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Judicial Law Making: Intent of Legislature vs. Literal Interpretation

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> "Whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the law giver to all intents and purposes and not the person who first wrote or spoke them."[1]

We more or less tacitly accept the proposition that it is the function of the legislature to make laws and that of the court to give them force and effect through interpretation.[2]

This principle is firmly grounded in the English common law[3] and finds its acceptance in this country through the theory of division of powers in our government.

The tripartite form of government is not mandatorily or specifically set up by the federal constitution, but the form of government provided is in harmony with the doctrine. The instrument does, however, divide the departments into legislative, judicial and executive with corresponding functions.[4]

Unlike the federal government, forty of the States have specifically adopted the doctrine in their constitutions.[5] This came about in spite of the fact there was in the early common law's conception of government no trace of separation of powers.[6] Possibly the doctrine originates in, and finds itself as a practical application of, the division of labor to government, with the sound belief that a specialized branch can function more efficiently than one charged with many duties.[7]

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[1] Gray, THE NATURE AND SOURCES OF THE LAW (1921), quotation from Bishop Hoadley, p. 271.

[2] U. S. v. American Trucking Ass'n., 310 U. S. 534, 60 S. Ct. 1059, 84 L. Ed. 1345 (1939).

[3] River Wear Comm'rs. v. Adamson-House of Lords (1877), 2 Appeals Cases 743.

[4] In O'Donoghue v. United States, 289 U. S. 516, 77 L. Ed. 1365, 53 S. Ct. 740 (1933), the Court said: "The Constitution in distributing the powers of government creates three distinct and separate departments This separation is not merely a matter of convenience or of governmental mechanism. Its object is basic and vital namely, to preclude a commingling of these essentially different powers of government in the same hands."

[5] Horack, SUTHERLAND STATUTORY CONSTRUCTION (3d Ed.) Vol. 1, Sec. 202.

[6] Radin, *Doctrine of Separation of Powers*, 86 U. of Pa. L. R. 842 (1937).

[7] Pound, *Spurious Interpretation*, 7 Col. L. R. 385 (1907).

While recognizing that the division of powers is a powerful influence in maintaining a democratic form of government, the three branches must be looked upon not as independent units but as coordinate branches of the same government under which the functions of one branch will necessarily at times overlap the other in the interests of an integrated, smooth-working organization. Fixed separation or occasional overlapping of functions must be determined by common sense and the inherent necessities of governmental coordination.[8]

The approach to the subject by the writer has not been intended in any manner of speaking to either justify or condemn judicial law making but rather to give some slight background for the proposition that it is the function of the legislature to enact laws and that it is for the courts to apply them.

As early as 1584 we find an English court reorganizing the legislative intent as material in construing a statute,[9] and since that date the search for legislative intent, with the increase of statutory law, has grown apace rather than abated.

Can a statute be applied to a factual situation without judicial law making having occurred? It is commonly said that where a statute is clear and unambiguous on its face it requires no interpretation, the court merely applies the statute in a somewhat routine manner. Consideration of this situation would seem to lead one to a logical conclusion that the court has in fact interpreted when it decided particular words were applicable to given facts. If the court finds itself in accord and harmony with the clear meaning of an act, then the intent of the legislature and that of the court are in tune.

When a court finds that an act is clear and unambiguous it determines that the intention of the legislature is apparent from the face of the statute and it applies the words literally without interpretation.[10] The language must be held to mean what it clearly expresses. However, situations arise where it is plain to be seen that a literal interpretation would reach a result contrary to the intent of the legislature. Or, perhaps, it is more correctly stated as being an unforeseen situation and hence, not within the legislative intent.

In cases where a literal interpretation would reach an absurdity, most generally the courts, not averse to a little unadmitted judicial law making, will find that the legislature could not have intended such a result.[11] Unfortunately for the majority of us who would find a

[8] J. W Hampton & Co. v. United States, 276 U. S. 394, 72 L. Ed. 624, 48 S. Ct. 348 (1928).
[9] Heydon s Case, 3 Co. Rep. 72, 76 Eng. Repr. 637 (1584).
[10] People ex rel. Wood v. Sands, 102 Cal. 12, 36 Pac 404 (1894).
[11] Pierce v. Van Dusen, 78 Fed. 693 (1897).

magic formula of interpretation acceptable, the courts are not in harmony in the decisions, possibly because what is an absurdity to one is not an absurdity to another.

A very clear cut example of a case in which a literal interpretation would create an absurd result is one in which the State sought to confiscate a car which was used for the transportation of liquor by one who had stolen it from the owner.[12] The applicable statute provided that:

> "Any motor vehicle used for the transportation of liquor within the state is hereby declared a common nuisance and may be confiscated upon proceedings instituted by the state."

The court was undeniably correct in its holding that the legislature could not have intended by the act that an innocent owner's car should be confiscated. To apply the act literally would impute to the legislature an absurd and wrongful intent it seems. This result is representative of necessary judicial law making.

As pointed out the above rule is not consistently followed, or else we are not all in agreement as to what is an absurdity The court may apply the literal rule, while finding that a hardship results and in effect say that if such be the case the remedy is for the legislature not the courts.

In *Chung Fook* v *White*[13] the statute provided:

> "That if the person sending for wife or minor children is *naturalized,* a wife to whom married or a minor child born subsequent to such husband or father's naturalization shall be admitted without detention for treatment in hospital "

The act referred to persons found to be infected with a contagious disease, and Chung Fook, a *native-born* citizen sought to have his alien wife admitted without detention in a hospital.

The court refused to hold the act applicable to native-born citizens, saying that if the act unjustly discriminates against native-born citizens the remedy lies with Congress. It found the words clear and unambiguous and found its duty in such case was to apply the law as written, if not unconstitutional. Was not this a plausible and opportune case for finding that as the legislature extended a privilege to naturalized citizens a fortiori it intended it to apply to native-born citizens? The decision undoubtedly causes the statute to place a premium on naturalization, and conversely a penalty on citizenship. The only logical conclusion is that the court failed or refused to use legislative intent as a criterion, avoiding judicial legislation.

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[12] State v. Goyette, 140 Kan. 732, 37 P 2d 1001 (1934).
[13] 264 U. S. 443, 68 L. Ed. 781, 44 S. Ct. 361 (1924).

Again in a case decided in 1916 the United States Supreme Court disregarded legislative intent.[14] The case involved an alleged violation of the White Slave Traffic Act, which made unlawful the interstate transportation of a woman or girl, "to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice."

It was argued that the act was directed at commercialized vice only, and although Caminetti's conduct, in taking a woman across a state line to become his mistress, was reprehensible it was not within the purview of the act. The court's answer to this argument was that admittedly the defendant's actions brought him within the language of the act, "any other immoral purposes." It thus applied the rule that the meaning of an act must first be sought in the language thereof, and if the meaning is clear and within constitutional authority the sole function of the court is to apply it.

The dissent was more forward-looking and comprehensive. It considered the title of the act as significant. Further, the surrounding circumstances at the time the act was passed were emphasized. The dissent found that commercialized vice was the evil to be cured and that Congress had no intent as to such personal escapades, though certainly to be frowned upon.

Perhaps the most enlightening part of the dissent is the expression that there is danger in extending an act beyond its purpose through a literal interpretation. Very practically the opportunity for blackmailers of both sexes to operate under this decision was recognized.

Twenty-four years prior to the Caminetti case the Supreme Court rendered an irreconcilable opinion in which it stated that "all laws should receive a sensible construction," and permitted an immigrant preacher to accept a contract of employment in this country, though prohibited by the language of a statute.[15]

The act made it unlawful to bring an alien into this country to perform labor or services of any kind under an agreement made prior to the migration or importation.

Here again was an admitted violation of the act under a literal interpretation. The court looked to the purpose of the act which was to prevent floods of cheap labor and found that importation of a minister did not come within the spirit or intent of the act though literally it was within the prohibition "or service of any kind."

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[14] Caminetti v. United States, 242 U. S. 470, 61 L. Ed. 442, 37 Sup. Ct. 192 (1916).

[15] Church of the Holy Trinity v. United States, 143 U. S. 457, 36 L. Ed. 226, 12 S. Ct. 511 (1891).

Whilst wrestling with conflicting opinions, we must charitably recognize that the courts are wrestling with an onerous problem in deciding whether or not to permit legislative intent as conceived by the court to override the literal meaning. Whenever a factual situation is within the language of an act, and yet by sound reasoning and logic it would seem not to have been so intended the result of the decision is of impelling consideration. One s conscience is not shocked by the Caminetti case, wherein an act immoral and illegal in any event is punished by a literal construction. Nor are one s legal concepts violently shaken when the language of an act is ignored, thereby permitting a minister of the gospel to enter the country

In a federal case[16] the court had occasion to construe a rather peculiar Kentucky Statute[17] providing that a corporation may provide "that holders of its preferred stock shall be entitled, upon terms prescribed by it, to convert the same into the bonds or other obligations of the corporation." Under this statute a debtor corporation had permitted, by provision in its articles of incorporation, a conversion of preferred stock into mortgage bonds. The court held that the holders of stock who made such conversion thereby changing themselves into creditors of the corporation acquired no priority over existing general creditors upon reorganization of the corporation in bankruptcy

This decision may aptly be described as an example of judicial construction benevolently applied so that the option to change from a shareholder to that of a creditor could not be exercised prejudicially to dilute the security of existing creditors. The court refused to give a literal construction to the language of a statute which was contrary to sound legislative policy, justice and common sense. The case is a working example of judicial law making, a phrase the courts themselves have coined as descriptive of an infringement of the legislative prerogative.

Not only does the attempt to determine legislative intent arise by necessity in many instances where a literal interpretation is patently inequitable but also, and more frequently, in cases where the statute to be construed is ambiguous. That is, the language used is not clearly expressed as a result of which the objectives of the act are doubtful.[18] Again ambiguity may result from two different sections of an act being in apparent conflict.[19] It is then the function of the

[16] In Re Phoenix Hotel Co. of Lexington, Ky., 83 F (2) 724 (C.C.A.), Cert. Denied, 299 U. S. 568.
[17] Ky. Stats. 564-1 (K.R.S. 271.140).
[18] River Wear Comm s. v. Adamson (supra).
[19] Comm. v. Mullins 296 Ky. 190, 176 S.W (2) 403 (1943).

court to read the one in the light of the other and reconcile them if possible, thereby determining the true intent of the legislature.

The courts generally feel justified in referring to all relevant matters in determining the legislative intent. As to what is relevant, there are various aids to which the courts may have recourse in pinning down the sometimes elusive legislative intent. Basically we may say it is extremely doubtful that upon any given enactment each and every legislator voting in the affirmative had a specific intent which was thereby integrated into a determinable group intent as to the enacted statute. Any such conclusion would mean that practical legislative procedure had been ignored. It would indicate that such theory fails to take into consideration voting along party lines, reciprocal voting, special interests and "band wagon voting." It is then erroneous to subjectively seek the intent of an entire legislative body

In the light of present day legislative procedure possibly one of the best reflectors of legislative intent is the committee investigation and report. The complexities of our modern society combined with the ever growing mass of proposed legislation which face our short session, sometimes ill informed legislatures make the legislative committee a potent and useful legislative arm.

In a given case where a bill has been referred to committee and that committee has carried on an exhaustive and comprehensive hearing prior to making its report and recommendation to the legislative body, it is reasonable to assume that the purpose or intent discernible from the committee procedure was adopted by the legislative body upon enacting the bill into law

The courts in general will look to such extrinsic aid in construing an ambiguous statute, as part of the legislative history of an act.[20] The intent of the legislature becames the mischief at which the statute was aimed as revealed by the committee hearing.[21]

In a Supreme Court case[22] the court had occasion to refer to a report of the Committee of Agriculture as furnishing the contemporaneous history of the evils to be remedied upon which the bill was framed.

As a general proposition it may be said that the court will not use general floor discussion on a bill as an extrinsic aid to interpretation. It has been held that debates in Congress are not appropriate sources

[20] Grieb v. National Bank of Kentucky s Receiver, 252 Ky. 753, 68 S.W (2) 21 (1934).
[21] Amos v. Conkling, 99 Fla. 206, 126 So. 283 (1930).
[22] Stafford v. Wallace, 258 U. S. 495, 66 L. Ed. 735, 42 S. Ct. 397 (1922).

of information from which to discover the meaning of a statute passed by that body [23]

Yet we find a federal court referring to a debate in Congress on an amendment to a bill and quoting therefrom as indicative of intent.[24]

Consideration of the problem will reasonably lead one to the conclusion that possibly as a general rule floor discussion is not a reliable indicator of legislative intent. Yet, it is clear that when floor discussion centers on the purpose of a particular portion of a proposed bill and this is followed by passage of the bill the court would be amply justified in referring to such debate in construing a doubtful statute. This the court did in the case last above cited.

Where the intent of the law making body is doubtful and obscure the courts will look to legislative history of the act or statutes relating to the same subject, i.e., in pari materia.

In *United States* v *Pfitsch*[25] the court was called upon to construe a section of an act which apparently conferred exclusive original jurisdiction on the District Courts, while another section gave such jurisdiction concurrently to the District Courts and Court of Claims in trying certain types of claims for compensation against the United States. There appeared no good reason for such distinction, but by reference to other such acts the court found that Congress had established three distinct jurisdictions for the purpose of suits against the Government. This reference to extrinsic aid led the court to the decision that the apparently aimless distinction was not such, but rather intended by Congress.

It has been suggested that in cases where the court cannot discern the legislative purpose they might rather than declare the statute void on grounds of indefiniteness or uncertainty apply a "reasonable legislature" test comparable to the "reasonable man" instruction in negligence cases.[26] That is, the court would consider the evil to be cured and from the language available from the statute arrive at a decision as to what a reasonable legislature would probably intend under the circumstances.

The suggestion is not objectionable on its face except possibly to those critics who condemn legislative intent construction as judicial law making. It is certainly a step further in developing the field of legislative intent.

A juror in deciding what a reasonable man would do under the

[23] Dunlap v. United States, 173 U. S. 65, 43 L. Ed. 616, 19 S. Ct. 319 (1893).
[24] Gosnell v. Spang, 84 F 2d. 889 (C.C.A. 3, 1936).
[25] 256 U. S. 547, 65 L. Ed. 1084, 41 S. Ct. 569 (1920).
[26] Horack, *Sutherland Statutory Construction*, Vol. 2, Sec. 4508.

same and similar circumstances sets himself up as that reasonable man. A judge in determining what a reasonable legislature intended would use his own thoughts and ideas as the standard of reasonableness. This is inescapable, but not necessarily objectionable as the court's standards of morals, ethics and logic assert themselves in any opinion.

The suggestion has its merits in that it is consistent with the maxim that we do not presume the legislature intended to do a futile thing. Presumptions favor the validity of an act and all doubts are resolved in favor of constitutionality [27]

Critics of the legislative intent doctrine fear the usurpation of the legislative function by the court. The plain answer is that a real usurpation cannot take place so long as the two departments of government are permitted to function independently Any ensuing session of a legislature may repeal, reenact, amend or in some jurisdictions declare its intent if a decision does not satisfactorily or correctly interpret its intent.

They further take the view that legislative intent as such is not discoverable.[28] This is to ignore realities, legislative procedure. how courts function in any event, and assume that bare words in a statute can stand alone and impart their meaning to a situation without judicial application.

Finally, proponents of codification of the laws express the views that complete codification would divorce our legislative and judicial departments thereby bringing about realism of our maxim of government that the same person should not be both law giver and judge.[29]

The answer is that codification can accomplish that result if it can be made to cover all conceivable situations that may arise between persons in their relations, and all future transactions that may occur. Then will "reason, science and conscience"[30] be eliminated from the law, judicial law making will be gone and all the law will be on the shelf available, clear, and an open book to the layman and lawyer alike.

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[27] State v. Roby, 142 Ind. 168, 41 N.E. 145 (1895).
[28] Radin, *Statutory Interpretation* (1930), 43 HARV. L. R. 863.
[29] David D .Field, *Codification* (1886), 20 AM. L. REV. 1.
[30] James C. Carter, *Provinces of the Written and Unwritten Law*, 24 AM. L. REV. 1. (1890).

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