

## THE EQUITY OF A STATUTE.

A discussion of the phrase "Equity of a Statute" will not, perhaps, lead to the solution of any burning question of the day; in fact the principle involved in the phrase, as applied in the seventeenth century, has been relegated to the limbo of legal antiquities, reappearing now and then in altered form, the ghost of its former self. But no phrase in the English law has been more indefinitely and loosely used over a longer period of time, and a brief account of its place in English legal literature may not be uninteresting; particularly since the general repudiation of the doctrine of equitable interpretation or construction has not led to a surrender by the courts of the power, that must lie somewhere, of applying to the literal meaning of the words of a statute the principles of reason and common sense. Indeed some of the more recent cases might confirm the view that the power, broadly claimed but sparingly exercised at the common law, is to-day more freely exercised than ever by courts that have disavowed the right to apply an equitable construction to the statutes.

The word equity, as used in the phrase "Equity of a Statute," is not to be confused with the equitable jurisdiction of the Court of Chancery. Historically the two meanings of the word are of course related, but the term had a well-recognized meaning in the law courts long before it was applied to the doctrines of chancery. Equity, as a legal term, was adopted into our law from civilian sources and brought with it the various meanings that had been attached to it by civilian commentators, most of which relate to the use of a power, supposed to be possessed by the courts, of modifying the rigor of the law by applying to its interpretation principles of an assumed ethical superiority.<sup>1</sup> Into this

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<sup>1</sup> Liebers' *Hermenutics*, Hammond's Note, p. 283; Spence's *Equity*, Vol. I, p. 326, note (1846); Maine's *Ancient Law*, p. 27.

maze it is inadvisable to penetrate except to note that the word is defined by quotations from the continental writers<sup>2</sup> and is employed by the common lawyer in the same manner as by the canonist or civilian;<sup>3</sup> all, in fact, that was fluctuating and doubtful in the civilian use of the word *aquitas* reappears in the use of that word by English writers, together, at a later date, with new sources of confusion growing out of its application to a specialized system of justice in a manner unknown to any other jurisprudence.

It is not, however, this general notion of equity but its application to the exposition of statutes that is intended to be discussed. That there existed a vague and undefined power, called *aquitas*, vested in the judiciary or executive, to disregard the letter of the law to attain the ends of justice, was an idea familiar to the civilians,<sup>4</sup> and clearly traceable to the great master of ethics, Aristotle, whose words are paraphrased in the familiar maxim "*aquitas est correctio legis generatim late qua parte deficit*,"<sup>5</sup> or as Blackstone puts it, quoting from Grotius, equity is the "correction of that wherein the law, by reason of its universality, is deficient."<sup>6</sup> It is true the maxim does not, in terms, discriminate between common and statute law; the principle was borrowed from a foreign source before it had come under critical examination; but an inspection of the year book

<sup>2</sup> Bracton's definition (Chap. IV, 5, fol. 3a) is taken directly from Azo in Inst. I, l. f. 240). Bracton and the Roman Law, Güterbock (Phila., 1866), p. 80. See also Glanville, introduction.

<sup>3</sup> Citations from the civilians, as well as from Thomas Aquinas and St. Cyprian, are collected in the introduction to Ash's *Epieikia* or Table to the Year Books.

<sup>4</sup> Puffendorf Elem. Jur. Univ. I, def. 13, § 22; Ash's *Epieikia*, *supra*; Story's Equity, Chap. I.

<sup>5</sup> Equity is the correction of the law, when too general, in the part in which it is defective. Plowden, 465, who adds, "or as the passage is explained by Peronius, equity is a certain correction applied to law, because on account of its general comprehension, without an exception something is absent." If the original had been correctly stated the gloss would have been unnecessary. Aristotle, Ethics, *ad Nicom. lib. 5, c. 10. καὶ ἔριν ἀντὴ ἢ φύσει τὸν ἐπιεικὸς ἐπαρμόρρωμα τοῦ νόμου, ἢ ἐλλείπει διὰ τὸ κατὸν* Bac. Abr. (1832), Vol. VII, p. 459.

<sup>6</sup> 1 Bl. Comm. Introd. 61, citing *De aequitate*, § 3. See Grotius *De Jur. et Pac. Lib. II, Ch. 16, § 26, 1*; Seneca IV, *Controversia 27*.

cases reveals the fact that it is in the domain of statute law that the doctrine summarized in the maxim is applied; the phrase "*per l'equite de le statut*" is frequently on the tongue of counsel and judge.<sup>7</sup>

St. Germain has an interesting chapter "In what manner a man shall be holpen by equity in the laws of England."<sup>8</sup> First, he says, "there be in many cases divers exceptions from the general grounds of the law of the realm by other reasonable grounds of the same law, whereby a man shall be holpen in the common law. \* \* \* And so it is likewise of divers statutes," and, after citing examples, adds, "And thus it appeareth that sometimes a man may be excepted from the rigor of a maxim of the law by another maxim of the law; and sometimes from the rigor of a statute by the law of reason, and sometimes by the intent of the makers of the statute." But in speaking of the equity enforced by subpoena in chancery he says, "Of this term equity, to the intent that is spoken of here, there is no mention made in the law of England—but of an equity derived upon certain statutes mention is made many times, and often in the law of England; but that equity is all of another effect than this." Sir John Doderidge in commenting on St. Germain is concerned lest some men might think that the dialogues spoke only of the equity which "enlargeth or restraineth statute law," and goes on to explain that the use of equity "is triple in our law. For 1. Either it keepeth the common law in conformity by means here mentioned. 2. Or it expoundeth the statute law. 3. Or thirdly giveth remedy in the court of conscience in cases of extremity, which, otherwise, by the laws are left unredressed."<sup>9</sup> Equity, or *epicikeia*,<sup>10</sup> as it is sometimes

<sup>7</sup> 3 Edw. IV, 14; 4 Edw. IV, 8; 15 Edw. IV, 20; 14 Hen. VII, 13; 14 Hen. VII, 17; Br. Abr. Tit. Parliament, § 104. The Year Book cases on equitable construction of statutes are tabulated in Ash's *Epicikeia*.

<sup>8</sup> Doctor and Student, Dialogue I, Ch. XVII.

<sup>9</sup> Dodderige's *English Lawyer*, p. 211; Finch, 55; West's *Symbolography II*, p. 174; Dawson's *Origio Legum*.

<sup>10</sup> *επιεικεια*, reasonableness, fairness, equity.

called, is therefore a recognized aid to the interpretation of acts of Parliament in the courts of common law in the infancy of chancery jurisdiction, as the writers of that period are at some pains to explain.<sup>11</sup>

It is to Coke and Plowden that we are chiefly indebted for an explanation of what was understood by the equity of a statute in the period when the doctrine received its greatest elaboration, a process peculiarly congenial to an age influenced in its literary standards by Euphuism and in its methods of reasoning by the ponderous rules of formal logic, coupled with a belief in maxims as infallible major premises for any argument. Says Coke:

"Equitie is a construction made by the Judges that cases out of the letter of a statute yet being within the same mischief or cause of the making of the same, shall be within the same remedy that the statute provideth; and the reason thereof is, for that the law-makers could not possibly set down all cases in express terms."<sup>12</sup>

This, however, presents but one side of the subject, which is explained more fully by Plowden in his note to *Eyston v. Studd*.<sup>13</sup> In that case a husband and wife seised in fee in right of the wife levied a fine and the conusee granted the land back to the husband and wife in special tail. After having issue a son, the husband died and the wife, marrying again, levied a second fine to the use of herself and her second husband, whereupon the son by the first marriage

<sup>11</sup> If space permitted it would be easy to point out instances in which modern writers have confused these different uses of the word equity, probably through the careless use of the word, for the distinction is too obvious to be disputed. See particularly Sedgwick on Statutes, p. 311 (1874).

<sup>12</sup> Co. Litt. Lib. I, Ch. II, § 21, fol. 24b, quoting Bracton's definition. See also 2 Co. Inst., 151; Porter's Case, 1 Co. Rep. 25; Corbet's Case, 1 Co. Rep. 88; Chudleigh's Case, 1 Co. Rep. 131; Butler & Baker's Case, 3 Co. Rep. 27; Boyton's Case, 3 Co. Rep. 44; Vernon's Case, 4 Co. Rep. 4; Duke of Lenox Case, 2 Brownlow, 306.

<sup>13</sup> Plowd. 459. That Plowden was a specialist on this subject is evident from the frequency of the references to statutory construction in his reports. *Regnier v. Fogossa*, Plowd. 9, 10, 17, 18; *Platt v. The Sheriffs of London*, Plowd. 36; *Wimbish v. Tailbois*, Plowd. 46, 53, 57, 59; *Partridge v. Strange*, Plowd. 82, 83; *Fulmerston v. Steward*, Plowd. 109; *Buckley v. Rice Thomas*, Plowd. 125; *Hill v. Grange*, Plowd. 177; *Stradling v. Morgan*, Plowd. 204; *Wilton v. Berkley*, Plowd. 244; *Stowel v. Lord Zouch*, Plowd. 363, 366, 371.

brought ejectment for a forfeiture under the act of 11 Hen. VII, c. 20. It was held by the whole court that there was no forfeiture, for although within the letter of the act, the case was not within the intention of the lawmakers, which was to prevent women having jointures proceeding originally from their husbands from disinheriting their husband's heirs, and since in this case the land was that of the wife herself, to bar her, after her husband's death, from disposing of her inheritance would be contrary to all reason. "For oftentimes things which are within the words of statutes are out of the purview of them, which purview extends no further than the intent of the makers of the act." As sound legal reasoning to day as then.

"From this judgment and the cause of it," says Plowden,<sup>14</sup> "the reader may observe that it is not the words of the law but the internal sense of it that makes the law and our law (like all others) consists of two parts, viz., of body and soul, the letter of the law is the body of the law, and the sense and reason of the law is the soul of the law, *quia ratio legis est anima legis.*"

It is the fundamental principle of all interpretation that words are to be taken in that sense which it is honestly believed the writer attached to them. And since interpretation never has been and never can be wholly dispensed with, owing to the nature of our minds and language, since absolute language is conceivable in mathematics only,<sup>15</sup> good faith and common sense are peculiarly requisite where the object is to discover the true sense of a doubtful act. Literal interpretation is, in fact, rarely possible, since, as Lieber points out, all human language is made up of tropes and expressions relating to erroneous conceptions, such, for example, as "the sun rises," "time flies" or, in law, "convey-

<sup>14</sup> Plowd. 465. "As to construing the statute by equity; equity is synonymous to the meaning of the legislature" per Lord Mansfield in *R. v. Williams*, 1 Wm. Bl. 93.

<sup>15</sup> Mathematical terms constitute an apparent rather than a real exception to the rule that all language requires interpretation; the mental process by which such terms are represented to the consciousness is as truly a process of interpretation as the construction of the most difficult law.—Hammond's note to Lieber's *Hermeneutics*, p. 15.

ance of land," "bankruptcy" or "agreement." "If we understand by literal interpretation, a species which, by way of adhering to the letter, substitutes a false sense for the true one, it has no more meaning than the term false facts." Plowden, however, goes on to elaborate his text; sometimes the sense is more contracted than the letter of the law and sometimes more extensive, and equity operates in two ways, by diminishing or enlarging the letter at discretion. For the first method he cites the passage from Aristotle previously referred to and adds numerous cases where an exception had been made from the text of a statute:

"from whence the reader may observe how convenient a thing this equity is, and the wise Judges of our law deserve great commendation for having made use of it where the words of the law are rigorous, for thereby they have softened the severity of the text, and have made the law tolerable."

The other sort of equity is defined:

*"Equitas est verborum legis directio efficacius, cum una res solummodo legis cavetur verbis, ut omnis alia in aequali genere eisdem cavetur verbis. \* \* \** So that when the words of a statute enact one thing, they enact all other things which are in the like degree"

And after citing illustrations he continues:

"And from hence it appears that there is a great diversity between these two equities, for the one abridges the letter, the other enlarges it, the one diminishes it, the other amplifies it, the one takes from the letter, the other adds to it. So that man ought not to rest upon the letter only, *nam qui haeret in litera, haeret in cortice*, but he ought to rely upon the sense, which is tempered and guided by equity, and therein he reaps the fruit of the law, for as a nut consists of a shell and a kernel, so every statute consists of the letter and the sense, and as the kernel is the fruit of the nut, so the sense is the fruit of the statute. And in order to form a right judgment when the letter of a statute is restrained and when enlarged by equity, it is a good way, when you peruse a statute, to suppose that the law-maker is present, and that you have asked him the question you want to know touching the equity, then you must give yourself such an answer as you imagine he would have done, if he had been present."

The length of this excerpt must be pardoned, as it presents the viewpoint of the ablest reporter of that time upon one of the perennial problems of the law. Stripped of its metaphor and circumlocution, it declares that the object to be aimed at is the intention of the lawmaker, and that where

this is in doubt the spirit and reason of the statute controls the letter, and upon this principle all of the cases cited by Plowden might easily be decided, with the aid of the subsidiary rules of construction recognized by the courts. It would be interesting, if space permitted, to take up these illustrations *seriatim* and point out how a modern court would approach the same problems. The same is true of other cases decided in the period succeeding Plowden and Coke.<sup>16</sup> Upon their facts, with some exceptions, it would probably be agreed that they were correctly decided, but the *dicta* indicate the acceptance, in theory at least, of a principle that the courts, guided by the dictates of conscience and natural justice, could modify the rigor of a statute or apply its rules to cases not provided for, to avert hardship or injustice.<sup>17</sup>

"If you ask me then," it is said in *Sheffield v. Ratcliffe*,<sup>18</sup> "by what rule the Judges guided themselves in this diverse exposition of the self-same word and sentence? I answer, it was by that liberty and authority that Judges have over laws, especially over statute laws, according to reason and best convenience, to mould them to the truest and best use."

Sir Christopher Hatton observes:

"Sometimes statutes are expounded by equities because law and reason repugn to the open sense of the words and therefore they are reformed to consonance of law and reason."<sup>19</sup>

And Lord Chancellor Ellesmere in the case of the *Post-nati*<sup>20</sup> went so far as to say:

"That words are taken and construed sometimes by extension; sometimes by restriction; sometimes by implication; sometimes a disjunctive for a copulative; a copulative for a disjunctive; the present tense for the future; the future for the present; sometimes by equity out of the reach of the words, sometimes words taken in a contrary sense. sometimes figuratively, as *continens pro contento*, and many other like; and of all these, examples be infinite, as well in the civil as common law."

<sup>16</sup> *Folliet v. Saunders*, 2 Roll. 500; *Jenkins*, 101, 288; *James v. Tintney*, W. Jones, 421; *Rogers v. Mascal*, 1 Raymond, 128; *Hammond v. Webb*, 10 Mod. 282. Dwarrris on Statutes, Vol. II, p. 720 (1831).

<sup>17</sup> Black on Interpretation of Laws, p. 42.

<sup>18</sup> Hobart, 346.

<sup>19</sup> Hatton's Treatise on Statutes, Ch. 5, § 4, p. 44. See Hobbes' *Leviathan*, Bk. II, Ch. 26, p. 145.

<sup>20</sup> 2 Howell's State Trials, p. 675.

which is almost equivalent to saying that statutes are to be construed in a "Pickwickian sense."

We must not, however, make too much of the rhetorical flourishes of the age or smile too broadly at the *a priori* methods of the sages of the law. If pragmatism is no longer fashionable in jurisprudence it has strengthened its hold on the sister science of metaphysics. The danger of the method was averted by the caution of the courts and that practical common sense which must be brought to bear in every litigated case. If it is a crime to do X, and A does X, he is guilty. But if A does X+Y what then? A modern court would say the intention of the legislature was to punish for X although an additional circumstance such as Y was present, therefore the act applies; a seventeenth century judge would have said: by the laws of logic X+Y is not X; it is completely out of the letter of the statute, but, by equity, the statute is *extended* to cover X+Y, and A is guilty by "equity of the statute." The result of the two mental processes is the same, but the fallacy in the last method lies in the assumption of the power to mould an act to suit the courts' idea of wisdom or expediency.<sup>21</sup> Such a power the modern judge modestly disavows. "I think" said Lord Tenterden, "there is always danger in giving effect to what is called the equity of a statute, and that it is much safer and better to rely on and abide by the plain words, although the legislature might possibly have provided for other cases had their attention been directed to them."<sup>22</sup> In America, the doctrine of equitable construction is regarded either as "long since exploded"<sup>23</sup> or as

<sup>21</sup> It must be remembered that it was then a mooted point whether the courts had not power to set aside an act as contrary to reason. 1 Blackstone Comm. Introd., p. 91; *Dr. Bonham's Case*, 8 Coke Rep. 118a; *Day v. Savidge*, Hobart. 87; *London v. Wood*, 12 Mod. 687; *Wood v. Watts*, 2 El. & B. 458; *Jones v. Smart*, 1 Term. Rep. 44; *Lee v. Bude R. Co.*, L. R. 6 C. P. 582; 1 Kent Comm. 447.

<sup>22</sup> *Brandling v. Barrington*, 6 Bar. & Cress, 467 at p. 475. See also *Guthrie v. Fisk*, 3 Bar. & Cress. 178; *Atty. Gen. v. Gillen*, 2 H. & C. 431 at p. 532; *Miller v. Salomons*, 7 Exch. 475 at p. 559; *R. v. Turvey*, 2 B. & Ald. 520. *Ex parte Walton*, 17 Ch. D. 746.

<sup>23</sup> *Encking v. Simmons*, 28 Wis. 272; *Demarest v. Wynkoop*, 3 Johns, Ch. 142; *Tompkins v. First Nat. Bk.*, 18 N. Y. Supp. 234.

approaching "so near the power of legislation, that a wise judiciary will exercise it with reluctance and only in extraordinary cases;"<sup>24</sup> and where the phrase is occasionally met with<sup>25</sup> it is safe to regard such use as a survival in language rather than doctrine and not as intended to assert the power to override the plain language of an act.<sup>26</sup> What is termed the policy of the government with reference to any particular piece of legislation is a matter upon which opinions may differ and is "a ground much too unstable upon which to rest the judgment of the court in the interpretation of statutes."<sup>27</sup>

The broad theory of equitable construction is so much at variance with modern views as to the functions of the judiciary that apologetic reasons have been suggested to account for its acceptance. Lord Brougham states that the extreme conciseness of the ancient statutes was the only ground for the sort of legislative interpretation frequently put upon their words<sup>28</sup> and Lord Ellenborough has referred it to the lack of precision in the drafting of acts that then prevailed. And no doubt, as Lord Selbourne has observed, the province of judge and legislator were not unfrequently confounded under these principles.<sup>29</sup> It has also been suggested that the ancient practice of having the statutes drawn up by the judges from the petitions of the Commons and the answers of the King would dispose the former to interpret with confidence,<sup>30</sup> but Lord Halsbury has said that the worst person

<sup>24</sup> *Monson v. Chester*, 22 Pick. 385.

<sup>25</sup> *Simonton v. Barrell*, 21 Wend. 362; *Hersha v. Brennehan*, 6 S. & R. 2; *Petit v. Fretz*, 33 Pa. 118; *Hoguet v. Wallace*, 28 N. J. L. 523. In *Russell v. Meyrick* (1903), Ch. 461, Cozzens-Hardy, M. R., in construing the estates act of 1863, quotes from *Vernon's Case*, 4 Co. Rep. 1a and adds, "it is frequent in our books that an act made of late time shall be taken within the equity of an act made long before." See *Hardcastle's Statute Law* (4th Ed.), p. 100.

<sup>26</sup> *United States v. Jackson*, 143 Fed. 783.

<sup>27</sup> Per Harlan, J., in *Bate Refrigerating Co. v. Sulzberger*, 157 U. S. 1, at p. 37.

<sup>28</sup> *Gwynne v. Burnell*, 6 Bingh. N. C. 453, at p. 561.

<sup>29</sup> *Wilson v. Knubley*, 7 East. 134; *Bradlaugh v. Clarke*, 8 App. Ca. 354, at p. 363.

<sup>30</sup> *Maxwell's Interpretation of Statutes* (4th Ed.), p. 386. Chief Jus-

to construe a statute is he who drew it, for he is disposed to confuse what he intended to do with the effect of the language employed.<sup>31</sup> It is unnecessary, however, to resort to speculation to account for a doctrine thoroughly in accord with the philosophy of the law of the time when it was announced and altogether out of harmony with that of to-day.

But if the courts no longer avowedly enlarge or restrain a statute, it is not to be denied that the same result is accomplished by the liberal application of principles in better accord with the modern theory of the judicial functions. Indeed it is more than doubtful whether the courts of the seventeenth century would have construed the act of Congress of 1885, prohibiting the importation of aliens under contracts to perform "labor or service of any kind," as not applying to a contract of employment between a church and an alien minister, for the reason that such employment was not within the spirit and intention of the act, although within its letter.<sup>32</sup> In an act of Congress granting lands in a territory to settlers, the words "single man" have been held to include an aged widow;<sup>33</sup> and a widow whose husband had long been dead and whose only child, a daughter, was living with her husband in another district, was held "an unmarried person not having a child" within a poor law.<sup>34</sup> The "suffragettes" have not fared as well as the widows; in spite of a brilliant and persuasive argument by two of the appellants, the House of Lords has recently held that women graduates of a university are not entitled to vote as

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tice Hengham said that he knew better than counsel the meaning of 2nd Westminster, as he had drawn up that statute. 33 Edw. I (Rolls Ed.), p. 82. Lord Nottingham claimed to know the meaning of the Statute of Frauds, as he had introduced it into the House of Lords. *Ash v. Abdy*, 3 Swanst. 664. See also *Hay v. Lord Provost of Perth*, 4 Macq. H. L. Sc. 544.

<sup>31</sup> *Hilder v. Dexter* (1902), App. Ca. 474.

<sup>32</sup> *Holy Trinity Church v. United States*, 143 U. S. 457. See Black on Interpretation of Laws, p. 48. Endlich on Interpretation of Statutes, Chapter XI, *passim*.

<sup>33</sup> *Silver v. Ladd*, 7 Wallace, 219.

<sup>34</sup> *Turbett Twp. Overseers v. Port Royal Bor.*, 33 Pa. Super. Ct. 520.

members of the university council, since the word "person" in statutes conferring the franchise must be understood to mean "male person."<sup>85</sup> The word equitable as applied to interpretation may be tabooed, but the courts in dealing with an act are just as capable as in the days of Plowden of either extracting the kernel or leaving it in the nut.

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<sup>85</sup> *Nairn v. University of St. Andrews* (1909), App. Ca. 147.