

COMMENTARIES

ON

EQUITY JURISPRUDENCE.

CHAPTER I.

THE TRUE NATURE AND CHARACTER OF EQUITY JURISPRUDENCE.

[\* § 1-24. Equity, as applied to jurisprudence, does not comprehend the broader principles of universal law, which are properly embraced in the more extended import of the term Natural Equity, or what is sometimes called Moral Equity.

§ 25-34. Equity jurisprudence, as a distinct branch of the law, is the complement of legal administration, whereby through defect of evidence, or from imperfect procedure, it is unable to afford that ample and specific redress for all injuries, which courts of equity may do, by requiring the defendant to answer, upon his conscience; by reforming mistakes in written contracts, and by injunctions, both restrictive and mandatory, and in many other ways. It is that portion of remedial justice which is administered exclusively by courts of equity. Equity will not relieve against any defect, imperfection, or abuse of the law itself, but only against the unconscionable claims and abuses of the parties. Courts of equity can give no different construction to the law, whether written or customary, from that which must govern courts of law. They are equally bound by precedents with courts of law. Courts of equity, afford relief in regard to those rights, recognized by the jurisprudence of the State, where the remedy of law is doubtful, inadequate, or incomplete.

§ 35-37. The administration of equity jurisprudence is more perfect in those States, other things being equal, where it is intrusted to courts exclusively devoted to that department of municipal law].

§ 1. IN treating of the subject of equity, it is material to distinguish the various senses in which that word is used. For it cannot be disguised, that an imperfect notion of what, in England, constitutes equity jurisprudence, is not only common among those who are not bred to the profession, but that it has often led to mistakes and confusion in professional treatises on the subject. In the most general sense, we are accustomed to call that equity,

which, in human transactions, is founded in natural justice, in honesty and right, and which properly arises *ex æquo et bono*. In this sense it answers precisely to the definition of justice, or natural law, as given by Justinian in the Pandects. “*Justitia est constans et perpetua voluntas jus suum cuique tribuendi*. Jus pluribus modis dicitur. Uno modo, cum id quod semper æquum et bonum, jus dicitur; ut est jus naturale. Juris præcepta sunt hæc; honeste vivere, alterum non lædere, suum cuique tribuere.”<sup>1</sup> And the word *jus* is used in the same sense in the Roman law, when it is declared, that *jus est ars boni et æqui*,<sup>2</sup> where it means, what we are accustomed to call, jurisprudence.<sup>3</sup>

§ 2. Now, it would be a great mistake to suppose that equity, as administered in England or America, embraced a jurisdiction so wide and extensive, as that which arises from the principles of natural justice above stated. Probably the jurisprudence of no civilized nation ever attempted so wide a range of duties for any of its judicial tribunals. Even the Roman law, which has been justly thought to deal to a vast extent in matters *ex æquo et bono*, never affected so bold a design.<sup>4</sup> On the contrary, it left many matters of natural justice wholly unprovided for, from the difficulty of framing any general rules to meet them, and from the doubtful nature of the policy of attempting to give a legal sanction to duties of imperfect obligation, such as charity, gratitude, and kindness, or even to positive engagements of parties, where they are not founded in what constitutes a meritorious consideration.<sup>5</sup> Thus, it is well known, that in the Roman law, as well as in the common law, there are many pacts, or promises of parties (*nude pacts*), which produce no legal obligation, capable of enforcement *in foro*

<sup>1</sup> Dig. Lib. 1, tit. 1, l. 10, 11.

<sup>2</sup> Dig. Lib. 1, tit. 1, l. 1.

<sup>3</sup> Grotius, after referring to the Greek word, used to signify equity, says, *Latinis autem æqui prudentia vertitur, quæ se ita ad æquitatem habet, ut jurisprudentia ad justitiam*. Grotius de *Æquitate*, ch. 1, § 4. This distinction is more refined than solid, as the citation in the text shows.

See also Taylor's Elements of the Civil Law, p. 90 to 98. Cicero, Topic. § 2; II. ad Heren. 13; III. ad Heren. 2. Bracton has referred to the various senses in which *jus* is used. Item (says he), *jus quandoque ponitur pro jure naturali, quod*

*semper bonum et æquum est; quandoque pro jure civili tantum; quandoque pro jure prætorio tantum; quandoque pro eo tantum, quod competit ex sententiâ*. Bracton, Lib. 1, ch. 4, p. 3. See Dr. Taylor's definition of *lex* and *jus*. Elem. Civ. Law, p. 147, 148; id. 178; id. 40 to 43; id. 55, 56; id. 91.

<sup>4</sup> See Heinecc. Hist. Edit. L. 1, ch. 0; De Edictis Prætorum, § 7, 8, 9, 10, 11, 12; id. § 18, 21 to 30; De Lolme on Eng. Const. B. 1, ch. 11.

<sup>5</sup> Ayliffe, Pand. B. 4, tit. 1, p. 420, &c.; 1 Kames, Equity, Introd. p. 3; Francis, Maxims, Introd. p. 5, 6, 7.