Alice Through the Statutes

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> "Definitions should not be too artificial.
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> For example —
>
> 'dog' includes a cat
>
> is asking too much of the reader;
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> 'animal' means a dog or a cat
>
> would be better."
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> *Memorandum on the Drafting of Acts of Parliament and Subordinate Legislation* (1951), Department of Justice, Ottawa.[1]

These words were used more than twenty years ago by a Canadian Government drafter of legislation. On the next page, the same author adopted without criticism or comment, a number of provisions from the federal *Interpretation Act*,[2] including the following: "[W]ords importing male persons include female persons and corporations."[3]

Dogs and cats have not objected to the way they are defined, and in fact have not taken any notice of the dictum with respect to them.[4] But women, demanding to be treated as humans, have protested constantly about the use of male terms to apply to both sexes. In

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[1] At 10. The Memorandum notes that it was prepared by Elmer A. Driedger, K.C., Parliamentary Counsel, Department of Justice. The Memorandum is hereinafter referred to as the *Justice Drafting Memorandum.*

[2] R.S.C. 1927, c.1 as am. by S.C. 1947, c.64.

[3] *Justice Drafting Memorandum,* 11, quoting s.31(1)(i) of the *Interpretation Act, ibid.* Mr Driedger's comment on the same page that s.2(3) makes definitions subject to their context, deals with a variation of the problem and will be discussed *infra.*

[4] There is no record of them having been consulted. Similarly, there is no record of women having been consulted. When women have protested, their protests have been ignored and majority votes have often concealed the fact of their protest. A recent example is the *Anti-dumping Tribunal Rules of Procedure,* made under authority of P.C. 1974-2232 of 8 Oct. 1974, SOR/74-581, Canada Gazette, Part II, vol.108, no.20, 2738, 1974.

1970, the distinguished woman Senator from New Brunswick, the Honourable Muriel McQueen Fergusson, pointed out to the Senate repeated instances in which both the language used by Senators and government officials, and the policies discussed, indicated that "the existence of women seems to be overlooked". The examples she cited ranged from the use of the term "Gentlemen" to apply to Senators of both sexes, to the government statement on Indian policy which dealt with an "Indian" only as a man, and included speeches which dealt with prisons and prisoners as if only men were involved.[5]

Other women have taken up the protest against legislation which defines the male as including the female, thereby appearing to place a lower value on the latter. On November 5, 1974, one of the present women Members of Parliament, Mrs Simma Holt, expressly protested the government practice of writing legislation by reference to the male.[6] The Minutes of the Parliamentary Committee at which her protest was made, show immediate reactions by other Members, some crying "Shame!" and others supporting Mrs Holt. At last the Minister concerned, the Honourable Alistair Gillespie, called on the General Solicitor for the Industrial Development Bank. The transcript reveals the defence which was used for legislating as if only men were involved:

Mr Gillespie: I wonder if you will accept a legal opinion on this point as to how well established the principle is that I tried to enunciate in my own law language.

Mrs Holt: I know but it is obsolete today.

Mr Gillespie: Mr Urquhart, will you come to a microphone, please?

Mr Urquhart: Section 26(6) of the Interpretation Act says:

> Words importing male persons include female persons and corporations.

Mrs Holt: That is very simple. Could you tell me why we do not change the Interpretation Act then?[6a]

The matter did not end there. Mrs Holt prepared a proposal[7] to change the *Interpretation Act*.[7a] On June 10, 1975, when the Honourable Marc Lalonde, Minister of National Health and Welfare, pre-

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[5] *Debates of the Senate*, 1969-70 Sess., vol.2, 1178-1182.

[6] *Minutes of Proceedings and Evidence of the Standing Committee on Finance, Trade and Economic Affairs*, 1st Sess., 30th Parl., 1974, House of Commons Issue No.7 (Nov. 5, 1974).

[6a] *Ibid.*, 34.

[7] *Minutes of Proceedings and Evidence of the Standing Committee on Health, Welfare and Social Affairs*, 1st Sess., 30th Parl., 1974-75, House of Commons Issue No.24 (Jun. 10, 1975), 17.

[7a] R.S.C. 1970, c.I-23.

sented the Commons Standing Committee on Health, Welfare and Social Affairs with Bill C-16, entitled *An Act to amend certain statutes to provide equality of status thereunder for male and female persons,* the drafting was challenged again. The transcript quotes Mrs Holt as criticizing the unnecessary use of male terms where they could have been avoided, and proposing neutral terms. As she put it:

> I would say that in a bill that is partly entitled " ... equality of status thereunder for male and female persons", the Interpretation Act should not be an excuse for having it written in language that is definitely discriminatory.[8]

The end result was that the Minister of National Health and Welfare refused such amendments and relied on the Department of Justice as the department responsible for drafting federal legislation.[9]

So the protests are growing. Protests against legislation which is written as if only men exist. Protests against a way of thinking which regards it as illogical to define "dog" as including "cat" but logical to define male humans as including female humans. For increasing numbers of people, such a way of thinking and legislating is just as strange as anything in *Alice in Wonderland.*[10]

THE FEDERAL INTERPRETATION ACT — A REAL SOLUTION OR PART OF THE PROBLEM?

As we have seen, women who complain about the way the laws refer to men and ignore women, are often told that the *Interpretation Act* protects them. They are told that the Act defines the male as including the female. In theory, therefore, women suffer no practical injustice. In theory they are subject to the same benefits and the same burdens as the male. If this is correct, the demand by women is nothing more than the objection to being ignored.

Yet when we look at the actual legislation, we find that this reassurance is wrong. There has never been *any* version of the federal *Interpretation Act* since Confederation in which male terms are defined as including the female for *all* purposes. Every version of the *Interpretation Act* from Confederation to the present day has clearly

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[8] *Supra,* f.n.7.

[9] *Ibid.,* 18.

[10] Alice's world of the ridiculous was intended for children; see Gardner (ed.), *The Annotated Alice: Alice's Adventures in Wonderland and Through the Looking Glass by Lewis Carroll* (1965), 21. However, adults will find many situations which are relevant to law and politics.

authorized the use of the *context* to find a different or contrary meaning.

The first *Interpretation Act* of the new Dominion of Canada was passed in 1867. It provided:

> In construing this or any Act of the Parliament of Canada, unless it is otherwise provided, *or there be some thing in the context or other provisions thereof indicating a different meaning or calling for a different contruction*: ...
>
> *Tenthly.* Words importing the singular number of the masculine gender only, shall include more persons, parties or things of the same kind than one, and females as well as males, and the converse; ... .[11]

Far from defining the male as including the female for all purposes, this wording permitted judges to look at the context in deciding whether male words should include females or female words should include males. The power of decision was in the courts, at a time when women could be neither lawyers nor judges.

This wording was compressed in 1886[12] without change in substance. By 1906 it had been compressed further, to read: "In every Act, *unless the contrary intention appears,* ... words importing the masculine gender include females ... ."[13] Apparently the idea of the female including the male had become too difficult for the egos of the drafters, because the reverse definition had now disappeared. The drafting concept had frozen into the formula that males include females, subject to the finding of a "contrary intention" as before. This wording was carried forward in the Revised Statutes of Canada for 1927 and again in the Revised Statutes of Canada for 1952. In each case the *Interpretation Act* provision clearly authorized the finding of a "contrary intention" to the general definition that words importing the masculine gender include females.[14]

In 1967, the whole *Interpretation Act* was consolidated and revised, and the following wording adopted: *"Words importing male persons include female persons and corporations."*[15] It looked as if women could at last argue that words indicating males included them for *all* purposes, because the discriminatory words "unless a contrary intention appears" had been taken out of the provision. In fact, however, they surfaced in section 3 applying to the whole Act and reading:

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[11] S.C. 1867, c.1, ss.6 and 7 (emphasis added).

[12] *The Interpretation Act*, R.S.C. 1886, c.1, s.7(21).

[13] *Interpretation Act*, R.S.C. 1906, c.1, s.31(i) (emphasis added).

[14] *Interpretation Act*, R.S.C. 1927, c.1, s.31 and R.S.C. 1952, c.158, s.31.

[15] S.C. 1967-68, c.7, s.26(6) (emphasis added). Note that this had been proposed by the *Justice Drafting Memorandum, supra*, f.n.1, 11, para.17(1).

APPLICATION

Every provision of this Act extends and applies, *unless a contrary intention appears*, to every enactment, whether enacted before or after the commencement of this Act.[16]

The government drafters had given the women no help. All they had done was to conceal in a different part of the Act the words permitting a finding of a "contrary intention". Women were still subject to the whims of the courts.

That is how the present gender provisions of the *Interpretation Act* developed. The 1967 wording has been carried forward unchanged into the present *Interpretation Act* in the Revised Statutes of Canada, 1970.[17] Section 26(6) provides, exactly as quoted by the General Solicitor for the Industrial Development Bank in his answer to Mrs Holt, that "words importing male persons include female persons and corporations".[18] But he failed to say that the equality which section 26(6) purports to give with one hand is still taken away by the other, because of section 3(1) containing the pitfall words "unless a contrary intention appears". The wording of the *Interpretation Act* clearly leaves it open for any official or any court to deny rights to women by finding some "contrary intention" in the context. Canadian women have no guarantee of any kind that any provision of any federal Act which grants rights to the male, will be interpreted to confer the same rights on women.[19]

So the challenge posed by Senator Fergusson, Simma Holt, M.P. and other women must be answered. Why is legislation written in terms of the male? What is the effect of legislating by reference to the male and defining male terms as including females? This leads us into the question of the behavior of the judges when women have come before them in cases involving the application of the *Interpretation Act.*

The Courts and the Interpretation Act

It is, of course, a matter of complaint by women that the courts (with a few exceptions at the lower levels) are composed entirely of

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[16] *Interpretation Act, ibid.*, s.3(1) (emphasis added).

[17] *Interpretation Act*, R.S.C. 1970, c.I-23, s.26(6).

[18] *Supra*, f.n.6, 35.

[19] Women thought they had such a guarantee in the *Canadian Bill of Rights*, S.C. 1960, c.44 (see R.S.C. 1970, Appendix III). This hope was ended by the Supreme Court of Canada in *Attorney-General of Canada* v. *Lavell* [1974] S.C.R. 1349, (1973) 38 D.L.R. (3d) 481. Contrast the Supreme Court decision in *R.* v. *Drybones* [1970] S.C.R. 282, (1969) 9 D.L.R. (3d) 473, [1970] 3 C.C.C. 355.

males. How have these courts reacted in cases which have come before them involving women and the *Interpretation Act?*

The European traditions which were brought to Canada were traditions of discrimination. The basic situation in France was described more than two hundred years ago by one authority as follows:

> Domat ... dit que le sexe qui distingue l'homme et la femme, fait entr'eux cette différence, pour ce qui regarde leur état, que les hommes sont capables de toute sorte d'engagements et de fonctions, si ce n'est que quelqu'un en soit exclus par des obstacles particuliers; et que *les femmes sont incapables, par la seule raison du sexe, de plusieurs sortes d'engagements et de fonctions.*[20]

It is well known that such traditions of discrimination, imported into Quebec and reflected in the Quebec Civil Code and other legislation, created barriers to equality at innumerable levels within that province.[21]

Perhaps less well known is the fact that the English Common Law suffered from similar barriers to equality. One writer summed it up as follows:

> We have been rapidly diminishing the number of 'normal persons', of free and lawful men. We have yet to speak of *half the inhabitants of England.* No text-writer, no statute ever makes any general statements as to the position of women. This is treated as obvious, and we believe that it can be defined with some accuracy by one brief phrase: — private law with few exceptions puts women on a par with men: *Public law gives a woman no rights and exacts from her no duties save that of paying taxes and performing such services as can be performed by deputy.*[22]

Yet the English common law was not a monolithic structure. It was, instead, a conglomerate of rules and traditions from which the courts selected those principles which they wished to follow.[23] Women, being excluded in law or in fact from the government, from

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[20] Extract from *Dictionaire de Droit et de Pratique* by M. Claude-Joseph de Feriere, Doyen des Docteurs-Regens de la Faculté des Droits de Parix, E ancien Avocat en Parlement. (Paris, 1762), vol.1. Avec Approbation E Privilège du Roi (emphasis added).

[21] *E.g.*, former arts.179, 643 and 1301 C.C.; Pothier, *Oeuvres* 2d ed. (1861), vol.9, 47-48, paras.121 and 122.

[22] Pollock and Maitland, *History of English Law* (1895), vol.1, 465 (emphasis added).

[23] See *Black's Law Dictionary* 4th rev.ed. (1968), 345:
"Common Law... [a]s distinguished from law created by the enactment of legislatures, ... comprises the body of those principles and rules of action, relating to the government and security of persons and property, which derive their authority solely from usages and customs of immemorial antiquity, or from the judgments and decrees of the courts recognizing, affirming, and enforcing such usages and customs; and in this sense particularly the ancient unwritten law of England."

Parliament and from the courts, had no share in the decisions which have established the basic law applicable to women in Canada today.

Our primary concern is, of course, the examination of the way in which the courts have treated laws written in male terms under which women have sought equal rights. Nonetheless, the pattern of decisions against women has included many cases where the language was *not* sexist. One much quoted case is that of *The King* v. *Alice Stubbs*,[24] decided in 1788, in which the appointment of a woman as an overseer of the poor was challenged despite the fact that she fulfilled the statutory definition of a "substantial householder". The arguments against her alleged a basic incapacity at common law which applied to women, idiots and lunatics; it was also urged that parts of the duty of the office which would require her to make inquiries relative to bastards were "inconsistent with the decency of the sex". The Court held that:

> ... where there are a sufficient number of men qualified to serve the office, *they are certainly more proper*: but that is not the case here; and therefore, if there be no absolute incapacity, it is proper in this instance from the necessity of the case.[25]

Thus the problem is greater than the language employed. Even where legislation has had no sex limitations in its wording, and even where women have admittedly fallen within the statutory qualifications, and even where the court has admitted that there was no absolute disqualification of women at common law, *Judges in this leading case nevertheless openly considered that men were to be preferred for such offices if the men were available.*

A significant factor which emerges in the early cases is the influence of the judges' personal prejudices in the decisions affecting women. An important Irish case, *The Queen* v. *Crosthwaite*,[26] demonstrates this clearly.

In the *Crosthwaite* case, the question was whether a woman was within the meaning of "persons" in the *Towns Improvement (Ireland) Act*, 1854,[26a] for the purpose of voting. Masculine pronouns had been used twice in the drafting, but there was a provision in the first section of the Act that "words importing the masculine gender, except only the word 'male', shall, in the construction of the Act, unless there be something in the subject or context repuguant to such construction, include females". The word "male" had not been used, but the Court nevertheless found that there were sufficient

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[24] (1788) 2 T.R. 395.
[25] *Ibid.*, 406 (emphasis added).
[26] (1867) 17 Ir.Com.Law Rep. 463.
[26a] 1854, 17-18 Vict., c.103 (U.K.).

indications in the Act (including the male references in the form of notice of meeting) that the context could be held to exclude women. The Judges left no doubt about their own attitudes to the place of women, and felt no need to conceal their views. Thus Deasy B. admitted that there was no precise enactment and no positive rule of law excluding women from Parliamentary elections at least in modern times, but found that:

> [T]he general policy of the law is to exclude them from any such intervention ... *partly on the supposition that such subjects are beyond their cognizance, as requiring a judgment superior to that which they possess,* and partly upon the ground that it is inconsistent with the delicacy and modesty of their sex that they should be mixed up in the strife and turmoil of a contested election ... .[27]

And again:

> ... I think that the appearance and intervention of females at such meetings, held under such circumstances, and for such purposes, and liable to such interruptions, would be inconsistent with the policy of the law, and a violation of those decent restraints which the custom and opinion of society impose upon their sex.
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> I think this a serious political and social innovation, and that before sanctioning it by our decision, we ought to have some stronger reason than that which is afforded by a glossary clause in an Act of Parliament.[28]

No one can read these judgments without being aware of the extent to which they were tainted by the personal views of the Judges. Thus Fitzgerald B., to illustrate why women can be excluded from persons qualified, pointed out that "idiots and lunatics" are excluded by the reasons and rules of the common law "as being destitute of the discretion necessary to the performance of the duties of electors".[29] He then proceeded to say:

> That the law in recognising the distinction of the sexes *assumes a greater worthiness in the male than the female,* is manifest from the law of descent; that it has regard to the infirmity of bodily strength and ability in the female, by rendering her incompetent for some offices and privileges, or incapacitating her from the discharge of the duties thereto belonging, cannot be questioned. Again, that she is subject to incapacities, *from a presumed inferiority of discretion and judgment,* seems also certain: a woman was not admitted as a witness in a case of villenage against a man; and the reason assigned is, because of her 'frailty'.[30]

Despite admitting that in fact there were cases in which women had been held capable of holding certain offices to which some of these reasons would apply,[31] Fitzgerald B. went on to state:

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[27] *Supra,* f.n.26, 472 (emphasis added).
[28] *Ibid.,* 473.
[29] *Ibid.,* 474.
[30] *Ibid.,* 475 (emphasis added).
[31] Ibid., 476.

> But, without holding any essential infirmity of women to men in judgment and discretion, I can have no doubt that in substance the reason of the Common Law still applies; and that *the course of education and mental training to which women, happily for us and themselves, are subject, does render them far less fit than men* for the administration of public affairs, and interference in the election to offices concerned in such administration.
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> Having regard to every one of the reasons of the Common Law, *the subordination of sex, the inferiority of bodily ability, and the mental inferiority,* in the sense explained, as well as to decency and decorum, I am not sorry that I am able, on the best consideration I have been able to give the case, to come to the conclusion that this judgment ought to be reversed.[32]

Such words expressed prejudices which were decisive to the case. Their influence is confirmed by the shocked protest of Pigot C.B., reviewing the common law and dissenting in the strongest possible terms:

> I am perfectly at a loss to understand the proposition — I can hardly embrace it — that there is a Common Law disability in women to exercise such functions as are necessary to the election of Town Commissioners. I cannot do that in a country in which it is part of the Common Law of the land, that a Queen may reign ... .[33]

And again:

> I cannot hold that, in this realm, in which a female not only may reign, but does reign, in her own right, there is in women a Common Law disability arising out of mental incapacity.[34]

And finally:

> I cannot bring my mind to the conclusion that we are at liberty to construe this Act otherwise than as its words plainly import, or to interpret the express legislation of the glossary as if these words had a flexibility that enabled the Court to mould and apply them *according to the mere opinions of Judges,* as to the delicacies or proprieties of the female character, or as to the expediency or inexpediency of conferring functions of this kind upon women.[35]

But Pigot C.B. failed to carry the day. The prejudices of his colleagues continue to affect the law in relation to women's rights in Canada in the twentieth century.

There is no doubt that the same attitudes also influenced the decision of the landmark case *Chorlton* v. *Lings*.[36] The circumstances are important. A woman named Mary Abbott and 5,346 other women claimed the right to be put upon the list of voters for the township of Manchester, England. They claimed the right to vote under the

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[32] *Ibid.*, 479 (emphasis added).
[33] *Ibid.*, 481.
[34] *Ibid.*, 483.
[35] *Ibid.*, 486 (emphasis added).
[36] (1868) L.R. 4 C.P. 374.

Representation of the People Act, 1867,[37] which enacted that "every man" with certain qualifications was entitled to the franchise. They relied upon *Lord Brougham's Act* (the predecessor of the *Interpretation Act*) passed in 1850, which provided that:

> ... in all Acts, Words importing the Masculine Gender shall be deemed and taken to include Females ... unless the contrary ... is expressly provided... .[38]

This is the most important case on the subject. Four highly respected Judges (Bovill C.J., Willes, Byles and Keating JJ.) formed the Court, All of them reacted with shock to the idea that a mere interpretation provision could allow women to claim the right to vote as "men".

It is clear that the Court in *Chorlton* v. *Lings* had evidence before it that in early times women had exercised public functions. Each Judge however, rejected or explained such evidence away to his own satisfaction, and then held that women were legally incapacitated at common law to exercise such a function and were therefore still excluded as persons "subject to legal incapacity".[38a]

The Court disposed of the argument based on *Lord Brougham's Act* by ingenious means. It simply refused to accept the argument that the legislature would confer on women such an important right as the right to vote, by a mere interpretation provision. They supported this conclusion by reference to their previous conclusions that women were legally incapacitated at common law. Bovill C.J. actually *reversed* the interpretation provision and required that women be expressly *mentioned* by statute.[39] Keating J. similarly insisted that if the Legislature intended so important a change, one would expect it to say so plainly and distinctly.[40] All four Judges decided, in spite of the plain provision in *Lord Brougham's Act* that words importing the masculine gender "shall be deemed and taken to include Females ... unless the contrary is *expressly* provided",[41] that the male terms in the 1867 *Representation of the People Act* could be read as subject to the 1832 Act[41a] which predated the interpretation provision and which clearly did not include women at that time. Byles J. was concerned that even reading the two Acts

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[37] 1867, 30-31 Vict., c.102 (U.K.).

[38] *An act for shortening the Language used in Acts of Parliament*, 1850, 13-14 Vict., c.21, s.4 (U.K.).

[38a] *Supra*, f.n.36, 382.

[39] *Ibid.*, 387.

[40] *Ibid.*, 395.

[41] *Supra*, f.n.38 (emphasis added).

[41a] *An Act to amend the Representation of the People in England and Wales*, 1832, 2-3 Wm.IV, c.45 (U.K.).

together did not dispose of the interpretation provision but he settled his problem by deciding that the words "expressly provided" in *Lord Brougham's Act* often only meant plainly, clearly or the like, and that the earlier Act met this watered-down definition.[42]

Chorlton v. *Lings* has become the basic case establishing for England and for Canada the "fact" that the common law excluded women so rigidly from public functions that the clearest possible legislation is necessary, designating them by sex, before they can be admitted to the exercise of any public functions. Yet examination of the judgments shows how far the Judges were affected by their prejudices. One even finds the judgment of Willes J. referring to the "*peculiarity*" of the Britons that women "had prerogative in deliberative sessions touching either peace-government or martial affairs",[43] or explaining away the signatures of abbesses at the Saxon Gemot (as merely *watching* matters affecting the interests of their Convents), and the signatures of other women of distinction (whose names he thought were possibly put in by way of compliment).[44] Considering obiter the question whether a peeress in her own right was entitled to a seat and vote in the House of Lords, he felt that if such right had ever existed, time had made it extinct and concluded that "it may be more correct to say that the right never existed".[45]

Like the decision itself, the comments of Byles J. have passed into legend. He stated:

> No doubt, the word 'man', in a scientific treatise on zoology or fossil organic remains, would include men, women, and children, as constituting the highest order of vertebrate animals. It is also used in an abstract and general sense in philosophical or religious disquisitions. But, in almost every other connection, the word 'man' is used in contradistinction to 'woman'. Certainly this restricted sense is its ordinary and popular sense.[46]

The extent of the prejudice in this case is emphasized by the existence of a general rule that words conferring the franchise must be construed "in their largest ordinary sense".[47] Two years after his restrictive decision in *Chorlton* v. *Lings,* Willes J. applied this principle to allow a broad definition of counting-houses in a matter not involving women's rights, and stated unctuously: "That is the rule which has been constantly acted upon by this court in construing statutes which related to the franchise."[48]

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[42] *Supra,* f.n.36, 393-4.
[43] *Supra,* f.n.36, 389.
[44] *Ibid.,* 390 (emphasis added).
[45] *Ibid.,* 391.
[46] *Ibid.,* 392.
[47] *Craies on Statute Law* 7th ed. (1971), 171.
[48] *Piercy* v. *Maclean* (1870) L.R. 5 C.P. 252, 261.

The irony of the boast did not escape *Craies on Statute Law* however, in which it was pointed out that the rule "was not applied so as to give the franchise to 'persons' of the feminine gender".[49]

THE BASIC LAW AFTER CHORLTON v. LINGS

In the century which has elapsed since the *Chorlton* case, its statement of the common law as inflicting a total incapacity on women in public functions has been adopted almost without question. Its conclusions about the inadequacy of interpretation provisions to confer rights on women have been followed; its views about male language not including women for the purpose of granting rights have been applied. Common law situations which *Chorlton* v. *Lings* erected into a permanent monolithic structure have been extended by other cases to apply to public functions which were unknown to the common law, and to occupations which were given the status of professions by statute law.

Examples are readily available. They include *Beresford-Hope* v. *Lady Sandhurst* in 1889, in which the Court of Appeal set aside the election of a woman as member of the Brixton County Council. The grounds? That an interpretation provision which stated that words importing the masculine gender included females for all purposes connected with, and having reference to, the right to vote did not include the right to be elected.[50] They include *De Souza* v. *Cobden* in 1891, in which the Court applied the *Beresford-Hope* case to deny a single woman the right to be considered as a man for purposes of election, but treated her as included within the masculine terminology for the purpose of imposing a penalty against her.[51] They include the 1908 case of *Nairn* v. *University of St. Andrews* in which the *Chorlton* case was one of the cases most strongly urged, and the House of Lords applied similar reasoning in refusing even to allow the term "person" to include women in the General Council of the University and thus in the right to vote at a parliamentary election.[52]

They include *Bebb* v. *Law Society* in 1913,[53] by which women were shut out of the profession of solicitor in England despite the clear statement in the statute that "every word importing the masculine gender only shall extend and be applied to a female as well as a

[49] *Supra*, f.n.47, 171 (f.n.93).
[50] (1889) 23 Q.B.D. 79 (C.A.).
[51] [1891] 1 Q.B.D. 687 (C.A.).
[52] [1909] A.C. 147 (H.L.).
[53] [1914] 1 Ch.D. 286 (C.A.).

male" unless "there be something in the subject or context repugnant to such construction".[53a]

The final alienation of women from the courts was carried out by the House of Lords. In 1919 the United Kingdom Parliament had finally passed a *Sex Disqualification (Removal) Act* which (while expressly approving the reservation of certain types of positions to men) stated clearly that: "A person shall not be disqualified by sex or marriage from the exercise of any public function...".[54] Yet in 1922 when Margaret Haig, Viscountess Rhondda, a Peeress of the United Kingdom in her own right, petitioned for the issuance to her of a writ of summons to Parliament, the House of Lords Committee for Privileges held that this Act did not entitle her to receive a writ of summons to Parliament. *Chorlton* v. *Lings* was again relied upon; even the specific legislation contained in the *Sex Disqualification (Removal) Act* was held not to be specific enough to remove the "disability" of a woman.[55] When one considers the House of Lords' decision to keep out Viscountess Rhondda, one has a mental image of the tea party in *Alice in Wonderland*, with the March Hare, the Mad Hatter and the Dormouse crowded together at one corner of a very large table and shouting out "No room! No room!", when they saw Alice.[56]

The Situation in Canada

We have seen from our examination of the Interpretation Acts since Confederation that no federal Interpretation Act has ever provided that words importing the masculine gender include females without adding the pitfall phrase "unless the contrary intention appears". As we have also seen from our examination of the development of the case law in England, courts developed many techniques for discovering in the words or subject matter of a statute some intent of the Legislature that public rights were intended only for males. No law was too clear for the all-male courts to discover *some* reasons for denying equality to women.

Under these circumstances, it was difficult for Canadian cases to arise on the subject of the right of females to be regarded as males under a federal statute. However, there are a few reported instances

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[53a] *An Act for consolidating and amending several of the Laws relating to Attornies and Solicitors practising in England and Wales*, 1843, 6-7 Vict., c.73, s.48 (U.K.).

[54] *Sex Disqualification (Removal) Act, 1919*, 9-10 Geo.V, c.71, s.1 (U.K.).

[55] *Viscountess Rhondda's Claim* [1922] 2 A.C. 339 (H.L.).

[56] *Supra*, f.n.10, 93.

involving provincial law, which show the situation to have been similar to that in England. In 1868 in Ontario, one finds the "principal law officer of the Crown" interpreting the word "pupils" in the *Grammar Schools Act*[57] as restricted to boys, in line with the open prejudice of the Chief Superintendent of Education, Dr Egerton Ryerson.[58] In 1905 in New Brunswick, a young woman named Mabel P. French, who had been admitted as a student-at-law in 1902 and admittedly met all the requirements, sought admission as an attorney, on the ground that she was included in the expression "person" despite use of masculine pronouns in the relevant legislation.[59] Despite obvious support for her from the Council of the Barristers' Society and from the City of St. John, the Judges reacted with shock. The report quotes Tuck C.J. as saying:

> If this young lady is entitled to be admitted an attorney she will in a year be entitled to be called to the bar, and, in a few years, *will be eligible to be appointed to the bench.*[60]

Not surprisingly, the Court applied *Chorlton* v. *Lings*[61] and *Beresford-Hope* v. *Lady Sandhurst*[62] to exclude her on the grounds of the legal incapacity of women at common law, and the presumed intent of the Legislature that the word "person" in the relevant statute applied only to males. There also appears to have been a strong belief by the Judges that they were carrying out the will of God, with Barker J. quoting with obvious approval from a leading United States case:

> The paramount destiny and mission of women are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases.[63]

Apparently Miss Mabel P. French either did not believe that the Judges were speaking with the voice of God, or else decided that there was a higher authority. We know that she obtained special

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[57] *An Act for the further improvement of Grammar Schools in Upper Canada,* S.C. 1865, c.23.

[58] See an excellent article by Royce, "Arguments Over the Education of Girls — Their Admission to Grammar Schools in this Province" in *Ontario History,* vol.LXVII, No.1, March 1975, 1. The dispute was reported in the United States; see *Education in Canada,* Godeys Magazine, vol.77, no.461, Nov. 1868, 449-450. I am indebted to Dr J. Alex Edmison of Ottawa for contributing these to my archives on this subject.

[59] *In Re Mabel P. French* (1905) 37 N.B.R. 359.

[60] *Ibid.,* 361 (emphasis added).

[61] *Supra,* f.n.36.

[62] *Supra,* f.n.50.

[63] *Ibid.,* 366.

legislation,[63a] became a full-fledged barrister, and in 1911 applied to the Courts in British Columbia seeking a writ of mandamus to force the Benchers of the Law Society of that Province to accept her application for enrolment on the books of the Law Society as a "person" fulfilling the requirements of the statute, including that of having been duly called and admitted to practice as a barrister-at-law in another Province of Canada.[63b] The lower Court decided against her, as did the Court of Appeal, rejecting the power of the *Interpretation Act* to bring about "so radical a change" and holding a woman barred by the common law.[64] Similarly, in Quebec in 1915, in *Dame Langstaff* v. *The Bar of the Province of Quebec*[65] the interpretation rule was held inapplicable and women were excluded from the practice of law on account of their sex.

The right of women to exercise public functions on the same basis as men was settled in Alberta in 1917 in an entirely different way. Alberta had obviously accepted the position that specific legislation was necessary to confer public rights on women. In 1916, therefore, Alberta passed *The Equal Suffrage Statutory Law Amendment Act*,[66] which by section 2 provided that:

> Notwithstanding any provisions therein contained, women shall be upon an absolute equality with and have the same rights as men in the following Acts, Ordinances and Charters:
>
> (1) *The Alberta Election Act* . . . .

The Act was a piece of legislation clearly directed towards certain specific Acts, Ordinances and Charters, and was not of a general nature such as those which had been interpreted against women in so many cases. However, the Provincial Government had appointed two women Police Magistrates and objections were made to them exercising this public function without a statute expressly authorizing them to do so. In 1917 the matter came to a head in *R.* v. *Cyr (Alias Waters)*[67] which went to the Appellate Division of the Supreme Court of Alberta in the same year. The Appellate Division upheld the lower Court judgment, in which the *Interpretation Act* provision that words importing masculine gender include females[68] had been applied, and found the accused woman to be within the Criminal Code section

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[63a] *An Act to remove the Disability of Women so far as relates to the Study and Practice of the Law*, S.N.B. 1906, c.5.

[63b] *In Re Mabel Penery French* (1912) 17 B.C.R. 1 (C.A.).

[64] *Ibid.*, 8.

[65] (1915) 47 C.S. 131, 25 R.J. 11.

[66] S.A. 1916, c.5.

[67] (1917) 2 W.W.R. 1185 (Chambers).

[68] R.S.C. 1906, c.1, s.31(i).

on vagrancy.[68a] However, one ground of attacking the conviction had been the incapacity of the female Police Magistrate, and the Court therefore also proceeded to review the common law with respect to the right of women to hold public office. The result was an unanimous opinion that a woman appointed as Police Magistrate was *not* disqualified under the common law in Alberta, in spite of the absence of any specific statute.[69]

This was the fair, large and liberal opinion which could have been given by the Court in *Chorlton* v. *Lings*[70] almost fifty years earlier. The common law, reviewed in this judgment, appears in a different light; the instances of women actually occupying public office are given due weight as events which, even though not frequent, nevertheless did occur. The Court held that women were *not* disqualified by the common law of England in 1870 (the date the common law was introduced into Alberta), and distinguished the *Chorlton* case on the ground that its decision as to the position of women under the common law was *obiter dicta* not binding in Alberta. It held that alternatively, only so much of the common law of England as it stood in July 1870, and as was applicable to Alberta was introduced, and that the Court was at liberty to take cognizance of the different conditions in Alberta, the general conditions of public affairs in that Province, and the general attitude of the community in regard to the particular matter in question. The provision of the *Interpretation Act* was not considered or relied upon with reference to the right of a woman to hold public office, although it had been applied to include the accused woman under the vagrancy provision of the Criminal Code.

The remaining major Canadian case was the famous *"Persons"* Reference[71] submitted to the Supreme Court of Canada on October 19, 1927,[72] to settle whether women were entitled to be considered as "persons" within Section 24 of the *British North America Act*,[73] and therefore eligible for appointment to the Senate. The Government of Canada and the Government of Quebec argued that women were not "persons"; the Government of Alberta supported the women's argument that women *were* "persons".

[68a] R.S.C. 1906, c.146, s.238(a).

[69] *R.* v. *Cyr (Alias Waters)* (1917) 3 W.W.R. 849 (S.C.A.D.).

[70] *Supra*, f.n.36.

[71] *In the matter of a reference as to the meaning of the word "Persons" in Section 24 of the British North America Act, 1867* [1928] S.C.R. 276.

[72] Order in Council P.C. 2034, Oct. 19, 1927, Public Archives of Canada.

[73] 1867, 30-31 Vict. (U.K.).

The Supreme Court of Canada decided unanimously against women. Anglin C.J.C., whose judgment was adopted by the majority, noted that when standing alone "persons" *prima facie* includes women. As he said, "[i]t connotes human beings — the criminal and the insane equally with the good and the wise citizen, the minor as well as the adult".[74] However, the majority judgment thereafter reflects the shock the Supreme Court felt at the idea of women being included among persons eligible for the Senate. The judgment contains such words as "dangerous to assume" and "so vast a constitutional change affecting Canadian women".[75] It is hardly surprising therefore that the majority applied *Chorlton* v. *Lings*, holding that it was

> ... conclusive against the petitioners alike on the question of the common law incapacity of women to exercise such public functions as those of a member of the Senate of Canada and on that of their being expressly excluded from the class of 'qualified persons' within s.24 of the *B.N.A. Act* by the terms in which s.23 is couched ... .[76]

Section 23 is, of course, the section setting out qualifications of Senators, utilizing male pronouns.

This decision was appealed to the Privy Council. Their opinion was in favour of women.[77] In their statement, they propounded what has come to be known as the "living tree" doctrine of the Constitution, resting their view also on the ambiguity of the word "persons" and the fact that some sections of the Act clearly used "persons" to include females while other sections used the words "male persons" to confine other matters to males; the opinion also relied on the provisions of the *Interpretation Act* with reference to "persons". Although they distinguished *Chorlton* v. *Lings*,[78] it is clear that they accepted the view of the common law incapacity of women which had been formulated in that case and carried forward in the successive English cases culminating in *Viscountess Rhondda's Claim*.[79] The *"Persons"* case is clearly limited to the word "persons" or perhaps other neutral words where the language is ambiguous. It might be limited to minor statutes[80] or even to other constitutional

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[74] *Supra.*, f.n.71, 285.

[75] *Ibid.*, 287.

[76] *Ibid.*, 290.

[77] *Henrietta Muir Edwards* v. *Attorney-General for Canada* [1930] A.C. 124 (P.C.).

[78] *Supra*, f.n.36.

[79] *Supra*, f.n.55.

[80] For example, the *"Persons"* case was applied in *Harrison* v. *The Ocean Accident and Guarantee Corp.* (1947) O.W.N. 959, 960 to permit a woman to recover damages as a "passenger" under an automobile insurance policy.

documents. It might even be restricted by courts to the precise section of the *British North America Act* which was referred to the Supreme Court for an opinion. No matter how one regards the *"Persons"* case, it is clear that it provides women with no protection whatsoever against the application of the common law disabilities to women who seek equality with men under statutes drafted in terms of the male and dealing with rights and privileges.

IN SUMMARY — DEFENDING THE INDEFENSIBLE

We have seen that the practice of legislating in male terms is under challenge in Parliament. We have seen that the answer to that challenge has been that the *Interpretation Act* provides that male terms include the female. We have seen, on examination of every federal Interpretation Act since Confederation, that this defence is simply not true; that all federal Interpretation Acts — including the present one — contain the deceptive provision about dependence on the "context". And we have seen that male-constituted courts have interpreted the "context" in line with the judges' personal prejudices, to deny the right of women to vote, to be elected, or to exercise public functions of any kind, or even to carry on a profession, unless there is a specific statute which clearly creates the right for women. We have seen that judges, under the influence of openly prejudiced opinions about the mental capacity and the place of women, have deliberately chosen from two possible views of the common law the one which denies women equality with men. They have, in fact, deliberately erected into permanent law in modern times the common law view that the male includes the female for the purposes of pains and penalties but not for rights and privileges.

We have also seen that the exceptions are rare and limited. In *R.* v. *Cyr*[81] the Appellate Division of the Supreme Court of Alberta gave a fair, large and liberal opinion on the common law position of women, but its view has not been followed. We have seen that the Judicial Committee of the Privy Council in the *"Persons"* case[82] opened a very small door for women to creep through but this door is not available where a statute is clearly drawn in male terms. Wherever any statute or regulation is drafted in terms of the male, a woman has no guarantee that it confers any rights on her at all. Any official or any court has ample authority for deciding that the male does include the female for purposes of taxes, penalties or

[81] *Supra,* f.n.69.
[82] *Supra,* f.n.77.

criminal law, but does not include the female for the purposes of rights or privileges. The burden and the expense, the worry and the waste then fall entirely on the woman to establish whether in fact she is or is not included. Usually she will find that the tax-supported institutions and officials are lined up against her.[83]

The Actual Practice of Drafters

When the practice of drafting in male terms is attacked, three defences are usually raised:

1. *That women suffer no discrimination because the Interpretation Act provides that words importing male persons include female persons.*

We have seen that this belief is wrong. The *Interpretation Act* provides women with the *illusion* of protection but denies them the reality. Nor is it likely that many government officials believe it. One need only mention the refusal of the Department of National Defence to extend to females the rights and privileges of males in such tax-supported organizations as Cadets until the word "boys" was changed by statute recently to "persons";[84] or the continuing refusal to treat Indian women as "males" for the purposes of rights and privileges under the *Indian Act*.[85]

2. *That it is a matter of "convenience" for drafters to draft by reference to one sex only.*

It would undoubtedly be "convenient" also to define "dog" as including "cat" but the *Justice Drafting Memorandum* rejected this as "asking too much of the reader".[86]

It would also be "convenient" to draft statutes in one language instead of two, without translation and printing in two languages, but this has also been rejected by the federal government.[86a]

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[83] This is one of the major hurdles for women. In the United States, a number of women's groups, including the National Organization for Women, have focused particularly on this problem. Canada has no equivalent group with the funding and expertise to work continuously on this aspect, although different groups have been concerned from time to time on a volunteer basis.

[84] The *National Defence Act*, R.S.C. 1970, c.N-4, s.43. The change from the word "boys" to the word "persons" has now been made by the *Statute Law (Status of Women) Amendment Act, 1974*, S.C. 1974-75, c.66, s.21 (Bill C-16, assented to July 30, 1975).

[85] R.S.C. 1970, c.I-6, ss.11 and 12.

[86] *Supra*, f.n.1, 11.

[86a] *Official Languages Act*, R.S.C. 1970, c.O-2.

Under these circumstances, the argument of convenience becomes incredible when used as a reply to women's protests. It becomes all the more incredible since, as we have seen, *any* practice of drafting in terms of the male on the assumption that the male includes the female is a loaded gun pointed against women.

It is, of course, a peculiar argument in any event, that "convenience" is an answer to injustice or discrimination. But when one examines the Canadian statutes, one discovers that the drafters themselves have abandoned consistency. They themselves have used neutral terms or terms relating to both sexes wherever they have thought it desirable to achieve their own purposes. The Criminal Code[87] contains many examples of legislation by use of neutral words ("every one" or "persons"). Section 157 of the Criminal Code, applying to "every one" was adopted deliberately in the 1953-54 Criminal Code[88] and the male wording was abandoned to make certain that females would be included in the prohibition of acts of gross indecency previously prohibited only with respect to males.

So we find that "convenience" is a flexible word, to be dragged out of the cupboard whenever the usual way of doing things is under attack. From the women's point of view, however, drafting by reference to the male is *not* convenient; it is also not just.

3. *That "established drafting practice" or the "established canons of drafting" require drafting in terms of the male.*

This argument can be restated: "We admit that our drafting produces injustice, but we are used to drafting this way and we intend to keep on doing it." Its morality needs no comment.

But the argument fails when we look at the facts. We have seen that a reciprocal gender provision was contained in the early Interpretation Acts of Canada; and in fact this reciprocal gender definition existed in various parts of Canada and continued in Alberta until 1958.[88a] Clearly, therefore, drafting in form of the male has not been universal. Similarly, when one examines the most recent amendments to the *Canada Pension Plan*[89] enacted in response to criticism of discrimination, one finds that the drafters have found it possible to introduce the presumptive reciprocal gender definition

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[87] R.S.C. 1970, c.C-34.

[88] S.C. 1953-54, c.51.

[88a] It was eliminated by *The Interpretation Act, 1958*, S.A. 1958, c.32, s.18(1)(h).

[89] R.S.C. 1970, c.C-5.

into that Act.[90] Established drafting practices are easily changed, therefore, under pressure.

In addition, as we have seen, the drafters themselves have not hesitated to abandon these drafting practices whenever they have wished to do so. Examples have been cited from the statutes. One need only refer again to the *Indian Act*, where express legislation framed with reference to female Indians is used to deny them the rights extended to male Indians.[91] The *Lavell* case[92] makes clear that this sex-based drafting to deprive Indian women of rights was not an accident but deliberate policy.

Other examples are found in other statutes. Sex-based legislation treats evidence by a woman against a man in sexual cases as less deserving of belief than evidence by a man and discriminates against a raped woman in favour of the rapist;[93] sex-based legislation affects women's rights to equal pay,[94] their right to unemployment insurance,[95] their right to family allowances for female children,[96] their right to confer citizenship on spouse and children.[97]

Historically, drafters have never hesitated to abandon the sacred canon of drafting in the form of the male whenever they themselves wished to do so — even if they have had to make sentences so long and confused that the legislation should have been issued with road maps. Drafting is flexible *if* the drafters wish.

CONCLUSIONS

Thus the legal position of women is indeed something out of *Alice in Wonderland*,[98] or *Alice Through the Looking Glass*.[99] For over a hundred years it has been clear that legislation drafted in terms of the male exposes women to denial of rights granted to men. Even legislation drafted in neutral terms has often been used to exclude women from rights and privileges. The whole

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[90] *Statute Law (Status of Women) Amendment Act, 1974, supra*, f.n.84.

[91] *Supra*, f.n.85.

[92] *Supra*, f.n.19.

[93] Criminal Code, R.S.C. 1970, c.C-34, s.142.

[94] All equal pay legislation must necessarily be sex-based to deal with the problem; see *e.g., Canada Labour Code*, R.S.C. 1970, c.L-1, Division II.1 added by R.S.C. 1970, 2d Supp., c.17, s.9.

[95] *Unemployment Insurance Act, 1971*, S.C. 1970-71-72, c.48, s.30 as am. by S.C. 1974-75, c.66, s.22.

[96] *Family Allowances Act*, R.S.C. 1970, c.F-1.

[97] *Canadian Citizenship Act*, R.S.C. 1970, C-19.

[98] *Supra*, f.n.10, 21.

[99] *Ibid.*, 175.

structure of the law with respect to women rests upon judgments of men who regarded women as inferior. Women who seek even the smallest hope of equality must demand express legislation, written in the clearest possible terms. Yet legislation, however clear, has often failed at the hands of antagonistic male judges.

What is the answer? What should women and those men who sympathize with them do? Would it be better to ignore the *Interpretation Act* and to concentrate on other statutes which appear to promise equality? Will the promise of these statutes be any better than the illusion of the *Interpretation Act?*

One has only to look at the failure of the courts and governmental bodies to eliminate discrimination against women in the area of equal pay,[100] or to look at the sad history of the *Canadian Bill of Rights*[101] so far as women are concerned. Once there was a time when women believed that they were entitled to equal rights before the law in areas of federal jurisdiction because of the *Canadian Bill of Rights*,[102] but significantly they waited for some other woman to test it before the highest Court while they themselves endured discrimination and injustice. When the Supreme Court of Canada issued its declaration of justice in the *Drybones*[103] case and found intolerable racial discrimination in the denial to an Indian male of the right to drink off the reserve, women thought those great declarations of principle also applied to them. The decisions of the Supreme Court of Canada in the *Lavell*[104] and *Canard*[105] cases have stripped that illusion from women. They cannot rely on any statute unless they control the drafting. Some would add that they must also be the judges of it.

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[100] The most recent case is the judgment of the Federal Court of Appeal on Aug. 8, 1975 (not yet reported) against two female employees of Bell Canada, Patricia Harris and Elizabeth Kennedy, seeking the collectable portion of moneys they claimed under the *Female Employees Equal Pay Act*, S.C. 1956, c.38, which had been enacted originally by Parliament nineteen years previously.

[101] *Supra*, f.n.19.

[102] See *e.g.*, Address by Miss Sylva M. Gelber, Director, Women's Bureau, Canada Department of Labour, to the Annual Meeting, Ontario Public Health Association, Toronto, October 19, 1972, 3, referring to equal rights before the law as

> "rights which Canadian women have enjoyed in the federal area of jurisdiction for a dozen years"

and citing the *Canadian Bill of Rights* as the authority for this statement. Shortly afterwards the Supreme Court ended this belief.

[103] *Supra*, f.n.19.

[104] *Ibid.*

[105] *Attorney-General of Canada* v. *Canard* (1975) 52 D.L.R. (3d) 548 (S.C.C.).

What we do know is that words can be made to mean many different things. It all depends on who is drafting the statutes and who is deciding upon their meaning.

Lewis Carroll said it all in *Alice Through the Looking Glass*:

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean — neither more nor less."
> "The question is," said Alice, "whether you *can* make words mean so many different things."
> "The question is," said Humpty Dumpty, "which is to be master — that's all."[106]

And that is the question. Not for dogs and cats, but for women and men who are concerned about something called justice.

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[106] *Supra*, f.n.10, 269.