CHAPTER 5

Interpretation of Legislation *

Sec. 5-01. When interpretation is needed—scope of chapter. In the preceding chapter we viewed the processes of legal control primarily from the side of the agency which formulates a legislative message; we stressed the problems of the lawmaker. At this place we shift our point of view and look at the processes of legal control from the side of persons to whom the legislative message is addressed; we look at the message as it appears to persons who must use or apply its directives. However, we shall not undertake to discuss all aspects of the application of legislation. We have already covered a large part of this ground; we have already discussed cases where the legislative message is clear and understandable and where its provisions are applied without effort. The only cases that need to be discussed further are those where the application of legislation raises doubts or difficulties in the mind of the person who must apply it.

If language were a perfect vehicle of communication, and if human beings thought out their intentions with complete foresight, and if they expressed their aims and desires fully and perfectly, one might expect to find legislation which

* (I.R.) Suggestions for further reading:
SUTHERLAND, STATUTORY CONSTRUCTION (3rd ed. by Horack, 1943).
READ AND MACDONALD, CASES AND MATERIALS ON LEGISLATION (1948).
See also items cited herein in sec. 5-14, note *, and sec. 5-17, note *. The voluminous material on this topic is found for the most part in the Law Reviews. It is not necessary to cite it all here as it is referred to or quoted in the works above cited.

1 Notably those parts of chapters 2 and 3 where we discussed the use of standards for the individual (secs. 2-43 to 2-48) and the use of standards for officials (secs. 3-30 to 3-34).
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needed no interpretation. However, there are deficiencies in language itself, in human foresight, and in the ability to express ideas; all these contribute to the general result that verbal acts of all kinds require interpretation. The use of language in legislation, like any other use of language, may be insufficient or obscure; it may be ambiguous, self-contradictory, vague or incomplete. If legislation is defective in any of these respects there is work for the interpreter to do.

This chapter will be devoted to the work of the interpreter, to cases where the meaning of legislation is problematic and has to be settled before it can be applied. This subject matter will be taken up under the following heads:

Role of interpreter.
Sources and standards of interpretation.
Typical interpretive problems.

ROLE OF INTERPRETER

Sec. 5–02. Who interprets—dominance of judiciary. On occasion, almost anyone may be confronted by the necessity of interpreting a legislative provision, just as he may have to apply one. An important new labor law, such as the Fair Labor Standards Act, raises at once questions of interpretation for every employer of labor: whether this statute applies to his contracts with his employees, and if it does, what are the effects of its provisions regarding wages and hours in his case. Only after a considerable length of time do such questions receive authoritative answers, and until and unless they do, the individual affected must make his own guesses as to how the act will be applied and enforced.¹ In like manner,

¹ In a speech last year Justice Jackson said:
"I read from time to time of laws enacted by Congress of which it is said it will require several years to learn how the Courts will apply them and what meaning Courts will give to them. . . . This seems to be accepted as necessary and usual, but it really indicates that there is something wrong in the process by which law is communicated to this country," "The Meaning of Statutes," 34 A. B. A. J. 535, 537 (1948).
an official who is under obligation to enforce a legislative provision may have to figure out the meaning of its terms before he embarks on the performance of his duties. Also, the trial judge frequently must construe a legislative provision of doubtful meaning before he takes action or decides the case before him. And finally, the Supreme Court counts among its chief functions the settlement of questions of constitutional and statutory interpretation, that is to say questions which come up on appeal from the courts below. So that we can truly say that the interpretation of legislation is a function which may have to be performed on occasion by everyone.

But judicial interpretations of constitutional and statutory clauses have a peculiar significance which does not attach to the interpretations of other officials or of individuals. And from this peculiar significance has developed the common notion that the power of interpretation belongs exclusively to the judiciary, or more specifically, to the supreme court of each jurisdiction. There is no real contradiction here. The one proposition is to the effect that anyone may have to interpret legislation before he acts; the other to the effect that the supreme court gives the final and conclusive interpretation when it does speak. The latter proposition emphasizes the predominant role of the supreme court in settling the meaning of legislative provisions.

The predominance of judicial interpretations is best appreciated if we note the status in our American legal systems of judicial decisions construing constitutions and statutes. Such decisions are recorded and followed. A judicial interpretation of a legislative provision virtually becomes part of that provision's meaning; what the court says adheres to the legislative text. The interpretation is a judicial precedent; it is treated by all concerned as part and parcel of the provision's effective meaning, quite as if written into the provision itself.
The supreme court which rendered the decision so regards its prior interpretation. Courts of other jurisdictions and text writers do likewise. And lawyers always deal with a construed provision of a constitution or statute as if the construction were embodied in the provision; they do not simply cite the text of the provision, they also quote what the supreme court has said that the text means.

In view, then, of the dominance of judicial interpretations of legislation and of the fact that the judicial process typifies the interpretive process generally, I shall from this point on discuss judicial acts of interpretation (except where some other interpretive act is indicated) and shall use "interpretation" to mean judicial interpretation.

Sec. 5-03. Three theories of interpreter's role—"legislative intent" theory. What is the interpreter's role or function? Three theories have been propounded in answer to this question. I believe it will help us to understand the processes of interpretation if we examine each of these theories rather closely. These theories, and the conceptions of the interpreter's role which they express, are:

1. "Legislative intent" theory, to discover L's intent.
2. "Verbal meaning" theory, to arrive at the settled meaning of the words L used.
3. "Free interpretation" theory, to interpret as the interpreter chooses.

First, then, of the "legislative intent" theory. This is the conventional theory of interpretation. It declares that the judicial interpreter is expected to discover the legislator's intent. Statements to this effect appear over and over in the cases. Sometimes this theory purports to be a description of what the interpreter does; sometimes it is essentially a rule of method for the interpreter, telling him that the discovery of the legislator's intent is controlling or that his
proper goal is to find out what the legislator meant. Offhand, these statements sound plausible; and probably in cases where the meaning of legislation is fairly clear under all the circumstances, such modes of stating objectives do no particular harm. But in cases where the legislator's meaning is not clear, in cases where real problems of interpretation confront the person who must apply legislation, these ways of stating the interpreter's objective serve to obscure the real nature of the interpretive process and the factors which are involved in it; they misdescribe the process which occurs and misdirect the attention of the interpreter in a manner which may be positively harmful.

Sec. 5-04. Problems. 1. Gray says of this theory:

"A fundamental misconception prevails, and pervades all the books as to the dealing of the courts with statutes. Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a 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. If that were all that a judge had to do with a statute, interpretation of statutes, instead of being one of the most difficult of a judge's duties, would be extremely easy. 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; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present in its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present. If there are any lawyers among those who honor me with their attendance, let them consider any dozen cases of the interpretation of statutes, as they have occurred consecutively in their reading or practice, and they will, I venture to say, find that in almost all of them it is probable, and that in most of them it is perfectly evident, that the makers of the statutes had no real intention, one way
or another, on the point in question; that if they had, they would have made their meaning clear; and that when the judges are professing to declare what the Legislature meant, they are, in truth, themselves legislating to fill up casus omissi.”

How would you state Gray's objection to this theory? Why does his view, if correct, make it difficult to accept the "legislative intent" theory?

2. Why does the following case make difficulty for the "legislative intent" theory?

State v. Partlow. 2 "The defendant is indicted for selling one quart of spiritous liquor to one Rutherford within three miles of Mount Zion church, in the county of Gaston, in violation of the Act of 1881, ch. 234.

"It was in evidence that the liquor was sold as alleged; and that there were two churches (about fifteen miles apart) each called "Mount Zion church," in said county—one for the white people and the other for the colored people. And there was nothing in the statute indicating to which of these two churches the name applied or had reference.

"With a view to apply the statute, the state introduced a witness who was a senator in the general assembly at the time the Act in question was passed, and the court allowed him to testify, after objection, that it was intended to apply to the church mentioned by himself and the other witnesses, and this he knew, because the provision of the Act in respect to Mount Zion church was inserted upon his motion, made in response to petitions praying for the prohibition of the sale of spiritous liquor within three miles of Mount Zion colored church, signed by colored people whom he knew. The defendant excepted, and further insisted that the statute was ambiguous and therefore void.

"Verdict of guilty; judgment; appeal by the defendant. . . ."

Merrimon, J.: "The Act of 1881, ch. 234, prohibits the sale of spiritous liquors within designated distances from

1 The Nature and Sources of the Law, sec. 370 (1916).
2 91 N. C. 497 (1884).
many churches and other places named therein. So much of it as is material to this case provides, 'that the sale of spiritous liquors shall be prohibited within three miles of . . . Mount Zion church in Gaston county.'

"It appeared on the trial that there were two churches bearing the name 'Mt. Zion' in Gaston county, and there is nothing in the statute indicating to which of them it applies. "It is plainly the duty of the court to so construe a statute, ambiguous in its meaning, as to give effect to the legislative intent, if this be practicable . . . . But the meaning must be ascertained from the statute itself, and the means and signs to which, as appears upon its face, it has reference. It cannot be proved by a member of the legislature or other person, whether interested in its enactment or not. A statute is an act of the legislature as an organized body. It expresses the collective will of that body, and no single member of it, or all the members as individuals, can be heard to say what the meaning of the statute is. It must speak for and be construed by itself, by the means and signs indicated above. Otherwise, each individual might attribute to it a different meaning, and thus the legislative will and meaning be lost sight of. Whatever may be the views and purposes of those who procure the enactment of a statute, the legislature contemplates that its intention shall be ascertained from its words as embodied in it. And the courts are not at liberty to accept the understanding of any individual as to the legislative intent . . . . "Now, the clause of the statute before us simply refers to 'Mount Zion church in Gaston county,' and there are two churches of that name in that county. There is nothing in the statute that in the remotest degree indicates to which of the two it refers. There are no means or signs of any kind appearing in it, in terms, by implication, by reference, or by any possible construction, that go to point to one of the two churches any more than to the other. It must, therefore, be as inoperative as if there was no church, or fifty churches of the same name in that county. "The testimony of the witness, who was a senator at the time the statute was enacted, was wholly incompetent for the reasons already stated.
"We are constrained to declare that the clause of the statute under consideration is, because of its ambiguity, inoperative and void.
"Error. Reversed."

Sec. 5-05. The "verbal meaning" theory. On the basis of reasoning like that of the Partlow Case just quoted, a second theory of the interpreter's role has been evolved. This theory I call the "verbal meaning" theory. It declares that the interpreter is concerned strictly with the established meaning of the language which the lawmaker has used. In the words of another court, "Whether we are considering an agreement between parties, a statute or a constitution, ... the thing we are to seek is the thought which it expresses. ... That which the words declare, is the meaning of the instrument; and neither court nor legislatures have a right to add to or take away from that meaning."¹

As a description of the interpretive process this theory has the advantage of frankly converting the process of interpretation into an inquiry based on objective materials. The job of the interpreter becomes an investigation of the established meaning of what the legislator has said. This conception of the interpreter's task represents an advance in realism insofar as it discards any fictitious and irrelevant subjective element suggested by the "legislative intent" theory; it represents a sound policy inasmuch as it refers the interpreter to objective material, the legislative text, which is also available to persons affected by the legislation.

Those who announce this "verbal meaning" theory have usually assumed that the proper meaning of a legislative text is simple and single; they have usually assumed, if not stated, that the proper meaning inheres in the words used and can be directly read off. Thus Justice Story, who emphatically announces the view that the correct meaning of

¹ Johnson, J., in Newell v. The People, 7 N. Y. 9 at 97 (1852).
the clauses of the Federal Constitution is to be derived from the words used, also takes for granted that there can be only one proper meaning of those words. As he says:

"Nothing but the text itself was adopted by the people. And it would certainly be a most extravagant doctrine to give to any commentary then made, and a fortiori to any commentary since made, under a very difficult posture of feeling and opinion, an authority which would operate as an absolute limit upon the text, or should supersede its natural and just interpretation." 2

Here Story takes for granted that the text has one natural and just interpretation. In another part of the same section, he says, "The Constitution was adopted by the people of the United States, and it was submitted to the whole upon a just survey of its provisions as they stood in the text itself." This learned author takes great pains at the same time to point out that the parties who adopted the language of the Constitution may have had different views as to what its language meant.

Sec. 5–06. Problems. 1. If the proper interpretation of language, or as Story calls it "the natural and just interpretation," is as obvious and uniform as his theory assumes it to be, how is it possible for courts to differ as widely as they often do, regarding the correct interpretation of a statutory or constitutional clause? Story himself was a member of the United States Supreme Court when it thus differed in opinion with the supreme appellate tribunal of New York in the celebrated case of Gibbons v. Ogden.1 The difference concerned the proper interpretation of the simple language of the Commerce Clause of the Federal Constitution. The United States Supreme Court gave the clause a wide and comprehensive interpretation, to bring all kinds of intercourse

between states within the legislative power of Congress; the New York Court would have restricted Congressional control to commerce in the sense of traffic in goods. Both interpretations were possible, both were reasonable from any ordinary point of view, and each was adopted by a bench of judges whom we number among the leading lights of our legal history.

Why does such a difference of opinion, as was found in the Gibbons Case in regard to the meaning of the Commerce Clause, make difficulty for the "verbal meaning" theory as Story and others have declared it?

2. Jethro Brown: "As a matter of fact, however, the statute does not mean—cannot mean—to one generation just what it meant to a preceding generation." 2 Brown here speaks of a statute. His remarks would apply with great force to such ancient legislation as the Statute de Donis and the Statute of Uses. What he says would apply equally to legislation such as our Federal Constitution and to important constitutional documents, such as Magna Charta. If what he says is true, how does it bear on the "verbal meaning" theory?

Sec. 5-07. The "free interpretation" theory. This brings us to the third theory of interpretation: that the interpreter can and does make the statute mean whatever he wants it to mean. The theory, which has had considerable vogue recently, I have called the "free interpretation" theory; it stresses the creative role of the interpreter; in fact, it converts this role into a complete theory of interpretation. On this point Gray quotes a venerable writer as follows: "Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is he who is truly the Law Giver to all intents and purposes, and not the Person who first wrote and spoke them." 1 In similar vein, Chief Justice Hughes, when he

2 "Law and Evolution," 29 Yale L. J. 394 at 396 (1920).
1 The Nature and Sources of the Law, sec. 276 (1916).
was Governor of New York, said of the power of the United States Supreme Court to interpret the Constitution: "We are under a Constitution, but the Constitution is what the judges say it is." ²

Sec. 5–08. Problems. 1. Why would you not be ready to accept the "free interpretation" theory? What would be its necessary effect?

2. How would you state a theory to combine the virtues of all three theories? In other words what do you think ought to be the interpreter's role and method of interpreting a statute?

Sources and Standards of Interpretation

Sec. 5–09. The interpreter's act and his sources. The interpreter's act starts with the legislative text. This is the primary subject matter of interpretation.¹ However, interpretation always occurs in a problematic situation. If the application of the legislative text raised no doubts, there would be nothing for the interpreter to do as such; if the text were not unclear or incomplete there would be no call for interpretation. In other words, the interpreter's act is partially creative, it adds elements not expressed in the legislative text itself. At the very least the interpreter is called upon to restate or explain what the legislator has said; and he may have to go so far as to correct the legislative statement or to supply gaps in it.

While the creative side of the interpreter's act is indisputable, the nature and amount of his contribution will vary

² Unlike some who have since quoted his words, the learned Chief Justice probably did not intend his statement as a complete characterization of the process of interpretation.

¹ Unless one accepts the theory of "free interpretation" in an absolute and unlimited form (of course, we do not, and I doubt if anyone does), one always begins with the legislative text.
from case to case. For this reason there does not seem to be much point in trying to separate and distinguish neatly between elements contributed to the final meaning by legislator and by interpreter respectively. It can never be quite clear, either in reference to a specific interpretive act or in reference to the process of interpretation generally, how much the interpreter derives from what the legislator has said or suggested and how much he adds to the legislative text which he is interpreting. What the legislator says passes by imperceptible degrees into what he implies or takes for granted. What the legislator implies or takes for granted, is not clearly distinguishable from what he would have said, if he had thought of the problem which is now presented to the interpreter. And what the legislator would have wanted and would have said, shades into what the interpreter thinks ought to be the meaning of the legislative provision, purely as a matter of policy.

A more promising undertaking than to try to measure the specific contributions of legislator and interpreter to the final product, is to analyze the interpretative process itself in order to see what materials the interpreter works with and what he does with these materials. These at least are the tasks which we shall set ourselves in the remainder of this chapter. In the present subtopic we shall examine primarily the materials out of which the interpreter develops his interpretation. In the subtopic to follow we shall see how he goes about solving typical interpretive problems.

Turning now to the materials which the interpreter uses in his act of interpretation we find that he has two important sets of materials to work with: (1) the language which the legislator has used; and (2) the context in which the language is used. The interpreter deduces his interpretation from the text of the legislation and the context of its use. Both these factors are objective, and open to investigation.
and determination by the interpreter; both contribute to the final interpretation which he adopts.

The necessity of considering the text of the legislative provision is obvious enough. That is what the interpreter is construing. But the nature and role of context is not so obvious. What is the context which is important? What do we mean by the term and what does it include? In a general sense context means setting. It embraces all the conditions and circumstances which attend the use of language. In the case of the interpreter we can regard context as just another name for the sources on which he draws in developing his interpretation. In context he finds the materials and ideas on the basis of which he reworks the legislator’s text. So that context is to the interpreter what sources are to the legislator; and ideally we hope that both legislator and interpreter act in the light of the same context or, otherwise stated, draw on the same sources for their verbal acts. If not, we shall find that when the interpreter says what the legislator meant, the meaning as declared will not correspond with the real meaning of the legislator.

For the purpose of further analysis and discussion, I shall differentiate three kinds of context:

1. The general context, i.e., the general knowledge of the time.
2. The legal context, i.e., other law existing at the time of enactment.
3. The history and circumstances of enactment of the particular legislative provision.

Sec. 5–10. The general context. Any verbal declaration, oral or written, must be interpreted against the cultural background in which it is made. The culture consists of the entire fund of knowledge which belongs to the community. This background is implied in all uses of language, and in every application thereof. In this sense any legislative declaration
must be read and interpreted in relation to the general context in which it is enacted and applicable. Exactly the same statutory provision would, and should, have a different meaning and application in India from what it would have in England; in England, from what it would have in the United States. Where habits, knowledge, and modes of living are different, the interpretations of one and the same legal provision are bound to be different.

Prominent in the general context are the facts of *common experience* in the community. Matters of common knowledge, such as the facts that cattle eat grass and that milk requires special care to prevent contamination and spoiling, are presupposed and taken for granted in the enactment and the interpretation of legislative provisions regarding cattle raising and milk marketing. The legislator has to assume that he is addressing an interpreter, as well as ordinary individuals, who know the common patterns according to which people in the community live and move about, e.g., what they use an automobile for. Of course, a man from Mars would not know these facts and could not interpret what the legislator has enacted; and even the mundane interpreter may have to make facts of common knowledge explicit, whenever they become relevant to a problem of interpretation.

Another important part of the general context consists of the various branches of tested knowledge which we know by the collective name of *science*. Here belong the pure sciences, e.g., biology, physics, chemistry, and astronomy, as well as medicine, engineering and other fields of applied science; and we use science in a broad enough sense to include all branches of special knowledge such as agriculture, lumbering, plumbing, carpentry, etc. We shall see presently that one of the recognized rules of interpretation requires the interpreter to give technical words their technical signification. “Technical” is used here as substantially equivalent to “scientific” in the broad sense just suggested. If a scientific
word or a word peculiar to a special profession or trade is employed in a legislative enactment, the interpreter must draw upon the proper field of knowledge for its definition.¹

The general history of the community constitutes another part of the context which may have to be used or examined by the judicial interpreter. Historical conditions of the past are often important in determining the meaning of legislation. Even today the Supreme Court of the United States frequently refers to general conditions in America at the time when the Revolution occurred and when the Constitution was framed.

And finally, though our enumeration is not intended to be exhaustive, the general background includes all the established usages of language. It includes the standard meanings of words, the usages of grammar, rules of punctuation, and other related matters. Language symbols by themselves are abstract and meaningless.² Meaning attaches to them through repeated and continuous use. The interpreter, like the legislator, must be able to use and apply standard language devices; he must know, for example, what the words “automobile” and “driving” mean. Language devices and all they imply are taken for granted in the processes of enacting, applying, and interpreting legal provisions. Familiarity with language is something distinct from the common knowledge and the scientific knowledge mentioned, although both kinds

¹ Compare sec. 4–20 above, where the use of popular and technical terms in statutes is discussed.
² Accordingly, a particular group of language symbols—a legislative or other text—means absolutely nothing except in terms of a particular cultural background. And this dependence of the significance of symbols upon established cultural background holds true of all symbols whatever. For example, the word “gift” in an English setting, means a donation; in a German setting, means poison. What this all signifies philosophically is that the distinction between text and cultural context is really a distinction between one part of the cultural heritage and another part; it is a distinction between the prevailing symbol system and the rest of the culture. Nevertheless, the distinction is a practical one which is commonly made; and I have not hesitated to use it for the present purpose.
of knowledge are definitely hooked up with language devices. However, it is quite possible that a Frenchman may be conversant with the knowledge of today but unable to interpret a statute written in English. The interpreter must not only be possessed of knowledge; he must also be familiar with the particular language devices which refer to it.

Sec. 5-11. Problems. 1. A Michigan statute provides:

"Words imputing to any female a want of chastity shall be deemed to be actionable in themselves. . . ." Mich. Stats. Ann. § 27.1370. Plaintiff, a married woman, brought action for slander based on this statute. The defendant admitted that, in an argument over some horses, he had called the plaintiff "you damned old bitch." The trial court instructed the jury that these words "did impute the want of chastity to Mrs. Warren" and that she was entitled to recover. The Supreme Court reversed the case on account of this instruction. It declared "We are of the opinion that the court erred in instructing the jury that the language admitted to have been used by defendant, under the circumstances alleged by him, was slanderous per se."

This was all that was said on the subject by the court.¹

On what basis would you say that the court reached its decision?

2. McBoyle v. United States.² Mr. Justice Holmes delivered the opinion of the Court.

"The petitioner was convicted of transporting from Ottawa, Illinois, to Guymon, Oklahoma, an airplane that he knew to have been stolen, and was sentenced to serve three years' imprisonment and to pay a fine of $2,000. The judgment was affirmed by the Circuit Court of Appeals for the Tenth Circuit, 43 F. (2d) 273. A writ of certiorari was granted by this Court on the question whether the National Motor Vehicle Theft Act applies to aircraft. Act of October 29,

² 283 U. S. 25 (1931).
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1919, c. 89, 41 Stat. 324; U.S. Code, Title 18, § 408. That Act provides: 'Sec. 2. That when used in this Act: (a) The term "motor vehicle" shall include an automobile, automobile truck, automobile wagon, motor cycle, or any other self-propelled vehicle not designed for running on rails; . . . Sec. 3. That whoever shall transport or cause to be transported in interstate or foreign commerce a motor vehicle, knowing the same to have been stolen, shall be punished by a fine of not more than $5,000, or by imprisonment of not more than five years, or both.'

"Section 2 defines the motor vehicles of which the transportation in interstate commerce is punished in § 3. The question is the meaning of the word 'vehicle' in the phrase 'any other self-propelled vehicle not designed for running on rails.' No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air, and sometimes legislation extends the use in that direction, e.g., land and air, water being separately provided for, in the Tariff Act, September 22, 1922, c. 356, § 401 (b), 42 Stat. 858, 948. But in everyday speech 'vehicle' calls up the picture of the thing moving on land. Thus in Rev. Stats. § 4, intended, the Government suggests, rather to enlarge than to restrict the definition, vehicle includes every contrivance capable of being used 'as a means of transportation on land.' And this is repeated, expressly excluding aircraft, in the Tariff Act, June 17, 1930, c. 997, § 401 (b); 46 Stat. 590, 708. So here, the phrase under discussion calls up the popular picture. For after including automobile truck, automobile wagon and motor cycle, the words 'any other self-propelled vehicle not designed for running on rails' still indicate that a vehicle in the popular sense, that is a vehicle running on land, is the theme. It is a vehicle that runs, not something, not commonly called a vehicle, that flies. Airplanes were well known in 1919, when this statute was passed; but it is admitted that they were not mentioned in the reports or in the debates in Congress. It is impossible to read words that so carefully enumerate the different forms of motor vehicles and have no reference of any kind to aircraft, as including airplanes under a term that usage more and more precisely confines to a different class. The counsel for the
petitioner have shown that the phraseology of the statute as to motor vehicles follows that of earlier statutes of Connecticut, Delaware, Ohio, Michigan and Missouri, not to mention the late Regulations of Traffic for the District of Columbia, Title 6, c. 9, § 242, none of which can be supposed to leave the earth.

"Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that, if the legislature had thought of it, very likely broader words would have been used. United States v. Thind, 261 U. S. 204, 209. "Judgment reversed."

Where does Holmes get his information about the meaning of "vehicle"? How does he happen to know the manner in which planes move? How far are these points dealt with in the text of the statute?

Ordinarily the court goes to the dictionary and other standard books of reference, if it is in doubt about the meaning of an expression which it is interpreting. Does this seem proper?

Suppose the expression is defined in the statute itself, e.g., "motor vehicle" in the statute involved in the McBoyle Case. What difference does this make?

Sec. 5-12. The legal context.¹ Maitland once declared, in words often quoted, "The law is a seamless web." His words express neatly the idea that the mass of legal rules, principles,

¹ The sociologist regards the law as part of the culture of a community. In this sense he would treat the legal background as a mere part of the general
and doctrines, constitutes an integrated whole of which any particular law is only a part, and at the same time suggest the idea that the entire body of law is a general background for any individual legal provision. In this latter sense the lawmaker who frames a law really weaves a small strand into an already existing legal web; he takes an established legal fabric for granted and attaches his legislation to it. And, by the same token, the interpreter assumes and relies on the existing legal context; he can understand a particular legislative provision only in relation to it. In working out the meaning of any provision, he must trace out connections between its terms and the existing legal setting.

The legal context is traditionally divided into common law and legislation, and in line with this division we find several recognized rules of interpretation which are intended to guide the interpreter in developing the relationships of new pieces of legislation to established law. One declares that every statute is to be interpreted in the light of the common law; or, to use a quaint metaphor of Coke, “To know what the common law was before the making of the statute is the very lock and key to set open the windows of the statute.” Another rule declares that statutes in derogation of the common law are to be strictly construed—a rule of somewhat doubtful virtue since its general tendency is to perpetuate antiquated common law at the expense of modern legislation.

The integration of new legislation with existing legislation is equally important; and there are helpful rules to guide the interpreter in this part of his job. One part of the established legal background consists of the constitutions. The interpreter must, if he can, harmonize a new statute with cultural background. But the legal background is so important for our purpose that I feel justified in treating it as something separate and distinct. See the remarks made in sec. 5–10, note 2, regarding a similar distinction between language and culture.
these. If a statute conflicts with a constitutional provision, of course it is void; but this is not the only significance of constitutions. The interpreter presumes that the legislator did not intend his act to run afoul of constitutional provisions; the interpreter is required to adopt a construction which will avoid these consequences. Furthermore, the constitutions commonly state important policies regarding the public welfare, the liberties of the individual, and other matters. These statements of policy have substantial weight in the interpretation of statutes. Where the judicial interpreter has a choice between two interpretations he is always ready to choose that one which tends to effectuate, or which is in harmony with, such a constitutionally declared policy.

Another part of the established legal background is made up of existing statutes. The interpreter draws on this existing material for aid in construing a new statutory provision and also tries to harmonize the latter with the existing law. Such efforts are in line with well-recognized rules of interpretation. For example, one such rule declares that any piece of legislation is to be interpreted in relation to existing legislation on the same subject. This rule is commonly called the in pari materia doctrine. According to this doctrine, if a new statute be passed dealing with some special feature of the law of corporations, this statute is to be interpreted in the light of existing legislation governing corporations; a new larceny statute is to be fitted into the existing law of larceny; a new tax regulation into the body of law and regulations on this subject; in short any legislative act is to be read in the light of other legislation on the same subject.

And we cannot say that the legal background is limited merely to existing enactments and existing common law. Existing law has behind it a long history. The interpreter may consider this history to discover instructive trends. Such trends may be useful to him in guiding his choice between
different possible interpretations. Furthermore, he may travel outside the body of existing law to consider doctrines which have been developed by writers on legal subjects. Textbooks, encyclopedias, and other works on law, may furnish the interpreter with instruction or inspiration for his creative role, just as they serve the legislator as sources for ideas and materials which he embodies in enactments. So that we have to recognize that the sources on which the interpreter draws and the materials which he considers, include not only common law and legislation but also these extralegal writings about law.

In connection with what has just been said about the use of legal background as a source of ideas, it is worth pausing to note more specifically how the interpreter may use legal background as a source of materials and what important materials he derives from it. In the legal background he may find four important kinds of material: (1) general notions of the ends of law; (2) definitions of legal ideas and existing classifications of legal material; (3) existing provisions which define the functions of officials and control their modes of action; (4) existing law dealing with the acts of individuals. Each of these four elements requires a word of comment as regards its status as part of the legal background.

1. Prevailing notions of legal policy (ends of law) are part of the wider background of the legislator’s act: preservation of the general peace, protection of property, freedom of contract and trade, safeguarding family relations, and so on. The lawmaker may or may not refer to these policies explicitly. But even if he says nothing about them, the interpreter assumes that the lawmaker had them in view. Recognized legal policies are frequently cited by the interpreter as reasons for choosing one interpretation rather than another, for cor-
recting or limiting the operation of the text, or for filling a gap in the text.

2. Definitions of legal ideas and existing classifications of legal material constitute an important part of the legal background. These definitions and classifications are found in various parts of the existing common and statutory law and in writings about law. The legislator usually expects the interpreter to find them for himself; the legislator does not feel obliged to state them out every time he enacts a new legislative provision, though occasionally a provision will contain definitions of important terms which it employs, as well as specifications of the way in which they are to be construed in relation to existing law.

3. Existing rules and principles which define the functions of officials and govern their acts also constitute a major element of the background of any new legislation. They are taken for granted by lawmaker and by interpreter; they are assumed to be part of the legislation just as if they were explicitly stated in it. The legislator who creates a new action for damages does not ordinarily say anything about the rules of pleading or procedure which are to govern the action. Nor does he undertake to tell the court how to interpret the legislation in question. He expects all these effects of the legislation to be handled according to existing principles and techniques of the legal system. Only if the lawmaker wants to make some special provision relative to the way in which the new legislation is to be applied, enforced, or interpreted, does he take the trouble to refer explicitly to general functions and techniques of officials. Nevertheless, those general functions and techniques constitute part of the significance of new legislation in the sense that they must be drawn upon as occasion requires and read into its terms by the interpreter.
4. New legislation affecting the individual is also incomplete and takes much for granted. Existing rules and principles of law, which relate to acts and activities of the individual, supply the material which is to be read into the gaps and blanks of this new legislation. They furnish the materials for supplementing the express provisions of the new law so far as supplementation is later needed. In this respect the function of existing materials is analogous to the materials mentioned in the last preceding paragraph.

Sec. 5-13. Problems. 1. In State v. McGowan (sec. 2-48, problem 2) a state statute provided simply that "arson" should be punished in a certain manner. The court had to decide whether setting fire to a new house, not yet occupied as a dwelling, constituted the crime of arson. More specifically the question was whether such a house was a dwelling for the purpose of this crime. Where did the court find the definition of arson, and the answer to the more specific question?

2. It should be noted that the parts of a statute are to be construed in relation to one another. Any part finds an immediate verbal setting in the other parts. Each section is to be construed in the light of others, any clause in relation to other clauses and to the whole. Indeed, any word has to be construed in connection with the words which surround it. There are many established norms which recognize this method of construing parts with reference to one another. I shall mention only one, the maxim of *ejusdem generis*. This maxim is to the effect that general words, following an enumeration of specific things, are to be interpreted as limited to things of the same kind (*ejusdem generis*) as those specifically enumerated. (Cf. remarks of Holmes, J., about the enumerated forms of motor vehicles in sec. 5-11 above.) This maxim and its application illustrate very well the
dependence of the meaning of one phrase or clause upon the phrases or clauses with which it is associated.

3. *Hoff v. State of New York.* Appeal from a judgment, entered November 26, 1937, upon an order of the Appellate Division of the Supreme Court in the fourth judicial department which affirmed a judgment in favor of defendant entered upon a decision of the Court of Claims dismissing on the merits a claim of the appellant.

Lehman, J.:

[1] "The claimant on March 6, 1936, while confined to Tonawanda State Hospital under an order of the court, signed and verified a petition for a writ of habeas corpus and placed it in a stamped envelope addressed to his attorney, A. Stanley Copeland. The claimant had been adjudged insane. It is the duty of an employee of the hospital, acting under the direction of the superintendent, to examine all the mail of patients confined in the hospital before the mail is sent out. The claimant, believing that he was sane, had written to many men in public life asking their assistance. The claimant's wife had been annoyed by inquiries from persons who have received such letters. She requested that all letters written by the claimant should be sent to her. The superintendent of the hospital acceded to her request and, by his directions, all mail, including the letter addressed to the claimant's attorney and containing the petition for the writ of habeas corpus, was forwarded to claimant's wife who suppressed the letter. On March 25th, Copeland presented a new petition verified by himself to the County Judge of Erie county.

[2] "The writ was made returnable on March 30th before a jury. On April 2, 1936, the claimant was discharged from custody after the jury had determined that he was sane. Our constitutional guarantees of liberty are merely empty words unless a person imprisoned or detained against his will may challenge the legality of his imprisonment and detention. The writ of habeas corpus is the process devised centuries

1 279 N. Y. 490 (1939).
ago for the protection of free men. It has been cherished by generations of free men who had learned by experience that it furnished the only reliable protection of their freedom. The right of persons, deprived of liberty, to challenge in the courts the legality of their detention is safeguarded by the Constitution of the United States and by the Constitution of the State. The Legislature could not deprive any person within the State of the privilege of a writ of habeas corpus. (N. Y. Const. art. 1, Sec. 4.) The superintendent of the hospital by diverting to claimant's wife the letter and petition for a writ of habeas corpus obstructed the claimant's right to test the legality of his imprisonment. Doubtless the superintendent acted in the honest belief that the claimant was insane. Nevertheless, his act delayed for a time a test of the claimant's sanity which, when made, resulted in his discharge. . . .

[3] "The right of the superintendent in the exercise of a reasonable discretion to censor the ordinary mail written by a patient who has been adjudged insane is not challenged. The question is whether the superintendent of a State hospital for the insane may in the exercise of his discretion obstruct or delay a challenge of the legality of detention by a patient held under a court order. To that question one answer is clearly dictated. The State cannot under the Constitution withhold the privilege of the writ of habeas corpus. It has not attempted to do so. On the contrary, the Legislature has provided that 'any one in custody as an insane person, . . . is entitled to a writ of habeas corpus, upon a proper application made by him or some relative or friend in his behalf.' (Mental Hygiene Law (Cons. Laws, ch. 27), § 204.) An officer of the State . . . may not by indirection accomplish what the Constitution forbids to the State. He may not lawfully withhold from a person so detained the opportunity to apply for a writ of habeas corpus. . . .

[4] "The Legislature in the Civil Practice Act has made clear that under no circumstances may the grant of the writ of habeas corpus, or a hearing upon the writ when granted, be refused or delayed. A judge authorized to grant the writ 'must grant it without delay' whenever a petition therefor is presented and for violation of that command a judge
forfeits to the prisoner $1,000. (§ 1235.) It may not be disobeyed for any defect of form. It may be served even on a Sunday (§ 1242) and 'the court or judge before which or whom the prisoner is brought by virtue of a writ of habeas corpus . . . must examine, immediately after the return of the writ, into the facts alleged in the return and into the cause of the imprisonment or restraint of the prisoner.' (§ 1251.)

[5] "The act of the superintendent was an act of misfeasance, and the State may be held liable for any damages caused by that act. (Martindale v. State, 269 N. Y. 554.) In this case the damages were probably very small but there can be no doubt that the claimant's challenge, ultimately successful, was delayed for approximately two weeks.

"The judgments of the Appellate Division and of the Court of Claims should be reversed and a new trial granted, with costs to abide the event."

(This decision by one of our leading courts is interesting to us because of the manner in which the court reaches its conclusion; it is also interesting because, as a note writer in the Michigan Law Review says, "No case has been found to parallel this decision.")

In arriving at his decision is Judge Lehman warranted in considering the provisions of the Mental Hygiene Law (referred to in paragraph [3]) and the provisions of the Civil Practice Act (referred to in paragraph [4] of this opinion)? In what way are these materials relevant to his conclusion?

What is the relevance of the judge's view that "The writ of habeas corpus is the process devised centuries ago for the protection of free men. It has been cherished by generations of free men who had learned by experience that it furnished the only reliable protection of their freedom."?

We have been talking of interpretation here. Have you paused to think just what it is we are interpreting? Is it the

2 38 Mich. L. Rev. 103 (1939).
clause of the New York Constitution mentioned in paragraph [2]? Is it the Mental Hygiene Law mentioned in paragraph [3]? Is the court merely elaborating the scope of the common law action for false imprisonment? Or do you have some other suggestion regarding the subject matter (text) of interpretation?

Sec. 5–14. History and circumstances of enactment: extrinsic aids. We have now discussed the general context of enactment and the legal context. It remains to consider a third contextual factor, the history and circumstances of the specific provision's enactment. This context is often characterized by the plural title "extrinsic aids." It includes the occasion for enactment, e.g., the existence of a depression or a crime wave; the legislative history of the passage of the provision, embracing all changes in its wording from introduction to final approval; the report of the legislative committee or official agency or outside group, which prepared the draft of the provision for submission to the legislative body; the report of a committee to which the draft was referred for examination and recommendation; and statements of persons charged with steering the provision in question through the legislative processes, made during its consideration and enactment.

There is no sharp line to divide the specific history from the general background. The latter may be regarded as the more remote circumstances of enactment; the "history and circumstances," in which we are now interested, as the immediate circumstances. And there is no clear-cut distinction between the specific legal conditions (occasion) out of which the enactment in question evolved, and the wider legal background. But distinctions are not useless because they are not clearly or sharply marked. There are practical differences between the significance of general context and legal
context on the one hand, and specific conditions and origins on the other. Courts have recognized and acted on these differences in the processes of interpreting statutes; the courts have appreciated that general conditions, cultural or legal, can be taken to be commonly known, while specific historical materials cannot be supposed to be open to everyone who must act on the basis of the legislation.¹

For the reason just stated, not all courts have been ready to resort to these "extrinsic aids" to interpretation. The English courts have, generally speaking, refused to consider them at all.² The federal courts in this country make full use of these extrinsic aids. The state courts do not reject them outright, but have made much less use of them than the federal courts have done. It is not worth our while to go into detail here regarding the actual holdings of the cases.* Such a discussion would require more complete information than you possess, regarding technical rules of evidence and other matters. It will suffice, for our present purpose, to state for your consideration (in the next section) a relatively recent case in the United States Supreme Court, which

² See Davies, "The Interpretation of Statutes in the Light of Their Policy by the English Courts," 35 Col. L. Rev. 519 (1935).

will show the variety of extrinsic aids which can be resorted to for the purpose of interpreting a federal statute.

**Sec. 5-15. Problems. 1. Nye v. United States.**\(^1\) E, as administrator of his son's estate, had entered suit against B and C for the wrongful death of his son. One hundred miles from the courthouse, M and N, by plying E with liquor, induced him to terminate the action. E was illiterate and "feeble in mind and body." N, through his lawyer, prepared and mailed letters to the trial judge asking that the case be dismissed, and filed a final administration account, for which he paid the fee. E was promised, and received, nothing for the dismissal. Upon the motion of E's attorney, an order to show cause why M and N should not be attached and held for contempt of court was issued. The district judge found that the intent and effect of the actions of M and N were to prevent a trial on the merits and adjudged them guilty of contempt. The judgment was affirmed by the circuit court of appeals. On certiorari the Supreme Court reversed the judgments below.

Douglas, J., speaking for the Court, said in part:

[1] "The question is whether the conduct of petitioners constituted 'misbehavior . . . so near' the presence of the court 'as to obstruct the administration of justice' within the meaning of § 268 of the Judicial Code. That section derives from the Act of March 2, 1831 (4 Stat. 487). The Act of 1789 (1 Stat. 73, 83) provided that courts of the United States 'shall have power . . . to punish by fine or imprisonment, at the discretion of said courts, all contempts of authority in any cause or hearing before the same.' Abuses arose, culminating in impeachment proceedings against James H. Peck, a federal district judge, who had imprisoned and disbarred one Lawless for publishing a criticism of one of his opinions in a case which was on appeal. Judge Peck was ac-

\(^{1}\) 313 U. S. 33 (1914).
quitted. But the history of that episode makes abundantly clear that it served as the occasion for a drastic delimitation by Congress of the broad undefined power of the inferior federal courts under the Act of 1789.

[2] "The day after Judge Peck's acquittal Congress took steps to change the Act of 1789. The House directed its Committee on the Judiciary 'to inquire into the expediency of defining by statute all offences which may be punished as contempts of the courts of the United States, and also to limit the punishment for the same.' Nine days later James Buchanan brought in a bill which became the Act of March 2, 1831. He had charge of the prosecution of Judge Peck and during the trial had told the Senate: 'I will venture to predict, that whatever may be the decision of the Senate upon this impeachment, Judge Peck has been the last man in the United States to exercise this power, and Mr. Lawless has been its last victim.' The Act of March 2, 1831, 'declaratory of the law concerning contempts of court,' contained two sections, the first of which provided: 'That the power of the several courts of the United States to issue attachments and inflict summary punishments for contempts of court, shall not be construed to extend to any cases except the misbehaviour of any person or persons in the presence of the said courts, or so near thereto as to obstruct the administration of justice, the misbehaviour of any of the officers of the said courts in their official transactions, and the disobedience or resistance by an officer of the said courts, party, juror, witness, or any other person or persons, to any lawful writ, process, order, rule, decree, or command of the said courts.'

[3] "Sec. 2 of that Act, from which § 135 of the Criminal Code (35 Stat. 1113, 18 U. S. C. § 241) derives, provided: 'That if any person or persons shall, corruptly, or by threats or force, endeavour to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct, or impede, or endeavour to obstruct or impede, the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall on conviction thereof, be
punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offence.

[4] "Congress was responding to grievances arising out of the exercise of judicial power as dramatized by the Peck impeachment proceedings. Congress was intent on curtailing that power. The two sections of the Act of March 2, 1831 when read together, as they must be, clearly indicate that the category of criminal cases which could be tried without a jury was narrowly confined.

[5] "Mindful of that history, we come to the construction of § 268 of the Judicial Code in light of the specific facts of this case. The question is whether the words 'so near thereto' have a geographical or a causal connotation. Read in their context and in the light of their ordinary meaning, we conclude that they are to be construed as geographical terms.

[6] "We are dealing here only with a problem of statutory construction, not with a question as to the constitutionally permissible scope of the contempt power.*

[7] "We may concede that there was an obstruction in the administration of justice, as evidenced by the long delay and large expense which the reprehensible conduct of petitioners entailed.

"The fact that in purpose and effect there was an obstruction in the administration of justice did not bring the condemned conduct within the vicinity of the court in any normal meaning of the term. It was not misbehavior in the vicinity of the court disrupting to quiet and order or actually interrupting the court in the conduct of its business. Cf. Savin, Petitioner, supra, at p. 278. Hence, it was not embraced within § 268 of the Judicial Code. If petitioners can be punished for their misconduct, it must be under the Criminal Code where they will be afforded the normal safeguards surrounding criminal prosecutions. Accordingly, the judgment below is Reversed."  

*(I.R.)* The constitutional question here mentioned was considered and decided in Bridges v. California, 314 U. S. 252 (1941).

2 A large part of the majority opinion, in which the Court considered and overruled Toledo Newspaper v. United States, 247 U. S. 402 (1918), has been omitted.
Stone, J., wrote a dissenting opinion in which the Chief Justice and Roberts, J., concurred.

Note the first four paragraphs of Justice Douglas' opinion. What are the principal factors which he invoked as aids in construing this act of Congress? How would you distinguish the directions of the House to its Committee on the Judiciary and the remarks of James Buchanan (in paragraph [2]), from the statement of the sponsor which was denied consideration in the Partlow Case in section 5-04 above?

2. In the McBoyle Case, section 5-11, problem 2, Holmes, J., said:

"Although it is not likely that a criminal will carefully consider the text of a law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used."

At another point in his opinion he said "Airplanes were well known in 1919 when this statute was passed, but it is admitted that they were not mentioned in the reports or the debates in Congress." Suppose airplanes had been mentioned and suppose it had been clear from the reports and debates that airplanes were intended to be included in the term "vehicle," should the statute have been construed to apply to McBoyle's act?

3. Suppose the occasion and purpose for a statute are set forth in a preamble or in a preliminary section (see for example the federal statute regarding issuance of injunctions in labor disputes, which is quoted in sec. 4-19). What difference should this explicit statement make?
Sec. 5–16. Nature of rules of interpretation. The acts of the interpreter are guided by rules just as the acts of the legislator are. In fact, the rules which prescribe standards for the interpreter are part and parcel of the rules applicable to officials. They are rules which apply to a judge when he does a particular kind of act, i.e., interprets legislation. The existence and operation of these rules furnish added reasons for not accepting the “free interpretation” theory without reservations. The interpreter’s act is not unrestrained; it is not freely creative as is the act of the legislator who enacts the text to be interpreted. The interpreter’s act is not only tied to the legislative text, but is controlled also by established rules of interpretation.¹

Some of the rules which guide the interpreter have already been noted incidentally in the preceding sections; this notice could hardly have been avoided in view of the important functions of these rules in the interpretive process. But I saved the discussion of their nature and operation until this point; I felt that it was necessary to dispose first of the interpreter’s role and of the material with which he works. The rules of interpretation are primarily concerned with the ways in which the interpreter handles the legislative text and its context. Having finished the consideration of the text and context as such, we are now ready to examine the rules which guide the interpreter in the performance of his functions.

The rules with which we are concerned are rules of method; they are techniques. They tell the interpreter how he is to handle text, when and how he should refer to context, how to resolve ambiguities, how to eliminate inconsistencies, and how to restrict, expand, or supplement the language of legislation. On the whole, these rules have been judicially

¹ In fact, the obligation of the interpreter to begin with the text, i.e., with the language used, can be regarded as itself a rule of interpretation, the most fundamental of all such rules.
developed, that is to say they are part of the common law. They are rules which the courts have worked out over the centuries for their own guidance in elaborating, correcting and supplementing the legislative product. But some of these common law rules have been deemed so important that they have been embodied in constitutional provisions. And in recent decades some of the states have, by so-called "statutory construction acts," wholly or partially codified the judicially developed rules and in some particulars modified them.²

In their character of rules of method, the rules of interpretation have to be differentiated from ordinary rules of law. They are *rules for interpreting rules*. They do not serve the same function as rules which govern the activity of Tom, Dick and Harry, and fix their relations to one another. They do not have the same role in the legal system as the common rules which govern the activities of officials. The rules which govern individuals and officials constitute the subject matter with which the interpreter works, whereas the rules of interpretation tell him how to do his work. Only the greatest confusion of thought can result from the failure to keep the interpretive rules clearly in view, from the failure to distinguish them from the rules being interpreted. If we were concerned with the repair of a house, we would not need to be warned against confusing the house with the methods used in repairing it; nor would there be danger of confusing methods of repair with the physical materials which go into the repair of the house. But when we leave the physical realm and deal with processes of correcting and supplementing legal rules we find ourselves in serious danger of blending the rules we are interpreting, with rules of interpretation, and with other existing legal rules which constitute a major part of the background for the interpreter's work. To specify further there are three kinds of rules to distinguish and to

keep clearly in view: First, there are the legal rules which are the subject matter of interpretation; these are analogous to the house which is to be repaired. Second, there are the rules of method which govern the interpreter as he corrects and supplements the legislation which he is interpreting; these are parallel to the methods of repairing the house and are the rules of interpretation in which we are presently interested. Third, there are the rules, principles, and objectives of the law, already established and existing, which form a background for our interpretive problems; these are comparable to the material which is used in the repairing of the house and like that material they may be built into and added to the rule which is being interpreted. Confusion is easy here because subject matter, methods, and material are all rules or guides for conduct. To overlook the rules of interpretation is likewise easy because rules of interpretation are more or less taken for granted and do not have the prominent place in attention which is occupied by the subject matter of interpretation or the existing law to which it is being related. The interpretive rules need to be clearly seen as rules of a distinct and special kind which tell the interpreter how to clarify, correct and supplement the rules set forth in legislative texts.

Sec. 5-17. Problems—types of rules. 1. The expression "rules of interpretation" is commonly applied to a wide variety of guiding standards for the interpreter. These standards have only the one feature in common, their guidance function; all tell the interpreter how he shall carry on some phase of the interpretive process. They range all the way from specific rules—rules in a strict and accurate sense—through principles and presumptions, to the most general doctrines and prescribed attitudes. For example the term may include such varied elements as the following: (1) a specific
rule that when a period of time is referred to in any law, such period shall be so computed in all cases as to exclude the first and include the last day; (2) a principle that associated words explain and limit each other, or a principle that ordinary words are to be taken in their plain and ordinary sense; (3) a presumption, that the legislature does not intend a result which is absurd; and (4) a prescribed attitude, such as that which is expressed in the doctrine that penal statutes are to be strictly construed.

It would serve no good purpose to attempt to furnish an exhaustive list of rules of interpretation. The rules are listed in standard works on interpretation and are the chief subject matter of discussion in courses on legislation. It will be enough if I introduce you to a few of the common rules and give you an opportunity of "spotting" a few of them in a decided case. Accordingly, I suggest that you see how many such rules you can point out in the opinion of the court and in the opinion of the dissenting judges in the following case:

Caminetti v. United States. ¹ Mr. Justice Day delivered the opinion of the court:

"... The petitioner was indicted in the United States District Court for the Northern District of California, upon the sixth day of May 1913, for alleged violations of the act. The indictment was in four counts, the first of which charged him with transporting and causing to be transported and aiding and assisting in obtaining transportation for a certain woman from Sacramento, California to Reno, Nevada, in interstate commerce for the purpose of debauchery, and for an immoral purpose, to wit, that the aforesaid woman should be and become his mistress and concubine. A verdict of not guilty was returned as to the other three counts of this indictment. As to the first count defendant was found guilty and sentenced to imprisonment for eighteen months and to pay a fine of $1,500.00. Upon writ of error to the United States

¹ 242 U. S. 470 (1916).
Circuit Court of Appeals for the Ninth Circuit, that judgment was affirmed. 220 Fed. Rep. 545.

"It is contended that the act of Congress is intended to reach only 'commercialized vice,' or the traffic in women for gain, and that the conduct for which the several petitioners were indicted and convicted, however reprehensible in morals, is not within the purview of the statute when properly construed in the light of its history and the purposes intended to be accomplished by its enactment. In none of the cases was it charged or proved that the transportation was for gain or for the purpose of furnishing women for prostitution for hire, and it is insisted that, such being the case, the acts charged and proved, upon which conviction was had, do not come within the statute.

"It is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, and if the law is within the constitutional authority of the law-making body which passed it, the sole function of the courts is to enforce it according to its terms. Lake County v. Rollins, 130 U. S. 662, 670, 671. . . .

"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. Hamilton v. Rathbone, 175 U. S. 414, 421. There is no ambiguity in the terms of this act. It is specifically made an offense to knowingly transport or cause to be transported, etc., in interstate commerce, any woman or girl for the purpose of prostitution or debauchery, or for 'any other immoral purpose,' or with the intent and purpose to induce any such woman or girl to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.

"Statutory words are uniformly presumed, unless the contrary appears, to be used in their ordinary and usual sense, and with the meaning commonly attributed to them . . . while the title of an act cannot overcome the meaning of plain and unambiguous words used in its body . . . , the title of this act embraces the regulation of interstate commerce.

2 Three cases were heard and decided together by the Supreme Court: Caminetti v. United States, Diggs v. United States and Hays v. United States.
'by prohibiting the transportation therein for immoral purposes of women and girls and for other purposes.' It is true that § 8 of the act provides that it shall be known and referred to as the 'White-slave traffic Act,' and the report accompanying the introduction of the same into the House of Representatives set forth the fact that a material portion of the legislation suggested was to meet conditions which had arisen in the past few years, and that the legislation was needed to put a stop to a villainous interstate and international traffic in women and girls. Still, the name given to an act by way of designation or description, or the report which accompanies it, cannot change the plain import of its words. If the words are plain, they give meaning to the act, and it is neither the duty nor the privilege of the courts to enter speculative fields in search of a different meaning.

"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. See Mackenzie v. Hare, 239 U. S. 299, 308. . . .

"The judgment . . . is Affirmed. . . .

"Mr. Justice McKenna, with whom concurred the Chief Justice and Mr. Justice Clarke, dissenting.

"Undoubtedly in the investigation of the meaning of a statute we resort first to its words, and when clear they are decisive. The principle has attractive and seemingly disposing simplicity, but that it is not easy of application or, at least, encounters other principles, many cases demonstrate. The words of a statute may be uncertain in their signification or in their application. If the words be ambiguous, the problem they present is to be resolved by their definition; the subject-matter and the lexicons become our guides. But here, even,
we are not exempt from putting ourselves in the place of the legislators. If the words be clear in meaning but the objects to which they are addressed be uncertain, the problem then is to determine the uncertainty. And for this a realization of conditions that provoked the statute must inform our judgment. Let us apply these observations to the present case.

"The transportation which is made unlawful is of a woman or girl 'to become a prostitute or to give herself up to debauchery, or to engage in any other immoral practice.' Our present concern is with the words 'any other immoral practice,' which, it is asserted, have a special office. The words are clear enough as general descriptions; they fail in particular designation; they are class words, not specifications. Are they controlled by those which precede them? If not, they are broader in generalization and include those that precede them, making them unnecessary and confusing. To what conclusion would this lead us? 'Immoral' is a very comprehensive word. It means a dereliction of morals. In such sense it covers every form of vice, every form of conduct that is contrary to good order. It will hardly be contended that in this sweeping sense it is used in the statute. But if not used in such sense, to what is it limited and by what limited? If it be admitted that it is limited at all, that ends the imperative effect assigned to it in the opinion of the court. But not insisting quite on that, we ask again, By what is it limited? By its context, necessarily, and the purpose of the statute.

"For the context I must refer to the statute; of the purpose of the statute Congress itself has given us illumination. It devotes a section to the declaration that the 'Act shall be known and referred to as the "White-slave traffic Act."' And its prominence gives it prevalence in the construction of the statute. It cannot be pushed aside or subordinated by indefinite words in other sentences, limited even there by the context. It is a peremptory rule of construction that all parts of a statute must be taken into account in ascertaining its meaning, and it cannot be said that § 8 has no object. Even if it gives only a title to the act it has especial weight. United States v. Union Pacific R. R. Co., 91 U. S. 72, 82. But it gives more than a title; it makes distinctive the purpose of
the statute. The designation ‘White-slave traffic’ has the sufficiency of an axiom. If apprehended, there is no uncertainty as to the conduct it describes. It is commercialized vice, immoralities having a mercenary purpose, and this is confirmed by other circumstances.

“... Any measure that protects the purity of women from assault or enticement to degradation finds an instant advocate in our best emotions; but the judicial function cannot yield to emotion—it must, with poise of mind, consider and decide. It should not shut its eyes to the facts of the world and assume not to know what everybody else knows. And everybody knows that there is a difference between the occasional immoralities of men and women and that systematized and mercenary immorality epitomized in the statute’s graphic phrase, ‘White-slave traffic.’ And it was such immorality that was in the legislative mind and not the other. The other is occasional, not habitual—inconspicuous—does not offensively obtrude upon public notice. Interstate commerce is not its instrument as it is of the other, nor is prostitution its object or its end. It may, indeed, in instances, find a convenience in crossing state lines, but this is its accident, not its aid.

“... There is danger in extending a statute beyond its purpose, even if justified by a strict adherence to its words. The purpose is studied, all effects measured, not left at random—one evil practice presented, opportunity given to another. The present case warns against ascribing such improvidence to the statute under review. Blackmailers of both sexes have arisen, using the terrors of the construction now sanctioned by this court as a help—indeed, the means—for their bandage. The result is grave and should give us pause. It certainly will not be denied that legal authority justifies the rejection of a construction which leads to mischievous consequences, if the statute be susceptible of another construction. ... the Chief Justice and Mr. Justice Clarke concur in this dissent.”

The rules of interpretation which are applied in this case, relate chiefly to the use of contextual factors: when is context to be referred to and when not. Why did the majority of
the court feel bound to reject references to the history of this act?

2. In reading and interpreting the language of past works, historical, scientific, and literary, the reader is usually desirous of putting himself in the writer’s position; he wants to know what the writer meant when he wrote, not what he would mean if he were writing today. And traditionally the judicial interpreter adopts the same approach to the legal mandates which have come down from the past; he assumes that he is expected to find out what the legislative mandate meant when it was issued. Indeed, the judicial interpreter regards himself as bound by a principle which requires him to read the legislator’s declaration in the context in which it was enacted.

What would you think of a proposal to have the courts continuously reinterpret constitutional provisions in the light of present times and needs, i.e., present context?*

Suppose courts always interpreted statutes as if they were written today. Would this be the same method of interpretation as that represented by the “free interpretation” theory?

**Typical Interpretive Problems**

Sec. 5–18. Types of problems. So much for the role of the interpreter, the sources on which he draws, and the rules which control his operations. Now let us turn to some applications and illustrations of the principles that have been developed, to some typical interpretive problems. Suppose

the language of legislation is ambiguous, how is the ambiguity to be resolved? Or suppose the language is general, how far is the interpreter free to fill in details or to extend the language or restrict its meaning? Or suppose the indications of the words and the indications of context point in different directions, is the meaning suggested by the words or the meaning suggested by extrinsic aids to be preferred? Or finally, suppose the language of legislation is incomplete, how far are the various elements of setting to be drawn upon to supply what the words do not declare? Such are the basic problems which confront the interpreter.

For the purpose of convenient treatment I shall divide the interpreter's problems into five main types:

Resolving ambiguity.
Reconciling inconsistency.
Reading details into general provision.
Restrictive interpretation of general provision.
Extensive interpretation of general provision.

Sec. 5-19. Resolving ambiguity. Here we start with a situation where the text itself points to two or more possible meanings. A rather trivial example will show what I mean. A business man receives a scribbled note reading, "Your suit is ready to try tomorrow. Smith." He hands the note to his secretary and says, "Look at that. I cannot tell whether it comes from my lawyer or my tailor. Both are named Smith." In this case, the word "suit" has two distinct meanings; likewise the word "try"; and the name Smith may refer to either of two persons. The note is ambiguous in the sense that I have in mind. Earlier in this chapter I mentioned the case of the statute which was similarly ambiguous; the statute which forbade the sale of liquor within three miles of Mount Zion Church, in Gaston County. On its face, such a statute would appear to be clear and sufficiently definite, yet in actual
application it turned out to be ambiguous, as there were two Mount Zion Churches in said county, one for white persons, the other for colored persons. Not a few such ambiguities develop even in the most carefully drafted statutes.

How do these ambiguities happen? Basically, the cause of ambiguity is to be found in the nature of language itself. It would be utterly impossible to have a specific symbol for each and every idea which anyone wants to express. The burden of creating, learning and retaining so many words would be overwhelming. Instead, we make every one of our verbal symbols serve in a number of different type situations; practically every important word in the dictionary has not one but many meanings. On the one side, this multiple use of symbols represents an economy of human effort. On the other side it entails danger of confusion; it is the basic cause of ambiguity. Yet multiple usage is not the only cause of ambiguity in actual life situations. The danger of ambiguity is a danger which varies with the way in which persons use language. A careful and explicit use of terms will eliminate much of the danger; carelessness, ignorance, or lack of foresight on the part of the one who uses language, increases the danger. For example, in the case of the note from the tailor or the lawyer, the ambiguity would not have existed if the writer had used his business stationery and perhaps not if he had signed his full name. The ambiguity would not have existed in case of the churches, if the framer of the statute had expressed a little more fully what he had in mind and had declared that the statute was applicable to Mount Zion Church for colored people. In short, while ambiguity is a danger which can never be completely avoided, it is a danger which can be greatly reduced by a careful and explicit use of language.

Whatever the cause, ambiguity means a problem for the interpreter, a problem of choosing between competing mean-
Of course, the choice is not absolutely compulsory. The court which is called upon to apply a statute which is ambiguous in its application may treat the ambiguity as fatal; it may refuse to apply the statute at all. But as regards most ambiguities, this is not the course taken by the interpreter. He feels obliged to choose if he can, and to give effect to one of the two or more meanings of which the statutory language is capable. This method of dealing with problems of ambiguity is the method in which we are interested. What does the interpreter do when he undertakes to resolve an ambiguity? On what basis does he decide in favor of one meaning or another?

In part the interpreter is guided by rules which aid in making a choice between possible meanings of language. One such rule requires that he adopt the popular meaning of words; it declares that the language of a legislative text is to be taken in its ordinary or popular sense. You will remember that Justice Holmes recognized and followed this rule in his opinion in *McBoyle v. United States.* He had to decide whether an airplane was a vehicle within the meaning of a federal statute which penalized the transportation of a stolen motor vehicle from one state to another. He said, "No doubt etymologically it is possible to use the word to signify a conveyance working on land, water or air. . . . But in everyday speech 'vehicle' calls up the picture of a thing moving on land." He concluded, therefore, that, as an airplane did not fall within the meaning of "vehicle" in the popular sense, its transportation from one state to another was not punishable under this statute. The rule is one of preference, however; it establishes a mere presumption in

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2 In the Partlow (Mount Zion Church) Case, the court's language suggests that ambiguity is generally fatal; however, it is not quite clear that the court would have refused to choose between the two Mount Zion churches if there had been competent evidence (such as a record of debates) on which to predicate a choice.

3 Sec. 5-11.
favor of the popular meaning, not an absolute prescription. The context or counter-presumptions may nullify its effect so that the interpreter derives only a tentative guidance from this rule.

As a general canon of interpretation, this rule appears founded on good reasons. In the first place, the legislative provision which is being construed is framed by a legislative body presumably drawn from all walks of life and composed of persons with different verbal backgrounds and different kinds of experience. These men have agreed upon a verbal text. It is natural to assume that the standard of usage, which this heterogeneous group has followed in adopting its text, is the common or popular standard. In the second place, legislative provisions are normally framed so as to be applicable to persons generally. So far as they do apply to the general population, the popular sense of terms offers the appropriate and expectable standard of interpretation.

Another general rule, which serves as a companion to the rule just discussed, and which may aid the interpreter in making a choice between possible meanings, is the rule that technical terms are to be interpreted in a technical sense. Different professions and occupations have their peculiar terms and these are sometimes used in legislation; where this is the case, the interpreter is directed to adopt the technical meaning in his interpretation. 4

But it is sometimes hard to decide whether language is used in a popular or a technical sense; usages change; they are not clearly divided. As I have said earlier, technical terms often become popular, by a slow process of adoption. Thus the word “legacy” would usually be regarded as a technical legal term, a word used by lawyers to refer to a testamentary

4 In regard to technical legal terms, the rule which requires that technical terms be interpreted in a technical sense is identical with the rule that requires the interpreter to find his definitions of legal (i.e., technical) terms in the common law and other repositories of legal learning.
gift of personal property. In popular usage, however, the word "legacy" is often employed in a more comprehensive sense to include testamentary gifts of personal property, or real property, or both. If the legislature uses the term "legacy" in a statute, the interpreter may well decide, as the Colorado Supreme Court did in a case of this sort, that the term bears a popular meaning. In so doing the interpreter is aided by a rule of preference favoring the popular meaning and based on reasons set forth in an earlier paragraph.

Of material assistance in resolving ambiguities are also a variety of rules which instruct the interpreter in the use of the verbal context of the ambiguous word or phrase. Typical are the rule of *ejusdem generis* and the rule that words are to be construed in relation to their associates. The former declares that general words (the ambiguous element) following an enumeration of specific things are to be interpreted as limited to things of the same kind (*ejusdem generis*) as those specifically enumerated. The other rule, which is more general and which may indeed be said to include the former, stresses the dependence of the meaning of one word or phrase upon the words or phrases with which it is associated in use. For instance the word "home" in one connection might refer to a man’s dwelling house; in another connection it might refer to place of his origin or birth; in another connection it might refer to his legal domicile, as where I say, "The State of Michigan is my home." So that in one statute the word might receive one construction, in another a different construction, depending on the text of

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5 Logan v. Logan, 11 Colo. 44 (1888). In reaching its conclusion in favor of the popular and comprehensive meaning, the court relied chiefly on two points: the fact that the legislature had used this term in a popular sense in other statutes, and the fact that the broad popular meaning of legacy would give a result more nearly in accord with the aim of the particular statute and with established policies (equality of shares), than the technical meaning would have produced.

6 Other typical rules govern the force and effect to be given to preambles, provisos, etc.
the statute as a whole or the text of the section in which the word is used, or even upon the associated words of the phrase or clause in which the word is used.\footnote{An important type of situation where this rule applies—though it is not commonly so labeled—is the case of the statute which carries its own definitions of questionable terms. These definitions are part of the verbal context of the terms as used; they fix the meaning thereof, even though each term standing alone might have had other meanings.}

Many other rules serve as guides in resolving an ambiguity. Some of them have already been mentioned in discussing the various kinds of context: the rules which require the interpreter to look to the general and historical background for information; the rule which requires him to find his definitions of legal terms in the common law; the rule that statutes in derogation of the common law are to be strictly construed; the rule that statutes are to be interpreted in relation to other legislation dealing with the same subject matter; the rule that penal legislation is to be strictly construed, etc. These and almost all the other rules of interpretation hereinafter discussed, can be invoked in the solution of ambiguity problems. But it would be tedious and superfluous to try to illustrate the application of all these rules to problems of ambiguity or to each and every other kind of interpretive problem. I shall refer, in the next section, only to two more types of ambiguity problems and the methods of dealing with them.

\textit{Sec. 5-20. Problems. 1. Abrams et al. v. United States.} ¹

This case involved a choice between different meanings of the word \textit{intent}. The defendants had been indicted and convicted of conspiring to violate the Espionage Act of 1917. On appeal the Supreme Court held the evidence sufficient to sustain their conviction of violating said act by publishing certain circulars \textit{intended} to provoke and encourage resistance

¹ $250$ U. S. 616 (1919).
to the United States in the war with Germany and by inciting and advocating, through such circulars, resort to a general strike of workers in ammunition factories for the purpose of curtailing production of ordnance and munitions essential to the prosecution of the war. The members of the Court differed in opinion as to the sense in which the word "intent" was used in the Espionage Act. Three different senses of this term are common in legal parlance—as Mr. Justice Holmes points out: according to one usage, a person intends what he desires and aims to bring about; according to a second, he intends what he foresees as a consequence of his action, even though he does not desire to bring the consequence about; and according to a third usage, he intends the foreseeable consequences of his act, even though he does not actually foresee, nor actually desire, those consequences.

Mr. Justice Clarke, speaking for the majority of the Court, adopted the second usage as the proper one; he stressed the highly inflammatory and dangerous character of the circulars which defendants had published. In part, he said:

"It will not do to say, as is now argued, that the only intent of these defendants was to prevent injury to the Russian cause. Men must be held to have intended, and to be accountable for, the effects which their acts were likely to produce. Even if their primary purpose and intent was to aid the cause of the Russian Revolution, the plan of action which they adopted necessarily involved, before it could be realized, defeat of the war program of the United States....

"These excerpts sufficiently show, that while the immediate occasion for this particular outbreak of lawlessness, on the part of the defendant alien anarchists, may have been resentment caused by our Government sending troops into Russia as a strategic operation against the Germans on the eastern battle front, yet the plain purpose of their propaganda was to excite, at the supreme crisis of the war, disaffection, sedition, riots, and, as they hoped, revolution, in this country
for the purpose of embarrassing and if possible defeating the military plans of the Government in Europe. . . .”

Mr. Justice Holmes (supported by Mr. Justice Brandeis) dissenting, thought “intent” in this statute should be understood in the first sense; he minimized the danger of evil which might result from the circulars published by defendants and emphasized the need for safeguarding freedom of speech. As regards the meaning of intent, he said in part:

“I am aware of course that the word intent as vaguely used in ordinary legal discussion means no more than knowledge at the time of the act that the consequences said to be intended will ensue. Even less than that will satisfy the general principle of civil and criminal liability. A man may have to pay damages, may be sent to prison, at common law might be hanged, if at the time of his act he knew facts from which common experience showed that the consequences would follow, whether he individually could foresee them or not. But, when words are used exactly, a deed is not done with intent to produce a consequence unless that consequence is the aim of the deed. It may be obvious, and obvious to the actor, that the consequence will follow, and he may be liable for it even if he regrets it, but he does not do the act with intent to produce it unless the aim to produce it is the proximate motive of the specific act, although there may be some deeper motive behind.

“It seems to me that this statute must be taken to use its words in a strict and accurate sense. They would be absurd in any other. A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime. . . .”

On the basis of this condensed statement of the Abrams case, what would you infer was the basis of choice between
meanings of the word intent? Was it a mere matter of follow­ing the commoner usage?

2. Suppose a statute is adopted in California which might have either of two possible meanings, meaning X and mean­ing Y; and suppose this statute is later interpreted by the Supreme Court of California in an opinion which adopts meaning X. Now suppose this same statute is later borrowed and adopted by the State of South Dakota. The Supreme Court of South Dakota will treat the California decision as controlling. In so doing, how does the South Dakota court resolve the ambiguity? How would you formulate the rule followed?

Sec. 5-21. Reconciling inconsistency. Ambiguity and in­consistency are quite similar in nature and in the problems which they pose for the interpreter. Ambiguity characterizes a text which points in two directions, which may have either of two meanings. Inconsistency involves separate texts or different parts of one text, which point in two directions. Ambiguity and inconsistency are alike in that the language which the legislator has used points in two ways, and in that the interpreter must make a choice between them.

The chief kind of inconsistency which I have in mind is conflict between different parts of a single legislative enact­ment. The possibility of inconsistency inheres in the fact that any extended enactment consists of a series of more or less independent and more or less overlapping statements; the lawmaker may not sufficiently consider each of his statements in relation to the others. He states a purpose in the preamble of his legislative act and states a specific mandate in the body thereof, which suggest conflicting meanings or which coincide with one another only in part. Or he states a standard of behavior for individuals in one section, and another standard
in another section which is not quite consistent with the first. Or he states overlapping but different standards of behavior for officials in different sections of his act. In all such cases the interpreter has the task of reconciling the applications of the various parts of the text with one another.

How does the interpreter deal with these problems? He finds a few guides which are peculiarly applicable to inconsistency problems. These rules give preference to one part of the legislative act over another part, or to one kind of statement therein over another kind of statement. Of such rules the two following provisions of the Pennsylvania Statutory Construction Act,¹ are typical; the provisions are merely declaratory of common-law rules of interpretation:

Sec. 563. Particular Controls General. "Whenever a general provision in a law shall be in conflict with a special provision in the same or another law, the two shall be construed if possible, so that effect may be given to both. If the conflict between the two provisions be irreconcilable, the special provision shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the Legislature that such general provision shall prevail."

Sec. 564. Irreconcilable Clauses in the Same Law. "Except as provided in section (five) sixty-three, whenever, in the same law, several clauses are irreconcilable, the clause last in order or date or position shall prevail."

However, most of the rules and methods which the interpreter uses in reconciling inconsistencies are not peculiar to the inconsistency problem. For the most part, he proceeds in about the same way and uses the same methods and materials as he does in resolving an ambiguity. The same guiding principles apply, so that it is not worth our while to list again all those rules which aid in choosing between conflicting

meanings or which guide the interpreter's reference to the general, legal, and the historical context, of the legal provisions which he is attempting to reconcile. Nor is it surprising that the interpreter sometimes finds, as he does in resolving ambiguities, that all other prescriptions fail, and that he has to choose between inconsistent textual provisions simply on the basis of what is desirable policy.

In the wide sense one may find inconsistency between a statute and the common law, or between a statute and an earlier statute, or between a statute and a constitutional provision. For such cases our legal system is prepared with general solutions of conflict which are relatively easy. The statute displaces the common law, the later statute repeals the earlier, and the constitution overrides the conflicting statute. Established rules regarding the operation of legal provisions leave the interpreter without any real problems of reconciling conflicts to struggle with. Only if the inconsistency in any of these cases be partial, does the interpreter have something to do. He must then decide how much of the common law, of the earlier statute, or of the conflicting statute, is inoperative and how much of it remains in force. Typical of this kind of problem and of the way our legal system deals with it, is the following provision of the Pennsylvania Statutory Construction Act, dictating the proper solution where a statute conflicts in part with a constitutional provision:

Sec. 555. Constitutional Construction of Laws. "The provisions of every law shall be severable. If any provision of a law is found by a court of record to be unconstitutional and void, the remaining provisions of the law shall, nevertheless, remain valid, unless the court finds the valid provisions of the law are so essentially and inseparably connected with, and so dependent upon, the void provision, that it cannot be presumed the Legislature would have enacted the remaining valid provisions without the void one; or unless
the court finds the remaining valid provisions, standing alone, are incomplete, and are incapable of being executed in accordance with the legislative intent."

This statute is simply declaratory of principles which the courts had worked out for themselves independently of legislation.

Sec. 5—22. Reading details into general provision. In the last chapter I pointed out that the legislator always uses language which is more or less general; that he uses general language in order to conserve his own effort in thinking out more detailed provisions and in order to cover unforeseen cases which future conditions may present. If his legislation specifies details of application with undue particularity, there is always the danger that important situations will be omitted and that the language of his text will fail to embrace cases which he would have wanted to cover if he had had sufficient foresight and could have stated his meaning perfectly.

On the other side of the ledger is the fact that a general text is indefinite; that general language fails to furnish assured guidance to individuals and officials who need it. An extreme example will make my point. Suppose that a criminal statute were to provide simply that "any act prejudicial to the general welfare is punishable as a misdemeanor." Such a statute leaves everything undefined.¹ It fails in the prime function of a legal provision. It leaves the individual who may be punished, without guidance; and it leaves the judge who may have to apply the provision, likewise without proper direction.

¹ In fact a court would probably hold the very statute which we have supposed, invalid by reason of its indefiniteness. (See United States v. Cohen Grocery Co., 257 U. S. 81 (1921).) But this does not destroy its value as an example. Indefiniteness is a matter of degree. A somewhat slighter degree of generality and indefiniteness would escape the ban of invalidity. And constitutional provisions themselves escape this reason for judicial disapproval. The problem of dealing with indefinite provisions is one which the courts must face and which they do dispose of in the ways indicated in the text.
What is the judicial interpreter to do, when he is called upon to apply such an indefinite provision? Shall he declare the provision void for indefiniteness, and therefore refuse to apply it? Or shall he apply it in cases as they arise, according to his best judgment on the facts of each case, but leave the provision in its undefined state and let every individual continue to act at his peril?* Or shall he undertake to complete the meaning of the indefinite provision as he applies it from case to case, by establishing subsidiary rules to define what is, and what is not, prejudicial to the general welfare? All three of these solutions are possible and are at times adopted; we are interested now only in the last solution because it alone can be called interpretation, and because it is the common solution adopted by American judges.

This solution requires the interpreter to define or redefine the general terms of the provision to make them definite. In the words of Chief Justice Hughes in *Home Building and Loan Association v. Blaisdell*, the famous mortgage moratorium case: “... where Constitutional grants and limitations of power are set forth in general clauses, which afford a broad outline, the process of construction is essential to fill in details.” 2 The Chief Justice means, though he does not say just this, that the interpreter must supply details which are not found in the constitutional provision he construes.

When we connect this method of supplying needed details with the general doctrine that judicial decisions are con-

* (I.R.) Occasionally courts realize the danger of making their own, or the legislative, product too specific in operation (see first paragraph of this section) and warn that instances are not to be understood as definitive; they try to keep the operation of the provision which they are construing, general and undefined; consider, for example, the way equity courts have refused to tie themselves by definite notions of fraud and the way our Supreme Court has refused to formulate standards of due process more definite than the standard of reasonableness. Nevertheless specific cases are decided and cited as precedents even though the courts profess to keep their own hands free; so that the whole tendency is to convert general legislative standards into more specific, as is pointed out in the ensuing paragraphs of the text.

2 290 U. S. 398 at 426 (1934).
trolling precedents for future applications of the provision, we see that the details become essentially judicial additions to the original text. The court’s decisions in one case after another furnish more specific rules in the general area covered by the original indefinite provision. A vague general provision is converted by interpretation into an aggregate of specific rules, all of which together constitute the effective meaning of the general provision.

Original indefiniteness is especially characteristic of constitutional provisions; in fact Chief Justice Hughes used the language above quoted in regard to the Contracts Clause of the Federal Constitution. The extent to which such a clause is rendered more definite by judicial interpretation can be illustrated by the development of the meaning of that clause. It reads: “No state shall . . . pass any Law . . . impairing the Obligation of Contracts. . . .”\(^8\) The major terms here are all vague and general. What is a “law”? The Supreme Court has said that the term “law” includes state statutes, city ordinances, and state constitutional provisions, but does not include decisions by state courts. What is a “contract” which is protected against impairment? The term “contract” is held to embrace private and public contracts, executed and executory contracts, express and implied contracts; it includes franchises, corporate charters and public grants of land. Like questions have arisen and have had to be answered regarding the application of “obligation” and “impairing.” The result is that in the century and a half since the clause was adopted a great mass of specific judicial propositions have been developed which are the real, practical meaning of the Contracts Clause. The exact wording of the clause itself has ceased to be of primary consequence. It is these details of meaning, supplied by adjudication, on which the lawyer’s chief interest centers.

\(^8\) Art. I, Sec. 10.
Moreover, this process of filling in details is not limited to obviously indefinite statutory provisions and sweeping clauses of a constitution. The process of filling in needed details occurs regularly in the application of any general term which may be found in legislation. As regards all enactments, there is a continuing process of reducing general terms to more specific. Thus, the judicial interpretations which have supplemented the general terms of the Statute of Frauds fill many volumes. One obtains no adequate conception of what that statute means by a mere scrutiny of its language. It was once said about Coke's elaborate commentary on Littleton's *Tenures*, that the book represented a little rivulet of Littleton running through a great meadow of Coke. No less can it be said that the text of the Statute of Frauds is almost lost to sight in the enormous judicial gloss erected about the legislative original. And while the accumulated volume of judicially supplied details is never quite so large in the case of modern statutes, it is nevertheless apparent enough. Phrase after phrase of the Uniform Negotiable Instruments Act has had to be construed, and these constructions constitute, in the main, detailed applications and refinements of the general terms of this legislation. Every term of a simple statute, such as a criminal statute prohibiting the carrying of concealed weapons, calls for the same kind of judicial exposition. What is a "weapon"? When is a weapon "concealed"? And what is "carrying" a weapon? Details have to be filled in, specific answers have to be furnished. And, in effect, these specific answers develop into a cluster of specific rules.

The process of filling in details is analogous to the process of resolving an ambiguity. Both processes are concerned with a legislative text not fully expressed. Both processes involve for the interpreter a choice between possible meanings. The means of solving an ambiguity and the sources of details are alike to be found in the context, general, legal, and historical;
and the rules of interpretation applicable to both problems are essentially the same. The difference between resolving an ambiguity and choosing between the various meanings which may be read into a general term, lies in the fact that the general term ordinarily allows the interpreter a wider choice of possibilities. He is not limited to a choice between two but may choose among several detailed meanings. In furnishing the details for the Contract Clause, for example, the Supreme Court was free to choose from a variety of senses of the words *contract, obligation, impair*, etc. It found the material of its choices in popular and legal usages of terms.4

Sec. 5-23. Restrictive interpretation of general provision. Sometimes a statute or a constitutional provision is couched in terms which literally include more ground or more items than the interpreter believes the framer would ever have wanted to include; and the question confronts the interpreter whether he ought to trim down the operation of the statute or constitutional provision by interpretation.*

The overinclusive provision may be due to any of the reasons already mentioned, which explain such defects as ambiguity, inconsistency and indefiniteness. But the prime reason for overinclusiveness is the legislator's effort to offset

4 The choice was based on considerations of history and policy, considerations derived from context. See for example such cases as *Fletcher v. Peck*, 6 Cranch 87 (1810); *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518 (1819); *Home Building and Loan Association v. Blaisdell*, 290 U. S. 398 (1934); *Gelfert v. National City Bank of New York*, 313 U. S. 221 (1941).

* (I.R.) In strict logic restrictive interpretation might be regarded as a special instance of the process of filling in details (sec. 5-22); or, perhaps, the latter process as an instance of restrictive interpretation. Both processes involve the qualification or limitation of general language by reading limitative particulars into it. However, we are accustomed to think and speak of the two processes as different. Filling in details is regarded as a form of limitation which supplements or completes what is said; restrictive interpretation (including the introduction of exceptions) is regarded as a form of limitation which cuts across or contradicts what is said. This difference in traditional view and mode of speech is practical warrant for treating restrictive interpretation under a separate head.
his inability to foresee and specify all the situations to which he wants his provision to apply. The legislator wishes his provision to be inclusive enough, and therefore uses comprehensive terms. He wishes the provision to cover not only types of cases of which he has had experience, but also analogous types and new types which come into existence in the future. To this end he uses catchall phrases. Thus a statute may be enacted which prohibits individuals to carry dangerous weapons. This blanket provision would doubtless apply to a new form of atomic weapon even though such a weapon had never been dreamed of at the time when the statute was passed. By using comprehensive terms the legislator is able to cope with the problems of an expanding and indefinite future. However, in his effort to catch all the fish he wants to catch by casting a wide net of broad general character, the legislator runs the risk of sweeping up some fish in his net which he would not have desired to catch if he had had the vision of the "compleat angler."

How does the interpreter arrive at the conclusion that the legislator has overreached himself in this way? Actually the interpreter does this on the basis of the fact that important contextual factors suggest a narrower inclusion than the language suggests. Conventionally he talks in terms of a distinction between the purpose (or spirit) of the statute on the one hand, and its literal terms on the other. But the important point is not the matter of names; it is the fact that the interpreter recognizes a divergence between language and something else. It is not hard to see that the purpose (or spirit), which is not consistent with the language, is nothing but the purport of known contextual factors; indeed, that it is a mere deduction from them.**

** (I.R.) Sometimes a partial divergence between different parts of the language of a statute (inconsistency) is combined with divergence between the language and the spirit. In this case solution of an inconsistency is blended with restrictive interpretation.
What does the interpreter do when he uncovers such a conflict between the text and the purpose of legislation? Of course he might refuse to amend the legislator's work, apply the statute as it stands, and "pass the buck" back to the legislature to make any needed changes. But on the whole, courts are inclined to make free use of their corrective power; they are prepared to do a job of restrictive interpretation whenever they feel that contextual factors point with sufficient clearness to this result. The limits and details of this method of pruning down, or engrafting exceptions on, the language of a statute will be developed in the following cases.

Sec. 5–24. Problems. 1. State v. Gorham.¹

Fullerton, J. "The appellant was convicted of a violation of the speed ordinances of the city of Hilliard. The facts are stipulated, and are in substance these:

"The city named lies within, and forms a part of, the county of Spokane. The appellant is a duly appointed, qualified and acting deputy sheriff of such county. On June 3, 1919, a charge of grand larceny was preferred against one William Agnew, and a warrant issued for his arrest. This warrant was given to the appellant for execution. The specific charge was the larceny of an automobile, and on inquiry the appellant was informed by a police officer of the city of Spokane that the accused had been seen on that day on the downtown streets of the city driving an automobile bearing the license number of the stolen automobile. Upon further inquiry, the officer found a young man who knew the accused, and who stated to the officer that he had seen the accused only a few moments before that time driving an automobile 'at a good rate of speed' toward the city of Hilliard, on the main highway leading from the city of Spokane to that city. The officer immediately took up the pursuit of the accused on a motorcycle, and in passing through the city of Hilliard,

¹ 110 Wash. 330 (1920); Waite, Cases on Criminal Law (2d ed.) 62 (1937).
rode the motorcycle at a greater rate of speed than its ordinances permitted.

"In this court, the appellant . . . (contends) . . . that a sheriff is exempt from the operation of city ordinances regulating the speed at which a motor vehicle may be driven when he is in pursuit of a person accused of felony for whose arrest he has a warrant.

"The sheriff is made, by statute, the chief executive officer and conservator of the peace of the county. By statute, also, it is made his duty to keep the public peace, and to arrest and confine all persons who commit violations of the law, and especially is it made his duty to execute all process issued to him by a court of justice. His duties in these respects are public duties necessary to the safety of the state and its people, and necessary for the preservation of public and private property. In the performance of these duties, the sheriff has many privileges not accorded to a private individual, and statutes and ordinances directed against the individual do not generally apply to him when so performing them, especially where their enforcement would hamper and hinder performance."

"That the enforcement against a peace officer of statutory or ordinance provisions limiting the speed at which a motor propelled vehicle shall be driven over a public highway would have a tendency to hamper him in the performance of his official duties, can hardly be doubted. The case in hand affords an illustration. Here the felon was fleeing with a stolen automobile. Naturally he would pay but little regard to the minor offense of exceeding the speed limit. And if the sheriff must confine himself to that limit, pursuit in the manner adopted would have been useless, since the felon could not have been overtaken. The rule contended for would

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2 Where a court is considering a choice between two interpretations of a legislative provision, it is very common practice to develop the consequences which will follow from the one interpretation and the other, and to allow the choice to be determined by the consequences which the court regards as preferable or as more nearly in accord with a general legislative purpose. See for example Hoff v. State of New York quoted in sec. 5-13, problem 3. The consequences of alternative interpretations are especially stressed by the court when it says, "Our constitutional guarantees of liberty are merely empty words unless a person imprisoned or detained against his will may challenge the legality of his imprisonment and detention."
also hinder the public peace officers in enforcing the statutes regulating traffic upon the state highways. These statutes contain somewhat stringent regulations as to the speed a motor propelled vehicle may be driven over them, and contain no exception in favor of the peace officers whose duty it is made to enforce them. If these officers may not pursue and overtake one violating the regulations without themselves becoming amenable to the penalties imposed by them, the old remedy of hue and cry is not available in such instances, and many offenders who are now brought to answer will escape.

"It is not meant to be asserted, of course, that there are no restrictions upon the speed a sheriff or a peace officer may travel in the pursuit of a fleeing criminal. Such officers may abuse their privileges in this respect as well as in others and must answer for such abuse. What is meant to be said is that the statutory regulations as to speed do not apply to them, and that for an abuse of their privileges in this respect they must answer in the manner they are required to answer for other abuses of privilege.

"Our conclusion is that the trial court erred in adjudging the officer guilty of the offense charged. Its judgment will therefore be reversed, and the cause remanded with instruction to discharge the appellant."

On what contextual factors, does the court predicate an exception to the speed regulations here involved?

2. Queen v. Tolson. An Act of Parliament provided that "whoever being married, shall marry any other person during the life of the former husband or wife . . . shall be guilty of felony"; the Act also contained a proviso that "nothing in this act shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years last past, and shall not have been known by such person to be living within that time." D married her husband on September 11, 1880; he

3 (1889) 23 Q. B. D. 168.
deserted her on December 13, 1881. D, believing in good faith and on reasonable grounds that her husband was dead, married another on January 10, 1887. In December 1887 her husband, who had not died, reappeared.

On the question whether D was guilty of bigamy nine judges of the Court for the Crown Cases Reserved, held that she was not and that her conviction must be quashed. Several opinions were filed; the major arguments for the court's conclusion were that while the words of the Act literally applied to a case such as the one presented, the Act must be construed in the light of its purpose, of the harsh consequences of applying it here, and of the undoubted "principle of English criminal law that, ordinarily speaking, a crime is not committed if the mind of the person doing the act is innocent." On these grounds the court decided in effect that the Act did not apply to a person "who married believing in good faith and on reasonable grounds that the former husband or wife is dead."

A minority of five judges dissented; they thought D was guilty of bigamy on the ground that the language of the Act was plain and clear. One judge declared, "It is the imperative duty of the Court to give effect to it, and leave it to the legislature to alter the law if it thinks it ought to be altered."

What factors of context does the majority invoke as a basis for restricting the language of this Act?

What might be said to be the force and effect of the proviso?

A contemporary commentator said of the decision:

"The judgment of the majority of the Court will no doubt commend itself to popular opinion, and we do not assert that the judgment is wrong. It suggests however observations of some importance.

"If the judges are to qualify the plain language of a statute by the introduction of limitations and provisos as to
which not a hint is to be found in the Act, statutory legislation must necessarily become hopelessly confused. If the Courts hold that Parliament cannot mean what Parliament says, then how is anyone to make sure as to what an Act really means? If Parliament had meant to make bigamy in all cases a crime, Parliament could not have used language more clear than the terms of 24 & 25 Vict. chap. 100, sec. 57.

"The popular idea that a code would remove all possibility as to uncertainty about the meaning of a law is shown by the Queen v. Tolson, if proof were needed, to be a delusion. Ambiguity arises in the main from the difficulty of framing rules accurate enough to meet the subtlety of nature. Human nature and the facts of life create cases which human sagacity fails to anticipate." 4

Is there force in this commentator's general criticism of the decision?

3. People v. Hatinger.5

"Bird, J. Under an agreed statement of facts in the trial court, the respondent was convicted by a jury of a violation of the local-option law. He now seeks to have the conviction set aside by this court, on the ground that it is at variance with the law.

"It appears from the stipulation of facts that respondent, in the months of August and September, 1912, was operating a lunch and soft drink counter in the village of Edmore; that he had on sale what was known as 'Old Fort Cider,' which he purchased under a positive guaranty that it contained no alcohol; that the same was analyzed and found to contain 5.6 per cent alcohol; that as soon as the respondent learned that it contained alcohol he discontinued the sale. It is conceded by the people that respondent bought and sold the cider in good faith and with no intent to violate the law.

"It was the claim of respondent that under the case made by the stipulation he was entitled to a directed verdict of not guilty. This claim is based upon the concession of the people

5 174 Mich. 333 (1913); Waite, Cases on Criminal Law (2d ed.) 57 (1937).
that respondent had no intent to violate the law. The contention of the prosecuting attorney was that the question of intent was immaterial, and was not a prerequisite to a conviction. The trial court agreed with the contention of the prosecuting attorney, and instructed the jury that it was their duty to return a verdict of guilty.

"The question raised is one of construction of the statute which is charged to have been violated. While most of the offenses defined by the criminal laws involve guilty knowledge or intent, it is admittedly competent for the legislature to forbid the doing of an act and make its commission criminal without regard to the intent of the doer. . . . If the legislature may create offenses with or without the element of intent, it becomes important to inquire what its intention was with respect to the passage of Act No. 183 of the Public Acts of 1899.

"Section 1 of the act prohibits in positive terms the sale of intoxicating liquors, and no language is used which indicates that the element of intent is to be read into it. Had the legislature intended to make the intent to violate the law an essential element, it would have doubtless used some appropriate language indicating its purpose. If it were necessary to prove intent to violate the law before a conviction could be had, the act would fall far short of doing what the legislature obviously intended it should do; and presumably in this can be found the chief reason why it did not incorporate into the act the element of intent. Laws forbidding the sale of intoxicating liquor and impure foods would be of little use if convictions for their violations were to depend on showing guilty knowledge. The fact, then, that respondent had no knowledge that the cider contained alcohol and that he purchased it and sold it in good faith, with no intent to violate the law, will not avail him in the face of his admission that he sold it and that it contained alcohol. . . ."

Here the court allowed the language to have its full effect and refused to exempt the respondent from liability. Why? What is the difference between this case and the Tolson Case? Is it a difference of the statutory language?
Sec. 5-25. Extensive interpretation of general provision. The interpreter sometimes concludes that a provision is too narrowly stated. It fails to cover certain cases which are within its purpose (or spirit). The deficiency, you will notice, is just the opposite of the defect last considered. Here, as we assume, the provision is too narrow in terms; there the provision was too inclusive. The questions here are whether the interpreter shall stretch the provision to include cases not normally within their meaning, or whether he shall go even further and expand the scope of the provision by analogy, to include cases not within its terms in any sense. *

The reasons for this defect, like other defects of statement, may be lack of care in drafting and failure to foresee the situations to which the enactment should apply. Particularly the sponsor of legislation may have a special case in mind and frame a specific rule to cover it, and his legislative brethren may be indifferent or inattentive to the wording of the act as they go through the steps of enacting it. Thus the initiating legislator may think simply of the necessity for regulating the catching of trout and may introduce a bill fixing a limited trout season. He may not realize (or if he does, not care) that catching of other fish needs to be likewise regulated, or that a limited season should be similarly fixed for each kind of fish. Shall the interpreter extend the application of an act so framed to cover all the kinds of fish within the need for regulation?

As regards statutes, our judges are not inclined to indulge in extensive interpretation of either sort. They are not usually ready to stretch the statutory terms; and they refuse to extend them to analogous cases. The courts ordinarily declare that it is their function to apply a statutory provision as it stands, not to amend it; and they argue that legislation will, on the whole, be more carefully drafted if courts refuse to

*(I.R.) Extensive interpretation may also be combined with solution of an inconsistency or resolution of an ambiguity. (Cf. sec. 5–23, note ** (I.R.).)*
correct legislative errors by interpretation, and leave to the legislature the responsibility for avoiding or rectifying them.

Queries: Have these lines of argument any more relevance to extensive interpretation than to restrictive interpretation? Is there any logical or practical basis for making a distinction between the two types of correction?¹

However, our courts often interpret constitutional clauses extensively, by stretching their terms to the farthest limits. On this point the great Chief Justice Marshall declared, in words which are frequently quoted: “We must never forget, that it is a Constitution we are expounding ... a Constitution intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.”² Accordingly, the Supreme Court of the United States, in particular, has construed important clauses of the Federal Constitution in the most comprehensive sense. The Commerce Clause, for example, has been construed to include many things which are not “commerce” in the ordinary sense; the Due Process Clause has been given the widest possible meaning so as to cover many things which were certainly not originally included in the concept of “due process of law” in a historical sense; and the Contracts Clause has been interpreted to

¹ In this connection it is relevant to note that the courts in civil law countries (France, Germany, Italy, Spain and the Latin American countries) do interpret a code provision extensively; they apply a code provision to cases which are literally not included but which fall within the principle of the provision. See Pound, “Theory of Judicial Decision,” 36 Harv. L. Rev. 641 at 647 (1923); and compare the following:

“With the general assumption of complete codification goes a liberal attitude toward legislation. German legislation is readily construed to cover cases beyond its letter. Emphasis is put on the spirit or principle embodied in code provisions, rather than on the literal meanings of words. The general reliance of the German lawyer on legislation and his readiness to construe legislation as complete, i.e., liberally, stand in contrast to our own reliance on the common law to furnish the solution of doubtful cases and to our narrow construction of statutes, which are expressed in the propositions that the common law fills all gaps in the law and that statutes in derogation of the common law are to be strictly construed.” Shartel and Wolff, “German Civil Justice,” 42 Mich. L. Rev. 863 at 866 (1944).

² McCulloch v. Maryland, 4 Wheat. 316, 407, 415 (1819).
embrace many types of transaction which have not been called "contracts" in any ordinary usages of that term.

Sec. 5-26. Problems. 1. Why should the Supreme Court indulge more readily in extensive interpretation of constitutional, than of statutory, provisions?

2. International Stevedoring Co. v. Haverty, 272 U. S. 50 (1926). The plaintiff was a stevedore employed by the defendant company. While he was engaged in storing freight in the hold of a vessel lying at the dock in Seattle, he was injured through the negligence of a fellow employee of the defendant company. He brought action in a Washington court to recover damages for the injury sustained. The defendant company contended that it was not responsible for the injury to the plaintiff on the ground that the fellow-servant rule was applicable. Under this rule, an employer is not liable for an injury to one servant caused by the negligence of a fellow servant. The plaintiff contended that his action was governed by a federal statute which abrogated the fellow-servant rule in actions by "seamen" against the vessel on which they are working, and made the vessel liable for all injuries occurring in the course of their employment. The trial court held the statute to be applicable, and gave judgment on a verdict in plaintiff's favor; the Supreme Court of Washington affirmed the judgment. A writ of error was granted by the United States Supreme Court. The question presented to the Supreme Court was whether or not the defendant company was liable to the plaintiff stevedore under the terms of this federal statute.

The court, speaking through Mr. Justice Holmes, affirmed the judgment of the Washington Supreme Court and held that the defendant company was liable to the plaintiff. In his opinion, the justice referred to the fact that before Congress enacted the statute in question, it had enacted a similar
statute abolishing the fellow-servant rule in regard to suits against railroads by their employees. Among other things he said:

"It is true that for most purposes, as the word is commonly used, stevedores are not 'seamen.' But words are flexible. The work upon which the plaintiff was engaged was a maritime service formerly rendered by the ship's crew. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52, 62. We cannot believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by the ship. The policy of the statute is directed to the safety of the men and to treating compensation for injuries to them as properly part of the cost of the business. If they should be protected in the one case they should be in the other. In view of the broad field in which Congress has disapproved and changed the rule introduced into the common law within less than a century,¹ we are of opinion that a wider scope should be given to the words of the act, and that in this statute 'seamen' is to be taken to include stevedores employed in maritime work on navigable waters as the plaintiff was, whatever it might mean in laws of a different kind."

This was a case in which the Supreme Court gave an extensive interpretation to a statute. What was the special factor which induced the court to do this? ²

Would the Supreme Court have held either the statute regarding railroad employees or the statute regarding seamen to be applicable to employees of an airline or a motor carrier?

¹ "The rule that the employer was not liable for injuries caused by the negligence of a fellow servant first appeared in England in 1837, and almost immediately in the United States, where it was stated elaborately in a well-known opinion of Chief Justice Shaw of Massachusetts in Farwell v. Boston and Worcester Railway." PROSSER, TORTS 514 (1941).

² Another instance of extensive interpretation (or perhaps I should say interpretation by analogy) is the common extension of statutes of limitation, applicable literally only to suits for possession to cases involving prescriptive claims to easements. See, for example, Klin v. New York Rapid Transit Corp., 271 N. Y. 376 (1936).
Can you say that Holmes' opinion in the above case is consistent with his opinion in the *McBoyle Case* (sec. 5–II)? If "seamen" can include stevedores, why cannot "vehicles" include airplanes? In the *McBoyle Case* Holmes said: "... the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used."

Sec. 5–27. Summary. Interpretation is necessary because legislative provisions are obscurely or inadequately expressed. As a matter of terminology we do not speak of interpretation except in instances where the meaning of legislation is problematic and has to be settled before it can be applied. The principal instances of this sort arise from the legislator's use of ambiguous or inconsistent terms, from his use of indefinite language, from the fact that he leaves gaps in his legislative plan, and from his employment of overcomprehensive or unduly narrow expressions. In the face of a deficient legislative provision the person who is called upon to apply it, may take one of three courses. Sometimes he may refuse to apply the provision at all; at other times he may attempt to apply the provision just as it stands even though the results be harsh or even absurd; and finally, he may undertake to correct the deficiencies in the legislative provision before he applies it. Ordinarily, and certainly within very wide limits, the last course is that which is chosen by our American courts. It is the course which has been discussed in the present chapter.

All the processes of interpretation are creative to a certain degree; they involve a limited amount of judicial lawmaking. The interpreter's act is aimed to restate and explain the legislator's verbal act. The interpreter's act revises or completes a job of legislation which is deficient or incomplete.¹

¹ And the interpreter's own act, like any other verbal act, may be deficient or incomplete and call for subsequent interpretation.
The interpreter starts work with the language which the legislator has used. He draws material for correcting deficiencies from the context of the legislator’s act. This context embraces matters of general knowledge, the existing legal background, and the specific history of the enactment to be construed. The interpreter derives his information about these extrinsic factors partly from his own previous experiences, partly from deliberate inquiry on the particular occasion, and partly from evidence offered by other persons.

The whole of the interpreter’s procedure is controlled by rules of method. These purport to tie the interpreter to what the legislator has said; they instruct the interpreter’s choice as between various linguistic meanings; they specify the extrinsic sources on which he may draw for aid in carrying out the process of interpretation; they establish a variety of presumptions in favor of this meaning or that; they define the ends and policies of the legal system. To be sure, these various rules do not bind the interpreter absolutely; they leave a great deal of play for his discretion and judgment. But in practical operation the established procedures and rules of interpretation do offer real guidance for the interpreter’s activities; they do guarantee that he will not depart too far from the expectable applications of the text of the legislation he is interpreting. While we can say that the interpreter acts as a supplementary lawmaker, his action is markedly different from the original lawmaker’s in that he is merely completing or amending a structure already built, and he is working according to instructions which specify in some detail the way in which he is to carry out even this limited task.