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FORTY-FIVE YEARS AS A REMEDIES TEACHER: A RETROSPECTIVE

GRANT S. NELSON*

INTRODUCTION

Little did I know in 1967, when I left practice to begin my teaching career at the University of Missouri-Columbia, that I would ultimately teach Remedies at least forty times over a forty-five year span as a legal academic. When Joe Covington called a few months earlier to inform me that my teaching load would include Constitutional Law and Remedies, my elation about the former course was outweighed by my disappointment at the prospect of teaching Remedies. Not only was Remedies my least favorite course in law school, it also represented my lowest grade. At the time, I would not have predicted that teaching Remedies and editing a Remedies casebook would immeasurably aid my teaching and scholarship in real estate finance and property, the major focuses in my academic career.

After being assigned to teach Remedies, I deliberated long and hard about my choice of casebook. Ultimately, I chose the fourth edition of the classic book, *Cases and Materials on Equity* by Professors Zechariah Chafee, Jr. and Edward D. Re.¹ As its title suggests, this casebook was dominated by the history of the law and equity, equitable remedies, and substantive equitable principles. Thus the bulk of my three-unit course consisted of coverage of specific performance, injunctions (in both procedural and substantive contexts), equitable defenses such as laches and unclean hands, equitable conversion, and contempt. I further supplemented the course with material on declaratory judgments and the right to jury trial in law and equity. While the course was described as “Remedies,” it was largely an equity offering. Damages were covered largely in the context of determining whether equitable relief was precluded by the existence of an adequate remedy at law. Restitution went largely untouched. In short, equity dominated the course and a bias in favor of equity coverage has colored my teaching ever since.

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1. ZECHARIAH CHAFEE, JR. & EDWARD D. RE, *CASES AND MATERIALS ON EQUITY* (4th ed. 1958).

I. THE EVOLUTION IN REMEDIES TEACHING MATERIALS

A major change in the nature of the Remedies course had already occurred in 1967 when Professors Kenneth H. York and John A. Bauman of the UCLA School of Law published their path-breaking casebook, *Cases and Materials on Remedies*,² which integrated the coverage of equity, damages, and restitution in one volume. Perhaps more than any other casebook, it signaled the major shift from separate offerings in equity, damages, and restitution to our present-day integrated Remedies course.

I became involved in this integration trend in 1971 when West Publishing Company asked Professor Robert N. Leavell of the University of Georgia School of Law and me to revise Professor Maurice T. Van Hecke's casebook, *Cases and Materials on Equitable Remedies*, which had been published in 1959.³ Our publication in 1973 of a renamed *Cases and Materials on Equitable Remedies and Restitution* casebook⁴ evidenced the inclusion by Professor Leavell of substantial material on Restitution, and marked for me the beginning of a career-long involvement in the production of Remedies teaching materials. Seven years later, we added Professor Jean C. Love of the University of Iowa College of Law as a co-editor.⁵ She substantially aided the expansion of our book by including significant and valuable independent coverage of Damages in contractual, tort, and civil rights settings. By the time of the fourth edition in 1986, we had changed the title of the casebook to *Cases and Materials on Equitable Remedies, Restitution and Damages*.⁶ We explained the change as follows:

The change in the title . . . reflects the expanded scope of the new edition. Extensive coverage is now given to damages, in addition to the remedies that were previously covered—injunctions, specific performance, declaratory judgments, rescission, reformation and the restitutionary remedies. As a result, the casebook is now suitable for courses in Remedies, Equitable Remedies, Equity, Injunctions, Damages, or Restitution.⁷

2. KENNETH H. YORK & JOHN A. BAUMAN, *CASES AND MATERIALS ON REMEDIES* (1st ed. 1967).

3. MAURICE T. VAN HECKE, *CASES AND MATERIALS ON EQUITABLE REMEDIES* (1st ed. 1959).

4. MAURICE T. VAN HECKE, ROBERT N. LEAVELL & GRANT S. NELSON, *CASES AND MATERIALS ON EQUITABLE REMEDIES AND RESTITUTION* (2d ed. 1973).

5. ROBERT N. LEAVELL, JEAN C. LOVE & GRANT S. NELSON, *CASES AND MATERIALS ON EQUITABLE REMEDIES AND RESTITUTION* (3d ed. 1980).

6. ROBERT N. LEAVELL, JEAN C. LOVE & GRANT S. NELSON, *CASES AND MATERIALS ON EQUITABLE REMEDIES, RESTITUTION AND DAMAGES* (4th ed. 1986).

7. *Id.* at xv.

With the publication of the fifth edition in 1994,⁸ we welcomed a new co-editor to our team—Professor Candace S. Kovacic-Fleischer of the American University Washington College of Law. She is a renowned restitution scholar who added a separate damages chapter, and her overall contributions have added immeasurably to the quality of the casebook. The four of us also produced the sixth edition in 2000.⁹ Unfortunately, in 2004 we lost our revered colleague, Bob Leavell, to a tragic automobile accident. However, the three of us have persevered to produce two more editions, the seventh and eighth, in 2005¹⁰ and 2011¹¹ respectively.

The past four decades have witnessed the production of numerous high quality Remedies casebooks and treatises. Professor Dan Dobbs's three-volume treatise, *Dobbs Law of Remedies*¹² remains a leading work in the field. Professor George Palmer's multi-volume treatise on restitution is still a classic.¹³ The recent Restatement (Third) of Restitution and Unjust Enrichment¹⁴ adds immeasurable scholarly heft to the law of Remedies. Moreover, the current scene boasts of numerous casebooks by leading academics including the following: Douglas Laycock;¹⁵ David Levine, David J. Jung, and Tracy Thomas;¹⁶ Doug Rendleman and Caprice Roberts;¹⁷ Russell L. Weaver, David Partlett, Michael Kelly, and W. Jonathan Cardi;¹⁸ Emily

8. ROBERT N. LEAVELL, JEAN C. LOVE, GRANT S. NELSON & CANDACE S. KOVACIC-FLEISCHER, *CASES AND MATERIALS ON EQUITABLE REMEDIES, RESTITUTION AND DAMAGES* (5th ed. 1994).

9. ROBERT N. LEAVELL, JEAN C. LOVE, GRANT S. NELSON & CANDACE S. KOVACIC-FLEISCHER, *CASES AND MATERIALS ON EQUITABLE REMEDIES, RESTITUTION AND DAMAGES* (6th ed. 2000).

10. ROBERT N. LEAVELL, JEAN C. LOVE, GRANT S. NELSON & CANDACE S. KOVACIC-FLEISCHER, *CASES AND MATERIALS ON EQUITABLE REMEDIES, RESTITUTION AND DAMAGES* (7th ed. 2005).

11. CANDACE S. KOVACIC-FLEISCHER, JEAN C. LOVE & GRANT S. NELSON, *EQUITABLE REMEDIES, RESTITUTION AND DAMAGES: CASES AND MATERIALS* (8th ed. 2011).

12. DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION* (2d ed. 1993).

13. GEORGE E. PALMER, *THE LAW OF RESTITUTION* (1978).

14. *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* (2011). The reporter is Andrew Kull, Austin B. Fletcher Professor of Law, Boston University.

15. DOUGLAS LAYCOCK, *MODERN AMERICAN REMEDIES: CASES AND MATERIALS* (4th ed. 2010).

16. DAVID I. LEVINE, DAVID J. JUNG & TRACY A. THOMAS, *REMEDIES: PUBLIC AND PRIVATE* (5th ed. 2009).

17. DOUG RENDLEMAN & CAPRICE L. ROBERTS, *REMEDIES: CASES AND MATERIALS* (8th ed. 2011).

18. RUSSELL L. WEAVER, DAVID F. PARTLETT, MICHAEL B. KELLY & W. JONATHAN CARDI, *REMEDIES: CASES, PRACTICAL PROBLEMS AND EXERCISES* (2d ed. 2010).

Sherwin, Theodore Eisenberg, and Joseph R. Re;¹⁹ and Elaine W. Shoben, William Murray Tabb, and Rachel M. Janutis.²⁰ In short, the Remedies course currently is blessed by a strong cadre of teachers and scholars.

II. THE CURRENT STATUS OF REMEDIES: SOME OBSERVATIONS

For the span of my teaching career, the Remedies course has occupied an ambiguous and often tentative place in the law school curriculum. It is sometimes a stepchild, and often either ignored or threatened by law school faculties. What follows are my insights concerning the present status of Remedies.

- Remedies continues to be my most difficult teaching assignment because it requires a significant knowledge of numerous law school courses, many of which I have seldom, if ever, taught. I assume many, if not most, Remedies teachers share in this observation. Because injunction procedure and practice and contempt are integral parts of the Remedies course, an understanding of civil procedure is clearly necessary. Similarly, other courses that are crucial or highly relevant to a Remedies teacher are Property, Contracts, Torts, Criminal Law, Constitutional Law, Civil Rights, Business Associations, Wills and Trusts, Intellectual Property, Administrative Law, Labor Law, Alternative Dispute Resolution, Real Estate Finance, and Federal Courts. Indeed, this list encompasses most of the core courses in the law school curriculum. As a result, entry-level teachers often find the Remedies course particularly challenging. Even experienced teachers rarely have taught all or most of the above courses. Indeed, after over four decades of teaching Remedies, I have taught less than half. Each year I teach Remedies, I must refresh myself about significant aspects of courses such as Contracts, Torts, Criminal Law, Will and Trusts, Business Associations, and Federal Courts.

- Students, likewise, find Remedies to be one of their most challenging law school courses. They often tell me that they have a difficult time “putting it all together.” They continually search for commercial outlines and other student aids. I shared much of this puzzlement not only as a 1960s law student, but also as a beginning Remedies teacher. As many of my colleagues in this symposium surely have concluded over the years, it is difficult to agree on the appropriate content of the Remedies course. More on this later in this commentary. In any event, I have the strongly held view that Remedies should be a “capstone” course for most law students. Third-year students who have had many, if not most, of the courses listed in the prior paragraph frequently describe their experience in Remedies as “tying law school courses together”

19. EMILY SHERWIN, THEODORE EISENBERG & JOSEPH R. RE, AMES, CHAFEE, AND RE ON REMEDIES: CASES AND MATERIALS (2012).

20. ELAINE W. SHOBN, WILLIAM MURRAY TABB & RACHEL M. JANUTIS, REMEDIES: CASES AND PROBLEMS (5th ed. 2012).

and as “providing them with a more global understanding of the law.” Not only are students probably correct in this assessment, many Remedies teachers experience a similar reaction themselves. For these fortunate academics, there can be a significant academic payoff, an issue I cover later herein.

- The content of Remedies courses varies more substantially than is the case with other law school offerings. Most casebooks simply contain more material than can be covered in the typical three-unit Remedies course. Remedies teachers “pick and choose” to a greater extent than their counterparts teaching other courses. To some extent, there is a “path dependence” to what we select. In my case, since equitable principles govern much of my non-Remedies research interests, I tend to cover more equitable topics than may be common for other teachers. Injunctions, specific performance, real estate tort remedies, and equitable conversion may see more coverage in my course than in courses taught by my colleagues, Jean Love or Candace Kovacic-Fleischer, who may tend to stress to a greater extent damages and restitution. My conversations with other Remedies teachers lead me to believe that this type of variation is typical among Remedies teachers nationally. In any event, most of us make sure that our coverage is broad enough to encompass the topics typically covered by most bar examinations.

- Perhaps more than any other law school course, Remedies frequently lacks a built-in protective constituency on law school faculties. My anecdotal observation over a lifetime of teaching Remedies is that the majority of its teachers have their core research and scholarship interests elsewhere in the curriculum. With the notable exception of such stalwarts as Professors Douglas Laycock and Dan Dobbs, for most teachers in the area, Remedies is a “service” or “utility infielder” course. Good faculty citizens and pre-tenure professors who lack institutional “clout” tend to be assigned to teach the course. Why is this significant in assessing faculty treatment of Remedies? Most veterans of countless faculty meetings and committee work will probably agree that curricular decisions are the product of two conflicting forces—a genuine concern for the quality of the law school experience for students and faculty self-interest. When questions concerning Remedies arise in the faculty context, since fewer professors have a vested research interest in the subject, it is easier for them to sacrifice the course in the name of “curricular reform.”

- As I emphasized earlier, for those of us (probably the majority) for whom Remedies is primarily a service course, there can nevertheless be a substantial scholarly payoff that is more accessible to us than for colleagues who do not teach Remedies. Even though I have authored only one article expressly dealing with Remedies issues,²¹ as a real estate finance and property scholar, I have benefited enormously from my long-time involvement with

21. See Grant S. Nelson, *Purchase-Money Resulting Trusts in Land in Missouri*, 33 MO. L. REV. 552 (1968).

Remedies and remain particularly grateful to my first dean, Joe Covington, for assigning me to teach it. Mortgage law, after all, developed in English equity courts.²² The fifteenth century concept called the “equity of redemption” is not only the product of equity, it is part and parcel of the law of mortgages today.²³ I remind Property and Real Estate Finance students alike that when a contemporary homeowner talks about the equity in his or her house, the concept is the product of English equity courts. Moreover, equitable doctrines or defenses such as subrogation,²⁴ marshalling, unclean hands, unjust enrichment, and estoppel have been especially important factors in my scholarship. In addition, teaching Remedies has played a significant role in my scholarship concerning suits to enjoin or set aside non-judicial foreclosures.²⁵ In my role as a Co-Reporter for the Restatement (Third) of Property: Mortgages,²⁶ my experience as a Remedies teacher proved to be a major advantage to our work. I often advise entry-level teachers whose major interests lie in such basic courses as Civil Procedure, Torts, and Property to volunteer to teach Remedies. For Civil Procedure teachers, the law of injunctions and contempt are a branch of Civil Procedure, even though this area gets at most minor treatment in the first-year course. For example, the law of injunction bonds is replete with public policy issues that are uniquely suited to tenure or tenure-track scholarship.²⁷ Constitutional Law teachers would

22. GRANT S. NELSON & DALE A. WHITMAN, REAL ESTATE FINANCE LAW § 1.2, at 5–7 (5th ed. 2007).

23. *Id.* §§ 1.3–1.4, at 7–10.

24. See Grant S. Nelson & Dale A. Whitman, *Adopting Restatement Mortgage Subrogation Principles: Saving Billions of Dollars for Refinancing Homeowners*, 2006 BYU L. REV. 305 (2006).

25. See NELSON & WHITMAN, *supra* note 22, § 7.22, at 660–64.

26. RESTATEMENT (THIRD) OF PROP.: MORTGAGES (1997).

27. Policy questions concerning the injunction bond requirement for temporary restraining orders and preliminary injunctions are numerous. For example, should such a bond be mandatory or discretionary? If mandatory, should the absence of bond be jurisdictional? Should a bond be waived when the plaintiff is indigent? Is the waiver of the bond for indigent plaintiffs constitutionally mandated? Should bonds be waived for public interest plaintiffs? On the other hand, if courts waive a bond, does that violate the due process rights of a defendant who is damaged by a wrongfully issued injunction? Should a wrongfully enjoined defendant be able to recover damages in excess of the bond? Should such a defendant be able to recover attorney’s fees? See generally DAN B. DOBBS, LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 2.11(3), at 205 (abr. 2d ed. 1993) (discussing problems raised by injunction bond cases); KOVACIC-FLEISCHER ET AL., *supra* note 11, at 86–111 (covering bonds and other forms of security); Dan B. Dobbs, *Should Security Be Required as a Pre-Condition to Provisional Injunctive Relief?*, 52 N.C. L. REV. 1091 (1974) (describing the nature and purposes of the bond requirement and proposing a statutory amendment); Alexander T. Henson & Kenneth F. Gray, *Injunction Bonding in Environmental Litigation*, 19 SANTA CLARA L. REV. 541 (1979) (examining the effects of injunction bonds in environmental litigation); Erin Connors Morton, Note, *Security for Interlocutory Injunctions Under Rule 65(c): Exceptions to the Rule Gone Awry*,

clearly benefit from the extensive coverage of structural injunctions used to enforce constitutional rights in the state institutional context, a topic commonly covered in most Remedies courses. So too, the law of torts and property is infused with numerous remedial issues that are exposed by teaching Remedies.²⁸ Similar stories doubtless can be told by countless other Remedies teachers who have their primary research interest elsewhere in the law school curriculum.

CONCLUSION: THE FUTURE OF THE REMEDIES COURSE

As I stressed earlier in this Essay, there are significant law school institutional forces that are hostile or indifferent to law school Remedies courses. The course usually has no built-in constituency to protect it in internal curricular reform deliberations. It is not a required course in many, if not most, law schools. With that said, the Remedies course has one very important ally—state bar examiners. A substantial number of states continue to require that Remedies be separately tested on their bar exams.²⁹ In my view the bar

46 HASTINGS L.J. 1863 (1995) (exploring confusion over the waiver of injunction bonds); Note, *Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c)*, 99 HARV. L. REV. 828 (1986) (offering clearer standards for application of Rule 65(c)). The foregoing questions have profound policy implications and await fresh scholarly insights.

28 For example, should encroachments on real estate merit mandatory injunctions? Should the issuance of such injunctions be ameliorated by balancing the hardships and substituting damages? Should a vendor be entitled to specific performance of land sale contracts or should she be limited to damages? Should injunctions be available in the private nuisance and trespass setting? Should the tort of defamation or invasion of privacy be subject to injunctive relief? Do such injunctions violate the constitutional prohibition against prior restraints? See generally KOVACIC-FLEISCHER ET AL., *supra* note 11, at 789–832, 1051–1113 (exploring remedies for private nuisance and injunctive relief for interference with dignity interests); GRANT S. NELSON, WILLIAM B. STOEBCUK & DALE A. WHITMAN, CONTEMPORARY PROPERTY 912–28 (3d ed. 2008) (covering remedies for breaches of real estate sales contracts).

29 A survey of the websites for the boards of bar examiners in most states reveals that while a variety of approaches are used in testing Remedies on state bar exams, there is still a significant emphasis on that subject. At least thirteen states, including such large states as California, New York, and Michigan test Remedies or Equity as a separate essay subject. See, e.g., *Frequently Asked Questions*, MICHIGAN COURTS, [http://www.courts.michigan.gov/courts/Michigansupreme/court/ble/pages/frequently-asked-questions-\(faqs\).aspx](http://www.courts.michigan.gov/courts/Michigansupreme/court/ble/pages/frequently-asked-questions-(faqs).aspx) (last visited Nov. 9, 2012); *Scope of the California Bar Examination*, THE STATE BAR OF CALIFORNIA, <http://admissions.calbar.ca.gov/Portals/4/documents/gbx/BXScope-R.pdf> (last visited Nov. 9, 2012); *The New York State Bar Exam*, THE NEW YORK STATE BOARD OF LAW EXAMINERS, <http://www.nybarexam.org/TheBar/TheBar.htm#newyork> (last visited Nov. 9, 2012). Some other states (including Florida and Oklahoma) do not separately test Remedies or Equity on their bar exams, but their bar examiners indicate that the topic could be tested as a component of other officially listed subjects. See, e.g., *Florida Bar Examination Information*, FLORIDA BOARD OF BAR EXAMINERS, <http://www.floridabarexam.org/public/main.nsf/FLABarExamDates.html> (last visited Nov. 9, 2012); *Rules Governing Admission to the Practice of Law in Oklahoma*, OKLAHOMA BOARD OF BAR EXAMINERS, http://www.okbbe.com/docs/rules_governing_admission.pdf (last visited Nov. 9,

examiners are correct in imposing this requirement. They surely are in a better position to judge the importance of remedies in the practice of law than those of us who are academics. So long as bar examiners stress the importance of a Remedies course, it is unlikely to disappear from most law school course offerings. For that, I am grateful.

There may be another “pro-Remedies” force at work—entry level teachers. I have served on my law school’s “new to teaching” appointments committee for the past five years. My impression is that more faculty candidates are expressing a preference or at least a willingness to teach Remedies than has been the case in the past. Whether this reflects a genuine desire to teach Remedies or simply a grapevine message that this is what appointments committees want to hear is anybody’s guess. On the other hand, I am also aware of several entry-level teachers who not only are teaching Remedies but are exploring the subject as a primary research interest. I also sense that more new teachers view Remedies not just as a service course, but as a significant benefit to their research agendas in other subjects. This is a welcome development. In sum, I am optimistic that Remedies will find a place in the law school curriculum for many years to come. More importantly, I’m grateful that in the spring of 1968 my dean required me to teach Remedies.

2012). Finally, a number of states use the Multistate Essay Examination (MEE) as part of their bar exams. On the MEE, Remedies can appear on the exam as part of several listed topics, including: Contracts, Federal Civil Procedure, Real Property, and Secured Transactions. *See Subject Matter Outlines*, NATIONAL CONFERENCE OF BAR EXAMINERS, http://www.ncbex.org/assets/media_files/Information-Booklets/MEEIB2013SMO.pdf (last visited Nov. 9, 2012).