Punctuation and the Interpretation of Statutes

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On the morning of August 3, 1916, at Pentonville Prison in England, Roger David Casement, former Knight of the Realm, was hanged. Sir Roger's last thoughts on that ultimate morning may well have centered on the incredible series of misadventures and blunders that led to his arrest some four months earlier, but his lawyer's thoughts almost certainly centered on punctuation. It was indeed an improbable set of mishaps that led to Sir Roger's arrest, but it was punctuation that eventually and inexorably did him in.

I. The Casement Case

The Arrest

Sir Roger's story began in the shadows and fog of an Irish predawn. Near the western coast of the island the still, black surface of Ballyheigh Bay was suddenly split by the conning tower of a submarine. The dark silence was ruffled as three figures clambered out of the hatch, whispered their farewells, and launched themselves shoreward in a collapsible dinghy. The year was 1916; the submarine, a German U boat; the three men, Sir Roger Casement and two members of his Irish Brigade; the event, the famed and ill-fated Easter Week Rebellion.

The path that led to Sir Roger's presence in that dinghy was an improbable one. Though born in Dublin, Casement was not a Catholic, and for virtually his entire life he could never have fairly been described as an Irish partisan. Between 1895 and 1911 Sir Roger served the English Crown in various diplomatic posts in Africa and South America. Shortly before retirement from the diplomatic service in 1911, he was knighted. Then in 1914 Sir Roger suddenly appeared in Germany. He was reported to have met on several occasions with Irish prisoners of war at the Limburg Lahn prison camp in
Germany and to have urged them to fight for Irish freedom, under the Irish flag but with the support of the Empire of Germany. And so it was that in the predawn hours of a Good Friday morning, Sir Roger and his confreres found themselves wafting on the breakers of Ballyheigh Bay.

Casement's landing was the most, and indeed the only, successful episode in the execution of his daring plan. A car was to have met the landing party and spirited them to a Dublin rendezvous with the other leaders of the Easter Week Rebellion. A German cruiser disguised as a Norwegian vessel was to have provided arms and munitions once overt activities commenced. The car, as luck would have it, was not there to meet Sir Roger. Speeding through the unlit darkness, the driver had taken a wrong turn and careened off the end of a dock and into the River Laune. The cruiser, moreover, was captured later that day by a British sloop. Unmet and sensing urgency, Sir Roger struck out overland in search of the nearest Sinn Fein partisans. In the confusion, however, he neglected to destroy the dinghy with its telltale markings, and a farmer on his way to early Good Friday services tripped over the boat and alerted the authorities. Sir Roger was soon found hiding in the nearby ruins of an abandoned castle. He was, of course, arrested, interrogated, and charged with treason.¹

The Conviction

The story of Sir Roger’s conviction can be said to have begun five hundred and sixty-five years before his arrest, when the House of Commons petitioned King Edward to declare what types of conduct ought to be outlawed as treasonous. Edward’s response was the Treason Act of 1351, which in 1917 read in pertinent part:

[If a man . . . be adherent to the King’s enemies in his realm, giving to them aid and comfort in the realm, or elsewhere, . . . [that] . . . ought to be judged treason . . . .²

Sir Roger was charged with being adherent to the King’s enemies by giving them aid and comfort. But clearly he had not had time be-

¹. The story of Sir Roger Casement has appeared several times in book form. See, e.g., G. Keeton, Trial for Treason 195-252 (1959); Trial of Sir Roger Casement (G. Knott ed. 1917).
². The Treason Act, 1351, 25 Edw. 3, c. 2. The original statute was written in the Law French of the day, and the quoted excerpt is from 8 Halsbury’s Statutes of England—Criminal Law 14 (3d ed. 1969). The Halsbury edition juxtaposes the Law French text with the modern English text.
tween his arrival on British soil and his arrest to commit any act which could be fairly characterized as adherence to the enemy. Necessarily, the indictment against him focused exclusively on his activities in Germany:

Sir Roger David Casement . . . whilst . . . an open and public war was being prosecuted and carried on by the German Emperor and his subjects . . . did traitorously adhere to and aid and comfort the said enemies in parts beyond the seas without this realm of England—to wit, in the Empire of Germany.³

Sir Roger’s lawyer, Sergeant A. M. Sullivan, seized upon that limitation in the indictment and argued that the treason statute only prohibited adhering to the King’s enemies within the English realm; Sir Roger was not accused of adhering within the realm but in Germany.

Still, there remained the accusation that Sir Roger had given “aid and comfort” to the enemy without the realm and the contention that the treason statute prohibited such conduct as well. Sullivan argued that the phrase “giving to them aid and comfort in the realm, or elsewhere” was a mere descriptive modifier of the clause “be adherent to the King’s enemies in his realm.” In other words, had Sir Roger been adherent to the German Emperor on English soil, he would thereby have given the Emperor aid and comfort in Germany, and the treason statute would have applied. Grammar seemed to lend credence to Sergeant Sullivan’s construction: “giving” is a participle necessarily modifying “man,” not an independent verb in apposition to “be adherent.” Thus, in Sullivan’s scheme of things, what the treason statute prohibited was adherence to the enemy on English soil by giving that enemy aid and comfort either on English soil or elsewhere (wherever the enemy was). But Sir Roger was not accused of doing anything improper on English soil.⁴

Sir Frederick Smith, prosecuting for the Crown, agreed that “giving to them aid and comfort” was descriptive of “be adherent to the King’s enemies,” but would go no farther. Smith’s position was that the comma preceding the words “or elsewhere” destroyed Sullivan’s construction; for the “aid and comfort” phrase was set off with commas, as it should have been if it were a descriptive participial phrase, but the words “or elsewhere” lay outside the commas

⁴. Id. at 470-71. See also Trial of Sir Roger Casement 67-92 (G. Knott ed. 1917).
—a clear indication that those two words were meant to apply to what had preceded the descriptive prepositional phrase, namely the adherence clause. Smith’s conclusion was that the treason statute prohibited adherence, in the realm or elsewhere, to the enemy and that it consequently covered Sir Roger’s activities in Germany.\(^5\)

The placement of the commas made Smith’s argument highly believable, but Sullivan exultantly replied that the original texts of fourteenth century statutes were unpunctuated, and he invoked the ancient canon of statutory interpretation that “[p]unctuation cannot be regarded in an Act of Parliament.”\(^6\) If punctuation were disregarded, as the canon required, the treason statute would make perfect sense in accordance with Sullivan’s construction. The trial judge, however, agreed with Sir Frederick Smith and Sir Roger was convicted. Undaunted, Sullivan raised the same issue on appeal.

**The Appeal**

Sergeant Sullivan must have felt a surge of confidence in preparing his appellate argument. Defending a man charged with treason during wartime is a particularly hard task, and a loss at the trial level was not surprising. But his legal argument had emerged from the trial relatively unscathed. True, Sir Frederick had brought up the matter of the commas. But if one point in the canons of statutory interpretation undeviatingly had been made clear over the centuries it was that one may not resort to punctuation in such a way that the plain unpunctuated language of the statute is altered,\(^7\) for punctuation forms no part of an act. Moreover, everyone knew that the ancient statutes were unpunctuated in their original texts, and this basic point seemed unassailable.\(^8\)

\(^5\) 86 L.J.K.B. at 472-73.
\(^6\) Id. at 471.
\(^8\) Devonshire v. O’Connor, 24 Q.B.D. 468, 478 (1890): “[I]t is perfectly clear that in an Act of Parliament there are no such things as brackets any more than there are such things as stops.” (Lord Esher); Doe dem. Willis v. Martin, 100 Eng. Rep. 882, 897 (K.B. 1790): “[W]e know that no stops are ever inserted in Acts of Parliament . . . .” (Lord Kenyon); Regina v. Oldham, 169 Eng. Rep. 587, 588 (C.C.R. 1852): “[O]n the Parliament roll it is well known there were no stops . . . .” (Maule, J.). It seems to have been uniformly believed that Parliament’s acts were unpunctuated until 1849. See cases collected in D. MELINKOFF, THE LANGUAGE OF THE LAW § 83 (1963). For a description of how the statutes were embossed on the rolls, see W. BLACKSTONE, COMMENTARIES *183.
It is likely, then, that Sullivan spent most of his preparation time covering what perhaps was the lone exception to the hoary canon that punctuation is not to be resorted to in interpreting a statute. That exception was the equally ancient doctrine of *temporanea expositio*: One may resolve ambiguities in a particularly old act by adopting the unanimous construction placed on that act throughout the long course of its existence.\(^9\) There had been many cases which assumed that it was treasonous to adhere to the King's enemies elsewhere than in the realm, but none had focused on the commas, and most involved military commanders, over whom jurisdiction could have been sustained on other grounds.\(^10\) On balance, Sullivan's position seemed secure.

Thus armed, Sullivan entered King's Bench with, one might surmise, a springing step and a confident air. The arguments proceeded predictably with Sir Frederick pressing *temporanea expositio*, and renewing his contention that the phrase "giving them aid and comfort in the realm" ought to be read as though it were in brackets. The rhythm of the closely argued appeal flowed smoothly until Justice Darling interrupted Sergeant Sullivan to make a startling comment:

> My brother Atkin and I have been to the Record Office, and we have read the original of this Statute in Norman-French and compared it with the Parliamentary Roll of the same date, which probably was written rather before it; and we carefully observed the writing and the punctuation, if that is worth anything . . . .\(^11\)

One can imagine Sullivan's surprise. What punctuation? No four-

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9. On the application of *temporanea expositio* (or *contemporanea expositio*), as it is more frequently described, to punctuation, see 32 Halsbury's Statutes of England 373, 380-81 (3d ed. 1971). Halsbury cites Claydon v. Green, L.R. 3 C.P. 511, 522 (1869), for the point, but *Claydon-Green* involved marginal notes and not punctuation. The principle, nonetheless, seems sound that, regardless of whether Parliament punctuated its acts, the long, unanimous interpretation of the act in accordance with its punctuation establishes the interpretation, if not the punctuation, as a part of the act. It does seem that another exception to the punctuation rule has been creeping into English jurisprudence in recent years, one that might presage the eventual adoption by England of a rule more in line with the consensus American view. Halsbury cites Director of Public Prosecutions v. Schildkamp, [1969] 3 All E.R. 1640, 1641, 1657, as a recognition by Lords Reid and Upjohn that the old punctuation rule is too artificial to commend itself to modern courts.


11. *Id.* at 484-85 (emphasis added).
teenth century statutes were punctuated! But surprise must have turned into gaping astonishment when the justice continued:

I mention this because there was a great deal of argument at the trial about commas and brackets. If you look at the original Norman-French, you will find there is a break. You do not see brackets or commas, but they put a transverse line right through. There is a break after “le Roi en le roialme,” and then comes “donant a eux eid ou confort en son Roialme ou par aillours.” But if you look at the Parliamentary Roll there is just the same break after “en le Roialme,” and then comes “donant a eux eid et confort en son Roialme,” and then another break, the equivalent of the bracket contended for at the trial by the Attorney-General. That break is drawn right through the line, and you get the words “ou par aillours.” If you look at the Statute Roll in that place where there is an undoubted break in the Parliamentary Roll, there is a mark which we looked at very carefully with a magnifying glass. It is not certain that it is a break just as it appears in the Parliamentary Roll, but we were inclined to think it was a break—not made with a pen, but a break which had come by the folding in the course of all these six centuries. If you put that break after “donant a eux eid ou confort en son Roialme,” it is very much the worse for your argument.12

The nonplussed Sergeant Sullivan could only manage a lame “I understood brackets did not exist.”13 Sullivan recovered, of course, and went on in lawyerly fashion to address more pointed arguments to Judge Darling:

[N]o inference can be drawn from punctuation. The whole matter should be determined without any theory as to punctuation arising from a fortuitous circumstance which is not the same in the two rolls, and in dealing with a penal statute crimes should not depend on the significance of breaks or commas . . . .14

But the damage had been done. Punctuation had been let into the argument and Sullivan’s carefully orchestrated syllogism had been de-
stroyed by a transverse line.

And so the appeal was lost and Sir Roger was hanged. Some have said that Sir Roger was railroaded: arrested in April, hanged in August. No doubt it was the quickness of Sir Roger’s conviction and its affirmance that upset a portion of the citizenry. But it was the novelty of the decision that must have upset a goodly portion of the bar. A judge of the King’s Bench had debunked the theretofore universally held myth that ancient acts of Parliament were not punctuated. Was not that belief the sole underpinning of the canon that punctuation was not to be resorted to in interpreting a statute? Traitors may die quickly, but myths (particularly of the legal variety) take a good bit of killing.

II. THE CANON IN ENGLAND

To modern eyes an unpunctuated document is a curiously enigmatic affair. Not so for the courts of England. For many English statutes were unpunctuated, Casement notwithstanding, and courts were called upon from time to time to resolve ambiguities through statutory interpretation. In those instances the court’s task was obvious: it had to punctuate the statute.

One such case was Barrow v. Wadkin, involving an act of Parliament which declared all persons born outside the realm but whose fathers were natural-born subjects to be “natural-born subjects” themselves. The statute contained a proviso prohibiting construction of the act in such a way that it would repeal, abridge, or alter any law then in force concerning “aliens duties customs and impositions.” The proviso and its meaning were of the utmost importance to Eliza Barrow of Skaneateles, New York, for she stood to gain or lose an inheritance depending upon how the words “aliens duties customs and impositions” were punctuated. Two versions were offered. The first hypothesized an apostrophe after the word “aliens.” Such a construction would have left Eliza home free with her inheritance by restricting the proviso to the then existing laws concerning aliens’ duties. The second version, which placed a comma after the word “aliens,” would have broadened the proviso considerably so that one or another of the extant laws concerning aliens would surely have defeated Eliza’s claim.

15. See the editorial views in Keeton and Knott, supra note 1, passim.
17. 1773, 13 Geo. 3, c. 21, § 1.
18. Id. § 3.
Sir John Romilly, the Master of the Rolls, carefully scrutinized the words in question, looking to unofficial compilations of the statutes for help—the Quarto Edition of 1774 and Raithby's Edition. With these, however, the problem was compounded rather than elucidated. The Quarto employed the comma, whereas Raithby used the apostrophe. Sir John accordingly dusted off the original Roll of Parliament on the statute.19 Alas, there were no surprises. This act of Parliament was, indeed, unpunctuated. With no Parliamentary guidance then, Sir John proceeded to use the spirit and reason rule20 to conclude in favor of Eliza and the apostrophe.21 The English court had, in effect, to supply the punctuation.

At one time marginal notes, like punctuation, were not considered to be part of a statute because they were inserted by a clerk after the statute had been enacted by Parliament.22 But beginning in 1849, both marginal notes and punctuation were included in each bill before Parliamentary action, and both now appear on the Rolls of Parliament as a matter of routine.23 As a result, English courts since 1849 have shown a marked tendency to regard marginal notes with some deference in interpreting the language of a statute.24 Treatment

19. Why? Didn't Sir John believe the widely accepted wisdom that the original acts of Parliament were unpunctuated? The question is not completely answered by Sir John's offhand remark: "I supposed I should not learn much on the subject from the inspection of the Roll of Parliament; but, as it was in my custody, I have examined it . . . ." 53 Eng. Rep. 384, 385 (Ch. 1857). Was the belief as uniform and widespread as we have been led to think?


22. See R. Wilson & B. Galpin, supra note 20, at 41. See also H. Black, Handbook on the Construction and Interpretation of the Laws 262 (2d ed. 1911): "In the English statutes, the marginal notes are brief abstracts of the matter to which the section relates, or a word or phrase descriptive of the subject-matter, much resembling section headings."

23. R. Wilson & B. Galpin, supra note 20, at 41-42.


[T]he general rule of law as to marginal notes, at any rate in public Acts of Parliament . . . is founded . . . upon the principle that those notes are inserted not by Parliament nor under the authority of Parliament, but by irresponsible persons. Where, however, . . . the marginal notes are mentioned as already existing and established, it may well be that they do form a part of the Act of Parliament.
of punctuation, however, has not taken the same course.\textsuperscript{25} Except for the \textit{temporanea expositio} approach taken by Sir Frederick in the \textit{Casement} case, the courts have shown little deference to punctuation.\textsuperscript{26}

With the exception of one drastic anomaly, the sentencing of Sir Roger Casement to death for a comma,\textsuperscript{27} and a small hint of a liberalizing change just over the horizon,\textsuperscript{28} the law of England concerning punctuation in statutory interpretation has held fast. Punctuation today forms no part of an act and may not be regarded in ascertaining legislative intent\textsuperscript{29}—even in the face of two seemingly significant developments: the 1917 exposure of the myth that early statutes were unpunctuated, and the 1849 changeover to punctuated rolls. Clearly there is little left to the rationale behind the English rule, and consequently less, if any, justification for continued adherence to it.

\section*{III. The Canon in America}

Sometimes hesitantly, sometimes defiantly, a number of American courts have taken the step which English courts have avoided

\textit{In re Woking Urban Council (Basingstoke Canal) Act, 1911, 83 L.J.C.D. (C.A.) 201, 217-18 (1914) (dictum).} "[S]ome help will be derived from the side-note (though of course it is not part of the statute), which shews that the section is dealing with [certain matters]." Bushnell v. Hammond, 73 L.J.K.B. 1005, 1007 (1904). Jessel, M.R., in \textit{In re Venour’s Settled Estates}, L.R. 2 Ch. D. 522, 525 (1876), flatly declared that "the marginal notes of Acts of Parliament now appear on the Rolls of Parliament, and consequently form part of the Acts." But Willis, J., in Claydon v. Green, L.R. 3 C.P. 511, 522 (1869), viewed the 1849 changeover differently: "[T]his change in the mode of recording them cannot affect the rule which treated .. the marginal notes, and the punctuation, not as forming part of the act, but merely as temporanea expositio."

\textsuperscript{25} \textit{But see} the remarks of Lord Reid and Lord Upjohn in Director of Public Prosecutions v. Schildkamp, [1969] 3 All E.R. 1640, 1641, suggesting that the traditional canon is too artificial a rule to commend itself to modern courts.

\textsuperscript{26} \textit{See} notes 3 and 9, \textit{supra}. Note the dearth of punctuation cases on point. \textit{But see} Lords Reid and Upjohn’s 1969 dictum in the \textit{Schildkamp} case, note 25 \textit{supra}.

\textsuperscript{27} Sir Roger’s case has a footnote of sorts. On September 19, 1945, William Joyce, an American citizen, was found guilty in England’s Central Criminal Court of having made radio broadcasts on behalf of Hitler’s Germany from Berlin in violation of the same provision of the \textit{Treason Act}, 1351, \textit{i.e.}, adhering to the King’s enemies elsewhere than in the King’s realm. Joyce’s death sentence was affirmed in the House of Lords on the strength of \textit{Rex v. Casement}, with no reference, however, to the \textit{Casement} punctuation argument. Joyce v. Director of Public Prosecutions, 31 Crim. App. 57 (H.L. 1945).

\textsuperscript{28} \textit{See} note 25 \textit{supra}.

\textsuperscript{29} England’s Commonwealth associates have been in accord. \textit{See} Charlton v. Ruse, 14 C.L.R. 220 (Austl. 1912); City of Medicine Hat v. Howson, 53 D.L.R. 264 (Can. 1920).
taking since 1849. A good example of the freer American approach occurred in 1906 when Albert J. Taylor sued the inhabitants of the town of Caribou, Maine, for a refund of some taxes he had paid under protest. By statute, the State of Maine had imposed a tax on certain intangible items of personal property, including "money at interest, and debts due the persons to be taxed more than they are owing." Albert had about a thousand dollars in a bank earning interest, but he also owed a thousand dollars or more to various creditors. Albert's claim was that he shouldn't be taxed for the money held at interest because it was not "more than . . . [he was] owing." The Caribou tax collector, however, focused on the comma in the statute and argued that "more than they are owing" qualified only "debts due persons to be taxed," and not "money at interest." The Supreme Judicial Court of Maine could have reached its decision by ignoring punctuation in the English fashion, but it chose not to do so. The court took the occasion to declare its own independence from the English rule, displaying the eagerness of some American courts to depart from the strict canon on punctuation:

We are aware that it has been repeatedly asserted by courts and jurists that punctuation is no part of a statute, and that it ought not to be regarded in construction. This rule in its origin was founded upon common sense, for in England until 1849 statutes were enrolled upon parchment and enacted without punctuation. . . . Such a rule is not applicable to conditions where, as in this State, a bill is printed and is on the desk of every member of the Legislature, punctuation and all, before its final passage. There is no reason why punctuation, which is intended to and does assist in making clear and plain the meaning of all things else in the English language, should be rejected in the case of the interpretation of statutes. "Cessante ratione legis cessat ipso lex." Accordingly we find that it has been said that in interpreting a statute punctuation may be resorted to when other means fail . . . ; that it may aid its construction . . . ; that by it the meaning may often be determined . . . ; that it is one of the means of discovering the legislative intent . . . ; that it may be of material assistance in determining the legislative intention . . . .

31. Id. at 406, 67 A. at 4.
As though catching itself in an excess of radical enthusiasm, however, the court tempered its declaration:

The punctuation, however, is subordinate to the text and is never allowed to control its plain meaning, but, when the meaning is not plain, resort may be had to the marks, which for centuries have been in common use to divide writings into sentences, and sentences into paragraphs and clauses, in order to make the author’s meaning clear.\(^\text{32}\)

One may wonder why, if legislatures enact punctuation as well as text, punctuation is \textit{subordinate} to the text. To this we shall return. In any case, the rationale behind this American departure from the strict English punctuation canon stems without doubt from the difference between the presumed pre-1849 English Parliamentary practice of enrolling unpunctuated acts and the American practice of legislating already punctuated acts.\(^\text{33}\)

The \textit{Taylor} court had partially relied on an 1899 decision of the New York Court of Appeals in a suit brought by a city street cleaning foreman named Tyrrell.\(^\text{34}\) Tyrrell was seeking extra pay for work on Sundays under a state law prescribing:

\begin{quote}
The annual salaries and compensations of the members of the uniformed force of the department of street cleaning shall be fixed by the board of estimate and apportionment and shall not exceed the following: \ldots{} of the section foremen, one thousand dollars each; \ldots{} of the hostlers, seven hundred and twenty dollars each, and extra pay for work on Sundays.\(^\text{35}\)
\end{quote}

The New York Court of Appeals relied in part on punctuation—the significance of the semicolon separating the foremen clause from the hostlers clause and the mere comma separating the Sunday pay clause from the hostlers clause—in ruling against Tyrrell:

\begin{quote}
The punctuation of this statute is of material aid in learning the intention of the legislature. While an act of par-
\end{quote}

\(^{32}\) \textit{Id.} at 406-07, 67 A. at 4.

\(^{33}\) Some courts in giving weight to punctuation have done so recognizing that the English rule was based on the premise that acts of Parliament were unpunctuated. See Wagner v. Botts, 88 So. 2d 611, 613 (Fla. 1956); Weinacht v. Board of Chosen Freeholders, 3 N.J. 330, 334, 70 A.2d 69, 71 (1949); Curly’s Dairy, Inc. v. State Dep’t of Agric., 244 Or. 15, 21-23, 415 P.2d 740, 743-44 (1966).

\(^{34}\) 102 Me. 401, 404-05, 407 (1907).

liament is enacted as read and the original rolls contain no marks of punctuation, a statute of this state is enacted as read and printed, so that the punctuation is a part of the act as passed and appears in the roll when filed with the secretary of state. 36

One should not conclude from the Taylor and Tyrrell cases that all or even a majority of American courts have scrapped the English canon. Some courts have adhered to it slavishly. Others have followed an independent path to the English result of disregarding punctuation in statutory interpretation.

An early example of American adherence to the English canon occurred in Massachusetts in 1857. On a thin lip of land jutting out from what might be called the lower jaw of Boston harbor lay the town of Hull and Nantasket Beach. The town of Hull had given Paul Worrick a general license to gather seaweed on Nantasket Beach. David Cushing, wanting to gather seaweed for himself and sensing some unfairness in the licensing scheme, sued Worrick. The case narrowed to the issue of the right of the town to issue seaweed licenses for Nantasket Beach, and that issue depended upon an interpretation of a provision in the state law setting the boundaries of Hull. A comma in the right place would have iced the case for Cushing. The Supreme Judicial Court of Massachusetts said as much, but it then declined to check the engrossed bill to see if the comma was there. 37 Instead it matter-of-factly related:

It is unnecessary to resort to the draft of the bill as passed to be engrossed, in order to explain the statute as actually engrossed; for the general rule is that punctuation is no part of a statute. 38

Other jurisdictions have also adhered to the English rule. 39

36. Id. at 242, 53 N.E. at 1112.
37. Sir John Romilly, in Barrow v. Wadkin, 53 Eng. Rep. 384 (Ch. 1857) (discussed at text accompanying notes 16-21 supra), did actually check the enrolled bill, as did Justice Darling in the Casement case, text at note 11 supra.
39. See United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 82-83 (1932); Hammock v. Farmers' Loan & Trust Co., 105 U.S. 77, 84-85 (1881); In re Schilling, 53 F. 81, 83 (1892); Andrew Dossett Imp., Inc. v. United States, 273 F. Supp. 908, 911 (Cust. Ct. 1967); Starrett v. McKim, 90 Ark. 520, 523, 119 S.W. 824, 825 (1909); Hodges v. Quire, 295 Ky. 78, 87, 174 S.W.2d 9, 14 (1943); Clinton v. Miller, 124 Mont. 463, 472, 226 P.2d 487, 492 (1951). In the Clinton case the Montana Supreme Court declared: "Punctuation is no part of the English language... Never must punctuation marks be
An independent rationale, developed in the United States Supreme Court and not tied in with English precedent, provided a more logical basis for decisions which downgraded the value of punctuation in statutory interpretation. That rationale had its humble beginnings in 1834 when James Ewing sued to eject Jacob Burnet, an alleged adverse possessor, from a piece of land in Cincinnati. Ewing lost in the lower court and pressed only one point in his appeal to the Supreme Court. Certain punctuation in the Ohio statute of limitations required a reading that would defeat Burnet's claim of adverse possession. Justice Baldwin ruled against Ewing and observed:

Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the Court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent on judicially inspecting the whole, the punctuation will not be suffered to change it.40

Baldwin's simple and concise downplaying of punctuation was significant because he achieved the result of the English rule without running aground on the shoals of its inapplicable rationale.

The Supreme Court of Ohio expanded upon Baldwin's new rationale, though it paid lip service to the English rule, in a suit brought by Jacob Albright against William Payne to recover ten head of hogs allegedly taken by Payne. An Ohio statute authorized finders of animals let loose by their owners to "take up and confine the same forthwith, giving notice thereof to the owner. . . ."41 Payne apparently took the hogs "forthwith," but he was slow in giving notice to Albright. The Ohio Supreme Court, thinking the statute would read permitted to control the meaning of the text of a legislative enactment." It should be noted that in Pennsylvania the rationale for the English rule persisted. Statutes in Pennsylvania as passed by the legislature and signed by the governor were not punctuated. Punctuation was inserted later by a clerk in the office of the Secretary of the Commonwealth. Curiously, however, weight has been given to punctuation in at least one case of Pennsylvania statutory interpretation. See Orlosky v. Haskell, 304 Pa. 57, 155 A. 112 (1931), noted in 36 Dick. L. Rev. 39 (1931). The English rule does seem to have remained in force in Pennsylvania despite Orlosky. See Yeager Unempl. Comp. Case, 196 Pa. Super. 162, 169 (1961). Note too that Pennsylvania, Minnesota, and Texas have, in a sense, mandated the English rule by statute: "In no case shall the punctuation of a law control or affect the intention of the Legislature in the enactment thereof." PA. STAT. ANN. tit. 46 § 553 (Purdon 1969); MINN. STAT. ANN. § 645.18 (West 1945); TEX. CIV. STAT. ANN. art. 11 (Vernon 1969). See also S.D. COMPIL. LAWS ANN. § 2-14-8 (1974).

41. Albright v. Payne, 43 Ohio St. 8, 13 (1885).
better if the comma preceded instead of followed "forthwith," ruled against Payne and in so doing embellished the Baldwin rationale with some historical observations:

Ancient inscriptions and writings show that words were grouped together without break or punctuation mark, the location and form of the words being the only indications of the meaning. The use of spaces and marks was adopted very slowly, but mostly since the beginning of the sixteenth century.\(^42\)

Perhaps the staunchest defender of the Baldwin thesis has been the Committee on Legislative Drafting of the National Conference of Commissioners on Uniform State Laws. On May 10, 1938, the Committee concluded that "[b]oth reason and experience are against reliance upon punctuation" in statutory interpretation.\(^43\) Many courts as well have followed the Baldwin approach.\(^44\)

The punctuation canon in America, then, has assumed at least three forms: (1) adhering to the strict English rule that punctuation forms no part of the statute;\(^45\) (2) allowing punctuation as an aid in statutory construction;\(^46\) and (3) looking on punctuation as a less-than-desirable, last-ditch alternative aid in statutory construction.\(^47\) The last approach, based upon Justice Baldwin’s thesis that punctuation is "a most fallible standard by which to interpret a writing," seems to have prevailed as the majority rule. Courts in most states view punctuation as a genuine part of legislative enactments but regard it as subordinate to text. The net result of this approach is that

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42. Id. at 14. There is evidence that marks were in use in the middle of the 14th century. See notes 11-12 supra and accompanying text.
   So it has been stated that in construing statutes it is not a safe rule to place too much reliance upon punctuation, and that punctuation must not be allowed to interfere with a reasonable statutory construction.
   N.Y. STAT. LAW § 253 (McKinney 1971) (footnotes omitted).
45. See notes 37-39 supra and accompanying text.
46. See notes 31-36 supra and accompanying text.
47. See notes 40-44 supra and accompanying text.
punctuation serves not as a full-fledged tool of statutory interpretation but rather as a tool of last resort.48

A natural outgrowth of the notion that punctuation is subservient to text, as it was a natural outgrowth of the English rule that punctuation is no part of the act, is the idea that punctuation may be ignored or changed when it does not serve the interpreter's view of the text.49 According to Professor Sands, punctuation may be disregarded, transposed, or changed only in those instances in which "the act as originally punctuated does not reflect what is otherwise indicated to be the true legislative purpose. . . ."50 Clearly ignoring or altering punctuation is proper when after-inserted punctuation changes the meaning of the original statute.51

IV. STATUTES ON PUNCTUATION

No doubt attempting to resolve an already confused state of affairs, five states have legislation concerning the weight to be given punctuation in statutory interpretation. Pennsylvania, Minnesota, and Texas have identical provisions:

In no case shall the punctuation of a law control or affect the intention of the Legislature in the enactment thereof.52

Such a statute seems to make eminent sense in Pennsylvania, for example, where statutes are enacted in unpunctuated form.53 But its logic is questionable in a jurisdiction where the legislature enacts punctuated statutes. South Dakota's law is similar:

Punctuation shall not control or affect the construction of any provision when any construction based on such punctua-

50. C. SANDS, supra note 49, § 47.15.
52. MINN. STAT. ANN. § 645.18 (West 1945); PA. STAT. ANN. tit. 46 § 553 (Purdon 1969); TEX. CIV. STAT. ANN. art. 11 (Vernon 1969). See also S.D. COMPIL. LAWS ANN. § 2-14-8 (1974).
53. See note 39 supra.
tion would not conform to the spirit and purpose of such provision.\textsuperscript{54}

South Dakota appears to have joined Minnesota, Texas, and Pennsylvania in separating statutory intent from punctuation, and it seems as though legislators in those states have authorized themselves to ignore, or at least be careless about, the punctuation in the bills which cross their desks.

Doubtless the most complete statute on punctuation in existence today can be found in volume 1 of the Consolidated Laws of the State of New York:

Generally, statutes of this state are enacted as read and printed, so that the punctuation is a part of the act as passed and appears in the roll when filed with the Secretary of State. The punctuation, however, is subordinate to the text, and it is never allowed to control the plain meaning of the act. So it has been stated that in construing statutes it is not a safe rule to place too much reliance upon the punctuation, and that punctuation must not be allowed to interfere with a reasonable statutory construction. The courts, therefore, where it is necessary for the expounding of the legislative intent, will not hesitate to transpose a comma or other mark of punctuation or to change one mark for another which better represents the intention of the lawmakers.

However, the common marks of punctuation have been in use for centuries, and it is well known that their chief function is to make the writer's meaning clear. Hence if such meaning is not clear the marks may be considered, and they frequently form a valuable aid in determining the legislative intent. The use of a comma before the disjunctive "or", in construing a sentence in a statute, ordinarily indicates an intention to discriminate the first half of the sentence from the second half.\textsuperscript{55}

Furthermore, New York has elsewhere recognized that punctuation may abrogate the "last antecedent" rule.\textsuperscript{56} Besides being an excellent

\textsuperscript{54} S.D. COMPILED LAWS ANN. § 2-14-8 (1974).
\textsuperscript{55} N.Y. STAT. LAW § 253 (McKinney 1971) (footnotes omitted).
\textsuperscript{56} Id. at § 254. The last antecedent rule has been articulated as follows: "[A] relative word refers to the next antecedent; unless by so doing, the meaning of the sentence would be impaired." Foote v. People, 56 N.Y. 321, 328 (1874).
essay on the present state of the majority (Baldwin) approach to the
use of punctuation in statutory interpretation, the New York statute
adds considerable flesh to the bare bones of the Pennsylvania, Min-
nesota, Texas, and South Dakota statutes. But it too is incomplete.
Clearly New York lawmakers see, approve, and enact the punctuation
when they see, approve, and enact the statute. How is it, then, that
New York still relegates punctuation to a secondary or tertiary posi-
tion behind the text and the legislative intent? Cryptically and some-
what amusingly, New York has solved this dilemma
by legislatively
recognizing the grammatical ineptitude of the legislators:

The members of the Legislature are not necessarily charged
with a knowledge of the grammatical rules of the English
language. . . . In other words, legislators are not presumed
to be good grammarians, and inaccurate grammar must yield
to the legislative intent.57

This statute makes one wonder whether it is safe to assume that the
legislators may fairly be charged with a knowledge of lawmaking. In
any event, the New York position is internally consistent in its candor
and serves as a valuable contribution to a resolution of the inconsis-
tency inherent in the majority (Baldwin) approach.

V. ANALYSIS AND COMMENTARY

In a fit of understatement, Professor Endlich wrote in 1888 that
"[t]he effect of punctuation in a statute, as an element in its construc-
tion, is not determined by the courts with absolute uniformity."58
Over the years Endlich’s remark has been underscored: the not-
entirely-true premise on which the English rule was based; the 1849
abrogation of that not-entirely-true premise; the post-1849 adherence
to that not-entirely-true and abrogated-to-boot premise both in Eng-
land and America; the not-quite-successful revolution against the En-
glish rule based on the observation that its premise does not obtain in
America anyway; and the development of a not-entirely-palatable
American rule.

What of the future development of the American canon on the
use of punctuation in statutory interpretation? The Casement court
acted consistently in letting the light of punctuation shine fully and
clearly on the problem before it, once the premise for the prohibition

57. N.Y. STAT. LAW § 251 (McKinney 1971) (footnotes omitted).
58. G. ENDLICH, supra note 49, § 61, at 77.
against using punctuation had crumbled following Justice Darling's discovery of punctuation in the Treason Act of 1351. We are struck as Sergeant Sullivan must have been with the difficulty of arguing against what the court was doing. The Supreme Judicial Court of Maine observed in Taylor that American statutes are punctuated before enactment and that consequently the English rule should not apply in this country. The court puzzlingly argued for subordination of punctuation to text. These two instances give rise to two questions: Would any evils flow from granting to punctuation the same weight in statutory interpretation given the other tools for discovering legislative intent? Should punctuation and text be of equal importance? Perhaps the most oft-voiced criticism is that punctuation would control and destroy true legislative intent. This criticism is justified no doubt, but it applies generally to every tool of statutory interpretation. Expressio unius can be overapplied. Casual footnote remarks in committee reports on a bill can be overblown. Yet misapplications do not render tools of statutory interpretation useless. Another prevalent and justifiable concern over the lack of standardization in the rules of punctuation arises as well from the lack of standardization in the rules of grammar and spelling. Is it proper to split an infinitive? Not doing so often creates a syntactic ambiguity. When such an ambiguity occurs courts simply refer to other guides to statutory intent, such as legislative history or the spirit and reason rule, to resolve the dilemma. Would courts act differently when faced with an ambiguity created by punctuation? Professor Sands, without citational authority, surmised that they would not:

[It is more satisfactory to treat the rules of punctuation on a parity with other rules of interpretation. When punctuation discloses a proper legislative intent or conveys a clear meaning the courts should give weight to it as evidence. When the act as punctuated is inconsistent with what is otherwise established to be the clear intent or meaning the punctuation should be disregarded.]

In Sir Roger's case the court placed the rules of punctuation on a par with the other rules of interpretation. This need not have been

60. Id.
62. C. Sands, supra note 49, § 47.15.
done. The court could have reasoned that punctuation is, in Justice Baldwin's words, "a most fallible standard by which to interpret a writing," and applied the rule that penal statutes are to be construed strictly against the Crown.

Do courts have the power to treat punctuation as subordinate to text? When courts ignore or change punctuation on the strength of what is deemed a superior rule of interpretation, are they interpreting the law or are they making the law? In a jurisdiction in which legislators see, approve, and enact punctuation along with text, the answer is far from clear.

In according punctuation its full effect we do no more than give the law reader a more complete means of ascertaining legislative intent. In truth, neither the words, nor the text, nor the syntax, nor the grammar, nor the punctuation of a statute is "the law." "The law" is nothing more or less than the will of the lawmaker. All else, including fully weighted punctuation, is merely evidence of that will.

63. R. Wilson & B. Galpin, supra note 20, at 1.