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Statutory Interpretation -- Light from Plowden's Reports

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STATUTORY INTERPRETATION—LIGHT FROM PLOWDEN'S REPORTS.

There are eighty-one references "Concerning Statutes in General" in the index to Plowden's Reports.[1] They refer to but sixteen cases. However, in these sixteen cases and Plowden's notes concerning them, many processes of statutory construction with which we are familiar today have been discussed. A consideration of these cases may not only be of interest to the historian but may also hold interest for those engaged in the practical problems of litigation in which the judicial use of legislative materials forms an important part.

The process and problems of statutory interpretation are more or less universal. They arise from the necessity of applying abstract legal rules to the concrete situation of human conduct. Law, as such, must because of its generality cover at times too little or too much and therefore it cannot attain even a kind of justice in those situations which its generality unwittingly includes or excludes, nor in those cases to which the legislative consciousness was never directed.[2] Thus to breathe life and flexibility into an inanimate rule, various agencies,[3] and among them courts, have been created to make the administration of the law something more than a mechanical process.

The duty placed upon courts in applying law to cases requires them to give consideration to two questions: What do the words of the statute mean and to whom do they apply? Often they feel the necessity of considering the further question, What *should* the words mean and to whom *should* they apply? So long as the first question may be answered by a literal reading of the text or by manifest declarations of legislative intention the interpretation may be said to be genuine; but when these sources have failed to illuminate the text or reach an apparently desirable result the court is often ready to interpret the statute in the light of reason and the desirability of results.

[1] Edmund Plowden first published his reports in 1578. They were in two parts and contain cases argued during the reigns of Edward VI, Queen Mary, Philip and Mary, and Queen Elizabeth.

[2] Lieber, Hermeneutics, 3d Ed., Hammond's note pp. 283-289.

[3] Hammond, supra n. 2 at 284 suggests that this flexibility is given to law by the power of pardoning, by the use of juries, by judicial discretion concerning punishments, by equitable jurisdiction, and by equitable interpretation.

When this is done the court seeks not the intent which was the legislature's but the intention which the court believes they should have had. This is spurious interpretation.[4] But it is this process with which the court is so much concerned. For it is, as Gray pointed out, that although we consider the discovery of the legislative intent the chief function of the court in the interpretation of statutes, in reality "when the legislature has had real intention one way or another on a point, it is not once in a hundred times that any doubt arises as to what its intention was. . . . . The fact is that the difficulties of so-called interpretation arise when the legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; . . . ."[5] In a sense the problem of the court is to give meaning to that which is in itself meaningless. To do this they must give expression not to what the legislature thought but to what they would have thought, had they thought. The dangers inherent in so speculative a power have appealed to all. Even the courts themselves have felt the necessity of frequently denying both its existence and its use. Nevertheless, the power has remained and its use has not declined. But its style and its embellishments have frequently changed and with the new vogues the old fashions have been renounced and condemned. Thus some of the processes of interpretation characteristic of Plowden's time have been declared undesirable and even dangerous. However, before we accept such condemnation we should be convinced that an operative test of these older processes discloses that they tend to destroy predicability, that they individualize law in an inhibitive sense, create judicial dominance of legislative function—in short operate in a politically and sociologically destructive manner. Until this is proved, these older methods of interpretation should be considered as no more undesirable than our present methods of statutory interpretation.

In evaluating the sixteenth century processes of interpretation it will be infinitely more important to know what the judges thought they were doing and know the results they obtained than to have a mere analytical knowledge of the rules that existed. Indeed, it is the thesis of this paper that the interpreta-

[4] For a discussion of genuine and spurious interpretation, see Pound, Spurious Interpretation, 7 Col. L. Rev. 379 (1907).

[5] Gray, Nature and Sources of the Law (1909) p. 165.

tive processes applied during the time of Plowden were no more liberal, nor more inconsistent with legislative independence than are the regularly accepted methods of interpretation employed today. By this I do not wish to suggest that the judges of that period did not make law but rather that they did not conceive of their position as that of law-makers. It is not the fact that they made law, but that they did not consciously and intentionally seek to legislate, which is important.

This leads us to the universal inquiry whether it is the duty of the courts to find that law which is ethically correct, that is, should courts mete out justice regardless of law, or should they adhere to the exact words of the legislators and mete out law regardless of justice?[6] It is of course impossible that the courts should adhere to either policy exclusively; though there seems to be an all too prevalent idea that the courts of the sixteenth and seventeenth centuries enforced their own concepts of justice rather than Parliament's declaration of law. This is perhaps due in part to an unconscious transplanting of sixteenth century language and conditions into present day channels of thought. To correctly appreciate the manner of sixteenth century interpretation, the import of their language must be considered contemporaneouly with the time in which it was used. For the moment we must forget that many of their statements concerning methods of interpretation have been discredited. We must accept them as the accepted methods; recognize that a vast mass of legislation had been enacted during the reign of Henry VIII and that it had to be assimilated;[7] that the common law which had been developed around a land law system was finding difficulty in adjusting itself to rapidly changing social and economic conditions.[8] With this background we must

[6] Cardozo, The Growth of the Law, p. 81; Pound, "The Administrative Application of Legal Standards", 44 Rep. Am. Bar Assoc. 445 and particularly at 451 et seq.

[7] "To one who marvelled what should be the reason that acts and statutes are continually made at every parliament without intermission, and without end; a wise man made a good and short answer, both which are well composed in verse.

Quaeritur, ut crescunt tot magna volumina legis
In promptu, causa est, crescit in orbe dolus.

And because fraud and deceit abound in these days more than in former times, it was resolved in this case by the whole court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud." Twynn's Case, 3 Co. Rep. 80a, 82.

[8] 4 Holdsworth, History of English Law 314-318; 355-359.

consider that the judges were beginning to realize that statutes were not to be ignored or applied at their discretion, but that they were to control the courts in some, as yet, uncertain way. Thus for the first time judges were faced with the problem of construing liberally statutes which for the first time they felt the necessity of following.[9] These statutes were inadequately drafted and in uncertain form, so that the need for interpretation was greatest at the very moment when the technique of interpretation was still experimental. Thus the courts were called upon to apply an unfamiliar process to a very difficult situation.

When the situation was clearly within or without the operation of the statute and that fact was determinable from the words of the statute itself the problem for the court was not difficult; but when situations apparently within the words of the statute arose which were not governed by it, or when situations apparently outside the operation of the statute were brought within its operation, difficulties of interpretation became manifest. To justify the result in these difficult cases the courts normally declare the interpretation was required by the "intention of the Legislature" or by "the Equity of the Statute." The first explanation is still popular today; the second has been generally renounced.[10]

The intention of the lawmakers has long been sought; indeed, it may well be believed that Hengham's retort to counsel, "Do not gloss the statute; for we know better than you; we made it,"[11] while the most memorable was not the first experi-

[9] The movement which Plucknett observes in the fourteenth century of limiting judicial discretion in the application of statutes is firmly fixed in this period. Plucknett, Statutes and Their Interpretation in the Fourteenth Century, pp. 121-127; 4 Holdsworth, History of English Law, 185-188.

[10] "The right to apply an equitable construction to the written laws was often adverted to as one to be exercised with caution, on account of the danger of turning the courts into legislatures, and in modern times it has been disavowed by them, and its principle distinctly repudiated." Black, *Interpretation of Statutes*, 2d Ed., p. 62 (1911); see also, Lewis' *Sutherland, Statutory Construction*, vol. 2, p. 1077 (1904).

[11] *Aumeye* v. *Anon.*, Y. B. 33 & 35 Edw. I, 82; see also, *Anon.* v. *Thomas the Notary*, Y. B. 32 & 33 Edw. I, 429, where Hengham said, "We agreed in Parliament that the wife if not named in the writ should not be received."

ence which bench and bar had had with this delicate problem.[12] The problem has always been to justify an interpretation which the court feels necessary or desirable but which is not readily apparent from the literal reading of the statute. It is most natural that the intention of the legislature should be used to justify the interpretation which the court seeks to make. No doubt in many cases courts do actually discover the will of the legislature; the trouble is that too frequently the legislative intention is so clothed with nebulosity that even when judges were also legislators there was no assurance that the judges did not mistake their own intention for that of the legislators.[13] But to launch into a discussion of what is legislative intention and its existence as a phase of corporate will expressed in action is to go beyond the scope of this paper. We shall only consider the manner in which legislative intention, assuming it capable of discovery, has been discovered by the courts in which Plowden reported.

Some of the cases apparently find no necessity of explaining how legislative intention is either determined or discovered; the greater portion, however, explain that because of the nature of statutes *in pari materia,* of the common law, of certain mischiefs and evils, or even because of pure reason the intention of the makers of the act is apparent and should govern the application of the statute.

The judges whose cases Plowden reports apparently make little use of legislative materials in determining legislative intention with which we are familiar today. The nearest approach to modern practice was in the use of statutes *in pari materia* to explain the ambiguous intention of an act which the court sought to apply. Thus it was urged in *Reginer* v. *Fogossa* that the intention of the makers of the statute could be determined from the "Usage in former Times, for all Statutes before then made, ... have had the very same words which this Statute

[12] For a consideration of the early cases on this problem, see Plucknett, *Statutes and Their Interpretation in the Fourteenth Century,* particularly pp. 49-81.

[13] ". . . interpretation never has been and never can be wholly dispensed with, owing to the nature of our minds and languages, since absolute language is conceivable in mathematics only, (therefore) good faith and common sense are peculiarly requisite where the object is to discover the true sense of the doubtful act. Loyd, *The Equity of a Statute,* 58 U. of Pa. L. Rev. 76, at 80; see also, Lieber, *Hermeneutics,* 3d Ed. 14.

hath."[14] But even such evidence as this is rather speculative, and goes to prove specific intention in a particular statute only by way of generalization.

In some of the cases the judges argued that the intention of the legislature when not manifest might be discovered by analogy to the common law. This was probably the result of a rather inherent suspicion of statutes and a belief that in the absence of very definite intention to the contrary that the common law should remain inviolate.[15] Nevertheless, in interpreting the Statute of Fines "for the better understanding of the Act, and of the Reason of making it, they considered Fines as they stood at the Common Law, and the force which the Common Law attributes to them, ..."[16] Likewise, Lord Coke suggests that ". . . . if any doubt be conceived on the words or meaning of an act of Parliament, it is good to construe it according to the reason of the common law."[17] But here again it is to be noticed that frequently the common law situation will state the exact opposite of the draftsman's intention and that to generalize that his intention shall in any case coincide with or be contra to the common law is highly speculative.

The next step away from this fictional substantiation and proof of a particular intent is to generalize the intention from the mischiefs which the legislature has sought to remedy. The proposition which Coke propounded in Heydon's case[18] for the

[14] 1 Plowd. 1, 17. See also: *Corbet's Case*, 1 Co. Rep. 83b, 88; *Alexander Powlter's Case*, 11 Co. Rep. 29, 34; *Wimbish* v. *Tailois*, 1 Plowd. 38, 57a, 58; *Stradling* v. *Morgan*, 1 Plowd. 198b, 204; *Willion* v. *Berkley*, 1 Plowd. 222a, 247a.

[15] Thus originally the common law could not be abrogated without the use of negative words; later it was said if a change in the common law was made the negative would be implied although the words used were affirmative. *Townsend's Case*, 1 Plowd. 110a, 113. ". . . the Words of the Act . . . appoints the Manner of a Thing which was not before at the Common Law; And therefore although the Words of the Act are in the Affirmative yet they contain a Negative . . ."

[16] *Stowel* v. *Lord Zouch*, 1 Plowd. 353a, 356a.

[17] *Fermor's Case*, 3 Co. Rep. 77, 77a. See also: *Nichols* v. *Nichols*, 2 Plowd. 477, 487; *Willion* v. *Berkley*, 1 Plowd. 222a, 234a; *Fitz-Williams Case*, 6 Co. Rep. 32, 34.

[18] 3 Co. Rep. 7, 7a (1584). "And it was resolved by them, that for the sure and true interpretation of all statutes in general (be they penal or beneficial, restrictive or enlarging of the common law) four things are to be discerned and considered: 1, What was the common law before the making of the act? 2, What was the mischief and defect for which the common law did not provide? 3, What remedy the parliament hath resolved and appointed to cure the disease of the commonwealth? And 4, The true reason of the remedy? And then the

interpretation of statutes states in essence this proposition. It is interesting to note however that the rule which he made famous was known to the profession over twenty years before he propounded it. In 1562 in *Willion* v. *Berkley*,[19] it was suggested that in interpreting statutes these things were to be done: "First, the Common Law is to be considered, and the Mischief that was before the Statute; secondly, the Purview and Intent of the Statute; and thirdly, the State and prerogative of the King." Any inquiry into such tangible subjects as mischiefs tends to harmonize the law of the statute with the demands of practice; but again its certainty in expressing the legislative intention is not assured, although it may be that in the normal case the general legislative intent will be towards a pragmatically desirable result.

At this point in the development of interpretation the law might have taken a very different turn. Instead of continuing in an everlasting and unconvincing search for an abstract intention of the legislature where it often had no specific intention, the courts could have emphasised the necessity of adjusting the rule of law to the particular case according not only to the circumstances that impelled the original rule but also to the circumstances which made its continuance a necessity.[20] A

office of all the judges is always to make such construction as shall suppress subtle inventions and evasions for the continuance of the mischief, and *proprivato commodo*, and to add force and life to the cure and remedy, according to the true intent of the makers of the act, *pro bono publico*.

[19] *Supra* n. 14 at 234a. See also: *Dive* v. *Maningham*, 1 Plowd. 60, 63, "Statutes are not made to remedy such rare Mischiefs, but common Mischiefs."

[20] They might thus have obtained the result Kohler urged. "We (have) overlooked completely that the law-maker is the man of his time, thoroughly saturated with the thoughts of his time, thoroughly filled with the culture that surrounds him, that he works with the views and conceptions which are drawn from his sphere of culture, that he speaks with words that have a century of history behind them and whose meanings are fixed by the sociological process of a thousand years of linguistic development, and not through the personality of the individual. The opinion that the will of the law-maker is controlling in construing legislation is only an instance of the unhistorical treatment of the facts of the world's history and should disappear entirely from jurisprudence. Hence the principle: rules of law are not to be interpreted according to the thought and will of the law-maker, but they are to be interpreted sociologically; they are to be interpreted as products of the whole people, whose organ the law-maker has become." Kohler, *Lehrbuch des Burgerlichen Rechts*, I, sec. 38 (transl. in Pound, *Readings in Roman Law*, p. 20).

development of the idea that statutes should be interpreted according to the mischiefs that were to be remedied would have made interpretation avowedly pragmatic instead of only incidentally so. Coke apparently had something of this idea for although he suggests in one case that " . . . the Good expositor makes every sentence have its operation to suppress all the mischiefs before the said act and chiefly those which are specified in the act itself,"[21] he was equally as willing to restrain the extension of an act, where " . . . a great number of the subjects who are now in peace, would be vexed and molested if the common received opinion should now be changed."[22] Although such practical considerations as these, no doubt, impel many courts today, they still are clothed in terms of abstract intention.

Instead of following the course above suggested, the law under the urge of the rapidly growing juristic thought of that time, turned to reason as the means by which the intention of the law makers might be discovered. Thus Littleton was accredited with deciding a case in a particular fashion because, " . . . it was the Intent of the Legislature that made him say so. And that their Intent was so, he gathered from Reason."[23] But that the intention was Parliament's and not Littleton's seems a matter of opinion. Indeed, it is submitted that in many cases the discovery of intention by "reason" merely makes legislative intention subjectively determined according to the judicial conception of justice. That such a method, while not without advantage, does not necessarily discover the real legislative intent is well illustrated by the case of *Willion* v. *Berkley*. In that case counsel for the plaintiff argued that the Statute De Donis should not apply to the King as it was not the intention of the makers.

"Inasmuch as the Act is made by the Subjects, who, it is to be presumed would not restrain the King and also by the King himself, who cannot be presumed to mean to restrain himself, (therefore) the Expositors of Acts heretofore have well collected from the Intent of them, that the King should be exempted out of the General Words of Restrain, unless he is expressly named and restrained."[24]

[21] *Alexander Powlter's Case*, 11 Co. Rep. 29, 34; *Case of Avowry*, 9 Co. Rep. 20, 22; *Magdalen College Case*, 11 Co. Rep. 66b, 70.
[22] *Sir George Curson's Case*, 6 Co. Rep. 75b.
[23] *Stradling* v. *Morgan*, 1 Plowd. 198b, 204a.
[24] 1 Plowd. 222a, 239a.

On the other hand, Dyer C. J. found that reason dictated an entirely different result, for he said,

> "he who will maintain it to be reasonable that the King . . . shall be exempted, . . . undertakes to prove that the Makers of the Act thought it reasonable to suffer the King to violate the good Intent of him that gave the Land, . . . And this cannot be taken to be the Intent of the Makers of the Act, but they meant to reform the Abuse in all, *viz.* as well in the King as in others."[25]

It is not beyond the limits of speculation to believe that the makers of the act never considered the King in relation to the operation of the statute, and yet it was their "intention" which is offered as the explanation for the decision. But we should not be too severe with such opinions, for cases are being decided in the same way today.

In fact this rather critical rehearsal of the method of interpretation according to the "intention of the legislature" is intended not so much to discredit it, as to show that it is no more conservative, nor safer, than the other common method of interpretation employed in the sixteenth century. This method was known as interpretation according to the "equity of the Statute." Equitable interpretation, as this method is often paraphrased, while very popular in the later sixteenth and the seventeenth centuries is today renounced as a system of uncontrolled judicial supremacy.[26]

It may be well to interpose at this point, that the "equity of the statute" of which the writers speak has no jurisdictional connection with the equity powers of the Chancery courts.[27] It existed at common law long before the organization of these courts, although its principle "the correction of that wherein the law, by reason of its universality, is deficient,"[28] is also an underlying principle of chancery jurisdiction.

The "equity of a statute," though given its fullest elaboration by Plowden in his commentaries, was well described by Lord Coke when he said that it was,

> ". . . . a construction made by the judges, that cases out of the letter of a statute, yet being within the same mischiefe, or cause of

[25] *Supra* n. 24 at 251a.
[26] *Supra* n. 10.
[27] Loyd, *"The Equity of a Statute," supra* n. 13; Lieber, *Hermeneutics, supra* n. 2.
[28] Aristotle's definition of equity quoted in the note to *Eyston* v. *Studd*, 2 Plowd. 459a, 465; also in Loyd, *The Equity of a Statute, supra* n. 13 at 77.

making of the same, shall be within the same remedie that the statute provideth: . . ."[29]

and conversely that

"A case out of the mischiefs is out of the meaning of the law, though it be within the letter."[30]

Abstractly, such a rule of interpretation gives to the judges free reign in the extension or restriction of the effect of statutes; consequently only as we know the application of the rule can we judge whether its intendment was to allow reason and natural law uncontrolled dominance of the statute law or whether it was merely a more or less innocuous recognition of the fact that some agency of flexibility is needed to allow abstract legal principles to operate satisfactorily in concrete situations. A consideration of Plowden's generalizations and the cases upon which they are based will be of value in determining this question. Plowden says that,

"The Reader may observe, that it is not the Words of the Law, but the internal Sense of it, that makes the Law, and our Law (like all others) consists of two parts, viz. of Body and Soul, the Letter of the Law is the Body of the Law, and the Sense and Reason of the Law is the Soul of the Law . . . And the Law may be resembled to a Nut, which has a Shell and a Kernel within, the Letter of the Law represents the Shell, and the Sense of it the Kernel, and as you will be no better for the Nut if you make Use only of the Shell, so you will receive no Benefit by the Law, if you rely only upon the Letter . . . for sometimes the Sense is more confined and contracted than the Letter, and sometimes it is more large and extensive. And Equity, . . . enlarges or diminishes the Letter according to its discretion. . . ."[31]

The "equity" which Plowden has so pictured is a large and powerful monster; but the reader will observe that Plowden has so lost himself in style that the work may be more worthy as a literary contribution than as a legal treatise. In fact a resume of the application of "equity" as he would have it applied to cases leads to the conclusion that he too would use the doctrine only when the words of the statute were indefinite and ambiguous.[32] And the equity which he would apply in this restricted

[29] 1 Coke on Littleton (Hargrave & Butler, 19th Ed.) 24b.
[30] Coke, *Second Institute* (Clark & Son, London, 1817) 106.
[31] *Eyston* v. *Studd*, 2 Plowd. 459a, at 465.
[32] "Things which don't come within the words, shall not be taken by Equity." *Partridge* v. *Stranger and Croker*, 1 Plowd. 77, 86. In *Chudleigh's Case*, 1 Co. Rep. 113, 131, the court refused an equitable interpretation for, "the meaning of the makers of the act is apparent,

field is not an uncontrolled equity, but an equity which seeks to disclose by way of reason the intention of the law-makers.

A consideration of the cases reported by Plowden and the notes which he himself prepared suggest that the use of equitable interpretation was an administrative expedient rather than a tool for legislative activity by the courts. For example, the rather commonplace problem of whether the plural includes the singular was left to equitable interpretation for explanation. The Statute of Gloucester provided "That a Man from henceforth shall have a Writ of Waste in the Chancery against him that holdeth by Law of England, or otherwise for Term of Life, or for Term of Years or a Woman in Dower."[33] It seems fairly apparent that the statute was merely referring in general to certain interests less than a fee, and that by Term of Years it did not mean to exclude a Term for a Year, yet Plowden elaborately explained that "by the Equity thereof a Man shall have an Action of Waste against him that holds but for a Year, or for 20 Weeks, and yet this is out of the Words of the Act, for he that holds but for one Year does not hold for Years, but it is within the Intent of the Act, and the Words which enact the one do by Equity enact the other."[34] So also Plowden severely criticized a decision that declared a statute depriving a thief of horses of his clergy did not apply to a thief who had stolen a single horse.[35] He says, "the Statute speaks in the plural Number, yet by Equity (which considers the Intent of the Legislature) it ought also to comprehend one singular Horse only, . . . as fully as if it had said (Horses or Horse) . . ."[36]

and the letter of the act is expressly with us." It was also refused in *Butler and Baker's Case*, 1 Co. Rep. 25, 27b, "for if any exposition be made against the direct letter of the exposition made by Parliament, there would be no end of expounding." See also: *Wimbish* v. *Tailbois*, 1 Plowd. 38, 57a; *Stowel* v. *Lord Zouch*, 1 Plowd. 353a, 366a; *Edricks Case*, 5 Co. Rep. 118.

[33] 6 Edw. I, c. 5.

[34] *Eyston* v. *Studd*, 2 Plowd. 459a, 467.

[35] The original statutory provisions were, 37 Hen. VIII, c. 8, II and I Edw. VI, c. 12, X. The judicial interpretation was corrected by 2 Edw. VI, c. 33, which provided, "For as much as it is and hath been ambiguous and doubtful upon the Words mentioned in one Act . . . whether that any Person . . . found guilty . . . for feloneously stealing of one Horse, Gelding, or Mare . . . to be admitted to his Clergy . . . Therefore it is declared . . . (he) shall not be admitted to his Clergy . . . in like Manner and Form as though he had been indicted or appealed for feloneously stealing two Horses, Two Geldings, or Two Mares . . ."

[36] *Eyston* v. *Studd*, *supra* n. 34 at 467a.

Modern courts no doubt would agree with Plowden but would hardly feel the same necessity for justifying their action. Certainly the use of the "equity of a statute" in such situation as these does not suggest that it was intended as a powerful judicial weapon.

Where the generality of the words extends beyond the intention of the makers, equity will restrict the application of the statute to the intention of the makers. Thus a bargain and sale of land made before a writ would not be within the Statute of Champerty[37] even though seisin was delivered after the writ, for "although it is within the Words of the Act, it is out of the Purview of the Act, and that by Equity, . . ." Our courts would be content to set forth the statute which said, "so long as the Thing is in Plea before us, . . . he that doth contrary to this Act . . . make any bargain, shall be punished . . ."[38] and declare that as the bargain was made prior to the plea the statute did not apply. So also Plowden explained that the Statute of 3 Edw. I, cap. 4, which declared that,

> "Where a Man, a Dog, or a Cat escape quick out of the Ship, such Ship . . . nor any thing within them, shall be adjudged Wreck: (2) but the Goods shall be saved and kept by View of the Sheriff . . . and delivered into the hands of . . . (him that) prove that they were his, within a Year and a Day. . . ."

would not apply to a sheriff who sold the goods immediately if they were perishable, for although "if we should adjudge according to the Words, the Sheriff should be sent to Prison . . . if we follow the Sense and Meaning of the Act, he has done well, and should not be punished . . ."[39] Such an act would come within the exceptions to statutes such as infancy, insanity, self-defense, compulsion, and the like and could be explained on the ground that "in every Law there are some Things which when they happen a Man may break the Words of the Law, and yet not break the Law itself; . . . for breaking the Words of the Law is not breaking the Law, so as the intent of the Law is not broken."

On the contrary if any act although outside the words of the law come within its intention the law should by equity be extended to those things which are in the same degree with the

[37] 13 Edw. I, c. 49.
[38] *Eyston* v. *Studd*, *supra* n. 34 at 465.
[39] *Eyston* v. *Studd*, *supra* n. 34 at 466.

legislative intent. This is Plowden's second type of equity.[40] It is the exercise of this equity which is the more susceptible to criticism as endowing courts with legislative powers. And yet of the many cases which he cites only two seem subject to this type of criticism.

The Statute of *Circumspecte agatis* though only referring specifically to the "Bishop of Norwich and his Clergy" was made to apply to all the clergymen of the realm.[41] And though it should he noticed that the statute refers specifically to the Bishop only in the first sentence and the remainder of the act refers generally to "any parson" without attributive adjectives, and is an "antiqua statuta" and more needful of liberal construction than the later enactments, it still seems to go beyond the acceptable bounds of present day interpretation.

The other act in which the interpretation seems too liberal concerns the statute of 1 Ric. II, cap. 12 which provided that:

> ". . . . Whereas divers People . . . be often times suffered to go at large by the Warden of the Prison . . . It is ordained and assented, that from henceforth no Warden of the Fleet shall suffer any Prisoner . . . to go out of Prison . . ."

This statute was specifically limited both by the preamble and by the limitation on the person made the predicate of the action to apply only to the Warden of the Fleet. It was by equitable interpretation extended to apply to all gaol-keepers in similar circumstances. It is significant to note however, that Plowden suggests that the rule might have existed at common law, in which case the decision might have been supported on common law rules without the aid of equity.[42]

The same results would have been obtained in these cases, with a few exceptions, by the application of modern methods of interpretation, so the possibility is strongly suggested that equitable interpretation is more the product of sixteenth century logic and dialectic than the product of a political doctrine peculiar to that period. Indeed, our own United States Supreme Court has been willing, though under other names, to carry the

[40] *Eyston* v. *Studd, supra* n. 34 at 467.

[41] Cited in *Platt* v. *Sheriffs of London*, 1 Plowd. 35, 36; 13 Edw. I, Stat. 4.

[42] ". . . it appears that an Action of Debt upon an Escape lay against another Officer than the Warden of the Fleet by Equity of the Statute, if any will say that it lay not by the Common law." *Platt* v. *Sheriffs of London*, 1 Plowd. 35, 36a.

doctrines of equitable interpretation quite as far as the courts with which Plowden was familiar. Thus the Supreme Court has voiced the intention of Congress upon situations which they admitted Congress had never expressed an intent,[43] and in some cases if Congress had any intent the court expressed and enforced a contrary intention.[44]

Thus it would appear from the use of equitable interpretation both at the present and in former times that it is no more than a different form of expressing a search for the intent of the legislature. In fact that is the way it is described by Plowden in his comment to *Eyston* v. *Studd;* he says,

> "And in order to form a right Judgment when the Letter of a Statute is restrained, and when enlarged, by Equity, it is a good Way, when you peruse a Statute, to suppose that the Law-maker is present, and that you have asked him the Question you want to know touching the Equity, then you must give yourself such an Answer as you imagine he would have done, if he had been present. . . And if the Law-maker would have followed the Equity, notwithstanding the Words of the Law, . . . you may safely do the like, for while you do no more than the Law-maker would have done, you do not act contrary to the Law, but in Conformity to it."[45]

The purpose of showing the similarity or identity between equitable interpretation and interpretation according to the

[43] In *Holy Trinity Church* v. *United States*, 143 U. S. 457, 12 Sup. Ct. 511 (1892), the court held that a statute prohibiting the importation of any alien under contract "to perform labor or service of any kind", did not apply to an Episcopal clergyman. The court said, "It is a case where there was present a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

[44] See for example *Caminetti* v. *United States*, 242 U. S. 470; 37 Sup. Ct. 192 (1916), where the majority of the court interpreted the Mann Act to apply to "other immoral practices" although the intent of Congress had apparently been to limit its application to the "White-slave traffic." The purpose of citing these two cases in which interpretation has been used in a rather inconsistent manner has not been to show that the court is acting in defiance of the legislative mandate but rather to illustrate the truth of Gmelin's statement that in the end the purpose of judicial decision is to "bring about a just determination by means of the subjective sense of justice inherent in the judge, guided by an effective weighing of interests of the parties in the light of the opinions generally prevailing in the community." Gmeling, *Sociological Method*, 9 Mod. Leg. Phil. Ser. 131.

[45] *Supra* n. 34 at 467.

intent of the legislature has not been so much for the purpose of showing the harmless character of the former, though that is apparently its character, as it has been to show the unrestrained character of the latter. To say that the one allows uncontrolled judicial exercise of legislative power and the other makes the court servient to legislative intention places emphasis upon words and not facts. Courts can not interpret statutes according to the intention of the legislature when the legislature has had no intention, if there must be interpretation in those cases it must be according to "reason and equity." The cases and comments of Plowden admirably illustrate that a responsible court will achieve with "either process" the same results. In other words the title does not alter the process, which is not so much the searching for the intention of the legislators as it is administration of the legislator's rule by the court, according to a semi-intuitive sense of justice which will make the abstract rule amenable to the juristic needs of the community. This from necessity must be the purpose of interpretation and courts will do well to so recognize it.

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