Meant to Mean: A Note on the Problems of Extrinsic Aids to Statutory Construction.

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If the plain natural meaning of a statute is not to the liking of those who share the political philosophy of its promoters or does not cover a case they wish it to cover, they try nowadays, with increasing boldness, to urge that the statute be given the meaning they say it was meant to have. "Interpretation", unless ill done, is an old and honoured way of giving words other than their plain natural meaning, but is done from their context, both the document in which they are used and the law as a whole, and from the circumstances of their use, but today it is proposed to rely on many other things that could not be used to interpret a will, a contract, or a conveyance. The purpose of this article is not to examine or criticize such proposals but to state a number of things of which their proponents appear ignorant.

Before there is an Act there must be a Bill, and before there can be a Bill there must be instructions for it. Instructions are simple or complex, complete or incomplete, but whichever of these they are they may be clear, confused, ambiguous, or inconsistent, either internally or with facts or other laws. The draftsman is fortunate if on the first documents he receives he can at once do his first draft of the Bill. More often than not he must seek further and better instructions. Sometimes the first draft will become the Bill, but usually it will be amended, little or much, before it is approved by the Minister and Cabinet to become the Bill. While the instructions for the first draft may usually be found in the draftsman's file, those for amendments may not. That file may show that there was to be a conference with the Minister, then a copy of the draft used at the conference with notes intelligible only to the draftsman, and then a new draft and a copy of a covering letter saying that herewith is a new draft amended in accordance with instructions given at the conference.

Whatever has gone before, there is at last a draft that the draftsman believes or ought to believe fulfills his instructions and the Departmental officers likewise. They may be mistaken and if both are mistaken the mistake may not be mutual. Had one then to determine the intent behind the words of the draft one would need both the Department's and the draftsman's files and recollections of any supplementary or conflicting conversations. That should be enough if all concerned were honest, of learned understanding, and in possession of all relevant law and facts. It has not been unknown for a Department to conceal its real purpose from both the draftsman and its Minister, for the Minister to try to put one over

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Cabinet, or for Cabinet to try to put one over the Party, the Parliament, or the public.

The final draft, whatever it means or was meant, by the draftsman, the Minister, or the Department, to mean, becomes the Bill and is read a first time. A new group of minds sets about its interpretation. The Minister will move its second reading with a speech explaining its principles and urging its passage and he will speak, perhaps, to some of its clauses in committee. His speech may be his own but will often be his Department's. It may represent the purposes of the Bill well or for several different reasons may not. If the Department has paraphrased a provision of the Bill in layman's language, it may have, quite innocently, misrepresented its meaning. The second reading debate may reveal more of the purposes of the Bill, as when the Opposition asserts that it will do or enable something it ought not or fail to do what it should. In committee the Minister may or may not use his notes on the clauses, depending on how the Opposition is treating the Bill. The Bill may be amended in committee. The amendment may be drawn by the draftsman on the Minister's instructions, in which case it should be of one piece with the Bill: or it may be drawn by the Opposition and accepted by the Minister as harmless, in which case it may produce inconsistency or ambiguity, or even wreck part of the Bill.

Finally, the Bill is passed. It now formally expresses the will of the House, and not just the wishes of the Minister or the combined thought of the Department and the draftsman. The House is influenced by what it has been told and what it has read for itself. Some members may have disbelieved the Minister or not understood him. The Opposition may have seen a flaw in the Bill and not drawn attention to it, preferring the Bill with the flaw to the Bill as they know the Government would like it.

Eventually there is an Act, an expression of the royal will made with the advice and consent of both Houses. Many minds have been used to achieve this result, some clever, some stupid, some diligent, some careless. The Minister's is only one among many.

If the interpretation of an Act were to depend on facts surrounding it, it would have to be on facts, not on speculation.[1] Even if one had all official files, Hansard, and tapes of relevant conversations, one might still fail to discover the collective mind of

1. Moreover the use of evidence to construe statutes may also be considered of doubtful utility on such grounds as that either a construction based on evidence in one proceeding should not bind parties in another proceeding in which the evidence could be different or that the first decision should be binding regardless of other evidence that was not used in reaching that decision; that if construction can depend on evidence, either the court must rely on the parties before it or it must conduct an inquisition to find all the relevant evidence, with the possibility that the best evidence, oral or documentary, can no longer be had; and that if evidence is to be used it should be only such evidence as has been promulgated with the text of the statute and approved by the legislature and not merely by the executive or some member of it.

the Parliament, because of mental reservations, ignorant or deliberate misunderstanding, or concealed fraud.**

It is often suggested that where the Bill is just the draft bill attached to the report of a commission of inquiry to give effect to its recommendations one should use the report to elucidate the Act. This assumes that the commissioners, or enough of them, conceived a complete and coherent scheme, that they expressed it properly in their report, and that their draft bill would properly give effect to it, and, of course, that the commissioners and their staff were honest, frank, and both masters and lovers of clear English.

The writer was once given the report of an eminent Queen's counsel, with recommendations and a draft bill and told that the Government wished to enact the last without alteration. His first question was, "Is the draft to be followed where it differs from the recommendations?" Answer: "Give effect to the recommendations." Then he considered consequences not thought of by the eminent Q.C., who came from another State, and *casus omissi*, and asked such questions as, "Do you wish partly to repeal the such and such Act?" [Usual answer: "No."] and "What do you want done about so and so?" The Bill that was brought in was based on the draft but it then expressed in almost every word the intent of the Minister, who had taken some points to Cabinet, the permanent head, and the writer.

Once the writer was in the House for the second reading of one of his Bills. As he listened to the Minister's speech with increasing astonishment, the Attorney-General came and asked him, "When did you first hear of this scheme?" He answered, "Now, as the Minister was explaining it." The Attorney-General, "Will the Bill do it?" The writer, "I think it will, but I must go off and look at it to make sure." Between first and second readings the Minister had been to a conference and come back with such a scheme that the principal powers in the Bill were no longer needed and the ancillary powers were enough to carry out the new scheme.

One can put oneself "in the testator's chair" to interpret a will, but one cannot put oneself in all the seats in both Houses. Evidence should, however, be allowed of the mischief to be remedied by a statute because that is a matter of history which could if a hundred years had gone by be read in history books, and therefore if it is not yet in books it should be ascertainable directly from the sources that historians would use. Such evidence is most needed when the mischief, or cause of the change is known only to a few, who in five or ten years have passed from the scene or forgotten. Often judges speculate wildly when there is a man who can say, "It was done because of such an event", an event that judges and counsel have

****Editorial Note:** In the United States where such materials are welcomed it is common for opponents of bills to give long disquisitions on their correct interpretation in the hope that the Courts may read the statute down so that the object that failed in the House may have another day in court through the exploitation of legislative history. Of a more insidious character is the tendency for virtually defeated opponents to switch sides so as to read materials into the legislative history of a bill.

forgotten or not heard of but the making known of which would lead all to say, "Of course, it could only have been done because of that."[2]

It is not mentioned in the books but with the mischief to be remedied should be included mischief to be avoided. An example of the latter is in the history of the Constitution of the Commonwealth of Australia. Rule from a distant city, London or Sydney, was a mischief the early Constitution Acts were to remedy. When the separate colonies exhausted their credit, total separation became a mischief to be remedied. The purpose of the Act of 1900 was to remedy it while avoiding the old mischiefs of centralized government.

2. *Gardziel v. Gardziel* [1961] Tas S.R. 64, at pp. 76, 77, 91, 82, is interesting. The basis of the speculation was an enquiry of the writer for the reason for the *Supreme Court Civil Procedure Act*1958, s. 4.