THE ABSURDITY AND REPUGNANCY OF THE PLAIN MEANING RULE OF INTERPRETATION

It is said that law by its conservative nature is twenty years behind the people. This is not always true, of course. There have been cases where the law preceded the social mores. But that side of the scale of justice is outbalanced by the much more weighty examples of the law that is much, much further behind the people than a mere score of years.

A more stunning example cannot possibly be found than the exposition of one of the fundamental rules (or approaches) of statutory interpretation, that of the plain meaning rule. And before looking at this rule in relatively modern terms and cases, let us take a fleeting glance at a man who was aware of the absurdity four centuries ago—William Shakespeare:

Earl of Somerset: Judge you, my Lord of Warwick, then between us.
Earl of Warwick: Between two hawks, which flies the higher pitch;
Between two dogs, which hath the deeper mouth;
Between two blades, which bears the better temper;
Between two horses, which doth bear him best;
Between two girls, which hath the merriest eye;—
I have, perhaps, some shallow spirit of judgment:
But in these nice sharp quillets of the law,
Good faith, I am no wiser than a daw.
Richard Plantagenet: Tut, Tut! here is a mannerly forbearance:
The truth appears so naked on my side,
That any purblind eye may find it out.
Earl of Somerset: And on my side it is so well apparell'd,
So clear, so shining, and so evident,
That it will glimmer through a blind man's eye.[1]

Shakespeare was writing about law in general but the dialogue bears the most truth on the interpretation of statutes and other instruments. And it is the intention of this writer to demonstrate that the plain meaning approach is plain nonsense. To do this it will be necessary to look at a few cases, and a few comments.

Before we deal with the arguments, it might be well to know about what we are arguing. In the interpretation of statutes and other instruments there are three basic "rules" or approaches.[2] These are the plain meaning rule, the golden rule, and the mischief rule. In brief, the plain meaning rule, also called the literal, or grammatical, or ordinary, or natural meaning rule, is that statutes should be construed according to the intention expressed in the Acts themselves. This means, of course, that in one sense there is no actual interpretation since "interpretation" is unnecessary.[3] Certain rules were formulated to

1. King Henry The Sixth, Part One, Act II, Scene IV.
2. Some people prefer to relegate the golden rule to the status of a subordinate rule of both the plain meaning and mischief rules.
3. Eg., **Waugh v. Middleton** (1853) 8 Ex. 352 at p. 356 per Pollock CB; **Bradlaugh v. Clarke** (1883) 8 App Cas 354.

assist in "not interpreting" statutes but we will leave that for the time. The golden rule is, in one respect, a continuation of the plain meaning rule in that if to construe the words of a statute according to the plain meaning a repugnancy or absurdity with the remainder of the statute results, then the "plain meaning" is modified so as to avoid this repugnancy or absurdity.[4] In another respect the golden rule is related to the mischief rule, for if two meanings are conceivable for the words in question and one of the meanings would lead to an absurdity, then by this golden rule that meaning which would avoid the absurdity is to be used.[5] The third rule or approach, the mischief approach, was born in *Heyden's case*.[6] This approach is to interpret statutes which are incapable of the literal approach on the basis of going behind the statute to try to determine the intent of the legislature; to, in effect, ascertain the mischief intended to be remedied. This last has required the establishment of a great body of sub-rules which, the reader will no doubt be pleased to learn, we will ignore for the purposes of this paper.

Those, generally, are the three basic approaches. We need now only look at the sub-rules of the plain meaning approach to understand the direction in which we are about to leap.

First, in taking the plain meaning approach, the intention of the legislature is not to be speculated upon, the reasoning being that the speculation is unnecessary due to the "plain meaning." Second, we have the rule given the Latin tag of *ut res magis valeatquom pereat*.[7] This rule postulates that if at all possible all words in the statute ought to be given meaning: that is, the same words mean the same thing, different words mean different things, and more specifically, where the legislature uses analogous words, each word has (or is presumed to have, since these are all presumptions) a separate and specific meaning.[8] Third, a statute may not be extended to meet a case for which provision has not been made.[9] Fourth, the court cannot interfere to aid persons against express statutory provisions.[10] Other rules apply to interpretation according to time and place, and are not significant for our purposes.

To argue now that the plain meaning approach is plain nonsense will require the posing of and responding to three questions: One, how

4. Eg., **Grey v. Pearson** (1857) 6 HLC 61 at p. 106 per Lord Wensleydale.
5. Eg., **Singer v. Town N' Country Holding Co.** (1966) 56 DLR 339 at pp. 342-3.
6. (1854) 3 Co Rep 7a—in fact, the mischief rule is sometimes referred to as the rule in Heyden's Case.
7. For the benefit of scholars who have not had the advantages of a classical education this mean "It is better for a thing to have effect than to be made void." See **Roe v. Tranmarr** (1757) Willes 682.
8. Eg., **Re CPR & RM Lac Pelletier** [1944] 3 WWR 637 at p. 644.
9. Eg., **Royal Bank of Canada v. Acadia School Division** [1943] 1 WWR 256.
10. This, of course, is what interpretation is all about.

can there be a dispute where there is a plain meaning? Two, how can anyone ascertain the plain meaning without considering the entire scheme, which is to say including all relevant matters thereto such as preambles and scheduled draft conventions? Three, how can two or more judges come to different views on a statute which they say has a plain meaning?

Question One—A Disputed Plain Meaning!

A proper trial by its very nature connotes a dispute. If the dispute relates to the interpretation of a statute, logically there cannot be a plain meaning since there would then be no dispute. Perhaps that statement is too simple. The difficulty is, of course, that the statement, like any statute, or deed, or what have you, is written in words. "The literal rule assumes the existence of 'plain words' taking no account of the intrinsic frailty of language."[11]

This was appreciated somewhat in *Lyone v. Tucker*[12] where Grove J. said:[13] "the language of statutes is not always that which a rigid grammarian would use." J. L. Montrose suggested in an article[14] that if two courts (or readers) come to a different conclusion about words in a particular context, then these words must be ambiguous.

The question, however, is best answered by E. A. Driedger, renowned for some time in connection with the proper drafting of statutes. He wrote:

> "At present many of the so-called rules of interpretation cannot be applied until some absurdity, repugnancy, inconsistency, ambiguity, inconvenience, injustice or hardship has been found. But before the lawyer can find a defect of that kind, he must read and interpret the statute without assistance. Frequently an alleged flaw in a statute results from a misreading of the statute or from failure to understand the subject matter. No lawyer can grasp the full meaning of a statute merely by reading through it once, much less find any flaw in it. Many hours of thought and labour are put into the drafting of a statute. There is no perfect statute, but rarely is a defect apparent at first reading. It is only after the lawyer has studied the statute and considered it in the light of a specific problem that defects reveal themselves. Once he has mastered it as a whole, and has begun to apply specific sections to actual problems, the lawyer will be able to judge whether there is in it any ambiguity and, having a thorough knowledge of its contents, he will be able to form an intelligent opinion on the true interpretations of any doubtful provisions."[15]

Question Two—Interpretation of Words or a Statute?

The cases are numerous which hold that where the words of a statute are clear and unambiguous, there is no need to look elsewhere

11. The Law Commission and Scottish Law Commission Published Working Paper on the Interpretation of Statutes, 1967, hereafter cited "Law Commission Working Paper," at p. 32.
12. (1881) 6 QBD 660.
13. Ibid, at p. 664.
14. (1960) 76 Law Quarterly Review 359 at pp. 360-1.
15. In The Composition of Legislation (Ottawa, Queen's Printer, 1957, hereafter cited "Driedger") at pp. 159-60.

to discover their intention or their meaning,[16] and the "elsewhere" has been extended to include what must be considered not only part of the legislative schemes but the Act being itself construed. Thus it has been held on many occasions that the title, or the preamble, or conventions scheduled to the Act, cannot be considered in interpreting the statute where the section in question is "unambiguous."

The leading case on preambles is *Att.-Gen. v. Prince Ernest of Hanover*.[17] In this case a statute of 1705 which purported to naturalize all the issue of Princess Sophia, the Electress of Hanover, was to be interpreted. The preamble in effect limited the issue; the words of the section in question did not. The House of Lords held that since the statute was clear and unambiguous recourse could not be had to the preamble. In the result the court held that the statute made British subjects of the plaintiff, Prince Ernest, who had actually fought against Britain in the Second World War, the German Kaiser, and some four hundred other persons scattered about Europe.[18]

With respect to conventions, the highest authority in England held[19] that where the statute is clear and unambiguous, and even where the convention is referred to in the long and short titles of the Act, which also contains a preamble stating that the purpose of the Act was to give effect to that convention, the court could not resort to the convention in order to give a section other than its "natural meaning." In mitigation to that, it should be pointed out that very recently the English Court of Appeal has restricted the *Ellerman Lines v. Murray* decision considerably on this point of conventions. In *Salomon v. Commissioners of Customs and Excise*[20] Diplock L.J.[21] in distinguishing the House of Lords decision said:

> But if the terms of the legislation are not clear but are *reasonably capable* of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including therein specific treaty obligations;[22] and if one of the meanings which *can reasonably be ascribed* to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred.[23]

This is, of course, merely an application of the golden rule. But it seems to go against the dictum of Viscount Simonds in the Prince

16. Eg., Sussex Peerage Case (1844) 11 Cl & Fin 85 at p. 143; Vacher & Sons Ltd. v. London Society of Compositors [1913] AC 107 at p. 117.
17. [1957] AC 436. But see, The Interpretation Act, S.M. 1957, c. 33, s. 11 and the Interpretation Act, S.C. 1967, c. 7, s. 12.
18. Odgers Construction of Deeds and Statutes (London, Sweet & Maxwell, 5th ed., 1967) at p. 267.
19. In Ellerman Lines v. Murray [1931] AC 126.
20. [1966] 3 WLR 1223.
21. At p. 1233.
22. Oddly enough, in this case, the Act nowhere mentioned the convention.
23. Emphasis added.

of Hanover case[24] where he issued a warning against finding ambiguities to enable the preamble to be referred to:

> . . . it must often be difficult to say that any terms are clear and unambiguous until they have been studied in their context. That is not to say that the warning is to be disregarded against creating or imagining an ambiguity in order to bring in the aid of the preamble. It means only that the elementary rule must be observed that no one should profess to understand any part of a statute or of any other document before he has read the whole of it. Until he has done so he is not entitled to say that it or any part of it is clear and unambiguous.

This writer confesses a certain confusion in reconciling the last part of that dictum with the decisions in many other cases[25] that the preamble is "undoubtedly part of the Act."

Justice Frankfurter wrote in 1947:[26]

> The current English rules of construction are simple. They are too simple. If the purpose of construction is the ascertainment of meaning, nothing that is logically relevant should be excluded. The rigidity of English courts in interpreting language merely by reading it disregards the fact that enactments are, as it were, organisms, which exist in their environment.

In the Prince of Hanover case itself, a statement of Lord Somervell is worthy of repeating:[27]

> It is unreal to proceed as if the court looked first at the provision in dispute without knowing whether it was contained in a Finance Act or a Public Health Act. The title and general scope of the Act constitute the background of the context. When a court comes to the Act itself, bearing in mind any relevant extraneous matters, there is, in my opinion, one compelling rule. The whole or any part of the Act may be referred to and relied on. It is, I hope, not disrespectful to regret that the subject was not left where Sir John Nicoll[28] left it in 1826. "The key to the opening of every law is the reason and spirit of the law—it is the 'animus imponentis,' the intention of the law-giver, expressed in the law taken as a whole. Hence to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not be viewed detached from its context in the statute: it is to be viewed in connection with the whole context—meaning by this as well the title and preamble as the purview or enacting part of the statute."

There are many cases pro and con on this question of using the rest of an Act, including its title, preamble, and other sections, to interpret the section in dispute, but we may conclude this second question with a "simple" statement from Halsbury:[29]

> For the purposes of construction, the context of words which are to be construed includes not only the particular phrase or section in which they occur, but also the other parts of the statute . . . The literal meaning of

24. [1957] AC 436 at p. 463.

25. Eg., **Salkeld v. Johnson** (1848) 2 Ex 256 at p. 283 per Pollock CB.

26. Some Reflections on the Reading of Statutes, 47 Columbia Law Review 527.

27. [1957] AC 436 at p. 473. In spite of the way the dictum sounds, Lord Somervell did not give a dissenting judgment. The judgment in fact was unanimous. However it should be noted that Lord Somervell, utilizing to some extent the mischief approach, considered the preamble before ascertaining the context of the statute. He stated that he found the preamble to be ambiguous and therefore chose to disregard it in interpreting the "plainer" section in question.

28. In **Brett v. Brett** (1826) 3 Add 210 at p. 216.

29. Halsbury's Laws of England (London, Butterworth & Co., 3rd ed., 1961), at p. 395.

> a particular section may in this way be extended or restricted by reference to other sections and to the general purview of the statute.

And an even more cogent statement from Driedger:[30]

> [The rules of language, inferred intent, declared intent, and presumed intent] are all applicable to every statute and not only to those that are found to be defective. Every statute involves language, a legislative scheme, and a declared and presumed intent of parliament. It is not only a faulty statute that must be interpreted; all statutes must be. A lawyer should be able to suggest a sensible interpretation of a defective statute, but is even more important that he be able to read a good statute without misconstruing it.

Question Three—Multifaceted Views of a Plain Meaning!

In *Barnes v. Jarvis*[31] Lord Goddard C.J. said: "A certain amount of common sense must be applied in construing statutes." Yet for all the desire for common sense expressed by some judges and wished for by counsel and clients, decisions are still reached by courts that a particular section in question is plain in meaning without agreement between the members of that court as to the plain meaning. In what is possibly the best article ever written on statute interpretation[32] John Willis cites the decision in *Croxford v. Universal Insurance Co.*[33] where Scott L.J. agreed with counsel that the meaning was plain but disagreed with him (and Slesser L.J.) as to the supposed plain meaning. And, of course, all writers on this question inevitably cite the famous *Ellerman Lines v. Murray*[34] judgment.

In that case the question involved the interpretation of section one of the Merchant Shipping (International Labour Conventions) Act of 1925[35] which provided as follows:

> (1) Where by reason of the wreck or loss of a ship in which a seaman is employed his service terminates before the date contemplated by the agreement, he shall . . . subject to the provisions of this section, be entitled, in respect of each day on which he is in fact unemployed during a period of two months from the date of termination of the service, to receive wages at the rate at which he was entitled at that date.
>
> (2) A seaman shall not be entitled to receive wages under this section if the owner shows that the unemployment was not due to the wreck or loss of the ship and shall not be entitled to receive wages under this section in respect of any day if the owner shows that the seaman was able to obtain suitable employment on that day.

Murray was a seaman who, before the termination of his contract, became unemployed as a result of the wreck of his ship, the Croxteth Hall. He claimed two months' wages, though his contract under normal

30. Driedger, op. cit., at p. 163.
31. [1953] 1 WLR 649.
32. Statute Interpretation in a Nutshell, (1938) 16 Canadian Bar Review 1, hereafter cited "Willis."
33. [1936] 2 KB 253.
34. [1931] AC 126.
35. 15 and 16 Geo. 5, C. 42.

circumstances would have been terminated in a matter of days.[36] Murray won judgment in the Court of Appeal on a two-to-one decision (Slesser L.J. dissenting) and in the House of Lords on a four-to-one decision (Lord Blanesburgh dissented on almost the same grounds as Slesser L.J. in the court below). Yet all agreed (including the dissenting Lord Blanesburgh) that the section was unambiguous.[37] Although Lords Dunedin, Tomlin and Macmillan all said that the section was perfectly plain, many writers have stated in commenting on the case that in fact they disagreed as to the plain meaning.[38] The writer on examining the judgments is more inclined to say that each discussed a different aspect of the so-called plain meaning. Viscount Dunedin, after discussing "indemnity" which is the word used in the preamble and the convention but not in the section, then gave a straightforward interpretation of the section. Lord Tomlin, though giving the same interpretation, discussed the lack of anything cutting down the two months stated in the section. Lord Macmillan[39] spoke at length about the alleged ambiguity in "in fact unemployed." He also added in his decision a dictum that even if the preamble and convention could have been used in interpreting the section, it would not have helped the appellants since he could interpret the words there to assist the respondent.[40] In his dissenting judgment, Lord Blanesburgh conducted a highly involved analysis of the section based upon one word in particular, "wages." With all due deference to the learned Lord Justice, this writer is of the opinion that he went overboard (no pun intended) on the matter.

The entire decision of the *Ellerman Lines v. Murray* case brings to the writer's mind the argument of Fox Andrews K.C. and J. Charlesworth in *London & North Eastern Railway Co. v. Berriman*[41] as commented on in the Law Commission Working Paper:[42]

> Where eminent judges at the level of the House of Lords can thus differ as to the "ordinary" meaning of a regulation and when counsel in the case think it necessary to refer to the Oxford English Dictionary, a will of 1577, Milton's "Paradise Lost" and Dr. Johnson to determine the meaning of "repair," it is hard to avoid the conclusion that the protagonists are engaged in a somewhat unreal verbal contest. The diverging meanings contended for would seem ultimately to depend on different

36. In the case heard at the same time before the same court, **White Star Line of Royal & U.S. Mail Steamers Oceanic Steam Navigation Co. Ltd. v. Comerford**, the seaman there had only one day left of his contract if the ship had made it to port.
37. At p. 144 of the judgment, Lord Blanesburgh said: "It is obscure, it remains oblique but it is not in the result ambiguous. The truth from the well is found, at the end of the search for it, to have been leaking out of the section itself . . ." Despite holding it "unambiguous" Lord Blanesburgh employed the mischief approach.
38. Eg. Willis, op. cit., at p. 2; Craies on Statute Law, (Sweet & Maxwell, London, 6th ed., 1963) at p. 85, note 23; Odgers, op. cit., at pp. 441-2.
39. The decisions of both Lords Tomlin and Macmillan were actually read by Lord Thankerton.
40. This is the same Lord Justice that stated at p. 148 of the judgment: ". . . only a sophisticated reading could import any ambiguity into [the terms of the statute]."
41. [1946] AC 278.
42. Law Commission Working Paper, op. cit., p. 15.

> concepts of the policy underlying the regulation which, for whatever reason, has not communicated itself with sufficient clarity.

The unfortunate part of all this is that the problem still exists. In a decision given as recently as January 23, 1969 in the Manitoba Court of Appeal,[43] Monnin J.A., invoking the plain meaning approach from *Dufferin Paving & Crushed Stone v. Anger*,[44] said:

> The words "used for hospital purposes" are clear and unambiguous. They must, therefore, be interpreted in their natural and ordinary sense and there is little need to bring forth the numerous canons of interpretation of statutes which apply only when the language used is not clear or is ambiguous.

Yet in the same case, Guy J.A. saw the section another way completely. This writer finds the greatest difficulty in understanding how two judges of the highest court in the Province can decide differently on a point and yet have one of them say that it is clear and unambiguous.

John Willis, in his article of 1938, concluded that the literal meaning approach no longer has any credence. He wrote:[45]

> A hundred, even fifty, years ago it was unusual for statutes to be framed in wide and general terms, and the "literal" rule was consequently of great practical importance. Today it is a commonplace that the function of most modern statutes . . . is to tell some layman, not some court, to do something. To this end, statues are now drafted in intelligible, and hence wide and general language, and fall outside the proper scope of the literal rule.

It is the respectful opinion of this writer than in the thirty years that have passed the statement has become more, rather than less, true.

In conclusion, it should be pointed out that eliminating the plain meaning rule will not automatically solve interpretation problems. What it will do is permit a more realistic approach to ascertaining the intention of the legislature in passing the disputed statute—within limits.

To illustrate the implication involved in the last two words of the above paragraph, we may examine a statute passed by the Ontario Legislature in 1967—the Law Enforcement Compensation Act[46]—and the first case to test it.

Section 3 of that Act prescribes the conditions under which compensation may be paid. It provides as follows:

> (1) Where any person is injured or killed by any act or omission of any other person occurring in or resulting directly from assisting a peace

43. **Medical Centre Apartments Ltd. v. The City of Winnipeg** (unreported, as of Feb. 1969).

44. [1940] S.C.R. 174 at p. 181, per Davis J.

45. Willis, op. cit., at pp. 10-11.

46. S.O. 1967, c. 45. Since the writing of this article, the Government of Ontario has introduced legislation by which the Act will be amended to provide compensation for the innocent victims of criminal acts and for those injured while trying to stop a crime, in addition to those injured while assisting policemen who are now covered under s. 3 of the Act. Similar legislation can be found in Britain, New Zealand, New South Wales, California, New York, Massachusetts and Saskatchewan; and, it is under consideration in Alberta and Manitoba.

> officer, as defined in the Criminal Code (Canada), in arresting any person or in preserving the peace, the Board[47] may, on application therefor and after a hearing, make an order in its discretion exercised in accordance with this Act for the payment of compensation, and the decision of the Board is final and conclusive for all purposes.

In second reading on June 1, 1967 of Bill 130, which ultimately resulted in this Act, Mr. Elmer W. Sopha, the Member of the Legislature for Sudbury, a lawyer, made this comment:[48]

> . . . I would invite the Attorney-General before it goes much further, to have a look at that section three, which is the operative section and on which I prophet [sic] a view that it is very badly drafted. As I read it, the citizen has to wait until the arrival of the police officer, or the peace officer to be correct. There may be a breach of the peace, but if he has a sophisticated knowledge of this statute, he will say to himself and to anyone else present, do not do a thing until the cops arrive to prevent a breach of the peace, because the way it reads, he has to be present.

On April 26, 1968, three youths in Toronto conspired to rob a taxi driver of his vehicle. They hailed the cab driven by Larry Botrie and asked to be driven to the city limits. In the vicinity of Highway 401 and Yonge Street, Botrie asked for his fare. When he was informed that they had no money, he drove onto a service station lot on Yonge Street in order to, as he told the youths, call the police. The boy in the front seat produced a knife and held it against Botrie's chest. After a struggle Botrie succeeded in disarming the knife-wielder. Then he left the cab shouting "police" whereupon another of the trio shot him with a 30/30 rifle they had brought along.

On September 13, 1968, a hearing was held in Toronto by the Board on the application of Alfred and Mentaha Botrie for compensation because of the death of Larry Botrie.

Appearing for the applicants was Dr. Allen Linden, Professor of Law at Osgoode Hall Law School, who argued (ably, according to the chairman's comment at the end of the judgment, but without success) that the Board should interpret the section broadly. The decision of the Board, in fact, was exactly as Mr. Sopha interpreted the section. The chairman of the Board, C. E. Bennett C.C.J., began his decision with the now familiar dicta on the plain meaning rule. The learned judge decided, in concluding that Botrie did not fall within the provisions of section 3, that the language section 3(1) was not ambiguous. But note his very next statement:[49]

> However, we also approached our task of interpretation on the premise that the language was ambiguous; that it was capable of two meanings, as was argued by the applicants.

The Board was still unable to conclude that the tragedy was compensable; but, the fact that they were prepared to consider that another

47. The Law Enforcement Compensation Board established under the Act.
48. Debates of the Ontario Legislature, June 1, 1967, at pp. 4204-5.
49. At p. 11 of the unreported judgment.

interpretation was reasonably conceivable, though they did not share it, and therefore to look at other relevant information to assist in the interpretation of the section, was a worthy decision and deserving of strong support and following. Of course, having the information available to us, that their interpretation was foreseen before the bill was passed, makes the decision of fact easier to acknowledge. This case can be employed also to demonstrate how the use of Hansard could aid in the interpretation of a statute. At the time of the second debate noted above, in answer to Mr. Sopha's "prophecy," the Attorney-General is reported to have said: "I am indebted, Mr. Speaker, to the Hon. member for Sudbury for the suggestion. I think we might look at that in Committee then."[50] We have no knowledge of what occurred in Committee, but having had Mr. Sopha's view and reply before them the Law Enforcement Compensation Board might very easily have substantiated their actual conclusion by stating that, since the Government was made aware of the likely interpretation and acknowledged it sufficiently to mention looking at it in Committee, the fact than when the bill was passed third reading it had not been altered is evidence that the meaning was as intended and as interpreted by Mr. Sopha.

In any event, the Botrie decision, hard as it may have been on the applicants, illustrates the need for better drafting *before* the statute comes to be interpreted. But once it is passed, if all courts pursued the reasoning that the Law Enforcement Compensation Board used, which in effect ruled out plain meaning where a dispute involves the interpretation of a statute or instrument, statutory interpretation will have come to the position concluded necessary by John Willis in 1938.

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50. Debates of the Ontario Legislature, op. cit., at p. 4205.

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