

The Victorian Bar, Melbourne

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Blackstone's "signs" and statutory interpretation

In a description of statutory interpretation worthy of Saussure<sup>1</sup>

Blackstone said<sup>2</sup>:

"The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *signs* the most natural and probable. And these signs are either the words, the context, the subject matter, the effects and consequences, or the spirit and reason of the law." (emphasis in the original)

Those five "signs", for interpreting or ascertaining the "will of the legislator", *words, context, subject matter, effects and consequences* and the *spirit and reason* of the law are perfectly serviceable in current times. This is because of a perceived evolution of the principles of statutory interpretation from a strict and literal approach, to an approach in which context, purpose and broad considerations of legality and fairness have a role<sup>3</sup>. In truth,

<sup>1</sup> The Swiss Linguist, Ferdinand de Saussure, author of *Cours de linguistique générale* (Course in General Linguistics) (1916). Saussure's essential theory about language was that it was made up of signs which had two parts; words (signifiers) and concepts (signified) which combined in an act of intellectual apprehension to form the sign.

<sup>2</sup> Blackstone, *Commentaries on the Laws of England*, (1765), vol 1 at 59. See Attachment 1.

<sup>3</sup> Geddes, "Purpose and Context in Statutory Interpretation", (2005) 2 *University of New England Journal* 5; see also Lannquist, "The Trend Towards Purposive Statutory Interpretation: Human Rights at Stake", (2003) 13 *Revenue Law Journal* 18.

there was probably far less rigidity about the two approaches in practice, than distinguishing between them suggests<sup>4</sup>. Blackstone went on to illustrate each of the five signs by examples from which it can be discerned that "subject matter" for him covered at least the "mischief" which a statute addressed and "reason" covered, at least what is now called "purpose".

Blackstone's examples, intended to illustrate his five "signs", demonstrate that his reference to the legislator's "will" was a way of referring to the meaning of legislation; others have remarked that a court's interest in the legislator's intention is not an interest in actual subjective intention it is a quest for meaning<sup>5</sup> framed by reference to the phrase "the intention of the legislature" and reflecting the "constitutional relationship between the legislature and the judiciary"<sup>6</sup>.

In our system it has always been the business of the legislature to make the law through statutes and "the business of the judges" to construe statutes or provisions in them<sup>7</sup>, as a preliminary to

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<sup>4</sup> *R (Quintavalle) v Secretary of State for Health* [2003] 2 AC 687; see also *Craies on Legislation*, 5th ed (2004) at 561 [18.1.7].

<sup>5</sup> Gummow, *Change and Continuity, Statute, Equity and Federation* (1999) at 22-28; see also Spigelman, "The Principles of Legality and the Clear Statement Principle", (2005) 79 *Australian Law Journal* 769 at 770.

<sup>6</sup> *Wilson v Anderson* (2002) 213 CLR 401 at 418 [8] per Gleeson CJ.

<sup>7</sup> Blackstone, *Commentaries on the Laws of England*, (1765), vol 1 at 87.

application or enforcement of them; but it was not always precisely so. Prior to the establishment of the supremacy of Parliament with the *Act of Settlement* of 1701, Parliament entrusted the task of drafting statutes to a smaller body of the sovereign's learned counsellors and the judges before any making of the law by Parliament<sup>8</sup>.

On at least one reported occasion in the early 14th century, the Chief Justice of the Common Pleas cut short counsel's submissions on the interpretation or proper construction of a statute with the remark<sup>9</sup>:

"Do not gloss the Statute, we know it better than you for it was our work."

Our constitutional arrangements, with their clear and formal separation of powers, mean that the court's role of determining the meaning of a statute is independent of Parliament; as Gummow J has put it<sup>10</sup>:

"... the source of the common law is decisions of the judges, whereas statutory law is an expression of 'the will of the legislature'."

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<sup>8</sup> Pollock, *A First Book of Jurisprudence*, 5th ed (1923) at 353-354.

<sup>9</sup> "*Ne glosez point le statut; nous le savoms meuz de vous qar nous les [sic] feimes*" quoted in Pollock, *A First Book of Jurisprudence*, 5th ed (1923) at 354.

<sup>10</sup> *Brennan v Comcare* (1994) 50 FCR 555 at 573.

The familiar division between making laws by statute and interpreting laws by a process of construction, reflects the distinction between the general and the particular. The courts interpret and apply statutes, made in general terms, to the particular individuals and circumstances which come before them. There are entire dictionaries devoted to words and phrases which have been judicially interpreted and there is no doubt that first decisions on the meaning of provisions in a statute, "like precedents in the common law, have what [Benjamin] Cardozo called the power of the beaten path"<sup>11</sup>.

Contemporary statutory interpretation occurs in circumstances where there has been a great deal of recent thinking and writing by philosophers, linguists and literary theorists about signs, text, meaning, context and certainty. It has been recognised by academic writers on the topic of statutory interpretation that this is not unimportant<sup>12</sup>; it may well have injected fresh vigour into debates about the utility of several possible approaches to statutory interpretation. Certainly accepted approaches to statutory interpretation or construction employed now preclude any sacrifice of meaning to inflexible principles.

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<sup>11</sup> Mayer, *The Judges*, (2007) at 366.

<sup>12</sup> Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 23-24; see also Corcoran, "Theories of Statutory Interpretation" in Corcoran and Bottomley (eds), *Interpreting Statutes*, (2005) at 8.

These introductory remarks are by way of explaining that I am assuming your complete familiarity with the two common law approaches to statutory interpretation, referred to as the "literal approach", and the "purposive approach". To elicit meaning a court once looked primarily at the words of a statute, and if they were ambiguous then the court looked, not only at the words, but also considered the subject matter and reason for the statute. The general rule laid down by Coke<sup>13</sup> required the court to ascertain (1) what was the common law before the Act, (2) what was the mischief and defect for which the common law did not provide, (3) what remedy had Parliament resolved upon to cure the mischief, and (4) the true reason of the remedy<sup>14</sup>.

The literal approach, exemplified in the *Engineers' case*<sup>15</sup>, only required an answer to the question: what does the language of the statute mean? As Higgins J explained<sup>16</sup>:

"... when we find what the language means, in its ordinary and natural sense, it is our duty to obey that meaning, even if we think the result to be inconvenient or impolitic or improbable."

<sup>13</sup> *Heydon's case* (1584) 3 Co Rep 7a at 7b [76 ER 637 at 638].

<sup>14</sup> *Halsbury's Laws of England*, 1913, Vol XXVII at 132.

<sup>15</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

<sup>16</sup> *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 162

A much more recent example of reliance on the "plain meaning" of a single word in the Constitution, which was a past participle used adjectively, can be found in *New South Wales v The Commonwealth*<sup>17</sup> ("the Incorporation case").

The purposive approach, originating in *Heydon's case*<sup>18</sup>, required an answer to a more contingent question: What does the language of the statute mean having regard to the purpose or "mischief" to which the statute was directed? The establishment of that involved all the considerations of Coke enumerated above.

In *Cabell v Markham*, Learned Hand J famously said<sup>19</sup>:

"Of course it is true that the words used, even in their literal sense, are the primary, and ordinarily the most reliable, source of interpreting the meaning of any writing: be it statute, a contract, or anything else. But it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning."

The story of increasing dissatisfaction with too great an emphasis on a strictly literal approach to statutory interpretation, particularly

<sup>17</sup> (1990) 169 CLR 482 at 498 per Mason CJ, Brennan, Dawson, Toohey, Gaudron and McHugh JJ considering the meaning of "formed" as it appears in s 51(xx) of the Constitution.

<sup>18</sup> (1584) 3 Co Rep. 7a at 7b [76 ER 637 at 638].

<sup>19</sup> 148 F 2d 737 at 739 (2nd Cir 1945).

in the context of tax evasion, and the eventual favouring of a purposive approach is told elsewhere<sup>20</sup> and I will not repeat it.

It is sufficient, for present purposes, to note that relevant legislation of the Commonwealth and Victoria, mandates that a construction of a statute, which promotes the purpose or object of an Act, is to be preferred to a construction which would not do so. Taking the Commonwealth legislation as the exemplar, s 15AA(1) of the *Acts Interpretation Act* 1901 (Cth) provides:

"In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."

It is important to recognise that this statutory guidance in no way ousts a "plain meaning" approach. Many statutes which do not come before the courts are expressed in plain and unambiguous language. In fact, considerations of purpose may reveal "no foundation for reading the relevant provisions of the Act otherwise than according to their terms"<sup>21</sup>. It can also be noted that all Victorian Statutes now have an "objects" clause spelling out the purposes and objects of the legislation.

<sup>20</sup> For example, see Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006) at 29 [2.6] ff; Lannquist, "The Trend Towards Purposive Statutory Interpretation: Human Rights at Stake", (2003) 13 *Revenue Law Journal* 18.

<sup>21</sup> *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249 at 262 [28] per McHugh, Gummow, Hayne and Heydon JJ.

Further, the common law approach to construction has been altered by s 15AB of the *Acts Interpretation Act 1901* (Cth) which provides for the use of extrinsic materials as an aid to the interpretation of an Act<sup>22</sup>.

Before turning to consider contemporary approaches to the establishment of the meaning of a statute in more detail, permit me to say something more about Blackstone. I have already mentioned his conception that consideration of the "spirit and reason" of a law may elucidate the will of the legislator, and therefore the meaning of a statute or provision in it.

He elaborated this<sup>23</sup>:

"But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it ... From this method of interpreting laws, by the reason of them, arises what we call *equity*; which is thus defined by Grotius, 'the correction of that, wherein the law (by reason of its universality) is deficient'."

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<sup>22</sup> See also the *Interpretation of Legislation Act 1984* (Vic), s 35(b); *Interpretation Act 1987* (NSW), s 34; *Acts Interpretation Act 1954* (Q), s 14B; *Interpretation Act 1984* (WA), s 19; *Acts Interpretation Act 1931* (Tas), s 8B.

<sup>23</sup> Blackstone, *Commentaries on the Laws of England*, (1765), vol 1 at 61.



Whilst the notion of "the equity" of a statute is said to have fallen into disfavour<sup>24</sup>, possibly with the assertion of Parliament's supremacy and subsequently compounded by the emergence of Benthamite positivism<sup>25</sup>, there is enduring vitality and utility in such a notion<sup>26</sup>. At the least, it provides food for thought in considering contemporary working principles for statutory interpretation, as they have emerged in the cases.

Blackstone's remarks raise for consideration a number of significant aspects of statutes and the role of the courts in interpreting them. Statutes passed by our legislatures may be remedial in respect of a mischief; they may prohibit certain criminal conduct; they may regulate economic or other behaviours; they may codify the common law or establish new settings which displace the common law, wholly or in part.

Merely mentioning those purposes for making laws by statute (which are not exhaustive), emphasises that there is a sense in which all statutes must be affected by the "spirit of legality" which

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<sup>24</sup> Corcoran, 'Theories of Statutory Interpretation', in Corcoran and Bottomley (eds), *Interpreting Statutes*, (2005) at 14

<sup>25</sup> Jeremy Bentham, who attended Blackstone lectures at Oxford, published his *Fragment on Government* anonymously in 1776, just four years before Blackstone died. It was cast in the form of criticism of Blackstone's *Commentaries on the Laws of England*.

<sup>26</sup> See Gummow, *Change and Continuity, Statute, Equity and Federation* (1999) at 18-22.

Dicey notes is a characteristic of a federal system<sup>27</sup>. The spirit of legalism is not confined to persons subject to the law or to states willing to enter a federation. It is a pervasive aspect of social and political organisation which tempers power which could otherwise be untrammelled. Three points at least arise from that observation.

First, in our society, legislation which impinges, or appears to impinge, on long-standing common law freedoms - freedom of movement, freedom of speech, freedom from arbitrary detention and search, and freedom from retrospective criminal laws will always be subject to the closest scrutiny underpinned by the assumption that such matters are part of the rule of law which governs Parliament as well as the courts and the community.

In *Al-Kateb v Godwin*, Gleeson CJ said<sup>28</sup>:

"Where what is involved is the interpretation of legislation said to confer upon the Executive a power of administrative detention that is indefinite in duration, and that may be permanent, there comes into play a principle of legality, which governs both Parliament and the courts. In exercising their judicial function, courts seek to give effect to the will of Parliament by declaring the meaning of what Parliament has enacted. Courts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment."

<sup>27</sup> Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (1920) at 170.

<sup>28</sup> (2004) 219 CLR 562 at 577 [19].

Secondly, the working assumption underpinning all statutory interpretation is that legislators are rational and that the legislature's "will" involves a collective will to make laws which are, in turn, rational and clear, particularly when seeking to achieve such purposes as defining and enforcing normative behaviour. A related assumption is that the goals of a rational legislature expressed in statutes will be "harmonious"<sup>29</sup>.

Thirdly, Dixon CJ pointed out in *Commissioner for Railways (NSW) v Agalinos*<sup>30</sup> that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed", a view which is wholly consonant with Blackstone's reference to the "equity" of a statute.

The current approach to establishing the meaning of a provision in a statute, by reference not only to the plain meaning of words but also by reference to context, purpose, legality or fairness, or some combination of such considerations, exemplifies the proposition that no single theory of, or approach to, statutory interpretation or construction is invariably more useful than, or to the exclusion of, others. It is the problems which are thrown up by the cases, and the particular statutes under consideration in individual cases,

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<sup>29</sup> *Ross v The Queen* (1979) 141 CLR 432 at 440 per Gibbs J.

<sup>30</sup> (1955) 92 CLR 390 at 397.

which determine which approach is useful, rather than it being the other way round.

### Context and Purpose

It can be essential to refer to context in order to overcome what otherwise might be a patently flawed search for meaning based on a literal approach.

The *Project Blue Sky* case<sup>31</sup> involved the question of whether a program standard known as the Australian Content Standard made by the Australian Broadcasting Commission ("ABC") was invalid. The invalidity alleged was that the ABC gave preference to Australian television programmes contrary to Australia's obligations under certain trade agreements. As is common, the objects clause specified the purpose of the Act, but within the Act there were two ostensibly conflicting provisions. There was no doubt the Australian Content Standard was authorised by the literal reading of the words of the relevant provision. However, the provision which was inconsistent with that section made the meaning "dubious"<sup>32</sup> to use Blackstone's word. The Court observed that the "legal meaning", ie the meaning the legislature is taken to have

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<sup>31</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

<sup>32</sup> See footnote 23.

intended, may not correspond to the literal or grammatical meaning. As four justices put it<sup>33</sup>:

"The context of the words, the consequences of a literal or a grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning." (footnote omitted)

It is impossible not to be struck by the references to context, consequences and purpose, all of which are encompassed in Blackstone's "signs" for interpreting the will of the legislature.

The impact of principles of statutory interpretation, which privilege object and purpose over other considerations, has now been felt to the extent that context is not something to which reference will only be made after a "literal approach" has failed to reveal the meaning of a statute or provision, in a manner which commands acceptance.

This has been described in *CIC Insurance Ltd v Bankstown Football Club Ltd* thus<sup>34</sup>:

"[T]he modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses 'context' in its widest sense to include such things as

<sup>33</sup> *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 per McHugh, Gummow, Kirby and Hayne JJ.

<sup>34</sup> (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.

the existing state of the law and the mischief which ... one may discern the statute was intended to remedy."(footnote omitted)<sup>35</sup>

Further, in *Singh v The Commonwealth*, Gleeson CJ said<sup>36</sup>:

"Meaning is always influenced, and sometimes controlled, by context. The context might include time, place, and any other circumstance that would rationally assist understanding of meaning."

In constitutional matters, historical context has been relied on to fix upon meaning, in circumstances where conflicting case law did not provide the certainty required of the law, *Cole v Whitfield*<sup>37</sup> and *Ha v New South Wales*<sup>38</sup> being two of the best known examples.

### Spirit and Reason

The phrase "spirit and reason" appears apt to cover an approach to interpreting a statute, or a provision, where a reference to the statute's purpose does not result in an acceptable construction.

<sup>35</sup> Cf Blackstone, *Commentaries on the Laws of England*, (1765), vol 1 at 87: 'There are three points to be considered in the construction of all remedial statutes; the old law, the mischief and the remedy' .

<sup>36</sup> (2004) 222 CLR 322 at 332 [12]. Gleeson CJ was considering the meaning of "aliens" in s 51(xix) of the Constitution.

<sup>37</sup> (1988) 165 CLR 360.

<sup>38</sup> (1997) 189 CLR 465.

The "spirit" of the law is not an unfamiliar concept in terms of statutory interpretation. For example, it may be referred to so as to include a person within the operation of a beneficial statute, when a literal reading may exclude that person; equally it may be invoked to exclude a person or circumstance if that construction appears to properly reflect the will of Parliament.

Both the "spirit and reason" of the *Native Title Act 1993* (Cth), as the terms are employed by Blackstone, can be seen in the statement of main objects in s 3 of the Act.

Further, whilst I am not suggesting that the "spirit and reason" of a law are necessarily self-standing considerations, for interpretation purposes, it is possible to see their place in certain cases. *Pfeiffer v Stevens*<sup>39</sup> required the Court to determine whether an interim local law was in force. That turned on the power of the relevant Minister to extend the period, the subject of a sunset provision, for a second time. It was contended that as a matter of statutory construction the power to extend was capable of being exercised only once. There were three possible constructions of the relevant provision. Two of the justices said<sup>40</sup>:

".. it is not difficult to imagine reasons why a further extension might, in some cases, be desired."

<sup>39</sup> (2001) 209 CLR 57.

<sup>40</sup> *Pfeiffer v Stevens* (2001) 209 CLR 57 at 64 per Gleeson CJ and Hayne J.

They then outlined a "most likely reason" and continued<sup>41</sup>:

"That would be a good practical reason, involving no infringements of anybody's constitutional or other rights, and no infringement of democratic principles for wishing to have a further extension. It would be surprising if the legislature had overlooked such an obvious possibility, and had not intended to make provisions for it."

This is quite a good modern example of resort, to something more than "purpose"; the "will" of Parliament was only able to be discerned in that case by reference to a practical consideration of the reason and dare I say it the "spirit" of the statute.

A statute can be specifically designed to effect a policy. In *Thomas v Mowbray*, in a joint judgement of two justices, it was said<sup>42</sup>:

"It is a commonplace that statutes are to be construed having regard to their subject, scope and purpose. Much attention now is given by the courts, when engaged on that task, to placing the law in question in its context and to interpreting even apparently plain words in the light of the apprehended mischief sought to be overcome and the objects of the legislation."

The context in that case included matters of "general public knowledge", namely recent terrorist attacks such that the "mischief" sought to be addressed had been apprehended both within and beyond the Commonwealth. Blackstone's signs,

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<sup>41</sup> *Pfeiffer v Stevens* (2001) 209 CLR 57 at 64 per Gleeson CJ and Hayne J.

<sup>42</sup> (2007) 81 ALJR 1414 at 1439 [82] per Gummow and Crennan JJ.



considered collectively, do not seem out of place when context and purpose may depend on such considerations.

Finally, mention should be made of two discrete points. In the preparation of submissions in a case concerning an issue of statutory construction it is necessary to remember the caution expressed from time to time to the effect that extrinsic materials are no more than an aid to interpretation: "The words of a Minister [in a Second Reading Speech] must not be substituted for the text of the law"<sup>43</sup>.

A further and perhaps obvious point is that legislation often involves compromise<sup>44</sup> resulting in a degree of opacity<sup>45</sup>. As a result, a real issue can arise as to whether a legislature has in fact achieved its purposes.

It has been my intention tonight to provide some food for thought on the allocated topic of statutory construction, without mere repetition of what can be found in the many excellent textbooks on the subject<sup>46</sup>.

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<sup>43</sup> *Re Bolton; ex parte Beane* (1987) 162 CLR 514 at 518 per Mason CJ and Wilson and Dawson JJ.

<sup>44</sup> Gummow, *Change and Continuity, Statute, Equity and Federation* (1999) at 26-27.

<sup>45</sup> Mayer, *The Judges*, (2007) at 366.

<sup>46</sup> Bennion, *Statutory Interpretation*, 4th ed (2002); *Craies on Legislation*, 8th ed (2004); Pearce and Geddes, *Statutory Interpretation in Australia*, 6th ed (2006).

When faced with a practical problem of statutory interpretation or construction, a great deal can be accomplished by asking what a provision means by reference to Blackstone's "signs": that is, by asking what a provision means by reference to the words (the "plain meaning"), the context, the subject matter (which I take to at least include the "mischief" being addressed), effects and consequences and the spirit and reason for the law. This is especially so when coupled with Blackstone's notion of establishing the "equity" of a statute through such inquiries, because the "equity" of a statute encompasses wider considerations of "fairness"<sup>47</sup> and "legality"<sup>48</sup>.

This is not to suggest that Blackstone's signs are a substitute for mastery of the current authorities and familiarity with relevant judicial pronouncements on the topic; it is merely to remind you that his signs continue to be a useful, simple starting point when approaching the question of the meaning of statutory provisions.

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<sup>47</sup> *Commissioner for Railways (NSW) v Agalianos* (1955) 92 CLR 390 at 397 per Dixon CJ.

<sup>48</sup> *Al-Kateb v Godwin* (2004) 219 CLR 562 at 577 [19] per Gleeson CJ.

*Commentaries  
on the  
Laws of England*

William Blackstone

A Facsimile of the First Edition  
of 1765—1769

VOLUME I

*Of the  
Rights of Persons  
(1765)*

With an Introduction by Stanley N. Katz

The University of Chicago Press  
*Chicago & London*

THE fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by *figs* the most natural and probable. And these figs are either the words, the context, the subject matter, the effects and consequence, or the spirit and reason of the law. Let us take a short view of them all.

1. Words are generally to be understood in their usual and most known signification; not so much regarding the propriety of grammar, as their general and popular use. Thus the law mentioned by Puffendorf, which forbid a layman to *lay hands* on a priest, was adjudged to extend to him, who had hurt a priest with a weapon. Again; terms of art, or technical terms, must be taken according to the acceptation of the learned in each art, trade, and science. So in the act of settlement, where the crown of England is limited "to the prince's Sophia, and the heirs "of her body, being protestants," it becomes necessary to call in the assistance of lawyers, to ascertain the precise idea of the words "*heirs of her body*;" which in a legal sense comprize only certain of her lineal descendants. Lastly, where words are clearly *repugnant* in two laws, the later law takes place of the elder: *leges posteriores priores contrarias abrogant* is a maxim of universal law, as well as of our own constitutions. And accordingly it was laid down by a law of the twelve tables at Rome, *quod populus populi iussit, id ius ratum esto*.

<sup>1</sup> *Leg.* l. 2. 6.

<sup>1</sup> L. of N. and N. 5. 12. 3.

2. If words happen to be still dubious, we may establish their meaning from the context; with which it may be of singular use to compare a word, or a sentence, whenever they are ambiguous, equivocal, or intricate. Thus the proeme, or preamble, is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws, that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point. Thus, when the law of England declares murder to be felony without benefit of clergy, we must resort to the same law of England to learn what the benefit of clergy is; and, when the common law censures simoniacal contracts, it affords great light to the subject to consider what the canon law has adjudged to be simony.

3. As to the subject matter, words are always to be understood as having a regard thereto; for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end. Thus, when a law of our Edward III. forbids all ecclesiastical persons to purchase *provisions* at Rome, it might seem to prohibit the buying of grain and other victual; but when we consider that the statute was made to repress the usurpations of the papal see, and that the nominations to vacant benefices by the pope were called *provisions*, we shall see that the restraint is intended to be laid upon such provisions only.

4. As to the effects and consequence, the rule is, where words bear either none, or a very absurd signification, if literally understood, we must a little deviate from the received sense of them. Therefore the Bolognian law, mentioned by Puffendorf<sup>m</sup>, which enacted "that whoever drew blood in the streets should be punished with the utmost severity," was held after long debate not to extend to the surgeon, who opened the vein of a person that fell down in the street with a fit.

<sup>m</sup> *L. 5. c. 12. §. 8.*

5. BUT, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the reason and spirit of it; or the cause which moved the legislator to enact it. For when this reason ceases, the law itself ought likewise to cease with it. An instance of this is given in a case put by Cicero, or whoever was the author of the rhetorical treatise inscribed to Herennius. There was a law, that those who in a storm forsook the ship should forfeit all property therein; and the ship and lading should belong entirely to those who staid in it. In a dangerous tempest all the mariners forsook the ship, except only one sick passenger, who by reason of his disease was unable to get out and escape. By chance the ship came safe to port. The sick man kept possession and claimed the benefit of the law. Now here all the learned agree, that the sick man is not within the reason of the law; for the reason of making it was, to give encouragement to such as should venture their lives to save the vessel: but this is a merit, which he could never pretend to, who neither staid in the ship upon that account, nor contributed any thing to its preservation.

FROM this method of interpreting laws, by the reason of them, arises what we call *equity*; which is thus defined by Grotius, "the correction of that, wherein the law (by reason of its universality) is deficient." For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of excepting those circumstances, which (had they been foreseen) the legislator himself would have excepted. And these are the cases, which, as Grotius expresses it, "*lex non exacte definit, sed arbitrio boni viri permittit.*"

Equity thus depending, essentially, upon the particular circumstances of each individual case, there can be no established

rules and fixed precepts of equity laid down, without destroying its very essence, and reducing it to a positive law. And, on the other hand, the liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. And law, without equity, tho' hard and disagreeable, is much more desirable for the public good, than equity without law; which would make every judge a legislator, and introduce most infinite confusion; as there would then be almost as many different rules of action laid down in our courts, as there are differences of capacity and sentiment in the human mind.

