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A A Symposium on Statutory Construction--Foreword

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A SYMPOSIUM ON STATUTORY CONSTRUCTION

FOREWORD

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Since even Professor Wade, the Faculty Editor of the *Vanderbilt Law Review,* has yielded to the theory of blurbs, who am I to gainsay him and deny myself the pleasure of expressing a word of warm appreciation for an admirable symposium on statutory construction? The symposium is illuminating not because it has spawned new ideas which will relieve lawyers from the hard, high tasks of advocacy or judges from the anguish of judgment. The abstract ideas in the papers, apart from their concrete applications, are not, I venture to believe, very different from what is found in a charming essay on statutory interpretation written nearly four hundred years ago, for which we are indebted to Professor Samuel E. Thorne of Yale.[1] Nor, indeed, has much been added by way of generalities to the wisdom of the resolutions in *Heydon's Case,* as reported in the robust English of Coke's Reports.[2]

The interpretation of statutes is merely one aspect of the interpretation of writings generally. Since man has been busy writing for a good long while, the problems of rendering what has been written are as old as composition itself. To be sure, thought has not stood still. It has been nourished by advances in scholarship in many directions, particularly pertaining to language and the relation of words to thought and feeling. Thus, by shrewd insight into the properties of the word "allowance" a very cultivated and learned judge may not only find his clue to the proper construction of an Australian tax act; he thereby opens up veins of helpful suggestions for construing wholly different statutes. " 'Allowance' is one of the many words," Mr. Justice Dixon of the High Court of Australia wrote, "which take their meaning from a context rather than affecting or controlling the meaning of other words of the context in which they occur. For, considered alone and at rest rather than at work with other words, it means the allowing

* Associate Justice, United States Supreme Court.

1. THORNE (ED.), A DISCOURSE UPON THE EXPOSICION & UNDERSTANDINGE OF STATUTES (1942).

2. 3 Co. Rep. 7a, 76 Eng. Rep. 637 (Ex. 1584).

of a thing or a thing allowed. It is only by its application that you discover the kind of thing in mind." [3]

The worth of these papers lies precisely in the fact that they may be fairly called modern instances of old saws. The central problem of statutory construction is to ascertain meaning. But the meaning is to be found by one authority of another's composition. The divorce of the functions of authorship and interpretation becomes of profound importance when such divorce is one of the great safeguards of a free society. This may sound like a highfalutin way of referring to the separation of powers. Highfalutin or not, consciously kept in mind or not, this is the source of the judiciary's problems in construing legislation.

It was of course not always thus. The problems were different when judges were lawmakers and lawmakers were judges, before adjudication was separated from legislation. With casy confidence the great Hengham could stop counsel's argument as to the meaning of an Act of Parliament, when Hengham contemporaneously sat in Parliament, with "Do not gloss the Statute; we understand it better than you do, for we made it." This was in 1305.[4]

Innocent as the Victorians were supposed to have been, Lord Halsbury was far less cocksure than Chief Justice Hengham that the author of a statute is its most dependable interpreter. With characteristic dogmatism he thought the opposite. As the occupant of the woolsack, the surviving anachronism in exercising the disparate functions of legislator and judge, he had this to say:

> "I have more than once had occasion to say that in construing a statute I believe the worst person to construe it is the person who is responsible for its drafting. He is very much disposed to confuse what he intended to do with the effect of the language which in fact has been employed. At the time he drafted the statute, at all events, he may have been under the impression that he had given full effect to what was intended, but he may be mistaken in construing it afterwards just because what was in his mind was what was intended, though, perhaps, it was not done." [5]

But perhaps an even more treacherous business than finding the meaning of one's own composition is to interpret what another meant. Words both elude and betray meaning. The subtlety of the process involved in extracting fairly the thought beneath words is given illusory simplicity by talk about the intention of the legislature. When counsel used that phrase, Mr. Justice Holmes was wont to say with courteous downrightness, "I don't care what their intention was. I only want to know what the words meant." In one of those felicitous sentences which Mr. Justice Holmes tossed off in a

3. Mutual Acceptance Co. v. Federal Comm'r of Taxation, 69 C.L.R. 389, 402 (1944).
4. Aumeye v. Anon., Y.B. 33 & 35 Edw. I, 79, 82 (Horwood ed. 1879); see also PLUCKNETT, STATUTES AND THEIR INTERPRETATION IN THE FIRST HALF OF THE FOURTEENTH CENTURY 50 *et seq.* (1922).
5. Hilder v. Dexter, [1902] A.C. 474, 477.

letter, he characterized intention as "a residuary clause intended to gather up whatever other aids there may be to interpretation beside the particular words and the dictionary."

An enactment is an organism in its environment. And the environment is not merely the immediate political or social context in which it is to be placed, but the whole traditional system of law and law enforcement, of recognized remedies and procedures which are the presuppositions of our law. This is the truth behind the rather grandiloquent statement of Bishop when he said: "A statute is simply a fresh particle of legal matter dropped into the previously-existing ocean of law." [6]

The task of judicial interpretation derives from the fact that mere reading does not yield meaning. This is so because of the finitude of even the most piercing legislative imagination. Judge Learned Hand, who has been long and wisely at this business, has stated the philosophy of the task and has thereby implied the qualifications for its exercise:

> "As courts become increasingly sure of themselves, interpretation more and more involves an imaginative projection of the expressed purpose upon situations arising later, for which the parties did not provide and which they did not have in mind. Out of the rivers of ink that have been spilled upon that subject I know nothing that has emerged which enlightens us beyond the caution that departure from the text—necessary as it is—must always be made with circumspection." [7]

"Judicial legislation" is a phrase often in the mouths of those who think a statute is an inert mass of words to be read with sterile literalness. But it also embodies part of the constitutional struggle to secure institutions calculated to preclude autocracy by distributing governmental powers among the three departments of government. "It is always a dangerous business to fill in the text of a statute from its purposes, and, although it is a duty often unavoidable, it is utterly unwarranted unless the omission from, or corruption of, the text is plain." [8] These are weighty words because they come freighted with the experience of the most philosophic of our judges. The same thought was recently put in a homespun way by Lord Justice Denning: "A judge must not alter the material of which it [an act] is woven, but he can and should iron out the creases." [9]

The effective authors of federal legislation have, ever since the days of Alexander Hamilton, largely been the various agencies of the Government. For judicial construction to stick close to what the legislation says and not draw prodigally upon unformulated purposes or directions makes for careful draftsmanship and for legislative responsibility. This applies equally

6. 1 BISHOP, CRIMINAL LAW § 291*b* (9th ed., Zane and Zollmann, 1923).
7. Jackson & Co. v. Royal Norwegian Gov't, 177 F.2d 694, 702 (2d Cir. 1949) (dissenting opinion).
8. Learned Hand, J., in Harris v. Comm'r, 178 F.2d 861, 864 (2d Cir. 1949).
9. Seaford Court Estates Ltd. v. Asher, [1949] 2 K.B. 481, 499 (C.A.).

to state legislatures. Judicial expansion of meaning beyond the limits indicated is reprehensible because it encourages slipshodness in draftsmanship and irresponsibility in legislation. It also enlists too heavily the private social and economic views of judges.

These are commonplaces. But their application, with delicate regard for their contradictory nuances and with due adjustment of their relevant claims, constitutes the problems of statutory construction. Lawyers cannot be provided with a *vade mecum* to advise their clients, or judges to decide controversies. What is helpful is to enlarge the understanding of both, by a concentration of instances in the different fields that from time to time are the chief concern of legislation, so that the mind neither rusts in literalness nor roams in undisciplined looseness. That is precisely the value of these papers. By isolating the problems pertinent to special types of legislation, they make vivid the organisms created by the legislature and outline the environment essential for the full life of these organisms.