

# THE EQUITY OF THE STATUTE

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## Introduction: the two meanings of the equity of the statute

In Blackstone's *Commentaries*, he cited an example of statutory interpretation, which he attributed to Cicero. The example concerned a law which mandated that those who abandoned a ship in a storm would forfeit all property on the ship. In a storm, all of the mariners abandoned the ship except for one passenger who was too sick to escape. The ship, by fluke, drifted into port. The sick man claimed that he was entitled to all the property on the ship. But Blackstone said that all agreed that the sick man was not entitled to the property. He said that from this method of interpretation "arises what we call *equity* ... 'the correction of that, wherein the law (by reason of its universality) is deficient.'"<sup>1</sup> This equity, he said, depends essentially "upon the particular circumstances of each individual case".<sup>2</sup> Blackstone explained that there are two limbs to this doctrine of the equity of the statute. (1) Cases "out of the letter, are often said to be within the equity", and (2) "cases within the letter are frequently out of the equity."<sup>3</sup> This equity of the statute approach had much support when Blackstone

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<sup>1</sup> Blackstone, *Commentaries on the Laws of England*, 1st ed (1765), bk 1, s 2 at 61 (quoting Grotius, *De Aequitate*).

<sup>2</sup> Blackstone, *Commentaries on the Laws of England*, 1st ed (1765), bk 1, s 2 at 61.

<sup>3</sup> Blackstone, *Commentaries on the Laws of England*, 1st ed (1768), bk 3, c 27 at 431.

wrote. The technique was also supported by St German,<sup>4</sup> Viner,<sup>5</sup> Bacon,<sup>6</sup> Coke<sup>7</sup> and Wood.<sup>8</sup> But there is controversy about what it involved.

This chapter is about the history and philosophical foundation of this doctrine of the equity of the statute. The primary focus is upon statutes, which is where this role of 'equity' has received the greatest attention. But the doctrine is not limited to statute. A similar doctrine applies to all written documents that create legal rules and norms. The legal rule created might be of narrow application, such as a private Act of Parliament applying to a single corporation, a contract between two persons, or a will with a single beneficiary. Or the legal rule created might be widespread and in the public interest, such as a general statute, a treaty between many nations, or a large trust or will with many trust powers, beneficiaries and legatees. In each case, there can be a role for the equity of the instrument to be applied. The focus of this chapter is upon two, opposed meanings of this notion of equity. One is much more legitimate than the other.

On one view, likely to have been the original view, the equity of the statute is an invitation to apply an external principle of justice that involves changing the meaning, and therefore the effect, of statutory words. It is not "interpretation". The "equity", in this sense, involves justice beyond the meaning of the words of the statute even the justice is limited by that which the judge considers that a reasonable and just lawmaker might have enacted had he or she considered the issue.<sup>9</sup> The equity here is truly a "correction" or rectification of the statutory words "to be applied in contradiction to the positive law"<sup>10</sup>. It might be more accurately described as equitable construction rather than equitable interpretation because it is not concerned with the meaning of the statutory words. But it is not construction in the sense of applying the meaning, as interpreted, to the facts. Rather, it involves *not* applying the meaning of the law that is actually enacted.

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<sup>4</sup> St Germain and Muchall, *Doctor and Student*, 17th ed (1787), Dialogue 1, c 17 at 49.

<sup>5</sup> Viner, *A General Abridgement of Law and Equity*, 2nd ed (1791) at 513.

<sup>6</sup> Bacon, *A New Abridgement of the Law*, 5th ed (1786) at 649.

<sup>7</sup> Coke, *The First Part of the Institutes of the Laws of England*, 9th ed (1684), c 2, s 21 at 24ff.

<sup>8</sup> Wood, *An Institute of the Laws of England*, 10th ed (1772) at 9.

<sup>9</sup> For which reason Klimchuk in this volume argues that it is "not quite" an external account: D Klimchuk "Aristotle at the Foundations of the Law of Equity".

<sup>10</sup> Spence, *The Equitable Jurisdiction of the Court of Chancery* (1846) 326-327.

The other, more modern, view might have evolved, with the recognition of a separation of powers, as a transformation of the original conception of the equity of the statute. That other view of the equity of the statute is little more than what is commonly described as modern purposive and contextual interpretation and construction.<sup>11</sup> The equity of the statute in this sense can operate in two ways. First, in this modern sense, it can operate in the process of interpreting the meaning of the statutory words. The "equity" of the statute requires preference to be given to a meaning that is consistent with the purpose of the statute even if that meaning is contrary to the semantic, literal meaning of the words of the statute. Secondly, the doctrine also operates in the process of applying the meaning to the facts by construction. If the meaning of the statutory words leaves scope for different possible applications to the facts (such as a provision that depends on notions such as "offensive", "unfair", or "unconscionable") preference must be given to a construction that would apply most consistently with the statutory purpose. In both cases, the concern with the "equity" of the statute is really just a concern with its context and purpose. Equity, in this sense, does not describe a principle of justice at all. It is a misnomer to describe as "equitable" these techniques of interpretation and construction that are similar to techniques that apply to all speech acts.

### **An early example of the equity of the statute: the *Statute of Frauds***

In order to illustrate the two possible meanings of the equity of the statute it is helpful to begin with a well-known example of the doctrine before turning to the two different approaches to that example. In 1677, the Cavalier Parliament passed *An Act for Prevention of Frauds and Perjuries*. The Act was said to be designed to prevent fraud and perjury in oral testimony. The *Statute of Frauds* is a useful case study in the application of the equity of the statute because Holdsworth described it as the most important of the older private law statutes.<sup>12</sup> And at the end of his life, Lord Kenyon described it as "one of the wisest laws in our Statute Book."<sup>13</sup>

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<sup>11</sup> See Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (2010) at 49 who suggests that this view might be attributed to St German.

<sup>12</sup> Holdsworth, *A History of English Law*, 2nd ed (1937), v 6, c 7 at 379.

<sup>13</sup> *Chaplin v Rogers* (1800) 1 East 192 at 194 [102 ER 75 at 76].

A short-lived example of the application of the equity of the statute approach to the *Statute of Frauds* is the decision of Lord Mansfield in *Simon v Motivos*.<sup>14</sup> In that case, Lord Mansfield suggested that the *Statute of Frauds* might not apply to a sale by auction. There was nothing in the meaning of the words of the statute which could have revealed this exclusion. But Lord Mansfield said that "many cases, though seemingly within the letter, have been let out of it".<sup>15</sup> In the same case, Wilmot J remarked that "[h]ad the Statute of Frauds been always carried into execution according to the letter, it would have done ten times more mischief than it has done good, by protecting, rather than preventing, frauds."<sup>16</sup> Ultimately, this view of sale by auction did not prevail.<sup>17</sup>

A more lasting example of the equity of the statute approach to the *Statute of Frauds* is the decision of the English Court of Appeal in *Rochefoucauld v Boustead*.<sup>18</sup> That case considered section 7 of the *Statute of Frauds*, which provided that "... all Declarations or Creations of Trusts or Confidences of any Lands... shall be manifested and proved by some Writing signed by the Party who is by Law entitled to declare such Trust... or else they shall be utterly void and of none Effect." The litigation concerned the Delmar coffee estates in what was then Ceylon. The Comtesse de la Rochefoucauld owned the estates and mortgaged them. When she could not meet the mortgage repayments, and fearing that her recently divorced husband would enforce his interest recognised by the Divorce Court by buying the titles from the mortgagee, she arranged for the defendant to buy the titles from the mortgagee. She alleged that the defendant had orally declared a trust of the estates for her, subject to her promise to repay to him the purchase price which he had paid to the mortgagee.<sup>19</sup> The defendant subsequently mortgaged, and then sold, the land without her knowledge. She sought to recover the price received by him less the amount which she said was owed to him. The trial judge, Kekewich J, heard the oral evidence of the declaration of trust but,

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<sup>14</sup> (1746) 1 Black W 599 at 600-601 [96 ER 347 at 347-348].

<sup>15</sup> *Simon v Motivos* (1746) 1 Black W 599 at 600 [96 ER 347 at 347].

<sup>16</sup> *Simon v Motivos* (1746) 1 Black W 599 at 601 [96 ER 347 at 348].

<sup>17</sup> See *Kenworthy v Schofield* (1824) 2 B & C 945 [107 ER 633] and the discussion of Lord Blackburn in *Maddison v Alderson* (1883) 8 App Cas 467 at 488.

<sup>18</sup> [1897] 1 Ch 196.

<sup>19</sup> The trust was an express trust, as Swadling explains: see Swadling, "The Nature of the Trust in *Rochefoucauld v Bowstead*", in Mitchell (ed), *Constructive and Resulting Trusts*, (2010) 95.

consistently with the words of section 7 of the *Statute of Frauds*, refused to admit that evidence.<sup>20</sup>

The Court of Appeal was not merely referred to the oral testimony of the Comtesse. It was also referred to written correspondence prior to the creation of the trust. But the judges considered that they did not need to determine whether the trust was manifested and proved by some writing. They considered that the trust would not be void even if it had not been manifested and proved in writing. This was because, "notwithstanding the statute",<sup>21</sup> oral evidence was "admissible in order to prevent the statute from being used in order to commit a fraud".<sup>22</sup> The so-called "fraud" was for "a person to whom land is conveyed as a trustee, and who knows it was so conveyed, to deny the trust and claim the land himself."<sup>23</sup> The Court of Appeal relied upon an earlier decision in which it was said that the general principle that a statute is not to be used as an instrument of fraud "has long been recognised by Courts of Equity".<sup>24</sup>

*Rochefoucauld* was not an uncontroversial decision. In 1760, in *Bartlett v Pickersgill*, the Lord Keeper had reached the opposite result without even calling upon the defendant. Henley LK (later Northington LC) explained that to allow the evidence "would be to overturn the statute".<sup>25</sup> Although doubts had been expressed about the decision in *Bartlett*,<sup>26</sup> it had been upheld on nearly identical facts in *James v Smith*.<sup>27</sup> Curiously, the trial judge in *James v Smith* was the same trial judge (Kekewich J) who later decided *Rochefoucauld* and the Court of Appeal in *James v Smith* included Lindley LJ who sat in the Court of Appeal in *Rochefoucauld*.<sup>28</sup> However, in *Rochefoucauld*, Lindley LJ dismissed *James*

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<sup>20</sup> The first instance proceedings are not reported on this point but this is discussed in the Court of Appeal at [1897] 1 Ch 196 at 199.

<sup>21</sup> *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 206 per Lindley LJ (giving the judgment of himself, Lord Halsbury LC and A L Smith LJ).

<sup>22</sup> *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 207.

<sup>23</sup> *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 206.

<sup>24</sup> *In Re Duke of Marlborough; Davis v Whitehead* [1894] 2 Ch 133 at 141 per Stirling J.

<sup>25</sup> *Bartlett v Pickersgill* (1760) 1 Eden 515 at 516 [28 ER 785 at 786]; 1 Cox 15 at 15 [29 ER 1041 at 1041].

<sup>26</sup> *Heard v Pilley* (1869) LR 4 Ch App 548.

<sup>27</sup> [1891] 1 Ch 384 (Kekewich J).

<sup>28</sup> [1891] WN 175.

*v Smith* as inconsistent with the modern decisions which had held that the *Statute of Frauds* cannot be used as an instrument of fraud.<sup>29</sup>

The decision in *Rochefoucauld* prevailed in England and the Commonwealth. It was anticipated by, and consistent with, the decision of the majority of the Supreme Court of Canada in *Barton v McMillan*.<sup>30</sup> In contrast, in *Barton*, Strong J, in dissent, borrowing from Sir Edward Sugden, said that to allow oral evidence would be "directly in the teeth of the Statute of Frauds".<sup>31</sup> In Australia, where *Rochefoucauld* has been approved by the High Court of Australia,<sup>32</sup> White J reiterated that the reason "the Statute of Frauds does not stand in the way is that it would be to use the Statute as an instrument of fraud to deny enforcement of the true transaction."<sup>33</sup> These explanations use "fraud" in a sense other than actual fraud. There was no suggestion that the defendant in *Rochefoucauld* was deceitful or dishonest merely by relying upon the statute. Perhaps for this reason Glass JA preferred to say that the doctrine in *Rochefoucauld* was said to rest upon the proposition that the "trust is enforced, because it is unconscionable of the legal owner to rely on the statute to defeat the beneficial interest."<sup>34</sup> But it is difficult to know what is meant by the reference to "unconscionable". As has been said in the High Court of Australia, "the statement that enforcement of the transaction would be 'unconscionable' is to characterise the result rather than to identify the reasoning that leads to the application of that description".<sup>35</sup>

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<sup>29</sup> *Rochefoucauld v Boustead* [1897] 1 Ch 196 at 206.

<sup>30</sup> (1892) 20 SCR 404.

<sup>31</sup> *Barton v McMillan* (1892) 20 SCR 404 at 413.

<sup>32</sup> *Cadd v Cadd* (1909) 9 CLR 171 at 178 per Griffith CJ, 187 per Isaacs J; [1909] HCA 59; *Bloch v Bloch* (1981) 180 CLR 390 at 403 per Brennan J; [1981] HCA 56.

<sup>33</sup> *Ciaglia v Ciaglia* (2010) 269 ALR 175 at 191 [69]; [2010] NSWSC 341. See also *Dalton v Christofis* [1978] WAR 42 (Smith J). There have been some attempts to evade the obvious words of the statute by attaching the label 'constructive' to the trust which is recognised. See the discussion in Swadling, "The Nature of the Trust in *Rochefoucauld v Boustead*" in Mitchell (ed), *Constructive and Resulting Trusts*, (2010) 95.

<sup>34</sup> *Allen v Snyder* [1977] 2 NSWLR 685 at 693.

<sup>35</sup> *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 409 [34] per Gaudron, McHugh, Gummow & Hayne JJ; [1998] HCA 48. See also *Australian Competition & Consumer Commission v CG Berbatis Holdings Pty Ltd* (2003) 214 CLR 51 at 73 [43]; [2003] HCA 18 (Gummow and Hayne JJ saying that the use of terms like unconscionable and unconscientious "may have masked rather

The equity of the statute was also applied to the *Statute of Frauds* in relation to the doctrine of part performance. The doctrine permitted the enforcement of a parol contract for the sale of land that had been partly performed despite the plain terms of the *Statute of Frauds*<sup>36</sup> including the prohibition that "no action shall be brought" to charge a person for a contract for the sale of land unless the agreement upon which the action is brought, or memorandum or note of it, is in writing and signed. However, by the late eighteenth century the doctrine of part performance had been narrowed and confined.<sup>37</sup>

The leading nineteenth-century case was *Maddison v Alderson*.<sup>38</sup> Thomas Alderson promised his housekeeper, Elizabeth Maddison, that he would leave her a life estate in his land in his will. On the faith of this promise, she continued as his housekeeper. But Alderson's will was not attested. Alderson's heir demanded the title deeds. Ms Maddison pleaded that there was an agreement that she be entitled to a life interest. The difficulty for Ms Maddison was that the agreement was oral. It fell squarely within Section 4 of the *Statute of Frauds*, which broadly provided that no action shall be brought to charge any person upon any contract or sale of lands unless the agreement, or a memorandum or note of it, is in writing and signed by the person to be charged or his or her agent.

Various of their Lordships expressed concerns with the doctrine of part performance that had been the product of the equity of the statute. Lord Selborne, the Lord Chancellor, referred to the technique discussed above of justifying the doctrine of part performance on the basis that it rested on the principle of "fraud", although he immediately noted the inadequacy of this basis as a general explanation.<sup>39</sup> Lord O'Hagan said that previous "bold decisions" on part performance were "prompted no doubt by a desire to

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than illuminated the underlying principles at stake"); *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 325-326 [23]-[26] per Gleeson CJ, McHugh, Gummow, Hayne & Heydon JJ; [2003] HCA 57.

<sup>36</sup> *An Act for Prevention of Frauds and Perjuries* 1677 (UK) ss 4(4) and 4(6).

<sup>37</sup> See, for instance, the rejection of the sufficiency of payment of money as an act of part performance: *Clinan v Cooke* (1802) 1 Sch & Lef 22 at 40-41; *Hughes v Morris* (1852) 2 De G M & G 349 at 356; 42 ER 907 at 910; *Britain v Rossiter* (1879) 11 QBD 123 at 130-131.

<sup>38</sup> (1883) 8 App Cas 467.

<sup>39</sup> (1883) 8 App Cas 467 at 474.

defeat fraud and accomplish justice".<sup>40</sup> And Lord Blackburn said that he had "not been able to discover to my satisfaction what is the principle which is involved in the numerous cases in equity".<sup>41</sup> He said that the principle involved a construction of the statute "as if it contained these words, 'or unless possession of the land shall be given and accepted.'"<sup>42</sup> Ultimately, the House of Lords held that although there was no memorandum in writing the agreement might still have been enforceable if the defendant had performed acts of part performance that were unequivocally referable to an agreement of the general nature as that alleged. However, continuing in the service of Alderson without wages was not an act that was unequivocally so referable.

## **The modern meaning of the equity of the statute**

In 1839, Lieber drew a distinction between interpretation and construction.<sup>43</sup> The words are today sometimes used interchangeably and sometimes used differently from Lieber's terminology. Nevertheless, that terminology helpfully illustrates two different concepts that are in play. "Interpretation", he said, involves determining the meaning conveyed by the text itself.<sup>44</sup> Therefore, an interpreter from one language to another is involved in determining the best meaning of the words. When words are interpreted contextually, they are not limited to the range of their literal semantic meanings. Even "black" can mean "white" in the process of contextual interpretation.<sup>45</sup> An example is French legislation that, read literally, would have made it an offence for passengers to get on or off a train when it was *not* moving. This, and other obvious examples, are instances of "simple, grammatical, drafting errors which if uncorrected would defeat the object of the provision".<sup>46</sup> The correction of such "thumping, obvious error[s]" in the course of interpretation is usually explained as involving a "contextualist" approach to the meaning of the

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<sup>40</sup> *Maddison v Alderson* (1883) 8 App Cas 467 at 485.

<sup>41</sup> *Maddison v Alderson* (1883) 8 App Cas 467 at 488.

<sup>42</sup> *Maddison v Alderson* (1883) 8 App Cas 467 at 489.

<sup>43</sup> F Lieber *Legal and Political Hermeneutics* (1839). See also the different distinction in *Life Insurance Company of Australia Ltd v Phillips* (1925) 36 CLR 60 at 78; [1925] HCA 18 explaining *Chatenay v Brazilian Submarine Telegraph Co* [1891] 1 QB 79 at 85 per Lindley LJ.

<sup>44</sup> F Lieber *Legal and Political Hermeneutics* (1839) at 55.

<sup>45</sup> *Mitchell v Henry* (1880) 15 Ch D 181.

<sup>46</sup> *Taylor v Owners -- Strata Plan No 11564* (2014) 253 CLR 531 at 548 [38] per French CJ, Crennan and Bell JJ; [2014] HCA 9.

statute.<sup>47</sup> Of course, statutes are generally expected to be carefully drafted instruments so the more that their words are said to depart from the range of their literal semantic meanings, the more closely that the proffered interpretation must be examined.

In contrast with "interpretation", Lieber used "construction" to mean "the drawing of conclusions respecting subjects, that lie beyond the direct expression of the text, from elements known from and given in the text"<sup>48</sup>. Construction, in this sense, requires the application of interpreted meaning. The interpreted meaning is applied to the subject matter to reach a conclusion about its legal effect. Construction generally requires the application to the facts of the statutory words as contextually interpreted. An open textured word, such as "offensive", "unfair", or "unconscionable" might not present great difficulty for interpretation but the process of applying that meaning may be very difficult.

A modern view of the 'equity of the statute' is that it is a label that describes a contextual approach to interpretation and construction. In other words, it relies upon context and purpose in interpretation to supply a meaning to the words that may be different from their literal semantic content or to supply an application of the meaning where different applications are open. In each case, the context or purpose is derived from the ascertained intention of the notional speaker, Parliament from the objective perspective of a notional reasonable reader.

This meaning of the "equity of the statute" renders "equity" a misnomer. Blackstone, with whom this chapter began, apparently favoured this modern meaning of the equity of the statute. He gave the example of the ship's sick passenger as an illustration of discovering the "true meaning" of the law when "the words are dubious"<sup>49</sup>. He did not explain how the words of the law should be interpreted, by their expression or by implications, to deny property to the sick man. But he saw the question as being one of giving the best meaning to the statutory words based upon the intention of Parliament. Blackstone observed that if "the parliament will positively enact a thing to be done which is unreasonable, I know of no

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<sup>47</sup> Siegel, "What Statutory Drafting Errors Teach Us about Statutory Interpretation", (2001) 69 *George Washington Law Review* 309.

<sup>48</sup> F Lieber *Legal and Political Hermeneutics* (1839) at 56.

<sup>49</sup> Blackstone, *Commentaries on the Laws of England*, 1st ed (1765), bk 1, s 2 at 61.

power that can control it".<sup>50</sup> The unreasonableness of one interpretation of a law can be a factor which militates against that interpretation because it is unlikely that a reasonable person would perceive the reasonable notional speaker, Parliament, to have meant that. But, as Blackstone emphasised, if that interpretation is the intention of Parliament then for judges to reject it would "set the judicial power above that of the legislature, which would be subversive of all government."<sup>51</sup>

There are, of course, large questions concerning the 'intention of Parliament'. For some, like Sir John Laws and Professor Andrew Burrows, it is nonsense to speak of the intention of Parliament because courts are not concerned with the subjective intentions of Members of Parliament, individually or even if their intentions could be aggregated.<sup>52</sup> This approach, requiring focus on the intention of Parliament, is also favoured by some modern commentators. This view is correct in that courts are not concerned with identifying the subjective intention of Parliamentarians any more than they are concerned with identifying the intention of the parties to a contract, the author of a will, or the person declaring a trust. But in each case, the references to intention are a short-hand description for what a reasonable, informed person (the listener or reader) would understand to have been the intended meaning of the person making the utterance (the speaker). In each case, the relevant speaker, like the relevant reader, is a construct. We are not concerned when construing legal instruments with the actual, subjective intentions of any person involved in the utterance. Hence, in contract, we ask what a reasonable, informed person would understand to be the intended meaning of contractual words uttered by a person in the position of *both* of the parties. It does not matter that no such person actually exists. So too, we ask what a reasonable, informed person would understand to be the intended meaning of statutory words uttered by a person in the position of Parliament without concern that this intention is conceptual.

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<sup>50</sup> Blackstone, *Commentaries on the Laws of England*, 1st ed (1765), bk 1, s 3 at 91.

<sup>51</sup> Blackstone, *Commentaries on the Laws of England*, 1st ed (1765), bk 1, s 3 at 91.

<sup>52</sup> Laws, "Publication Review: The Nature of Legislative Intent", (2016) 132 *Law Quarterly Review* 159; Burrows, *Thinking about Statutes* (2018) at 17-18. Compare the force of Ekins and Goldsworthy, "The Reality and Indispensability of Legislative Intentions", (2014) 36 *Sydney Law Review* 39; F Bennion *Bennion on Statutory Interpretation* (5th edn, 2010) 463.

On the modern view of the equity of the statute the "intention of the Parliament" applies to determine the meaning of the words used even if that meaning involves a large departure from the semantic literal meaning of the words. For some, this view was controversial. It was disputed by those who would limit words to their literal, semantic meanings in all but the most extreme cases. Towards the end of the eighteenth century, Jeremy Bentham pleaded that "such a degree of comprehension and steadiness might one day perhaps be given to the views of the legislator as to render the allowance of liberal or discretionary interpretation on the part of the judge no longer necessary."<sup>53</sup> Hence, a large or liberal departure from the literal semantic meaning of statutory words is sometimes deprecated, even if that departure involved giving a meaning to the words, in context, as the notional Parliament intended.

For the same reasons, even if some of the cases concerning the *Statute of Frauds* could be understood as applying the modern view of the equity of the statute they would still have been controversial. Lord Kenyon lamented that "if the Courts had at first abided by the strict letter of the Act it would have prevented a multitude of suits that have since been brought."<sup>54</sup> Lord Cowper LC emphasised that he had "been always tender in laying open that wise and just provision the parliament had made" and refused "to obviate the pretence of such and such cases being out of the mischief of the statute".<sup>55</sup> Lord Macclesfield LC said in response to a submission that signature was unnecessary: "to put a different construction upon the Act, would be to repeal it".<sup>56</sup> And in one of the first texts written on the *Statute of Frauds*, William Roberts, an iconoclastic barrister, and a prolific writer and editor whose views may have expressed the prevailing opinion at the Middle Temple at the time, introduced his book with a plea that:<sup>57</sup>

An administrator of the laws ought not to aim *phainesthai philanthropoteros tou nomou*;<sup>[58]</sup> for the true compassion of the law is to prevent cases of compassion

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<sup>53</sup> Bentham and Hart, *Of Laws in General*, (1970) at 240.

<sup>54</sup> *Chater v Beckett* (1797) 7 TR 201 at 204 [101 ER 931 at 933].

<sup>55</sup> *Bawdes v Amhurst* (1715) Prec Ch 402 at 403 [24 ER 180 at 181].

<sup>56</sup> *Hawkins v Holmes* (1721) 1 P Wms 770 at 771 [24 ER 606 at 607].

<sup>57</sup> Roberts, *A treatise on the statute of frauds*, (1805) at xxvi-xxvii.

<sup>58</sup> An approximate translation of the Greek, which itself may be a paraphrase from Paul in Romans, is 'to be more charitable than the law'.

from recurring. That indulgence is but treacherous lenity, which, by departing from known rules, leaves men in uncertainty as to means of their security, and destroys confidence by the misdirection of feeling.

These criticisms of the modern approach to the equity of the statute invite two possible responses. One powerful response is to acknowledge the criticisms but to use them merely as a basis to take care when applying the equity of the statute to depart from literal, semantic meaning of the words or to take care when applying an interpretation to particular facts. In the leading modern work on the *Statute of Frauds*, Williams cautiously explained that "fraud" was a "very broad term" and although in "its broadest sense the principle under discussion might well amount to a complete negation of the Statute," the principle could be confined to cases of part performance and intentionally preventing the execution of a sufficient writing.<sup>59</sup> In other words, the historical anomaly that used "fraud" as a technique to evade the statute should be confined to historically developed doctrines but not extended. This response also seems to underpin the approach of the Lord Chancellor in *Maddison v Alderson* whose focus was to preserve the doctrine of part performance as based upon history and his attempt to justify that history by what the "statute ... has in view".<sup>60</sup> In an attempt to marry the language of the statute with the doctrine, albeit one that was not without difficulty, the Lord Chancellor said that a defendant was "'charged' upon the equities resulting from the acts done in execution of the contract, and not ... upon the contract itself".<sup>61</sup>

The second response to the concern that the equity of the statute involves departure from the meaning of Parliament's words is to deny that construction must give effect to the interpreted meaning of the statutory words. The second response is that statutory construction permits the words to be applied contrary to their meaning. This is truly to apply principles of justice that are external to the statute. This response involves a different, and much older, conception of the equity of the statute, considered below. Without a statutory mandate to depart from the meaning

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<sup>59</sup> Williams, *The Statute of Frauds Section Four in the Light of its Judicial Interpretation*, (1932) at 221-223.

<sup>60</sup> *Maddison v Alderson* (1883) 8 App Cas 467 at 476.

<sup>61</sup> *Maddison v Alderson* (1883) 8 App Cas 467 at 475, 478 per Lord Selborne LC.

of words in construction<sup>62</sup> and without the legal practice and precedent that is applied in adjudication, that conception is much harder to justify today.

## The older meaning of equity of the statute

The classic story of the history of equity as a different conception of justice begins with Aristotle, particularly his excursus in Book V of *Ethics*.<sup>63</sup> With the subtitle "A digression on equity, which corrects the deficiencies of legal justice", Aristotle wrote:<sup>64</sup>

For equity, though superior to one kind of justice, is still just, it is not superior to justice as being a different genus. Thus justice and equity coincide, and although both are good, equity is superior. What causes the difficulty is the fact that equity is just, but not what is legally just: it is a rectification of legal justice. The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is none the less right; because the error lies not in the law nor in the legislator, but in the nature of the case; for the raw material of human behaviour is essentially of this kind...This also makes plain what the equitable man is. He is one who chooses and does equitable acts, and is not unduly insistent upon his rights, but accepts less than his share, although he has law on his side. Such a disposition is equity: it is a kind of justice, and not a distinct state of character.

Following Aristotle, the first sentence of Justinian's Digest began with Celsus' statement that *ius est ars boni et aequi* ('law is the art of the good and the equitable'),<sup>65</sup> borrowing the *aequitas* from Aristotle's *ἐπιείκεια* ('equity'). The Roman notion of two autonomous systems of justice was controversial. In the Republican period, the *praetor's* role of 'correcting' the *ius civile* was circumscribed and contentious. Similarly, in the Empire, Capitolinus explained how even the equitable imperium of the Emperor was questioned. In his biography of Opilius Macrinus, Capitolinus said that Macrinus wanted to abolish rescripts and establish a system of lawmaking

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<sup>62</sup> See, for instance, *Human Rights Act 1998* s 3.

<sup>63</sup> Aristotle and Thomson, *The Ethics of Aristotle: The Nichomachean Ethics*, rev ed (1976).

<sup>64</sup> Aristotle and Thomson, *The Ethics of Aristotle: The Nichomachean Ethics*, rev ed (1976) at 199, 200 [1137b5-1137b20, 1137b30-1138a1].

<sup>65</sup> *Digest* at 1.1.1.pr.

by General Edict, because he could not bear the thought of individual discretion being exercised by rulers like Commodus or Caracalla.<sup>66</sup> From Rome, through the Middle Ages,<sup>67</sup> Aristotle's views on justice remained controversial.

Adjudication in the early development of English law is generally described as bifurcated in the same manner. Courts of common law were generally described as dispensing a strict or generalised form of justice. General legal rules governed all cases and if a claimant could not bring his or her claim within an existing writ the claim would fail. In contrast, the Lord Chancellor allowed a claimant to bring a petition to the Chancellor based on the facts of the claimant's individual case. A claimant's petition was a supplication seeking whatever mercy the Chancellor, and his judges, might dispense. The Court of Chancery would restrain the enforcement of a judgment at common law if it considered the result to be contrary to conscience. As Henderson observed, by the sixteenth century the injunctions occurred so frequently that people must have assumed that there was something wrong with the common law.<sup>68</sup>

With the advent of legally-trained Chancellors and law reporting the Chancery courts began to develop general legal rules and the exercise of an individual, unrestrained discretion became less and less common. Prior to his appointment, the first legally-trained Chancellor, Sir Thomas More, argued passionately that if judges "rule by the leading of their own nature...then the people will in no way be freer, but, by reason of a condition of servitude, worse, when they will have to obey, not fixed and definite laws, but indefinite whims changing from day to day."<sup>69</sup> By the start of the nineteenth century, the Lord Chancellor, Lord Eldon, remarked that

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<sup>66</sup> Birley, *Lives of the Later Caesars*, (1976) at 268.

<sup>67</sup> Responding to Augustine's objection that *epikeia* (equity) is a vice rather than a virtue because "seemingly *epikeia* pronounces judgment on the law, when it deems that the law should not be observed in some particular case", Aquinas responded with an example of a madman demanding his legal entitlement to the return of his sword whilst he was mad: "on these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good. This is the object of '*epikeia*' which we call equity." See Aquinas, *Summa Theologica* II.II, Q120, Art 1.

<sup>68</sup> Henderson, "Relief from Bonds in the English Chancery: Mid-Sixteenth Century", (1974) 18 *American Journal of Legal History* 298 at 306.

<sup>69</sup> St Thomas More, "*Responsio ad Lutherum*" in Headley (ed), *The Yale Edition of The Complete Works of Thomas More*, (1969), vol 5 at 277.

"[n]othing would inflict on me greater pain, in quitting this place, than the recollection that I had done any thing to justify the reproach that the equity of this Court varies like the Chancellor's foot."<sup>70</sup>

Equitable principles were also sometimes applied at common law.<sup>71</sup> Existing concurrently with Chancery's application of its discretionary, equitable form of justice was the common law approach to the equity of the statute by which the common law judges relied upon externally imposed principles of justice, independently of the intention of the legislature as deduced from the words used by Parliament. However, the common law approach would rarely involve a purely external principle of justice. That external principle was constrained by the purpose of the statute. Although the words of the statute could be applied despite their meaning, the meaning could not be altered if to do so would be contrary to what the hypothetical legislator of that law would have considered appropriate.

One of the most famous discussions of this version of the equity of the statute thesis is by Plowden in his lengthy note to the report of *Eystone v Studd*.<sup>72</sup> Plowden considered many cases involving numerous different statutes and explained the meaning of the *Eystone* decision as follows:<sup>73</sup>

From this judgment and the cause of it, the reader may observe, that it is not the words of 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, *quid ratio legis est anima legis*. ... And equity, which in Latin is called *equitas*, enlarges or diminishes the letter according to its discretion, which equity is in two ways: The one Aristotle defines thus, (which is touched by Catline, Chief-Justice, in Stowell's case) *Equitas est correctio legis generatim latae qua parte deficit*, or, as the passage is explained by Perionius, *Equitas est correctio quaedam legi adhibita, quia ab ea abest aliquid propter generalem sine exceptione*

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<sup>70</sup> *Gee v Pritchard* (1818) 2 Swans 402 at 414 [36 ER 670 at 674]. Harman LJ once commented that "since the time of Lord Eldon ... equitable jurisdiction is exercised only upon well-known principles": *Bridge v Campbell Discount Co Ltd* [1961] 2 WLR 596 at 605.

<sup>71</sup> *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 550 [88]; [2001] HCA 68 (Gummow J referring to the "common counts" of *indebitatus assumpsit* which Lord Mansfield described as being in the nature of a Bill in Equity: *Clarke v Shee* (1774) 1 Cowp 197 at 199-200 [98 ER 1041 at 1042]).

<sup>72</sup> *Eystone v Studd* (1574) 2 Plow 459 at 465-469 [75 ER 688 at 695-700].

<sup>73</sup> *Eystone v Studd* (1574) 2 Plow 459 at 465 [75 ER 688 at 695-696].

*comprehensionem*, both which definitions come to one and the same thing. And this correction of the general words is much used in the law of England ... in these cases the general words of the law are corrected and abridged by equity.

The same approach, relying on principles of justice rather than a consideration of the intended meaning of the words that were used, was taken by St Germain, who spoke of the leaving the "words of the law" to follow that which "reason and justice requireth" as "an exception of the law of God, or the law of reason".<sup>74</sup> It was also the approach taken by Pufendorf, where he observed that in contrast with the meaning of the statute derived from the words used by Parliament, the "equity" could permit a law to be "restrained" if, "although it be not absolutely unlawful to stick to the Letter, ... upon weighting the Thing in Candour and Prudence, it appears to be too grievous and burdensome".<sup>75</sup>

The approach taken by Sir Edward Coke was less clear. In his famous report of *Heydon's Case*,<sup>76</sup> he described the decision that the Acts of Dissolution by Henry VIII<sup>77</sup> did not invalidate a grant of copyhold, despite the apparent words of the statute, as arising because "the office of all the Judges is always to make such construction ... according to the true intent of the makers of the Act, *pro bono publico*."<sup>78</sup> This, it seems, was an approach that allowed departure from the intended meaning of the words used by Parliament in favour of a "true intent" independent of the words although based upon what the makers of the Act would have decided. However, an apparently stronger approach was taken by Coke CJ, whilst still Chief Justice in Common Pleas, when he spoke in *Bonham's Case*<sup>79</sup> of a statute being adjudged void and controlled by the common law because it is "against common right and reason". That view was used against Coke, and relied upon as an application of the older approach, in *The Earl of Oxford's Case*, when the Lord Chancellor, arguing for equity to prevail, asserted that "the Judges themselves do play the Chancellors Parts (upon Statutes, making Construction of them according to Equity ... and enlarging

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<sup>74</sup> St Germain and Muchall, *Doctor and Student*, 17th ed (1787), Dialogue 1, c 16 at 45.

<sup>75</sup> Pufendorf, *Of the Law of Nature and Nations*, 5th ed (1749), bk 5 at 550.

<sup>76</sup> *Heydon's Case* (1584) 3 Co Rep 7 [76 ER 637].

<sup>77</sup> 31 H VIII, c 13.

<sup>78</sup> *Heydon's Case* (1584) 3 Co Rep 7 at 7b [76 ER 637 at 638]. See also Coke, *The First Part of the Institutes of the Laws of England* (1628) at s 21.

<sup>79</sup> (1610) 8 Co Rep 113b at 118a [77 ER 646 at 652].

them *pro bono publico*, against the Letter and Intent of the Makers, whereof our Books have many Hundreds of Cases".<sup>80</sup> The Lord Chancellor referred to the approach of Sir Edward Coke, in the Court of King's Bench the orders of which the Lord Chancellor had restrained from execution. The Lord Chancellor said that Sir Edward Coke's decision and report of *Bonham's Case* had applied that doctrine of the equity of the statute despite the intention of Parliament.<sup>81</sup>

The same older approach to the equity of the statute was sometimes seen in relation to the *Statute of Frauds*. When Lord Mansfield applied the equity of the statute approach in *Simon v Motivos*, he did so without focus upon the meaning of the words of the statute but said that the "key" to construction was "the intent of the Legislature".<sup>82</sup> But, in contrast, when Pratt LCJ (later Lord Camden), in a dissenting opinion in 1765, differed from Lord Mansfield's conclusion in *Wyndham v Chetwynd*,<sup>83</sup> the Lord Chief Justice said pointedly that "it is not my business to decide cases by my own rule of justice, but to declare the law as I find it laid down; if the statute of frauds has enjoined this determination, it is not my opinion, but the judgment of the legislature."<sup>84</sup>

## The decline of the older approach

The older approach to the equity of the statute might not be thought surprising in the era in which it occurred. As Postema explained, Coke's view of the law was that "legislative change represented degeneration of the law from its pristine purity in ancient times."<sup>85</sup> For this reason, Frederick Pollock remarked that the doctrine of the equity of the statute "cannot well be accounted for except on the theory that Parliament generally changes the

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<sup>80</sup> (1615) 1 Chan Rep 1 at 12 [21 ER 485 at 488]. See further the comprehensive discussion of this case in the chapter in this volume by D Klimchuk "Aristotle at the Foundations of the Law of Equity".

<sup>81</sup> (1615) 1 Chan Rep 1 at 11 [21 ER 485 at 487].

<sup>82</sup> *Simon v Motivos* (1746) 1 Black W 599 at 600 [96 ER 347 at 347].

<sup>83</sup> (1757) 1 Black W 95 [93 ER 53].

<sup>84</sup> *Hindson v Kersey* (1765) in Burn, *The Ecclesiastical Law*, 9th ed (1842), vol 4, 116 at 118.

<sup>85</sup> Postema, *Bentham and the Common Law Tradition*, (1986) at 15.

law for the worse, and that the business of the judges is to keep the mischief of its interference within the narrowest possible bounds."<sup>86</sup>

The older approach to the equity of the statute lost its legitimacy for three reasons. First, in early English law statutes were also sometimes drafted by the very judges who were called upon to interpret them.<sup>87</sup> A judge who had drafted a statute could correct a statute by saying, in effect, "this statute objectively means x but for reasons of equity I am going to apply meaning y". As Professor Manning observed, "one would hardly expect the medieval English judge to have a sense of usurping the responsibilities of a different branch, with distinct competence and legitimacy, when interpreting a clear statute contrary to its terms"<sup>88</sup>. But by the mid-eighteenth century the judges who construed a statute were rarely the same persons who had drafted it. Even the draftsmen of the *Statute of Frauds* had been forgotten. It was thought by some that Sir Matthew Hale had drafted the statute.<sup>89</sup> But when, in *Wyndham v Chetwynd*,<sup>90</sup> counsel relied on the stature of Lord Hale as part of a submission that the word 'credible' would not have been used in a superfluous sense, Lord Mansfield pointed out that Hale had died the year before the Act was drafted.<sup>91</sup> The notion of independent, objective judicial construction on this approach to the equity of the statute therefore required it to be based upon the notional construct of the reasonable intention of Parliament.

Secondly, the rise of notions of separation of powers did not permit real equity in this sense of judicial rectification of the meaning of a statute<sup>92</sup>.

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<sup>86</sup> Pollock, *Essays in Jurisprudence and Ethics*, (1882) at 85.

<sup>87</sup> Thorne, "The Equity of a Statute and Heydon's Case", (1936) 31 *Illinois Law Review* 202 at 203.

<sup>88</sup> J Manning "Textualism and the equity of the statute" (2001) 101 *Colum Law Rev* 1 at 42-43.

<sup>89</sup> John Campbell described Hale as "not merely by far the best Common Law Judge, but by far the best Equity Judge of his time". The great Lord Nottingham regarded Hale as "his great master": Campbell, *The Lives of the Chief Justices of England*, rev ed (1979), vol 1 at 551-552.

<sup>90</sup> (1746) 1 Black W 96 at 97 [93 ER 53 at 54].

<sup>91</sup> The likelihood is that the first draft was written by Lord Nottingham: Hening, "The Original Drafts of the Statute of Frauds and their authors", (1913) 61 *University of Pennsylvania Law Review* 283.

<sup>92</sup> J Landis "Statutes and the Sources of Law" in M Carlisle et al (ed) *Harvard Legal Essays* (1934) at 217-218.

As Deane and Gummow JJ observed in *Nelson v Nelson*,<sup>93</sup> the doctrine of the equity of the statute "fell deeply into disfavour in England and the United States with the rise of legal positivism in the last century". The process of creating new law by reference to considerations of justice independent of the statute was recognised as one that can cross the line of constitutional settlement between adjudication and legislation. By the mid-nineteenth century, Sedgwick remarked of this approach to the equity of the statute:<sup>94</sup>

The process, therefore, in these cases, is not obedience to legislative commands; it is not an effort to arrive at the legislative intention; it is not construction of a doubtful provision; it is a violation of the words of the statute, in order to make a rule according to the judicial notion of right. It is purely and strictly judicial legislation. And, fortunately, we are not without abundant authorities in our law which steadily, it may be sternly applied, will establish in its proper place the line that separates the judicial from the legislative functions.

Thirdly, concerns about consistency with the rule of law may have contributed to the general rejection of the older approach to the equity of the statute. In *Burrage v State of Queensland*,<sup>95</sup> I considered a submission that the 'equity' of the *Native Title Act 1993* (Cth) concerning awards of costs should extend to judicial review proceedings, about which that statute was not concerned and about which there could be no basis to prescribe any Parliamentary intention. As I observed in that case, a difficulty with the approach to the equity of the statute that applies a law in terms beyond what it means is that this contravenes the legislative principle, of which Barwick CJ spoke in *Watson v Lee*,<sup>96</sup> that a person should not be bound by a law the terms of which she has no means of knowing.

However, the doctrine of the equity of the statute in its older sense still persisted in some cases. An example in 1889 is *Riggs v Palmer*.<sup>97</sup> In that case, a majority of the Court of Appeals of New York held that a legislative provision that apparently permitted a grandson to inherit most of his grandfather's estate would be construed as subject to an exception where the grandson had murdered the testator. At one point in his

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<sup>93</sup> (1995) 184 CLR 538 at 553; [1995] HCA 25.

<sup>94</sup> *The Interpretation and Application of Statutory and Constitutional Law*, (1857) at 307.

<sup>95</sup> (2015) 236 FCR 160.

<sup>96</sup> (1979) 144 CLR 374 at 381; [1979] HCA 53.

<sup>97</sup> (1889) 22 NE 188.

reasoning in the majority, the Chief Justice appealed to the maxim that a person shall not profit from his wrong, effectively suggesting that it was a background assumption to the meaning of the legislation. Whether or not it is plausible that such a wide and general background assumption could be given direct effect in the interpretation of statutory words, that approach is still an example of legitimate techniques of statutory interpretation.<sup>98</sup> Yet the Chief Justice did not rationalise the result on the basis of an implication from the words of the statute in their context, including their background. He said that that the equity of the statute permitted him to ask whether if the lawmakers had been consulted they would have permitted the passage of title to the grandson.<sup>99</sup> In this hypothetical consultation with the lawmakers the meaning to be given to the legislative provision was not derived from the meaning of the law that *was* passed. It was a concern with the law that *should* have been passed. For this very reason, Professor Dworkin argued in favour of the approach of the Chief Justice in *Riggs v Palmer*. He saw that approach as giving effect to extrinsic normative principles rather than any ascription of notional Parliamentary intention based only on interpretation of the words used. For Dworkin, those principles were external considerations of justice albeit ones which "could not depend on the judge's own preferences amongst a sea of respectable extra-legal standards".<sup>100</sup>

Although the persistence today of the older view of the equity of the statute, in cases like *Riggs v Palmer*, is rare, remnants of the older version of the equity of the statute remain present in two forms. The first remnant is the continued recognition of doctrines that were developed in the period of classical application of the equity of the statute. The proper, incremental development of the common law may not permit the eradication of doctrines forged upon an illegitimate premise, especially where those doctrines have persisted for hundreds of years and have been assumed to exist in the course of legislative developments.

An example is the continued recognition of the doctrine of part performance in Australia. In a case that post-dated the presentation of this

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<sup>98</sup> *Welwyn Hatfield BC v Secretary of State for Communities and Local Government* [2011] 2 AC 304 at [45]-[46].

<sup>99</sup> *Riggs v Palmer* (1889) 22 NE 188 at 189.

<sup>100</sup> Dworkin, *Taking Rights Seriously*, (1977) at 37.

paper, *Pipikos v Trayans*,<sup>101</sup> a central issue was whether the doctrine of part performance should be expanded so that there was no longer a requirement that the act of part performance be unequivocally referable to a contract of the general nature as that alleged. It was argued that the decision of the House of Lords in *Steadman v Steadman*<sup>102</sup> had paved the way for the doctrine to be expanded, until legislative intervention in the United Kingdom brought an end to that venture. The High Court of Australia refused to extend the doctrine.<sup>103</sup> The joint judgment of Kiefel CJ, Bell, Gageler and Keane JJ explained that although Chancery judges of the late 17th century might not have regarded the *Statute of Frauds* as applying to proceedings in equity, by the time of *Maddison v Alderson* in the late 19th century it was "unacceptable" for a court of equity to take itself outside the prescriptions of Parliament.<sup>104</sup> In my reasons for decision I considered that although the doctrine had been forged upon the older view of the equity of the statute, it was too late for it to be abolished. Indeed, part performance was expressly preserved by s 26 of the *Law of Property Act 1936 (SA)*<sup>105</sup>. But, I reiterated the point made by Sedgwick in 1874 that the doctrine "approaches so near the power of legislation that a wise judiciary will exercise it with reluctance, and only in extraordinary cases"<sup>106</sup>.

The second remnant of the equity of the statute is a weaker, but far more legitimate, form by which the common law is extended or modified by reference to the general purpose of a statute rather than by direct extension of the particular provisions. In 1907, Roscoe Pound observed that there were four ways that the common law might respond to legislation.<sup>107</sup> The fourth of these was integrating statute and common law and giving superior status to legislative analogies in the development of the common law. This weak version of the older equity of the statute approach extends the reach of the statute by reference to considerations of justice and the general purpose of the statute. By this route it is possible to reach a result that the common law

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<sup>101</sup> [2018] HCA 39.

<sup>102</sup> [1976] AC 536.

<sup>103</sup> *Law of Property (Miscellaneous Provisions) Act 1989 (UK)*, ss 2(1), 2(8), 4, Sched 2.

<sup>104</sup> [2018] HCA 39 at [73].

<sup>105</sup> [2018] HCA 39 at [125].

<sup>106</sup> Sedgwick and Pomeroy, *A Treatise on the Rules which Govern the Interpretation and Construction of Statutory and Constitutional Law*, 2nd ed (1874) at 251, citing *Monson v Chester* 22 Pick 385 at 387 (1839).

<sup>107</sup> Pound, "Common law and legislation", (1907) 21 *Harvard Law Review* 383.

might not have reached without the legislation.<sup>108</sup> But the form is much weaker because that modification will generally only occur when it is consistent with basic common law norms.

An example of this approach is equity's application of limitation periods "in analogy to the statute"<sup>109</sup> provided that no "greater equity" outweighs it.<sup>110</sup> Extension by analogy is not confined to statutes of limitation. In *Eso Australia Resources v Commissioner of Taxation*,<sup>111</sup> Gleeson CJ, Gaudron and Gummow JJ said:<sup>112</sup>

"Where over a period of years there can be discerned a steady trend in legislation which reflects the view of successive Parliaments as to what the public interest demands in a particular field of law, development of the common law in that part of the same field which has been left to it ought to proceed upon a parallel rather than a diverging course."

The reason why this is a weaker, and legitimate form of the equity of the statute is because it does not involve the direct application of statutory provisions outside their terms and also because the common law will not be extended or constrained by reference to statutory policy where to do so would be contrary to the deeper common law norms. An example is the decision of the High Court of Australia in *Brodie v Singleton Shire Council*.<sup>113</sup> In *Brodie*, the High Court considered whether to maintain a so-called "immunity" of public authorities for tortious liability based on nonfeasance rather than misfeasance. A Roads and Traffic Authority had the powers and the immunities of a council in relation to a public road. It was held by a majority of the court (Gaudron, McHugh, and Gummow JJ, with whom Kirby J generally agreed) that the statutory powers of the Authority gave it a degree of control that was thought to be sufficient to render it liable for non-feasance. However, the common law was developed,

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<sup>108</sup> See also Atiyah, "Common Law and Statute Law", (1985) 48 *Modern Law Review* 1 at 7.

<sup>109</sup> *Sterndale v Hankinson* (1827) 1 Sim 393 at 398 [57 ER 625 at 627]. See also *Smith v Clay* (1767) 3 Bro CC 646 [29 ER 743 at 744, 746]; *Re Greaves*; *Bray v Tofield* (1881) 18 Ch D 551 at 553.

<sup>110</sup> *R v McNeil* (1922) 31 CLR 76 at 100; [1922] HCA 33.

<sup>111</sup> (1999) 201 CLR 49 at 62 [24]; [1999] HCA 67.

<sup>112</sup> Quoting *Warnink v J Townend & Sons (Hull) Ltd* [1979] AC 731 at 743 per Lord Diplock.

<sup>113</sup> (2001) 206 CLR 512.

by abolishing the so-called immunity despite the existence of State statute law that preserved the so-called immunity.

This weak application of the older approach to the doctrine of the equity of the statute can also be seen in the approach to illegality taken in the High Court of Australia. An example is the decision in *Equuscorp Pty Ltd v Haxton*.<sup>114</sup> In that case, the High Court considered whether a common law claim for unjust enrichment could be brought by a lender to recover money assumed to have been paid to investors under contracts which were unenforceable for illegality. The statute which made the contracts unenforceable did not bar any action for unjust enrichment, either expressly or impliedly. The statute also contained its own regime of penalties, including possible imprisonment. The majority held that the common law claim based upon unjust enrichment must fail because it would "stultify" the statutory purpose.<sup>115</sup> All of the judges in the majority relied upon the earlier decision of Deane and Gummow JJ in *Nelson v Nelson*.<sup>116</sup> In that judgment, their Honours explained that the origins of this "third class of illegality" might be seen in the equity of the statute, "a survival of an earlier school of statutory interpretation"<sup>117</sup> which was a "doctrine [that] had the support of the common law judges led by Sir Edward Coke, who looked back to a time before the rise of the doctrine of parliamentary sovereignty and the subjection to it of the common law."<sup>118</sup> In *Haxton*, Heydon J dissented. His Honour held that there was nothing express or implied in the language of the statute which had the effect of extinguishing an otherwise valid common law claim:<sup>119</sup>

The contrast between direct legislative prohibition and the policy of the law is not a contrast between what the statute provides and some entirely extra-statutory doctrine. The "policy of the law" is to be found in the "scope and purpose" of the statute. The scope and purpose of the statute depend solely on the meaning of its language.

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<sup>114</sup> (2012) 246 CLR 498; [2012] HCA 7.

<sup>115</sup> *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 514 [25] per French, Crennan and Kiefel JJ, 537-538 [96], 544 [111] per Gummow and Bell JJ; [2012] HCA 7. Compare the English approach in *Patel v Mirza* [2017] AC 467.

<sup>116</sup> *Nelson v Nelson* (1995) 184 CLR 538 at 552; [1995] HCA 25.

<sup>117</sup> *Nelson v Nelson* (1995) 184 CLR 538 at 554; [1995] HCA 25.

<sup>118</sup> *Nelson v Nelson* (1995) 184 CLR 538 at 552; [1995] HCA 25.

<sup>119</sup> *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498 at 549 [124]; [2012] HCA 7.

## **Conclusion and wider application**

If the equity of the statute is regarded merely as a technique by which statutory context and purpose moulds the interpretation and construction of statutes then it should be uncontroversial. There is nothing unusual about an interpretation of a statute extending beyond the literal range of semantic meanings of the words to reach what the judge believes to be the meaning of the words intended by Parliament, as a notional speaker, to a reasonable person, as a notional reader. Nor is there anything unusual in construing the application of the words of a statute by reference to the statutory context and purpose particularly in cases where the words are vague, ambiguous or leave gaps in their application. However, in the usual circumstances where Parliament has used words deliberately and carefully, the more the interpretation of the meaning of words departs from the literal range of semantic choices for the words, and the more that the construction or application of the words departs from that interpretation, the more difficult the result should be to justify.

Much more controversial is the older sense of the equity of the statute. This older sense seeks to supplement the statute with external principles of justice. This is a separate philosophical principle. The two approaches might coincide where the reader of the legal text can reasonably assume from the words and their context that the principle of justice is not external but is one which was intended by the notional speaker. But to apply 'equity' as an external principle of justice, without finding an express or implied warrant in the words themselves, would make the exercise of giving effect to an expression of democratic power an exercise of predominantly judicial power. For this reason, as I have explained, the only broad acceptance of this approach is in circumstances where the common law is expanded or constrained by judicial development based upon the equity of the statute.

Although this chapter is concerned only with the interpretation and construction of statutes, the same issues arise in relation to all legal documents. The modern approach to the equity of the instrument, is consistent with an approach that is ubiquitous in speech acts generally. In every speech act, the listener or reader must interpret and construe the words by reference to context and purpose in an attempt to understand the intended meaning of the speaker. Hence, there is a powerful argument that there is

nothing fundamentally different between the way we interpret and construe a statute and the way we interpret and construe any other speech act. This is why, in 1889, Bowen LJ said that the "rules for the construction of statutes are very like those which apply to the construction of other documents"<sup>120</sup> and, a decade later, Holmes J said that "we do not deal differently with a statute from our way of dealing with a contract."<sup>121</sup> This point has further force where the statute enacts a treaty or a contract, such as a State Agreement. Most recently, in *Attorney General of Belize v Belize Telecom Ltd*,<sup>122</sup> Lord Hoffmann, giving the advice of the Privy Council, gave examples of statutes, written contracts and articles of association as all involving a construction of the meaning which is conveyed by the instrument to a reasonable reader. And in *Byrnes v Kendle*,<sup>123</sup> Heydon and Crennan JJ observed how "matched" approaches applied to contractual and statutory construction.

On the other hand, the older, controversial approach is sometimes also applied to other instruments. One example will suffice to illustrate the controversy that elsewhere surrounds the application of the older approach to the equity of the instrument. Historically, in cases where the effect of words in a trust or will would be to cause a charitable gift to fail – for example, where the original purpose is impossible – courts developed a doctrine called *cy-près*, which allowed the words to be given a meaning "as near as possible" to the meaning that they would otherwise bear. As Dixon and Evatt JJ said in *Attorney General (NSW) v Perpetual Trustee Co (Ltd)*:<sup>124</sup>

... the court will execute the trust by decreeing some other application of the trust property to the furtherance of the substantial purpose, some application which departs from the original plan in particulars held not essential and, otherwise, keeps as near thereto as may be.

The application of the doctrine was sometimes consistent only with the older approach to the equity of the statute, constrained only by the

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<sup>120</sup> *Curtis v Stovin* (1889) 22 QBD 513 at 517.

<sup>121</sup> Holmes, "The Theory of Legal Interpretation", (1899) 12 *Harvard Law Review* 417 at 419.

<sup>122</sup> [2009] 1 WLR 1988 at 1993 [16]; [2009] 2 All ER 1127 at 1132.

<sup>123</sup> *Byrnes v Kendle* (2011) 243 CLR 253 at [95]-[116] per Heydon and Crennan JJ; [2011] HCA 26.

<sup>124</sup> (1940) 63 CLR 209 at 225; [1940] HCA 12.

*general* charitable intention of the settler or testator: "a general principle of piety in the testator".<sup>125</sup> The possibility for complete reinterpretation of a will or trust was manifest. For instance, the doctrine of *cy-près* was used in one case by the Lord Chancellor to apply a bequest for a house of Jewish study to a home to bring up children in the Christian faith.<sup>126</sup> Lord Eldon remarked wryly that "[i]t would have caused some surprise to the testator if he had known how his devise would have been construed."<sup>127</sup> Unsurprisingly, like the 'equity of the statute', the doctrine of *cy-près* was always controversial and liable to be abused. In *Attorney General v Lady Downing*,<sup>128</sup> the Lord Chief Justice, expressing the opinion of himself, the Lord Chancellor and the Master of the Rolls, said that the doctrine would permit a situation in which "the testator is made to disinherit [the heir at law] for a charity he never thought of; perhaps for a charity repugnant to the testator's intention, and which directly opposes and encounters the charity he meant to establish'. And in *Attorney General v Andrew*,<sup>129</sup> the Lord Chancellor referred to older cases which had suggested that the doctrine "ought never again to be mentioned in this Court."

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<sup>125</sup> *Moggridge v Thackwell* (1802) 7 Ves Jun 36 at 69 [32 ER 15 at 26] per Lord Eldon.

<sup>126</sup> *Da Costa v De Paz* (1754) Amb 228 [27 ER 150]; 2 Swans 532 [36 ER 715]. See, further, the discussion in Getzler, "Morice v Bishop of Durham (1805)", in Mitchell and Mitchell (eds), *Landmark Cases in Equity*, (2012) 157.

<sup>127</sup> *Attorney General v Mayor of Bristol* (1820) 2 Jac & W 294 at 308 [37 ER 640 at 645].

<sup>128</sup> *Attorney General v Lady Downing* (1767) Wilm 1 at 32 [97 ER 1 at 13].

<sup>129</sup> *Attorney General v Andrew* (1798) 3 Ves Jun 633 at 649 [30 ER 1194 at 1202].