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INTERPRETATION OF STATUTES.*

Operation and Interpretation.—Treatises on statutory construction deal both with rules governing the operation of statutes as regards time and place and their relation to other acts, particularly by way of repeal, and with rules by which the meaning of their language is ascertained. The two sets of rules cannot always be clearly differentiated, for the operation of a statute may depend upon the meaning of its language, and the ascertainment of the meaning of a statute may be affected, if not controlled, by extrinsic rules of law in addition to what may be gathered from grammatical interpretation and context.

Interpretation as a Judicial Function.—It is the practically undisputed Anglo-American view that interpretation is a specifically judicial function. In the American doctrine of the judicial power to declare laws unconstitutional, this view finds its most striking expression. In continental countries with written constitutions, the constitution is supposed to be as binding upon legislation as it is in America. But the equal constitutional status of legislature and judiciary makes it appear logical that, since the legislature is first called upon to apply the constitution,

*A chapter of a treatise on the Elements of Law upon which the writer is engaged.

the conclusion which it has reached, under its oath, as to the meaning of any provision, must be respected by organs subsequently called upon to apply the laws, and which are merely co-ordinate and not superior to the legislature. The American view that the legislative interpretation is not binding upon the courts cannot rest upon the fact that no prior judgment can bind a co-ordinate judiciary for, if so, the judicial judgment would not bind the equally co-ordinate chief executive who has the last word in the application of the laws. The American view—apart from purely political considerations—can be supported best upon the theory that interpretation is a specifically judicial function, which cannot be renounced in favor of the prior action of a political body.

The history of the American federal constitution shows that in view of the inevitable ambiguities of language, a power of interpretation is a controlling factor in the effect of legislative instruments, and makes the courts that exercise it a rival organ with the legislature in the development of the written law.

Opposition to Judicial Interpretation.—In the history of jurisprudence the recognition of this fact has led repeatedly to the attempt on the part of the legislator to forbid the exercise of the judicial power of interpretation.[1] In France particularly, the independence of the judiciary of the old regime and its antagonism to reform measures aroused the jealousy of the revolutionary legislative organs and led to drastic attempts to curb the judicial power of interpretation. Thus it was provided by a law of August 24, 1790, that the judges should apply to the legislative assembly every time they thought it necessary to interpret a law, and subsequent legislation required the Court of Cassation to ask for a legislative declaratory decree if the lower tribunals persisted in ignoring the view supported by that court. A legislator, subsequently himself a member of the Court of Cassation, spoke of judicial interpretation (*jurisprudence des tribuneaux*) as the most destestable of all institutions, and

[1] Stobbe, *Deutsches Privatrecht*, Sec. 26.

of the legislature as the sole and true interpreter of laws. Robespierre said the term *"jurisprudence des tribuneaux"* should be erased from the French language. The Court of Cassation was to reverse only in case of flagrant violation of the law. In 1810 an author sought to distinguish formal violation of the law and its erroneous application from incorrect interpretation, and condemned reversals on the latter ground as an abuse of judicial power, but even at that early date he had to recognize the exercise of jurisdiction on that ground as firmly established. In 1837 the third decision of the Court of Cassation in overruling the lower court was made binding, and its power of interpretation thus recognized by the legislature. The recourse to the legislature for declaratory decrees was abolished.[2] Thus the judicial power of interpretation triumphed in the long run. In Prussia the attempt to forbid its exercise was even more short-lived. The experience of history thus shows that the judicial function of interpretation is inevitable and will in the long run always assert itself.

Legislative Interpretation.—Conversely, there are difficulties in the way of maintaining a legislative power of interpretation. Continental jurists recognize the possibility of authentic interpretations by which the legislator declares the true meaning of a law by which courts are to be guided.[3] Such authentic interpretation has retroactive force (as a judicial interpretation has), and this was expressly declared in the original draft of the French Civil Code. It may be argued that so long as interpretation is made in good faith, its inevitable retroactive operation must be legitimate no matter from what source it comes, while, on the other hand, an abusive exercise of the power of interpretation is none the less unjust in its retroactive effect because it proceeds from a court. It is however acknowledged by continental jurists that the power of authentic

[2] Gény, *Méthode d'Interprétation*, pp. 41-45. For a striking instance of reference to the legislature in early English law see the Statute of Treasons of 1350 and the observations on the provision in question in Strafford's Trial, Howell's State Trials, Vol. III, pp. 1506-1508.

[3] Savigny, System, Sec. 32; Unger, Austrian Private Law, Sec. 14; Dernburg, Prussian Private Law, Sec. 17; Dernburg, German Civil Law Sec. 6; Aubry and Rau, *Droit Francais* I, Sec. 30.

interpretation once recognized, its validity cannot depend upon the good faith of its exercise, and that retroactive legislation under the guise of authentic interpretation is valid simply because the soverign power to legislate retroactively cannot be questioned. But all the arguments against retroactive legislation count in consequence against the power of authentic interpretation, which is in theory admissible only as an emergency power, and the practical examples of which are rare indeed. The French Act of June 21, 1843, on the form of notarial acts, referred to as an instance of authentic interpretation by French writers, was in the nature of a validating act, such as American legislative practice recognizes.[4] The real and permanent objection to authentic legislative interpretation is that interpretation is an incident to the application of the law, and that the judicial application of the laws should be independent. The universal modern recognition of the independence of the judiciary as essential to government by law, therefore, condemns the practice of legislative interpretation, and as a matter of fact it is exercised only in very exceptional cases.[5]

In the history of the English law explanatory acts are not unknown, so the Act of 1542 explaining the Statute of Wills of 1540, and the provisions in the Statute of Frauds and in the perpetuating Act of 1685 explaining the Intestate Estates Act of 1670; but modern Anglo-American jurisprudence is opposed to legislative interpretation with retroactive effect. A legislative act declaring for the future the meaning of an older act is equivalent to an amendment of that act, and any interpretative act will be construed in this way, so the act of Congress of February 26, 1845,[6] passed to counteract the decision in *Cary* v. *Curtis*.[7] Pennsylvania, declares a prospective legislative direction to construe a statute in a certain way to be an unauthorized exercise of

[4] Goshen v. Stonington, 4 Conn. 221.

[5] The latest instance of French authentic interpretation is the Act of April 13, 1908, reversing the judicial interpretation of the act regarding the separation of church and state of Dec. 9, 1905; as to this see, Gaston Jèze in *Jahrbuch für öffendtl. Recht.* 1910, pp. 495-497.

[6] 5 Stat. L. 727.

[7] 3 How. 236. (See 109 U. S. 238, and 182 U. S. 1, pp. 174-180.)

judicial power by the legislature,[8] and while this is an extreme and untenable position, the decision is characteristic as an expression of the sentiment that even prospective legislation should not take the form of authentic interpretation, and that interpretation is an exclusively judicial function.

Executive and Administrative Interpretation.—Where a statute depends for its execution and enforcement upon administrative action, executive interpretation is an important factor. For, although ultimate judicial interpretation may be independent, yet much of statutory execution never goes through the courts, and in the enforcement of criminal statutes a lenient attitude of law-enforcing authorities must as a rule be conclusive. German and French legislation is overlaid by executive instruction to an extent unknown in England and America, but even in our jurisprudence the opinions of law officers advising executive departments in many cases practically determine the operation of statutes.

But this is true only of public or criminal legislation. Generally speaking, private law operates without executive intervention. Instructions to courts were not unknown even in England at a time when governmental functions were not clearly differentiated, and some early English legislation (*e. g.*, the statute *Circumspecte agatis*),[9] appears in the form of a royal instruction to justices. But in every modern constitutional government the principle of the independence of the judiciary forbids the intimation of any executive direction, and courts are subject to the departments of justice merely with reference to the purely administrative or executive side of their business. Executive interpretation may, therefore, be said to play no part whatever in the operation of private law.

Legal Science and Interpretation.—Where legal writings and the opinions of jurists constitute an authoritative source of law, this "legal science" will claim the field of interpretation as well as that of reasoning from general principles. And where the entire law purports to be codified all legal science will con-

[8] Titusville Ironworks v. Keystone Oil Co., 122 Pa. 627.

[9] 13 Ed. I, st. 4.

sist in interpretation. Thus, legal science began in Rome with the interpretation of the Twelve Tables, and both the jurisprudence of the Koran and that of the Jewish Talmud are concerned almost exclusively with subtleties of interpretation, which are made necessary by the stagnation of natural organs of development.

Interpretation a Question of Law.—The question of the interpretation of a statute is considered to be a question of law and not a question of fact. Even in a will, which is the act of an individual, it must often happen that actual intent is not predicable; still more commonly must this be true of a statute which is the act of two concurring bodies, each composed of many minds. [10] Were the legislator an individual, his intent would not be ascertainable by direct examination, as this is constitutionally inadmissible, and the practice of courts justly excludes resort to debates, the effect of which upon the final vote must be matter of speculation [11] or even resort to the legislative history of one house, the proceedings of which are not necessarily known to the other house.[12]

The legislative intent by which the language of a statute is permitted to be controlled, is an inference from facts and conditions of which a court may take judicial notice as part of the public history of the times or of usages or understandings prevailing when the act was passed; thus in the Income Tax cases [13] the debates in the constitutional convention are freely referred to for the purpose of showing the meaning of direct tax and excise, but the subsequent debates in the state conventions and in the Federalist are equally referred to, showing that the reference is not for the purpose of proving that the framers of the constitution wanted particular words to be understood in a

[10] Some questions which are relevant to the validity of a will cannot arise in a statute; so particularly there is nothing corresponding to the reality of the *animus testandi;* questions of seriousness of the transaction, of fraud or duress may be eliminated, since the constitutional forms of legislative action cannot be drawn in question in these respects.

[11] 169 U. S. 699.

[12] Craies, Statute Law 122; 143 U. S. 502.

[13] 157 U. S. 562-569.

particular sense, but to prove what the accepted meaning of the words was at the time.

Legal Rules of Interpretation.—While it is a matter of relative indifference and perhaps incapable of strictly logical determination whether we should treat interpretation as a question of law or of fact, it is of the utmost importance to inquire to what extent interpretation is governed by rules of law.

The usual aids to interpretation, notably the context of language and the history of law and legislation, are found in general rules of reason and logic which do not belong exclusively to legal science.

There are other rules of interpretation for which there are no precise parallels outside of the law. It is, thus, generally held, that where a statute is adopted from another state, it is adopted with the construction previously placed on it in that state.

Rules similarly precise and reliable are rare, if we except the ordinary canons applicable to the meaning of certain words (person, singular and plural, male gender) which are now commonly embodied in interpretation acts.

Strict and Liberal Construction.—There are general principles necessarily more vague which are nevertheless of the utmost value and importance, above all the rule that penal statutes are to be construed strictly, a rule sometimes criticized as inconsistent with the duty of fair interpretation,[14] but in reality not irreconcilable with that duty and practically indispensable.

It is the absence of such a principle which may enlarge the judicial power of interpretation into a virtual power of legislation. Where the legislature permits the granting of a divorce for cruelty or extreme cruelty, the effect of the law depends entirely upon the strictness or liberality of its interpretation. Judicial practice will determine the facilities for divorce, and the unity of the law will depend upon this practice being harmonized as far as may be by the decisions of the court of last

[14] 215 U. S. 679.

resort. In England the expensiveness of appeals makes the decisions of judges practically final and the principle of interpretation should, therefore, be settled by legislative enactment or a less flexible term be chosen to designate the ground for divorce.[15]

The principle of strict construction is applied to other than penal statutes, so, to acts imposing taxes and to acts in derogation of the common law. When the English Act permitting the wife or husband of a person charged with certain specified offenses to be called as a witness either for the prosecution or defense and without the consent of the person charged, was construed as making the wife or husband competent but not compellable to testify,[16] the prevailing consideration was that nothing short of an absolutely explicit provision should be allowed to override an ancient common law privilege. But the principle should not apply where the policy of the statute is based upon a profound dissatisfaction with the policy of the common law, and in that case express clauses superseding the usual principle of construction are now and then introduced.

Principles of Legislation as Principles of Construction.—If it be conceded that the presumable intent of the legislature should be the principal guide of interpretation, yet in many cases presumptions will be so equally balanced as to leave us without any guidance on this basis. The following will serve as an illustration. General principles of construction permit qualifying rules of law of a subsidiary character (as *e. g.*, relating to procedure, to disqualifications, to liability or to relief) to be read into a statute, though not therein expressed, while it is also possible to give effect to a statute literally and to refuse the application of these qualifying rules. Not uncommonly this situation will arise: the legislature has expressed the qualifying rule by specific provision in a number of statutes, while in the statute under construction a similar provision is not found (*e. g.*, provision for notice and hearing, for compensation, for official liability, for relief against official action, *etc.*) How does the

[15] Report of Royal Commission on Divorce, 1912, p. 71.
[16] Leach v. Director, 1912, A. C. 305.

legislative explicitness in analogous cases affect the legislative silence in the particular case? Should the courts argue that the particular statute should be construed in the light of the general legislative policy evidenced by the express provisions of other statutes, or should they argue that a significance should be attached to a failure to be explicit, where explicitness is otherwise common? Either of the two opposite contentions is equally plausible. Under these circumstances the courts had better abandon the attempt to guess at legislative intent, and assume the task of independent construction. The guide to construction in such a case should be sound legislative policy. But the question remains whether this policy should be gathered from current legislative practice, or from what the court conceives to be the true principle of legislation. Perhaps the first impression would be that the courts should subordinate their own views to what they believe the legislature would have done had their attention been directed to the point. But this view does not do adequate justice to the legitimate place of the judicial power in the development of the law. Legislatures have not infrequently assumed extreme attitudes in the assertion of the public interest and against the claims of private right. The vindication of private right has then fallen to the courts through the instrumentality of powers of construction. The remedial side of administrative law has thus been built up almost entirely by the judicial implication of a saving of private right in the face of legislative silence. The legislature has been notoriously remiss in developing this side of public law, believing that the courts could be relied upon to safeguard private rights. Judicial policy may in other words be in the development of legislation as legitimate a factor as legislative policy. In America any implication of judicial usurpation of power may be negatived by pointing out that legislative policy is subordinate to constitutional policy, and that the courts act as guardians of the latter in asserting their independence in construction. But the exercise of judicial power has been equally independent and equally indispensable in England. We shall, therefore, conclude, that in using the power of construction by way of legiti-

mate implication, the courts should be guided by what appears to them as a sound policy of legislation, and that they are entitled to exercise an independent judgment for that purpose. In the domain of private law, issues of this type are not very likely to arise.

Statutory Rules of Interpretation.—Rules of interpretation are also fixed by statute, particularly by the general statutory construction acts of many states. The operation of these acts is necessarily qualified. As all statutes are read in connection with each other, every new statute may be presumed to have been enacted with reference to the interpretation or construction act, the application of which to the particular statute rests upon its voluntary acceptance by the legislature in passing the latter act. The interpretation act cannot be imposed by one legislature upon subsequent legislatures of precisely equal power against their will, and the will of a later legislature not to be bound by an interpretation act need not be explicitly expressed, but may be implied from circumstances. The operation of an interpretation act is, therefore, in itself, matter of construction.

Qualified Force of Rules of Interpretation.—And the same is true of every other rule or principle of interpretation or construction.[17] There is a sharp difference in this respect between wills and statutes. With reference to wills there are yielding and absolute rules of construction; the latter would not yield to an apparent contrary intent of the testator, and the rule of *stare decisis* applies to such rules.[18] But no rule of statutory construction is a binding or absolute rule in that sense, and, except with reference to the same statute, there can be no application of the rule of *stare decisis*. A court of last resort has it always in its power to ignore rules of construction as being contrary to the implied intent of the legislature in a particular case, and from this point of view a question of interpretation

[17] Even the rule that a statute adopted from another state is adopted with the construction previously put upon it in that state, is not of unqualified operation. It does not apply where the act adopted is of a common type, variously construed in various states. Valjago v. Carnegie Steel Co., 226 Pa. 514.

[18] 1 Cox 327.

is much more like a question of fact than like a question of law. It is this necessary qualification of rules of construction that makes the ordinary case law on statutory construction so unsatisfactory and inconclusive.

Rules of Interpretation and Judicial Precedents and Dicta.—It is a mistake to treat statutory construction like other branches of the common law, as a body of doctrine to be gathered from particular precedents and judicial utterances; the only proper method of approaching the problem is the inductive one, gathering from the mass of decisions certain tendencies and seeking to determine whether some of these tendencies are strong enough to impose themselves upon courts by reason of inherent fitness and necessity. The rule of strict interpretation of penal statutes will from this point of view appear as a principle of far greater value than the rule that statutes in derogation of the common law should be strictly construed. And most of the current maxims stated in textbooks and judicial decisions are of little value. Modern codes have wisely refrained altogether from formulating general principles of construction.

Construction in the Absence of Ambiguity.—The common cases of construction are those in which the language of a statute is capable of more than one meaning, but the most interesting problems of the extent of judicial power with regard to the construction of a statute arise where its meaning, looking merely to the language used, does not admit of controversy and is not in any special manner affected by other statutes or common law rules with reference to which any new statute must be read. The question may arise whether it is legitimate to depart from the letter of the statue to carry into effect what is presumed to have been the true legislative intent, or perhaps even in order to develop a rule according to its spirit beyond its legislative expression.

It is well to distinguish this kind of problem of statutory construction from the question whether a departure from the letter of a statute entails the nullity of acts done in disregard of its terms. The courts in such a case determine merely the consequences of the violation of a statute, and not the extent

or effect of its application, and they do not claim the power to add to or detract from its terms.

Principle of Literalness.—The starting point in questions of construction must always be the principle of literalness, according to which the legislator is presumed to, as in fact he does, choose his words deliberately intending that every word shall have a binding effect.[18a] Moreover, unless the statute is a pure statement of principle, its words will never be precisely co-extensive with its reason, for conventional limitations and definitions will take the place of flexible generic terms. If the period of litimations is ten years, a day less will not avail the possessor, and the closeness of the margin on the other side will not save the owner, whatever the particular circumstances may be; and if a will is required to be holograph the fact that a date is printed may be fatal to its validity.

In such a case a liberal construction may possibly aid a very slight defect by stretching or narrowing terms used by the legislator to the utmost, by declaring a departure to be irrelevant, or some particular requirement to be merely directory; thus in a holograph will a printed date may possibly be ignored, in usury laws making seven *per cent. per annum* the maximum legal interest a provision for semi-annual payment may be held admissible, and the maxim *"de minimis non curat lex"* may save trivial violations from criminal prosecution, but such relaxations do not amount to the acknowledgment of a principle that precise measures are to be construed as satisfied by substantial approximations, so that cases on the border line should be judged according to the equities of the particular circumstances, or that a waiver of rights which arise from literal interpretation should be implied in equity. Certainly, no such principle is recognized by the prevailing law.

Conceding, however, the principle of literalness, the question will arise how to deal with cases of variance between legislative expression and presumable legislative intent, cases of

[18a] 101 U. S. 115. Strong quotes from Bacon's Abridgement: "A statute ought upon the whole to be so construed that if it can be prevented, no cause, sentence, nor word shall be superfluous, void or insignificant."

legislative inadvertence, looseness, or lack of foresight, with defects of expression, of thought, or of provision. Some typical instances will serve to illustrate these defects and the judicial practice with regard to them.

Verbal Inaccuracies and Defects of Expression.—An obvious clerical error can be corrected by construction, as *e. g.*, the reference to a wrong date,[19] or to a wrong chapter or section number of a statute when the intended reference is clear.[20] Certain defects of expression are so common that the judicial power with regard to them has become well established, particularly the word "and" in a disjunctive sense instead of the word "or".

But even such errors may be fatal to a statute imposing a burden or a penalty. Cases may be cited where an obvious inaccuracy has been corrected with the result of sustaining a conviction;[21] but such cases are rare; the power to substitute "or" for "and" in a criminal case has been denied by a federal court,[22] and very striking instances are found of a refusal to give effect to obvious intent as against the faulty wording of a revenue or penal statute where the effect would be to the detriment of private liberty or property.

Thus a provision in an adulteration act "that no person either by his servant or agent, or as the servant or agent of another" shall sell, *etc.*, is not permitted to be corrected by judicial interpretation so as to include a person selling as principal,[23] and where an act punishes the fraudulent removal of assets by specified officials or other employees of an establishment receiving on deposit the money of such (instead of: of other, or, of any) persons, it is applied in accordance with the obviously unintended narrow scope of its literal terms.[24]

[19] English Postponement of Payments Act, 1914, referring to a proclamation of August 3d, which was actually dated August 2d.

[20] Lewis-Sutherland, Statutes, Sec. 412.

[21] "For every violation of the first *and* second sections of this act"—People v. Swatser, 1 Dak. 295; see also Haney v. State, 34 Ark. 261.

[22] U. S. v. Ten Cases Shawls, 2 Paine 162, Fed. Cases No. 16448.

[23] State v. Squibb, 170 Ind. 488, 84 N. E. 969.

[24] State v. Traylor, Miss., 56, So. 521.

The definition of a common towel as one intended or available for common use by more than one person without being laundered after *such* use [25] could be given sense, if "each use" were substituted for "such use," but the statute being penal, it is extremely doubtful whether a court would make this correction. Clerical errors in the final draft of a customs tariff act have been acquiesced in by the Treasury Department, where the effect of the wrong placing of punctuation or parenthesis was to relieve the importer from a duty concededly intended to be imposed.[26] But the correction will be made if it will operate in mitigation of a penal statute, so where the amendment to an act forbidding the carrying of concealed weapons, by striking out too many words from the clause specifying the legitimate purposes, would on literal reading have left the statutory privilege of carrying weapons senseless.[27]

Defects of Thought.—It may be urged that a liberality of construction similar to that applied to plain verbal errors should be extended to obvious imperfections of thought, particularly such as represent familiar types of mental lapse. The point is controversial in the law of wills. If a testator gives to A for life, and if A die without children, then to B, the inference is almost irresistible that he meant to give to A's children if he should leave any. A mere negative by way of exception may perhaps legitimately support the implication of an opposite positive provision on failure of the excepted contingency, as a preference to the alternative of leaving a situation altogether unprovided for.

There are well-known English and American cases in which the obvious intent of the testator has been permitted to prevail in the absence of an expression of an intent, when according to strict rules of construction intestacy would result. The writer is not acquainted with any similar or analogous case in the construction of statutes (where the equivalent of resulting intestacy would be the continued application of common law

[25] Laws Virginia, 1916, ch. 278.
[26] Re Schilling, 53 Fed. 81; Craies, Statute Law, p. 424.
[27] Earhart v. State, 67 Miss. 325.

rules), and the presumable scarcity of such cases, if any, attests the care which is after all devoted to the drafting of statutes.

Non-literal Construction.—Courts have not hesitated to supplement or vary the text of a statute where a literal reading would without any apparent reason have contravened settled principles. Several states have undertaken to transform an estate in fee tail into a life estate in the first taker with a remainder in fee simple to the succeeding tenant in tail. In the statutes the latter is described as the person to whom the estate would on the death of the first donee in tail first pass according to the course of the common law. By construction, the determination of the remainderman is controlled by the statute of descent, and not by the common law, in order to avoid the anomaly of reinstating the rule of primogeniture for that particular case.[28]

A statute of Illinois provides that if a legacy is given to a child of the testator, and the child dies before the testator leaving issue, such issue in the absence of an express different provision should take the legacy intended for the child, but if no such issue survive the testator, the estate given by the legacy shall be considered as intestate. The common law rule is that if the legacy is specific or a stated amount, and there is a residuary bequest, the lapsed legacy falls into the residue; and since no explanation can be given why this rule should be departed from, it may be reasonable to construe the statute as though the saving clause for the event of the non-survival of issue were left out.

Restrictive Interpretation.—Statutes Whether Controllable by Equity.—The power of non-literal construction has been chiefly urged for the purpose of reading into a statute unexpressed exceptions demanded by equity or by policy. It seems to have been believed at one time that statutes could be controlled by established doctrines of equity.[29] On this ground exceptions were read into the statute of frauds,[30] and the opera-

[28] Kales, Future Interests in Illinois, Sec. 118.
[29] See, "The Equity of a Statute," 58 U. of Pa. L. Rev. 76.
[30] Walker v. Walker, 2 Atk. 98, 1740.

tion of registration or recording acts was qualified by the equitable doctine of notice,[31] while in Virginia an early decision applied to the registration act of that state the maxim that equity will not relieve against a statute.[32] The judicial restriction of the statute of frauds has subsequently been criticized, and it has been said that the former judicial practice can no longer be justified now that statutes are enacted with a view to equitable as well as legal doctrines;[33] thus the defective excution of a power of appointment is not aided where the execution is controlled by a statutory provision.[34]

Statute Whether Controllable by Established Policy.—To support an implied exception on the ground of policy, the policy ought to be one firmly established. The federal constitution extends the judicial power of the United States to all suits arising under the laws and constitution of the United States, while the Eleventh Amendment excepts from federal jurisdiction suits brought against a state by the citizen of another state. It was contended that a citizen might sue his own state on a cause arising under the laws and constitution of the United States, as a clear implication from these provisions. But the Supreme Court considered the principle of non-suability of the state so firmly established, that it would not permit its abrogation as a mere matter of inference, and an exception was therefore read into the original clause of the constitution.[35]

Perhaps the most striking instance of restrictive interpretation is found in connection with the Contract Labor Law of 1885. The act forbids the bringing into the country of persons under contract to perform labor or service of any kind, carefully specifying certain exceptions. By unanimous decision it was held, that a minister of the church was not within the spirit of the exclusion act, though not expressly excepted.[36]

[31] Le Neve v. Le Neve, 1 Amb. 346.
[32] Knight v. Triplet, Jefferson (Va.) 71.
[33] 1876, 2 Ch. D. 291, 297.
[34] 1900, 1 Ch. 442.
[35] Hans v. Louisiana, 134 U. S. 1.
[36] Holy Trinity Church v. U. S., 143 U. S. 457.

The decision made much of the power and duty of a court to interpret a statute according to its spirit and not according to its letter; but in view of the fact that the implied exception was in deference neither to an established policy nor to a strong equity it would be most unsafe to rely upon this decision as a precedent, and it is clear that a similar construction would have been impossible if the result would have been to impose a restriction or penalty instead of relieving therefrom.

Restrictive Interpretation to Prevent a Murderer from Reaping the Benefit of His Crime.—The question of the judicial power of restrictive interpretation has been particularly discussed in the cases in which an inheritance or devise or dower or the amount of an insurance policy was claimed by one who had by murder caused the death which was the basis of the claim. The doctrine that a devisee is incapacitated by his crime from taking the devise was first propounded in New York,[37] but subsequently the court shifted its ground and declared that while the statute would have its operation in the first instance, the wrong would be corrected in equity by preventing the devisee from retaining the fruits of his crime.[38] Here then the court, after all, finally refused to read an unexpressed exception into a statute in order to carry into effect a theory of natural justice.

The question has since repeatedly come before American courts, and by a very decided preponderance of authority they have declared themselves to be without power to override a plain statutory rule in view of conditions not foreseen or provided for by the legislature.[39] A contrary view is taken in Tennessee,[40] and in Missouri.[41] In the latter case the power of restrictive interpretation, the judicial power to control the

[37] Riggs v. Palmer, 115 N. Y. 506.

[38] Ellerson v. Westcott, 148 N. Y. 149.

[39] 256 Ill. 180; 182 Ind. 289; 125 Ia. 449; 72 Kans. 533; 41 Nebr. 61, changing 31 Nebr. 61; 100 N. C. 240; 53 Oh. St. 668; 170 Pa. 203; 185 S. W. 487 (Ky.).

[40] Box v. Lanier, 112 Tenn. 393, a case of an insurance policy, not of a statute.

[41] Perry v. Strawbridge, 209 Mo. 621.

letter of the statute by the spirit of the law, is claimed very emphatically, but the decision merely serves to place in strong relief the general unwillingness of courts to assume a similar responsibility. Obviously, the controlling difference between this class of cases and the Trinity Church case [42] is that in the latter the effect of liberal construction was purely relieving and beneficial, while in the inheritance cases it would be to impose a forfeiture.

Extensive Interpretation and Analogy.—Analogy is one of the main pillars of the common law. For it means after all merely that principles recognized in the administration of justice should be carried to their legitimate consequences wherever they are applicable. The rejection of an analogy means either a differentiation in principle (showing that the claim of analogy has no basis), or it stamps the rule of the common law which the court refuses to extend as one based upon authority only, and not on reason or principle.

Analogy may be said to enter into the application of statutes in so far as a statute leaves room for the operation of common law principles. It is true that where a statute extends a relation already subject to common law rules, there is no need to resort to analogy; thus it goes without saying that if a statute introduces adoption, the ordinary rules of the law of parent and child as to custody, services and support apply, and if copyright or patent are recognized as species of property, they become subject to the law of wills and administration. But a real instance of analogy seems to be furnished where legislation introduces absolute divorce in addition to, or in place of, separation from bed and board; in that case it seems proper to accept by analogy the defences of condonation or recrimination, as has been done by American courts.

Where a statute imposes upon an employer the duty to give to a discharged employee a card stating the reasons for the discharge, it may be legitimate to apply by analogy the defence of privileged communication developed in connection with the

[42] Holy Trinity Church v. U. S., *supra*, note 36.

law of libel, and the denial of that defence by an American court may justly be questioned.[43] In these cases the statute creates a relation so like a common law relation that since the new relation must be governed by some principle, the common law principle should be applied; the only alternative is to contend that a statute must be read without reference to outside rules of law, which in the clearance card case would mean that there could be no liability even for a malicious assignment of an unfounded charge.

Abrogation of Common Law Rules by the Spirit of New Legislation.—A problem closely allied to that of analogy is created by the fact that statutes may change common law relations so radically, that beyond the scope of the express statutory provision the continued application of the common law would be inconsistent with the spirit of the newly created relation. Thus married women's acts have rarely undertaken to deal comprehensively with the relation of husband and wife, as logically affected by making the married woman capable of holding property and contracting; they do not always speak of the relation of the husband to the wife's torts, of the estate by entirety, or other kindred matters. If the courts hold common law rules abrogated by the spirit of the new statute—and it should be observed that authority is much divided upon the point—they do not construe the meaning of the statute, but deal with the common law and with the controversial problem whether rules of the common law disappear where their reason no longer holds (*cessante ratione legis cessat lex ipsa*). On the basis of the altered relation a court may go so far as to eliminate an existing special rule of law, but it can hardly create new obligations not previously existing. Thus it has not been suggested that the new rights of a married woman impose upon her new duties of support, but correlative positive obligations of this kind can only be recognized if created by legislation.

General Exclusion of Analogy.—The true problem of analogy may be stated this way: a statute has altered common

[43] St. L. & S. W. R. Co. v. Griffin, 154 S. W. 583 (Texas).

law principles with reference to one relation; another relation not covered by the terms of the statute involves the same or similar principles: can the new relation be said to be within the spirit though not within the letter of the statute? The principle of literalness stands in the way, or, to put it in another way, most statutes deal with principles only in the form of rules, and a principle is flexible while a rule is not. The law of prescription is in America common law and expresses a principle with regard to easements analogous to the principle involved in the statute of limitations which applies to corporeal hereditaments; the traditional period of the statute of limitations having been twenty years, such is also the common law period of prescription. If the period of limitation is by statute reduced to fifteen years, the courts correspondingly reduce the time for prescription.[44] But if the period of prescription is fixed by statute, as it is in England (1832), it does not alter automatically by a reduction of the period of the statute of limitations from twenty to twelve.[45]

It would probably be accepted as an undisputed proposition of English and American law that statutes are not extended by analogy. A statute of Massachusetts provides for the apportionment of income between a tenant for life and a remainderman;[46] the courts will not extend this rule so as to apportion between personal representatives and heirs—a relation closely analogous.[47] Courts would take the position that such extension was not interpretation but judicial legislation. Where extensive interpretation has been undertaken, it has taken the form of stretching the meaning of words. The Twelve Tables gave a cause of action for cutting down trees; this was interpreted as including vines: extensive interpretation, to be sure, but not application of a statute by analogy, which implies a much greater attitude of independence toward the written law than would have been thought possible in the early stages of the

[44] Tracy v. Atherton, 36 Vt. 503.
[45] English act of 1874.
[46] Rev. L. Ch. 141, Sec. 24, 25.
[47] Dexter v. Phillips, 121 Mass. 178.

Roman Law. A Nebraska statute avoids testamentary gifts to subscribing witnesses (thereby saving the will); this was interpreted as meaning attesting witnesses, thus extending the application of the statute to nuncupative wills.[48] Some courts have accomplished the more difficult feat, in the same type of statute, of including under the term witness the husband or wife of the witness by reason of the unity of interest,[49] but other American courts have justly declared this to be impossible,[50] and the object was attained by an amendment of the statutes in question. When in Illinois the courts extended the absolute right of the widow to share in her deceased husband's estate beyond the terms of the statute, they relied less upon the construction of a particular statute than upon "a sort of common law" that had grown up in the state in harmony with an entire course of legislation.[51] It is characteristic that leading English and American treatises on statutory construction do not even refer in their indices to the term "analogy", and the few cases in which the terms of a statute have received an extended application beyond their possible literal meaning, are clearly exceptional or anomalous;[52] there is no doctrine in this respect comparable to the doctrine that implied exceptions may be made from a statute on the ground of equity or to harmonize it with common law principles. If certain old English statutes have been extended beyond their terms in ways which would now be thought impossible, this must be attributed to the fact that statutes at that time were occasionally drawn with great looseness, and the line between royal and legislative power not clearly observed, so that a specific authorization by Parliament served as a warrant for a general alteration of judicial practice.

It has been said that the judge-made rule of law which creates a presumption of death from seven years's absence unaccounted for, can be traced to the establishment of such a pre-

[48] Godfrey v. Smith, 73 Neb. 756.
[49] Decisions of Maine and New York, see 25 Me. 493; 1 Johns. Cas. 163.
[50] 106 Mass. 474, 150 Ill. 253.
[51] Taylor's Will, 55 Ill. 202.
[52] See Lewis-Sutherland, 587-599.

sumption for specific cases by statute;[53] but according to common law doctrine this is not an extension of the application of a statute by construction, but a development of common law upon the model of legislation; just as the period of prescription follows the statute of limitations. In an early case indeed the seven year statute was applied by analogy to persons "within the equity" though not within the strict letter of it.[54] This was true extension by analogy, but the case was almost within the letter of the statute.[55]

Evasion of Statute by Keeping Out of Its Letter.—In certain cases it might be urged that an analogous extension of statutes is demanded in order to prevent fraud. The type of cases is that a statutory prohibition is circumvented by adopting an equivalent arrangement not covered by the terms of the statute. *E. g.*, the law forbids a married woman to dispose by will of more than one-half of her personal property without her husband's consent;[56] the married woman makes a gift *mortis causa* of substantially all her personal property; this is held not to be within the prohibition of the statute.[57] A general doctrine making fraud upon statutory rights illegal would cover this point, and substantially would in many cases lead to an analogous extension of statutes; but there is no such doctrine known to our law, or in other words, it is considered legitimate to evade, if possible, the effect of a statute, by keeping outside of its terms, although what is done violates its spirit.[58] There is, thus, no question that a collateral inheritance tax statute can be evaded by making gifts though in contemplation

[53] 19 Car. II, c. 6; Thayer's Prelim. Treatise on Evidence, pp. 319-324.

[54] Holman v. Exton. Carth., 246, 1692.

[55] The rule that statutes will not be extended by analogy was carried to an extreme and unreasonable length when it was held that an act providing that a child born to testator after the making of his will without providing for such child, should succeed to his intestate portion of his father's estate, could not be applied to the mother, after married women had been enabled to make wills. Cotheal v. Cotheal, 40 N. Y. 405. To construe father as meaning parent would have been within the legitimate bounds of judicial power, although the Court denied this. Two judges dissented, and the General Term had reached the opposite conclusion. See also Roton's Will, 95 S. C. 118, 78 S. E. 711 (widow including widower).

[56] Massachusetts General Statute, Chap. 108, Sec. 9.

[57] Marshall v. Berry, 13 Allen 43.

[58] Craies Statute Law, pp. 75-77.

of death, if these are not covered explicitly. A considerable part of the art of drafting statutes consists in anticipating attempts at evasion and providing against them by sufficiently comprehensive language.

A statute of Kentucky undertakes to guard against this kind of evasion by providing that no trick, device, subterfuge or pretence shall be allowed to evade the operation or defeat the policy of the law against selling intoxicating liquors without a license,[59] and the courts have succeeded in holding that sales made across the border should be treated as having been made in reality within the state;[60] but these decisions did not perhaps exceed the legitimate bounds of construction.[61] Courts would probably decline to travel far beyond the letter of the statute to supplement defects of legislation.

Analogy and Codification.—The French law offers some very striking instances of the development of code provisions on the basis of analogy. Thus Article 1423 of the Code Civil authorizes the husband to dispose by will of his share of the community property; the like authority is accorded to the wife by French "jurisprudence."[62] Article 109 of the Commercial Code allows purchase and sale to be proved by witnesses in the discretion of the court; judicial practice has extended this to commercial transactions generally.[63] The Commercial Code makes bills of exchange negotiable; in practice negotiability is extended to other securities.[64]

This may be attributable in part to the peculiarly lapidary style of the French codes; note *e. g.*, the phrase *"en fait de meubles possession vaut titre,"* which demands supplementation by construction. But generally speaking, it may be contended that principles of interpretation which are suitable to statutes in a system of unwritten law are not necessarily applicable to

[59] Statutes 1894, Sec. 2570.
[60] 127 Ky. 480, 188 S. W. 332, 366, 398.
[61] See 121 Ky. 689.
[62] Dalloz Code, Sec. 1423, note 19; Beaudry XIV, No. 678.
[63] Beaudry Obligations, No. 2514 Sq., 2575.
[64] Lyon-Caen IV, 156.

a code;[65] for a code is apt to lay down principles rather than rules, and if a code abrogates the older common law, its inevitable gaps must necessarily be filled by judicial construction, and some codes expressly refer to analogy as a guide. Only for the criminal codes this principle seems now generally repudiated (*"nulla poena sine lege"*); we find analogy first expressly excluded by the Austrian Criminal Code of 1787.

Gény, the most philosophical expounder of French theories of interpretation, is a strong advocate of the principle of liberality, both by way of extension and by way of exception, where a legislative policy is not emphatically expressed, and we gather from his observations that the practice of the courts is more liberal in that respect than the opinion of text writers. Thus he refers to the opinion "so widely held by writers ('doctrine'), in spite of the unceasing protests on the part of the courts ('jurisprudence'), which, in the absence of a specific provision, relentlessly and indiscriminately denies any legal effect to transactions between an apparent heir and parties dealing with him in good faith," and he condemns a "brutal analysis of statutes," presupposing the plenitude and perfection of the written law.[66] No English or American court or lawyer would think it possible to protect the *bona fide* purchaser from an heir against a subsequently discovered devisee, in the absence of special protective legislation, such as is found in New York and Massachusetts.

Perhaps it is true that Anglo-American jurisprudence is exceptionally strict in accepting the logical consequences of legal rules and principles whether the results accord with a sense of equity or not, and maintains that attitude equally towards statutes and the common law. If so, this is probably due to the heightened sense of responsibility which is created by the consciousness of great judicial power, and which makes it a deliberate policy to disclaim any semblance of arbitrary discretion.

[65] For a discussion of "Judicial Powers of Interpretation Under Foreign Codes," see 65 U. of Pa. L. Rev. 39.

[66] Gény, Sec. 96.

English text writers refer to the greater spirit of freedom manifested by the courts of Scotland toward the legislation of that country, and it has been said of Hungary, that it was an established tradition that judges were entitled to improve bad laws. The operation of the rule of precedents undoubtedly tends to bind interpretation by law.

Conceding that this spirit of interpretation is part and parcel of our law, it may yet be urged that in cases of genuine ambiguity courts should use the power of interpretation consciously and deliberately to promote sound law and sound principles of legislation. That object is far more important than a painstaking fidelity to the supposed legislative intent. This intent is in reality often a fiction, and the legislature is fully aware that any but the most explicit language is subject to the judicial power of interpretation. That power might, therefore, as well be frankly and vigorously used as a legitimate instrument of legal development and of balancing legislative inadvertence by judicial deliberation. English and American legal sentiment, however, is decidely against the exercise of such judicial power, which is strongly advocated by new schools of jurisprudence in France and Germany, and it seems strange to find German writers refer to the power of English judges as a model to be followed in Germany.[67]

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[67] Note the references to a supposed *"Richterkönigtum"* (judge-kingship) in England by so eminent a German publicist as Adickes, the former Mayor of Frankfort on the Main. A recent civil law writer regards the English and American judge-made law as an extension by analogy of the statute law which "according to the prevailing English theory" is the basis of the application of law! (Professor Kiss in *Jherings Jahrbücher,* Vol. 58, p. 484).