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Construction of Written Instruments (Part 2)

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CONSTRUCTION OF WRITTEN INSTRUMENTS
(Continued)

By RICHARD R. POWELL*

THIRD:

The utilization of facts extrinsic to the text of a statute in determining its meaning.

In my lecture of yesterday I sought to accomplish three things. The first of these was to introduce the general topic upon which we are thinking together for these three days, to define the broadly inclusive sense in which I am using the word "construction" and to recall to you the essential differences between existing varieties of written instruments which must be constantly watched in making generalizations as to the process of construction. In the second place I presented the authorities requiring resort to all that can be found within the four corners of a statute and the regrettable intermittent reluctances of the courts of Indiana to accept unqualifiedly a like principle applicable to instruments of conveyance. In the third place, I discussed with you the extent to which a will or similar voluntary inter vivos disposition of property is to be construed in the light of the circumstances of its

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formulation, and the propriety, in this process, of resorting
to facts extrinsic to the text of the conveyance.

Throughout our time together today I shall be handling
problems which concern statutes. We shall discuss the the-
oretical background of statutory construction, the frequency
with which these problems assume importance in the modern
practice of law and the decisions, English, Federal and Indi-
ana, as to the resort to facts extrinsic to the text of the
statute for the purpose of determining the limits within which
the statute functions and the functioning of the statute within
the limits so determined.

We need, perhaps, the perspective of history, in order
to appreciate the status of statutes, in our present legal
system. The law evolved in England between the eleventh
and fourteenth centuries by the utilization of writs issued
under the seal of the King served the end of unifying the law
throughout that realm, but the law so unified became formal,
became crystallized and therefore difficult of adaptation to
the new conditions so rapidly developing in the evolution
of the state from a feudal type of organization into a state
drawing its life-blood from trade and commerce and gradu-
ally taking on the form set by a capitalistic society. The
development of equity met the existent need and provided
a channel for the sloughing off of what no longer served con-
tinuing needs and for the development of new law suited
to the changed conditions. Social institutions and social
phenomena are the inevitable products of what has gone
before and what is currently happening. No century in the
history of man has seen more rapid change in the manner
of life than the past one hundred years. This rapidity of
change in the manner in which we live has made a need for
change in the laws applicable for the regulation of our mode
of life. Just as equity in the deliberate manner of English
tradition worked a wholesale change in the fabric of the
antecedent common law, so statutes in the hasty manner of
modern American society has been working wholesale modi-
fications in the entire fabric of the judge-made law. The
immensity of the subject matters thus sought to be brought
within the control of the statutory precept has injected into our legal system the beginnings of what seems likely to be the fourth channel of political and legal evolution, namely the administrative board. Statutes have found it impossible to imprison in written words the multiplicity of rules needed for regulating large segments of evolving human conduct. Hence statutes of the past decade evidence a new technique, namely the declaration of a general policy, the administration of which is committed to a constantly functioning body of persons hoped to be experts. Ten or twenty years hence and perhaps long before that time, you may well need an Institute dealing with the construction of the rules of administrative bodies. But today we are still much concerned with the third of these four steps—statutes—and it is to the problems concerning their construction that I desire to direct your attention.

The rapid increase in the number and importance of statutes is working a seldom realized transformation of the function of our courts. More and more do they approximate "the civil law ideal of courts as agencies for the application and administration of the legislative precept." Gray's Nature and Sources of the Law, published in 1924, sought to minimize the reality of this change and to this end, emphasized the continued dependence of our legal system upon the courts and their utterances, by asserting with a vehemence that to many has seemed somewhat of an overemphasis, that statutes are empty, meaningless things except and until construed and applied by courts. Thus, says Gray, with statutes, as before statutes, our law is essentially judge-made and judge-developed. The sound core of his viewpoint is thus expressed by him:

"The dependence of the statutes upon the will of the judges for their effect is indicated by the expression often used, that interpretation is an art and not a science; that is, that the meaning is derived from the words according to the feeling of the judges, and not by any exact and foreknowable processes of reasoning. Undoubtedly rules for the interpretation of statutes have been sometimes laid down, but their generality

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1 Horack, 38 W. Va. L. Rev. 119, 124 (1932).
shows plainly how much is left to the opinion and judgment of the court.” [p. 177]

A most extreme application, or perhaps it is better regarded as an extension, of this attitude appeared in 1930 in the Harvard Law Review. Professor Max Radin of the School of Jurisprudence of the University of California at Berkeley wrote on Statutory Interpretation. He denies the existence of any such thing as an “intent of the legislature;” he denies that it is useful to use the concept of such an intent in approaching a problem of construction. Speaking of the oft repeated emphasis upon seeking the intent of the legislature, he says (at page 869):

“It is clearly enough an illegitimate transference to law of concepts proper enough in literature and theology. . . . A legislature certainly has no intention whatever in connection with words which some two or three men drafted, which a considerable number rejected and in regard to which many of the approving majority might have had, and often demonstrably did have, different ideas and beliefs.”

After an exposition of his theory as to the judge choosing the applicability and effect of the statute he continues thus at page 881:

“But since a choice implies motives, it is obvious that somewhere, somehow, a judge is impelled to make his selection—not quite freely, as we have seen, but within generous limits as a rule—by those psychical elements which make him the kind of person that he is. That this is pure subjectivism and therefore an unfortunate situation is beside the point.”

This article by Radin not only minimizes the importance of statutes and attributes transcendant importance to judges, but it also completely embraces the jurisprudential attitude described by some as the “Gefuhljurisprudenz” and by others, less elegantly, as “visceral construction.” Like most ideas of thoughtful persons—and Radin is one entitled to our very real respect—this viewpoint is a mixture of truth and of over-emphasis.

243 Harv. L. Rev. 863-885.
James Landis, now Dean of the Harvard Law School, wrote a note on Radin's thesis and it appeared immediately following that article.³ Said he:

"Surely what Broom, Coke, Bacon, Austin and Lieber dignified with the conception of a science deserves a better fate than the surrender implicit in the resort to Gefühlsjurisprudenz."

He urged that if we are to emphasize the attitude of someone in construing a statute, we devote our efforts to ascertaining the attitude which gave rise to the legislation and ventured agreement with Dicey, who, writing in 1926, said this:

"If a statute * * * is apt to reproduce the public opinion not so much of today as of yesterday, judge-made law occasionally represents the opinion of the day before yesterday."

He made it clear that the language which we find in a statute represents the effort to imprison and to communicate somebody's idea and that the proper function of the process of construction is to apprehend the idea thus sought to be communicated. He concludes:

"The use of extrinsic aids to statutory interpretation thus has real and not illusory significance. Hopeful developments toward a science of statutory interpretation must be in the direction of devising means of properly evaluating the effectiveness to be given such extrinsic aids. Of course, guessing will not thereby be eliminated; but what science, natural or otherwise, has eliminated the necessity for guesswork? Nevertheless the emphasis must lie upon the honest effort of courts to give effect to the legislature's aims, even though their perception be perforce through a glass darkly."

This position of Dean Landis accords meaning and recognizes utility in the constantly reiterated references found in the decisions of this and other States to the "intent of the legislature." It recognizes that construction of a statute resembles construction of a will in that it is a search for the idea sought to be expressed in the language of the instrument. It analyzes the concept of the "intent of the legislature" in

³ 43 Harv. L. Rev. 886-893.
the light of facts known to the veriest tyro in the legislative process and makes us aware of the fact that we must often search back of the legislative halls into Committee rooms and into those petitions, public activities and situations which generated the idea sought to be embodied in the statute. It gives some reality to the supposed separation of the legislative and judicial branches of government. It creates a prima facie case for widespread resort to facts extrinsic to the text of the statute when we seek to know its meaning.

So much for underlying theory as to the relative functioning of legislator and of judge, as to the existence of an "idea" back of legislation and as to the utility of searching for that idea in our process of construction.

As persons with minds alive and active we are all interested in theory but our interest in theory is in no wise diminished, if we find that our theoretical cerebrations have practical importance in the earning of our respective livings. Hence I desire briefly to suggest first, the occasions on which statutory construction becomes the content of day by day office practice and, second, the aspects of statutory construction which are aided most by resort to facts extrinsic to the text of the statute in question. In this audience I do not need to stress the multiplicity of the aspects of the daily life of a business man which are touched by legislation both national and state. Taxation statutes stand as the ogres of modern fantasy ready to gobble those who act without due observance of the rituals embedded in the clauses of the statute. Regulations concerning the issuance of securities, the handling of labor relations, the marketing of products, all take their toll of the unwary. Time and again a statute is enacted and business men must shape their conduct in view of its provisions, but there cannot be a judicial decision as to its constitutionality or a judicial construction of its area of applicability or of its effects within its area of applicability for a period of months or even of years. In the absence of judicial constructions of the statute, your clients must turn to you and must rely upon what you say as to the meaning and effect of the statute. In this interim of uncertainty you must afford
safe guidance for the shaping of their conduct of their businesses. If your guidance does not prove to be correct, the immediate loss will fall upon your client but seldom will you escape the repercussions of such a loss. In the effort accurately to predict the ultimate judicial construction of a statute you must be prepared to do quickly for yourself, that which characterizes a Court's behavior when required to construe a statute. Time and again this process requires resort to the antecedents of the statute. Let me illustrate. The statute uses some general term. The Wage and Hour bill recently effective contains many such. How inclusive is this term? Particularly with respect to Federal statutes this is all made clear beyond a doubt, in many cases, by resort to the report of the Committee presenting the bill to Congress. Or suppose the statute makes some classification differentiating those who do, or do not, come within its command. The constitutionality of such a statute rests often on the reasonableness of the classification which it makes and that reasonableness is often demonstrable, if you know the facts before the body which drafted the classification. Too often, particularly in the large cities of the eastern seaboard, our lawyers approach these problems of statutory construction with little or no awareness of the importance of a statute's background and with little or no knowledge of how to learn a statute's antecedents. *A priori* reasoning on such subjects, especially when proceeding, as it often does, from major premises tinged with hostility to legislation of the sort in question, is apt to be costly to the client who relies thereon.

In addition to this work of prophylaxis, this effort to keep clients away from missteps and out of costly modes of procedure, there are, of course, the abundant situations in which a client has not sought guidance in time, and hence finds himself unavoidably the participant in litigation involving statutory construction. Here again, adequate protection of his interests requires full acquaintance with the processes utilized by courts in construing statutes whether these processes are in fact acknowledged by courts in their opinions, or lie beneath the surface of the words found in those opinions.
Now that we have a common background as to the theoretical approach to statutory construction, and as to the frequency with which these problems arise to beset the modern lawyer, it is time to begin the more detailed examination of the cases and opinions which must be the tools for the performance of our tasks. These cases will be examined first in the English setting, with regard to Acts of Parliament, second in the Federal setting, with respect to Congressional legislation, and third in the State of Indiana, in the handling of the legislation of this State. As a part of this third group of cases I shall call your attention briefly to the handling of the problems of State legislation in other states of this country.

There is a marked difference in the attitudes manifested by early and recent English cases. In a Year Book case of the reign of Edward the First, we find a Judge Hengham saying to counsel:

"Do not gloss the statute; for we know better than you; we made it."  4

This is doubtless a reference to the early English practice, mentioned by Coke in his Commentaries on Littleton [272a], "of having the statutes drawn by the judges from petitions of the Commons and the Answers of the King." Judges familiar with the embryology of a statute were quite ready to recognize that the word of a statute should yield for the accomplishment of its purpose. Hence it is not surprising to find in the reign of Queen Elizabeth, this note written by Edmund Plowden of the Middle Temple, and appended by him to the report of the case of Eyston v. Studd:

"... 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, quia ratio legis est anima legis. 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

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4 Anymeye v. Anon, Y. B. 35 and 35 Edw. I. 82.
by the law, if you rely only upon the letter, and as the fruit and profit of the nut lies in the kernel, and not in the shell, so the fruit and profit of the law consists in the sense more than in the letter. And it often happens that when you know the letter, you know not the sense, for sometimes the sense is more confined and contracted than the letter, and sometimes it is more large and extensive. . . ."  

The English decisions of later centuries evidence a much less liberal attitude. Pollock and Maitland have spoken of the "mystical awe" with which the early English common law regarded the written instrument. This attitude found a much later manifestation in cases dealing with construction. In 1769 Willes, J., refused to consider the history of a statute as it passed through one of the Houses of Parliament, saying:

"That history is not known to the other House or to the Sovereign."

In Grey v. Pearson, 6 decided in 1857, the concurring opinion of Lord Wensleydale thus expressed the commonly prevailing view:

"I have been long and deeply impressed with the wisdom of the rule, now, I believe universally adopted, at least in the Courts of Law in Westminster Hall, that in construing wills and indeed statutes, and all written instruments, the grammatical and ordinary sense of the words is to be adhered to, unless that would lead to some absurdity, or some repugnance or inconsistency with the rest of the instrument, in which case the grammatical and ordinary sense of the words may be modified, so as to avoid that absurdity and inconsistency, but no farther. * * *

"The expression that the rule of construction is to be the intention of the testator is apt to lead into error, because that word is capable of being understood in two senses, viz., as descriptive of that which the testator intended to do, and of that which is the meaning of the words he has used. The will must be in writing, and the only question is, what is the meaning of the words used in that writing."

The reluctance of the English Courts to depart from their own reading of the text of a statute is rather amusingly revealed in a decision given in 1889. In Beresford-Hope v. Lady Sandhurst, reported in 23 Q. B. D. 79, the court ex-

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5 Plowden's Report 465 (1574).
pressed some doubt as to whether an established usage of twenty years was really long enough to be helpful in statutory construction.

These attitudes of the Courts caused Sir James Stephen thus to describe the task of one who undertakes to draft an Act of Parliament:

"It is not enough to attain to a degree of precision which a person reading in good faith can understand; but it is necessary to attain, if possible, to a degree of precision which a person reading in bad faith cannot misunderstand."

The last decade has seen no relaxation in this literal mindedness of our English cousins. Viscountess Rhondda claimed a seat in the House of Lords by virtue of the removal of a sex disqualification accomplished by a statute enacted in 1919. The Attorney General sought to show from the Journals of the House of Lords that the statute was understood in the House to exclude such a claim as was here asserted. Lord Chancellor Birkenhead recognized that courts of law cannot use such material for the construction of a statute but argued that a Committee of the House of Lords sitting to report upon claimed privileges in that House might properly resort thereto. Lord Haldane was certain that even this Committee could not thus aid itself. He said:

"My Lords, the only other point made on the construction of the Act was that this Committee might be entitled to look at what passed while the Bill was still a Bill and in the Committee stage in the House. It was said that there amendments were moved and discussions took place which indicated that the general words of s. 1 were not regarded by your Lordships' House as covering the title to a seat in it. But even assuming that to be certain, I do not think, sitting as we do with the obligation to administer the principles of the law, that we have the least right to look at what happened while the Bill was being discussed in Committee and before the Act was passed."

Lord Dunedin expressed the same view:

7 1 Q. B. 149, 167 (1891).
8 2 A. C. 339, 349 (1922).
"I put aside all reference to what happened at the passing of the Act as regards amendments proposed and rejected; and I consider that the extract from the Journals of the House, tendered by the Attorney-General, fell to be rejected. I think it is well settled, and it would be mischievous to throw doubt on the doctrine, that in interpreting a statute you can only examine the statute itself and the state of the law at the passing thereof as that state can be gathered from other statutes, from judicial decisions and from writers of recognized legal authority in past times."

Lord Wrenbury, disagreeing with his brethren upon the main issue of the case, nevertheless agreed with them heartily upon this point of the inadmissibility of the legislative history of a statute (p. 399). These very recent expressions from those charged with declaring the law in the highest judicial tribunal of England leave little doubt as to the truncated state of the process of statutory construction in that country and afford support for the feeling recently expressed by Mr. Davies of the London School of Economics that "the attitude of the courts [in England] towards statutory law tends to be formal and unhelpful." Such a judicial attitude is made tolerable in effects only by the very real skill heretofore exhibited in the drafting of Acts of Parliament. This skill renders it less often necessary than with us, to go behind the wording of a statute for the ascertainment of its meaning.

This attitude that the "sole authority is the text itself" has even found extension to the interpretation of treaties and has penetrated into the thinking, if not into the actual holdings of the Permanent Court of International Arbitration.

The contrast between the attitudes thus expressed in England and those which have gradually gained acceptance in the Federal Courts of this country with respect to the Constitution of the United States and Congressional legislation, is very striking.

The earliest form in which matters extrinsic to the text of the instrument appear in judicial opinions is when they are

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9 35 Col. L. Rev. 519, 526 (1935).
10 Fachiri, 23 Am. J. Int. Law 745, 746 (1929).
cited as corroboratory of results reached by the court upon some other basis. In *Martin v. Hunter's Lessee*, decided in 1816, the scope of the appellate jurisdiction of the Supreme Court was involved. Mr. Justice Story, in finding that this jurisdiction permitted a review of the result reached by the highest court of Virginia, thus spoke:

"Strong as this conclusion stands upon the general language of the constitution, it may still derive support from other sources. It is an historical fact, that this exposition of the constitution, extending its appellate power to State Courts, was, previous to its adoption, uniformly and publicly avowed by its friends, and admitted by its enemies, as the basis of their respective reasonings, both in and out of the State conventions. It is an historical fact, that at the time when the Judiciary Act was submitted to the deliberations of the first Congress, composed, as it was, not only of men of great learning and ability, but of men who had acted a principal part in framing, supporting, or opposing that constitution, the same exposition was explicitly declared and admitted by the friends and by the opponents of that system."

Three years later Chief Justice Marshall stated the then operative rules for the resort to matters extrinsic to the text of a statute or constitution. This he did in *Sturges v. Crowninshield*. It is submitted that at this early date the American rule had already become more liberal than the one which is at present applied by the House of Lords in England. The State of New York had enacted a statute for the relief of bankrupts, and this statute was challenged as violative of the provision in the Federal Constitution prohibiting state legislation impairing the obligation of a contract. The Court had been urged to find the New York legislation lawful within the spirit, although unlawful according to the letter of the Constitution. It was argued that "such acts have been passed by colonial and state legislatures from the first settlement of the country" and that the history of the times when the Constitution was framed shows

"that the mind of the convention was directed to other laws which were fraudulent in their character, which enabled the debtor to escape from

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12 1 Wheat. 304, 350.
his obligation, and yet hold his property, not to this, which is beneficial in its operation.”

The Justice thus continued:

“Before discussing this argument, it may not be improper to premise, that, although the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words. It would be dangerous in the extreme, to infer from extrinsic circumstances, that a case for which the words of an instrument expressly provide, shall be exempted from its operation. Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent, unless the natural and common import of words be varied, construction becomes necessary, and a departure from the obvious meaning of words, is justifiable. But if, in any case, the plain meaning of a provision, not contradicted by any other provision in the same instrument, is to be disregarded, because we believe the framers of that instrument could not intend what they say, it must be one in which the absurdity and injustice of applying the provision to the case, would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application. This is certainly not such a case.”

Herein we are permitted to resort to the processes of construction in two main types of cases, first, where doubt as to meaning is raised by internal conflict of language, and second, when doubt is raised by “monstrous absurdity” in what seems to be said by the language of the instrument. This is a narrow rule, in view of the more recent decisions of the Supreme Court, but it was a liberal and broad rule for the date of its utterance. Most situations which come within the rule thus formulated were covered by that part of my lecture of yesterday which dealt with the requirement that an instrument be read as an entirety for the purpose of permitting the literal provision of each clause to be modified by the provisions elsewhere found in the same or related statutes. But this doctrine of reading a statute as an entirety expands easily into the so-called doctrine of the equity of the statute, by which the language of the statute is to be read in its context or background and construed as such context or background may demand.
Let us examine a series of the decisions of the United States Supreme Court, seeking thus to discover the extent to which that court has gradually adopted the "contextual construction" and has expanded the word "context" to include not only the words found in this and related statutes but also the broader facts of the statute's background.

In the *Church of the Holy Trinity v. U. S.* 14 a statute of 1885 was before the Court for construction. This statute declared it unlawful for any person or corporation

"to prepay the transportation, or in any way assist or encourage the . . . migration of any alien . . . into the United States, . . . under contract, . . . made previous to the . . . migration of such alien . . . , to perform labor or service of any kind in the United States . . . ."

The Church, located in Brooklyn, N. Y., contracted with an English minister to become its rector. The Court said:

"It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added 'of any kind;' and, further, as noticed by the Circuit Judge in his opinion, the fifth section, which make specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. * * * It is a familiar rule that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. * * * This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act."

The authorities cited were largely those in which a court derived the "spirit" of the statute in question, from fitting

14 143 U. S. 457 (1892).
together language in different parts of the same statute. But Mr. Justice Brewer went further. He went into the situation which existed when this legislation was proposed and found that the statute was designed to meet the abuses of the importation of manual labor. He said:

"It appears, also, from the petitions, and in the testimony presented before the committees of Congress, that it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and least of all, that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress, or of the people, was not directed. So far, then, as the evil which was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act."

He quoted the report of the Senate Committee on Education and Labor, recommending the passage of the bill, showing thereby the clear intent that the general language of the statute be restricted to manual labor. Upon these bases, the broad literal meaning of the statutory language was narrowed and the Church was allowed to have its alien rector. This result is one which appeals to the common sense of us all, but we should note that the result was reached by resort to materials of several varieties extrinsic to the statutory text. The Court utilized the "situation" out of which the statute emerged and the Reports of Congressional Committees as to its intended scope. Nor was there ambiguity in the text as written. Perhaps the case could be thought within the second category of Mr. Justice Marshall, that is, its text, read literally, seemed a "monstrous absurdity." If so, one might well wonder at the inclusiveness of what, in judicial parlance, satisfies the strong words of "monstrous absurdity." Rather the case should be regarded as a milestone marking, as of 1892, a new liberality in the policies of statutory construction.

But such a change does not occur with steady pace. Advance is often followed by qualifying distinctions, or even by retreat. Thus in the decisions of the next decade we find many expressions which look backward and which restrict to
a high degree resort to matters extrinsic to the text. Mr. Justice Peckham, writing in the *Trans-Missouri Freight Association Case*,\(^1\) refused to restrict the broad inclusiveness of the language of the anti-trust legislation of 1890 despite evidence that the debates in Congress showed that the act was not intended to apply to railroads, saying:

"There is a general acquiescence in the doctrine that debates in Congress are not appropriate sources of information from which to discover the meaning of a statute passed by that body. * * *

"The reason is that it is impossible to determine with certainty what construction was put upon an act by the members of a legislative body that passed it by resorting to the speeches of individual members thereof. Those who did not speak may not have agreed with those who did; and those who spoke might differ from each other; the result being that the only proper way to construe a legislative act is from the language used in the act, and, upon occasion, by a resort to the history of the times when it was passed."

This viewpoint as to probative value of general debates is generally accepted. Resort to them can be had only to learn the "situation" for the meeting of which the statute was enacted. In this same case the Court did resort extensively to the course of events, amendments offered, accepted or rejected and to committee reports made prior to the enactment of the statute, but it emphatically, and correctly, rejected the probative value of the general debates in Congress.

In 1899 Mr. Justice Brown made a substantial recantation from the advanced positions theretofore expressed by his Court. Writing in *Hamilton v. Rathbone*,\(^2\) he said:

"Indeed, the cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary. The whole doctrine applicable to the subject may be summed up in the single observation that prior acts may be resorted to, to *solve*, but not to *create* an ambiguity."

The adoption of the "plain meaning rule," implicit in this language of Mr. Justice Brown, received a severe jolt in the

\(^1\) 166 U. S. 290 (1897).  
\(^2\) 175 U. S. 414, 421.
reversal of the Circuit Court of Appeals made by the Supreme Court in Johnson v. Southern Pac. Co.\textsuperscript{17} Legislation of 1893 designed to promote the safety of the employees and passengers of railroads was involved. The statute had two Sections. Section 1 made it unlawful to operate any \textit{locomotive} "not equipped with a power driving-wheel brake and appliances for operating the train-brake system." Section 2 made it unlawful to use any \textit{car} . . . not equipped with couplers coupling automatically by impact."

The Circuit Court of Appeals treated this statute in a manner justifiable only under the most hairsplitting and captious decisions of the English House of Lords. Since Section 1 made a requirement as to locomotives this justified (said the Circuit Court) an inference that this was the \textit{only} requirement intended to apply to locomotives. Hence Section 2 requiring "automatic couplers" as to any \textit{CAR} should not be construed to make this requirement as to locomotives. Furthermore, even if Section 2 applied to locomotives, this Section only required that each car be equipped with an "automatic coupler" and here both the locomotive and car was so equipped. The fact that the engine had a \textit{Janney} coupler and that the car had a \textit{Miller} hook and that these two wouldn't work together was not a violation of the statute since each car had \textit{an} automatic coupler as the statute, in terms, required. This was a most extreme refusal to go behind the literal form of a statute. That the Court intended this as its position is made clear by this passage from its opinion:

"Construction or interpretation have no place or office where the terms of the statute are clear and certain and its meaning is plain. In such a case they serve only to create doubt and to confuse the judgment."

The Supreme Court reversed, holding that locomotives as well as other cars were required to have automatic couplers and that this requirement was not met by couplers which would not work with each other. This result was reached by referring to the message of President Harrison to Con-

\textsuperscript{17} 196 U. S. 1 (1904).
gress urging the enactment of this legislation, and to Committee Reports in both the Senate and House. The requirement of the statute, when read sensibly in the light of the circumstances of its formulation, was a heavier requirement than that expressed, in terms, by the words in which it was couched. The background revealed AND resolved the ambiguity not discoverable on a bare reading of the statute.

Unfortunately this enlightened attitude did not continue without interruptions. *Caminetti v. U. S.* stands as a glaring anachronism. In it the Court refused to resort to available background material even though the text of the statute was more than arguably ambiguous, and even though the reasonableness of doubt as to its literal meaning was evidenced by the dissent of three members of the Court. This is the case interpreting the statute known as the Mann Act, imposing penalties upon persons paying for the transportation of a female

"to become a prostitute, or to give herself up to debauchery, or to engage in any other immoral practice."

This latter phrase was held to make the penalty of this statute applicable to a man who paid for the transportation of a female where the payer and such female contemplated sexual relations during or after such transportation. Such an act was within the literal wording of the statute. But the background of the statute, the Statement to Congress by the bill's originator and the report of a Congressional Committee all united unequivocally to show that such a situation was not contemplated by Congress as within the statute's condemnation. In the report of the House committee it was squarely stated that the bill

"does not attempt to regulate the practice of voluntary prostitution."

After the statute was enacted the Attorney-General gave an opinion that the generality of the statute's language should be thus restricted in view of the clear evidence as to the intent

18 242 U. S. 470 (1917).
of Congress. But Mr. Justice Day, writing for five members of the Court, brushed all of this aside as immaterial and based his decision upon what he claimed was the "clear language" of the statute itself:

"Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meanings need no discussion. * * * There is no ambiguity in the terms of this act. * * *

"Reports to Congress accompanying the introduction of proposed laws may aid the courts in reaching the true meaning of the legislature in cases of doubtful interpretation. * * * But, as we have already said, and it has been so often affirmed as to become a recognized rule, when words are free from doubt they must be taken as the final expression of the legislative intent, and are not to be added to or subtracted from by considerations drawn from titles or designating names or reports accompanying their introduction, or from any extraneous source. In other words, the language being plain, and not leading to absurd or wholly impracticable consequences, it is the sole evidence of the ultimate legislative intent."

Literalism had again won the victory and the process of construing statutes had been muddied and rendered less sensible and less useful than it was before.

Fortunately this situation did not long continue. Duplex Printing Press v. Deering¹⁰ raised the question of the legality of the "secondary boycott" under the Clayton Act. Mr. Justice Pitney, in his opinion, recognized the fallibility of the general debates of Congress as indicia of the scope of a legislative enactment, but reasserted strongly the value not only of the reports of Committees of either house, but also of "explanatory statements in the nature of a supplemental report made by the committee member in charge of a bill in course of passage" (p. 475). By resort to these sources it became clear beyond a doubt that the statute was drawn, as Mr. Webb stated:

"with the careful purpose not to legalize the secondary boycott."

Upon this basis the Court decided the case before it despite the dissents of Justices Brandeis, Clarke and Holmes. Their

¹⁰ 254 U. S. 443 (1921).
dissents, however, did not rest upon any disagreement with that part of the opinion in which we are presently interested. During the last decade there have been clear cut reiterations of the wise policies of the Court in the earlier cases of the English rector and of the automatic couplers. There are three of these cases which deserve our present consideration.

*Popovici v. Agler.* Article III, § 2 of the Constitution defines the scope of the federal judicial power. The Judicial Code, as enacted in 1911, contained this explicit language:

"The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several States, ... Eighth. Of all suits and proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, or against consuls or vice-consuls."

A Roumanian Vice-Consul claimed that a State Court of Ohio could not entertain a suit against him for divorce and alimony. Mr. Justice Holmes wrote the opinion denying this contention of the Vice-Consul. He wrote:

"The language so far as it affects the present case is pretty sweeping but like all language it has to be interpreted in the light of the tacit assumptions upon which it is reasonable to suppose that the language was used. * * *

"* * * "If when the Constitution was adopted the common understanding was that of the domestic relations of husband and wife and parent and child were matters reserved to the States, there is no difficulty in construing the instrument accordingly and not much in dealing with the statutes. 'Suits against consuls and vice-consuls' must be taken to refer to ordinary civil proceedings and not to include what formerly would have belonged to the ecclesiastical Courts."

The express provision of this statute was held less inclusive than it read because of the background into which it had been written. Facts extrinsic to the text determined the construction to be adopted, although neither ambiguity nor "monstrous absurdity" appeared on a literal reading of the text.

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20 280 U. S. 379 (1930).
Smiley v. Holm\textsuperscript{21} was an opinion written by Chief Justice Hughes. Article I of § 4 of the Constitution provides:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; . . . ."

Under the constitution of the State of Minnesota the "legislature" of that State consists of a Senate and a House of Representatives.\textsuperscript{22} However, the Governor of the State is given a veto power as to any law passed by the legislature and such a law can become effective, notwithstanding the veto by the governor, by a two-thirds vote in each house of the legislature.

The House and Senate in Minnesota passed a bill specifying the mode and districts for the election of the nine representatives of that State in Congress. The Governor vetoed the bill. No effort to repass the bill with a two-thirds vote was attempted. The State went ahead acting on the provisions of the bill passed by the two houses of its legislature, on the theory that under Art. I, § 4 of the Federal Constitution the requirement consisted only of action by the two legislative houses and that that had occurred. The highest Court of Minnesota sustained this contention of the State and gave effect to the literal wording of the Federal Constitution. The Supreme Court reversed this result. The Chief Justice made it clear that the word "legislature" does not necessarily mean the same every time it appears in the Constitution, and that the question now before the court was whether the reference to the "legislature" as the body to determine the time, place and manner of electing members of Congress, denoted the "law making agency" of the state or the House and Senate alone. He concluded that it denoted the "law making agency" of the State and hence this action by the House and Senate was of no effect in view of the veto by the Minnesota Governor. He stressed the fact that when the Constitution was adopted, two states,

\textsuperscript{21}285 U. S. 355 (1932).
\textsuperscript{22}Minn. Const. Art. IV § 1.
Massachusetts and New York, had a veto power with regard to legislative bills, and that this provision as to the fixation of the terms of Congressional elections was designed to be regulated in each state by the rules there applicable to any other act of law making.

By this decision the term "legislature," although defined by the Minnesota Constitution to consist of the two houses, was construed to include the unmentioned veto power of the Governor. The result is one with which we may agree but we must recognize that it is a result attainable only by extensive resort to data extrinsic to the text of the provision construed.

The last of the three cases in the past decade to which I desire to call your attention is Williams v. U. S. It is interesting to recollect that the opinions of the first was written by Justice Holmes, of the second by Justice Hughes, and of this third by Justice Sutherland. Such is the permeating power of truth and wisdom! This case involved the status of a judge in the U. S. Court of Claims. His salary had been reduced. If the Court of Claims was a court authorized by the Constitution rather than by Congressional action this reduction was unlawful. The judge argued that his court was authorized by that provision in Section 2 of Article III, wherein it is stated that

"The Judicial Power shall extend . . . to controversies to which the United States shall be a party."

Since the Court ofClaims handled suits brought against the United States it was clear that it handled "controversies to which the United States is a party." But Mr. Justice Sutherland held that this clear and unambiguous language of the Constitution must the read with an added and restrictive word so that it reads

"controversies to which the United States shall be a party plaintiff"

and that, thus read, the Court of Claims is not covered

23 289 U. S. 553 (1933).
CONSTRUCTION OF WRITTEN INSTRUMENTS

thereby. The part of the opinion embodying this process of construction is thus worded:

"Literally, this includes such controversies, whether the United States be party plaintiff or defendant; but in the light of the rule, then well settled and understood, that the sovereign power is immune from suit, the conclusion is inadmissible that the framers of the Constitution intended to include suits or actions brought against the United States. *

* * * It is enough to say that in the light of the settled and unvarying rule upon that subject it is not reasonably possible to assume that it was within the contemplation of the framers of the Constitution that the words, 'controversies to which the United States shall be a party,' should include controversies to which the United States shall be a party defendant."

This case is the more remarkable because only three years before Mr. Justice Sutherland wrote the opinion in Crooks v. Harrison,24 in which he substantially reiterated the early views of Chief Justice Marshall that the literal terms of a statute could be departed from only when the letter of the law results in an "absurdity so gross as to shock the general moral or common sense."

This same policy of construing an instrument by resort to the circumstances of its formulation has been recently applied by the Supreme Court in construing the treaty between Denmark and the United States. In Nielsen v. Johnson25 the preliminary diplomatic correspondence gave the basis for giving a content to the treaty provision as to the "removal of property" and the content, thus ascertained, caused the invalidation of a state statute conflicting therewith.

In the twelve Federal cases which I have discussed in your presence today, the Court has concerned itself solely with resort to matters extrinsic to the text of the provision to be construed, occurring BEFORE the enactment of that provision. There is another and distinct type of case in which the process of construction is aided by resort to events extrinsic to the text and occurring AFTER the enactment of the provision. I refer to those cases sometimes described as involving "prac-

tical construction," and sometimes referred to as instances of "contemporaneous exposition." In these cases, as in those heretofore considered, resort to this type of extrinsic data was earliest permitted only after the Court had found an ambiguity in the text, requiring resolution. United States v. Pugh²⁶ is an illustration of this form of the rule. The construction placed by both the Court of Claims and executive officers of the Government upon a statute enacted in 1864 was received as settling an otherwise doubtful point as to the inclusiveness of that statute. In 1892 this sort of evidence caused the Court, in United States v. Alabama R. R. Co.,²⁷ to depart from the literal and seemingly unambiguous language of a statute fixing the compensation of railroads for the carrying of mails. This statute provided²⁸

"that railroad companies whose railroad was constructed in whole or in part by a land grant made by Congress on the condition that the mails should be transported over their road at such price as Congress should by law direct, shall receive only eighty per centum of the compensation authorized by this act."

During a period of nine years, and under the administrations of six different Postmasters-General, this statute was construed to require the reduced rate of compensation only upon that part of the road aided by the land grant, rather than upon those railroads "constructed in whole or in part" with such aid. The Court said:

"We think the contemporaneous construction thus given by the executive department of the government, and continued for nine years through six different administrations of that department—a construction which, though inconsistent with the literalism of the act, certain consorts with the equities of the case—should be considered as decisive in this suit. It is a settled doctrine of this court that, in case of ambiguity, the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who

²⁶ 99 U. S. 265 (1878).
²⁷ 142 U. S. 615.
have contracted with the government upon the faith of such construction may be prejudiced."

You will note that the court spoke of this as a case in which practical construction aided in resolving an ambiguity. It is difficult to see how there was any ambiguity until the fact of the practical construction by the Post Office executives came into the picture.

The fact of executive construction of a statute has been customarily regarded as of particular weight when such construction has been followed by Congressional reenactment of the statute, unchanged in language, after a considerable period in which such executive construction has become a matter of common knowledge. As Mr. Justice McKenna said in 1907, this "is an adoption by Congress of such construction."

However, the Supreme Court, on at least one occasion, disregarded this rule. A revenue statute imposed a tax of 50% applicable to all sales of seats to public entertainments where the sale was made at an advance of more than a nominal amount above the established price for such seats. Stockholders in the Metropolitan Opera House in New York City received box seat allotments. For these there was no established price and hence the statute in terms was inapplicable. The Commission of Internal Revenue ruled a sale of such seats taxable. The Attorney-General gave an opinion that they were taxable. The statute was thereafter twice reenacted by Congress without change in this provision. One of the stockholders finally resisted and his case reached the Supreme Court in *Iselin v. U. S.* 29 The Court admitted that the Congress probably did intend the statute to apply. But it then went on to say:

"The statute was evidently drawn with care. Its language is plain and unambiguous. What the Government asks is not a construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function."

30 270 U. S. 245 (1936).
It is submitted that this decision is not in accord with those decisions of the Supreme Court which both preceded and followed it. The admitted intent of Congress, the ensuing administrative construction of the statute in accordance with that intent and the two-fold reenactment of the unchanged text of the statute gave complete justification for a construction opposite to that here reached.

The great weight now accorded to executive construction of a statute is well illustrated in *U. S. v. Shreveport Grain & Elevator Co.*[^31] The Food and Drug Act forbade interstate shipment of misbranded articles and defined an article as misbranded "if the quantity of the contents be not plainly and conspicuously marked on the outside of the package."[^32]

There was then this proviso, which was the part of the statute requiring construction:

"*Provided, however, That reasonable variations shall be permitted, and tolerances and also exemptions as to small packages shall be established, by rules and regulations made in accordance with the provisions of Section three of this Act.*"

If the provision as to "reasonable variations" meant that the labelled quantity could be otherwise than accurate, there was some basis for a claim that the statute was too indefinite to be enforced as a criminal statute. If, however, the "variations" was read along with the words "tolerances and exemptions" so that all three became capable of definite fixation by the authorized rules, this objection as to indefiniteness failed. The Court held that it failed. This construction gave effect to the manner in which the statute had been administered by the executive departments charged with its enforcement. The facts that this construction could be made only by inserting a comma in the last line of the proviso clause, after the word "established," and that this construction was directly *contra* to the *intent* of the act as stated in

[^31]: 287 U. S. 77 (1932).
the Report of the House Committee on Interstate and Foreign Commerce and in the Report of the Senate Committee on Manufactures, yielded to the force of the practical construction of the statute by the executive officers charged with its effectuation.

This emphasis upon practical construction has several justifications. It is common knowledge that the persons charged with the enforcement of a statute are often the originators of the legislation and, in such cases, their conduct thereunder is a good indication of the "idea" sought to be expressed in the words of the statute. When this role of originator is absent, it still remains true that those charged with the administration of a statute are persons commonly familiar with the subject-matter dealt with by the statute and hence their action can be regarded as "expert opinion" as to the meaning of the statutory language. Furthermore, the recurrent sessions of the legislative body make the failure of the legislature to change the wording of the statute some basis for an inference of legislative acceptance, by acquiescence, of the construction placed on such language. Last, but far from least, is the desire not to disturb public behavior which has shaped itself to the statute as construed by the executives.

At the end of this long survey of attitudes of the Federal courts toward the construction of the Federal Constitution and of Federal statutes what can we say by way of summary? It is clear that, in a proper case (and I shall indicate what constitutes a proper case in a moment), resort can be had to any one of six types of material, extrinsic to the instrument in question. The situation to meet which the statute was enacted can be proved. The legislative history, consisting of all changes in its wording from introduction to enactment and including at times statutes in pari materia, can be established. The report of the committee or commission which drafted the bill originally, whether this body be a legislative committee or one specially constituted by law for the purpose, is relevant as to the "idea" sought to be embodied in the bill. Other reports of committees of the legislature, made in the course of its consideration and statements of persons charged
with steering the legislation through either house can properly be examined. Lastly, the *practical constructions* placed upon the statute by executive officers administering its provisions, including opinions of the Attorney-General as to its meaning, have much of value for the Court faced with the problem of construction. Truly our Federal Courts have gone very far in their sincere and capable effort to make legislation accomplish the ends envisaged by those who framed its language.

But we have left open "what constitutes a proper case" for this extensive resort to material extrinsic to the text. Clearly such resort is proper in two situations, namely, those covered by Chief Justice Marshall's summary of more than a century ago, where doubt arises from internal conflict in the language of the instrument, or where a literal reading of the statute brings the reader to a "monstrous absurdity." I submit that gradually we have come to recognize the impracticability of the "plain meaning rule" and that, therefore, these resorts to extrinsic evidence are proper in substantially *every* case; that such resort can be had not only to show the proper resolution of an ambiguity otherwise and first established, but also to show the existence of an ambiguity and then to resolve the ambiguity so revealed. This is a complete repudiation of the clear meaning rule, it is the only possible explanation of some of the Supreme Court results which we have considered together. It is a sensible position designed to enable the courts to perform properly their function of giving effect to legislative action in accord with the motivations of that legislation in so far as such motivations can be ascertained. It is true that opinions of the Supreme Court and the current writings of experts in this field still contain from time to time formulations of the earlier and more restricted rule, but these occur, for the most part, in cases of some one of three types: first, where the more restricted rule is stated for the purpose of applying one of the exceptions thereto; second, where the more restricted rule is cited but the extrinsic facts are never-

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33 Chamberlain, The Courts and Committee Reports, 1 Univ. Chi. L. Rev. 81 (1933).
theless examined for the purpose either of showing that they lead to the same conclusion as has been independently reached on another basis, and third, where the extrinsic facts are examined in order to demonstrate that these factors, if relevant, would not controvert the conclusion reached on other grounds. All of these cases testify to the Court's realization of the persuasive value of these extrinsic facts. Those decisions of the Supreme Court which permit their primary utilization for whatever value they may have, embody the simpler and the sounder process of construction.

Having observed the totally different approaches and the sharp contrast between the processes of statutory construction as they exist in England as to Acts of Parliament and in the United States with regard to Federal statutes and the Federal Constitution it now becomes necessary to come closer home and to examine the similar problems as they have found treatment in our State courts with respect to State legislation.

In this connection I shall first present to you what I have been able to find in the decisions of the past five years in your own State of Indiana. First of all there are those decisions which I discussed with you yesterday where the Court correctly insisted upon reading the statute as a whole, even though this required the cutting down on the expansion of the words in one part to make them consistent with the words in another part. In this type of case the choice between those meanings equally available on the text of the statute is often dictated by the facts discovered on an inquiry into the background, history and purpose of the statute. This was true in the case of Shake v. Board of Com'r of Sullivan County,\(^{34}\) refusing to extend liability under the lynch statute to labor riots, and in the case of Zoercher v. Ind. Assoc. Telep. Corp.,\(^{35}\) dealing with the tax on intangibles.

In this period of five years there are at least two instances in which your Supreme Court corroborated a result otherwise independently reached by a consideration of the situation sought to be remedied by the statute in question. This was

\(^{34}\) 210 Ind. 61 (1936).
\(^{35}\) 211 Ind. 447 (1936).
done in *Snider v. State*,\(^{36}\) and also in *Board of Commissioners of Marion County v. Millikan*.\(^{37}\)

Such a resort to material extrinsic to the text for the purpose of confirming a result reached independently on other grounds is a recognition of the persuasive force of such material but is not of large importance. Hence I desire to move on to more significant resorts to such material. There are at least five cases in which the resort is justifiable within the early rule of Chief Justice Marshall, permitting such resort where doubt arises either from internal evidence of conflict or from the "monstrous absurdity" of the literal meaning of the wording. The first of these concerned the Petty Loan Law enacted in 1917. That statute prescribed the maximum interest rate chargeable per "month" and a general construction statute of your State defined "month" to mean calendar month. The Commonwealth Loan Company used thirty days as the uniform period for which it charged the permitted maximum "monthly rate." This was claimed to constitute "usury." The Supreme Court held that it did not in *Cotton v. Commonwealth Loan Co*.\(^{38}\) The reading of the statute without applying the general construction statute gave an ambiguity, whereas, reading it with the aid of the general construction statute, it literally applied the same rate of interest to each calendar month regardless of whether such month had 28 or 31 days. This result was so absurd that inquiry into facts extrinsic to the text became proper. Upon an examination of the situation to meet which the statute was drafted, and of the practical construction placed thereon by the appropriate State agency charged with the statute's enforcement, the conclusion is unavoidable that in this statute "month" denotes a thirty-day period and not a calendar month.

*Hall v. Essner*\(^{39}\) is the second of these five cases. It involved a suit brought on behalf of the depositors and creditors of a defunct and insolvent unincorporated bank against the

\(^{36}\) 206 Ind. 474 (1934).

\(^{37}\) 207 Ind. 142 (1934).

\(^{38}\) 206 Ind. 626 (1934).

\(^{39}\) 208 Ind. 99 (1934).
persons who, as partners, operated that bank. Article XI, § 6 of the Indiana Constitution restricted the liability of stockholders of every "bank and banking company" to an amount equal to "their respective shares of stock." Defendants claimed the benefit of this restriction, insisting that the constitutional provision applied to unincorporated as well as to incorporated banks. Here there was at least arguable ambiguity in the scope of application of Article XI, § 6. Extensive quotations appear in the opinion of the court from the discussions in the 1851 Convention which drafted the Constitution of the State. From these the Court concluded that the framers of this Section understood it as applicable "only to corporations." As to the significance of these debates the Court said:

"We recognize that the debates of members of a constitutional convention 'can not be resorted to for the purpose of qualifying or changing the meaning of 'constitutional provisions' but 'they (the debates of members) may be said to be of importance where they tend to support a construction which its (a constitution's) own language or terms would indicate.'"

Note well what the Court says. This data can be used to support a construction which the language indicates, in other words to choose between two or more constructions all equally plausible under a literal reading thereof.

In *Leach v. City of Evansville*, 40 Judge Fansler, writing for your Supreme Court repeated the often encountered phrase that:

"It is only where the language of a statute, and the intention of the Legislature, is obscure that courts will resort to construction for the purpose of determining the legislative intention"

But there was no evidence or argument offered which persuaded even considerably in favor of departing from the applicability of the provision in the statute in question, called for by a literal reading thereof. With deference, it may

40 211 Ind. 444 (1936).
therefore be hoped that the Supreme Court will not repeat this phrase in a case where it can affect the decision. The fourth of these five cases is Rogers v. Calumet National Bank of Hammond.\textsuperscript{41} The legislature of 1937 changed the provision as to membership in the board of waterworks for the City of Hammond and this suit was brought by the bank having on deposit the funds of that board to determine the rightful members of the board entitled to disburse its funds. The statute requiring construction provided as follows:\textsuperscript{42}

"Upon the taking effect of this act, the term of the trustees now serving in all cities, other than cities of the fifth class, shall terminate and the mayor of such city shall appoint five trustees in the following manner: One trustee to serve for one year; one trustee to serve for two years; one trustee to serve for three years, and two trustees to serve for four years.

"Upon the expiration of the term of office of each of said trustees, the mayor of such city shall appoint a successor to be approved by the council of said city to serve for a term of four years from the date of such appointment."

The provision for approval of the mayor's appointees by the city council clearly applied as to all of the new trustees after the first series of incumbents, but the statute was silent as to whether such approval was necessary as to this first series. The court said:

"The terms of this statute are clear and unambiguous. . . ."

After deciding that it was reasonable for the legislature to have required the approval of the city council as to subsequent appointments and to have dispensed with this requirement in the first instance so as to provide an immediately functioning board, the Court continued:

"The construction which we have placed upon the act under consideration lends force and vitality to each and all of its provisions and permits us to keep within the literal meaning of its express language.

\textsuperscript{41} 12 N. E. (2d) 261 (1938).
\textsuperscript{42} Acts 1937, C. 167, § 3."
'In giving force to a statute, courts should look to the language used by the lawmaking power as expressive of its will; and where this language is plain and free from ambiguity, and the meaning expressed is definite, a literal interpretation of the statute should be adopted. * * * It is not within the province of the court to take from or to enlarge the meaning of a statute by reading into it language which will, in the opinion of the court, correct any supposed omissions or defects therein.'

This language goes a long ways in the direction of the adoption of the "clear meaning rule" but again it must be noted that there is no indication of facts extrinsic to the text which persuaded against the literal meaning of the statute in question.

The last of these five cases centered about another statute enacted in 1937 which made it unlawful for any person to take fish "by any means other than angling with hook and line [with certain exceptions not now important]."

In *State v. Mears,* the defendant had used an unbaited hook on a line which he jerked back and forth in the hope of inserting the hook en route into some fish. The question was whether this was "angling" under the statute which I have quoted. Here certainly was ambiguity, and the Court proceeded to use all the aids made available to it for its resolution. Unfortunately these aids were very slight and one feels that while the court used what it could, it was forced largely to guess at what the Legislature meant by "angling."

I have found little indication in the decisions of this State that it has gone beyond the rule of statutory construction stated by Chief Justice Marshall for the Federal Courts more than a century ago. Occasionally a decision permits a literal requirement of a statute to be disregarded. Perhaps it is fair to say that the expressions favorable to the "clear meaning rule" to be found in your opinions are not as strong

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43 Acts 1937, C. 21, § 94.
44 12 N. E. (2d) 343 (1938).
as those found in the Federal opinions down to 1920 and hence there is no insuperable barrier for your Courts to resort to matters extrinsic to the text whenever such matters reveal an ambiguity in what otherwise seems to be the clear language of a statute. This is certainly the direction in which the evolution of the law of statutory construction can profitably move.

How have other states acted concerning the construction of their own statutes and Constitution? How freely have they resorted to matters extrinsic to the text in arriving at a conclusion? The decisions are scattered and far from conclusive.

Negatively, there are clear holdings that a court cannot safely rely on the general legislative debates, even if these are available in a preserved form, as they seldom are, except perhaps, for the purpose of informing itself as to the particular mischief which the statute was designed to remedy. This use was illustrated in *Wollcott v. Shubert* decided by the Court of Appeals of New York in 1916.45

As to practical construction there is more affirmative unanimity than on any other point. Where there is a *found ambiguity*, such evidence has been held highly persuasive in Florida, Minnesota, Ohio, New York, Virginia, Wisconsin and doubtless in many other states for which I have no citation of authority.46 When the question has arisen courts have found it difficult to determine whether the “ambiguity” requisite for an application of the rule in this restricted form, was present. Thus an identically worded statute was found by *Iowa* to be “too clear” to permit resort to extrinsic aids47 and by *Minnesota* to be “sufficiently ambiguous” to permit such resort.48

45 217 N. Y. 212, 221.
46 Bloxham v. Consumers, etc. R. R. Co. (1895), 36 Fla. 519; Estate of Boutin (1921), 149 Minn. 148; Hennepin County v. Ryberg (1926), 168 Minn. 385; Matter of Stupack (1937), 274 N. Y. 198; Industrial Com'n. v. Brown (1915), 92 Oh. St. 309; City of Richmond v. Duewry-Hughes Co. (1918), 122 Va. 178, 193; Union F. H. S. Dist. of Montfort v. Union F. H. S. Dist. of Cobb (1934), 216 Wis. 102.
48 Hennepin County v. Ryberg (1926), 168 Minn. 385.
As to the history of the bill between its introduction into the legislature and its enactment by that body, in so far as this history is confined to the record of changes, or proposed changes in its text, the courts of New Jersey and New York have received such evidence. In New Jersey this was done with respect to the Milk Control Act of 1933 in order to determine whether that act applied to the purchase of milk to be used in the manufacture of ice cream. In New York such evidence helped in ascertaining the meaning of its Employees' Liability Act and of its Civil Rights Act when Alexander Woollcott was denied access to the Shubert Theaters because of his unfavorable criticisms of a play. In Arkansas, on the contrary, the value of such evidence was declared in 1899 to be negligible. The date of this case lessens its significance since even the Supreme Court of the United States felt very similarly at that time.

Occasionally a State has a special Commission appointed to consider the desirability of legislation in a particular field. Thus in the State of New York in 1927 the Legislature appointed a Decedent Estate Commission to propose changes in the law of succession on death. This Commission had very able members, including many judges and experts in the field. Their report showed what they felt to be defects in the existing law and how their proposed legislation would change the existing law. Naturally the Courts have felt entitled to resort to this report when called upon to construe any part of the very extensive legislation enacted at the behest of this Commission. A rather interesting aspect of this resort is to be found in the opinion of Surrogate Wingate in the case of Estate of Bommer decided in 1936. This judge was a member of the Commission to which I referred. He opened his opinion with these words:

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49 State Board of Milk Control v. Richman Ice Cream Co. (1934), 117 N. J. Eq. 296.
53 159 Misc. 511.
"It is fortunately rare that a court is placed in the slightly anomalous and somewhat embarrassing situation inherent in the present litigation.

"As a member of the Decedent Estate Commission, upon the recommendation of which section 18 of the Decedent Estate Law was incorporated into the statutes of this State, the court, as an individual, is completely conversant with the motives and purposes which actuated the Commission, and by reason of numerous conferences with legislative leaders in respect to the proposed enactments, and the fact that the recommendations of the Commission were crystallized into law in substantially unaltered form, it possesses, still as an an individual, a clear conception of the actual legislative intent in the enactment of these laws. Use of this personal knowledge is, however, inhibited by basic rules of decision, and the only bases of interpretation which may be employed are the words of enactment when read in the light of the explanatory notes which were before the Legislature at the time of the consideration of the proposed bills."

Surrogate Wingate then proceeded to quote at length from the Commission's Report and to use it for the interpretation of the statute. Throughout his opinion he stresses the fact that he is "laying aside the personal knowledge of the court respecting the actual legislative intent in the enactment." To those who are Gilbert and Sullivan addicts this is strangely reminiscent of one of the characters in the Mikado. Why one should protest so vigorously that he hesitates to use special equipment which he possesses for the doing of the job committed to his care, is not clear. It is perhaps a further manifestation of what Pollock and Maitland described with regard to the twelfth and thirteenth centuries as the "mystic awe" of the common law for a written instrument. That great judge of Pennsylvania, Chief Justice Gibson, more than a century ago, utilized on the bench, the knowledge as to the purpose of statutes which he had gained in earlier decades as a member of the legislature. An illustration of such use by him is to be found in Moyer v. Gross, decided in 1830.54

As to the utilization of the report of a legislative committee which drafted the statute or deliberated thereupon prior to its enactment, there seems to be a division in the

54 2 Penrose and Watt 172.
few holdings I have encountered. In a Connecticut case,\textsuperscript{55} decided in 1925, the highest court of that state wrote as follows:

"As a preliminary question plaintiff strongly urges the consideration of the views of the various parties as presented before the finance committee of the General Assembly, and the expressed understanding of the committee as to the meaning of the bill by them reported to the Assembly and afterward passed, as being an important and even controlling factor in the interpretation of the Act. We cannot sustain this contention. The intention of the legislature is to be gathered from the words of the enactment, taken in connection with prior legislation contained in the city's charter and such surrounding facts as to the state of the art of road-making, and usual methods of attaining satisfactory results, structural and financial, of which the court may take judicial notice. The claims of the contestants before the committee and the ideas which the committee may have entertained are not to be regarded. Had the Superior Court proceeded to a trial in the instant case with a view to finding the facts, evidence tending to show the legislative purpose by what occurred at a committee hearing and by conclusions of the members of such committee would not have been admissible."

This rejection is not made upon any of the grounds elsewhere recognized as justifying hesitation in such resort. It seems rather as an unfortunate blanket rejection of potentially valuable material. The Supreme Court of Wisconsin has taken a diametrically opposite position. In \textit{Pellett v. Industrial Commission},\textsuperscript{56} the Court had to decide when an award, given under its Workmen's Compensation Law, could be set aside for "fraud." The statute listed as one basis for setting aside an award:

"That the order or award was procured by fraud."

Hence the court had to decide what the Legislature had meant by the inclusion of this provision. The Court thus handled its problem of construction:

\textsuperscript{55} Litchfield v. Bridgeport, 103 Conn. 565.
\textsuperscript{56} 162 Wis. 596 (1916).
"Happily there is as to this statute no doubt upon the subject. The report of the committee referred to and the discussions had before it conclusively show that it was the legislative intent that perjured testimony or concealment of material facts were not such fraud as the statute contemplates. In their report the committee said: 'The fraud alluded to in the second ground will be only such as was perpetrated in securing the award, and will not include false testimony of any party, because such questions all will be decided by the board' (commission). This view is reinforced by the discussions before the committee, too lengthy to be here inserted. Such being the express legislative construction given the language used; and such construction being repugnant neither to the language used nor to judicial principles, must control."

It is obvious that the judicial experts in the science of statutory construction in the state courts and with respect to state legislation have been much more hesitant and infrequent in resorting to matters extrinsic to the text of a statute, than have the Justices of the Supreme Court of the United States in handling like problems with respect to Federal legislation. No one can seriously urge that this is due to the fact that state legislation is more crystal clear than Congressional enactments, and hence less often gives occasion for such resort. Nor do I believe that it can be established that the state judiciaries are in general more imbued with the medieval mystic awe for a written instrument, or more reluctant to utilize aid available to them for the effective doing of their tasks, than are the members of the Supreme Court of the United States. Rather, I attribute this embryonic condition of the science of statutory construction in the courts of our several states to the general non-availability of the needed materials in the case of state legislation. Our state legislatures keep a lamentably inadequate record of their activities and the State of Indiana is no exception to this statement. No one acquainted with legislators doubts that the average legislator believes his legislative work to be important, and, within limits, this belief is entirely correct. But, in no other aspect of our government are activities of such importance, accorded such an ephemeral existence. The American Political Science Review for February, 1935 contains an article
by Phillips Bradley, formerly of Amherst College and now of Queens College, entitled Legislative Recording in the United States. It portrays in an appalling fashion the incompleteness of the state legislative records and the poor utilization of even the amount of state printing which is in fact authorized and paid for. A few years ago, Mr. Charles S. Hyneman of Illinois since removed to Louisiana, addressed inquiries to some twenty-five states seeking information as to the records kept (a) of legislative debates, and (b) of committee proceedings and reports. The answers were almost completely negative. Pennsylvania keeps and prints a record almost as complete as Congress. New York has an official stenographer in both Senate and Assembly but the minutes are not transcribed unless some member specially requests a record of his words of wisdom. No where is there any attention to Committee reports or to their proceedings. I find, on inquiry, that no record of the work of committees or of the debates occurring in the legislature of Indiana is preserved, and that the minute book kept in each branch of the legislature is the barest skeleton of the legislative activities.

Is this economy? I do not believe so. I am not suggesting that each state have its local "Congressional Record." That would be largely a waste of good paper and of public moneys as it is today in both Washington and Harrisburg. I am suggesting that we recognize the undoubted importance of the work done in the committees of a state legislature; that on all important legislation, such a committee be required to deliberate and to make a written report, and that the skilled aid of legal, economic and drafting experts be available to such committees. Your legislative reference bureau is a wise step in the right direction but needs expansion and development. Money thus expended will improve the quality of legislation enacted, will lessen the uncertainties as to the meanings of the bills which become law will aid you as lawyers in construing laws for your clients prior to judicial decisions thereon and will provide safe guidance for your courts when they are required to engage in statutory construction.
Thus we come to the end of our second day together. We have examined the authorities as to the extent to which the construction of written instruments requires first, a reading of each such instrument as an entirety, and second, a reading of each such instrument in the light of facts extrinsic to its text, particularly the circumstances of its formulation. I submit that our discussions justify three conclusions. In the first place, the wise position of your Supreme Court as to the construction of a statute as an entirety, taking into full account all of the provisions found within its four corners deserves to be extended to the construction of private instruments, so as to eliminate that tendency toward piecemeal construction of wills and other conveyances which is still sometimes found in this State under the cloak of the doctrine of repugnancy. In the second place, the hesitant and intermittent and qualified resort to matters extrinsic to the text of a statute, in the search for the "idea" sought to be embodied therein, could profitably be replaced by broad acceptance of that idea which has been recognized in this state as to wills, and in the Supreme Court of the United States as to Congressional legislation, namely, that the circumstances of the instrument's formulation should be broadly admissible and should be resorted to not only for the resolution of doubts otherwise engendered but also for the ascertainment of whether doubt is thus engendered, as to the purpose or meaning of the language found in such statute. In the third place, as lawyers, many of whom have large influence in the legislative halls of this state, you have an opportunity and a duty to increase the effectiveness of the work of legislative committees and to perpetuate for future use, when needed, the record of the work done and done well in these committees.