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Book Reviews

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BOOK REVIEWS

CASES AND MATERIALS ON RESTITUTION. By John W. Wade.[1] Brooklyn: The Foundation Press, Inc., 1958. Pp. xxxi, 903. $11.00.

Restitution is a subject in which controversy and imprecision begin on the title page. A considerable proportion of the subject has long been taught in American law schools, masquerading under such titles as "Quasi-Contracts," "Equity," "Remedies," and the like. The term "Restitution" as a designation for a separate field of law is relatively new, dating back only to 1937 when the American Law Institute published the *Restatement of Restitution*.[2] Until a relatively recent period the subject matter now assembled under the generic term "Restitution" was not dealt with as a unit by law writers or law schools, but was considered piecemeal under other rubrics. But it is now generally recognized that, however diverse may be the situations included within the field, there is a predominant purpose which the law serves in actions of restitution and that there are principles which run through the entire subject, so that it is entitled to be regarded as a distinct branch of the law.

The law of civil obligations may be viewed as a tripartite structure —divided into tort, contract, and restitution. The three divisions serve different functions: (a) The law of contract enforces promises. The postulate of the law of contract is that a person is entitled to receive what another has promised him. It protects the expectation interest. (b) The law of tort provides compensation for harm. Its postulate is the protection of the security interest. (c) Then there is a third postulate, sometimes overlapping the others, but different in its purpose, viz., the postulate that a person has a right to have restored to him an unjust benefit gained at his expense by another. Restitution, then, is the third estate of the private law of obligations.

This excellent casebook by Dean Wade is organized—like most of its predecessors in the field[3]—according to a scheme which catalogues the various situations in which a right to restitution may arise, *i.e.*,

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1. Dean, School of Law, Vanderbilt University.
2. The reporters for this Restatement were Professors Warren A. Seavey and Austin W. Scott.
3. The main predecessors were THURSTON, CASES ON RESTITUTION (1940) and Durfee & Dawson, CASES ON REMEDIES—RESTITUTION AT LAW AND IN EQUITY (1939). This latter work has just appeared in a new edition, Dawson & Palmer, CASES ON RESTITUTION (1958). The seminal casebook in this field was 3 COOK, CASES ON EQUITY (REFORMATION, RESCISSION AND RESTITUTION) (2d ed. 1932).

the various ways in which an "unjust benefit" may be conferred or acquired. Thus the book is organized into six chapters:

1. Introduction
2. Benefits Voluntarily Conferred
3. Benefits Conferred Under Legal Compulsion
4. Benefits Acquired Through Wrongful Conduct
5. Benefits Conferred in Performance of an Agreement
6. Benefits Obtained Through Mistake

The introductory chapter gives a key to the distinctive emphasis of the book, an emphasis on the procedural aspects—the remedies available and the results which they accomplish. Here the reader may catch a threshold glimpse of the varied arsenal of legal and equitable remedies for restitutionary relief: assumpsit, the constructive trust, the equitable lien, subrogation, equitable accounting. The historical background of the rise of indebitatus assumpsit is given fairly brief treatment: the Introductory Note to the *Restatement* plus Lord Mansfield's classic opinion in *Moses v. Macferlan*.[4] But enough is here to suggest the truth of Sir Henry Maine's famous aphorism: "So great is the ascendancy of the Law of Actions in the infancy of Courts of Justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure."[5]

The second chapter, dealing with "Benefits Voluntarily Conferred" without mistake, depicts (in less than fifty pages) the direct clash between the principle of restitution for unjust enrichment and the principle that no person should be forced to pay for a benefit thrust upon him. In the common law system the second principle has generally prevailed. This result is achieved by three doctrinal techniques: abusive epithet ("officiousness"), evasive ambiguity ("volunteer"), and fictional presumption ("presumption of gratuity"). The cases show this area to be one of the most unsatisfactory in the whole field of Restitution. One wonders whether the Civil Law (in its doctrine of negotiorum gestio) does not have a better answer to the basic question: to what extent should the legal system approve unsolicited intervention in another's affairs, by awarding restitution for benefits thus conferred?[6]

The third chapter, "Benefits Conferred Under Legal Compulsion," is a separate treatment of a topic usually lumped with duress and undue influence under the general heading of "Coercion." Here money or other property is paid under compulsion of a judgment. It now turns out that the judgment creditor had "no right" to the money.

4. 2 Burr. 1005, 97 Eng. Rep. 676 (K.B. 1760).

5. MAINE, ANCIENT LAW 389 (1861).

6. The doctrine of negotiorum gestio is illustrated in the casebook by the Louisiana case of *Police Jury v. Hampton*, p. 44.

Can the judgment debtor get restitution? Or alternatively it turns out that payment of the judgment has conferred a benefit on a third party by extinguishing his liability to the judgment creditor. Can the judgment debtor get contribution or indemnity from the third party? The short selection of cases here suggests the doctrinal intracacies without by any means exhausting the topic or the reader.

The fourth chapter, "Benefits Acquired Through Wrongful Conduct," groups together cases of theft or embezzlement, where there is no contract, with cases of fraud or duress, where there is a contract between the parties. Here restitution may serve a compensatory function, and thus the remedy considerably overlaps into the field of tort. It is obvious, for example, that the tort actions of replevin and trover are in substance restitutionary. Many of the cases in this chapter are classified in the old books under the delusive rubric "waiver of tort and suit in assumpsit."

In general one can say that, despite the overlap, the restitutionary remedy differs from the tort remedy in two basic respects: (a) The concept of fault has no central place in the law of restitution. Quasi-contractual liability, like contractual liability, is normally liability without fault, although of course it may arise from tortious conduct in which there is fault. (b) The measure of recovery in restitution is not loss to the plaintiff (as in tort), but benefit to the defendant (however artificially this "benefit" may be defined).

Restitution also overlaps into the field of Contract. Chapter 5 deals with this area and is entitled "Benefits Conferred in Performance of an Agreement." Perhaps the main work of Restitution is done in the field of express contract, awarding value restitution of performances rendered in actual or supposed conformity with contractual obligations. This chapter deals with that great variety of cases in which recovery on the contract itself is not permitted, because of breach, non-compliance with the Statute of Frauds, impossibility, illegality or defective capacity.

But here again note that, despite the overlap, there are two basic differences: (a) The law of contract protects the expectation interest, whereas the law of restitution normally protects only the reliance interest, and then only such elements of reliance as result in enrichment of the other party. (b) Unlike contractual obligations, which are consensual in origin, the obligation to make restitution is imposed by law irrespective of the will of the obligor. In this respect, of course, it is like the tort obligation.

The last chapter of the book deals with "Benefits Obtained Through Mistake," the most difficult and confused subject in the law of Restitution, perhaps in all of the law of obligations. The cases here are concerned with those complex conditions under which there is a

right to restitution because of a mistake in the conferring of a benefit. There is, of course, no universal rule that one who makes a mistake in the conferring of a benefit is entitled to restitution. Where the mistake is induced by fraud, relief is almost universally granted. But aside from the fraud cases, many policy factors influence the availability of the restitutionary remedy. Here, as elsewhere in the law of Restitution, the unjust enrichment formula is a principle and not a rule.

What of the selection of cases used to illustrate these various problems? It is here that Dean Wade has made his greatest contribution to the profession, for the originality of this casebook lies not so much in the organization of materials as in the selection of materials. One must remember that the collection of a group of cases in Restitution is no ordinary scissors-and-paste job. Restitution, alas, is a term unknown to legal treatises, encyclopedias and digests. The subject is not conveniently indexed. No digest heading brings together its precedents. They are scattered from Abandonment to Zoning, and only the practiced eye can pick them out. In the current judicial decisions applying restitution doctrines, only a minority of courts label them precisely, and for this reason one has difficulty in recognizing restitution decisions under their many disguises. The task which Dean Wade undertook was therefore one of considerable difficulty, and his achievement commands the highest admiration.

Of the 220 cases included in the book about half post-date the appearance of the *Restatement,* and many of these recent cases in fact quote the *Restatement.* This judicial reliance upon American Law Institute black letter law was rather surprising to me, because I have generally found the *Restatement of Restitution* rather unhelpful. But perhaps this is only to say that it is not a handy teaching device.

English cases are conspicuous by their relative absence: only nine are included here, and these are mainly the well-known classics.[7] Since the English courts are decidedly behind the American courts in formulating a systematic corpus of restitution doctrine,[8] this paucity of English authority is perhaps not surprising.

The test of a casebook, of course, is in the teaching; for however valuable a collection of such materials may be as a reference work to the practitioner (particularly in an emerging field such as this),

7. *Moses v. Macferlan,* p. 4; *The Fibrosa Case,* p. 539; *Sinclair v. Brougham,* p. 638; *Lady Hood of Avalon v. MacKinnon,* p. 845; *Holt v. Markham,* p. 872.

8. "Whatever may have been the case 146 years ago," said Lord Sumner in Baylis v. Bishop of London, (1913) 1 Ch. 140, "we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled justice as between man and man." Thus was repudiated Lord Mansfield's broad concept of assumpsit as an action for the prevention of unjust enrichment.

it is primarily designed as a teaching tool for students. How does this work fare in the crucible of the classroom? My own experience is this: I have taught Restitution out of three different casebooks, but most recently out of the Wade casebook, and find it not only most to my liking but indeed a superlative teaching tool. The old favorites are here.[9] But many sprightly new cases,[10] adroitly chosen for their human interest, enliven the book and animate class discussion.

The textual notes in the book are severely subordinated to the case materials, which again I find to my liking.[11] Written with complete economy of expression, Dean Wade's scholarly comments have only a delicate tincture of erudition, and therefore never become oppressive. The long string of citations, so characteristic of modern casebook annotation, is avoided.

Every reviewer is supposed to find at least one flaw in the book under scrutiny, and urge its correction in a later edition. Dean Wade and the Foundation Press have been most inconsiderate of reviewers in this respect. But I have found a linguistic impropriety in a note on page 177, which is perhaps a *lapsus linguae* or only a misprint. This is the reference to "intraspousal tort immunity." I had thought of suggesting that, in future editions, this should be made to read "interspousal" or perhaps "intrafamilial." But the present indelicacy may be too good to change.

One serious suggestion I do have for the distinguished editor of this casebook. It stems from the fact that there is no really good textbook in the field. Keener[12] and Woodward,[13] although still cited by the courts, are both works of considerable antiquity; and Dawson's brilliant little book[14] is only a monograph. The subject of Restitution still awaits its Prosser. This—a good one-volume text—is a task worthy of Dean Wade's next effort. But in the meantime one can only be grateful for his present contribution to this important subject.

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9. *E.g., Sherwood v. Walker*, p. 807; *Felder v. Reeth*, p. 145; *Marr v. Tumulty*, p. 353; *Concord Coal Co. v. Ferrin*, p. 676; *Vickery v. Ritchie*, p. 679; *Gaffner v. American Finance Co.*, p. 882.

10. *Hart v. E. P. Dutton* (alleged fascist sues publisher to establish constructive trust on profits from libellous book), p. 169; *Earl v. Saks & Co.* (sugar daddy buys fur coat for his dolly with surprising results), p. 257; *Harper v. Adametz* (indomitable torts scholar Fowler Harper sues real estate broker for secret profit made in fraud of both vendor and purchaser, court cites *Harper on Torts*), p. 265; Jersey City v. Hague (Jersey City sues the infamous Frank Hague to recover kickbacks extorted from city employees), p. 286; *Latham v. Father Divine* (intended legatee seeks to impress a constructive trust on testamentary gift to Father Divine, who was alleged to have caused death of decedent), p. 322.

11. Although this book is labeled "Cases *and Materials*," it sticks pretty much to the classic Langdell pattern and eschews the modern trend toward the monumental casebook-treatise.

12. KEENER, QUASI CONTRACTS (1893).

13. WOODWARD, QUASI CONTRACTS (1913).

14. DAWSON, UNJUST ENRICHMENT (1951).

EQUAL JUSTICE FOR THE ACCUSED. By a Special Committee of The Association of the Bar of the City of New York and The National Legal Aid Association. New York: Doubleday & Co., 1959. Pp. 144. $3.50.

As Judge Learned Hand once put it, a democratic society cannot afford to "ration justice." *Equal Justice for the Accused* is a careful report of what has been done and what remains to be done to achieve equal treatment under law for poor persons charged with crime. There is nothing particularly new in the findings and suggestions of this study, for they have been made many times before, but they gain authority in this presentation, the product of a diverse and qualified group which has thoroughly investigated the problem. This report grows out of the work, which was financed by the Fund for the Republic, of a joint committee of the Association of the Bar of the City of New York and the National Legal Aid and Defender Association.

The report is divided into two parts. The first part, consisting of chapters 1-3, is called "Representation of Indigent Defendants: The Necessity, the Past, and the Present." Chapter 1 deals with the necessity for representation. Chapter 2 looks into the history of defender systems and concludes with a discussion of the causes of the growth of voluntary- and public-defender systems. Chapter 3 considers the present methods of affording representation. In most of the communities which provide free legal services,[1] counsel is assigned by the courts, generally without compensation for services and often without reimbursement for expenses. In other communities, defender services are offered through private (non-governmental) legal aid societies or through a public defender who is selected non-politically and compensated for his services out of tax revenues. A few places employ a "mixed private-public system" in which control is non-political and substantial fractions of the necessary funds come from both private and public sources.

The second part of the report, consisting of chapters 4-7, contains the conclusions and recommendations of the Committee. Chapter 4 sets forth the six basic standards which the Committee considers are of primary significance in evaluating defender systems. They are:

1. It appears that the states under the Fourteenth Amendment are required, as a minimum, to furnish counsel in "serious" non-capital felony cases as well as in capital cases. See Slovenko, *Representation for Indigent Defendants*, 33 TUL. L. REV. 363 (1959). Mr. Harrison Tweed of New York, past President of the National Legal Aid Association, states in the Foreward to *Equal Justice for the Accused:* "For more than twenty-five years I have been interested in the efforts in different ways in various parts of the country to assure competent representation in the criminal courts for those who cannot afford a lawyer. What I have seen has not been calculated to bring joy to the heart of a lawyer interested in justice and in the legal profession (p. 5).

(1) The system should provide counsel for every indigent person who faces the possibility of the deprivation of his liberty or other serious criminal sanction; (2) The system should afford representation which is experienced, competent, and zealous; (3) The system should provide the investigatory and other facilities necessary for a complete defense; (4) The system should come into operation at a sufficiently early stage of the proceedings so that it can fully advise and protect and should continue through appeal; (5) The system should assure undivided loyalty by defense counsel to the indigent defendant; and (6) The system should enlist community participation and responsibility. In Chapter 5 each type of defender system (namely, the assigned-counsel, the voluntary-defender, the public-defender, and the mixed private-public systems) is evaluated in terms of the standards set forth in Chapter 4. In Chapter 6 the Committee sets forth its recommendations which are intended to aid a community in obtaining the type of system most suitable to its character and needs. In general, the Committee is of the opinion that the problem of legal representation for the indigent cannot be solved through the assigned-counsel method. It considers that the assignment system as a whole has proved a failure. The *American Bar Association Journal* has recently pointed out the anomalous fact that in federal courts, where the assignment of counsel is an essential jurisdictional prerequisite to a valid trial in all felony cases, the satisfaction of the obligation to furnish counsel is hit-or-miss, depending upon the availability of free assigned counsel or upon the graces of a state legal aid society.[2] The report concludes in Chapter 7 with "A Look Into the Future." The Committee's basic conclusion is that in many places in the United States today justice is not equal and accessible for all, and it hopes that this study will be but the beginning of a determined effort by all segments of the community to support and extend defender systems.

The problem of representation for indigent criminal defendants will become more acute in the various states, in view of recent decisions of the United States Supreme Court, which define a wide responsibility by the States for furnishing assistance for indigent criminal defendants. Charitable contributions which sustain voluntary defender offices may not long be relied upon for the discharge of the obligation. As demands increase, community fund authorities will become reluctant to continue the support of what is considered by many to be essentially a government obligation.[3]

2. Williams, *The Indigent Defendant: The Problem in the Light of Recent Decisions*, 45 A.B.A.J. 147 (1959); Mars, *The Problem of the Indigent Accused: Public Defenders in the Federal Courts*, 45 A.B.A.J. 272 (1959).

3. See Duggan, *Counsel for the Indigent Defendant in Massachusetts*, 2 BOSTON BAR J. 23 (No. 11, Dec. 1958).

Although this book is not concerned with the causes of crime and how to eliminate them, it may be well to point out that representation, although full and fair, will not upset the age-old proposition that poverty breeds crime. It will not demonstrate that penniless persons do not commit acts of crime. Furthermore, adequate representation will not dissuade the penniless person from the commission of crime. Curiously enough, it could well have the opposite effect by diminishing the deterrent effect of the law.

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