9-1-1973

Book Review: Cases and Materials on Equitable Remedies and Restitution (1973)

Milner S. Ball
University of Georgia School of Law

Cases and Materials on Equitable Remedies and Restitution. By Maurice T. Van Hecke,[1] Robert N. Leavell[2] and Grant S. Nelson,[3] St. Paul: West Publishing Co., 1973 (2d ed.). Pp. XXIV, 717.

Reviewed by Milner S. Ball[4]

Equity is alive and well, and this excellent casebook will serve as both a sign of and contribution to its vitality.

After a half-century of split opinion among commentators about whether equity was decadent or resurgent,[5] the Supreme Court indirectly settled the issue in favor of resurgence in *Brown v. Board of Education*.[6] The Court announced in *Brown* that in implementing school desegregation the lower courts would "be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power."[7]

The resurgence of equity has been particularly evident since the invocation of its power in the service of desegregation.[8] The continuing aftermath of *Brown* has been a history of expanding demands upon equitable innovation;[9] however developments in equity have not been confined to race relations. Experimentation under the aegis of equity has also been developing in other fields such as reapportionment[10] and environmental protection.[11] Whether as an indirect consequence of *Brown* or not, the Chancery has been clearly recrudescent for the last twenty years.

The prospect for the future is that there will be no abatement in the demands presently being made upon equity, and hence upon courts acting in their equitable capacities. Confidence in government has collapsed into cynicism about the legislative and executive branches. This collapse comes at a time when the body politic must respond to increasingly complex

---

[1] Late Kenan Professor of Law, University of North Carolina.

[2] Professor of Law, University of Georgia.

[3] Professor of Law, University of Missouri—Columbia.

[4] Assistant Professor of Law, Rutgers—Camden School of Law.

[5] *Compare* Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244 (1945), *and* Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20 (1905), *with* Bordwell, *The Resurgence of Equity*, 1 U. CHI. L. REV. 741 (1934), *and* Walsh, *Is Equity Decadent?* 22 MINN. L. REV. 479 (1938).

[6] 349 U.S. 294 (1955).

[7] *Id.* at 300.

[8] The busing plans adopted by courts of equity may lead some, not including this reviewer, to conclude that equity is on the decline.

[9] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969); Cooper v. Aaron, 358 U.S. 1 (1958).

[10] *E.g.*, Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962). *See* Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187 (1972).

[11] *See, e.g.*, Illinois v. City of Milwaukee, 406 U.S. 91 (1972).

needs for protection of human rights and the environment. Resolution of these problems calls for the exercise of the flexible power of courts of equity.

Equity jurisdiction defies satisfactory definition. It is, in many respects, as contextual now as it was when it first began to take shape in the Chancellor's conscience. Even in jurisdictions where law and equity have been procedurally merged, and the same judge hears both equitable and legal claims, judicial invention is less fettered when equitable principles are invoked. The determination of equity's province is both practically and jurisprudentially important. Practically, it affects trial strategy. Jurisprudentially, it illuminates the nature of law and the role of courts. But precision about the parameters of equity, for all its importance, remains elusive.

This inherent, elusive fascination of equity coupled with its modern resurgence renders it a lively subject for study as well as practice. The revival has produced several recent texts.[12] The instant volume is the best of a generally fine lot. Originally published by the late Professor Van Hecke in 1959,[13] it is a good book made even better in this new edition. In general, the new text tracks the old, but it has been updated and, at significant points, subtly and substantially re-cast as well.

The editors of the book have chosen wisely to provide for a thorough grounding in traditional equity. While equity may be flexible and contextual, it does have a history. A schooling in this history is a prerequisite to an understanding and practice of equity in the present. The point should not be belabored, and the editors have not done so. They have assembled a good collection of cases both old and new; it is a nice blend.

There are three major sections to the book. Two of them, "Specific Performance of Contracts"[14] and "Injunctions"[15] are the traditional great heads of equity. The third, "Restitution of Benefits"[16] cuts across equity and law. The section on specific performance introduces the student to the remedy itself and to some of the notions of equity like inadequacy of remedy at law, laches and estoppel.

The section on injunctions is absorbing and intriguing and is, accordingly, faithful to its subject. The most recent cases and developments are included.[17] The material is well-organized. There are the right number of

---

[12] *E.g.*, R. CHILDRES, EQUITY, RESTITUTION AND DAMAGES (1969); D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES (1973); O. FISS, INJUNCTIONS (1972); K. YORK AND J. BAUMAN, CASES AND MATERIALS ON REMEDIES (1967).

[13] M. VAN HECKE, CASES AND MATERIALS ON EQUITABLE REMEDIES (1959).

[14] M. VAN HECKE, R. LEAVELL AND G. NELSON, CASES AND MATERIALS ON EQUITABLE REMEDIES AND RESTITUTION 12-108 (2d ed. 1973) [hereinafter cited as VAN HECKE, LEAVELL and NELSON].

[15] *Id.* at 395-576.

[16] *Id.* at 200-394.

[17] For example, the problem of federal restraint of state court proceedings is presented through Mitchum v. Foster, 407 U.S. 225 (1972); Younger v. Harris, 401 U.S. 37 (1971); and

editorial comments which offer direction without intrusion and without—thank goodness!—inane questions. The first edition included the *Brown* case and an abbreviated notation of developments subsequent to it.[18] This new edition omits *Brown* and includes only five paragraphs of *Swann v. Charlotte-Mecklenburg Board of Education*.[19] Equity's role in racial integration of the schools is probably not appropriate for extensive inclusion in this book because it may better be covered in other courses, or because adequate treatment would require too many pages[20] or because it is altogether too familiar. Nevertheless, this reviewer was sorry that *Brown* had been dropped.[21]

The other major section of the book, that on restitution, is a rich presentation of the grounds for and uses of the legal as well as equitable remedies (*e.g.* quasi-contract, constructive trust, equitable accounting) for prevention of unjust enrichment. This section expands and brings up to date the material presented in the first edition. The title of the first edition was *Equitable Remedies*. That has been changed, in this edition, to *Equitable Remedies and Restitution* and more accurately reflects the area covered by the contents.

In addition to the three major sections on specific performance, injunctions, and restitution, there are seven smaller chapters: "Equity in the English and American Courts"[22] (historical introduction), "Reformation and Rescission for Mistake,"[23] "Rescission for Misrepresentation,"[24] "Law and Equity Merger: Jury Trial and Other Problems,"[25] "Enforcement of Decrees,"[26] "Control of Persons and Things Within and Outside of the State,"[27] and "Bills of Peace, Interpleader, Quieting Title, Declaratory Judgments and Other Remedies."[28]

These minor chapters embody some changes in order and emphasis. The one on merger of law and equity is new; it is a welcome, needed addition. "[D]istinctions between law and equity necessarily persist," the editors observe, "in spite of the almost universal procedural merger of the two systems. Moreover, almost all of the material in this volume reflects the continuing and engrained judicial practice of treating law and equity con-

---

Zickler v. Koota, 389 U.S. 241 (1967). *See* VAN HECKE, LEAVELL and NELSON at 520-36.

[18] M. VAN HECKE, *supra* note 13, at 468-70.

[19] 402 U.S. 1 (1971). *See* VAN HECKE, LEAVELL and NELSON at 401-02.

[20] Professor Fiss deals with the subject by presenting the history of litigation in the first five years of the Montgomery school desegregation case. O. FISS, INJUNCTIONS 415-81 (1972).

[21] This omission is a minor objection arising more from this reviewer's nostalgia than from trenchant criticism.

[22] VAN HECKE, LEAVELL and NELSON at 1-11.

[23] *Id.* at 109-64.

[24] *Id.* at 165-99.

[25] *Id.* at 577-604.

[26] *Id.* at 605-44.

[27] *Id.* at 645-69.

[28] *Id.* at 670-710.

ceptually as separate categories of substantive rules and remedial devices."[29] In this new chapter, and throughout the book, the editors precipitate the reader into a confrontation with several unanswered questions: What is equity? What is the distinction between law and equity? What differences might the distinction make? To what positive uses may equity be put and how? What sense does it make to talk about "equity" after merger? Answers to these questions await solution by future developments.

In the interest of full disclosure, it should be pointed out that this reviewer studied equity under one of the editors of the book, Professor Robert Leavell, and is an unabashed admirer of his. That confession aside, it is my scholarly judgment that this is a truly fine casebook. The class of two hundred students whom I am presently taking through the book agree. In fact, they are taking delight in it, and that is the ultimate tribute to the cases, to the subject matter and to all three of the editors.

This volume is highly recommended, and its editors are to be heartily thanked for so useful and thoughtful a contribution to the law and its teaching.

---

[29] *Id.* at 600.