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Trends in the Use of Extrinsic Aids in Statutory Interpretation

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NOTES

TRENDS IN THE USE OF EXTRINSIC AIDS IN STATUTORY INTERPRETATION

I. INTRODUCTION

As evidenced by the increasing numbers of court decisions which involve statutes,[1] and by the large and continually growing literature in the field,[2] the subject of statutory interpretation is one of the most important in modern law. Although it is a field in which exact rules of automatic application can very seldom be formulated, only recently a member of the Supreme Court pointed out the great need for a set of "consistently accepted principles of interpretation." [3] Since the primary purpose of all statutory interpretation is to ascertain the meaning and to effectuate the purposes of the legislature,[4] and since words are merely symbols without inherent meaning, every statute upon which a court is required to rule must, in some sense, be construed and interpreted.[5]

Among the many problems of statutory interpretation, one of the most important and also, as Mr. Justice Frankfurter has pointed out, one of the most troublesome is "the determination of the extent to which extraneous documentation and external circumstances may be allowed to infiltrate the text on the theory that they were part of it, written in ink and discernible to the judicial eye." [6]

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1. See Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COL. L. REV. 527 (1947); Johnstone, *The Use of Extrinsic Aids to Statutory Interpretation in Oregon* 29 ORE. L. REV. 1 n.1 (1949); Meyer, *Legislative History and Maryland Statutory Construction,* 6 MD. L. REV. 311 (1942).

2. Sanders and Wade, *Legal Writings on Statutory Construction,* 3 VAND. L. REV. 569 (1950).

3. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says,* 34 A.B.A.J. 535, 536 (1948), also in 8 F.R.D. 121 (1948).

4. *See* Woodroof v. Nashville, 183 Tenn. 483, 489, 192 S.W.2d 1013, 1015 (1946); see generally 50 AM.JUR., *Statutes* § 223 (1944); CRAWFORD, STATUTORY CONSTRUCTION § 158 (1940); 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4501 (3d ed., Horack, 1943).

5. See de Sloovère, *Extrinsic Aids in the Interpretation of Statutes,* 88 U. OF PA. L. REV. 527, 552-54 (1940); Nutting, *The Relevance of Legislative Intention Established by Extrinsic Evidence,* 20 B.U. L. REV. 601, 606 (1940). At times a technical distinction has been drawn between the "interpretation" and the "construction" of a statute, the former being the discovery of meaning from the words of the statute themselves, while the latter consists of drawing conclusions with respect to subjects not always included in the direct expressions in the text. *See* Bloomer v. Todd, 3 Wash. T. 599, 19 Pac. 135, 138 (1888); CRAWFORD, STATUTORY CONSTRUCTION § 157 (1940). This distinction is largely ignored in actual practice, however. *See* United States v. Keitel, 211 U.S. 370, 385-87, 29 Sup. Ct. 123, 53 L. Ed. 230 (1908). The two terms are used interchangeably in this Note for that reason.

6. Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COL. L. REV. 527, 529 (1947). Although the term "extrinsic aids" is frequently used to refer primarily to the pre-enactment history of statutes, in a broad sense it includes all materials other than the actual statute which may be used by the courts in interpretation. For the types

There has been much dispute among legal writers as to the value of extrinsic aids to statutory interpretation and as to the propriety of their use. On the one hand, it has been urged that legislative intention is a mirage, being either nonexistent or incapable of ascertainment if it does exist;[7] therefore the use of extrinsic aids to search for it is fruitless. On the other hand, it has been contended that even if a particular meaning was not in the legislative mind when a statute was enacted, nevertheless it is possible to ascertain the underlying purposes of a statute, and any material which is relevant to that determination should be utilized.[8] Perhaps the majority of writers share the opinion of Professor de Sloovère that the ultimate question is not whether "legislative intention" in any of its senses is determinable at all, but whether extrinsic aids, such as the legislative history of a statute, "are relevant and helpful in applying the statute in particular cases." [9]

Although the writers have not been able to agree, most of the American courts have not been greatly troubled over the existence or discoverability of legislative intention.[10] While they probably use extrinsic aids for the purpose stated by de Sloovère, they invariably assert that they resort to such materials in order to determine the "intention of the legislature," which they agree must control the interpretation of statutes.[11]

Like all other judicial processes, the use of extrinsic aids by the courts can be, and undoubtedly has frequently been, abused. The courts have drawn considerable criticism for their lack of consistency in the use of extrinsic aids;[12] for using extrinsic materials which were irrelevant in order to reach results felt to be desirable by the deciding court;[13] and for resorting to broad exclusionary rules when relevant aids were available and might have led to a decision opposite to the one reached.[14]

Nevertheless, there are few judges or legal writers in America today

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of materials which may be used as "extrinsic aids" see CRAWFORD, STATUTORY CONSTRUCTION §§ 209-26 (1940).

7. Radin, *Statutory Interpretation,* 43 HARV. L. REV. 863 (1930); Radin, *A Short Way With Statutes,* 56 HARV. L. REV. 388 (1942).

8. Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886 (1930).

9. de Sloovère, *Extrinsic Aids in the Interpretation of Statutes,* 88 U. OF PA. L. REV. 527, 529 (1940); Horack, *Cooperative Action for Improved Statutory Interpretation,* 3 VAND. L. REV. 382 (1950); Jones, *Extrinsic Aids in the Federal Courts,* 25 IOWA L. REV. 737, 740-41 (1940).

10. See Nutting, *The Ambiguity of Unambiguous Statutes,* 24 MINN. L. REV. 509 (1940).

11. For illustrative cases, see Note, 70 A.L.R. 5 (1931); see generally 2 SUTHERLAND, STATUTORY CONSTRUCTION § 4501 (3d ed., Horack, 1943). See also materials note 4, *supra.*

12. Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes,* 25 WASH. U.L.Q. 2 (1939); Nutting, *The Ambiguity of Unambiguous Statutes,* 24 MINN. L. REV. 509 (1940).

13. Curtis, *A Better Theory of Legal Interpretation,* 3 VAND. L. REV. 407, 411 (1950); Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says,* 34 A.B.A.J. 535, 538 (1948).

14. Perhaps the leading case illustrating this practice is Caminetti v. United States, 242 U.S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442 (1917); see Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes,* 25 WASH. U.L.Q. 2 (1939); Legis., 50 HARV. L. REV. 822 (1937).

who would advocate the adoption in this country of the English practice of disregarding, or using only sparingly, extrinsic aids to statutory interpretation.[15] Most of those who criticize the American practice do not deny the value of extrinsic aids in proper cases and simply call for the abandonment of flat rules of exclusion,[16] the use of frank and clear language by the courts,[17] and the exercise of careful and objective choice in admitting and weighing extrinsic materials.[18]

II. EXTRINSIC AIDS IN THE FEDERAL COURTS

The pattern for the use of extrinsic aids in statutory interpretation in the United States has largely been set by the federal rather than by the state courts. The history of their use in the federal courts has been discussed many times,[19] and it need be noted only briefly here. In general that history has been marked by an ever expanding use of extrinsic aids, both in the numbers of cases in which particular aids have been employed and in the varieties and types of materials which have been utilized. Thus while the reports of congressional committees have long been recognized by federal courts as legitimate aids to statutory interpretation,[20] they have been employed with increasing frequency in recent years.[21] And while formerly resort to legislative debates and the opinions of individual legislators was not permitted in construing a statute,[22] exceptions were early carved out in the case of speeches

15. For discussions of the English practice, see MAXWELL, THE INTERPRETATION OF STATUTES 29 (9th ed., Jackson, 1946); Davies, *The Interpretation of Statutes in the Light of Their Policy by English Courts,* 35 COL. L. REV. 519 (1937); Note, 55 L.Q. REV. 488 (1939). Not even Professor Radin would be willing to carry exclusionary rules to the extent of the English practice. Radin, *A Short Way With Statutes,* 56 HARV. L. REV. 388, 410 (1942).

16. de Sloovère, *Extrinsic Aids in the Interpretation of Statutes,* 88 U. OF PA. L. REV. 527, 553 (1940); Horack, *The Disintegration of Statutory Construction,* 24 IND. L.J. 335 (1949).

17. Horack, *Cooperative Action for Improved Statutory Interpretation,* 3 VAND. L. REV. 382 (1950); Nutting, *The Ambiguity of Unambiguous Statutes,* 24 MINN. L. REV. 509 (1940).

18. Frankfurter, *Some Reflections on the Reading of Statutes,* 47 COL. L. REV. 527, 543 (1947). See articles note 16 *supra.*

19. Jones, *Extrinsic Aids in the Federal Courts,* 25 IOWA L. REV. 737 (1940); Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes,* 25 WASH. U.L.Q. 2 (1939); Nutting, *The Relevance of Legislative Intention Established by Extrinsic Evidence,* 20 B.U.L. REV. 601, 606 (1940). At times a technical distinction *of Federal Statutes,* 73 U. OF PA. L. REV. 158 (1925); Notes, 25 CALIF. L. REV. 326 (1937), 5 GEO. WASH. L. REV. 235 (1937).

20. 2 SUTHERLAND, STATUTORY CONSTRUCTION §§ 5005 *et seq.* (3d ed., Horack, 1943); Chamberlain, *The Courts and Committee Reports,* 1 U. OF CHI. L. REV. 81 (1933); Frankham, *Some Comments Concerning the Use of Legislative Debates and Committee Reports in Statutory Interpretation,* 2 BROOKLYN L. REV. 173 (1933). See also articles note 19 *supra.*

21. Jones, *Extrinsic Aids in the Federal Courts,* 25 IOWA L. REV. 737, 745 (1940). For a collection of Supreme Court cases in which the legislative history of a statute, particularly as shown in committee reports, was resorted to, see the dissenting opinion of Justice Frankfurter in Comm'r v. Estate of Church, 335 U.S. 632, 687, 69 Sup. Ct. 337 (1949).

22. CRAWFORD, STATUTORY CONSTRUCTION § 213 (1940); 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5011 (3d ed., Horack, 1943). Individual opinions have been said to be

or answers to questions from the floor by committee chairmen and committee members.[23] Later even the opinions of individual members of Congress, expressed in debate, were permitted to be considered by the courts in determining the general purposes of statutes and the evils sought to be remedied by their enactment.[24] In few cases have the individual opinions of congressmen as to the meaning of the words of a statute been held admissible, whether such opinions were expressed in debate or in testimony before the courts.[25] Several writers upon the subject, however, have urged that such opinions should be admitted, although the weight to be given them should depend upon the authority with which the legislator spoke and upon his relation to the passage of the statute.[26] Indicative of a possible trend toward the use of such materials is a recent federal case[27] which has gone so far as to admit the affidavits of a congressman and the counsel for an administrative agency as to their understanding of the intention of Congress in enacting a statute. While the case has drawn criticism,[28] and perhaps justly so, and while it has gone further than any previous case in using such materials, it illustrates the liberal attitude prevailing in the federal courts as to the use of any extrinsic material which may be helpful in applying a statute to a given case.[29]

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of little value in ascertaining the intention of the legislature as a whole, because "[t]hose who did not speak may not have agreed with those who did; and those who spoke might differ from each other. . . ." United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 318, 17 Sup. Ct. 540, 41 L. Ed. 1007 (1897).

23. See Chamberlain, *The Courts and Committee Reports,* 1 U. OF CHI. L. REV. 81, 85-6 (1933); Frankham, *Some Comments Concerning the Use of Legislative Debates and Committee Reports in Statutory Interpretation,* 2 BROOKLYN L. REV. 173 (1933). See materials cited note 19 *supra.*

24. See, *e.g.,* Humphrey's Ex'r v. United States, 295 U.S. 602, 625, 55 Sup. Ct. 869, 79 L. Ed. 1611 (1935); Johnson v. Southern Pacific Co., 196 U.S. 1, 20, 25 Sup. Ct. 158, 49 L. Ed. 363 (1904); 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5011 (3d ed., Horack, 1943).

25. See note 22 *supra;* 2 SUTHERLAND, *op. cit. supra* note 24, at § 5013. Most authorities agree, however, that the rule permitting the use of legislative debates to ascertain the purposes of a statute has the effect of making such materials available for use generally, since it is almost impossible to draw a line between use for determining purpose and use to ascertain meaning. Frankham, *Some Comments Concerning the Use of Legislative Debates and Committee Reports in Statutory Interpretation,* 2 BROOKLYN L. REV. 173, 177 (1933); Note, 25 CALIF. L. REV. 326 (1937); Legis., 50 HARV. L. REV. 822, 824 (1937).

26. CRAWFORD, STATUTORY CONSTRUCTION § 213 (1940); Note, [1940] WIS. L. REV. 453, 457; Legis., 50 HARV. L. REV. 822, 824 (1937).

27. United States v. Howell Electric Motors Co., 78 F. Supp. 627, 630 (E.D. Mich. 1948), *aff'd,* 172 F.2d 953 (6th Cir. 1949).

28. 97 U. OF PA. L. REV. 293 (1948).

29. The freedom with which the federal courts have resorted to the use of extrinsic materials has probably tended to encourage an abuse in the legislative process itself; namely, the "manufacturing" of "legislative history" for statutes. This process consists of the making of detailed records of committee hearings, debates, etc., in which are set forth the "interpretations" by individual congressmen upon a proposed statute. When preserved in the records of hearings, these deliberately inserted statements may easily be taken by a court as evidence of the "intention" of Congress in enacting the measure, when actually they were never subjected to the test of a vote by the members of Congress at all. See Cox, *Some Aspects of the Labor Management Relations Act, 1947,* 61 HARV. L. REV. 1, 44 (1947).

Very recently, however, there has been some indication that in the future the use of extrinsic aids in the federal courts may be curbed, or at least that it may encounter opposition. Two members of the Supreme Court have given warning that the practice of using them, particularly the use of legislative history of statutes, has been "badly overdone." [30] In an address before the American Bar Association, Mr. Justice Jackson indicated that the temptations afforded by the free use of extrinsic aids and the abuses that such use has led to, are such that he is tempted to favor the English practice of excluding legislative history almost entirely.[31] His thesis was that the legislature has the burden of communicating its purposes in the language of statutes, and if it does not successfully do so, then the court has neither the right nor the duty to see what the legislature meant to do or should have done. He warned that some phase of the legislative history of a statute can usually be discovered to support any desired interpretation of the statute, and he pointed with alarm to the fact that an attorney can no longer rely upon the wording of a duly enacted statute unless he has available its entire legislative history.

Somewhat similar, although perhaps more modified, views were expressed by Mr. Justice Frankfurter in a recent address.[32] He urged the full use of all relevant extrinsic aids to determine the purpose of the legislature as evidenced by the statutory language, but he warned against their use in order to effectuate the subjective views of the judge or to carry out a purpose which the judge may think Congress should have had in mind in enacting the statute. Although he would not be willing to accept the English view, he would always make the language of the statute the principal guide to interpretation and then resort to other aids, giving them weight according to the circumstances of each case.

Despite these words of caution from two members of the highest Court, no appreciable trend has been apparent in the federal cases in the direction of a more conservative use of extrinsic aids.[33] In joining with Justice Black in his dissenting opinion in the recent case of *United States v. Alpers*,[34] Justices Jackson and Frankfurter adhered to their views that the language of the statute must be the controlling guide in ascertaining the purposes of the legislature,[35] but nothing in the majority or the dissenting opinions in

30. Jackson, *The Meaning of Statutes: What Congress Says or What the Court Says*, 34 A.B.A.J. 535, 537 (1948).

31. *Id.* at 538.

32. Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527 (1947).

33. Certainly if the attitude of the court in United States v. Howell Electric Motors Co., *supra* note 27, is indicative of that of the federal courts generally, as it seems to be, extrinsic materials will in the future be used even more freely than in the past.

34. 70 Sup. Ct. 352 (1950), *reversing* 175 F.2d 137 (9th Cir. 1949).

35. The statute involved was one which made it an offense to ship in interstate commerce any "obscene . . . book, pamphlet, picture, motion-picture film, paper, letter, writing, print, or other matter of indecent character." 41 STAT. 1060 (1920), 18 U.S.C.A.

that case shows any tendency on the part of the Court to reject relevant extrinsic materials. And in the recent *Standard Oil* case,[36] Justice Frankfurter made free use of the legislative history of the statute involved in writing the opinion of the majority of the Court.

III. Extrinsic Aids in the State Courts

While in general the greatest development in the use of extrinsic aids to statutory interpretation has been on the federal level with state courts following the patterns there set, this result has by no means been due to the fact that state courts are any less troubled with problems of interpretation than are the federal courts. The same problems exist at all levels, and while the proportion of cases in which state courts are compelled to deal with statutes still may be somewhat smaller than in the federal system, certainly as statutes and regulations continue to multiply, the instances in which the state courts will have to deal with them will increase.[37]

Undoubtedly the reason for the greater use of extrinsic materials at the federal level lies in the fact that such materials are far more readily available to the federal courts than to the state courts. Few states have available any publications to compare with the *Congressional Record* and the *Federal Register* to collect and preserve legislative materials and administrative rulings.[38] The carefully preserved committee reports and records of hearings before committees in the federal system make available to the federal courts rich sources from which may be drawn valuable materials bearing upon the meaning and purposes of federal statutes.

In contrast with the situation in the Federal Government is that to be found in the average state, where almost no legislatively-created extrinsic aids are available to assist the courts in interpreting statutes. As Professor Horack has pointed out, "The real problem today is the production, not the use, of extrinsic materials. Except for Congress and four or five state legislatures, legislative bodies have failed to provide administrators or courts with materials other than the statutes themselves." [39] For the general confusion in the language of the state court opinions and for the lack of predictability in the manner in which state courts will interpret statutes, Professor

§ 396 (1927), now 18 U.S.C. § 1462 (1948). The majority of the Court held that obscene phonograph records were included in the statute, but the dissenting justices felt that if Congress had intended for records to be included, it should have expressly so provided.

36. Standard Oil Co. v. United States, 337 U.S. 293, 69 Sup. Ct. 1051 (1949), 3 Vand. L. Rev. 156.

37. See Horack, *The Disintegration of Statutory Construction,* 24 Ind. L.J. 335, 341 (1949).

38. See Bradley, *Legislative Recording in the United States,* 29 Am. Pol. Sci. Rev. 74 (1935); Johnstone, *The Use of Extrinsic Aids to Statutory Construction in Oregon,* 29 Ore. L. Rev. 1, 10 (1949); Jones, *Extrinsic Aids in the Federal Courts,* 25 Iowa L. Rev. 737 (1940).

39. Horack, *Cooperative Aetion for Improved Statutory Interpretation,* 3 Vand. L. Rev. 382, 387 (1950).

Horack places the responsibility primarily upon the state legislatures and their failure to provide efficient drafting services to make statutory language clear, and to make available adequate legislative records to which attorneys and judges may resort in construing statutes.[40]

It is apparent from the many cases in the state reports that the state courts are no more hesitant than the federal courts to make full use of such extrinsic materials as are available to them.[41] Thus nearly all state courts are willing to use such materials relating to the history of a statute as they have at their disposal; for example, the history of the period when a statute was enacted has frequently been referred to in order to ascertain the purpose of the statute.[42] Similarly resort has been made to the general public policy of the state and the established policy of the legislature.[43] The state courts have generally shown the same reluctance as that shown by the federal courts to admit the testimony and opinions of individual legislators,[44] although they do sometimes utilize the testimony, oral and written, of code commissioners and revisers.[45]

It is with reference to the actual history of the enactment of statutes that extrinsic aids are lacking in most states, and these are the types of materials which are most valuable in determining what the legislature really intended. Only Pennsylvania makes an adequate report of legislative debates,[46] and in most states the only record of legislative activity which is kept consists of the journals of the respective houses, which in many states are required by constitutional provisions.[47] The Tennessee journals are typical

40. *Id.* at 387; for the utility of legislative materials to the practicing attorney, see MacDonald, *The Position of Statutory Construction in Present Day Law Practice*, 3 VAND. L. REV. 369 (1950).

41. For a collection of cases, see Note, 70 A.L.R. 5 (1931). Concerning the use of extrinsic aids in particular states, see Johnstone, *The Use of Extrinsic Aids to Statutory Construction in Oregon*, 29 ORE. L. REV. 1 (1949); Meyer, *Legislative History and Maryland Statutory Construction*, 6 MD. L. REV. 311 (1942); Notes, 35 IOWA L. REV. 88 (1949), 36 KY. L.J. 190 (1948), [1940] WIS. L. REV. 453.

42. *E.g.*, Kelly v. Dewey, 111 Conn. 280, 149 Atl. 840 (1930); State v. Kelly, 71 Kan. 811, 81 Pac. 450 (1905); Hubbard v. Haynes, 225 S.W.2d 252 (Tenn. 1949), 3 VAND. L. REV. 666 (1950); Trotter v. State, 158 Tenn. 264, 12 S.W.2d 951 (1929); State v. Nashville Baseball Ass'n, 141 Tenn. 456, 211 S.W. 357, 4 A.L.R. 368 (1919); CRAWFORD, STATUTORY CONSTRUCTION § 210 (1940).

43. *E.g.*, Woodroof v. Nashville, 183 Tenn. 483, 192 S.W.2d 1013 (1946); Franklin Light & Power Co. v. Southern Cities Power Co., 164 Tenn. 171, 47 S.W.2d 86 (1932); Hunter v. Harrison, 154 Tenn. 590, 288 S.W. 355 (1926); CRAWFORD, STATUTORY CONSTRUCTION § 212 (1940).

44. See generally 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5011 (3d ed., Horack, 1943). *But cf.* People *ex rel.* Fleming v. Dalton, 155 N.Y. 175, 52 N.E. 1113, 1116 (1899). A number of state courts have resorted to the use of debates of state constitutional conventions, and several writers have seen in this an indication that state courts would utilize legislative debates and the opinions of legislators if these materials were available to them. See Johnstone, *The Use of Extrinsic Aids to Statutory Construction in Oregon*, 29 ORE. L. REV. 1, 7 (1949); Notes, 36 KY. L.J. 190, 198 (1948), [1940] WIS. L. REV. 453, 457.

45. *E.g.*, Fidelity & Columbia Trust Co. v. Meek, 294 KY. 122, 171 S.W.2d 41 (1943); 2 SUTHERLAND, STATUTORY CONSTRUCTION § 5008 (3d ed., Horack, 1943).

46. See Bradley, *Legislative Recording in the United States*, 29 AM. POL. SCI. REV. 74 (1935).

47. "Each House shall keep a Journal of its Proceedings, and from time to time

of those kept in most states; they contain the record of votes upon the measures before the houses,[48] short, formal committee "reports," [49] messages of the chief executive, and full reprints of proposed amendments to bills.[50] As to the actual proceedings before committees, debates upon the floor of the legislature, and full committee reports there are no records at all in Tennessee. Newspaper accounts furnish almost the only written source of information as to what occurred during the legislative session.[51]

Thus at the state level where draftsmanship of statutes has been poorest and consequently where extrinsic aids are most needed,[52] such aids have been sorely inadequate.[53] There is at the present time some tendency among the states to provide better facilities for the drafting of statutes and to provide legislative reference services to members of the legislature.[54] That these and

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publish the same. . . ." TENN. CONST. Art. 1, § 5. See Note, 35 IOWA L. REV. 88, 92 (1949).

48. The entries for the passage of each bill are almost identical and are usually very uninformative. A typical entry in the Tennessee journals is as follows: "House Bill No. 415—To regulate elections in the City of La Follette.

"The bill passed its third and final reading by the following vote:

Ayes ——————— 69
Noes ——————— 0"

Then follows a list of representatives voting on the measure. TENN. H.R.J. 491 (1943).

49. A typical Tennessee committee "report" is as follows:

"MR. SPEAKER: Your Committee on Education and Common Schools beg leave to report that we have carefully considered and recommended Senate Bill No. 113, with Committee Amendments, for passage. LYON, *Chairman*"

TENN. SEN. J. 246 (1941).

50. As to the weight and usefulness of journal records of amendments in the interpretation of statutes, see Legis., 50 HARV. L. REV. 822, 824 (1937); Notes, 36 KY. L.J. 190, 195 (1948), [1940] WIS. L. REV. 453, 459.

51. This is true in most of the states, although in some there are publications sponsored by private enterprise which attempt to furnish some record of the activity of legislatures. Such an unofficial service exists in Tennessee, but it would be of very little use as an extrinsic aid to interpretation. It consists merely of a daily list of measures introduced in each house, the names of the sponsors of the bills, and the action of each house on the bills.

52. Horack, *Cooperative Action for Improved Statutory Interpretation,* 3 VAND. L. REV. 382, 387 (1950); Jones, *Extrinsic Aids in the Federal Courts,* 25 IOWA L. REV. 737, 738 (1940).

53. Although of little value to the courts in determining legislative meaning and purpose, the state legislative journals are, of course, frequently resorted to in order to determine whether a statute was enacted according to the required procedure. See *e.g.,* Fuqua v. Davidson County, 227 S.W.2d 12 (Tenn. 1950); State *ex rel.* Pitts v. Nashville Baseball Club, 127 Tenn. 292, 154 S.W. 1151 (1913); Trading-Stamp Co. v. Memphis, 101 Tenn. 181, 47 S.W. 136 (1898). See Note, 36 KY. L.J. 190, 196 (1948).

54. For example, in 1949 the Tennessee General Assembly enacted a statute providing for a legislative drafting and reference bureau. Tenn. Pub. Acts 1949, c. 192. The statute provides for a bureau of three members who are to conduct surveys upon request, collect and preserve data useful to legislators, advise and assist in the drafting of statutes, and index the statutory and other material available to legislators in the state libraries. Apparently no appropriation has been made for the bureau, so that it has not yet begun to function actively. A similar and more active service was recently set up in Oregon. Johnstone, *The Use of Extrinsic Aids to Statutory Construction in Oregon,* 29 ORE. L. REV. 1 (1949). For discusssion of similar agencies and the types of services which they render, see READ AND MACDONALD, CASES AND MATERIALS ON LEGISLATION 283-86 (1948); OUR STATE LEGISLATURES 12-15 (Rev. ed. 1948) (Report of the Committee on Legislative Processes and Procedures of the Council of State Governments).

similar services when well financed and organized are of real aid to legislatures and that their records furnish valuable sources for courts and attorneys to use in determining the meaning of statutes has been proved in New York, where several agencies concerned with the drafting and proposing of statutes have been created.[55] As yet, however, there seems to be little tendency at the state level to follow the lead of Pennsylvania and the Federal Government in providing complete records of committee hearings, committee reports and legislative debates. Until these materials are made available, the state courts will continue to be handicapped in their attempts to interpret statutes by the use of legislative history.[56]

With reference to other types of extrinsic aids than the history of the enactment of statutes, the state courts have generally been as willing as the federal courts to make use of relevant materials. Thus evidence of administrative and executive interpretation of statutes;[57] statutes *in pari materia*;[58] interpretations of other states upon statutes borrowed from those states;[59] and many other types of extrinsic materials[60] have been freely employed by the state courts.

Of course in the states as well as in the federal courts, the so-called "plain meaning" rule is still observed to some extent, and it presents at least a theoretical obstacle to the use of extrinsic aids in all cases.[61] Because there are no definite standards as to when the rule will be applied or ignored,[62] and because of an exception to it by which courts may render the rule almost meaningless,[63] generalizations as to its use are difficult. The rule has been

55. See MacDonald, *The Position of Statutory Construction in Present Day Law Practice*, 3 VAND. L. REV. 369 (1950) for an account of the operation of the New York Law Revision Commission and other New York agencies.

56. Horack, *The Disintegration of Statutory Construction*, 24 IND. L.J. 335, 348 (1949).

57. *E.g.*, Collins v. McCanless, 179 Tenn. 656, 169 S.W.2d 850, 145 A.L.R. 1380 (1943) (interpretation by tax authorities); Knoxtown Theatres, Inc. v. McCanless, 177 Tenn. 497, 151 S.W.2d 164 (1941) (construction by state legal department); Cummings v. Sharp, 173 Tenn. 637, 122 S.W.2d 423 (1938) (civil service and pension board construction); Sanford Realty Co. v. Knoxville, 172 Tenn. 125, 110 S.W.2d 325 (1937) (tax authorities). See Note, [1940] WIS. L. REV. 435, 461.

58. First National Bank v. Howard, 148 Tenn. 188, 253 S.W. 961 (1923); Kelly & Co. v. State, 123 Tenn. 516, 132 S.W. 193 (1910); 2 SUTHERLAND, STATUTORY CONSTRUCTION §§ 5201-05 (3d ed., Horack, 1943).

59. *E.g.*, State *ex rel.* Williams v. Jones, 179 Tenn. 206, 164 S.W.2d 823 (1942); Gazzola v. Kimball, 156 Tenn. 229, 299 S.W. 1039 (1927); Smith v. Dayton Coal & Iron Co., 115 Tenn. 543, 92 S.W. 62, 4 L.R.A. (N.S.) 1180 (1905).

60. *E.g.*, Shields v. Williams, 159 Tenn. 349, 19 S.W.2d 261 (1929) (construction placed on statute by legal profession). See generally Note, 70 A.L.R. 5 (1931); CRAWFORD, STATUTORY CONSTRUCTION §§ 209 *et seq.* (1940).

61. The plain meaning rule is simply a rule of construction under which the courts will not look beyond the words of a statute if the statute is "clear and unambiguous" on its face. See generally 2 SUTHERLAND, STATUTORY CONSTRUCTION §§ 4701-06 (3d ed., Horack, 1943); Note, 5 GEO. WASH. L. REV. 235, 236 (1937).

62. Jones, *The Plain Meaning Rule and Extrinsic Aids in the Interpretation of Federal Statutes*, 25 WASH. U.L.Q. 2 (1939); Nutting, *The Ambiguity of Unambiguous Statutes*, 24 MINN. L. REV. 509 (1940).

63. The exception is that if the literal construction of a statute will lead to an "absurd" or "unreasonable" result, then extrinsic materials will be utilized in order to

widely and sharply criticized,[64] but it still represents a device to which the courts may resort when they do not desire to consider extrinsic aids,[65] or when they are not persuaded by such materials as may have been presented to them.[66] It is probably safe to say that at the federal level, and probably to an increasing extent at the state level, the rule in all its former vigor[67] will seldom be applied,[68] but very modern reiterations of it are still to be found.[69] Thus in *Ex parte Collett,*[70] the Supreme Court stated that the rule was applicable, but it applied the rule only after it had considered the legislative history of the statute involved and found it unconvincing.

A practical problem in the use of extrinsic materials is the selection of the proper method of presenting them to the courts. Probably most extrinsic materials relate to matters of which the courts will take judicial notice.[71] Some authorities recommend that they be proved as evidence at the trial level,[72] although this method has the disadvantage of bringing into play the technical rules of evidence. A great many attorneys simply incorporate extrinsic materials into their briefs,[73] but this procedure, while probably the most simple, has the disadvantage that the court is not compelled to examine materials which are not part of the record. Whatever method is

ascertain the true intention of the legislature. See Johnstone, *The Use of Extrinsic Aids to Statutory Interpretation in Oregon,* 29 ORE. L. REV. 1 (1949); Jones, *supra* note 62, at 19.

64. de Sloovère, *Extrinsic Aids in the Interpretation of Statutes,* 88 U. OF PA. L. REV. 527, 528, 531 (1940); Horack, *The Disintegration of Statutory Construction,* 24 IND. L.J. 335 (1949); Legis., 50 HARV. L. REV. 822, 823 (1937); Note, 35 IOWA L. REV. 88, 89 (1949). See also note 62 *supra.*

65. Jones, *supra* note 62, at 18; Landis, *A Note on "Statutory Interpretation,"* 43 HARV. L. REV. 886, 890 (1930).

66. Legis., 50 HARV. L. REV. 822, 823-24 (1937); Note, [1940] WIS. L. REV. 453, 454.

67. *E.g.,* United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007 (1897); Hamilton v. Rathbone, 175 U.S. 414, 20 Sup. Ct. 155, 44 L. Ed. 219 (1899); Caminetti v. United States, 242 U.S. 470, 37 Sup. Ct. 192, 61 L. Ed. 442 (1917); United States v. Missouri Pacific Ry., 278 U.S. 269, 49 Sup. Ct. 133, 73 L. Ed. 322 (1929); Matson Nav. Co. v. United States, 284 U.S. 352, 52 Sup. Ct. 162, 76 L. Ed. 336 (1932).

68. Probably the modern attitude upon the subject is illustrated by the statement of Reed, J., that, "When aid to construction of the meaning of words is available, there certainly is no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" United States v. American Trucking Ass'ns, 310 U.S. 534, 544, 60 Sup. Ct. 1059, 84 L. Ed. 1345 (1940). In United States v. Dickerson, 310 U.S. 554, 60 Sup. Ct. 1034, 84 L. Ed. 1356 (1940), in reply to an argument that the statute in question was plain and unambiguous in meaning, Murphy, J., wrote: "It would be anomalous to close our minds to persuasive evidence of intention on the ground that reasonable men could not differ as to the meaning of the words. . . The meaning to be ascribed to an Act of Congress can only be derived from a considered weighing of every relevant aid to construction." 310 U.S. at 562. *See* Boston Sand and Gravel Co. v. United States, 278 U.S. 41, 48, 49 Sup. Ct. 52, 73 L. Ed. 170 (1928).

69. *E.g.,* Gemsco v. Walling, 324 U.S. 244, 260, 65 Sup. Ct. 605, 89 L. Ed. 921 (1945).

70. 337 U.S. 55, 61, 69 Sup. Ct. 944 (1949).

71. See de Sloovère, *Extrinsic Aids in the Interpretation of Statutes,* 88 U. OF PA. L. REV. 527, 550 (1940).

72. READ AND MACDONALD, CASES AND MATERIALS ON LEGISLATION, 1174-76 (1948).

73. *Ibid.* See Social Security Board v. Nierotko, 327 U.S. 358, 360, 66 Sup. Ct. 637, 90 L. Ed. 718 (1946) for a recent instance of a court's making use of extrinsic materials in the briefs of counsel.

selected as most appropriate for the individual case, there can be no doubt but that skillful presentation of extrinsic materials has been and will continue to be an important factor in persuading courts to make free use of them.

IV. CONCLUSION

From this brief survey of the present status of the use of extrinsic materials in statutory interpretation, it appears that the practice is generally accepted by the courts upon a broad scale. Although there are criticisms of the practice from some quarters and although few general rules may be formulated as to when resort to particular types of aids will be made, the tendency at the present time seems to be toward expanding rather than restricting the use of such materials.

At the state level, where the most valuable types of extrinsic aids are still generally lacking, all indications from previous decisions and from the states which do have such aids are that the state courts are willing to make full use of all types of relevant materials which may be presented for their consideration. At both the state and federal levels there is a definite trend toward the more clear and careful drafting of statutes. If the "plain-meaning rule" were consistently followed, then resort to extrinsic aids to interpretation would be reduced to the extent that greater numbers of "clear and unambiguous" statutes are enacted in the future. In view of the great criticism of that rule, however, and in view of the general willingness of courts to avoid it, it may very well be that in the future even apparently "clear and unambiguous" statutes will be interpreted in the light of extrinsic materials.

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