaration of trust but refused to admit that evidence.²¹

Although the Court of Appeal referred to written correspondence prior to the creation of the trust as well as the oral testimony of the Comptesse, the judges considered that they did not need to determine whether the trust was manifested and proved by some writing. The reason was that even if the trust was not manifested and proved in writing the court considered that it was not void because oral evidence was admissible ‘in order to prevent the statute from being used in order to commit a fraud’.²² The so-called ‘fraud’ was for ‘a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself.’²³

There is nothing in the language of s 7 which permitted this conclusion. In 1760 in *Bartlett v Pickersgill*, the Lord Keeper had reached the opposite result without even calling upon the defendant. Even though the defendant, who denied the oral trust in that case, was convicted for perjury, Henley LK (who later became, as Lord Northington, the Lord Chancellor) explained that to allow the evidence ‘would be to overturn the statute’.²⁴ Although doubts had been expressed about this decision,²⁵ it had been upheld on nearly identical facts only 7 years prior to *Rochefoucauld* in *James v Smith*²⁶ by the same trial judge (Kekewich J) as in *Rochefoucauld*. The Court of Appeal, which included Lindley LJ who gave the decision of the court in *Rochefoucauld*, had upheld the decision of Kekewich J although

²¹ The first instance proceedings are not reported on this point but this is discussed in the Court of Appeal at [1897] 1 Ch 196, 199.

²² [1897] 1 Ch 196, 207 (Lindley LJ giving the judgment of Lord Halsbury LC, Lindley LJ and A L Smith LJ).

²³ [1897] 1 Ch 196, 206.

²⁴ *Bartlett v Pickersgill* (1760) 1 Eden 515; 28 ER 785; 1 Cox 15; 29 ER 1041.

²⁵ *Heard v Pilley* (1869) LR 4 Ch App 548.

²⁶ [1891] 1 Ch 384 (Kekewich).

saying nothing about the issue of the *Statute of Frauds*.²⁷ In *Rochefoucauld*, Lindley LJ dismissed *James v Smith* as inconsistent with the modern decisions on the subject that the *Statute of Frauds* cannot be used as an instrument of fraud.

The decision in *Rochefoucauld* prevailed in England and the Commonwealth. It was anticipated, and consistent with the majority of the Supreme Court of Canada in *Barton v McMillan*,²⁸ over a dissent by Strong J who lamented, borrowing from Sir Edward Sugden, that to allow oral evidence would be ‘directly in the teeth of the *Statute of Frauds*’.²⁹ In Australia, the decision was approved by the High Court of Australia.³⁰ Last year, a Supreme Court judge rightly explained that the reason why a contract can be proved by oral evidence is that ‘the *Statute of Frauds* does not stand in the way is that it would be to use the Statute as an instrument of fraud to deny enforcement of the true transaction’.³¹ It is said that the doctrine in *Rochefoucauld* rests upon the proposition that the ‘trust is enforced, because it is unconscionable of the legal owner to rely on the statute to defeat the beneficial interest’.³²

The scope of this application of the equity of the statute naturally depends upon the breadth of the words ‘fraud’ or ‘unconscionable conduct’ in allowing an action to succeed where the statute would otherwise have

²⁷ [1891] WN 175.

²⁸ (1891) 20 SCR 404.

²⁹ (1891) 20 SCR 404, 413.

³⁰ *Cadd v Cadd* [1909] HCA 59; (1909) 9 CLR 171 at 178, (Griffith CJ), 187 (Isaacs J); *Bloch v Bloch* [1981] HCA 56; (1981) 180 CLR 390, 403 (Brennan J).

³¹ *Ciaglia v Ciaglia* [2010] NSWSC 341 [69] (White J). See also *Dalton v Christofis* [1978] WAR 42 (Smith J). There have been some misguided attempts to evade the obvious words of the statute by attaching the label ‘constructive’ to the trust which is recognised. This was not the doctrine in *Rochefoucauld* which concerned an express trust. See the discussion in W Swadling ‘The Nature of the Trust in *Rochefoucauld v Boustead*’ in C Mitchell (ed) *Constructive and Resulting Trusts* (2010) 95.

³² *Allen v Snyder* [1977] 2 NSWLR 685, 693 (Glass JA).

required it to fail. In more recent times the High Court of Australia has emphasised that 'the statement that enforcement of the transaction would be "unconscionable" is to characterise the result rather than to identify the reasoning that leads to the application of that description'.³³ But this long-standing application of the equity of the statute still remains.

A second manner in which the language of the *Statute of Frauds* was sidelined was in relation to the doctrine of part performance. The doctrine of part performance grew out of the notion that 'equity will not allow a statute to be used as an instrument of fraud' but eventually developed as an independent doctrine. Its effect was described by the High Court as based on 'three centuries of case law which has the effect of allowing specific performance of a contract which on its face the *Statute of Frauds* renders unenforceable.'³⁴

The leading case is *Maddison v Alderson*.³⁵ Thomas Alderson promised his housekeeper, Elizabeth Maddison, that he would leave her a life estate in his land in his will. On the faith of this promise she continued as his housekeeper. Alderson's will was not attested and it failed. Alderson's heir demanded the title deeds. Ms Maddison pleaded that there was an agreement that she be entitled to a life interest.

The difficulty for Ms Maddison was that the agreement was oral. It fell squarely within s 4 of the *Statute of Frauds* which broadly provided that 'no action shall be brought to charge any person upon any contract or sale of

³³ *Garcia v National Australia Bank Ltd* [1998] HCA 48; (1998) 194 CLR 395, 409 [34] (Gaudron, McHugh, Gummow & Hayne JJ). See also *Australian Competition & Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18; (2003) 214 CLR 51, 73 [43] (Gummow and Hayne JJ saying that the use of terms like unconscionable and unconscientious 'may have masked rather than illuminated the underlying principles at stake'. See also *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57; (2003) 217 CLR 315, 325 - 326 [23] - [26] (Gleeson CJ, McHugh, Gummow, Hayne & Heydon JJ).

³⁴ *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 29 [19] (Gleeson CJ, Gaudron and Gummow JJ).

³⁵ *Maddison v Alderson* (1883) 8 App Cas 467.

lands' unless the agreement, or a memorandum or note of it, is in writing and signed by the person to be charged or his or her agent.

The House of Lords held that although there was no memorandum in writing, the agreement might still have been enforceable if the defendant had performed acts of part performance which were referable only to the agreement to act as housekeeper in exchange for a life interest. However, merely continuing in the service of Alderson without wages was not evidence of a new contract for a life interest in the land. Lord Selborne explained that this exception to the *Statute of Frauds* arose because the defendant would be 'charged upon the equities resulting from the acts done in execution of the contract, and not (within the meaning of the statute) upon the contract itself'.³⁶

These approaches to the *Statute of Frauds* were always controversial. When Pratt LCJ (later Lord Camden), in a dissenting opinion, differed from Lord Mansfield's conclusion in *Wyndham v Chetwynd* on the meaning of 'credible', the Lord Chief Justice said pointedly that 'it is not my business to decide cases by my own rule of justice, but to declare the law as I find it laid down; if the statute of frauds has enjoined this determination, it is not my opinion, but the judgment of the legislature.'³⁷ Lord Hobart also said of the *Statute of Frauds* that 'it is better to admit a mischief in particular, even against the law of nature, than an inconvenience in general'.³⁸ Lord Kenyon lamented 'if courts had at first abided by the strict letter of the act, it would have prevented a multitude of suits which have been brought'.³⁹ Lord Cowper LC emphasised that he had 'always been tender in laying open that

³⁶ *Maddison v Alderson* (1883) 8 App Cas 467, 475 (Lord Selborne LC).

³⁷ *Hindon v Kersey* (1842) 4 Burn Eccl L 116, 118.

³⁸ *Needler v Bishop of Winchester* (1792) Hob 200, 224; 80 ER 367, 371.

³⁹ *Chater v Beckett* (1797) 7 TR 201, 204; 101 ER 931, 933.

wise and just provision the parliament had made' and refused 'to obviate the pretence of such and such cases being out of the mischief of the statute'.⁴⁰ And Lord Macclesfield LC said in response to a submission that signature was unnecessary: 'to put a different construction upon the Act, would be to repeal it'.⁴¹

Textbook writers

The rise and rise of the doctrine of the equity of the statute is also reflected by the increased trepidation with which legal commentators treated the doctrine. In one of the first texts written on the *Statute of Frauds*, William Roberts introduced his book as follows:⁴²

'where a law is made with an indirect application to the exigences of society, imposing a positive rule, in itself indifferent, and of which the wisdom is discernible only in its oblique and ultimate tendencies, if the rule be once loosened from the letter of the Statute, it serves only to distress legal questions with fluctuating criteria, and may convert provisions which were designed to assist trust with testimony, and to promote simplicity of dealing, into a prolific source of technical niceties and abstruse distinctions. An administrator of the laws ought not to aim *phainesthai philanthropotos tou nomou*;⁴³ for the true compassion of the law is to prevent cases of compassion from recurring. That indulgence is but treacherous lenity, which, by departing from known rules, leaves men in uncertainty as to means of their security, and destroys confidence by the misdirection of feeling.'

Roberts was an iconoclastic barrister, and a prolific writer and editor. His views probably expressed the prevailing opinion at the Middle Temple at the time. But a century and a half later, in another major work on the *Statute of Frauds*, the tone of the subsequent author had tempered greatly

⁴⁰ *Bawdes v Amhurst* (1715) Prec Ch 402, 403; 24 ER 180, 181.

⁴¹ *Hawkins v Holmes* (1721) 1 P Wms 770, 771; 24 ER 606, 607.

⁴² W Roberts *A treatise on the statute of frauds as it regards declarations in trust, contracts, surrenders, conveyances, and the execution and proof of wills and codicils : to which is prefixed a systematic dissertation upon the admissibility of parol and extrinsic evidence, to explain and controul written instruments* (1805) p xxiv.

⁴³ An approximate translation of the Greek, which itself may be a paraphrase from Paul in Romans, is 'to be more charitable than the law'.

perhaps reflecting how widely entrenched this specific application of the doctrine had become.⁴⁴

The leading modern work on the *Statute of Frauds* was written by James Williams in 1932. Williams was the Vice-Chancellor of Victoria University of Wellington and briefly Dean and Challis Professor of Law at University of Sydney. This book was his Cambridge doctoral thesis at Clare College. It was the foundation of his academic reputation. The book was widely reviewed in positive terms. Holdsworth, Winfield and Hamson all praised it. After Williams' death, Lord Cooke of Thorndon spoke of a joke, which Williams apparently relished, that after his appointment to a Chair, at the age of 27 on the strength of his extraordinary book on the *Statute of Frauds*, his colleagues would refer to him as the Professor of Frauds.⁴⁵

The contrast between the tone used by Williams and that of Roberts is stark. After referring to the 'fraud' exception where equity would allow a claim 'even against the words of the Statute',⁴⁶ Williams cautiously explained that 'fraud' was a 'very broad term' and although in 'its broadest sense the principle under discussion might well amount to a complete negation of the Statute',⁴⁷ the principle could be confined to cases of part performance and 'fraud in preventing the execution of a sufficient writing'.⁴⁸

The deeper roots of the 'equity of the statute'

There are two limbs to the doctrine of the equity of the statute. As Blackstone expressed them, they involve '[1] cases, thus out of the letter, are often said to be within the equity... [2] cases within the letter are frequently

⁴⁴ *The Statute of Frauds Section Four in Light of its Judicial Interpretation* (1932).

⁴⁵ R Cooke 'Tribute to James Williams' (1999) 30 VUWLR 385, 386.

⁴⁶ Quoting *Montacute v Maxwell* (1720) 1 P Wms 618, 620; 24 ER 541, 542 (Lord Parker LC, as Lord Macclesfield was then).

⁴⁷ J Williams *The Statute of Frauds: Section 4* (1932) 221-222.

⁴⁸ J Williams *The Statute of Frauds: Section 4* (1932) 223.

out of the equity.⁴⁹ In this expression Blackstone was making the same point as almost all the leading writers, previous and contemporary, including St Germain,⁵⁰ Viner,⁵¹ Bacon,⁵² Coke⁵³ and Wood.⁵⁴

In the first limb of the equity of the statute, the doctrine was used to extend the reach or effect of the statute to situations which were not within its words but perceived to be within the policy of the statute. In this latter sense, the doctrine was sometimes described as 'equitable analogous interpretation'.⁵⁵ This limb is described below as the 'extended statutory reach' limb. In the second limb, the doctrine is used, as in a case like *Rochefoucauld*, to place a case which fell within the words of the statute, outside those words by relying upon the perceived mischief of the statute. This limb might be described as the 'exclusion of statutory words' limb.

The brief chrestomathy which follows is an illustration of the span of the doctrine across the centuries.

One of the most famous discussions of the equity of the statute thesis is by Plowden in his lengthy note to the report of *Eystone v Studd*.⁵⁶ Plowden considered many cases involving numerous different statutes and explained the meaning of the *Eystone* decision as follows:

From this judgment and the cause of it, the reader may observe, (a) that it is not the words of law, but the internal sense of it that makes the law, and our law (like all others) consists of two parts, viz. of body and soul, the letter of the law is the body of the law and the sense and reason of the law if the soul of the law, quia ratio legis est anima legis. ... And equity, which in Latin is called equitas, enlarges or diminishes the letter according to its discretion, which equity is in two ways: (b) The one Aristotle defines thus, (which is touched by Catline, Chief-Justice, in

⁴⁹ R Kerr (ed) W Blackstone *Commentaries on the Laws of England* (4th edn, 1876) 223.

⁵⁰ C St Germain *Doctor and Student* (W Muchall ed, 17th edn, 1787) 49.

⁵¹ C Viner *A General Abridgement of Law and Equity* (2nd edn, 1791) 513.

⁵² M Bacon *A New Abridgement of the Law* (5th edn, 1786) 649.

⁵³ E Coke *Institutes of the Laws of England* (13th edn, 1788) 24.

⁵⁴ T Wood *An Institute of the Laws of England* (10th edn, 1772) 9.

⁵⁵ *Lee v Gansel* (1774) 1 Cowp 1, 6; 98 ER 935, 938 (Lord Mansfield).

⁵⁶ *Eystone v Studd* (1574) 2 Plow 459, 465-469; 75 ER 688, 695-700.

Stowell's case) *Equitas est correctio legis generatim latae qua parte deficit*, or, as the passage is explained by Perionius, *Equitas est correctio quaedam legi adhibita, quia ab ea abest aliquid propter generalem sine exceptione comprehensionem*, both which definitions come to one and the same thing. And this correction of the general words is much used in the law of England. ... in these cases the general words of the law are corrected and abridged by equity.

The reference to Aristotle, is to his excursus in Book V of *Ethics*.⁵⁷

With the subtitle 'A digression on equity, which corrects the deficiencies of legal justice', Aristotle wrote:⁵⁸

For equity, though superior to one kind of justice, is still just, it is not superior to justice as being a different genus. Thus justice and equity coincide, and although both are good, equity is superior. What causes the difficulty is the fact that equity is just, but not what is legally just: it is a rectification of legal justice. The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is none the less right; because the error lies not in the law nor in the legislator, but in the nature of the case; for the raw material of human behaviour is essentially of this kind...This also makes plain what the equitable man is. He is one who chooses and does equitable acts, and is not unduly insistent upon his rights, but accepts less than his share, although he has law on his side. Such a disposition is equity: it is a kind of justice, and not a distinct state of character.

In 1584, only a decade after Plowden's exposition, Lord Coke set out his famous enunciation of the technique of statutory interpretation in *Heydon's case*.⁵⁹ In that case, Coke CJ was confronted with the question of whether the Acts of Dissolution by Henry VIII, 31 H VIII, c 13, invalidated a grant of copyhold. His Lordship held that it did not, although the literal words of the statute would have required this conclusion. His Lordship said

⁵⁷ JAK Thomson (trans) Aristotle *Nicomachean Ethics* (1953 Folio Society London).

⁵⁸ 1137b5-1137b20, 1137b30-1138a1.

⁵⁹ *Heydon's case* (1584) 3 Co Rep 7; 76 ER 637.

that the 'sure and true' interpretation of all statutes required four things to be considered:⁶⁰

- (1) What was the common law before the making of the Act?
- (2) What was the mischief and defect for which the common law did not provide?
- (3) What remedy the Parliament had chosen 'to cure the disease of the Commonwealth'?
- (4) The true reason of the remedy?

Coke CJ explained that the function of the judge was to suppress the mischief and to advance the remedy. The focus of this 'mischief' rule is almost exclusively on statutory purpose. There was little regard for the language of the statute.

Although this might not be a direct application of the 'equity of the statute' since the approach did not necessitate the conclusion that the result would not be permitted by the statutory words. However, there are instances of Coke's application which appear to be examples of the stronger approach, reaching a conclusion beyond that which is permitted by the statute. The famous decision of Sir Edward Coke, whilst still Chief Justice in Common Pleas, in *Dr Bonham's case*,⁶¹ is, on one view, a robust application of the equity of the statute.⁶² Whilst the strong principle in *Dr Bonham's case* never obtained traction as a common law doctrine, Professor Nelson has shown that the decision might be the progenitor of *Marbury v Madison* and principles of constitutional review.

⁶⁰ *Heydon's case* (1584) 3 Co Rep 7, 7b; 76 ER 637, 638.

⁶¹ (1610) 8 Co Rep 113, 118; 77 ER 646, 652 'when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such Act to be void'.

⁶² W Nelson *Marbury v Madison: The Origins and Legacy of Judicial Review* (2000).

The equity of the statute approach might not be thought surprising in the era in which it occurred. As Postema has explained, Coke's view of the law was that 'legislative change represented degeneration of the law from its pristine purity in ancient times'.⁶³ And, as we have seen, Coke's view was shared by many others. Even Sir Matthew Hale, who was less sceptical of legislative intervention, argued that law reform should occur, wherever possible, through the courts and should never be attempted by a legislature on foundational legal matters or constitutional matters.⁶⁴

Two related matters may have led to the decline of the equity of the statute. First, the judges who interpreted legislation were no longer the same persons as those who drafted the legislation. Gone were the days, for example, where Lord Nottingham could both draft the *Statute of Frauds* and interpret it. As Thorne observed, 'so long as the law maker is his own interpreter the problem of a technique of interpretation does not arise'.⁶⁵

Secondly, as the notion of parliamentary sovereignty ascended, both the 'extended reach' limb and the 'exclusion of statutory words' limb of the equity of the statute doctrine became more controversial. Towards the end of the 18th century Jeremy Bentham pleaded that 'such a degree of comprehension and steadiness might one day perhaps be given to the views of the legislator as to render the allowance of liberal or discretionary interpretation on the part of the judge no longer necessary'.⁶⁶

By the mid-19th century, Sedgwick remarked of the doctrine that:⁶⁷

⁶³ G Postema *Bentham and the Common Law Tradition* (1986) 15.

⁶⁴ G Postema *Bentham and the Common Law Tradition* (1986) 15.

⁶⁵ S E Thorne 'The Equity of a Statute and Heydon's Case' (1936) 31 *Illinois Law Review* 202, 203.

⁶⁶ J Bentham *Of Laws in General* (ed HLA Hart, 1970) 240.

⁶⁷ T Sedgwick *Statutory Interpretation and Constitutional Law* (2nd edn, 1874) 261. The first edition was 1857.

... laws have been construed, not merely without regard to the language used by the legislator, but in defiance of his expressed will. Qualifications are inserted, exceptions are made, and omitted cases provided for, and the statute in truth remoulded, by the mere exercise of judicial authority. It is vain to seek for any principle by which these decisions can be supported, unless it be one which would place all legislation in the hands of the judiciary.

At about the same time, Sir Frederick Pollock added that the doctrine 'cannot well be accounted for except on the theory that Parliament generally changes the law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds.'⁶⁸

Modern cases

Modern treatment of the equity of the statute

The focus of this paper has been on instances of the doctrine of the equity of the statute where the judicial interpretation of a statute allowed purpose to prevail over text. As I have explained the doctrine was increasingly criticised over time. And modern texts on statutory interpretation rarely refer to the doctrine, but if they do it is usually very briefly and with some derision.⁶⁹

Nevertheless, the doctrine is not merely an historical anachronism. At a higher level of generality it is accurate to say that the concern of the doctrine, namely an inter-relationship between common law and statute, is a concern which is commonly enunciated today. As Professor Andrew Burrows has recently argued, the common law and statute are not 'oil and

⁶⁸ F Pollock *Essays in Jurisprudence and Ethics* (1882) 85.

⁶⁹ An example is F Bennion *Bennion on Statutory Interpretation* (5th edn, 2010) 463 'the practice of giving a strained meaning to statutes'. Bennion is here referring to the equity of the statute, although for reasons I have explained it is not accurate to describe the approach as 'a strained meaning' since the approach is generally based upon the premise that the words *cannot* be given the meaning sought.

water'.⁷⁰ Many common law doctrines today have their origin in statutes, or as glosses upon or responses to statutes.⁷¹ Examples of the close relationship, given by Gummow J, include statutes which operate upon the pre-existing common law, and statutes which establish a relationship which is so analogous to the common law that the common law must respect it.⁷² But the closer that one believes is the relationship between common law and statute, the closer one will move back towards the doctrine of the equity of the statute.

This point was recognised by Roscoe Pound in 1907. Pound observed that there were four ways that the common law might respond to legislation:⁷³ (1) a strict interpretation including refusal to develop the common law by analogy; (2) a liberal interpretation including refusal to develop the common law by analogy; (3) integrating statute and common law and treating them alike within the development of the common law without giving any superior status to legislative analogies; (4) integrating statute and common law and giving superior status to legislative analogies in the development of the common law. Pound observed that common lawyers tended to take the first approach. The fourth approach is indistinguishable from the limb of 'equity of the statute' which I have described as the 'extended reach' limb.⁷⁴

There are also some well known, and very common, canons of modern statutory construction whose foundation may lie in ideas very similar to the doctrine of the equity of the statute. For instance, there are

⁷⁰ A Burrows 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 Law Quarterly Review 232.

⁷¹ *Esso Australia Resources Ltd v Commissioner of Taxation* [1999] HCA 67; (1999) 201 CLR 49, 60 [19] (Gleeson CJ, Gaudron and Gummow JJ).

⁷² *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59 (1999) 200 CLR 1, 60-61 [164]-[166].

⁷³ R Pound 'Common law and legislation' (1907) 21 Harv Law Rev 383.

⁷⁴ See also P Atiyah 'Common Law and Statute Law' (1985) 48 Modern Law Review 1, 7.

well known canons of construction that a statute should be ‘presumed’ not to interfere with common law rights, especially property rights, or that penal statutes will be construed narrowly, which have been attributed to the equity of the statute.⁷⁵ In the earlier era of the rise of the equity of the statute, Holt CJ had remarked that '[l]et a Statute be ever so charitable, if it give away the property of a subject, it ought not to be countenanced'.⁷⁶

The doctrine of the equity of the statute has also been applied more directly. A very recent example of the application of the doctrine is a decision of the High Court of Australia earlier this year.

The equity of the statute doctrine in the High Court of Australia

In *Equuscorp Pty Ltd v Haxton*, the High Court considered whether a claim for unjust enrichment could be brought by a lender to recover money which had been paid to investors under contracts which were unenforceable for illegality. The statute which made the contracts unenforceable did not bar any action for unjust enrichment, either expressly or impliedly. The statute also contained its own regime of penalties, including possible imprisonment. A decision of the High Court of Australia in 1987 on a different statute, which did not involve illegality in the same sense, had previously held that the unenforceable nature of a contract did not, in that case, bar a claim for unjust enrichment.⁷⁷

The majority held that the claim based upon unjust enrichment must fail because it would ‘stultify’ the statutory purpose.⁷⁸ The majority said that the claim failed because it was contrary to the ‘scope and purpose’ of

⁷⁵ S E Thorne ‘The Equity of a Statute and Heydon’s Case’ (1936) 31 Illinois Law Review 202, 213-214.

⁷⁶ Quoted in 4 Bacon's Abridgement (1759) 650. See D J Llewelyn Davies 'The Interpretation of Statutes in light of their policy by English courts' (1935) 35 Colum L Rev 519, 533.

⁷⁷ *Pavey & Matthews Pty Ltd v Paul* [1987] HCA 5; (1987) 162 CLR 221.

⁷⁸ *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 [37]-[38] (French CJ, Crennan and Kiefel JJ).

the relevant statute; it was not necessary to identify an exclusion of the claim either in the express or implied language of the legislation.⁷⁹

The majority relied upon stultification in different ways. French CJ, Crennan and Kiefel JJ considered that the claim in restitution would have permitted recovery of that which was denied by exclusion of the contract claim.⁸⁰ Gummow and Bell JJ agreed with this but also focused upon the statutory policy of protecting investors.⁸¹

All of the judges in the majority relied upon the earlier decision of Deane and Gummow JJ in *Nelson v Nelson*.⁸² In that judgment their Honours explained the origins of this ‘third class of illegality’,⁸³ upon which the majority decision in *Haxton* relied. Deane and Gummow JJ said that a finding of illegality where there was nothing express or implied in the statutory language ‘may be seen as a survival of an earlier school of statutory interpretation’, namely ‘the equity of the statute’.⁸⁴ It appears, as Deane and Gummow JJ expressly acknowledged in *Nelson v Nelson* that in this area of illegality the development of the common law by reference to statute proceeds on the basis of this ‘doctrine [which] had the support of the common law judges led by Sir Edward Coke, who looked back to a time before the rise of the doctrine of parliamentary sovereignty and the subjection to it of the common law’.⁸⁵

⁷⁹ *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 [25] (French, Crennan and Kiefel JJ) [96] (Gummow and Bell JJ).

⁸⁰ *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 [45] (French, Crennan and Kiefel JJ).

⁸¹ *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 [110]-[111] (Gummow and Bell JJ).

⁸² *Nelson v Nelson* [1995] HCA 25; (1995) 184 CLR 538 at 552.

⁸³ *Nelson v Nelson* [1995] HCA 25; (1995) 184 CLR 538 at 554.

⁸⁴ *Nelson v Nelson* [1995] HCA 25; (1995) 184 CLR 538 at 552.

⁸⁵ *Nelson v Nelson* [1995] HCA 25; (1995) 184 CLR 538 at 552.

In *Haxton*, Heydon J dissented. His Honour held that there was nothing express or implied in the language of the statute which had the effect of extinguishing an otherwise valid common law claim:⁸⁶

The contrast between direct legislative prohibition and the policy of the law is not a contrast between what the statute provides and some entirely extra-statutory doctrine. The "policy of the law" is to be found in the "scope and purpose" of the statute. The scope and purpose of the statute depend solely on the meaning of its language.

A different version of the equity of the statute in the UK Supreme Court?

Moving from Australia to England, last year the United Kingdom Supreme Court decided the case of *Yemshaw v London Borough of Hounslow*.⁸⁷ The issue in that case was succinctly described at the opening of the leading judgment of Lady Hale, with whom Lord Hope and Lord Walker agreed (and Lord Rodger generally agreed). The issue was the meaning of the word "violence" in section 177(1) of the Housing Act 1996.

As Lady Hale acknowledged, the underlying purpose and effect of s 177(1) had remained the same since the initial statute was passed in 1977, before later consolidations and other amendments. Its effect was to deem a person who is at risk of violence to be homeless. The question for the Supreme Court was whether the word 'violence' was limited to physical contact or does it include other forms of violent conduct? The Supreme Court concluded that the word included forms of non-physical violence.

Lady Hale's judgment focused heavily upon the contemporary meaning and understanding of 'violence'. Her Ladyship relied upon a 1993 House of Commons Home Affairs Committee in its Report on Domestic

⁸⁶ *Equuscorp Pty Ltd v Haxton* [2012] HCA 7 [124] (Heydon J).

⁸⁷ [2011] UKSC 3.

Violence.⁸⁸ She relied upon a 1992 adoption of a general recommendation by the United Nations Committee which monitors the Convention on the Elimination of all Forms of Discrimination against Women.⁸⁹ She also relied upon the Department of the Environment's Code of Guidance for Local Authorities on Homelessness.⁹⁰ The Supreme Court was assisted by interventions in the case from the Secretary of State for Communities and Local Government and the Women's Aid Federation of England.

The conclusion reached by Lady Hale is set out in para 28:

whatever may have been the position in 1977, the general understanding of the harm which intimate partners or other family members may do to one another has moved on. The purpose of the legislation would be achieved if the term "domestic violence" were interpreted in the same sense in which it is used by the President of the Family Division, in his *Practice Direction (Residence and Contact Orders: Domestic Violence) (No 2)* [2009] 1 WLR 251, para 2, suitably adapted to the forward-looking context of sections 177(1) and 198(2) of the Housing Act 1996:

"Domestic violence' includes physical violence, threatening or intimidating behaviour and any other form of abuse which, directly or indirectly, may give rise to the risk of harm.

Having reached this conclusion, her Ladyship then turned to consider whether giving the words the meaning given to them by the President of the Family Division in the Practice Direction would be inconsistent with anything in the statutory language or purpose. She concluded that it would not.

Lord Brown had some concerns. His Lordship referred to the contrary approach taken in relation to this section in decisions of the Court of Appeal, by Lord Justices Mummery, Jacob and Neuberger, Waller, Laws and Etherton. In particular, in the leading decision prior to *Yemshaw*, Neuberger LJ had taken a close textual approach to the statute and had concluded that the statutory test is clear.⁹¹ However, Lord Brown, in an

⁸⁸ [2011] UKSC 3 [21].

⁸⁹ [2011] UKSC 3 [20].

⁹⁰ [2011] UKSC 3 [22].

⁹¹ *Danesh v Kensington and Chelsea Royal London Borough Council* [2006] EWCA Civ 1404, [2007] 1 WLR 69 [28].

interesting concluding paragraph said that although he had 'very real doubts' about the conclusion, at 'the end of the day, however, I do not feel sufficiently strongly as to the proper outcome of the appeal to carry these doubts to the point of dissent. I am content that the views of the majority should prevail...'⁹²

One can immediately see the reason why the result in *Yemshaw* was seen as desirable. Ms Yemshaw had left the matrimonial home with two young children. The home was rented solely in the name of her husband. Although her husband had never hit her before, she was fearful that if she confronted her husband about her suspicions that he was having an affair then he would hit her. He would shout at her in front of the children, treat her as inhuman, tell her that she was not able to cope with the children and that he would hit her if she returned home.

However, what is noteworthy about *Yemshaw* is how the conclusion was reached. The exercise of statutory interpretation in which the Supreme Court engaged *began* by looking at the meaning of 'violence' in a contemporary setting, including the meaning given to it by the Executive Government. The Supreme Court was not concerned with the meaning of the word 'violence' when the legislation was passed in 1977. The 'essential question' was described as 'whether an updated meaning is consistent with the statutory purpose'.⁹³

The effect of this reasoning is that the core meaning of a statute can change. Matters which are not within the meaning of the statute one year will fall within the statute in the next. This is very different from an approach which permits the scope of words of a genus as including

⁹² [2011] UKSC 3 [60].

⁹³ [2011] UKSC 3 [27].

circumstances which did not previously exist, such as now construing the word 'mail' in 1970's legislation to include 'e-mail'. It may be that this entirely orthodox approach is what is usually meant by references to statutes or the constitution as 'living instruments' or 'always speaking', particularly where the context of the words of the genus, such as within a constitution, encourages a broad approach.⁹⁴ In contrast, the approach in *Yemshaw* admits of the possibility that a circumstance which would properly have been expressly rejected in one case might properly be accepted in a later case.

There was no suggestion in *Yemshaw* that this technique would be confined to the civil law. It might be possible for a person to be acquitted of a crime based upon a construction of a criminal statute in 1977 but, in 2012 a court might hold that although that construction was correct in 1977, at some stage the words acquired a new meaning and a person could now be convicted of the offence in exactly the same circumstances. For this reason, the *Yemshaw* decision has been described by Dr Ekins, borrowing from Lady Hale's language, as an approach of judicial 'updating' of a statute.⁹⁵

It is possible to query whether such a result would be reached in Australia. In 2004, Gummow, Hayne and Heydon JJ said (of constitutional interpretation) that the identification of the meaning of the words used at Federation⁹⁶ 'is more than a matter of historical interest. It is an essential step in the task of interpretation ...That task of construction cannot be undertaken without knowing what particular constitutional expressions

⁹⁴ *Saraceni v Jones* [2012] WASCA 59 [15] (Martin CJ); *Commonwealth v South Australia* [1926] HCA 47; (1926) 38 CLR 408 (Isaacs J); *Theophanous v Herald & Weekly Times Ltd* [1994] HCA 46; (1994) 182 CLR 104 (Deane J).

⁹⁵ R Ekins 'Yemshaw and the constitutionality of updating statutes', unpublished lecture to the Institute of Advanced Legal Studies, London, 9 May 2011.

⁹⁶ *Singh v The Commonwealth* (2004) 222 CLR 322, 385 [159].

mean, and how words were used, at the time of Federation.' Later, in *Pape v The Commissioner of Taxation*, Heydon J said (not in dissent on this point):⁹⁷

[T]he idea that a statute can change its meaning as time passes, so that it has two contradictory meanings at different times, each of which is correct at one time but not another, without any intervention from the legislature which enacted it, is, surely, to be polite, a minority opinion.

There may also be questions concerning the constitutionality of such an updating approach. It is one thing for the courts to recognise the constitutional legitimacy of an express Henry VIII clause giving the executive the power to amend legislation.⁹⁸ It is another for the courts to recognise the constitutional legitimacy of conferring such a power on the judiciary. Depending on the operation of such an express clause, it might be held that the courts are exercising the powers of Parliament.⁹⁹ And if such an approach were not constitutional if done expressly, it might not be possible to do so as a technique of 'interpretation'.

On the other hand, there are passages in some authorities which might be read as endorsing an updating approach.¹⁰⁰ Further, the updating approach in *Yemshaw* shares commonalities with the 'equity of the statute' approach although it is not identical. The equity of the statute approach permits a court to say that a statute means X but it will be held to have effect Y. The *Yemshaw* updating approach permits a court to say that a statute

⁹⁷ (2009) 238 CLR 1, 145 [423].

⁹⁸ *Permanent Trustee* [2004] HCA 53; (2004) 220 CLR 388 at 420-421 [75]- [78] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

⁹⁹ *Western Australia v Commonwealth (the Native Title Case)* [1995] HCA 47; (1995) 183 CLR 373, 485.

¹⁰⁰ For instance, the Full Court of the Supreme Court of South Australia in *National Mutual Life Association v Commissioner of State Taxation* [2011] SASCFC 106 [109]-[111] (Gray J; Sulan and Vanstone JJ agreeing) or even the joint judgment in the High Court of Australia in *R v L* [1991] HCA 48; (1991) 174 CLR 379, 390 (although Mason CJ, Deane and Toohey JJ were speaking in that case of changes to criminal law in the common law in the context of considering the meaning of statutory words).

once meant X but now means Y. Both approaches rely upon general assertions of the purpose of the statute in reaching this conclusion which is acknowledged not to be within the words, or as in *Yemshaw* updating, to be contrary to the meaning of the words at the time they were used.

Conclusion and broader reaches of the doctrine

This paper began with a brief discussion of two of the most common difficulties of methodology in the search for the objective meaning of words used in a statute. Those difficulties involve, first, identifying and ascertaining the limits of external rules which impose the techniques of interpretation and, secondly, the weight which should be given in the process of interpretation to different aspects of *context* in construction of *text*.

Underlying these questions is the basic premise that the exercise of statutory interpretation involves a search for the objective meaning to be given to the words of a statute in context. This paper focused upon situations in which courts have departed from that premise. Those situations involve uncommon interpretative techniques.

I also began this paper with a reference to the thesis of Heydon and Crennan JJ that matched approaches to interpretation apply in relation to construction of a constitution, a trust, a contract, or a statute. In each of these areas it is possible to see remnants of the same uncommon interpretative approach. One example will suffice in conclusion to illustrate the scope of these ideas beyond statutory interpretation.

If the effect of words in a trust or will would be to cause a charitable gift to fail then courts developed a doctrine called *cy-près* which allowed the words to be given a meaning ‘as near as possible’ to the meaning which they would otherwise bear.

The doctrine was used in one case by the Lord Chancellor to apply a bequest for a house of Jewish study to a home to bring up children in the Christian faith.¹⁰¹ Lord Eldon remarked wryly that it 'would have caused some surprise to the testator if he had known how his devise would have been construed'.¹⁰² The early justifications for the doctrine sometimes focused upon the suggestion that it preserved the equity of the *general* charitable intention of the settler or testator: 'a general principle of piety in the testator'.¹⁰³ The words of a testamentary will or trust could be ignored in favour of the purpose, *pro salute animae* (for the good of his soul).

Unsurprisingly, this doctrine was equally controversial. In *Attorney General v Lady Downing*¹⁰⁴ the Lord Chief Justice, expressing the opinion of himself, and the Lord Chancellor and the Master of the Rolls, said that the doctrine would permit a situation in which 'the testator is made to disinherit [the heir at law] for a charity he never thought of; perhaps for a charity repugnant to the testator's intention, and which directly opposes and encounters the charity he meant to establish'. Like the 'equity of the statute' this doctrine of *cy-près* was always controversial. In *Attorney General v Andrew*,¹⁰⁵ the Lord Chancellor referred to older cases which had suggested that the doctrine 'ought never again to be mentioned in this court'.

Whether we are concerned with the interpretation or construction of words in a contract, in a deed of trust, in a statute or in a constitution, the view which is taken about these uncommon interpretative techniques will

¹⁰¹ *Da Costa v De Paz* [1754] EngR 10; (1754) Amb 228; (1754) 27 ER 150 (and the full Swanston report at 2 Swanston 532[1818] EngR 21; 36 ER 715. see, further, the discussion in J Getzler 'Morice v Bishop of Durham', in Mitchell and Mitchell (eds), *Landmark Cases in Equity* (forthcoming).

¹⁰² *Attorney General v Mayor of Bristol* (1820) 2 Jac & W 294, 308; 37 ER 640, 645.

¹⁰³ *Moggridge v Thackwell* (1802) 7 Ves 36, 69; 32 ER 15, 26 (Lord Eldon).

¹⁰⁴ *Attorney General v Lady Downing* [1767] EngR 25; (1767) Wilm 1, 32; [1767] EngR 25; (1767) 97 ER 1, 13.

¹⁰⁵ *Attorney General v Andrew* (1798) 3 Ves Jun 633, 649; [1798] EngR 110; (1798) 30 ER 1194, 1202.

depend upon the answer to deep questions including the nature of adjudication, the relationship between the judiciary and other branches of government, and the relationship between the common law and statute.

Professor Atiyah once remarked of the 'difficult and controversial subject' of the relationship between statute and common law:¹⁰⁶

If, as I have suggested, statute law and common law do, at least in many areas, work together in some kind of legal partnership, creating sometimes amalgams of law of various kinds [can the courts] ... take account of statute law, in the very development of the common law itself? Can the courts, for instance, use statutes as analogies for the purpose of developing the common law? Can they justify jettisoning obsolete cases, not because they have been actually reversed by some statutory provision, but because a statute suggests that they are based on outdated values? Could the courts legitimately draw some general principle from a limited statutory provision, and apply that principle as a matter of common law? It must be clear that using statutes in this way is fundamentally different from any process of construction, however benevolent or liberal that might be. Construction, as a matter of theory at least, requires the court to give effect to what it thinks the legislation actually enacts. Using statutes by way of analogy quite clearly involves using them to produce results which the legislation does *not* enact.

The nature of the exercise of statutory interpretation, and the relationship between statute and common law are fundamental questions. To the extent that the uncommon interpretation techniques to which I have referred in this paper are to survive in our law, then there is real force in Atiyah's observation that these techniques are not construction or interpretation at all. If they are to be accepted as legitimate in a modern plural democracy then their justification must be found elsewhere. But it is essential to understand how and why these techniques continue to exist because they challenge one of the usual premises underlying statutory interpretation.

¹⁰⁶ P Atiyah 'Common Law and Statute Law' (1985) 48 *Modern Law Review* 1, 6.