1940

The Ambiguity of Unambiguous Statutes

Charles B. Nutting

THE AMBIGUITY OF UNAMBIGUOUS STATUTES

By CHARLES B. NUTTING*

"WHERE a statute is plain and unambiguous, there is no room for construction. However, in construing a statute, intention governs the letter of the law and the literal meaning of statutory language must give way to the purpose of the enactment. Statutes will not be construed to lead to absurd results if avoidable. But the rule that statutes must be given a reasonable interpretation applies only where there is room or necessity for interpretation and a hard and unjust application of a statute does not authorize the court to change its plain provisions."

Reason appears not only to totter but permanently to vacate her throne when these sentences are read. The horrendous effect is obtained, however, merely by a horizontal rather than a vertical arrangement of the passages. They represent selected headnotes from the Fourth Decennial Digest. The textual treatment of the same matters to be found in legal encyclopedias is less apparently absurd only because a greater space separates the statements. In no field of the law is language used with a more wild disregard of consequences than in statutory interpretation; nowhere is precision of greater importance. This chaos is doubtless due in part to a general lack of the type of critical analysis which has been devoted to other subjects. Pending the arrival of a Williston or Wigmore of legislation, it behooves lesser lights to attempt, however inadequately, to shovel out portions of the Augean stables. Though statutory interpretation be largely an art rather than a science, and hence incapable of reduction to definite formulae, much good should result from a general recognition of problems and definition of principles. Even this may prove to be impossible. If it is, a frank recognition of the fact is better than continued resort to empty phrases such as those quoted above under the delusion that they stand for something in the world of reality.

What is ambiguity? Resort to Webster produces the following: "Ambiguousness in meaning arising from language admitting of more than one interpretation; duplexity in meaning." Undaunted, we refer to "ambiguous," and discover that it indicates that which is "capable of being understood in either of two or more possible senses; equivocal." Light begins to dawn.

*Professor of Law, University of Nebraska.

A word is ambiguous if it has two or more possible *meanings*. But what is meaning? Immediately gloom descends once more. To formulate an adequate conception of "meaning" for the purposes of statutory interpretation is a task of surprising difficulty. "Words," say Ogden and Richards, "as everyone now knows, 'mean' nothing by themselves. . . ."[1] But this general knowledge seems not to have permeated some tribunals of last resort.[2]

If words "mean" nothing by themselves, it seems the sheerest nonsense to assert that words are either ambiguous or unambiguous. Students of semantics seem to agree, though perhaps not all would adopt the same terminology, that a word has "meaning" when it symbolizes a referent.[3] Words such as "fascism" or "democracy" have no "meaning" because they do not stand for any referent. The word "apple" may have "meaning" if it stands for a particular object, the existence of which may be verified. Complex symbols such as "contract," "ownership" and "title" may have "meaning" since they stand for a group of referents, each of which must be present.[4] It might be

[1]The Meaning of Meaning (3d ed. 1930) 9. The authoritative character of this work, which has been used extensively in the preparation of the following article, may have been overemphasized, due to the present writer's inexperience in the field of semantics. It is intended, however, merely to cite it as representing an interesting and reasonable point of view, and to follow some of its implications as they relate to statutory interpretation.

[2]It is believed, for example, that much of the difficulty underlying the application of the contracts clause to legislation enacted under the "police power" is due to the assumption on the part of some courts that the word "contract" has a settled "meaning" which can easily be ascertained and applied. Cf. the following: "I necessarily conclude that the prohibition against the impairment of contracts by the legislature is so clear that it is only by an unwarranted judicial distortion of its plain provisions that the moratory law could be upheld. The meaning of the constitutional provision is so clear that it is not subject to construction. The idea that an existing emergency could change its meaning is clearly disproved by a reading of the simple language contained in the provision itself. . . ." Carter, J., specially concurring in First Trust Company v. Smith, (1938) 134 Neb. 84, 129, 277 N. W. 762, 784. But if the word "contract" may "mean," among other things, an agreement entered into between parties in the light of existing laws, including the power of the legislature to act in furtherance of the general welfare, the invalidity of moratory legislation becomes less obvious. As to the "meaning" of the expression "freedom of contract," compare Adkins v. Children's Hospital, (1923) 261 U. S. 525, 43 Sup. Ct. 394, 67 L. Ed. 785, and West Coast Hotel Co. v. Parrish, (1937) 300 U. S. 379, 57 Sup. Ct. 587, 81 L. Ed. 703.

[3]Ogden and Richards, The Meaning of Meaning (3d ed. 1930), especially chapter V. "Referent" as here used, "means" the thing or things for which the word or symbol stands. See, passim, Stuart Chase, The Tyranny of Words (1938) and Goldberg, The Wonder of Words (1938) especially chapter XV. Cf. the use of "determinate" and "determinable" in Radin, Statutory Interpretation, (1930) 43 Harv. L. Rev. 863.

[4]These terms, of course, constitute a convenient type of shorthand which relieves lawyers from the necessity of indicating all of the elements

said that a word is ambiguous if it stands for more than one referent. But this is against the rules. Quoting again from Ogden and Richards, "One symbol stands for one and only one referent."[5] If a word is not a symbol it has no "meaning." If it is a symbol, it cannot be ambiguous. Therefore words either "mean" nothing or have but one "meaning." But Webster says that an ambiguous word is one which is "capable of being understood in either of two or more possible senses." This may indicate that if it is possible for hearers to find more than one referent for a word it is ambiguous. It is possible, though perhaps not reasonable, for hearers to make more than one reference when any word is pronounced. Thus, when the word "apple" is heard the reference "orange" or "tomato" may be made and so on, ad infinitum. Or, if the word "dog" is pronounced, reference to either "Rover" or "Spot" is possible. If this position is taken, all words become ambiguous. This tends to become discouraging, and induces a type of verbal paralysis which is common to amateurs in the field of semantics.

Experts on statutory interpretation, however, have never studied semantics. This is perhaps a good thing. At any rate, certain basic assumptions seem to underly the interpretive process. One of these appears to be that "intention" has something to do with interpretation. In the case of private integrations[6] it is usually said that words are to be interpreted in accordance with the "intention" of the parties.[7] When statutes are

which they include whenever it becomes desirable to describe the situation which they connote. When the word "contract" occurs, for example, lawyers will understand, subject to certain qualifications of the type mentioned in note 2, supra, that it includes the elements of legally competent parties, apparent mutual assent, consideration (where necessary), and lawful purpose. Each of these elements may be reduced further. The fact that the word is highly complex does not destroy its validity, but it becomes dangerous to use in situations where extreme precision is required. Cf. Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, (1913) 23 Yale L. J. 16.

[5]Ogden and Richards, The Meaning of Meaning (3d ed. 1930) 88.

[6]The term "integration" is here used as it is employed in the Restatement of the Law of Contracts of the American Law Institute (1932). "An agreement is integrated where the parties thereto adopt a writing or writings as the final and complete expression of the agreement. An integration is the writing or writings so adopted." Sec. 228. In general the Restatement has been cited hereinafter in support of broad propositions which do not require detailed examination.

[7]The following statement is typical: "Generally speaking, the cardinal rule in the interpretation of contracts is to ascertain the intention of the parties and to give effect to that intention if it can be done consistently with legal principles." 12 Am. Jur., Contracts, sec. 227. Compare the much more accurate statement in the Restatement of the Law of Contracts, sec. 230: "The standard of interpretation of an integration, except where

involved, the "intention" of the legislature is said to control.[8] This may indicate that the words of a contract or statute will be held by the courts to be symbols of the referents the parties or the legislature had in mind.[9] This assumes first that the parties and the legislature did have referents in mind; second, that all the parties and all the members of the legislature had the same referents in mind; and third, that it is possible to discover what the referents are. In the case of integrations by private parties, it seems obvious that this idea is not to be taken seriously. Not the "subjective intent," but the "objective manifestations of intent" are considered by the courts.[10] Thus, the fact that an integration is ambiguous in the sense that the parties actually had different referents in mind, or "meaningless" in the sense that the words used did not symbolize referents, becomes irrelevant in many cases. The court will select its own referents, and hold that the words are symbols of those referents. In other words the court will declare that an integration "means" what it (the court) thinks it "means."[11] This will ordinarily be explained by the statement that the parties have made an objective manifestation of their intention in clear and unmistakable terms, and

it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean." See also secs. 231, 233.

[8]Again, a typical formulation is given instead of a cumulative citation of authorities: "In the interpretation and construction of statutes, the primary rule is to give effect to the intention of the legislature." 25 R. C. L., Statutes, sec. 216.

[9]Compare: "A symbol refers to what it is actually used to refer to; not necessarily to what it ought, in good usage, or is intended by an interpreter, or is intended by the user to refer to." Ogden and Richards, The Meaning of Meaning (3d ed. 1930) 103.

[10]"It is customarily said that mutual assent is essential to the formation of informal contracts, but is should further be stated that the mutual asssent must be manifested by one party to the other, and except as so manifested is unimportant. In some branches of the law, especially in the criminal law, a person's secret intent is important, but in the formation of contracts it was long ago settled that secret intent was immaterial, only overt acts being considered in the determination of such mutual assent as that branch of the law requires." Williston and Thompson, Contracts (rev. ed. 1936) sec. 22. See Restatement of the Law of Contracts, sec. 20.

[11]Perhaps this is not an entirely fair way of putting it. It is not intended to convey the suggestion that courts are often capricious or unreasonable. The "meaning" given an integration by the courts will usually coincide with that which would be given it by any other unbiased observer. But since the courts actually make the decisions, it is their "meaning" which is really adopted rather than that of a hypothetical reasonable man.

that they cannot vary those terms by the introduction of parol evidence to show their actual intention.[12]

However, on occasion, the court will not be satisfied as to what the referent is. In this case, the integration will be called "ambiguous" and an attempt will be made to determine the referent understood by the parties. Here, moral considerations seem to enter into the picture. If each party is innocent with respect to the existence of the "ambiguity," the words used will be held to symbolize the referent which each party had in mind. If it happens that the court is satisfied that each party had the same referent in mind, it will say that a "contract" is present; otherwise there will be no contract. On the other hand, if one of the parties was at fault with respect to the occurrence of the "ambiguity," then the referent the other party had in mind is selected as being the true one, and it will be said that there is a "contract" on the basis of the "meaning" attached by the innocent party.[13] Therefore it appears that, dependent on such circumstances as have been indicated, a "contract" may "mean" what both parties think it "means," what neither party thinks it "means" or what one of the parties thinks it "means."

Much the same sort of thing is to be found if statutes rather than private integrations are considered. Finding the "intention" of the legislature is said to be the goal of interpretation. One is met here by a difficulty in limine. Is there such a thing as legislative intention? The views expressed by professors are, as usual, diverse.[14] But the courts seem unaware of the problem. Assuming the existence of legislative intention, they have proceeded to declare what it is. When they feel satisfied without further investigation that they know what the statute "means." it is plain and unambiguous, leaving no room for interpretation. When the "meaning" is felt to be obscure, various extrinsic aids are employed in discovering it. One of the principal difficulties for the innocent bystander is to decide when a statute is suffi-

[12]Of course this does not take into account the possibility of reforming an integration in such a way as to make actual intent effective. See Restatement of Contracts, sec. 238 (c).

[13]Restatment of Contracts, sec. 233.

[14]The positions taken may be summarized as follows: There is no such thing as legislative intention. Radin, Statutory Interpretation, (1930) 43 Harv. L. Rev. 863, 870. Legislative intention exists and may frequently be established. Landis, A Note on Statutory Interpretation, (1930) 43 Harv. L. Rev. 886, 888. Whether or not legislative intention exists, it is useful to act as if it did. F. E. Horack, Jr., In the Name of Legislative Intention, (1932) 38 W. Va. L. Q. 119, 126.

ciently "ambiguous" to permit the use of extrinsic aids to determine the true "meaning."

Tentatively, it would seem that the following things might be true regarding the "meaning" of a statute. Each member of the legislature might have precisely the same referents in mind, and it might be possible to discover what those referents are. This is extremely unlikely. The members of the legislative committee having charge of the statute may have had certain referents in mind, which may be shown by the committee reports or the statements of the member representing the committee on the floor. This sometimes happens, though the courts do not always pay much attention to the circumstance.[15] No member of the legislature may have had the referent in mind which it is sought to establish in a particular case. Perhaps this is the most common situation. No member of the legislature may have had anything in mind when the statute was passed. There are no statistics on this proposition.

All of these situations may conceivably come before the courts in the course of litigation. As a practical matter, it is believed that only the second and third are of any considerable importance. Courts decide these cases on the ostensible basis that the legislative intention is being discovered and applied. This must "mean" that a statute "means" what the legislature thinks it "means," i. e., that words used in a statute are symbols of the referents which the legislature had in mind when the statute was passed. All statutory interpretation therefore appears to disregard the fourth canon of symbolism suggested by Ogden and Richards, in that the state of mind of the users of the words is ostensibly the controlling factor.[16] It remains to be discovered to what extent the rule as stated can and should be applied.

To what extent is legislative intention relevant in statutory interpretation? It is suggested that evidence of the intention of legislative committees should be regarded as evidence of legislative intention for this purpose[17] and further, that legislative

[15]An outstanding example of the refusal of a court to follow the legislative intention as revealed by the legislative history of the measure is the decision applying the provisions of the Mann Act to an isolated and non-commercial transportation of women for immoral purposes. Caminetti v. United States, (1916) 242 U. S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442. Cf. Church of the Holy Trinity v. United States, (1893) 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226.

[16]The Canon is set out in note 9, supra.

[17]It is not unreasonable to suppose that individual legislators who hear the explanation of a statute given by the person having charge of the bill

intention may be established by reference to former statutes, amendments and legislative procedure.[18] If the courts really act on the assumption that the intention of the legislature is controlling, then resort should be made in every case to every device by which intention may be shown. This would indicate that every statute is ambiguous as the term is used by the courts.[19] Just as an individual using words in a contract may, as a matter of subjective intention, have quite a different referent in mind when a word is used than would be ordinarily supposed by the other party, so the legislature may, through mistake or ignorance, select words which, in the mind of the reader, may cause quite a different reference than that which was contemplated. No matter how absurd the result might be, the court should, according to the rule stated, find the referent which the legislature had in mind. Thus, if an act were passed providing that all red-headed men should be subject to a poll tax of five dollars, and it were to appear by means of extrinsic evidence that the legislature really "meant" the statute to apply to all bald men, the court should adopt a construction which would carry out that intention.

Is such a statute "ambiguous" or "unambiguous"? If, as has been suggested, the statute "means" what the legislature thinks it "means," then it is a statute couched in unambiguous terms, applying to all bald men. If the test is whether two or more referents might be found for it, then it is ambiguous. The reader of the statute would find the referent, "all red-headed men," while the legislature, by hypothesis, did in fact find the referent "all bald men." But if the case were actually litigated, it is a safe assumption that the court would find the statute to be unambiguous and to apply to red-headed men. This would seem to indicate the futility of trying to solve problems of interpretation by creating the artificial categories of "ambiguous" and "unambiguous" statutes.

Probably no one would question the correctness of the decision in the supposed case. It would be intolerable to permit the legis-

on the floor and who thereafter vote in favor of the passage of the measure acquiesce in the statement made. See Landis, A Note on Statutory Interpretation, (1930) 43 Harv. L. Rev. 886.

[18]Landis, A Note on Statutory Interpretation, (1930) 43 Harv. L. Rev. 886.

[19]"Interpretation is but comparison and judgment and both of these processes take place before the court can determine the existence of ambiguity. Nothing is ambiguous in the abstract; or else, everything in the abstract is ambiguous." Horack, In the Name of Legislative Intention, (1932) 38 W. Va. L. Q. 119, 121.

lative intention to control. We are forced to the conclusion, therefore, that in some cases, legislative intention, even where it can be established, is irrelevant. This seems to destroy the very foundation of statutory interpretation as it has been expounded in the cases. However, this result has its counterpart in situations involving private integrations. It is suggested that the parol evidence rule as applied to private integrations, and the so-called rule that where a statute is plain and unambiguous there is no room for construction, are different aspects of the same thing. What the basis of this notion is must now, if possible, be discovered.

While students of semantics may explore the problem of "meaning" at their leisure, courts must decide cases. When a writing, whether contract or statute, is the basis of litigation, the court must discover a "meaning" or else leave the parties without any authoritative determination of their rights. It is probably true that at least the simpler words are generally understood to have fixed and determinable referents.[20] Were this not so, communication between human beings except by gestures would be impossible. Perhaps it is not indulging in too wild an assumption to state that courts are reasonably conversant with the "meanings" of words in popular usage, and will interpret words in such a way as to follow usage. If private parties wish to adopt "meanings" for words which differ from those usually understood, they may doubtless do so for their own purposes, but it is clearly unreasonable for them to expect the machinery of justice to be set in motion in order to follow their own caprice. If contracts are to be interpreted by courts, the parties must use the language of the court, and of other people in general, rather than a private code.[21] The same thing is true with respect to the use of words by legislative bodies. Further, it should be remembered that statutes are written and published so that individuals may govern their conduct in accordance with the legislative command. In such circumstances it is not unreasonable to insist that the burden of communication is on the legislature, and

[20]For example, if a housewife asks her grocer for a dozen oranges, it is extremely unlikely that even the most eccentric purveyor of foods would present her with a sack containing twelve onions. On the other hand, if her request is for citrus fruit, she should probably not be heard to complain if she receives lemons.

[21]Of course parties should be permitted to express themselves in accordance with recognized usage, and to make use of technical and trade terms subject to generally recognized qualifications. Restatement of Contracts, secs. 246-249.

that if words having a usually accepted "meaning" are used, that "meaning" should be applied no matter what the legislature may have intended.

The idea expressed by the statement that when a statute is plain and unambiguous there is no room for construction and by the parol evidence rule seems to be, then, that when words are used which are generally understood to have certain "meanings" the court will not consider any extrinsic evidence pointing to an intention to adopt another "meaning." It may be true that when such language is used the intended "meaning" will usually coincide with the understood "meaning," so that there is some justification for the expression frequently found in opinions that the legislature (or the parties) are "presumed" to intend the latter.[22] But the significant thing is that it makes no difference whether such is the case or not. In this situation intention is irrelevant. It would not be followed even if established.

There are, of course, many situations in which legislative intention, as the term is here used, may be discovered and applied. These seem to be cases in which the court feels that any one of a number of "meanings" may reasonably be adopted. Since the court has no strong convictions on the subject, it is willing to discover, if possible, what the legislature had in mind.[23] Is a tomato a "fruit" or a "vegetable?"[24] Is a jig-saw puzzle a "game?"[25] Is a street railway crossing state lines a "common carrier by railroad?"[26] In instances of this sort, the statutes are

[22]See the cases listed in 25 R. C. L. Statutes, sec. 234, note 16.

[23]This is subject to the qualification that the statute must be clear enough to enable the court to attach some "meaning" to it. This is especially true in the case of criminal statutes, where the requirements of definiteness and certainty have been the subject of much litigation. See, e.g., Jennings v. State, (1861) 16 Ind. 335; see, passim, Aigler, Legislation in Vague Terms, (1923) 21 Mich. L. Rev. 831. Cf. F. B. Washburn & Co. v. United States, (C.C.A. 1st Cir. 1915) 224 Fed. 395 (What is a macaroon?)

[24]Nix v. Hedden, (1887) 149 U. S. 304, 307, 13 Sup. Ct. 881, 37 L. Ed. 745.

[25]White v. Aronson, (1937) 302 U. S. 16, 58 Sup. Ct. 95, 82 L. Ed. 20.

[26]Omaha etc. Ry. v. Interstate Commerce Comm'n, (1913) 230 U. S. 324, 33 Sup. Ct. 890, 57 L. Ed. 1501. In Nix v. Hedden, (1887) 149 U. S. 304, 13 Sup. Ct. 881, 37 L. Ed. 745, the inquiry was directed to the "meaning" of the words "fruit," "tomato" and "vegetable," while in the Omaha Railway Case, the question really seems to have been whether the road in question was the sort of common carrier which congress intended to include under the terms of the Interstate Commerce Act. It has been suggested that a distinction may be drawn between determining the "meaning" of a word "as a word" and determining the application of a word of "known meaning" to different sets of facts. Endlich, Interpretation of Statutes (1888) sec. 9. This seems to be equivalent to saying that words "mean" something by themselves. It is suggested that such a distinction

apt to be termed "ambiguous" as a prelude to investigating the state of mind of the legislature. The word "ambiguous" in this connection appears to "mean" that the court is not satisfied with the "meaning" of the statute and wishes to look further before it decides the case. This seems to be the only situation in which legislative intention actually has an ascertainable effect in statutory interpretation. Even here, however, courts at times refuse to give effect to legislative intention revealed by extrinsic evidence, preferring to rely on rules for the interpretation of written instruments as an aid to discovering the supposed intention from the words of the statute.[27]

There remains the vast area in which courts are called upon to decide cases involving statutes as to which there is no discoverable evidence of legislative intention other than that disclosed by the words of the enactment. Especially in regard to state laws this is the rule rather than the exception. Here, courts are prone to state that the case is decided on the basis of what the legislature must have intended. The legislature is "presumed" to be reasonable.[28] The legislature is "presumed" not to intend a harsh and inequitable result.[29] Again, the statute which is

is productive of confusion and should not be followed. The real issue in cases in which the court is satisfied with the "meaning" of the words used by the legislature is whether it is good policy to apply the statute in a given situation. Whether or not the legislature intended the statute to apply may be relevant in arriving at a decision, but it is confusing to assert that the court is finding "meaning" or is interpreting the act in such a case.

[27]"I think it right to say that we have none of us acted on, or taken into consideration in the least, the speeches made in parliament. In fact, I think my brothers, who were not parties to the rule being granted, never heard of them at all; and they certainly have not read them. I express no opinion as to whether in a proper case a statement of facts might be moved from speeches in Parliament, but we have not paid the slightest attention to any of the speeches which were referred to in the affidavits on which the rules were removed." Lord Alverstone, C. J., in The King v. Board of Education, [1909] 2 K. B. 1045, 1072. This seems to represent the view taken by British courts. In the United States, certain types of extrinsic evidence usually are considered, but statements in debates made by private members are not referred to. However, committee reports, legislative history, statutes previously enacted relating to the same subject and other acts in pari materia are considered and, apparently, relied upon to a considerable extent. See, e.g., Duplex Printing Press Co. v. Deering, (1921) 254 U. S. 443, 41 Sup. Ct. 172, 65 L. Ed. 349; Church of the Holy Trinity v. United States, (1893) 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226; State v. Larimore, 4 W. W. Harr. (Del.) 153, 144 Atl. 867; United States v. Katz, (1926) 271 U. S. 354, 46 Sup. Ct. 513, 70 L. Ed. 986.

[28]E.g., United States v. Hartwell, (1868) 6 Wall. (U.S.) 385, 396, 18 L. Ed. 830; State v. Williams, (1910) 173 Ind. 414, 90 N. E. 754; Meroney v. Atlanta Bldg. etc., Ass'n, (1895) 116 N. C. 882, 21 S. E. 924.

[29]E.g., Adams v. Woods, (1804) 2 Cranch (U.S.) 336, 341, 2 L. Ed. 297; In re Meyer, (1913) 209 N. Y. 386, 103 N. E. 713.

plain and unambiguous on its face is said to leave no room for construction. And again it may be remarked that this constitutes an indication that the real intention of the legislature is considered irrelevant.

Finally there are the cases in which the court extends the provisions of a statute to cases which do not appear to be included in its terms, or refuses to apply a statute apparently applicable in a given situation. Much discussion has centered around the doctrine of the "equity of the statute," and its origins and scope have been thoroughly considered.[30] It is not proposed to continue the debate along these lines. However two points are pertinent to the present inquiry. In the first place, when a court gives an "equitable" interpretation to a statute it usually is giving it a "meaning" which is not apparent from its terms. In other words, to use the orthodox language, it is taking a statute which is "plain and unambiguous on its face" and concerning which there is therefore "no room for construction," and either applying it to a case not apparently covered by its terms[31] or refusing to apply it to a case in which it is apparently applicable.[32] Thus, "unambiguous" statutes are, in some situations, treated as if they were "ambiguous." This is a further illustration of the futility of using these terms as if they furnished a real basis for decision.

The second observation as to these cases is that once again legislative intention in the sense of real advertence to the particular situation involved is probably irrelevant. It would be conceded that in most instances of this kind the particular problem involved did not occur to the legislature. At any rate, evidence of legislative intention is generally lacking. Most courts resorting to the equity of the statute, either consciously or unconsciously, will make use of language tending to indicate that deference is being paid to the intention of the legislature. Since there is no real indication of what the legislature thought, it is necessary to accomplish this by the use of presumptions. "We will not presume that the legislature intended such a harsh and inequitable result." "The legislature could not have intended

[30]Thorne, The Equity of a Statute and Heydon's Case, (1936) 31 Ill. L. Rev. 202; Lloyd, The Equity of a Statute, (1909) 58 U. Pa. L. Rev. 76; De Sloovere, The Equity and Reason of a Statute, (1936) 21 Corn. L. Quart. 591; Pound, Spurious Interpretation, (1907) 7 Col. L. Rev. 379; Gray, Nature and Sources of the Law (2d ed. 1921) 179 ff.

[31]E.g., Turbett Twp. v. Port Royal Borough, (1907) 33 Pa. Super. Ct. 520. See Encarnacion v. Jamison, (1929) 251 N. Y. 218, 167 N. E. 422.

[32]E.g., Riggs v. Palmer, (1889) 115 N. Y. 506, 22 N. E. 188; United States v. Kirby, (1867) 7 Wall. (U.S.) 482, 19 L. Ed. 278.

the statute to apply in such a case as this one." As Professor Horack has indicated,[33] this constitutes speculation about what the legislature would have thought had it thought. An opinion which was sufficiently frank as to the analysis used in such a case might read as follows: "We are confronted with a case which must be decided. There is no evidence as to what the legislature thought about it. We feel that it would be unfair (unjust; inequitable) to make the statute cover this case. We believe that members of the legislature would have the same opinion. Therefore we hold that the statute is inapplicable."

It is suggested that the fourth sentence in the above statement involves a purely gratuitous assumption which might as well be eliminated as far as its bearing on the actual result is concerned. If the legislative intention can never be established either because there is no evidence of it or because there was none, it seems futile to pretend that it is actually being considered in the solution of the case. The court is actually giving the statute its own "meaning," and reference to the legislature is unnecessary except to preserve an illusion. Whether this technique is legitimate is beside the point as far as the present inquiry is concerned.[34]

It is a mistake to treat statutory interpretation as if it were completely distinct from the general field of the interpretation of writings. Almost every "rule" for determining the "meaning" of statutes has its counterpart in interpreting private integrations.[35] One gets the impression from studying the general problem of interpretation that legislative intention is felt to be entitled to greater respect than that of private parties, and that what would be referred to as "subjective intention" in contract law should, in the case of statutes, be given greater effect. This is perhaps due to the position which the legislature occupies as a branch of the government coordinate with the judiciary. But it is submitted that the result should not follow. The wide-

[33]Horack, In the Name of Legislative Intention, (1932) 38 W. Va. L. J. 119, 127.

[34]There would seem to be these alternatives: either the court must, in cases such as those mentioned above, give a statute its own "meaning," which will usually be influenced by what the court believes the legislature would have intended, and thus make the law effective, or it must declare that it is unable to find the "meaning" and refuse to give the statute any effect. It is submitted that the first alternative is preferable, except where no "reasonable meaning" can be attached to the statute. See infra, p. 521.

[35]This will be readily apparent to anyone who will scan the headings devoted to each subject in any of the standard legal encyclopedias or digests.

spread effect of statutes and their function as a guide to the future conduct of great numbers of persons should, it is believed, place a definite "burden of communication" on the legislature. One can have the greatest respect for the legislature as a co-ordinate branch of the government, and still insist on its duty to express itself in relatively intelligible language.

If carried to its logical conclusion, the view here expressed might result in a refusal on the part of courts to give any effect to a statute the "meaning" of which could not be discovered without resort to extrinsic evidence. It is believed, however, that this would place too heavy a burden on the legislature. Anyone who has had experience in the drafting of instruments, whether statutes or contracts, knows the impossibility of creating phrases which are free from doubt. Especially is this true in the statutory field where it is necessary to attempt to guard not only against ordinary perils but also against wilful misconstruction. If a statute may reasonably be understood to have more than one "meaning" it would seem to be constitutionally enforceable to be sufficiently informative, and the legislative intention, if ascertainable, should be controlling as to the precise "meaning."

In the light of the foregoing discussion the following suggestions may be made: The terms "ambiguous" and "unambiguous" as used in cases on statutory interpretation should be discarded as confusing and "meaningless." It should always be permissible for courts to discover the legislative intention if possible. However, once it has been discovered, it should be relevant to the solution of the case only if consistent with the "meaning" which may reasonably be attached to the words used. In other cases the "meaning" of the court is decisive. This will generally accord with the "meaning" which would be attached to the words by ordinary persons, but in some cases a different result may be reached because of considerations of equity or policy which, in the minds of the courts, are controlling.