# CONSOLIDATION ACTS

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## A. INTRODUCTION

As part of the process of keeping law up-to-date and reasonably accessible statutory provisions which have been in force for some time are often repealed and re-enacted in much the same form in a consolidation Act. Odgers describes a consolidation Act as one which[1]

> "comprehend[s] in one statute the provisions on a certain subject contained in a number of statutes, those former statutes being repealed."

This definition will suffice for present purposes provided it is remembered that many "consolidations", rather than being composed of provisions drawn from a number of *different* statutes, are simply re-enactments of a single statute incorporating all previous amendments; and that many "consolidations", as will soon be seen, themselves incorporate a substantial measure of new amendment.

### *England*

In England,[2] calls for consolidation of statute law began at an early date, in the hope of restoring order to the "tortuous and ungodly jumble".[3] Examples of consolidation Acts may be found as early as the 16th century, although the period of greatest impetus came in the second half of the 19th century when a number of bodies were established to investigate, and supervise the preparation of, consolidation Acts. At this time consolidation bills were generally passed without parliamentary opposition, a practice which was facilitated by the establishment of a Joint Committee of Parliament which from 1894 had the task of considering and reporting on them. However despite the existence of this machinery, the progress in enacting consolidation measures was not good. The main reason was simple, and has already been alluded to. Many took the view that true consolidation should not involve any change in the law, but should reproduce the old law exactly "with all its blemishes and imperfections".[4] Yet not only does this view substantially reduce the value of consolidation, it is often simply not feasible. Effective consolidation should involve reconciling provisions which do not fit well together, harmonising the style of provisions from different statutes, and removing anomalies.[5] In other words, it involves some degree of amendment. A failure to accept this led to the obstruction of a large number of consolidation bills.

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[1] Odgers, *The Construction of Deeds and Statutes* 5th ed at 334.

[2] For histories of consolidation in England, see Lord Simon of Glaisdale and J. V. D. Webb, *Consolidation and Statute Law Revision* [1975] Public Law 285 and Bennion, *Statute Law*, 67-72.

[3] The words of Oliver Cromwell.

[4] Lord Jowitt, H. L. Debs (1947-1948) Vol 155 col 1172.

[5] See the strong plea by Ilbert, *Legislative Methods and Forms*, 111 et seq.

The impasse was not effectively resolved in England till 1949, when the Consolidation of Enactments (Procedure) Act was passed, allowing "corrections and minor improvements" to appear in a consolidation bill. These are defined to mean[6]

> "Amendments of which the effect is confined to resolving ambiguities, removing doubts, bringing obsolete provisions into conformity with modern practice, or removing unnecessary provisions or anomalies which are not of substantial importance, and amendments designed to facilitate improvement in the form or manner in which the law is stated."

Under the procedure laid down in the Act, such consolidation bills are referred to a Joint Committee of Parliament, and provided (after hearing any representations which may be forthcoming) that committee certifies that the bill does consolidate the law with the addition only of "corrections and minor improvements" as defined, the bill will pass expeditiously through Parliament without amendment on the floor of the House.

The guidelines for even this amended procedure caused difficulty, so in 1965, on the setting up of the Law Commission, a further step was taken, enabling the Law Commission to recommend consolidation bills which embody improvements going beyond the scope permitted by the 1949 Act.[7] These more substantial amendments are detailed in a Command Paper presented to Parliament, which can discuss and amend them, despite the fact that the Joint Committee may have approved them. But even the Law Commission procedure permits only amendments which are necessary for satisfactory consolidation; the procedure must not be used to introduce far-reaching substantive changes. If a "consolidation" measure is to contain change as substantial as that it will normally be referred to an ad hoc committee.[8]

It may be seen, then, that even in Britain there are several categories of consolidation Act. The long title of the Act will normally describe into which category it falls: "pure" consolidation with "correction and minor improvements" under the 1949 procedure, consolidation with Law Commission amendments, and consolidation with amendments recommended by an ad hoc committee.

*New Zealand*

The system of textual amendment in New Zealand means that reprints incorporating amendments will often serve the purpose of tidying the law and render consolidation unnecessary.

However New Zealand has its own history of consolidation. Many statutes first passed in the 19th century were re-enacted before the century was out: the Land Transfer Act 1870 and the Acts Interpretation Act 1868 are two examples. These were more than "pure" consolidations; they were

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[6] Section 2. The joint committee must not approve any corrections or minor improvements unless they are satisfied that they do not effect any changes in the existing law of such importance that they ought to be separately enacted by Parliament (ibid s.1(5)).

[7] See Simon and Webb, supra n.2, at 301-304.

[8] Bennion, supra n.2, at 71.

revisions, as the young legal system developed new ideas. But in 1895 there came a most important development. It was felt that, even in such a short time, the law had become so piecemeal that consolidation on a large scale was required. Commissioners were set up by Statute[9] to accomplish no less a task than consolidating all the Statute law of New Zealand. The commissioners were given power to make[10]

> "such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the existing Acts."

Any such alterations were to be reported to Parliament.

In 1908 the Commissioners reported back, recommending the repeal of virtually all pre-existing New Zealand statutes, and the enactment of 208 consolidated statutes to replace them.[11] These recommendations were accepted, and the new statutes were all enacted at the same moment of time in 1908.[12] In the Report, the Commissioners produced the required list of alterations their measures made to the earlier law. The list is a long one, and it is clear that some of the changes made were substantial. Moreover the Report contains this interesting paragraph:

> "We do not understand this to require us to specify every alteration or change we have made. The resources of the printing office would be unequal to such a task, as, apart from numberless verbal alterations, many Acts are almost wholly recast."

Instances of quite significant alterations not listed in the Report soon came before the courts.[13] It is clear, therefore, that one could not describe the 1908 Consolidation as "pure" consolidation.

Since 1908 there have not been many Acts which have been described in their long titles as "consolidation" Acts: two are the Police Offences Act 1927 and the Income Tax Act 1976. These statutes have not been passed by any such special procedure as exists in the United Kingdom for consolidation Acts, and a perusal of them reveals that, while they certainly are predominantly pure consolidation there are nevertheless occasional differences in wording from the original Acts which may go beyond mere improvements of expression.[14]

The great bulk of reenacting statutes since 1908 are described in their long titles as Acts to "consolidate and amend" the law. They vary. Some

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[9] The Reprint of Statutes Act 1895. The Commissioners were to "revise, correct, arrange and consolidate such Acts, omitting all such enactments and parts thereof as are of a temporary character or of a local or personal nature, or have expired, become obsolete, been repealed, or had their effect." (ibid s.3(2)).

[10] Ibid s.3(3).

[11] The Report is published as a separate, introductory, volume to the Consolidated Acts of 1908.

[12] The statutes formed an Appendix to the Consolidated Statutes Enactment Act 1908. On the enactment of that Act they came simultaneously into force.

[13] See in particular *Hughes* v *Hanna* (1909) 29 NZLR 16 esp at 22-23 per Edwards J., and *Minister of Customs* v *McParland* (1909) 29 NZLR 279 at 285-289 per Edwards J.

[14] For instance compare the Income Tax Act 1976 sections 78 and 403 with the equivalent sections in the Land and Income Tax Act 1954.

of them — for instance the Land Transfer Act 1952 and the Property Law Act 1952 — are basically re-enactment with a small measure of amendment; others contain a large measure of alteration with only a few provisions re-enacting the original law. Indeed, some Acts described as Acts to "consolidate and amend" are really important reform statutes which introduce a new philosophy into that branch of the law: the Indecent Publications Act 1963 and the Domestic Proceedings Act 1968 are examples. This mode of description has become a little less common in recent years, there being a tendency where Acts introduce a large measure of reform to recognise that in the long title.[15]

*The Presumption that Consolidation Acts do not Change the Law*

All the books on statutory interpretation refer to the presumption that Consolidation Acts do not change the law,[16] so that differences in wording between the consolidation and original Acts will be deemed to be without substantive significance.

It will be apparent that in England there is a very sound basis for such a presumption, at least in the case of a statute which is pure consolidation, and has been passed by Parliament on that understanding. While the presumption may have added strength in respect of Acts passed since 1949 it has been applied in respect of Acts much older than this: one of the best illustrations of it is *Beswick* v *Beswick*,[17] in which the House of Lords held that section 56 of the Law of Property Act 1925 was not intended to alter the law about third-party enforcement of contracts, even though its wording appeared significantly different from that of its predecessor.

Even in England, however, the presumption is only a presumption, and will be defeated by words in the consolidation Act which are so clear that it is possible to interpret them only as changing the law.[18] Obviously, also, the presumption can have but little force in respect of Acts which consolidate and amend: indeed Lord Simon of Glaisdale has said the presump-

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[15] For instance the long title to the Family Proceedings Act 1980 describes it as "an Act to revise the Law", and that of the Summary Offences Act 1981 as "an Act to reform and restate the Law". Nevertheless the formula "consolidate and amend" is still not uncommon: see for example the Public Works Act 1981 and the Food Act 1981.

[16] See for instance *Craies on Statute Law* 7th ed at 59, *Maxwell on the Interpretation of Statutes* 12th ed at 21, and *Odgers Construction of Deeds and Statutes* 5th ed at 334.

[17] [1968] A.C. 58. See also the cases cited in Maxwell (supra n.16) at 21-23, and in Odgers at 334-338. A clear statement is found in *Mitchell* v *Simpson* (1890) 25 Q.B.D. 183 at 190 per Fry L.J. In *Beswick* v *Beswick* Lord Upjohn took the unusual step of consulting the proceedings of the joint committee which considered the bill "to see whether the weight of the presumption as to the effect of consolidation Acts is weakened by anything that took place in those proceedings." [1968] A.C. at 105. Cf also *Nolan* v *Clifford* (1904) 1 C.L.R. 429 at 449 per Barton J.

[18] E.g. *Williams* v *Public Trustee* [1906] A.C. 248 at 253, P.C. per Lord McNaghten; *H* v *H* [1966] 3 All E.R. 560 at 566 per Simon P.; *Macconnell* v *Prill* [1916] 2 Ch. 57 at 63 per Sargent J.

tion may need judicial reconsideration in the case of consolidation acts which incorporate Law Commission amendments.[19]

In New Zealand (as in Australia and Canada) there is obviously less room for the operation of this presumption. The major "consolidation" of 1908 clearly contains much amendment;[20] since 1908 there is no special parliamentary procedure which could lend the presumption any clear basis; and most "consolidation" Acts in New Zealand are in any event Acts "to consolidate and amend".[21] In respect of Canada, where the position is not dissimilar, Driedger has categorically stated that the presumption can have no operation.[22]

Yet it has been occasionally applied in New Zealand[23] — and also in Australia,[24] where it would seem to have no greater basis. However the stronger authority holds, at least in respect of the 1908 Consolidation, that it is[25]

> "impossible to attribute to the Legislature the intention merely to consolidate and not to alter the law."

This has had consequences which some may deem unfortunate. New Zealand "consolidations" often contain slight changes in wording, and one is left in the unsatisfactory position of not knowing in a particular case whether their significance is purely cosmetic, or whether they introduce a change of substance. Sir Alexander Turner, who is strongly critical of acts to consolidate and amend, has given the example of section 24 of the Crimes Act 1961 (on the defence of compulsion) and its predecessor, section 44 of the Crimes Act 1908.[26] One can debate long whether the subtle differences between the provisions are changes of substance or merely of expression.

## B. Some Problems of Consolidation Acts

Acts which consolidate, or consolidate and amend, particularly large Acts which draw together provisions from several original statutes, can give rise to difficult problems of construction. Some of the difficulties arise because the process of consolidation has been done too hastily.

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[19] *Maunsell* v *Olins* [1975] A.C. 373 at 392. It may also be that the presumption is stronger in some cases than others: for instance if it is contended for one side that the consolidation Act changes a fundamental principle of common law (as in *Beswick* v *Beswick*) or effects a change in a matter where civil liberties are at stake (e.g. *Nolan* v *Clifford* (1904) 1 C.L.R. 429 at 450 per Barton J.).

[20] Supra, p

[21] This clearly makes a difference: e.g. *Managh* v *Managh* [1937] N.Z.L.R. 498.

[22] *The Construction of Legislation*, at 161. Cf. however *Cedar Rapids Savings Bank* v *Dominion Purebred Stock Co.* [1923] 3 W.W.R. 1214 and the other cases cited in *The Canadian Abridgment* vol 36 at 131-134.

[23] E.g. *Wilson* v *Widdowson* (1909) 28 N.Z.L.R. 738 at 746 per Denniston J.

[24] E.g. *Nolan* v *Clifford* (1904) 1 C.L.R. 429.

[25] *Minister of Customs* v *McParland* (1909) 29 N.Z.L.R. 279 at 287 per Edwards J.

[26] *Changing the Law* (1969) 3 N.Z.U.L.R. 404 at 414-417. See also Craies, *Statute Law*, 7th ed. at 143-144.

—One sometimes finds sections in a consolidation Act, or even different parts of a single section,[27] which appear to be inconsistent with each other. This normally happens because insufficient attention has been paid to reconciling the provisions of two earlier statutes, or to harmonising re-enacted provisions with new ones. In such a case the court may be able to solve the problem by techniques of construction such, for instance, as *generalia specialibus non derogant*. If, however, the provisions are in irreconcilable conflict the court may have to go beyond construction, find the dominant provision, and declare the other to be superfluous.[28] The 1908 Consolidation, which enacted 208 statutes at the same time, was rich in such problems.[29] In particular, it succeeded in a number of instance re-enacting together two provisions, originally enacted at different times, which were so far in conflict that before the consolidation one would probably have been held to impliedly repeal the other.[30] In such cases the ultimate solution, where all else has failed, may be to hold that the consolidation merely perpetuates the implied repeal[31].

—Related to this problem is another. If the Act brings together provisions which were originally enacted at very different times, they may be based on different philosophies. Every statutory provision bears "the colour of its time."[32] This problem, although sometimes found in consolidation Acts is, of course, not confined to them; it can occur when an Act is amended at a much later date.

—Since the provisions may be drawn from a number of earlier statutes, language may not be used consistently throughout a consolidation Act.

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[27] See for example section 156(1) of the Summary Proceedings Act 1957: "The room or building in which any preliminary hearing takes place shall not be deemed to be an open Court; and, where the Court is of the opinion that [certain grounds exist] the Court may direct that those persons be excluded accordingly." The first and second parts of this subsection are not really consistent with each other, the first assuming that the hearing takes place in closed court, the second that the public can only be excluded on certain well-defined grounds. The two parts of the section originally appeared in two separate statutes which were conflated in the 1957 Act.

[28] E.g. *Wertheim* v *Samson* (1886) N.Z.L.R. 5 S.C. 208. See also *Walker* v *McLaren* (1884) N.Z.L.R. 2 C.A. 262.

[29] For example *Stubbing and Page* v *Barnett* (1909) 28 N.Z.L.R. 810.

[30] As in *Shearman* v *Kay* (1909) 29 N.Z.L.R. 540. In *Williams and Kettle Ltd* v *Official Assignee of Harding* (1908) 27 N.Z.L.R. 871, 11 G.L.R. 1 the Court of Appeal held that section 27 of the Chattels Transfer Act 1889 was impliedly repealed by section 79(2) of the Bankruptcy Act 1892. The facts of the case arose before the 1908 consolidation. As is noted in the headnote to the Gazette Law Reports report of the case, "Both sections have been re-enacted in the consolidated statutes."

[31] *Paterson's Freehold Gold Dredging Co Ltd* v *Harvey* (1909) 28 N.Z.L.R. 1008 at 1015, discussed in *Shearman* v *Kay*, n.30 supra. For other difficulties of implied repeal in consolidation Acts see Burrows, Inconsistent Statutes (1978) Otago L.R. at

[32] The language is that of Ilbert, *Legislative Methods and Forms* at 111. A good example is given by Cretney, "The Codification of Family Law" (1981) 44 M.L.R. 1 at 6.

Thus, there is no guarantee that different expressions have different meanings.[33] Nor is it safe to assume that the same expression always bears the same meaning:[34] the presumption of consistent usage has somewhat less than its normal weight in a consolidation Act.[35] This may happen even in cases where a word is defined in the interpretation section of the consolidation Act; the historical antecedents of one section may contribute to the conclusion that the "context requires" that the statutory definition does not apply to the word as used in that section.[36]

—Vagaries of expression may creep into the text. For reasons which are obscure, and sometimes explicable only on grounds of mistake, words may be introduced[37] which render the provision very difficult of comprehension; or apparently essential words may be omitted.[38] It is sometimes very difficult, and sometimes impossible,[39] for a court to remedy such errors (especially errors of omission) by a process of construction.

—Sometimes the transfer of a section from one Act to another may result in inaccurate cross-references. Reference to the other provisions may be erroneous,[40] or insufficiently determinate.[41]. Such situations may require an approach by the courts which is close to corrective surgery.

—Sometimes provisions may be re-enacted which have spent their force, and were effectively obsolete before the consolidation. Re-enactment will

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[33] *Inland Revenue Commissioners* v *Hinchy* [1960] A.C. 748 at 766 per Lord Reid.

[34] *R* v *Riley* [1896] 1 Q.B. 309 at 323 per Vaughan Williams L.J.; *R* v *Burt* [1960] 1 Q.B. 625 at 632 per Lord Parker C.J. ("The Costs in Criminal Cases Act 1952, the present Act. being an Act made under the Consolidation of Enactments (Procedure) Act 1949, there is no reason whatever for reading 'costs' in one part of the Act as meaning the same as 'costs' in another part of the Act.").

[35] *Maxwell on the Interpretation of Statutes*, 12th ed, 279.

[36] See, for instance, *Auckland City Corporation* v *Guardian Trust Co Ltd* [1931] N.Z.L.R. 914 where the word "owner" in section 193(1) of the Municipal Corporations Act 1920 was held not to bear the statutory definition given it by section 2 of the same Act: its origins were in another statute. Cf also *Associated Motorists Petrol Co Ltd* v *Bannerman* [1943] N.Z.L.R. 491 at 498 per Myers C.J.

[37] E.g. *The Arabert* [1963] P. 102: "This difference . . . . suggests the possibility that the word 'of' following the word 'loss' has crept in per incuriam." (per Lord Merriman P. at 109).

[38] *R* v *Joyce* [1968] N.Z.L.R. 1070: section 24 of the Crimes Act 1961 omits reference to aggravated robbery in the list of offences to which the defence of compulsion is not applicable.

[39] As in the *Joyce case* (supra n.38). No court can write words into an enactment.

[40] *Gualter Dykes & Co* v *Begg* (1910) 30 N.Z.L.R. 99. A reference to s.137 of the Act should really have been a reference to s.133. "The Courts have always been very chary of omitting a word, and still more so of substituting another, but such an omission must sometimes be made, where, as here, the reference in the text is really meaningless": Chapman J. at 117. The judge takes the unusual step of looking at the draft bill.

[41] *Warren* v *Hammond* [1928] N.Z.L.R. 808. In section 63(b) of the Gaming Act 1908, it is not very clear what the word "such" refers to in the expression "such bet or wager".

probably be held not to give such provisions new life if to do so would result in an absurdity or require the provisions to operate in a vacuum.[42]

In some of these cases there is not just a failure to clarify the legislative intent: it is inappropriate to speak of legislative intent at all. Standard rules of interpretation may be quite inadequate to solve such problems. This may be exacerbated by the fact that in some consolidations the legislation may reveal no consistent underlying purpose: the only purpose may have been to render the law more accessible. The courts in such situations have occasionally, although rarely, had to resort to heroic methods of interpretation, and at times have had to admit expressly that the legislature has made a mistake.[43]

However these are not the only difficulties caused by consolidation acts. The most important question they raise, from the point of view of both theory and practice, is the extent to which they should be interpreted with reference to the statutes which preceded them.

## C. Tracing Back — Reference to Prior Legislation

### 1. *The uses of reference to prior legislation*

The historical antecedents of a provision in a consolidation Act can often cast light on the meaning of that provision. This may happen in a number of ways.

Differences in the wording of the present provision from that of the earlier section which it replaced may be helpful. If one presumes that the consolidation Act was not meant to change the law, the wording of the original will determine the meaning of the present provision.[44] Even if there is no room for that presumption, changes in wording can still be significant: they may demonstrate exactly what change the legislature intended to make. The addition or omission of words and phrases can be particularly significant.[45] Moreover, progressive changes in wording throughout a series of Acts may demonstrate the legislature's intention to advance a certain policy.[46]

The context in which the provision in question appeared in the earlier legislation, and the the social circumstances surrounding its passing, can also

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[42] *McLauchlan* v *Marlborough County Council* [1930] N.Z.L.R. 746: "In truth, though the prototype of s.47(1) was essential in 1896, when the system of rating on unimproved value was first introduced, it is quite superfluous under present-day conditions and legislation. It is difficult to understand how it has been allowed to remain except through mere oversight on the part of the draftsmen." (Myers C.J. at 753).

[43] See n.42 supra.

[44] As in *Beswick* v *Beswick* [1968] A.C. 58.

[45] E.g. *Attorney-General* v *Daemar* [1980] 2 N.Z.L.R. 89; *Lilley* v *Public Trustee* [1981] A.C. 839; *R* v *Mickle* [1978] 1 N.Z.L.R. 720.

[46] E.g. *Leeds City Council* v *West Yorkshire Metropolitan Police* [1982] 1 All E.R. 274.

provide a clue as to its meaning, and hence to the meaning of the equivalent provision in the consolidation Act.[47] A good example of that occurred in a recent House of Lords case when a study of the origins of section 8 of the Coinage Offences Act 1936 showed that it was really about medals rather than coins, and thus should not have an effect on determining questions of mens rea in relation to other sections of the Act which related to coinage.[48]

Clearly also references to the earlier legislation can be helpful in explaining how apparent contradictions or inconsistencies in the consolidation Act happened. If it becomes apparent that they arose by inadvertence, the search for coherent legislative intent may be abandoned.[49]

2. *The permissibility of reference to prior legislation.*

The number of cases where the courts have referred to antecedent statutes to interpret a consolidation Act is vast. However until recently there were a great variety of dicta as to precisely when it can, or should, be done.

Some statements suggest that it is always permissible to refer to a provision's history, not only in respect of Acts which are pure consolidation[50] (in which case the presumption that consolidation Acts do not change the law could be taken to presuppose that the practice is legitimate) but also in respect of Acts which consolidate and amend.[51] Indeed some would regard it as axiomatic that the legislative history of a provision is part of the context which may legitimately be taken into account in interpreting it.[52]

However there are other dicta to the effect that recourse to antecedents should not be made if the wording of the consolidation Act is clear, and thus presumably does not need interpretation. Statements to this effect can

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[47] See the judgment of Lord Simon of Glaisdale in *George Hensher Ltd* v *Restawhile Upholstery (Lancs) Ltd* [1976] A.C. 64 at 89-90; also *Johnson* v *Moreton* [1980] A.C. 37.

[48] *R* v *Heron* [1982] 1 All E.R. 993.

[49] E.g. *Wertheim* v *Samson* (supra n.28).

[50] E.g. *R v Schildkamp* [1971] A.C. 1 at 23 per Lord Upjohn ("Therefore, bearing in mind that a consolidation Act is presumed not to alter the law, it becomes material to trace this subsection to its original source."); *Inland Revenue Commissioners* v *Hinchy* [1960] A.C. 748 at 768 per Lord Reid ("One must presume that such an Act makes no substantial change in the previous law . . . . . Therefore, in interpreting a consolidating Act, it is proper to look at the earlier provisions which it consolidated.").

[51] E.g. *In re Budgett* [1894] 2 Ch. 557 at 561-562 per Chitty L.J. ("I have here to deal, not with an Act of Parliament codifying the law, but with an Act to amend and consolidate the law . . . ; and I think it is legitimate in the interpretation of the sections in this amending and consolidating Act to refer to the previous state of the law,").

[52] E.g. *Macmillan* v *Dent* [1907] 1 Ch. 107 at 120 per Fletcher Moulton L.J.; *Mangin* v *Commissioner of Inland Revenue* [1971] N.Z.L.R. 591 at 594, P.C. per Lord Donovan.

be found dating back to last century, some of them in the strongest possible terms.[53] Statements of this kind appear, understandably, to have been more frequent in the case of Acts which consolidate and amend rather than consolidation Acts pure and simple.[54] But they can be found in respect of pure consolidation Acts too.[55]

The New Zealand courts, having mostly taken the view that the 1908 consolidation is not pure consolidation, have tended to oppose the tracing of legislative history where the consolidation Act is clear. One of the strongest statements is that of Stout C.J. in *Miller* v *Lamb*:[56]

> "In construing any of our consolidated statutes we must take them as the final law declared by the legislature, and it is a waste of time to institute comparisons with former Acts. Indeed, consolidation or codification — and they are practically the same — would be a farcical proceeding if laymen or lawyers had to try to discover the law by perusing repealed statutes."

However, here again the statements have not all been one way.[57] This is another area of statutory interpretation where for virtually any judicial dictum one can find another diametrically opposed.

### 3. *Farrell* v *Alexander.*

However of recent years the House of Lords has expressed a clear policy, in respect of all types of consolidation Act, of not tracing historical antecedents where the provision in the consolidation Act is clear. This policy was first stated in clear terms by the majority of the House in *I.R.C.* v

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[53] "If the later Act can clearly have only one meaning we ought to give effect to it accordingly. If, instead of doing that, we compare it with the former Act, and say that it differs from it only to such and such an extent, and then consider decisions upon the former Act, we might in that way go back to half-a-dozen older Acts, and after considering the decisions on them, we might at last arrive at a conclusion exactly contrary to the later Act.": *Ex parte Blaiberg* (1883) 23 Ch.D. 254 at 258 per Jessel M.R. See also *Bradlaugh* v *Clarke* (1883) 8 A.C. 354 at 380 per Lord Watson; *Williams* v *Permanent Trustee Co of N.S.W.* [1906] A.C. 248 at 253 per Lord McNaghten; *Ouellette* v *Canadian Pacific Railway Co.* [1925] A.C. 569 at 574 per Lord Shaw; *Beswick* v *Beswick* [1968] A.C. 58 at 73 per Lord Reid.

[54] E.g. *Ex parte Blaiberg* and *Bradlaugh* v *Clarke* (supra n.53). See also *Thames Conservators* v *Smeed, Dean & Co.* [1897] 2 Q.B. 334 at 346 per Chitty L.J.

[55] E.g. *Beswick* v *Beswick* (supra n.53). All the New Zealand Acts of 1908 are also expressed to be "consolidation" Acts. See n.56 infra.

[56] (1910) 29 N.Z.L.R. 873 at 879. See also *Warren* v *Hammond* [1928] N.Z.L.R. 808 at 813 per Smith J.; *Paterson's Freehold Gold Dredging Co* v *Harvey* (1909) 28 N.Z.L.R. 1008 at 1014-1015 per Williams J.; *Bremner* v *Dunn* (1902) 22 N.Z.L.R. 22 at 25 per Denniston J.

[57] See *Taylor* v *Harley* [1943] N.Z.L.R. 68 at 69 per Smith J., and *Public Trustee* v *Sheath* [1918] N.Z.L.R. 129. The question is fully discussed in the judgments of Chapman and Hosking JJ. in the latter case, but, with respect, these judgments are hard to follow. However Chapman J. clearly believes that consolidation and codification are different in this respect: see at 142. He concludes: "I do not think that any absolute rule can be adopted as to when the court ought to construe an Act without reference to its history as a compilation, and when it can rely on the light derived from such an examination." (ibid). See also Hosking J. at 155.

*Joiner*[58] and *R* v *Curran*,[59] but was put most explicitly in *Farrell* v *Alexander*[60] in 1976. In this case it was held that section 85 of the Rent Act 1968 clearly prohibited "any person" from receiving a premium from a tenant, and it was not proper to look to the earlier legislation which it had consolidated to demonstrate that "any person" was confined to the landlord. The following statement by Lord Wilberforce puts the matter very clearly:[61]

> "I would agree and endorse the principle that it is quite wrong that, in every case where a consolidation Act is under consideration, one should automatically look back through the history of its various provisions and minutely trace the language from Act to Act . . . . . I think that this tendency should be firmly resisted: that self-contained statutes, whether consolidating previous law, or so doing with amendments, should be interpreted, if reasonably possible, without recourse to antecedents, and that the recourse should only be had when there is a real and substantial difficulty or ambiguity which classical methods of construction cannot resolve."

A majority of the members of the House made statements to like effect.[62] While it is true that rules of statutory interpretation are seldom more than guides, their Lordships in *Farrell* v *Alexander* were obviously intent on framing an exclusionary rule of some strength. Lord Wilberforce said that it is "quite wrong" automatically to examine antecedents: Lord Simon said that it is normally not even *permissible* to refer to a consolidated statute at the primary stage of construction of the consolidation Act; to Lord Edmund-Davies it is *legitimate* to refer to an earlier statute only if there is ambiguity. The rule thus framed has since been followed several times by the House of Lords,[63] and has been approved in judgments in the New Zealand Court of Appeal.[64]

### 4. *The reasons for the rule in Farrell* v *Alexander.*

The pronouncements in *Farrell* v *Alexander* are in a sense surprising, for they tend to run counter to what is often said to be the "modern" purposive approach to construction which would allow the interpreter to

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[58] [1975] 1 W.L.R. 1701.

[59] [1976] 1 W.L.R. 87. See also the dissenting judgment of Lords Simon and Diplock in *Maunsell* v *Olins* [1975] A.C. 373.

[60] [1977] A.C. 59.

[61] [1977] A.C. 59 at 72-73.

[62] Lord Simon of Glaisdale at 82-84; Lord Edmund Davies at 94. Viscount Dilhorne and Lord Russell do in fact look at the earlier legislation.

[63] *Rogers* v *Cullen* [1982] 1 W.L.R. 729; *R* v *Cuthbertson* [1981] A.C. 470. See also *Grant* v *Director of Prosecutions* [1982] A.C. 190 at 201 (P.C.).

[64] *Rossiter* v *Commissioner of Inland Revenue* [1977] 1 N.Z.L.R. 195 at 207 per Cooke J. (He said that the spirit of Lord Wilberforce's "warning" in *Farrell* v *Alexander* was "helpful"); *Fuller* v *MacLeod* [1981] 1 N.Z.L.R. 390 at 395 per Richardson J.

examine the words of an Act in the widest possible context.[65] It is interesting, therefore, to examine the reasons which prompted the House of Lords to take this line. With respect, they all carry some conviction.

*First*, the whole point of consolidation is to tidy the law by gathering together in one place a number of provisions that were previously scattered throughout several statutes. It would destroy this purpose were one able in all cases to re-examine the old statutes. This was the major point made by Stout C.J. in the passage quoted above when he said it would be "farcical" if this were always to be permitted.[66] It was particularly emphasised by Lord Simon of Glaisdale in *Farrell* v *Alexander* itself.[67]

*Secondly*, to permit counsel to traverse all the previous law on the topic can take a long time. It is probably not without relevance that in some of the cases where the strongest objection has been taken to this kind of historical inquiry the court had been subjected to a particularly time-consuming exercise.[68] Indeed in *Farrell* v *Alexander* itself Lord Wilberforce noted that argument on the legislative history had consumed four days.[69] If the court feels the argument has not been productive, and has led to inconclusive results, so much more will its patience be tried.[70]

*Thirdly*, if the words of the consolidation Act really appear clear, citizens, whether legally trained or not, should be entitled to take them at face value. It would be to upset legitimate reliance on the words of a statute to vary its clear meaning by recourse to other materials, including the history of the provision, which might in any case not be readily available to the lay

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[65] *Attorney-General* v *Prince Ernest Augustus of Hanover* [1957] A.C. 436 at 461 per Viscount Simonds; see infra p

[66] *Miller* v *Lamb*, supra n.56.

[67] [1967] A.C. at 82. See also Lord Diplock in *I.R.C.* v *Joiner* [1975] 1 W.L.R. 1701 at 1711: "The purpose of a consolidation Act is to remove this difficulty by bringing together in a single statute all the existing statute law dealing with the same subject matter . . . . so that it will be no longer necessary to seek that context in a whole series of amended and re-amended provisions appearing piecemeal in earlier statutes . . . . [To allow recourse to the earlier legislation] would be to defeat the whole purpose of this type of legislation — to allow the absence of a tail to wag the dog."

[68] "I desire to say that I protest against being taken through the Wreck and Salvage Act 1846, and the Merchant Shipping Acts 1854, 1861, and 1862, in order to put a construction upon a few words in the great consolidating Act of 1894, with its 748 sections and twenty-two schedules, in the last of which no less than forty-eight prior Acts have been wholly or in part repealed. If this is to be the means by which a consolidating statute, such as that of 1894, is to be construed, it would be far better that the Legislature should not attempt to codify the law at all, for suitors and the Court would then be spared the trouble of having also to interpret an additional Act." *The Fulham* [1899] P. 251 at 259-260 per A. L. Smith L.J. See also *Minister of Customs* v *McParland* (1909) 29 N.Z.L.R. 279 at 288 per Edwards J.

[69] [1977] A.C. 59 at 73.

[70] See the comments by Sir Alexander Turner in *Changing the Law* (1969) 3 N.Z.L.R. 404 at 415. In *London Bookshop in Kirkcaldies Ltd* v *Police* [1980] 1 N.Z.L.R. 292 McMullin J. at 295 found the legislative history to which reference had been made of little assistance.

reader.[71] This is a sensible policy which has played a part in other similar exclusionary rules, for instance the rule excluding parliamentary history,[72] the rules limiting evidence of *contemporanea expositio*,[73] and the rule in *Cozens* v *Brutus*[74] that normally ordinary English words in a statute do not require judicial definition. Thus, *Farrell* v *Alexander* is part of a line of authority which prefers in the interests of simplicity to narrow the materials available to the interpreter of a statute; in other words it prefers to let clear words speak for themselves.

5. *The consequences of Farrell* v *Alexander.*

Nevertheless, although there is much to be said for such an approach, it does pose certain difficulties.

*First*, it is not easy to reconcile with the mischief, or purposive, approach to interpretation which is so often said to be the modern approach of the courts. Viscount Simonds's famous dictum in *Attorney-General* v *Prince Ernest Augustus of Hanover*,[75] which provides a means of reconciling the "mischief" and "literal" approaches, holds that every word of an Act must be read in its fullest context before one is entitled to even say that it has a "plain" or "obvious" meaning;[76] this context includes the mischief which the provision in question was designed to remedy. Yet, in the case of a consolidation Act, how is one to determine the mischief the provision was designed to remedy unless one is able to look at the pre-existing law? The purpose of the consolidation Act itself will normally be no more than to continue in force provisions enacted for good reason many years ago,[77]

[71] "It would be the height of judicial irony to hold that if a publican desires to know whether or not he may . . . sell beer drawn from a cask in respect of which duty has already been paid, in quantities of two gallons and upwards, he cannot ascertain that fact without tracing the legislation back to the year 1880."; *Minister of Customs* v *McParland* (1909) 29 N.Z.L.R. 279 at 289 per Edwards J. This consideration seems to have been in the mind of Lord Wilberforce in *Farrell* v *Alexander* when he said in [1977] A.C. at 73 that the principle of not tracing antecedents applied particularly to Acts "which have to be applied by county courts, and which have to be understood or at least explained to great numbers of citizens." See also Fuller, *The Morality of Law* at 82; and Cross, *Statutory Interpretation* at 132.

[72] See especially *Black-Clawson International Ltd* v *Papierwerke Waldhof-Aschaffenburg A.G.* [1975] A.C. 591 at 638 per Lord Diplock.

[73] *Campbell College Belfast (Governors)* v *Northern Ireland Valuation Commr* [1964] 1 W.L.R. 912.

[74] [1973] A.C. 854.

[75] [1957] A.C. 436 at 461: "So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use 'context' in its widest sense, which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes in parimateria and the mischief which I can, by those and other legitimate means, discern the statute was intended to remedy."

[76] "[I]t must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context." ibid at 463. See also *Maunsell* v *Olins* [1975] A.C. 373 at 393-395 per Lords Simon and Diplock.

[77] "The purpose of a consolidation Act is to remove this difficulty by bringing together in a single statute all the existing law dealing with the same subject matter . . . . . This is the only purpose of a consolidation Act; this is the only 'msichief' it is designed to cure." Lord Diplock in *I.R.C.* v *Joiner* [1975] 1 W.L.R. 1701 at 1711.

so very little of value will be obtained from examining the circumstances surrounding the enactment of the consolidation. Thus, if one is to look beyond the words of the provision in question for evidence of purpose, the only places one can usefully look are the original provision which has been repealed, the circumstances which gave rise to it, and the mischief which it was originally passed to remedy. It is precisely those things to which *Farrell* v *Alexander* restricts access. Thus, after *Farrell* v *Alexander* an advocate of the purposive approach will often be confined to the four corners of the consolidation Act, and must hope that the mischief to be cured, and the purpose of the relevant provision, can be correctly deduced from that alone. Lord Simon of Glaisdale assumes that they normally can be.[78]

> "Apart from the exceptional cases I mentioned[79] . . . . . the various statutory objectives will be apparent from a scrutiny of the provisions of the Consolidation Act itself (possibly aided by judicial notice and perusal of official reports[80])."

He does, however, allow room for the "exceptional case" where the purpose of a provision can only be grasped by examination of the social context of the original provision: this seems effectively to restrict the use of such materials to the case where the provision in question is unclear. Some might see this as a regression, in the case of consolidation Acts, to the old "literal" approach.[81] Others may reflect that, even if this is so, restriction of the materials available to a judge can mean that there is greater scope for him to put his own interpretation on the words in question.

*Secondly*, the *Farrell* v *Alexander* approach very much reduces the efficacy of the presumption that consolidation Acts do not change the law. If the provision in the consolidation Act appears clear, it will prevail whether it effects a change in the law or not. Indeed this almost certainly happened in *Farrell* v *Alexander* and *R* v *Curran*.[82] In both of these cases consolidation Acts were found to impose liabilities, and to render citizens liable to penalties, which went beyond anything in the previous law.[83] Yet, if an Act has been passed through Parliament without proper debate on the certification of a Joint Committee that it is pure consolidation which does not change the law, this is a strange result. Moreover it could upset long practice based on the original legislation. It seems that, to the House which decided *Farrell* v *Alexander*, the purpose of interpretation is to find the natural meaning of the words rather than the intention of Parliament.

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[78] *Farrell* v *Alexander* [1977] A.C. 59 at 84.

[79] That is to say, the "rare" situation where the purpose of a phrase can only be grasped by examination of the *social* context in which it was first used: ibid.

[80] Judicial notice of surrounding circumstances at what time, and which official reports — those which recommended the original legislation or the consolidation Act? See Lord Simon also in [1977] A.C. at 83.

[81] See Cross, *Statutory Interpretation* at 132.

[82] [1976] 1 W.L.R. 87.

[83] See the strong criticism in Newhouse, *Constructing and Consolidating* 1980 B.T.R. 102.

*Thirdly,* the case raises a difficult question, related to the points already mentioned above, of the *time* at which a statutory provision is to be read. It is still generally accepted that the connotations of a statutory word or phrase should be construed "as they would have been the day after the statute was passed."[84] It has sometimes been assumed in the case of the consolidation Act that this involves asking what the Parliament which enacted the original statute meant by it at the time that original statute was enacted.

Thus, in *McCulloch* v *Anderson,*[85] when Hutchison J had to put a meaning on the words "act as a conveyancer" in section 18 of the Law Practitioners Act 1955, he found that the words were originally used in New Zealand in an Ordinance of the Legislative Council in 1842. Thus, he said,[86] "the key to the question before the Court is what they would have meant in 1842." Similar statements may be found in many cases. Even in *Galloway* v *Galloway,*[87] where the House of Lords held by a majority that the word "children" in a consolidation Act included illegitimate children, no member of the House denied that the proper approach was to find what the word meant in the original version of the provision in 1857.[88] As Lord Tucker said, the House had to look at the Act "through 1857 spectacles."[89] Although there can be much room for argument with this approach, Reed Dickerson justifies it thus:[90]

> "There is a strong factual presumption in such cases that by retaining the original wording the re-enacting legislature intended to retain the substantive status quo .... This result makes good functional sense and it can be supported on the ground that, although the later legislature called the substantive shots, it called them in the outworn language of the earlier one."

However even a court which subscribed to this view might depart from it if the consolidation Act was much more than pure consolidation — if, in other words, the old provisions appeared in a completely different context in the new Act. For then one could reasonably say that the intention of the legislature at the time of the consolidation Act was to make a fresh start. This happened in *Tursi* v *Tursi*[91] where it was held that section 7(3) of the Matrimonial Causes Act 1950 should be construed to cover divorce decrees pronounced by foreign courts, even though it would not have been so construed as it appeared in earlier legislation. The changes made by

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[84] The words of Lord Esher in *Sharpe* v *Wakefield* (1888) 22 Q.B.D. 239 at 242. See *Maxwell on Interpretation of Statutes,* 12th ed, 85.

[85] [1962] N.Z.L.R. 130.

[86] Ibid at 132.

[87] [1956] A.C. 299.

[88] See, of the majority Law Lords, Lord Oaksey at 316, Lord Radcliffe at 319, and Lord Tucker at 324.

[89] Ibid at 324. See also *R* v *Schildkamp* [1971] A.C. 1 at 23 per Lord Upjohn and *Kingston Wharves* v *Reynolds* [1959] A.C. 187.

[90] *The Interpretation and Application of Statutes,* 130-131.

[91] [1958] P. 54.

other sections of the 1950 "consolidation" were so great that Sachs J held the Act had to be construed as "a new whole".[92]

However *Farrell* v *Alexander* seems to involve a more thorough-going abandonment of the traditional view. In holding that it is not often legitimate to trace the antecedents of a statutory provision, *Farrell* v *Alexander* must involve that one is asking what the consolidation Act meant at the time *it* was enacted. This is implicit in Lord Simon's statement that[93] "[I]t is the relevant provision of the consolidation Act, and not the corresponding provision of the repealed Act, which falls for interpretation." This is by no means the first statement of its kind. A much quoted statement is that of the Privy Council in *Administrator-General of Bengal* v *Prem Lal Mullock*:[94]

> "The respondent maintained this singular proposition: that in dealing with a consolidating statute each enactment must be traced to its original source, and, when that is discovered. must be construed according to the state of circumstances which existed when it first became law. The proposition has neither reason nor authority to recommend it. The very object of consolidation is to collect the statutory law bearing upon a particular subject, and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the consolidating Act is passed."

In many cases it will doubtless not make much difference which approach is adopted. But sometimes it could. For instance, if a term has changed in meaning over the years (something which is quite possible in areas like family law where changing social patterns can have effects on the usage of words[95]) the meaning at the time of the consolidation would, on the *Farrell* v *Alexander* approach, be the relevant one. Again, if the social context and surrounding circumstances at the time of the consolidation Act are materially different from those which pertained at the time of the original enactment (which might be the case with legislation originally passed in time of war or civil disturbance[96]) a different interpretation might

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[92] See also *Food Controller* v *Cork* [1923] A.C. 647 at 668 per Lord Wrenbury; *Bacon* v *Salamane* (1965) 112 C.L.R. 85; *Ex parte Jasaitis* (1970) 91 W.N. N.S.W. 444, and Reed Dickers *The Interpretation and Application of Statutes*, 130-131. Cf however *Mayor of Portsmouth* v *Smith* (1885) 10 A.C. 364 at 371 where Lord Blackburn suggests that where even a single section of an Act is introduced into another Act it should be read in the sense it bore in the original Act.

[93] *Farrell* v *Alexander* [1977] A.C. 59 at 82.

[94] (1895) L.R. 22 Ind. App. 107 at 116 per Lord Watson. The passage is quoted in *Craies on Statute Law* 7th ed, 137. It has been cited in *Minister of Customs* v *McParland* (1909) 29 N.Z.L.R. 279 at 288; *Warren* v *Hammond* [1928] N.Z.L.R. 808 at 813; and *Maybury* v *Plowman* (1913) 16 C.L.R. 469 at 479.

[95] E.g. *Dyson Holdings Ltd* v *Fox* [1976] Q.B. 503: this case held that the word "family" had changed in connotation since an earlier case interpreting the word. The case was doubted in *Joram Developments Ltd* v *Sharratt* [1979] 1 W.L.R. 3 and *Helby* v *Rafferty* [1979] 1 W.L.R. 13. When the *Sharratt* case was appealed to the House of Lords the point was left open. See the interesting discussion of the *Fox* case in Allott, *The Limits of Law*, 103 et seq.

[96] See, for example, the discussion of the origins of the Official Secrets Act 1911 in *Chandler* v *D.P.P.* [1964] A.C. 763 at 791 per Lord Reid and of the Extradition Act 1870 in *Cheng* v *Governor of Pentonville Prison* [1973] A.C. 931 at 952 per Lord Simon of Glaisdale.

result. And, although they will be very rare, one can imagine cases where a new grouping of sections, or the addition of new sections, in the consolidation Act might give a subtly different colour to a provision re-enacted from earlier legislation.

In many cases this new approach is sensible, but it is not without difficulty.

—It again involves a departure from the principle that the task of a court interpreting a statute is to give effect to Parliament's intention, because often Parliament's only intention in consolidating the provision in question was the neutral one of continuing it in force.

—If cases of high authority have interpreted the provision as it stood before the consolidation how far is the court permitted, or bound, to refer to these cases if it concludes that the provision in the consolidation Act is crystal clear as it stands? For the cases were decided under the old legislation which is now irrelevant. Yet it is difficult to believe they would not be referred to.[97]

—*Farrell* v *Alexander* involves that if a re-enacted provision appears in a new context in the consolidation Act it may be interpreted rather differently than it was while it remained part of the original statute. Yet would that have followed if, instead of being *consolidated*, the original Act had simply been *amended* by the repeal or addition of a few sections? Such authority as there is suggests that mere amendment cannot affect the interpretation of the other sections, even though their context may now be slightly different.[98] Should the fortuitous accident that the legislation was consolidated make so much difference?

6. *The exceptions to Farrell* v *Alexander.*

Because of the difficulties inherent in some of the consequences just discussed, and because reference to legislative antecedents can often be undeniably helpful, one may speculate that, despite the strength of the judgments in *Farrell* v *Alexander*, the courts will be ready enough to create exceptions to it. The case itself suggests some, later cases have already begun to add others.

*First*, the case itself makes it clear that it is permissible to have recourse to antecedents if the consolidation Act is not clear. "Ambiguity" is the criterion relied upon by the majority,[99] although Lord Wilberforce put the matter strongly: there must be "real difficulty or ambiguity which classical methods of construction cannot resolve".[1] In the language of statutory

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[97] Cf *Dyson Holdings Ltd* v *Fox* (supra n.95).

[98] E.g. *Public Trustee* v *Sheath* [1918] N.Z.L.R. 129 at 155-156 per Hosking J., citing the English authorities. Cf however *Johannessen* v *Miller* (1977) 16 S.A.S.R. 546 at 553 per Bray C.J.; and *Wakanui Road Board* v *Hampstead Town Board* (1907) 27 N.Z.L.R. 465 at 480 per Chapman J.

[99] [1977] A.C. 51 at 73 per Lord Wilberforce, at 84 per Lord Simon of Glaisdale, and at 94 and 97 per Lord Edmund-Davies.

[1] Ibid at 73.

construction "ambiguity" normally comprehends most of the vices of expression,[2] and this exception should thus apply whenever there is a real problem of interpretation, for example where there are apparently conflicting provisions, or doubts whether words are being consistently used in the consolidation Act.[3] A cynic might say that it is always possible for a court to find ambiguity; this however would be too cynical, for once a judge has concluded that a provision does have a plain meaning it is his duty to apply it, even if other members of the court do not reach the same conclusion.[4] Nevertheless it is clear that the ambiguity criterion is not a narrow one, and should permit reference to antecedents in many cases where such reference is necessary or desirable.[5]

*Secondly*, as already stated,[6] Lord Simon of Glaisdale was prepared in *Farrell* v *Alexander* to permit another exception: where the purpose of the provision can only be grasped by an examination of the social context in which the word was first used.[7] His Lordship believed that the necessity for this will be rare. However, with respect, judges who believe that one must look at the total context of a statutory provision before one is entitled to say it is plain may find it necessary, or at least desirable, to do this more than rarely, simply because the context of the consolidation Act will normally be quite unhelpful.

*Johnston* v *Moreton*[8] provides a good example of the difficulties. The question was whether a tenant could contract out of the protection of tenure given by the Agricultural Holdings Act 1948. Although recognising the restraints imposed by *Farrell* v *Alexander* Lords Simon and Hailsham did find it helpful to look back to the social circumstances which led to the passing of the original statutes, i.e. the wartime conditions and the consequent need to protect the tenure of those who were providing Britain's food supply. Lord Simon's words in this case suggest that the "purpose" exception to *Farrell* v *Alexander* may have a wider ambit than at first appears.[9]

> "[I]t is legitimate (indeed *incumbent*) to investigate the statutory history in so far as that throws light on the objective of a particular provision; the ascertainment of the parliamentary objective is an important — generally an essential — part of the process of statutory interpretation."

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[2] See Cross, *Statutory Interpretation*, 76; *I.R.C.* v *Joiner* [1975] 1 W.L.R. 1701 at 1710 per Lord Diplock.

[3] See above, pp

[4] *Farrell* v *Alexander* [1977] A.C. 59 at 95 per Lord Edmund-Davies; *I.R.C.* v *Joiner* [1975] 1 W.L.R. 1701 at 1716 per Lord Diplock.

[5] See, for example, Lord Wilberforce in *Maunsell* v *Olins* [1975] A.C. 373 at 386: "I am not, myself, able to solve this problem by a simplistic resort to plain meaning. Most language, and particularly all language used in rents legislation, is opaque: all general works [sic] are open to inspection, many general words demand inspection, to see whether they really bear their widest possible meaning."

[6] Supra p.

[7] [1977] A.C. 59 at 84. He cited the case of *George Hensher Ltd* v *Restawhile Upholstery (Lancs.) Ltd* [1976] A.C. 64 as an example of a case where reference to the social context of the earlier legislation was allowable.

[8] [1980] A.C. 37.

[9] [1980] A.C. at 62-63. Italics supplied.

Yet, with respect, since ascertainment of the objective is generally essential, and since one can never know what light legislative history casts upon this objective until it has been examined, it would seem that reference to it may be justified on more than "rare" occasions. Examination of Lord Simon's judgment suggests that he may be prepared to accord a wider operation to this exception than he was in *Farrell* v *Alexander*. Lord Hailsham referred to the history also, not, as he said, to construe the words of the Act which he felt were unambiguous, but to place them in their proper historical and social context in 1948. "In this I am only observing the wise counsel of Viscount Simonds in *Attorney-General* v *Prince Ernest Augustus of Hanover*."[10] Yet, with respect, the difference between construing words and placing them in context (generally thought to be an aid to construction) is finer than many would be prepared to accept. Moreover, once the context of the original provision is examined the door is surely wide open to arguments based on differences in language between the earlier and later provisions.

A *third*, and potentially very large exception has been put forward by Lord Simon in *R* v *Heron*.[11] He suggested that the presumption of *Farrell* v *Alexander* applies only to consolidation Acts passed under modern procedures (presumably the 1949 and 1965 procedures). "Consolidation Acts before these times may throw up inconsistencies, ambiguities, contradictions etc which can only be resolved by considering the origins of the provisions."[12] Thus it was legitimate to refer to the history of a consolidation Act passed in 1936. As yet there is no other support for this view which, if correct, would be a substantial limitation on the ambit of *Farrell* v *Alexander*. Moreover, while one appreciates the rationale of this exception, one wonders whether it ought to apply to modern "pure" consolidations. Under modern procedures, where a consolidation Act is certified to be pure consolidation, one would have thought there would be even stronger ground for referring to antecedents to support the presumption that consolidation Acts do not change the law.

Other exceptions may arise. There is already one implicit in the proposition mentioned in several cases, that the *Farrell* v *Alexander* approach is more appropriate to some types of statute than others: it has particular force in the case of Acts "which have to be applied by County Courts and which have to be understood or at least applied to great numbers of citizens".[13] Another exception will almost certainly have to be made for provisions which have been the subject of judicial interpretation before consolidation. Such case authorities can surely be referred to after consolidation; but the moment they are, the way is open to an argument that they no longer bind because of changes of wording in the consolidation Act.[14] Then one really has to entertain close comparisons of language of the kind that the House in *Farrell* v *Alexander* was so anxious to avoid.

[10] [1980] A.C. at 57.

[11] [1982] 1 All E.R. 993.

[12] [1982] 1 All E.R. at 995. Cf Lord Scarman at 999.

[13] *Farrell* v *Alexander* [1977] A.C. 59 at 73 per Lord Wilberforce; *R* v *Cuthbertson* [1981] A.C. 470 at 480 per Lord Diplock; *Fuller* v *MacLeod* [1981] 1 N.Z.L.R. 390 at 395 per Richardson J.

[14] See, for example, the judgments of Lord Bridge of Harwich in *Edwards* v *Clinch* [1982] A.C. 845, and Lord Diplock in *N.W.L. Ltd* v *Woods* [1979] 1 W.L.R. 1294.

Time may weaken the rule in *Farrell* v *Alexander*. Indeed it may eventually turn out to be little more than an injunction not to traverse history if (i) no clear conclusion is likely to result from the examination or (ii) the words of the consolidation Act cannot possibly support the interpretation which the historical material is being used to advance.[15] In other words, the court's time should not be wasted. Already since 1977 legislative history has, despite *Farrell* v *Alexander*, been used in quite a large number of cases.[16]

## D. Endorsement of Judicial Decision

Reference has already been made to some of the potential difficulties which may arise when there are judicial decisions on statutory provisions which are later consolidated. However the major difficulty is one which has been much discussed in the cases. If, after there have been cases interpreting a statutory provision, that provision is re-enacted in precisely the same form in a consolidation, can there be any argument that the legislature has statutorily endorsed those decisions? Some judicial dicta suggest that there can. The best known statement is that of James J.J. in *Ex parte Campbell*:[17]

> "If an Act of Parliament uses the same language which was used in a former Act of Parliament referring to the same subject, and passed with the same purpose, and for the same object, the safe and well-known rule of construction is to assume that the legislature when using well-known words upon which there have been well-known decisions use those words in the sense which the decisions have attached to them."

This conclusion is based on the premise that the legislature is deemed to know the law, and could have altered the form of words in the re-enactment if it had been dissatisfied with the law as interpreted by the courts.

Yet any such absolute rule would be manifestly unsatisfactory.[18] Its basic asumption (that the legislature knows all the cases on the provision) is unrealistic in the context of mechanical periodic consolidation. It could also, if strictly applied, give even questionable first instance decisions greater authority than a decision of the House of Lords. At times it would

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[15] In *Grant* v *D.P.P.* [1982] A.C. 190 at 201 it was put this way by Lord Diplock, delivering the reasons of the Privy Council: "In their Lordships' view as a matter of construction it is as plain as plain can be that the Director of Public Prosecutions is empowered to prefer an indictment at a circuit court . . . . . The words being plain and unambiguous it is not, in their Lordships' view, legitimate to have recourse to legislative history in the hope of finding something to cast doubt upon their plain and unambigous meaning."

[16] For example *R* v *Kelly* [1982] A.C. 665; *R* v *Heron* [1982] 1 All E.R. 993; *R* v *West Yorkshire Coroner, ex parte Smith* [1982] 2 W.L.R. 1071; *N.W.L. Ltd* v *Woods* [1979] 1 W.L.R. 1294; *Lilley* v *Public Trustee* [1981] A.C. 839; *Leeds City Council* v *West Yorkshire Metropolitan Police* [1982] 1 All E.R. 274.

[17] (1870) 5 Ch. App. 703 at 706.

[18] In *Barras* v *Aberdeen Steam Trawling and Fishing Co Ltd* [1933] A.C. 402 at 446 Lord Macmillan said "If this rule were to be treated as a canon of construction of absolute obligation I can see that it might have very far-reaching and possibly undesirable consequences."

also be unworkable — for instance if there were a number of barely reconcilable cases on the same provision.[19]

Because of these considerations it is not uncommon these days to find the "rule" quoted with such rigidity as it was by James L.J. In the fullest consideration of it by the House of Lords, in a case in 1933,[20] the Law Lords were by no means unanimous on the correct force to be accorded it. While some appeared to see it as an absolute principle, others treated it as a rebuttable presumption; yet others regarded prior decisions as having no greater force than they would have under normal rules of precedent.[21]

Since then, while the highest courts are unwilling to commit themselves to a final statement on the rule's status,[22] the most common version assumes that it only applies (and even then only as a rebuttable presumption) where the provision in question has been the subject of an authoritative decision or preferably line of decisions, which is well known and can realistically be held to have been in the minds of the framers of the legislation.[23] The courts will refuse to follow a single case on the earlier legislation which they are convinced was wrongly decided provided they are not bound by the ordinary rules of precedent to follow it.[24]

In the end, it is doubtful whether this "presumption", if it may be so called, gives the decisions much greater effect than they could have had under the ordinary rules of precedent anyway.[25] In *R* v *Reynhoudt* Dixon C.J. did not think so:[26]

> "I have been unable to regard re-enactment in consolidating statutes where periodical consolidation is practised as meaning anything at all as to judicial decisions upon the provisions repeated in the consolidation. In any case the view

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[19] *Robinson Brothers (Brewers) Ltd* v *Durham County Assessment Committee* [1938] A.C. 321 at 340 per Lord Macmillan.

[20] *Barras* v *Aberdeen Steam Trawling and Fishing Co Ltd* [1933] A.C. 402.

[21] A close analysis of the judgments is undertaken by W. H. D. Winder in *The Interpretation of Statutes Subject to Case Law* (1946) 58 Juridical Review 93.

[22] "[Their Lordships] have not found it necessary, or appropriate, to appeal to the doctrine of parliamentary endorsement of judicial decision . . . . . Their Lordships, recognising that reservations have been, and continue to be, expressed as to the validity and force (pre-emptive or influential) of 'legislative endorsement' prefer to confine themselves to the direct method of interpretation . . . . ." *Lilley* v *Public Trustee* [1981] A.C. 839 at 849, P.C. per Lord Wilberforce.

[23] E.g. *In re Otago Clerical Workers Award* [1937] N.Z.L.R. 578 at 668 per Callan J. (His Honour reviews the doctrine fully at 663-668); *Mitchell* v *W. S. Westin Ltd* [1965] 1 W.L.R. 297 at 307 per Pearson L.J. and at 309 per Salmon L.J.; *R* v *Sheppard* [1981] A.C. 394 at 407 per Lord Diplock; *Edwards* v *Clinch* [1982] A.C. 845 at per Lord Wilberforce; *Farrell* v *Alexander* [1977] A.C. 59 at 74 per Lord Wilberforce, and at 89-91 per Lord Simon of Glaisdale; *Lilley* v *Public Trustee* [1978] 2 N.Z.L.R. 605 at 611 C.A. per Somers J.; *Galloway* v *Galloway* [1956] A.C. 299 at 320 per Lord Radcliffe; *Irvine* v *Dunedin City* [1939] N.Z.L.R. 741 at 754 per Myers C.J.

[24] E.g. *Royal Crown Derby Porcelain Co* v *Russell* [1949] 2 K.B. 417. And see Reed Dickerson, *The Interpretation and Application of Statutes*, 179 et seq.

[25] See especially Lord Simon of Glaisdale in *Farrell* v *Alexander* [1977] A.C. 59 at 91.

[26] (1962) 107 C.L.R. 381 at 388. See the discussion by the Law Reform Commission of South Australia in its 9th Report, *Law Relating to Construction of Statutes* (1970) at 6.

> that in modern legislation the repetition of a provision which has been dealt with by the courts means that a judicial interpretation has been legislatively approved is, I think, quite artificial."

However to remove all doubt the legislature of Canada has thought fit to enact a provision in the Interpretation Act:[27]

> "A re-enactment, revision, consolidation or amendment of an enactment shall not be deemed to be or to involve an adoption of the construction that has by judicial decision or otherwise been placed upon the language used in the enactment or upon similar language."

The words "shall not be deemed" rather than "shall be deemed not" suggest that in strong cases a court is not forbidden to make a factual assumption.[28]

## E. CONTINUITY

Where a statutory provision is repealed and re-enacted in the same, or substantially the same, form, it is important to ensure continuity between old and new. The process of periodic consolidation ought to cause as little disruption to the law as possible.

The common law goes some way to this end. It has been held, for instance, that the re-enactment in a consolidation Act of a section defining an offence does not mean that the offence is *constituted* by the consolidation Act; the offence previously created is merely *continued* by it.[29] There are also dicta to the effect that consolidation Acts have retrospective effect in that they merely repeat what has gone before. In *I.R.C.* v *Joiner*, Lord Diplock said:[30]

> "So the presumption against ascribing to the language of a statute a meaning which would have retrospective effect upon transactions undertaken before it came into force does not apply to a statute whose only purpose is to clarify previously existing statute law. Such is the only purpose of a consolidation Act . . . . ."

Thus it may have been the position even at common law that official acts done, documents (for instance Orders in Council) made, and subordinate legislation passed under an earlier Act were re-enacted in a consolidation Act.[31]

However the common law did not take this to what might be thought its logical conclusion; it is still important that an offender be charged under the provision which was in force when he committed the offence. It

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[27] Interpretation Act, Revised Statutes of Canada 1970, Chap. I. 23 section 37(4).

[28] See Driedger, *The Construction of Statutes*, 103.

[29] *R* v *Kruger* (1977) 17 S.A.S.R. 214.

[30] [1975] 1 W.L.R. 1701 at 1715. This statement seems clearly to assume that consolidation Acts do not change the law. How, then, does it stand with *Farrell* v *Alexander*?

[31] *R* v *Parrott* [1968] 3 C.C.C., 56, a Magistrate's Court decision reciting *Trans Canada Insurance Co Ltd* v *Winter* [1951] 1 D.L.R. 272. See also *Ex parte Todd* (1887) 19 Q.B.D. 186.

will not do, if he is charged under the consolidation Act if the original Act was in force at the time of his wrongdoing,[32] and vice versa.[33]

Despite the amplitude of the common law on this topic, the legislature has enacted provisions in the Acts Interpretation Act 1924 to put the matter beyond doubt. The provisions all raise the same question of when the provisions of a new Act are "near enough" to the provisions of the old to be held to be substantially the same.[34]

Section 21 of the Acts Interpretation Act 1924 provides that in every unrepealed Act in which reference is made to a repealed Act that reference is to be construed as referring "to any subsequent enactment passed in substitution for such repealed Act". Normally this provision will give rise to little difficulty. In any Act passed before 1952, for instance, references to "the Land Transfer Act 1908" will now be taken to be references to "the Land Transfer Act 1952". But sometimes it is not so straightforward. In *Re Eskay Metalware Ltd*[35] section 309 of the Companies Act 1955 fell for discussion. It provides that payments made by a company which would amount to a fraudulent preference if done by an individual will be invalid in the event of the company being wound up. The reference to "fraudulent preference" was clearly a reference to section 79 of the Bankruptcy Act 1908. In 1971 the Bankruptcy Act was repealed and replaced by the Insolvency Act 1967. Section 56(2) of the latter Act makes provision for "voidable" preference as opposed to fraudulent preference. The Court of Appeal held that, although different in a number of respects, this section was "passed in substitution for" section 79 of the old Bankruptcy Act.[36]

> "To be 'in substitution for' means to be put in the place or stand in stead of the the repealed provision. It follows that the new enactment must be of the same character as its predecessor: it must have the same kind of function and the subject-matter must be essentially the same without necessarily being identical in scope. But, provided the new provision is directed to the same end, there need not be precise correspondence in the manner of dealing with the subject matter."

Section 20(d) and 20A (the latter added in 1960) made provision for the continued validity of regulations, bylaws, orders-in-council and the like made under a repealed Act,[37] provided there are empowering provisions in a new Act which are "corresponding" or "substantially corresponding" to those in the repealed Act. Section 20A is much wider in scope than 20(d). It applies to repeals and revocations by a wider range of subordinate legislation as well as by an Act; it covers more than just consolidating Acts to which section 20(d) is confined, and it preserves "any document made

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[32] *Smith* v *Ruskington Foods Ltd* [1956] Crim L.Rev. 557. See also *Police* v *Sketchley* [1963] N.Z.L.R. 875.

[33] *Meek* v *Powell* [1952] 1 K.B. 164. In such cases it may be said that the objection is technical, for an amendment will be allowed: ibid.

[34] In such a case the court is perforce obliged to conduct a comparison between the old and new provisions, despite *Farrell* v *Alexander*.

[35] [1978] 2 N.Z.L.R. 46.

[36] Ibid at 49 per Richardson J.

[37] In the absence of a re-enactment of the empowering Act all subordinate legislation would fall on its repeal: *Watson* v *Winch* [1916] 1 K.B. 688; *Phillips* v *Transport Department* [1972] N.Z.L.R. 122.

or any thing whatsoever done under the provision so repealed or revoked" rather than being confined to the more specific items listed in section 20(d).[38]

In *Winter* v *Ministry of Transport*[39] it was held that a ministerial approval of a breath-testing device under section 59B of the Transport Act 1962 remained valid after the substitution in 1971 of that section by a new one, section 58A, which was in slightly different terms. Section 20A of the Interpretation Act was used to justify the decision. Section 58A was held to "substantially correspond" to section 59B.[40]

> "The new section answers to the old one in character and function; it is similar in purpose, prescribes the same thing to be done, and is designed to produce the same result."

Finally, brief reference may be made to section 20(g) of the Acts Interpretation Act. It provides that on the repeal of an Act things begun under it may be completed, unless the new replacement statute contains provisions "adapted to the completion thereof."[41]

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[38] Section 20(d) applies to "the constitution of districts or offices, the appointment of officers, the making or issuing of Proclamations, Orders, warrants, certificates, rules, regulations, bylaws, or. . . .other similar exercise of statutory powers."

[39] [1972] N.Z.L.R. 539.

[40] [1972] N.Z.L.R. 539 at 541 C.A. per Turner J.

[41] This provision is discussed in Burrows, *The Retrospective Effect of Changes in the Law* [1976] N.Z.L.J. 343.