The slow death of a dogma? The prohibition of legislative history in the 20th century

John J Magyar

Abstract
It is commonly believed that the rule prohibiting reliance on legislative history as an aid to statutory interpretation was firmly in place in the United Kingdom, and indeed throughout the English-speaking common law jurisdictions of the world, long before the turn of the 20th century; and that the rule was set aside in the case of Pepper v Hart in 1992. However, an examination of the relevant cases and the canonical textbooks by Maxwell and Craies reveal that the rule was subject to a significant amount of disagreement at the turn of the 20th century, particularly with respect to the admissibility of commissioners’ reports to uncover the mischief of a statutory provision. This disagreement would not be completely resolved until the 1960s. With respect to other types of legislative history, there were prominent exceptional cases over the course of the 20th century; and there was a gradual acceptance of more types of legislative history as aids to statutory interpretation during the decades leading up to Pepper v Hart. Thus, the simple narrative description that the rule was firmly in place until it was set aside in 1992 must give way to a more complex narrative of disagreement and gradual decline. Meanwhile, as the rule lost traction in the United Kingdom over the course of the 20th century, a growing accumulation of justifications for the rule has been assembled, and an ongoing debate has been taking place about the efficacy of reliance on legislative history. Based upon the different trajectories followed in other English-speaking common law jurisdictions, and particularly the United States, the decline of the rule was not inevitable. It follows that the current state of affairs is likely to change over time.

Keywords
statutory interpretation, legislative history, exclusionary rule, Pepper v Hart
Introduction

When consulting any of a number of well-respected scholarly works on statutory interpretation, one will often find a simple narrative description of the history of the common law rule prohibiting reliance on legislative history in aid of statutory interpretation. Scalia and Garner provide an excellent example: ‘In English practice, a complete disregard of legislative history remained the firm rule from 1769 when it was first announced, until 1992, when the House of Lords changed the practice’. Those familiar with the traditional cases will instantly recognise 1769 as a reference to *Millar v Taylor*, and 1992 as a reference to *Pepper v Hart*.

While one purpose of this article is to challenge this simple narrative by revealing that the reality is far more complex, there is also an attempt to grapple with the jurisprudential developments that have brought about what is arguably the most significant change in common law adjudication over the past century. Parliamentary materials—commissioners’ reports, bills, white papers and statements made in the houses of Parliament and so on—have shifted from being highly restricted, if not strictly forbidden, to being readily available for the purpose of understanding the context within which legislation was passed; and admissible as an aid to interpretation when certain probative standards have been met. There has been a fundamental change. Formerly, out of respect for the legislature, all proceedings and communications were to be ignored; and now, out of respect for the legislature, the proceedings ought to be permissible considerations when seeking to understand legislation.

I have argued elsewhere that *Millar v Taylor* has become misunderstood as a precedent for statutory interpretation and that the rule did not simply become established in the United Kingdom and America as a result of that case. Meanwhile, the jurisprudential change at issue here, the move from restriction to permissiveness, began in the late 19th century when a series of appellate court judgments caused doubt about the breadth and strength of the rule against legislative history. Thus, the focus will be on the rule as of the late 19th century through to the present. The emphasis will be on the United Kingdom, however, various other common law jurisdictions will be discussed as comparators to better understand the nature of the developments.

With the theme in mind that the reality is more complex than simple rhetorical statements might suggest, six points will be defended in this article. The first point concerns how firmly established the rule was at the turn of the 20th century. Despite claims to the contrary, the rule was subject to sufficient ambiguity and doubt to cause a conflict between the two dominant treatises on statutory interpretation. The second point concerns the clarity of the rule over the course of the 20th century. While much of the doubt surrounding the rule would be settled a few
years into the 20th century, a significant amount of uncertainty would remain with respect to the admissibility of commissioners’ reports for the purpose of uncovering the mischief that a statute was intended to remedy. This matter would not be fully resolved until the 1960s. The third point concerns how strictly the courts adhered to the prohibition of legislative history. There were some noteworthy exceptional cases which, despite being prominent for other reasons, seemed to escape the notice of scholars of statutory interpretation. The fourth point concerns how the prohibition of legislative history came to an end. It did not occur abruptly with the case of Pepper v Hart. Instead, the rule yielded to exceptions incrementally over a period of several decades. The fifth and sixth points are considered for the sake of rounding out the jurisprudential context. The decline of the rule prohibiting recourse to treaties and preparatory materials when dealing with legislation to implement treaty obligations was a related issue. English judges were reluctant to set aside this rule, and did so in a very conservative fashion late in the 20th century, contemporaneously with the rule prohibiting legislative history. Contemporaneity was also exhibited by many of the English-speaking common law jurisdictions throughout the world. In most of these nations, the prohibition followed a somewhat synchronous decline. This is a curious sociological phenomenon as most of these jurisdictions had severed their formal ties to the UK court system and were not bound to follow the UK jurisprudence.

After considering these six issues, an attempt will be made to grapple with the many arguments that have been put forward in support of the rule against legislative history and counterarguments that can be raised. Relatively recently, Scalia and Garner put forward a comprehensive collection of arguments in favour of the rule, and the purpose, here, is to provide a countervailing perspective.

Finally, the post-Pepper v Hart cases will be considered so as to arrive at an understanding of the current state of the law in the United Kingdom.

The unsettled state of the law at the turn of the 20th century

Despite claims about the rule prohibiting recourse to legislative history, the state of the law was decidedly unsettled in the final decades of the 19th century. There was no generally accepted way of describing the rule nor were there generally accepted precedents in support. Evidence of this can be found in the two most well-respected treatises on statutory interpretation available at that time. The first was the canonical treatise by Sir Peter Bensen Maxwell, *On the Interpretation of Statutes*; and the second was the treatise by Henry Hardcastle, which morphed into Craies’ treatise, *On the Construction and Effect of Statute Law*, a current edition of which remains in publication today.6

The first edition of Maxwell’s treatise was published in 1875. In this work, the prohibition on legislative history was described as a broad and strict rule:

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6. Sir Peter Benson Maxwell, *On the Interpretation of Statutes* (William Maxwell & Sons, London 1875); Henry Hardcastle, *A Treatise on the Rules Which Govern the Construction and Effect of Statutory Law* (Stevens & Haynes, London 1879); William Feilden Craies, *Craies on Legislation: A Practitioners’ Guide to the Nature, Process, Effect and Interpretation of Legislation* (Editor, Daniel Greenberg, of Lincoln’s Inn, Barrister; Counsel for Domestic Legislation, House of Commons; General Editor, Annotated Statutes and Insight Encyclopaedia (Daniel Greenberg ed, 11th edn, Sweet & Maxwell, London 2017).
the language of an Act can be regarded only as the language of the legislature, and the meaning attached to it by its framers or by members of parliament cannot control the construction of language when it becomes that of the Legislature. The intention of the Legislature can be collected from no other evidence than its own declaration, that is, from the Act itself.\[7\]

In support of this claim, Maxwell cited *Martin v Hemming, Cameron v Cameron, Hemstead v Phoenix Gas Co* and *Selkeld v Johnson*.\[8\] In all of these cases except *Hemstead*, the material that the judges refused to consider came from commissioners’ reports.\[9\] Maxwell posited this rule as a general one which embraced all types of preparatory materials.

The first edition of Hardcastle’s treatises, published in 1879, dealt with the matter differently. Hardcastle distinguished between commissioners’ reports and ‘the “Parliamentary history” of a statute, that is to say, the debates which took place in Parliament when the statute was under consideration; and the alterations made in it during its passage through committee’.\[10\] Both were impermissible considerations according to the first edition, and the authorities cited followed the distinction. The authorities for refusing Parliamentary history included *R v Hertford College*,\[11\] *Green v The Queen*\[12\] and *Attorney General v Sillem*.\[13\] The authorities for refusing commissioners’ reports were *Selkeld v Johnson*\[14\] and *Farley v Bonham*.\[15\]

The second edition of Maxwell’s treatise, published in 1883, contained some additional authorities, but the claim remained the same. This can be contrasted with the second edition of Hardcastle’s treatise published in 1892. It contained a significant revision with respect to Parliamentary history, which ‘until very recently, it was never allowable to refer to in discussing the meaning of an obscure enactment[.]’\[16\] Thus, the treatise stated that it had become permissible to do so. Two cases were cited in support: *R v Bishop of Oxford*\[17\] and *SE Railway v Railway Commissioners*.\[18\] Craies noted the obvious inconsistency between the rule permitting legislative history and the rule prohibiting reliance on commissioners’ reports in a footnote.\[19\]

The third edition of Maxwell in 1896 contained no substantive changes. However, the third edition of Hardcastle’s treatise, published in 1901 and edited by William Fielden Craies,

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7. Maxwell, ibid., 23.
8. *Martin v Hemming* (1854) 10 Ex 478; *Cameron v Cameron* (1834) 2 My & K 289; and *Hemstead v Phoenix Gas Light & Coke Company* (1865) 3 H & C 745. Maxwell did provide some further examples to elaborate upon the specific aspects of the rule.
9. The practice has fallen out of favour in recent decades, but in the 19th and 20th centuries, it was common practice for legislators to appoint a Royal commission (an ad hoc committee hired by the government) to conduct a public inquiry and make recommendations when a change in the law was being contemplated.
10. Hardcastle (n 6) 56.
11. (1878) 3 QBD 693, 707.
12. (1876) 1 AC 513.
13. 2 H & C 521, 521–22.
14. (1848) 3 Exch 273.
15. (1861) 30 L J Ch 239. Both cases are cited by Maxwell in his elaboration of the exclusionary rule.
16. Henry Hardcastle and William Fielden Craies, *A Treatise on the Construction and Effect of Statute Law* (2nd edn, Stevens & Haynes, London 1892) 143, 144.
17. (1879) 4 QBD 525.
18. (1880) 5 QBD 217.
19. Footnote (d) at 145 cites some exceptional cases then concludes with ‘Vide supra, pp. 134, 144’. These are the pages containing discussion about cases citing statements by members of Parliament. One could also understand from this that Hardcastle was pointing out the tensions and contradictions within the available cases more generally.
contained another important change. The treatise claimed it was ‘now established that refer-
ence may be made to previous statutes in pari materia, and to reports on their effect and
defects’.20 He cited Eastman Photographic Materials Company v Controller-General of Patents, Designs and Trademarks21 as the main authority. In this case, the Controller-General
had refused to permit the word ‘solio’ to be registered as a trademark for photographic paper
because he regarded it as forming part of the English language. When reversing the decision of
the Controller-General, Halsbury LC referred to the commissioners’ report that preceded the
relevant amendment to the Patents, Designs, and Trade Marks Act 1883:22 ‘I think no more
accurate source of information as to what was the evil or defect which the Act of Parliament
now under construction was intended to remedy could be imagined than the report of that
commission’.23 Lords Herschell, MacNaghten, Morris and Shand concurred. This was a
unanimous decision by the House of Lords at a time when stare decisis was applied strictly.24

Anyone who is modestly familiar with the history of statutory interpretation in England will
find it remarkable that the two dominant English treatises made divergent claims about the law
governing legislative history in aid of statutory interpretation at the turn of the 20th century.
Maxwell’s treatise put forward what could be regarded as the orthodox claim: that all materials
comprising legislative history were forbidden by a single rule. No recourse could be had to
Hansard, bills prior to enactment or commissioners’ reports under any circumstances. Mean-
while, Craies claimed that parliamentary debates and commissioners’ reports were dealt with via separate rules and that recourse could be had to the former to interpret an obscure statutory
provision, while recourse could be had to the latter under the mischief rule.25

In almost every other respect, these treatises were interchangeable: they both put forward the
same collection of rules and canons of interpretation, often supported by the same cases,
although within a slightly different organisational framework. Both treatises embodied good
faith efforts to state the law as it was. On the face of it, the disagreement is rooted in the simple
fact that a different amount of weight was given to the recent cases to resolve a very typical
ambiguity that arose within the relevant body of cases. Underneath, it would appear that the
editors of Maxwell’s treatise believed in the efficacy of the simple, broad and strong prohi-
bition of Parliamentary materials, whereas the editors of Hardcastle’s treatise felt it insuffi-
ciently established as a broad principle to withstand exceptions from the higher courts. It is
possible that Craies found parliamentary material useful in his legal research and therefore

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20. Henry and Craies (n 16) (3rd edn, Stevens & Hayne, London s 1901) 140.
21. [1898] AC 571. [Solio case].
22. Great Britain, Report of the Committee appointed by the Board of Trade to Inquire into the Duties, Organization
and Arrangements of the Patent Office, under the Patents, Designs and Trade Marks Act, 1883, so far as relates to
Trade Marks and Designs (CMD 5350, 1888).
23. (n 21) 575.
24. The canonical case, London Street Tramways Co Ltd v London County Council [1898] AC 375, was decided in the
same year.
25. This rule was set out by Coke in Heydon’s Case 3 Co Rep 7a: for the sure and true interpretation of all statutes in
general (be they penal or beneficial, restrictive or enlarging of the common law), four things are to be discerned
and considered: (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 hath resolved and appointed to cure
the disease of the commonwealth; and (4) The true reason of the remedy; and then the office of all the Judges is
always to make such construction as shall suppress the mischief, and advance the remedy, and to suppress subtle
inventions and evasions for continuance of the mischief, and pro privato commodo, and to add force and life to the
cure and remedy, according to the true intent of the makers of the Act, pro bono publico. Halsbury LC explicitly
relied on this case in his opinion at [573].
supported the development of these exceptions. This would be the motivation for those who supported exceptions going forward.

This contradictory state of affairs was partially resolved in the fourth edition of Hardcastle’s treatise, which was rebranded as the first edition of Craies on Statute Law.26. This edition claimed that it was not permissible to refer to the Parliamentary history. Several cases from the first edition were cited as well as some more recent cases including R v West Riding of Yorkshire County Council.27. However, Craies continued to assert that commissioners’ reports were permissible under the mischief rule based on the Solio case. Craies and Maxwell would remain opposed to each other on this matter until much later in the century. It appears that Craies yielded some ground to a broad prohibition as reiterated by West Riding but followed the doctrine of strong stare decisis with respect to the Solio case. This was not unreasonable. In this time, the House of Lords claimed that they could not overturn their own past decisions.

West Riding would become an often-cited precedent for the rule against reliance on legislative history.28. It is interesting to note that Lord Justice Farwell explicitly incorporated the Solio case in his opinion in his effort to stamp out any notion that recourse could be had to legislative history:

The principles of construction applicable to Acts of Parliament are well settled, and will be found stated in Stradling v Morgan,29 and which has received approval of Turner LJ, in Hawkins v Gathercole30 and of Lord Halsbury in Eastman Photographic Materials v Comptroller-General of Patents,31... The mischief to be cured by the Act, and the aim and object of the Act must be sought in the Act itself. Although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn therefrom are extremely slight...32

Lord Justice Farwell was taking sides in the controversy over reliance on commissioners’ reports. He clearly regarded commissioners’ reports as documents which ought to be prohibited and went so far as to imply that the Solio case was one of the precedent cases for the rule that the mischief must be obtained from the statute alone. He said this as a judge at the Court of Appeal despite the undeniable ratio decidendi of a unanimous decision from the highest court in the United Kingdom at a time when the House of Lords asserted that they were unable to overturn their own precedents.

With a clear conflict between West Riding and the Solio case, and between Maxwell and Craies, there was a point of law that needed to be settled. Over a period of several decades, the matter was tested in court.

26. William Feilden Craies and Henry Hardcastle, A Treatise on Statute Law (1st edn, Stevens & Haynes, London 1907). The subtitle: ‘founded on and being the fourth edition of Hardcastle on Statutory Law’.
27. [1906] 2 KB 676. [West Riding].
28. See for example Charles E Odgers, The Construction of Deeds and Statutes (Carswell, London 1939) 221; Edward Beal, Cardinal Rules of Legal Interpretation (2nd edn Stevens & Sons, London 1908) 290. It was cited in Assam Railways and Trading Co. Ltd v Inland Revenue Commissioners [1934] All ER 646; Edwards v Attorney-General for Canada [1929] All ER 75; and in Black-Clawson International Ltd v Papierwerke Walldorf-Aschaffenburg [1975] 1 All ER 810.
29. (1560) 1 Plowd 199.
30. (1855) 6 DM & G 1, 21.
31. Solio Case (n 21).
32. (n 27) 716.
The admissibility of commissioners’ reports in the 20th century

The first prominent case to address the issue was *Viscountess Rhondda’s Claim*.\(^{33}\) Counsel argued that the Report of the Committee of Privileges should be considered and Viscount Birkenhead decided that the report was a judgment of a judicial body ‘governed by a pedantic and absolute adherence to the rules which govern procedure in Courts of law’.\(^{34}\) This statement implies that the report would be admissible and indeed, potentially persuasive on the grounds that it was analogous to a case. There would be no need for the mischief exception in this circumstance. However, the case was decided without recourse to the report, and the statement was *obiter*.

The next significant case to confront the issue was *Assam Railways and Trading Co v Commissioner of Inland Revenue*.\(^{35}\) This was a tax case in which the appellant company contested the method of calculating the net amount subject to tax relief based on an anti-double taxation rule for companies paying taxes in India, in accordance with the Income Tax Act 1918. Counsel for the appellant sought to rely on recommendations from a Report of a Royal Commission on Income Tax in 1920;\(^{36}\) he argued that, as the Act of 1920 followed these recommendations, it should be presumed that the words of the section were intended to give effect to them and hence they could be used to show what was the intention of the Legislature in enacting the section.\(^{37}\)

In his opinion, Lord Wright restated the rule as enunciated by Farwell LJ in *West Riding*, and therefore adopted a sceptical view of commissioners’ reports:

> It is clear that the language of a Minister of the Crown in proposing in Parliament a measure which eventually becomes law is inadmissible and the Report of Commissioners is even more removed from value as evidence of intention, because it does not follow that their recommendations were accepted.\(^{38}\)

The majority concurred. Following this case, Maxwell’s treatise added a single sentence which made explicit a claim that had been implicit from the first edition: ‘Nor can the report of a Royal Commission be admitted to show the intention of an Act’.\(^{39}\) Curiously, this case did not appear in revised editions of Craies’ treatise, and the claim about admissibility remained unchanged.

In 1939, the Privy Council consulted a commissioners’ report when deciding *Ladore v Bennett*.\(^{40}\) Several municipalities in Ontario, Canada, had been amalgamated and their debentures had been restructured with reduced interest rates to cope with the severe financial pressures of the great depression. The *vires* of the legislation was at issue—whether or not the provincial government had the constitutional authority to alter the terms of municipal bonds via

\(^{33}\) [1922] 2 AC 339.

\(^{34}\) Ibid., 349.

\(^{35}\) [1935] AC (HL) 445.

\(^{36}\) Great Britain, ‘Report of the Royal Commission on Income Tax’ (Cmd 615, 1920); Finance Act 1920.

\(^{37}\) (n 35) 457 per Lord Wright.

\(^{38}\) Ibid., 459.

\(^{39}\) Sir Peter Benson Maxwell and Gilbert HB Jackson, *The Interpretation of Statutes* (8th edn, London, 1937) 26.

\(^{40}\) *Ladore v Bennett* [1939] AC 468.
legislation under the Canadian Constitution, otherwise known as the British North America Act 1867. A commission had studied the circumstances of the municipalities and their debt obligations prior to the statute, and the report was presented to the court on the consent of both parties following objection and argument. Lord Atkin’s judgment state that “[t]heir Lordships do not cite this report as evidence of the facts there found, but as indicating the materials which the Government of the Province had before them before promoting in the Legislature, the statute now impugned.”

In Shenton v Tyler, Sir Wilfred Greene, MR, discussed the Second Report of the Common Law Commission when explaining the effect of amendments to the Evidence Act 1851 with respect to spousal privilege and witness compellability. The central issue of the case concerned whether or not there was a common law spousal privilege prior to the Evidence Acts. In his decision, the Master of the Rolls said the following:

the Common Law Commissioners presented their Second Report, in which, after examining the reasons for the rule making husbands and wives incompetent to give evidence either for or against one another, they recommended (at p. 13) that this rule should be abrogated ‘but that all communications between them should be held to be privileged.

The Master of the Rolls noted that

[t]his recommendation was accepted by the Legislature and embodied in the Evidence Amendment Act, 1853... The statutory privilege, therefore, extends only to communications made to the witness, and does not protect those made by the witness.

The imputation of the report’s explanation and motives to the legislature make this usage seem more like use for interpretation than use to uncover the mischief.

This case caught the attention of RM Jackson who wrote a note for the Law Quarterly Review to point out the divergence in the textbooks by Maxwell and Craies and the unsettled state of the law governing judicial reliance on commissioners’ reports. In his discussion, Jackson sided with Craies, arguing that the courts had ‘a wide choice of material upon which it may draw for information under the mischief rule.’ Surprisingly, this was the only contemporary piece of scholarly literature addressing this particular issue.

The matter arose again 1946 in Weatherly v Weatherly. Evershed LJ said the following:

Our attention was drawn to the report of the Royal Commission on Divorce and Matrimonial Causes... It was argued on the authority of the Eastman Photographic Materials case it is permissible for the court, in interpreting a statute, to refer to a Royal Commission report for the purpose of discovering what were the evils or defects the remedy of which might be taken to have been intended by the statute. Assuming, but without deciding, that it is permissible for us to refer to

41. 30 & 31 Vict c 3. This was an ordinary Act of the Westminster Parliament.
42. Shenton v Tyler [1939] 1 Ch 620.
43. Ibid., 628.
44. Ibid., 628–29.
45. RM Jackson, ‘Note (Shenton v. Tyler)’ (1939) 120 LQR 488.
46. Ibid., 489.
47. [1946] 2 All ER 1.
48. Great Britain, ‘Report of the Royal Commission on Divorce and Matrimonial Causes’ (Cmd 6478, 1912).
the report of this Commission, the document, in my judgment, so far from assisting the appellant, increases his difficulties.

The matter did not arise in a prominent published case again until 1953 when the Privy Council heard an appeal from Ceylon concerning the *vires* of a law requiring paternal descentancy to qualify as a citizen under the Citizenship Act 1948. Lord Oaksey expressed the matter as follows:  

It is common ground between the parties, and is in their Lordships’ opinion the correct view, that judicial notice ought to be taken of such matters as the reports of Parliamentary Commissions and of such other facts as must be assumed to have been within the contemplation of the legislature when the Acts in question were passed (cf. *Ladore v Bennett*), and both parties have referred to a number of paragraphs in the report of the Soulbury Commission of 1945.

When considering these cases collectively, there were a variety of divergent points of view. Some judges were willing to consider commissioners’ reports, either based on argument to assert the mischief exception, or simply on the authority of the *Solio* case, or by declaring a new exception that overcame the reason for the rule, as occurred in *Viscountess Rhondda’s Claim*. There were other judges who were more sceptical and either accepted the rule as asserted in *West Riding* or felt that the matter was contentious and the materials should not be relied upon if at all possible.

Within the cases, there is a noisy but discernable shift from reluctance early in the century towards acceptance of the *Solio* exception by the 1950s. However, there is an additional factor which suggests that from the turn of the 20th century through to the 1950s many judges sided with Maxwell and Farwell J and believed that commissioners’ reports should not be considered: commissioners’ reports arose in prominent judgments infrequently—only once or twice in a decade. Even after the Privy Council’s decision in *Pillai v Mudanayake*, which stated that the law was settled and commissioners’ reports were admissible, the matter was not revisited until 1964. It seems unlikely that the preponderance of judicial sentiment favoured the acceptance of such materials given how rarely they were dealt with.

There was noticeable change in judicial sentiment in the mid-1960s. In the famous case of *Rookes v Barnard*, the Report of the Royal Commission on Trade Disputes and Trade Combinations was discussed by Lord Pearce to show the mischief of the Trade Disputes Act 1906.

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49. *Pillai v Mudanayake* [1953] AC 514.
50. Ibid., 528.
51. [1964] AC 1149.
52. At [1236]: ‘At first sight, there is compelling force in the respondents’ argument that Parliament cannot have intended the second limb to be merely declaratory that interference with employment (which is not a tort) shall not be actionable. But at the date when the Act was passed the law was in some confusion. It was thought by some well-informed opinion that there was a tort of mere unjustifiable interference with trade. This appears from the report of the Royal Commission which preceded the Act. On this view of the law (which was subsequently shown to be wrong) it would be reasonable for Parliament to enact the second limb of section 3 for the purpose of ensuring that no conduct should be unlawful on the ground only that it interfered with trade—meaning that it was protected if it was tortious for that reason and for no other reason’. Great Britain, ‘Report of the Royal Commission on Trade Disputes and Trade Combinations’ (Cmd 2825, 1906).
In National Provincial Bank Ltd v Ainsworth, a bank sought to repossess a house that a husband had transferred to a corporation. The house was occupied by the husband’s separated wife and their children. Lord Denning MR had cited a passage from the Royal Commission on Marriage and Divorce when deciding in favour of the wife at the Court of Appeal. When the decision was reversed by the House of Lords, Lord Hodson acknowledged Denning’s reliance on the commissioners’ report. However, he did not criticise admissibility but merely noted that the report did not address the issue to be settled in this case: ‘as the Master of the Rolls himself pointed out the question is not here one between husband and wife but one which concerns the position of successors in title’.

In Letang v Cooper, the appellant relied on the Report of the Tucker Committee to argue that the limitation period for trespass ran for 6 years despite the fact that the limitation period for all actions in tort was only 3 years as set out in the Limitations Act 1939. Lord Denning noted that the report recommended a longer period for trespass, but that ‘Parliament may, and often does, decide to do something different to cure the mischief ...’.

In Cozens v North Devon Hospital Management Committee, the Limitations Act was again considered, but with respect to the ability to apply to set aside an order granting leave. A commissioners’ report was discussed by counsel for the defendant in the Court of Queen’s Bench, and although it was not sufficiently relevant to merit consideration in the judgment, Thompson J noted that such documents were admissible although not for the purpose of interpretation.

Heatons Transport (St. Helens) Ltd v Transport and General Workers Union was a trade union case. Union members had been impeding the movement of company goods in furtherance of a trade dispute contrary to a court order. When faced with a contempt proceeding, the

53. [1965] AC 1175.
54. ‘The Royal Commission on Marriage and Divorce (Cmd. 9678 (1956)) 162 to 168, sets out the law of England in relation to property rights between the spouses as it was in 1955 in the view of the commission. The decision of the Court of Appeal in the present case follows exactly that view of the law subject to any qualification necessary because the property here is registered land’. At [1201].
55. At [1221].
56. [1965] 1 QB 232.
57. Ibid., 240: ‘I must deal with a further argument which was based on the opinion of text-writers, who in turn based themselves on the Tucker Committee’s report on the limitation of actions which preceded the legislation. ... They recommended that, in actions for damages for personal injuries, the period of limitation should be reduced to two years; but they said: “We wish, however, to make it clear that we do ‘not include in that category actions for trespass to the person, false imprisonment, malicious prosecution or defamation of character, but we do include such actions as claims for negligence against doctors.’ I think the text-writers have been in error in being influenced by the recommendations of the committee. It is legitimate to look at the report of such a committee, so as to see what was the mischief at which the Act was directed. You can get the facts and surrounding circumstances from the report so as to see the background against which the legislation was enacted. This is always a great help in interpreting it. But you cannot look at what the committee recommended, or at least, if you do look at it, you should not be unduly influenced by it.” Great Britain, ‘Report of the Committee on the Limitation of Actions’ (Cmd 7740, 1944).
58. (n 56) 318.
59. ‘While maintaining, correctly, that the report of the committee could not be looked at to interpret the Act, Mr. Peter Webster, who appeared for the defendants in the first of the present applications, referred me to certain parts of the report to demonstrate that there was nothing in the recommendations of the committee which was inimical to the present application or which showed that the committee had even considered whether a defendant should, after leave granted by the judge in chambers, have the right to apply to set aside the leave’. At [321]. Great Britain, ‘Report of the Committee on Limitation of Actions in Cases of Personal Injury’ (Cmd 1829, 1962).
union argued that its shop stewards had been advised to comply with the order and that the stewards were acting outside of their duties when they interrupted company shipments. Passages from a commissioners’ report were cited by counsel in argument, and Roskill LJ found the material to be helpful.  

Much valuable information on this subject will be found in the report of the Royal Commission on Trade Unions and Employers’ Associations (1968) (Cmd. 3623), over which the late Lord Donovan presided. We were referred during the argument to many of the passages in that report... The failure of unions generally to define, and indeed, circumscribe the functions of the shop stewards was the subject of criticism in the Donovan Report.

In all of these cases, commissioners’ reports were mentioned by no more than one judge or Law Lord on any panel, so none could serve as a precedent. However, there was no reluctance or equivocation. In one case, it was mentioned that use was restricted to uncovering the mischief, but the judges at issue felt no need to cite a precedent to justify recourse to the reports; and the other judges on the panels raised no objection. Judicial reliance on these materials was perceived to be beyond controversy. Meanwhile, these five cases were heard within 3 years—much more frequently than had occurred in the past. Usage was not merely permissible. It was becoming an accepted practice.

It is rather curious that these newer cases were not mentioned in the subsequent edition of Craies’ treatise published in 1971. Although ultimately vindicated by these cases, this treatise continued to repeat the claim about admissibility of commissioners’ reports based on the Solio case. Maxwell’s treatises finally acknowledged the admissibility of commissioners’ reports in the twelfth and final edition, published in 1969. The explanation closed with a cautionary quote by Lord Denning from *Letang v Cooper*: ‘You must interpret the words of Parliament as they stand, without too much regard to the recommendations of the committee.’

The change in the judicial attitude towards commissioners’ reports was explicitly acknowledged in *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg*. The meaning of s 8(1) of the Foreign Judgments (Reciprocal Enforcement) Act, 1933 was at issue, and in particular, whether a case settled in a foreign jurisdiction on the grounds that it was time-barred because of expiration of the limitation period meant that the same matter could not be considered substantively in the United Kingdom where the limitation period had not expired. This hinged upon whether the Act altered the pre-existing common law rules or merely added to them. The commissioners’ report that preceded the Act addressed the matter directly, and although Lord Diplock felt that the statute lacked ambiguity and the matter could be settled without considering the report (indeed, he criticised his fellow lords for focusing so much on the report), the other four

60. [1973] AC 15, 66.
61. *Letang v Cooper*, 240.
62. William F Craies, *Craies on Statute Law* (Samuel GG Edgar ed, 7th edn, Sweet & Maxwell, London 1971).
63. Sir Peter Benson Maxwell, *Maxwell on the Interpretation of Statutes* (PStJ Langan ed, 12th edn, Sweet & Maxwell, London 1969).
64. (n 56), 240.
65. [1975] AC 591, 621 [Black Clawson].
66. ‘In construing [an act of Parliament]... the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates. That any or all of the individual members of the two Houses or Parliament that passed it may have thought the words bore a different meaning cannot affect the
Law Lords were in agreement that the report could be relied upon to uncover the mischief.\textsuperscript{67}

A draft Bill with commentary within the report proved to be a significant source of disagreement in \textit{Black Clawson}. The majority felt that these materials should be excluded. While Lord Dilhorne declined to consider the Bill, he said ‘surely it is legitimate to conclude, as Greene M.R. did in \textit{Shenton v Tyler} (supra), that Parliament had accepted the recommendation of the Committee and had intended to implement it’.\textsuperscript{68} Lord Simon of Glaisdale was in agreement:

> the technique of a draft Bill with commentary is so common nowadays in Reports to Parliament as to excuse, I hope, some expatiation on the matter…. To refuse to consider such a commentary, when Parliament has legislated on the basis and faith of it, is for the interpreter to fail to put himself in the real position of the promulgator of the instrument before essaying its interpretation. It is refusing to follow what is perhaps the most important clue to meaning.

These comments indicate that commissioners’ reports were indeed the thin edge of the wedge: the normalisation of their usage would increase the probability that judges might rely upon other kinds of preparatory materials because other types of preparatory materials were contained within them. However, their lordships were united on one matter. Hansard remained forbidden.\textsuperscript{69}

### Legislative history in court in the 20th century

The \textit{Solio} exception was for commissioners’ reports only, and all other types of legislative history, and particularly Hansard, were forbidden as aids to statutory interpretation from the turn of the 20th century. However, there are several instances when such materials appeared in prominent judgments.

In \textit{Henrietta Muir Edwards and others v The Attorney General of Canada},\textsuperscript{70} the Privy Council considered whether ‘qualified persons’ fit to be appointed senators in the Parliament of Canada, as provided for in the British North America Act 1867, included women.\textsuperscript{71} Lord Sankey noted that:

> when upon May 20, 1867, the \textit{Representation of the People Bill} came before a committee of the House of Commons, John Stuart Mill moved an amendment to secure women’s suffrage and the amendment proposed was to leave out the word ‘man’ in order to insert the word ‘person’ instead thereof. See \textit{Hansard}, 3rd series, vol. 187, col. 817.\textsuperscript{72}

\begin{footnotes}
\item[67] Per Lord Reid: ‘I think that we can take this Report as accurately stating the ‘mischief’ and the law as it was then understood to be, and therefore we are fully entitled to look at those parts of the Report which deal with those matters’. Ibid., 614; Per Lord Dilhorne, citing the Solio Case, ‘That one can look at such reports to discern the mischief is now, I think, established[.]’ At [622].
\item[68] Ibid.
\item[69] \textit{Black Clawson}, (n 65) 614–15, 623.
\item[70] [1930] AC 124.
\item[71] British North America Act 1867 (30 & 31 Vict c 3).
\item[72] (n 70) 143.
\end{footnotes}
The inference to be drawn is that the drafters intended the word ‘person’ to be gender inclusive. The MP was a known advocate of women’s rights, and the statement concerned a different statute than the one at issue, facts which make this inference all the more contentious. The case attracted attention because of its implications for interpreting constitutional statutes, and its implications for women’s rights, yet the case is not widely known for violating of the rule against Hansard as an aid to interpretation. Odgers devoted a paragraph to this case, discussing both the constitutional and women’s rights elements, and ignoring the use of Hansard, despite maintaining that Hansard was impermissible.

In *R v Commissioners of Customs & Excise*, s 46 of the Finance (1909–1910) Act 1910 was at issue. This provision enabled a person holding a liquor licence to recover a portion of the increase in the cost of a license from a landlord and liquor supplier ‘proportionate to any increased rent of the licensed premises, or increased process of intoxicating beverages supplied[,]’ In 1926, the appellant sought to recover based on annual increases in rent for the duration of his tenancy which commenced in 1911. The statute was enacted in April 1910 but applied to increases imposed from 1 October 1909. The respondent argued that the statute was only meant to apply to increases that occurred between October 1909 and the date that the statute was enacted, but not afterwards. Lord Blainsburgh felt compelled to examine the legislative history:

It has now been mooted that s. 46 found its place in the statute mainly that by it the position as between the licence holder and the brewer might be adjusted in respect of that long antecedent period, so that its operation was really spent with the expiration of the licensing year current at its passing. I therefore thought it right for my own satisfaction to examine the Finance Bill of 1909–10 as it was presented to this House in 1909 and then rejected, in order to see whether §46 had any counterpart in that Bill. And it may now be conveniently stated that its ss. 43–47 are in terms identical with those same sections of the present Act. In other words, if the Finance Bill of 1909 had in ordinary course been duly passed in 1909 in the form in which it left the House of Commons it would have presented in relation to s. 46 precisely the same problem that that section presents to your Lordships now.

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73. Olive M Stone, ‘Canadian Women as Legal Persons: How Alberta Combined Judicial, Executive and Legislative Powers to Win Full Legal Personality for All Canadian Women’ (1979) 17 Alta L Rev 331, 350–51.
74. C Wilfred Jenks, ‘The Constitutional Capacity of Canada to Give Effect to International Labour Conventions’ (1934) 16 J Comp Legis Int Law 201; Edward McWhinney, ‘The Role of the Privy Council in Judicial Review of the Canadian Constitution—A Post-Script’ (1951) 5 Vand L Rev 746; This case is famous for the metaphor of the living tree in constitutional interpretation. See for example Bertha Wilson, ‘The Making of a Constitution’ (1987) 71 Judicature 334; Asher Honickman, ‘The Living Fiction: Reclaiming Originalism for Canada’ (2014) 43 Advoc Quart 329; Dwight Newman, ‘Judicial Power, Living Tree—Ism, and Alterations of Private Rights by Unconstrained Public Law Reasoning’ (2017) 36 Uni Queensland La J 247; Bradley W Miller, ‘Beguiled By Metaphors: The ‘Living Tree’ and Originalist Constitutional Interpretation in Canada’ (2009) 22 Can J Law Jurisprud 331; WJ Waluchow, ‘Democracy and the Living Tree Constitution Constitutional Law Symposium: Debating the Living Constitution’ (2010) 59 Drake L Rev 1001; There is one journal article that points out the violation of the rule in this case: Vincent C MacDonald, ‘Constitutional Interpretation and Extrinsic Evidence’ (1939) 17 Can Bar Rev 77.
75. Odgers (n 28) 298, 219.
76. [1928] AC 402.
77. Ibid., 423.
It is curious that Lord Blainsburgh delved into the legislative history to confirm that it did not provide any illumination. It was not permissible for him to do so; and it could have been troubling had he found useful information therein.

In *re C, an Infant*, a husband and wife sought to adopt the wife’s illegitimate 19-year-old daughter from a prior relationship. The Adoption of Children Act 1926 prohibited the adoption of a child if the potential parent was less than 21 years older than the child. Both husband and wife were less than 21 years older. There was discretion to make exceptions for those ‘within the prohibited degrees of consanguinity’ which enabled ‘blood’ relatives to adopt. The father lacked such relations.

In his decision, Luxmoore J considered a variety of preparatory materials including the Bill in its original form, amendments proposed during passage, as well as statements made in the House of Commons:

In the debate in support of the amendment, Major Hill said:

> The Bill is mandatory, and so no order can now be made in any case unless the adopter is 21 years older than the infant. No discretion whatever is given to the court. Take the case of two brothers. Suppose that one dies and leaves a child of 6 years of age. Suppose there is a younger brother 25 years of age. No power can allow that brother to adopt his nephew. That is a case that may occur and it certainly ought to be provided for.

A passage by Commander Kenworthy was also quoted. Luxmoore cited these sources ‘to show that the policy of the Act appears to have been to relax the universality of the restriction in the [relevant] subsection’. He found that the wife possessed the blood relations and could therefore adopt her illegitimate daughter, but that the husband could not.

These cases are exceptional. The rule prohibiting recourse to legislative history was followed, for the most part. However, it is apparent that there were a few judges who were either misunderstood the breadth of the rule prohibiting legislative history or who disagreed with the strictness of it and felt comfortable making exceptions (and admittedly, the latter seems more probable). These are not obscure cases. All of them can be found in Incorporated Council reporters. The often repeated claim that the rule was strictly followed from the late 18th century through to the case of *Pepper v Hart* in 1992 must yield a bit of ground.

Reference was also made to Hansard in support of a practice note which was promulgated to correct some misapprehension which appears to have arisen about the exercise of the power conferred by Section 44 of the Criminal Justice Act 1948 [concerning costs] . . . . It was never intended, and it would be quite wrong, that costs should be awarded as of course to every defendant who is acquitted. Its use should be considered by the court on its own merits.

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78. [1937] 3 All ER 783, 787.
79. Ibid., 787.
80. In *Hadmor Productions Ltd. v Hamilton* [1983] 1 AC 191, 232, Lord Diplock said: There are a series of rulings by this House, unbroken for a hundred years, and most recently affirmed emphatically and unanimously in *Davis v Johnson*, that recourse to reports of proceedings in either House of Parliament during the passing of a Bill which upon the signification of the Royal Assent became the Act of Parliament which falls to be construed is not permissible as an aid to its construction. There were also exceptions in the 19th century, for example *Re Mew* (1862) 31 L J Ch 87. For a more detailed examination of this issue, see Magyar (n 5).
I may add that a reference to Hansard (449 HC Deb 5s 1294) shows that this is in accordance with what the Attorney General stated in Parliament was the intention of the clause when it was being considered in committee.\(^{81}\)

While a practice note is not a case, one could sympathise with any lawyer at the time who regarded this as somewhat hypocritical coming from a Bench which, but for the occasional self-directed exception, flatly rejected counsels’ attempts to use such materials, particularly as evidence of the intention of Parliament.

### The demise of the exclusionary rule

*Black-Clawson* revealed how commissioners’ reports were putting the exclusionary rule under pressure in the 1970s, and there are other cases worth noting. In *Warner v Metro Police Commissioner*, Lord Reid considered whether ‘possession’ in s 1 (1) of the Drugs (Prevention of Misuse) Act 1964 was a strict liability offense and said the following, in dissent:\(^ {82}\)

> the layman might well wonder why we do not consult the Parliamentary Debates, for we are much more likely to find the intention of Parliament there than anywhere else. The rule is firmly established that we may not look at Hansard and in general I agree with it, ... but I am bound to say that this case seems to show that there is room for an exception where examining the proceedings in Parliament would almost certainly settle the matter immediately one way or the other.

Lord Reid followed the rule in this case, but he did not a few years later in *Knuller (Publishing and Promotions) Ltd v Director of Public Prosecutions*.\(^ {83}\) The case concerned whether or not an advertisement for consenting adults to engage in private homosexual acts could amount to a conspiracy to corrupt public morals. Counsel argued that Shaw’s case\(^ {84}\) established that the offence could and that the defence to charges under ss 2(4) of the Obscene Publications Act 1959 did not apply. It was further argued that Parliament could have amended the Act had they disagreed with the decision in *Shaw*’s case. Lord Reid found this argument unconvincing:

> This matter was raised in the House of Commons on June 3, 1964, when the Solicitor-General gave an assurance, repeating an earlier assurance, “that a conspiracy to corrupt public morals would not be charged so as to circumvent the statutory defence in subsection (4)”. (Hansard, vol. 695, col. 1212)\(^ {85}\)

What makes this case all the more curious is the fact that Lord Reid upheld the status quo affirmed in *Black Clawson*—that recourse could be had to commissioners’ reports but not to the Bill and Commentary cited therein—despite evidence of the fact that Parliament enacted the relevant provisions based on recommended texts from the report without alteration. Under these circumstances, it is readily apparent that the commentary is relevant and potentially illuminating.

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81. Practice Note [1952] WN 175.
82. [1968] 2 WLR 1303, 1316.
83. (n 60) 435.
84. [1962] AC 220.
85. (n 83) 456.
Lord Diplock concurred with Lord Reid’s reasoning in Kneller, albeit more briefly. He felt that arguments to the effect that Parliament had accepted Shaw’s case ring hollow in light of the disclosure of the assurance given to Parliament by a Law Officer of the Crown in the course of debates on the amending Bill that a conspiracy to corrupt public morals would not be charged so as to circumvent the statutory defence in section 4 of the Act of 1959—which was precisely what had been done.86

A few years prior to Kneller, in Sagnata Investments Ltd v Norwich Corporation,87 Lord Denning relied on Hansard to argue that a bill had been enacted in direct response to a particular case that impacted the Betting and Licensing Act 1960:

We are, of course, entitled to look at the mischief which the Act was intended to remedy. I take it as described on second reading in the House of Commons, by the Minister. (Hansard, Parliamentary Debates, Commons, February 28, 1964, Column 784):

As a result, therefore [of Hewison’s case88] the situation has been reached when local authorities have simply not felt it open to them to refuse permits for such premises. Amusements in the shape of gambling machines are now installed under permits in a whole variety of places. . . . My Bill seeks to remedy this situation by strengthening the hands of local authorities to refuse permits for such premises. On the other hand, everything we try to do in the Bill is completely within the intention of Parliament as expressed during the Act of 1963. We have not gone one whit beyond those intentions.

Accordingly, Parliament passed the Act of 1964. Section 3 (1) was passed so as to do away with Hewison’s Case [1963] 1 Q.B. 584 and give to the local authorities the power which Parliament always intended they should have. It gave them the power to impose conditions.

In R v Greater London Council ex p Blackburn, Denning relied on Hansard again. The local authority had failed to prosecute a venue for showing pornographic films. Such venues tended to be prosecuted under the Obscene Publications Act 1959, and Denning sought to argue that the common law, the test for which proved far more likely to yield a conviction, was the appropriate mechanism for enforcement. Among his justifications for citing Hansard, Denning noted Lord Diplock’s reliance on Hansard in Kneller, but not Lord Reid’s:

Parliament expressly said that the provisions of the Act of 1959 were not to apply to cinematograph films shown in public. It did so by the proviso to section 1 (3) (b). Why did Parliament do this? I propose to look at Hansard to find out. I know that we are not supposed to do this. But the Law Commission looked at Hansard: see their Report, paragraph 3.46, p.88. So did Lord Diplock in Kneller’s case [1973] AC 435, 480. So I have looked at Hansard to refresh my memory. In the Lords Viscount Kilmuir L.C. referred to the four forms of publication which were excepted from the Bill. First, the live performance of stage plays; secondly, the cinema; thirdly, television; and fourthly, broadcasting. He said that the promoters of the Bill—it was a private member’s Bill—desired to leave those four out of the Bill and to allow the common law to apply to them. The government were content that this should be so. The Lord Chancellor said that they “have in practice not been prosecuted in the past and . . . are most unlikely, so far as can be contemplated,

86. Ibid., 480.
87. [1971] 2 QB 614.
88. Hewison v Skegness Urban District Council [1963] 1 QB 584.
to be prosecuted in the future”. See Hansard (House of Lords), June 22, 1959, vol. 217, col. 74. In the Commons the Solicitor-General added that those four forms “are subject, in fact, to censorship either by public authority or internal control by the Lord Chamberlain, the Board of Film Censors, or whatever it may be”: see Hansard (House of Commons), July 22, 1959, vol. 609, col. 1446.

Around this time, Lord Simon made some comments in the case of Race Relations Board v Dockers’ Labour Club and Institute Ltd. He did not go as far as Lord Denning—he did not actually cite or discuss Hansard. However, he implied that such a source could be useful to help understand particular pieces of legislation:

In Race Relations Board v Charter [1973] A.C. 868, 899–900, I speculated on the probability that during the debates in Parliament on the Bill which led to the Race Relations Act 1968 the question was raised whether the Act extended to working men’s clubs. If so, it must have been in contemplation that such clubs were bound together in a union giving rise to associated membership: this is a matter both of common knowledge and of official cognisance.89

This was one of the cases cited by Lord Denning in Davis v Johnson90 to justify his reliance on Hansard. The issue concerned whether or not an unmarried couple were ‘living together as husband and wife’ for the purposes of the Domestic Violence and Matrimonial Proceedings Act 1976, in which case the court could order one of the parties to be excluded from the home if they had committed acts of violence against the other. Lord Denning relied on the relevant prior reports. However, he also relied on statements made by the MP in charge of the Bill when introducing the Bill to the House of Commons for second reading. Lord Denning justified this as follows:

In some cases Parliament is assured in the most explicit terms what the effect of a statute will be. It is on that footing that members assent to the clause being agreed to. It is on that understanding that an amendment is not pressed. In such cases I think the court should be able to look at the proceedings.91

On appeal, the House of Lords affirmed Lord Denning’s outcome (that the court could make such an order) and unanimously condemned the use of Hansard.

In R v Local Commissioner for Administration, ex parte Bradford Metropolitan City Council,92 Lord Denning sought to determine the meaning of ‘maladministration’ in s 34 (3) of Local Government Act 1974:

The construction of that word is beyond doubt a question of law. According to the recent pronouncement of the House of Lords in Davis v Johnson, we ought to regard Hansard as a closed book to which we as judges must not look. . . . By good fortune, however, we have been given a way of overcoming that obstacle. For the ombudsman himself in a public address to the Society of Public Teachers of Law quoted the relevant passages of Hansard as part of his address: and Professor Wade has quoted the very words in his latest book on Administrative Law. And we have

89. Race Relations Board v Dockers’ Labour Club and Institute Ltd [1976] AC 285, 298.
90. Davis v Johnson [1979] AC 264. (This is the citation for the HL decision, but it also includes the judgment from the court below.)
91. Ibid., 277.
92. [1979] 2 All ER 881.
not yet been told that we may not look at these writings of the teachers of law. . . . I hope therefore that our teachers will go on quoting Hansard so that a judge may in this way have the same help as others have in interpreting a statute.\textsuperscript{93}

One cannot help but be impressed by Lord Denning’s tenacity and audacity. Around this time, a belief was spreading that parliamentary privilege, as set out in the Bill of Rights, had provided a long-standing statutory prohibition to the presentation of Hansard in court. Farrar and Dugdale, for example, claimed that:

until recently there were limitations on the extent to which judges could even have access to Hansard. However, by resolution of the House of Commons on October 31st 1980, a general permission was granted and it is now no longer necessary to petition the House for leave to place Hansard before the court.\textsuperscript{94}

At the time, this was a novel claim. The issue was never raised in any case in which Hansard had been presented by counsel; and in the case of Millar v Taylor, in which the rule against reliance upon Hansard purportedly began, floor debates were considered and discussed by Lord Yates at a time when the publication of such debates was illegal.\textsuperscript{95} According to Miers, ‘there was nothing in the background to the 1980 resolution which suggests that the Committee of Privileges was itself concerned about the impact of its recommendation upon judicial practice with regard to interpretation’.\textsuperscript{96} Yet, there was speculation about the impact of this resolution on the exclusionary rule at the time;\textsuperscript{97} and there was a newly emerged belief that the permission of the House had always been required to present Hansard in court.

It was perhaps inevitable that this issue would be raised. Article 9 of the Bill of Rights 1689 stipulates that ‘the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament’. The purpose of this provision was to ensure that MPs would face neither criminal nor civil proceedings because of things said in the House of Commons (as had happened prior to the Revolution of 1688). However, conceptually, it is also tied to the sovereignty of Parliament. The nature and extent of privilege was vague. With a preponderance of belief that Hansard was inadmissible, there would be no reason to consider the matter within the context of judicial interpretation. It was now a potential impediment that would have to be addressed.

The next significant case in which Hansard was addressed was Hadmore Productions v Hamilton.\textsuperscript{98} Video programs created by Hadmore Productions had been prevented from being broadcast because the company was not included on a list of union-approved production companies, despite having received a letter of assurance from the union organiser that the programs would meet union standards. At issue was whether or not the ‘blacking’ was pursuant

\textsuperscript{93} Ibid., 898.
\textsuperscript{94} JH Farrar and AM Dugdale, Introduction to Legal Method (3rd edn, Sweet & Maxwell, London 1990) 158.
\textsuperscript{95} Millar v Taylor (n 2); For a better understanding of the significance of this case, see Magyar (n 5).
\textsuperscript{96} David Miers, ‘Citing Hansard as an Aid to Interpretation’ (1983) 4 Stat L Rev 98, 104.
\textsuperscript{97} Ibid.; JFAJ, ‘Note (The Leedale Affair)’ [1983] BTR 70; Michael Rawlinson, ‘Tax Legislation and the Hansard Rule’ [1983] BTR 274. An ancillary issue deserves comment. Parliamentary privilege was established by statute. Privilege can be waived by the privilege-holder, however, would a resolution of the House of Commons be sufficient to waive the privilege of all subsequent MPs in the future? Or only those that voted at the time when the resolution was passed? Surely legislation would be more appropriate than a resolution.
\textsuperscript{98} [1983] 1 AC 191.
to a ‘trade dispute’ as defined in s 29 (1) of the Labour Relations Act 1974. If not, Hadmore Productions could seek damages. Lord Denning decided that the blacking was not pursuant to a trade dispute, and said the following about Hansard:

In most of the cases in the courts it is undesirable for the Bar to cite Hansard or for the judges to read it. But in cases of extreme difficulty, I have often dared to do my own research. I have read Hansard just as if I had been present in the House during a debate on the Bill. And I am not the only one to do so. When the House of Lords were discussing Lord Scarman’s Bill on the Interpretation of Legislation on 26th March 1981, Lord Hailsham LC made this confession (418 HL Official Report (5th series) col 1346):

It really is very difficult to understand what they [the Parliamentary draftsmen] mean sometimes. I always look at Hansard, I always look at the Blue Books, I always look at everything I can in order to see what is meant and as I was a Member of the House of Commons for a long time of course I never let on for an instant that I had read the stuff. I produced it as an argument on my own, as if I had thought of it myself. I only took the trouble because I could not do the work in any other way. As a matter of fact, I should like to let your Lordships into a secret. If you were to go upstairs and you were a fly on the wall in one of those judicial committees that we have up there, where distinguished members of the Bar... come to address us, you would be quite surprised how much we read... The idea that we do not read these things is quite rubbish... if you think that they did not discuss what was really meant, you are living in a fool’s paradise.

Having sat there for five years, I would only say: “I entirely agree and have nothing to add.”

Within his opinion, which examined the history of trade dispute legislation at length, Lord Denning cited the speech of Lord Wedderburn before a committee examining the bill.

Once again, Lord Denning was rebuked by the House of Lords, Viscount Dilhorne spoke for the court. He affirmed the ruling in *Davis v Johnson*, and indeed, he used his opinion in *Hadmore* to engage in a judicial dialogue in *obiter* to address the fact that counsel did not present Hansard in *Davis v Johnson* and that Lord Denning had done so of his own volition:

> [u]nder our adversary system of procedure, for a judge to disregard the rule by which counsel are bound has the effect of depriving the parties to the action of the benefit of one of the most fundamental rules of natural justice: the right to be informed of any point adverse to him that is going to be relied upon by the judge and to be given an opportunity of stating what his answer to it is.

The matter was revisited in *Pickstone v Freemans Plc.* Subsection 2A (1) had been added to the Equal Pay Act 1970 via regulation under the authority of the European Communities Act to comply with the terms of the Treaty of Rome concerning pay equity. The case hinged upon whether or not the fact that one male worker was employed at the same rate of pay as women in a particular job prevented this job from being rated as ‘work of equal value’ to a similar job at which only men worked and which received a higher rate of pay. Lord Keith quoted the speech of Lord Templeman introducing the proposed regulations for debate in the House of Commons to reveal the intent of the relevant provision. He justified this as follows:

99. Ibid., 201.
100. Ibid., 233.
101. [1989] AC 66.
The draft Regulations of 1983 were presented to Parliament as giving full effect to the decision in question. The draft Regulations were not subject to the Parliamentary process of consideration and amendment in Committee, as a Bill would have been. In these circumstances and in the context of section 2 of the European Communities Act 1972 I consider it to be entirely legitimate for the purpose of ascertaining the intention of Parliament to take into account the terms in which the draft was presented by the responsible Minister and which formed the basis of its acceptance.\(^\text{102}\)

In comparison to the cautious approach a decade prior, this case reveals a shift in judicial attitude. Lord Keith felt comfortable carving out this exception, and his action did not attract condemnation from his colleagues. Lord Templeman presided, and he penned a concurring opinion in which he too relied on the formerly highly questionable materials by quoting the Under Secretary of State for Employment’s statements in the House of Commons for the intention of the provision amended by regulation.\(^\text{103}\) While deciding based on other reasons, Lord Oliver said

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\text{[i]t is comforting indeed to find, from the statement made by the Minister to which my noble and learned friend has referred, that this construction does in fact conform not only with what clearly was the parliamentary intention but also with what was stated to be the parliamentary intention.}^\text{104}
\]

The final case with respect to Hansard was \textit{Pepper v Hart}.\(^\text{105}\) In this famous tax dispute, the children of high ranking employees at a private school could attend the school at a discount, and this discount was as a taxable benefit. Section 63(2) of the Finance Act 1976 stated that ‘the cost of a benefit is the amount of any expense incurred in or in connection with its provision . . .’. The employees argued that the ‘cost’ was the marginal cost of each addition student (which was negligible given that the school had excess capacity) while the government argued that the cost was average cost per student. A ‘traditional’ reading of the statute led a majority of the judges to decide in favour of the government. However, the Law Lords found the Hansard evidence sufficiently compelling to justify reaching the opposite conclusion and they decided to hear the case a second time so that counsel could address Hansard-based arguments. The statements made by the Finance Secretary in committee and when introducing the Bill to the House of Commons directly addressed the issue by discussing the children of teachers as an example, and the statements unequivocally favoured the employees in this dispute.\(^\text{106}\)

\[^{102}\text{Ibid., 112.}\]
\[^{103}\text{Ibid., 121–22.}\]
\[^{104}\text{Ibid., 128.}\]
\[^{105}\text{(n 3).}\]
\[^{106}\text{During questioning in the House of Commons, the Finance Minister went to great lengths to explain that the benefit was to be taxed at the marginal cost and not the price that would be charged to a customer. He discussed airline tickets given to airline employees as one example: ‘It was never intended that the benefit received by the airline employee would be the fare paid by the ordinary passenger. . . . [A]n airline ticket, allowing for occupation of an empty seat, costs an airline nothing—in fact, in such a case there could be a negative cost as it might be an advantage to the airline to have an experienced crew member on the flight’. When asked about travel concessions for seamen and their families, the Finance Minister said: ‘the only basis for charge would be on the cost to the employer, and in the example that we are considering that would be very small’. When asked about employees of fee–paying schools, the Finance Minister said ‘the benefit will be assessed on the cost to the employer, which would be very small indeed in this case’. See \textit{Pepper v Hart}, 228–29.}\]
The opinion of Lord Brown-Wilkinson attracted the concurrence of the majority. The issue of privilege was addressed, and it was affirmed that interpretation did not involve ‘questioning’ or ‘impeaching’ the freedom of speech in Parliament.\(^\text{107}\) With respect to Hansard, a rule was set out to carve out a narrow exception. There were three requirements: statutory text that was ‘ambiguous or obscure or the literal meaning of which leads to an absurdity’; a statement from the record which ‘clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words’; and the statements must come from ‘the Minister or other promoter of the Bill’, which is to say, someone bearing responsibility for the Bill.

Lord Oliver declared himself a ‘somewhat reluctant convert’\(^\text{108}\) while the remainder, excepting Lord Mackay, endorsed the new rule. Lord Mackay disapproved of the rule because of the impact on the cost of litigation.

This case and the rule delimiting the exception to the exclusionary rule have subject to a significant amount of scholarly debate.\(^\text{109}\) Thus far, the decision has not been reversed, and the subsequent treatment of Hansard reveals that this case put an end to the rule against legislative history. There are a number of cases in which Hansard was admitted and considered in subsequent cases without considering the rule in *Pepper v Hart*.\(^\text{110}\)

### International treaties and preparatory materials

The decline of the prohibition on legislative history coincided with the decline of an analogous rule that governed legislation enacted in compliance with international treaty obligations. For much of the 20th century, the rule was strictly applied: in the absence of ambiguity, judges could only consider the statute, and not the treaty; and under no circumstances could the preparatory materials be consulted. The case of *Ellerman Lines v Murray* reiterated this English rule, and it drew international criticism.\(^\text{111}\) In this case, the plain meaning of s1 of the Merchant Shipping Act 1925 was applied with the result that seamen who became unemployed because of a shipwreck were entitled to 2 months’ wages regardless of how many days of work were actually lost because of the shipwreck. The convention that motivated the Act required compensation for loss only.\(^\text{112}\)

It was well established on the Continent that the underlying treaty and the preparatory materials were acceptable as aids to interpretation regardless of ambiguity, and there was concern within the international legal community that the harmonisation of laws that treaties were intended facilitate would be thwarted if the modes of interpretation remained different.

Lord Denning had attempted to bypass *Ellerman Lines* and consult treaties to interpret the implementing statutes regardless of ambiguity since the 1960s, beginning with *Salomon v Commissioners of Customs and Excise*.\(^\text{113}\) Despite his efforts, it wasn’t until *Buchanon & Co*

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107. Ibid., 683.
108. Ibid., 619.
109. See for example Johan Steyn, ‘*Pepper v Hart; A Re-Examination*’ (2001) 21 Oxf J Leg Stud 59; Philip Sales, ‘Pepper v. Hart: A Footnote to Professor Vogenauer’s Reply to Lord Steyn’ (2006) 26 Oxf J Leg Stud 585.
110. *Scotland v Romein* [2018] UKSC 6, 8; *Miller v Secretary of State (Rev 3)* [2017] UKSC 5 [195], [263]; *Ali v Secretary of State* [2016] UKSC 60 [20].
111. See for example S Vesey-Fitzgerald, ‘The Interpretation of Codes in British India’ (1935) 68 Mad L J 67; H Lauterpacht, ‘Some Observations on Preparatory Work in the Interpretation of Treaties’ (1935) 48 Harv L Rev 549.
112. *Ellerman Lines Ltd v Murray* [1931] AC 126.
113. [1967] 2 QB 116; also see *HP Bulmer Ltd v J Bollinger SA* [1974] 2 All ER 1226.
Ltd v Babco Forwarding and Shipping Ltd\textsuperscript{114} that the House of Lords began to relax their approach. This case did not establish a broad exception but it did permit reliance on international agreements that were incorporated by reference in the statute. Consideration of foreign language versions was only permissible in cases of ambiguity.\textsuperscript{115}

This stance was loosened further in Fothergill v Monarch Airlines Ltd., albeit in \textit{obiter}.\textsuperscript{116} The issue of whether or not items that had gone missing from a suitcase during travel were ‘damage’ or ‘loss’. Claims for damage were time-barred by the Carriage by Air Act 1961, the appellant could seek recovery for loss. The French version of the treaty was authoritative, and the issue was settled through reliance on the French text and French jurisprudence. However, Lord Denning had considered the preparatory materials at the court below, and the Law Lords weighed in. The majority endorsed the view expressed by Lord Wilberforce, that, in the interests of harmonising interpretative practices with other parties a treaty:

\begin{quote}
\begin{itemize}
\item it would be proper for us \ldots{} to recognise that there may be cases where such travaux préparatoires can profitably be used. These cases should be rare, and only where two conditions are fulfilled.
\item First, that the material involved is public and accessible, and secondly, that the travaux préparatoires clearly and indisputably point to a definite legislative intention.\textsuperscript{117}
\end{itemize}
\end{quote}

This stance was remarkably cautious, given that the Vienna Convention had come into force in the United Kingdom.\textsuperscript{118} Article 32 provides that recourse can be had to the preparatory materials when interpreting a treaty to confirm an interpretation ‘in accordance with the ordinary meaning’; and also to assist with interpretation when an article is ‘ambiguous or obscure’, or ‘leads to a result which is manifestly absurd or unreasonable’.

This development correlates neatly with the decline of the rule against parliamentary documents. They are analogous issues: they depend upon the same underlying reasoning. Thus the issues are intertwined. Surely the English judiciary would have been more willing to harmonise with continental practices when dealing with treaty-based legislation had the rule with respect to domestic-rooted legislation not been so deeply entrenched.

The decline of the rule in other English-speaking common law jurisdictions

Given the role played by Lord Denning, and the strong presence of labour cases in the decline of the rule in the United Kingdom, it is tempting to seek to understand this phenomenon through the lens of political ideology. Denning was a Conservative appointee and an activist judge. It has long been alleged by critics of the practice that legislative history is the tool of activist judges. The problem with this line of analysis, though, is that judicial activism is not restricted to one side of the political spectrum. Interpretive methods, whether loose or restrictive, will assist and frustrated both sides of the political spectrum.\textsuperscript{119} By focusing on one

\textsuperscript{114} [1978] AC 141.
\textsuperscript{115} There was dissent on this point. See for example the opinion of Lord Dilhorn, 158 [F].
\textsuperscript{116} [1980] 2 All ER 696.
\textsuperscript{117} Ibid., 703.
\textsuperscript{118} The Vienna Convention on the Law of Treaties 1969 entered into force on 27 January 1980.
\textsuperscript{119} Strict interpretation enabled ship workers to receive a significant payout regardless of how many days of work were lost as a result of a shipwreck in \textit{Ellerman Lines Ltd v Murray} (n 112). It also enabled a corporation to
or the other side of the political divide, one misses the nature of the change that occurred. Although Denning led the charge against the rule, what is more significant is that the other senior judges in the United Kingdom began to agree with him on this particular methodological matter. This is not about political dispositions. It is about judicial conservatism and rule formalism yielding in the face of repeated demands for more flexibility to consult background documents when interpreting legislation.

The embrace of this rule had been uniform throughout English-speaking common law jurisdictions (with the exception of the United States).\(^{120}\) Over the course of the 20th century, many of these jurisdictions eliminated appeals to the Judicial Committee of the Privy Council and established domestic courts of final appeal. For these jurisdictions, UK jurisprudence remained persuasive, but over time the domestic courts acquired the confidence to establish interpretive autonomy.

As Lord Browne-Wilkinson had pointed out in *Pepper v Hart*, both Australia and New Zealand had moved more quickly than the United Kingdom. They began to admit Hansard in the 1980s, and this had occurred without adverse consequences, according to his Lordship. In Australia, the Acts Interpretation Act\(^{121}\) was amended in 1984 to permit reliance on Hansard with an important restriction—it could not be used to contradict the plain meaning of a statutory provision. The modification was made following a seminar on statutory interpretation attended by senior members of the legal community.\(^{122}\) Judges in New Zealand began to admit Hansard in the 1980s, and a Law Commission report published in 1990 stated that there never had been an exclusionary rule in force there.\(^{123}\)

The Supreme Court of Canada developed a series of narrowly construed exceptions to the prohibition of Hansard between 1976 and 1982 which were treated with caution and scepticism by the lower courts. Arguably by the mid-1990s, and certainly by 1998, the narrow exceptions were replaced by an open-ended willingness to consider Hansard.\(^{124}\)

Hong Kong began to admit Hansard in 1997 as a result of *Pepper v Hart*, according to a Hong Kong Law Reform Commission Report.\(^{125}\) The courts in Zimbabwe followed *Pepper v Hart* in the 1990s. The Parliament of Zimbabwe followed up on the matter by amending the applicable Interpretation Act in 2002 by adding a provision that is strikingly similar to the provision added to the Australian Acts Interpretation Act.\(^{126}\)

The one jurisdiction in which judges have been resistant to embrace this change is Ireland. The High Court refused to consider a ministerial statement in *Crilly v Farrington* in 2002,
although it was conceded that there was no common law rule forbidding such recourse. Following this case, Irish courts have been reluctant to consider these kinds of materials.

Most common law nations set aside the rule within loosely similar time lines and this is a curious sociological phenomenon. The reasons that resonated in the United Kingdom were felt elsewhere as well despite the very different political contexts. In jurisdictions such as India, the imposition of the common law was part of a larger process of subjugation and economic exploitation; while places such as Canada and Australia regarded the common law as part of their great European democratic heritage (with all of the concomitant overtones of racialised enlightenment values). There was a form of incrementalism at work. That some jurisdictions moved more quickly than the United Kingdom suggests that the courts were not simply following UK jurisprudence. Those jurisdictions that did follow the UK jurisprudence did so voluntarily and not because of stare decisis. The arguments for and against the prohibition of Hansard had not changed, yet there was an emerging consensus that the arguments in favour of the rule had lost credibility. There was something about the nature of the times—a common law zeitgeist—that made the change seem reasonable to the senior members of these various legal communities around the same time, despite the extraordinary differences in the cultural and political contexts.

The decline of the prohibition in context

It is tempting to conclude that, over the course of the 20th century, the increased availability of these materials led to more members of the legal community learning about their usefulness and that the accumulation of cases that brought about the decline and setting aside of the prohibition was inevitable. However, there is an important factor at work: the judges acquiesced, and their acquiescence was not inevitable. If it was, the prohibition would have been set aside within all English-speaking common law jurisdictions, and there are two important exceptions: Ireland, where the judiciary have continued to feel the force of the reasons for the rule, and the United States, where the federal Supreme Court has moved in the opposite direction—from permissive use at the turn of the twentieth century towards prohibition. A formal rule has not been put in place; however, there has been a significant decline in the amount of legislative history received and considered in argumentation at the Supreme Court over the past 30 years. The decline is due almost entirely to the efforts of Justices

127. [2001] 3 IR 251.
128. Allison Kenneally and John Tully, The Irish Legal System (Clarus Press, Dublin 2013) 110.
129. For an analysis of drafting and interpretation as part of a colonial legacy, see Arpeeta Shams Mizan ‘Continuing the Colonial Legacy in the Legislative Drafting in Bangladesh: Impact on the Legal Consciousness and the Rule of Law and Human Rights’ (2017) 6 IJLDLR 3.
130. The arguments had been well-documented by this time. See for example Great Britain, Law Commission, The Interpretation of Statutes (No 21, 1969); Miers (n 96); Francis Bennion, ‘Hansard – Help or Hindrance – A Draftsman’s View of Pepper v. Hart’ (1993) 14 Stat L Rev 149; Stephen D Girvin, ‘Hansard and the Interpretation of Statutes’ (1993) 22 Anglo-Am L Rev 475; DG Kilgour, ‘The Rule Against the Use of Legislative History: Canon of Construction or Counsel of Caution?’ (1952) 30 Cdn B Rev 769; JA Corry, ‘The Use of Legislative History in the Interpretation of Statutes’ (1954) 32 Cdn Bar Rev 624; Steyn (n 109); Stefan Vogenauer, ‘A Retreat from Pepper v Hart? A Reply to Lord Steyn’ (2005) 25 Ox J Leg Stud 629; Sales (n 109); Scalia and Garner (n 1) 369–96.
131. Michael H Koby, ‘The Supreme Court’s Declining Reliance on Legislative History: The Impact of Justice Scalia’s Critique’ (1999) 36 Harv J Legis 369; Miranda McGowan, ‘Do as I Do, Not as I Say: An Empirical Investigation of Justice Scalia’s Ordinary Meaning Method of Statutory Interpretation’ (2008) 78 Miss LJ 129;
Thomas and Scalia, the so-called textualist judges. Since Justice Scalia’s passing there have been two new appointments to the bench—Justices Gorsuch and Kavanaugh. They, too, are textualists and share Justice Scalia’s determination to reject legislative history. With sufficient consensus, the prohibition could be reinstated as a formal common-law rule (or set of rules). Meanwhile, lawyers are finding it less useful to include such materials in their submissions. Why take time to include these materials when several of the judges will refuse to read it? So even if no formal rule is put in place, an informal rule seems likely to emerge if it hasn’t already.

With the counterexamples in mind, we are left with what appears to be a phenomenon rooted in groupthink (although in a benign rather than a pathological sense). For much of the 20th century, the high-ranking judges throughout the various English-speaking common law jurisdictions (with the two exceptions) believed in the efficacy of the prohibition. Then, for reasons which are not entirely obvious, a growing number of high-ranking judges in most, but not all, of these jurisdictions began to find the justifications for the prohibition wanting in the 1960s, 1970s and 1980s.

The reasons for the rule

A number of reasons have been put forward to justify the rule, and these reasons have an evolutionary history of their own. During the period of time when the prohibition was accepted and entrenched, only brief reasons were provided in support. In the often cited and generally misunderstood case of *Millar v Taylor*, the rule was justified by the rather obscure reason that ‘the history of the changes it [ie a Bill] underwent in the house where it took its rise...is not known to the other house, or to the sovereign’. Another relatively early case argued that recourse ‘is not one of the modes of discovering the meaning of an Act of Parliament recommended by Plowden, or sanctioned by Lord Coke or Blackstone’. One often-cited case simply asserted that the legislative history is ‘wisely inadmissible’. Towards the turn of the 20th century, comparisons were made with the parole evidence rule with respect to wills and contracts, claiming that such evidence is entirely unreliable. In the early editions of the classic treatises on statutory interpretation that were published in the late 19th century, the emphasis was on explaining the law. They tended to quote brief passages from a variety of cases with added commentary to elucidate the contours of the rule, and no attention was devoted to the reasons for the rule. The value of the rule was regarded as self-evident.

Journal articles from the 1930s through to the 1950s, whether critical or supportive of the prohibition, tended to provide some explanation for the rule. However, none of the authors attempted a comprehensively treatment. It was in such sources as the Law Commission Report

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James J Brudney and Corey Ditslear, ‘The Decline and Fall of Legislative History – Patterns of Supreme Court Reliance in the Burger and Rehnquist Eras’ (2005) 89 Judicature 220.

132. The refusal to consider legislative history is a hallmark of textualism. See, for example, McGowan, Ibid.

133. (n 2) 2332.

134. *Sillem* (n 13) 521–22.

135. *R v Hertford College* (1878) 3 QBD 693, 707.

136. See *West Riding* (n 27).

137. See for example Peter Benson Maxwell, On the Interpretation of Statutes (Alfred Bray Kempe ed, 3rd edn, Sweet & Maxwell, London 1896) 36; Craies and Hardcastle (n 26) 122.
of 1969, the follow-up Renton Report on the Preparation of Legislation, subsequent journal articles, and of course, landmark cases such as Pepper v Hart, where the matter received more thorough consideration. One of the most comprehensive collections of arguments in favour of the prohibition can be found in a chapter of Reading Law.

The reasons for the rule can only be categorised loosely. There is some intertwining and overlap. One collection of justifications centres around the issue of comity between the judiciary and legislature. Generally speaking, it has been argued that the prohibition maximises the harmony between the legislative and judicial branches. Within this class of justifications, there are a number of specific sub-reasons.

One of the more often-cited arguments is epistemological in nature: the separation of powers requires that the courts do not examine legislative history because the legislature enacts as a whole, and individual members’ understandings are anecdotal. This can be buttressed by claims to the effect that there is no reason to believe that, if a minister made a statement about the meaning of a provision in proposed legislation, his colleagues were paying attention; and if they were, there is no reason to believe that they were motivated by the statement. There is equally no reason to believe that members of the legislature read a related commissioners’ or committee report; and again, if so, there is no reason to believe that they were influenced by it. This type of reasoning is sometimes posited as being analogous to the parole evidence rule in contract law. A related sub-class of argument holds that members in favour of a bill are akin to salesmen, and their words cannot be trusted.

There is also a constitutional argument based upon the separation of powers. It is claimed that, by deferring to members of the legislature, judges are violating the ‘constitutional requirements of nondelegability, bicameralism, presidential participation, and the supremacy of the judicial interpretation in deciding the case presented’. This is couched in terms that pertain to the United States, although the rule has also been justified via the constitutional requirement of the separation of powers in the United Kingdom. As Kavanagh has noted, ‘the two most prevalent and recurrent fears surrounding the rule in Pepper v Hart [are] both grounded in separation of powers concerns’. In the simplest formulation of the separation of powers argument, the courts should not be deferring to the legislators when interpreting legislation, and least of all, to specific members of the executive.

138. Great Britain, Law Commission and Scottish Law Commission, The Interpretation of Statutes (No 21, 1969).
139. Great Britain, Privy Council, Committee on the Preparation of Legislation, The Preparation of Legislation: Report (Cmd 5063, 1975).
140. Scalia and Garner (n 1) 369.
141. FAR Bennion, Statutory Interpretation: Codified with a Critical Commentary (Butterworths, London 1984) 530–32.
142. See for example Max Radin, ‘Statutory Interpretation’ (1930) 43 Harv L Rev 863; JH Baker, ‘Statutory Interpretation and Parliamentary Intention’ (1993) 52 Camb Law J 353, 354–55.
143. See for example Scalia and Garner (n 1) 375–77.
144. Bennion (n 141) 527; The Interpretation of Statutes (n 138) at 36; Corry (n 130) 621–22.
145. Scalia and Garner (n 1) 388.
146. ‘The first was that if parliamentary debates were admissible in judicial decisions, there would be a risk that judges would treat them as “canonical” or “controlling” or as a “source of law.” The second was that judges might be tempted to assume that statements made by an individual Minister during parliamentary debate could be “equated” with the will of Parliament as a whole’. Aileen Kavanagh, ‘Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory’ (2014) 34 Oxf J Leg Stud 443, 452.
Other justifications based on the separation of powers tend to focus on the incentives created. It has been argued that recourse jeopardises freedom of speech in Parliament by subjecting the statements of lawmakers to criticism in court, which, in the United Kingdom can be regarded as a violation of Parliamentary privilege.\textsuperscript{147} Along a similar vein, there is an argument which holds that judicial interpretation must be insulated from political controversy.\textsuperscript{148} Political controversies are normal and appropriate for the legislature to deal with; and recourse to legislative history necessarily engages judges these controversies. Recourse is therefore corrosive to the rule of law.

Another incentive-based argument holds that recourse to legislative history will encourage members of the legislature to deliberately seek to influence the interpretation of legislation through floor statements rather than providing good-faith statements in debates.\textsuperscript{149} Thus, recourse is regarded as corrosive to the legislative process and detrimental to the reliability of legislative history as an interpretive aid. Accordingly, recourse is regarded as self-defeating because it renders the material unfit for purpose.\textsuperscript{150}

There is an argument that concerns the incentive for best practices. If legislative history is a permissible consideration in court, the lawmakers may decide that the supplementary materials provide clarity and pass bills that are textually problematic or insufficient on their own; whereas if there is no recourse, legislators will be encouraged to ensure that the legislation is complete, clear, and self-contained.\textsuperscript{151} Meanwhile, judges may not regard the legislative history in the same way that the legislators did, thus leading to unpredictable outcomes. This reasoning can also be couched as a rule-of-law matter: citizens should be able to consult a statute to know the law without the need to consult legislative history.

There is a class of arguments that is economic in nature. The underlying claim is that recourse adds complexity and expense while adding insufficient value in return. If legislative history is permissible, it imposes an undue burden on the lawyer who risks malpractice if the legislative history is not exhaustively researched.\textsuperscript{152} At the same time, it imposes significant costs on the client. This includes not only cost for the lawyer’s research time but also the time spent in court considering and responding to the material. Meanwhile, benefits in terms of useful legal argumentation accrue so infrequently that the practice cannot be justified.

Finally,\textsuperscript{153} there is one more epistemological justification. It has been argued that the inevitable variety of opinions put forward in committee reports and in floor statements enable judges to decide any which way see fit. This argument has been explained by using the analogy

\textsuperscript{147} See for example, the opinion of Lord Scarman in Davis v Johnson, (n 90), 350; also see Miers (n 96); Bennion (n 141) 532. More will be said about privilege in the following section which considers the post-\textit{Pepper v Hart} cases.

\textsuperscript{148} Scalia and Garner (n 1) 379; quoting Jackson J in Schwegmann Bros v Calvert Distillers Corp 341 US 384, 396 (1951).

\textsuperscript{149} Antonin Scalia, ‘Common-Law Courts in a Civil–Law System’ in Amy Gutman (ed), \textit{A Matter of Interpretation} (Princeton University Press, Princeton 1997) 34.

\textsuperscript{150} Ibid.

\textsuperscript{151} Ibid. This is really a variation on arguments based on maximisation of the harmony between the legislature and the judiciary.

\textsuperscript{152} Ibid. 378; Scalia (n 149) 36.

\textsuperscript{153} I have left out one argument because it lacks credibility—that judges will ignore the words of the statute and look instead to the legislative history. To do so would be to commit a form of judicial malpractice. Reasonable advocates for recourse to legislative history only want it as an \textit{aid} to interpretation.
of a cocktail party—that the judge can look out over the crowd and choose his or her friends.\footnote{Scalia and Garner (n 1) 377; quoting Wald, quoting a personal conversation with Justice Leventhol of the District of Columbia Circuit Court. Patricia M Wald, ‘Some Observations on the Use of Legislative History in the 1981 Supreme Court Term’ (1983) 68 Iowa L Rev 195, 214.}

As a result, interpretive flexibility is increased, and indeed, the judge may be induced to put an interpretation upon a provision which the words alone could not possibly bear. Worse still, a judge might disregard the statute altogether and rely only on the legislative history.

There are, of course, opposing arguments. The claim that legislators do not have a collective intent and that reports and individual explanations do not reflect the whole of the legislature conflates that which confers the status of enactment with that which gives meaning to legislation.\footnote{David Feldman, ‘Statutory Interpretation and Constitutional Legislation’ 130 Law Q Rev 473, 487.} A counterargument has been put forward by Solan, who argues that groups often delegate tasks.\footnote{Lawrence M Solan, ‘Private Language, Public Laws: The Central Role of Legislative Intent in Statutory Interpretation’ (2004) 93 Geo L J 427; This touches on the larger debate concerning the meaning of legislative intent. See Richard Ekins, The Nature of Legislative Intent (OUP, Oxford 2012); Neil Duxbury, Elements of Legislation (CUP, Berkeley 2012); Feldman, Ibid.} That members vote in support of a bill without knowledge of the specifics that were determined by a person or small group of people who were responsible for if does not negate the relevance of their efforts. This does not justify reliance on any and all floor statements. It does provides a reason why committee reports and statements by informed members might be relevant. If, for example, a report contained recommended statutory provisions which were enacted in legislation word for word, it is reasonable to assume that the members who voted in support were deferring to the recommendations in that report.

The argument about unconstitutional delegation of interpretive authority is based in the presumption that judges are abdicating their role as interpreters and deferring to the members of the legislature when they consider legislative history. To accept this argument, one must assume that judges are not treating these materials as an aid to interpretation; but rather, deferring to them as binding statements about the meaning of legislation. If the judge consults but retains the authority to disagree, this is not a fair assessment of the interpretive process.

A similar assumption is made when judges are accused of ignoring the text of the statute and looking to the legislative history instead. A judge would be committing a form of malpractice in so doing, because she would be treating the legislative history as legislation rather than an interpretive aid. No reasonable advocate for the use of legislative history would suggest that judges should do this.\footnote{Per Lord Hobhouse in Wilson v Secretary of State for Trade and Industry at [139]: it is a fundamental error of principle to confuse what a minister or a parliamentarian may have said (or said he intended) with the will and intention of Parliament itself. ... Once one departs from the text of the statute construed as a whole and looks for expressions of intention to be found elsewhere, one is not looking for the intention of the Legislature but that of some other source with no constitutional power to make law.}

Generally speaking, the claim that recourse limits freedom of speech in the legislature does not seem to square well with the American experience. Legislative history has been permissible in parts of the United States since the middle of the 19th century and throughout the nation by the turn of the 12th century. There is no evidence to suggest that members were reluctant to speak honestly as a result.

One could argue, using Pepper v Hart as an example, that recourse does limit freedom of speech. Suppose that the member had deliberately explained the tax bill in that case in a manner favourable to the taxpayer when he believed that the courts would interpret in favour of the
government once the bill was passed. Arguably, this prevents a member from lying about a bill to sell it, so to speak. However, if the misrepresentation is obvious, it is not clear that judges will abide by the statements made in the House. It would only appear to have force if the misrepresentation is subtle enough to appear credible. This is precisely the kind of limitation on parliamentary privilege that has been sanctioned by the courts in *Pepper v Hart* and subsequently by parliamentary committees on privilege. There is some irony here. One could question the democratic bona fides of such a freedom. Under such circumstances, recourse to Hansard becomes a mechanism to compel integrity when a bill is being promoted.

Although members of the House of Commons gave little thought to the use of Hansard as an interpretive aid when they altered the rules governing Parliamentary privilege in the 1980s, the issue has increased in importance over the past two decades. Each subsequent committee report has had more to say about the potential for infringing parliamentary privilege, and recently the Office of the Speaker has taken the highly unusual step of intervening in court cases in which privilege was been implicated.\(^{158}\) In the interventions, counsel for the Speaker has acknowledged that the exception in *Pepper v Hart* is consistent with, and not a violation of, parliamentary privilege. The Joint Committee on Parliamentary Privilege found the usage to be unobjectionable in their report in 1999;\(^ {159}\) and while the 2013 report was more cautionary, it was accepted that, so long as Courts abide properly by the rule and reasoning put forward in *Pepper v Hart*, privilege is not infringed.\(^ {160}\)

The notion that members of the legislature would deliberately attempt to influence judicial interpretation via floor statements requires a decidedly judiciary-centric view of lawmakers to be credible. Members of a legislature have a variety of interests to manage when they debate Bills, and it is not self-evident that the use of their statements in judicial interpretation is at the forefront. Meanwhile, by deliberately stating a bad faith interpretation to influence the courts, that person will also put the self-serving interpretation before the other members of the legislature to either accept or oppose. MPs present in the House will hear the statements for certain while judges will only potentially consider the statement and they will not necessarily interpret in accordance with such statements. Given the risks and rewards, it is not clear that such behaviour will be incentivised. Furthermore, judges are accustomed to assessing credibility, and it is not self-evident that they will be persuaded by statements intended to mislead.

There is also a lack of evidence suggesting that recourse has fostered more judicial disdain for legislation in the United Kingdom after *Pepper v Hart*. With or without legislative history, judges must abide by legislation. When researching legislation, legal scholars would be remiss

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158. *Heathrow Hub Ltd v The Secretary of State for Transport* [2020] EWCA Civ 213.
159. Joint Committee on Parliamentary Privilege (First Report) (1998–99, HL 43, HC 214) para [50]: ‘[T]he Joint Committee is of the view that the development outlined above in *Pepper v Hart* is unobjectionable. This use of parliamentary proceedings is benign. The Joint Committee recommends that Parliament should not disturb the decision in *Pepper v Hart*. However, it is important that this specific court decision should not lead to any general weakening of the prohibition contained in article 9’.
160. Joint Committee on Parliamentary Privilege (2013–14, HL 30, HC 100) 36: ‘We welcome the clarification by the Lord Chief Justice as to the extent of the *Pepper v Hart* principle, namely, that those instances in which proceedings, including Committee reports, are questioned, are best “treated as . . . mistakes.” We do not at this stage believe that the problem of judicial questioning is sufficiently acute to justify either legislation prohibiting use of privileged material by the courts, . . . or the introduction of a formal and binding system of notification when reference to privileged material is contemplated. We trust that less formal means than those above, building on the current good relations between the judiciary and the parliamentary authorities, will address recent problems’. (Bullet formatting removed)
if they neglected these records; and personally (and therefore strictly anecdotally), I have been impressed with much of what I have observed within the parliamentary proceedings, particularly in the work of committees. It is not a foregone conclusion that examining the record will incite disdain.

The notion that recourse to legislative history unnecessarily involves judges in politicking can be doubted for the simple reason that public perceptions about politicking will be driven by external forces, and in particular, newsworthiness, rather than the details involved in the determinations.\(^{161}\) The refusal to consider legislative history did little to insulate judges from accusations of politicking in England when dealing with the infamous trade union cases.\(^{162}\) Meanwhile, few judges have attracted such intense accusations of political bias as Justice Scalia, despite his steadfast refusal to consult legislative history.\(^{163}\) How judges become entangled in political disputes has far more to do with the political nature of the legal determination before the court than it does with the types of evidence proffered in argumentation.

The notion that arguments arising out of legislative history will point in multiple directions and the judge can therefore choose those statements and reports that she agrees with and disregards those that she disagrees with implies that legislative history is fraught with chaos. However, in this respect, legislative history is no different from any other evidence of meaning that might be presented to the court (and, indeed, any other type of evidence concerning any disputed legal or factual matter). Counsel for the plaintiff and the defendant select their friends at the cocktail party from among that which is permissible when constructing the arguments to be presented in court. The judge, in turn, chooses her friends to decide. A prohibition on legislative history does not eliminate the cocktail party. It only makes the party smaller. The point being made here: if sources of argument that tend to point in multiple directions ought to be prohibited, then there are few sources of evidence, if any, that a court should be permitted to consider.

There also is room to doubt the notion that, by permitting legislative history, the legislators will be tempted to pass statutes that are incomplete and require the support of legislative history to be understood. Indeed, to accept this argument, one must adopt a rather cynical view of legislators. Drafting for the British government is done by the Office of Parliamentary Counsel, and for the OPC, clarity is a matter of policy.\(^{164}\) The office has earned a reputation for professionalism since it was established in the 1869. There have been occasional lapses, but to suggest that lax drafting could occur because it is possible to defer to legislative history is not credible. If an extrinsic document is required to understand a particular piece of legislation, it will be incorporated by reference.\(^{165}\)

When it comes to the clarity of legislation, it is important to keep in mind the process of scrutiny and amendment during passage through the houses. During this process, a variety of

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161. Ethan Katsh, ‘The Supreme Court Beat: How Television Covers the U.S. Supreme Court’ (1983) 67 Judicature 6.
162. Quinn v Leathem [1901] AC 495; Taff Vale Railway Co v Amalgamated Society of Railway Servants [1901] AC 426; Amalgamated Society of Railway Servants v Osborne [1910] AC 87; Also see JAG Griffith, The Politics of the Judiciary (5th edn, Fontana Press, London 1997) 63–68.
163. See for example Richard A Brisbin, ‘The Conservatism of Antonin Scalia’ (1990) 105 Pol Sci Q 1; Randy E Barnett, ‘Scalia’s Infidelity: A Critique of ‘Faint-Hearted’ Originalism’ (2006) 75 U Cin L Rev 7.
164. The official drafting guidance is entirely about ensuring clarity: Office of the Parliamentary Counsel, Drafting Guidance June 2018 <https://www.gov.uk/government/publications/drafting-bills-for-parliament> accessed 27 August 2020.
165. Bennion (n 141) 524.
factors might come to bear, including the need for vagueness to secure assent, that may result in textual deficiencies. When Nourse and Schacter studied the legislative process within the Senate Judiciary Committee, they found that staffers were well-trained, legally. However, the demands of the legislature meant that other competing factors became more important:

Staffers’ drafting choices seem to be driven not by issues of legal dexterity but by the demands of a competing set of virtues—what we are calling ‘constitutive virtues’. Constitutive virtues . . . tend to prize the institutional values of legislatures: action and agreement, reconciling political interests, and addressing the pragmatic needs of those affected by legislation.166

Once again, the argument against reliance arises out of a judiciary-centric view of the lawmaking process. The legislature is a complex forum with many factors tugging at the members and their support staff. The availability of the record as an aid to interpretation looms much larger in the minds of judges than it does in the minds of the people at the legislature.

While it is true that a lay person would have difficulties navigating legislative history, it is implausible to suggest that statutes would be self-contained without it. It is a fact that statutes exist within the entire backdrop of the law and must be interpreted within a larger context. To give just one example, the suggestion that a residential tenant in England could grasp the relevant matters pertaining to land law by consulting the available legislation is laughable. With or without recourse, people are regularly cautioned to consult a legal professional when they have a legal problem; and legal professionals often dispense highly nuanced, probabilistic answers to specific questions because the law is not entirely clear for any of a number of reasons including relevant cases. Case law poses at least as much challenge to a lay person as legislative history.

The claim that legislative history imposes an undue burden on lawyers carried much more weight in the past. In the 19th century, lawyers in remote locations would have found it difficult to access materials which were available, if at all, at major centres. Yet, such documents have long been required in court. Historically, judges were not required to take judicial notice of private acts. They had to be proved, which is to say, the party relying on a private act had to provide evidence that the statute was duly enacted. In the early- to mid-19th century, ‘[t]he regular proof of private acts of Parliament is by an examined copy, compared with the original in the Parliament Office at Westminster’.167 In the United States around this time, a state court judge had ruled that ‘the journals are the highest evidence of the fact of the enactment of a law, or of any other fact connected with its passage’.168 It is difficult for us today to imagine how lawyers met their clients’ needs without the benefit of modern communications technology but they most certainly did. They could hire a solicitor or clerk in the relevant centre and receive the documents by mail.

166. Victoria F Nourse and Jane S Schacter, ‘The Politics of Legislative Drafting: A Congressional Case Study’ (2002) NYU L Rev 575, 615.
167. Sir Fortunatus Dwarris and William Henry Amyot, A General Treatise on Statutes (2nd edn, W Benning, London 1848) 472.
168. The Southwark Bank v The Commonwealth 26 Penn State R 446 (1856): ‘The journals are the highest evidence of the fact of the enactment of a law, or of any other fact connected with its passage’. Theodore Sedgwick, A Treatise on the Rules which Govern the Interpretation and Application of Statutory and Constitutional Law (J S Voorhies, New York 1857) 241.
The available catalogues, which date back to the early the nineteen hundreds, indicate that libraries at the Inns of Court contained extensive collections of parliamentary records, including debates in the houses. Some of the regional law societies might have had them in their collections as well. Members of the legal community could access these materials if necessary. Meanwhile, in the present, when much of the material is available online, the burden of researching legislative history is certainly far less onerous.

It is a fact that trials have become longer over time. In the Victorian era, the Judicial Committee of the House of Lords regularly heard two cases in a day. The quantity of documents presented was modest and there was more reliance on oral argument. Today the volume of documentary submissions can amount to thousands of pages. No doubt, computers have enabled the generation of far more documents than could ever be produced in the past, and it makes for a potent cocktail when coupled with the fact that lawyers have an incentive to raise every potentially relevant argument. As a result, they might present rather tenuous evidence from the Parliamentary records if such material is permissible; however, this will also happen for all other types of admissible materials. In the light of this, is it credible to claim that a general prohibition of legislative history would reduce court costs meaningfully? It is, after all, an empirical matter and there are no empirical studies from which to draw. In many instances, lawyers may seek to work within the client’s budget regardless of what materials are permissible. The impact of the prohibition on costs might therefore be more modest than the economic argument suggests.

**Post-Pepper v Hart jurisprudence**

In the wake of *Pepper v Hart*, Hansard has been a source of controversy and disagreement in the higher courts in the United Kingdom on occasion as the rule has been fleshed out and judges have grappled with the nature of this interpretive aid. Generally speaking, judges have been comfortable relying on other types of legislative history but have avoided reliance upon Hansard when possible. There have been instances when particular judges refused to consider Hansard because they were doubtful of the efficacy of the rule in *Pepper v Hart*. There have also been instances when judges disagreed about the efficacy of reliance on Hansard in particular cases, although the preponderance of sentiment thus far has tended to favour

169. Sir Soulden Lawrence, *A Catalogue of the Printed Books and Manuscripts in the Library of the Inner Temple* (C & W Galabin, London 1806); George Chilton, *A Catalogue of the Printed Books and Manuscripts in the Library of the Inner Temple* (1833); Joseph Hunter, *A Catalogue of the Manuscripts in the Library of the Honourable Society of Lincoln’s Inn.* (1838) <http://hdl.handle.net/2027/hvd.32044021235247> accessed 29 October 2020; *A Catalogue of the Library of the Middle Temple,* vol I&II (Middle Temple 1845).

170. Robert Stevens, *Law and Politics: The House of Lords as a Judicial Body, 1800–1976* (Weidenfeld & Nicolson, London 1979) 324.

171. See for example *Mazhar v The Lord Chancellor* [2019] EWCA Civ 1558, [68].

172. For example, in *Star Energy Weald Basin Ltd v Bocardo SA* [2010] UKSC 35, [106], Lord Collins chose not to consider Hansard ‘in the light of the continuing controversy over *Pepper v Hart* [1993] AC 593 and its limits’.  

173. In *Assange v The Swedish Prosecution Authority (Rev 1)* [2012] UKSC 22, Lord Mance found the parliamentary materials compelling whereas Lord Phillips found them inconclusive. In *Harding v Wealands* [2006] UKHL 32, Lords Woolf and Hoffman felt that the ambiguity requirement was not met whereas Lord Carswell believed that it was. In *R v Secretary of State for the Environment, Transport and the Regions and Another, Ex Parte Spath Holme Limited* [2001] All ER 195, Lords Bingham, Nicholls and Hope believed that the materials were not admissible whereas Lord Cooke believed that the Court of Appeal were entitled to refer to the Hansard.
retaining the rule. Meanwhile, the meaning of the ‘exception’ has been fleshed out more fully, although not without raising some difficulties.

It was Lord Steyn who championed the notion, which has gained some traction, that the rule operates as a form of executive estoppel.\(^{174}\) By this understanding, the rule in *Pepper v Hart* ‘is available to prevent the executive seeking to place a meaning on words used in legislation which is different from that which ministers attributed to those words when promoting the legislation in Parliament’.—the executive is estopped from asserting legislation in their own favour if they have clearly stated in Parliament that they intend the law to be interpreted in a manner that is contrary to their interests.\(^{175}\) As Vogenauer has pointed out, this is problematic.\(^{176}\) Does a statute have one meaning if members of the public seek clarity from the courts, and another when the executive seeks to enforce a meaning contrary to that which they put forward to secure passage of the bill? Or is it that the assertions provide clarity to the meaning of the statute, and it is an aid, full stop, rather than a form of estoppel? Surely a statute must have one meaning for all purposes.

It would be fair to say that *Pepper v Hart* has proved to be a wedge. Once it became acceptable to consider Hansard under the relatively narrow exception set out in this case, further exceptions have been allowed. The permissibility of reliance on Hansard is inherently connected with the permissibility of recourse to the larger collection of documents produced by Parliament including commissioners’ reports, committee reports, white papers and so on. Such recourse is available when interpreting legislation and also when assessing the proportionality of legislation to test for compliance with the Human Rights Act 1998. Lord Nicholls put it this way:

> as when interpreting a statute, so when identifying the policy objective of a statutory provision or assessing the ‘proportionality’ of a statutory provision, the court may need enlightenment on the nature and extent of the social problem (the ‘mischief’) at which the legislation is aimed. This may throw light on the rationale underlying the legislation.

This additional background material may be found in published documents, such as a government white paper. If relevant information is provided by a minister or, indeed, any other member of either House in the course of a debate on a Bill, the courts must also be able to take this into account. The courts, similarly, must be able to have regard to information contained in explanatory notes prepared by the relevant government department and published with a Bill. The courts would be failing in the due discharge of the new role assigned to them by Parliament if they were to exclude from consideration relevant background information whose only source was a ministerial statement in Parliament or an explanatory note prepared by his department while the Bill was proceeding through Parliament.\(^{177}\)

This statement was put forward in a case in which the Speaker’s Office intervened to raise concerns about privilege. Hansard in court has proved to be something of a flashpoint for this issue. However, the assertion of privilege has tended to yield to the permissibility of Hansard. Recently, the Court of Appeal summarised the submissions by counsel for the Speaker’s Office which provide relatively succinct statement about the contexts within which Hansard is admissible:

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174. Steyn (n 109).

175. *R v Secretary of State for the Environment* (n 173), per Lord Hope at 227.

176. Vogenauer (n 130); also see Aileen Kavanagh, ‘Pepper v Hart and Matters of Constitutional Principle’ (2005) 121 LQR 98.

177. *Wilson v Secretary of State for Trade and Industry* [2003] UKHL 40, [63]-[64].
The Speaker accepts that there are circumstances in which reference can properly be made to proceedings in Parliament and where therefore this will not constitute impermissible ‘questioning’ of statements made in Parliament:

1. The Courts may admit evidence of proceedings in Parliament to prove what was said or done in Parliament as a matter of historical fact where this is uncontroversial: see Prebble v Television New Zealand Ltd [1995] 1 AC 321, at [337].

2. Parliamentary material may be considered in determining whether legislation is compatible with the European Convention on Human Rights: see Wilson v First County Trust Ltd (No. 2) [2004] 1 AC 816, at [65] (Lord Nicholls of Birkenhead).

3. The Courts may have regard to a clear ministerial statement as an aid to the construction of ambiguous legislation: see Pepper v Hart [1993] AC 593, at [638].

4. The Courts may have regard to Parliamentary proceedings to ensure that the requirements of a statutory process have been complied with. For example, in this case, the Courts may admit such material to be satisfied that the steps specified in s 9 of the Planning Act have been complied with.

5. The Courts may have regard to Parliamentary proceedings in the context of the scope and effect of Parliamentary privilege, on which it is important for Parliament and the Courts to agree if possible: see the decision of Stanley Burnton J (as he then was) in Office of Government Commerce v Information Commissioner [2010] QB 98, at [61].

6. An exception has also been identified for the use of ministerial statements in judicial review proceedings. The Speaker accepts that such an exception exists but contends that the scope and nature of this exception has not yet been the subject of detailed judicial analysis. It calls for careful consideration of the constitutional issues involved. We respectfully agree.

In the wake of Pepper v Hart, the UK courts have, generally speaking, developed the jurisprudence in a manner consistent with act utilitarianism. Exceptions have been developed to ensure that information is available for particular, unusual circumstances, when it is beneficial. This is a move away from the original rule as posited by Maxwell in the late nineteen hundreds, which was consistent with rule utilitarianism: there was a single rule that was regarded as beneficial despite any particular instances when the materials would prove to be useful and the rule would therefore be detrimental. Arguably, this is part of a larger trend in the United Kingdom. In the first half of the 20th century, literalism dominated under the belief that this was the best way to ensure that judges were abiding by the legislative will of Parliament. Along with the move towards acceptance of the various types of legislative history, there has been a move towards nuance, or to use Bennion’s term, ‘gloss’.178

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178. The first edition of Bennion’s treatise reveals the break from previous treatises’ veneration of literalism and the plain meaning rule: ‘It is sometimes suggested by judges that only necessary implications may be legitimately drawn from the wording of Acts. . . . This is too narrow’. For Bennion, it was a question of what was ‘necessarily or properly implied’. Bennion elaborated on the meaning of ‘proper’ by disagreeing with judges who insist that judges should not put glosses on the words of statutes. ‘The fact is that such glosses are not to be ignored. On the contrary they form an important element in the law, from which neither taxation nor any other area is exempt’. He went so far as to direct pointed criticism at Warner J in Page v Lowther for asserting that ‘. . . the well-established principle that in tax cases, the words to be interpreted and applied are those of the relevant statutory provision, not those of glosses put on them by judges’. Bennion’s retort: ‘[s]uch a judicial remark betrays an unfortunate ignorance of both statutory interpretation and stare decisis’. Bennion (n 141) 245–46; Page v Lowther [1983] 57 TC 199, 209.
Conclusion

Despite simplistic pronouncements, it is inaccurate to say that the rule prohibiting reliance on legislative history in the courts of the United Kingdom was firmly in place and strictly upheld from the beginning of the 20th century until Pepper v Hart. The rules governing legislative history were explained in divergent ways in the two dominant treatises on statutory interpretation in England at the turn of the 20th century. The prohibition on commissioners’ reports was subject to a precedent-based exception that was regarded by many judges as doubtful, and unsurprisingly, this case created a certain amount of uncertainty about the law. What is surprising is that the matter was not fully resolved until the 1960s.

As typically happens with common law phenomena, the change occurred through evolution rather than revolution. After it became firmly established that commissioners’ reports were admissible, judges began to see the merit in draft Bills, and commentaries, and then reliance on Hansard became a genuine topic of debate. The prohibition of legislative history was narrowed over time through the accumulation of exceptions as judges became comfortable with incremental changes.

The justifications for the rules continue to have traction in a small number of jurisdictions, and the debate is far from over. The sharp distinction in the trend between the United States and the United Kingdom reveals that, for this particular matter, the iconic distinction between form and substance has been inverted. The United States is embracing formalism and the United Kingdom is accommodating substance. However, it would be risky to declare that the matter is settled for good in the United Kingdom. The forces that coalesced to bring about the demise of the rule in the United Kingdom and elsewhere are neither inevitable nor permanent. This could be a cyclical phenomenon, and the United Kingdom may very well be at the point of maximum excursion against the rule. It would take as few as two or three determined Supreme Court judges to move things in the opposite direction.

Conflict of interest

The author(s) declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author(s) received no financial support for the research, authorship, and/or publication of this article.