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Dobbs: Handbook on the Law of Remedies

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HANDBOOK ON THE LAW OF REMEDIES. By Dan B. Dobbs.* St. Paul, Minn.: West Publishing Co. 1973. Pp. XXIII, 1067.

*Reviewed By Kenneth H. York***

In the curricular sky, the Remedies Course is no bright, scintillating, stellar object, but consists rather in bits and chunks of primordial legal stuff (along with a lot of dust) that has been swept up to form a lumpy, uneven body which at times doesn't even hold together. It is also pock-marked by glancing blows from other objects inhabiting the same reaches of this academic cosmos, which it occasionally approached but never captured.

To measure Professor Dobbs' undertaking and (let us say it at the outset) his significant contribution to the subject, it is well to go back and trace the accretions to the body which we now call the Remedies course. The subtitle of Professor Dobbs' book indicates the subject matter embraced: "Damages-Equity-Restitution."

Let us begin with "Damages" as a separate component of the subject. Although it is the primary substitutional remedy of the common law, "Damages" does not loom large in the early texts—primarily because the early remedies for injuries to property interests were restitutionary, the law merchant was treated as something apart, and the automobile was uninvented. Besides, learned scholars have always been tempted to expound in terms of rights and duties, while mundane things such as the measure of recovery are consigned to the rear of the book. Blackstone wrote two volumes on "Rights" before getting down to the remedial aspects of matters under the heading of "Private Wrongs" in volume three.

But the practicing lawyer will tell you that the "facts" not the law cause the most trouble, and the client wants results, not theory. One of the earliest examples of a separate text on "Damages" was written in London in 1770 by Joseph Sayer, Serjeant at Law, who explained in his preface that an earlier booklet he had written on "Costs" was so well received by his colleagues at the bar that he was moved to provide an additional volume. One recognizes Serjeant Sayer as the type of fellow who today would be writing for the Practicing Law In-

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stitute and for Continuing Education of the Bar programs (with perhaps a bar review course on the side). Anyway he was close to the mark. In October, 1973, California lawyers, presented with a choice of 81 possible subjects for a continuing education program chose "How to Prove Damages."

The burgeoning of "Damages" as a distinctly separate legal subject came with the publication of two legal treatises by that name during the latter part of the 19th century. Between 1882 and 1916, J. G. Sutherland's text grew from two to five volumes, with 5,213 pages, exclusive of index, etc., while Harry Dwight Sedgwick's treatise went through nine editions between 1852 and 1912, gaining four volumes in the process. In later years their exhaustive treatises have not been updated. The explication of contract damages went off to the *Restatement of Contracts* and to treatises by Williston and Corbin; while the consideration of tort damages was left to the *Restatement of Torts* and various texts on that subject. Separate volumes on "Damages" remain, such as Professor Howard Oleck's *Damage to Persons and Property* (1955), and the oft-quoted, typically meticulous, hornbook by University of Texas Dean and Professor, Charles T. McCormick (1935).

As a separate law school subject, "Damages" has had a sparse and somewhat personalized history. Professor Floyd Mechem at Michigan produced a casebook around the turn of the century and the course was taught at Michigan. Professor Joseph Beale at Harvard not only wrote a casebook, but also, in his famous paper at the second annual meeting of the Association of American Law Schools in 1902 on the first year curriculum in law, prescribed "Damages" as one of the courses. Other casebooks were produced by Professor Judson A. Crane at Pittsburgh (1940) and Professors McCormick and Fritz at Texas (2d ed. 1952). However, the 1973 Directory of Law Teachers lists no one at Harvard, Michigan, Pittsburgh, or Texas as teaching a course dealing strictly with "Damages." *Sic transit*, etc.

Such is the somewhat neglected body of learning that Professor Dobbs has undertaken to incorporate as the first segment in his text.

The next component is "Equity," which in the grand concept has even been described as a system of jurisprudence. A course in "Equity" was for generations a universal staple of the law school curricular offerings. Even two decades ago, the teaching material available was voluminous—at least five casebooks were in use, including that of the well entrenched authorities, Professors Zechariah Chafee of Harvard

in collaboration with Sidney Post Simpson of New York University (a book actually traceable to James Barr Ames through Roscoe Pound); and that of the late Walter Wheeler Cook, former Professor of Law at Northwestern University. There were also standard texts by Professors McClintock and Walsh, and the six volume treatise of Professor Pomeroy, at that time in its 4th edition. And behind all this was a mountain range of previous writing. But "Equity" as a separate subject was vulnerable, as even its devotees were all too well aware. Aside from the fact that the "merger" of law and equity had virtually eliminated any procedural elements, the subject was programmed to partial self-destruction. It has been the pattern of "Equity" to expand jurisdiction into new problem areas, and, by applying its techniques, principles, and remedies, to create an independent body of doctrine which then splits off. This has been the case with the law of Trusts, of Mortgages, of Partnerships, etc. More recently, court decisions employing equitable doctrines have pretty much outlined such areas as Unfair Competition and Privacy, and the equity casebooks persistently hold onto these topics, although in the long run the attempt to retain a substantive area once developed is surely futile. Since this leaves little more for the course than some history, and the teaching of the whys and wherefores of Equitable Remedies (plus a lot of ad hoc moralizing which tends to become tiresome), the traditional Equity course has been subjected to distribution. The "history" went off, hopefully, toward Procedure courses; "specific performance" went to Contracts; "equitable servitudes" ran off with the land to Property; and "injunctions" became an unclaimed orphan.

At the present time, "Equity" as an entity is somewhat bereft. The last edition of Pomeroy's treatise on Equity Jurisprudence was published in 1941, and no significant texts have been added since. One excellent casebook (holding fast to the basic form) remains—the 5th edition of the Chafee and Simpson work (now edited by Judge and Professor Edward D. Re). The other major casebook (that of the late Walter Wheeler Cook) after a fourth edition by Professor Van Hecke of North Carolina, had a partial reincarnation as *Cases and Materials on Equitable Remedies* (1st ed. 1959) by Professor Van Hecke. The latest edition of the book, now authored by Professors Van Hecke (now deceased), Leavell, and Nelson, has edged off down the path to the all-encompassing "Remedies" course and has been given a new title: *Equitable Remedies and Restitution* (2d ed. 1973).

Of course, "Equity" as a distinct topic has been held together by the fact that about half of the state bar examinations continue to list

it by name as a subject. Yet even here there are defections; the California Board of Bar Examiners, for example, recently announced that it is replacing "Equity" with "Remedies," thus joining such states as Oklahoma and Texas.

It is from this huge body of partially fragmented and scattered material that Professor Dobbs has undertaken to construct the second component of his book.

The third major component of Professor Dobbs' work is "Restitution," a body of substantive law and remedial devices with an odd history. No remedies are older than the restorative remedies; no theory of substantive civil rights is demonstrably more ancient than the notion of unjust enrichment. (Did the clout on the head precede the theft of the club?). But "Restitution" as a law school course did not merit a listing of its teachers in West's Law Teachers Directory until 1940-41, and only then as an adjunct of "Quasi Contracts." ("Quasi Contracts," which in 1933 listed more teachers than the course in "Damages," quietly dropped out during World War II.) Why this sudden development? The answer is that "Restitution" is also an accretion of elements that had been scattered around for a long time. Specific restitution remedies both legal and equitable were well-known. Quasi contracts were long discussed in Contracts courses, and still are, although the preoccupation of Contracts instructors with something that is in no way a contract is difficult to explain (unless there is less to the law of Contracts than one would suppose). The real specialists in the law of Quasi Contracts edged away on their own, notably the text writers—Keener in 1893 (441 pages) and Woodward in 1913 (498 pages)—and casebook editors such as Professors James Brown Scott in 1905, Edward S. Thurston of Harvard in 1916, and Edwin W. Woodruff in 1933. There was some cagey hedging here. Professor Edwin W. Patterson in 1934 produced a casebook on "Contracts" but split it into two volumes—the second volume embracing "Rescission, Reformation and Quasi-Contracts"—and awaited developments.

And all of this while over in the "Trusts" courses there was much discussion of "constructive trusts," which have no more to do with trusts than quasi-contracts with contracts.

Suddenly all these items were brought together and "Restitution" came into existence. The catalyst, of course, was the publication of the *Restatement of Restitution* in 1937, which drew Quasi Contracts and Constructive Trusts alongside of each other if not really together.

Professor Thurston's 1916 Casebook on *Quasi-Contracts*, beefed up by a modicum of equity materials, reappeared in 1940 as *Cases on Restitution*. Professor Patterson's second volume on Contracts went for the main chance and was republished as "*Restitution*." A new casebook was published in 1939 by Professors Edgar N. Durfee and John P. Dawson, both then at Michigan. And finally an intellectual tone plus a sound substantive foundation was added by Professor Dawson's classic work on *Unjust Enrichment* in 1951. It was plainly a time whose idea had come. At present two fine casebooks are in use—a second edition (1969) of the Durfee and Dawson book (produced alone by Professor Dawson, now at Harvard) and another by Professor Wade of Vanderbilt, also in a second edition. Professor Wade has also extensively reviewed the substantial literature on "Restitution" in 19 *Hastings Law Journal* 1087-1118 (1969). That it should take over 30 pages just to describe and catalogue the literature dealing with the third major portion of the Dobbs textbook suggests that it is no small item to work into an already crowded volume.

This summary of the aggregate components of Professor Dobbs' book is intended to emphasize the extraordinarily formidable task confronting him and the eclecticism needed to engage it. He was not without tentative guidelines for consolidation of all remedial aspects of the law into one course; the idea is too obvious to have escaped close attention. The sheer magnitude of the venture has been the deterrent until recently. However, discernible evolutionary developments precede this hornbook. Perhaps the first genuine effort in this direction was a privately printed 980 page casebook, which appeared in 1910, authored by Dean Samuel F. Mordecai, Trinity College of Law, (now Duke) and Professor Atwell C. McIntosh of the same school. Taking a forthright, no nonsense, practical approach (which frankly has much to recommend it) the book opened with such matters as self help and stoppage in transit. It was obviously ahead of its time. Thirty years later when the subject of "Restitution" was enjoying its period of most rapid development, the experts seemed to foresee its ultimate incorporation into "Remedies," for the actual full title of the 1931 Durfee and Dawson book was *Cases on Remedies, II, Restitution at Law and in Equity*. Volume I, which was to deal with "Damages" was never published—a great loss indeed, as the contribution of two such legal minds in putting together a Remedies Course would have been invaluable. That it failed to emerge is but another proof of the inherent difficulty.

In 1954, John Cribbet, now Dean at Illinois, contributed a volume

called *Judicial Remedies* which laid common law actions alongside of equitable remedies; and a year later Professor Charles Alan Wright of Texas produced a short casebook on *Remedies*. Professor Wright's book has had a major influence on the evolution of the Remedies course because, although quite sparse on the equity component, it first demonstrated that "Damages" and "Restitution" could be effectively integrated in various contexts. Later casebooks by Professors York and Bauman of UCLA (2d ed. 1973) and by Professor Childres at Northwestern (1969), in differing fashions, have integrated the three components of the Dobbs book, so that it has not entirely lacked organizational models.

In estimating how well the author has succeeded in achieving a coherent integration of these disparate elements, it may be helpful to identify certain points of particular difficulty which have frustrated or at least afflicted every attempt along these lines:

1. Overall organization. This is the basic dilemma in all instances when traditional courses are combined. The easiest solution is that of the layer cake. Put a single cover on what is essentially two or more separate books, *e.g.*, take "Bills and Notes" plus "Sales" and call it "Commercial Transactions." Obviously such a book on "Remedies" is possible but essentially pointless. The principal justification for the course is the opportunity to analyze and compare the advantages and disadvantages of *all* available remedies in a given situation, and over two-thirds of Professor Dobbs' book is cast in this form. But it is awkward to make comparisons without some initial information as to what is being compared. Some casebooks on the subject, such as those by Wright and Childres, may choose to open without preliminaries, but a textbook can hardly avoid providing some background material. Anyone who tries will soon discover why the creation of what seemed to be such an inevitably necessary and useful curricular consolidation as "Remedies" was so long coming about, and why several attempts must have foundered amidst frustration. Although the aim of the course is an integrated treatment of remedial possibilities, the nature, purpose, and development of "Damages," "Equitable Remedies" and "Restitution" are so diverse (partly because substantive as well as remedial elements are involved) that they cannot be *introduced* in any coherent integrated fashion. The outcome is a "layer cake" of three introductory chapters on the separate components—which is exactly what the compiler was attempting to avoid. He discovers what he does not wish to admit—that at several points his material is neither logically coherent nor compatible and that at

the beginning, whether he likes it or not, he is still dealing with three traditionally separate courses laid side by side. Professor Dobbs, therefore, has three separate chapters on "Equity and Equitable Remedies," on "Principles of Damages," and on the "Principles of Restitution." Approximately 25% of the book is thus essentially introductory—by no means bad per se. Unhappily there is an inescapable side effect: *i.e.*, to illustrate the basic principles it is necessary to employ examples which are repeated later, or to engage in footnote cross references. This makes a tale twice told (accompanied by considerable thumbing back and forth). And the longer the introduction the more bothersome it is apt to be. The reaction is that produced when the instructor raises a problem, gets involved, and then drops the matter on the excuse that it will be covered later (maybe, sometime).

Perhaps because the now tentatively organized Remedies book cannot be gotten off with precisely the ideal organizational characteristics that the organizer may have wished for, the temptation is to insert *another* introductory chapter. Beginning chapters are always the last to be written. The attempt is to explain (seemingly in advance) what is known by the writer to be inexplicable, to account for the organization of what turned out to be unorganizable, and to provide a theoretical basis for what was done with common sense pragmatism and some urgency of deadlines. The authors of the York and Bauman casebook on "Remedies," under the usual post-natal illusion that there must be some cosmological explanation for what they did, devised and revised a preliminary chapter about remedial goals, means, and judicial adaptations thereto, so profound that the implications or utility of the piece, on occasion, escapes even the authors. In a vein of sympathy, not criticism, it is noted that the Dobbs book also offers such an introductory chapter (with again a lot of "see later" footnotes) about the "Nature of Remedial Problems." There are some interesting bits included, but the chapter somehow wanders off into a section on "Election of Remedies," which is really an election between affirming or disaffirming contracts, which in turn doesn't really mean anything for another 600 pages. I cannot believe this is really where Professor Dobbs wanted to be by page 13. It is akin to watching the drive from the first tee make a last second inexplicable hook to the out of bounds. This is only the practice tee, however, and the author, by now playing a familiar course, remains thereafter on target.

2. How much Equity? Since only equitable *remedies* are technically of relevance, the question arises as to the inclusion of materials which reflect the history and ethical elements which make the remedies

intelligible. Professor Dobbs has wisely opted to include these materials. This is the undistributable core of the traditional Equity course and is, I think, properly to be included in "Remedies," if for no other reason than to insure against its loss. More importantly, the administration of the harsh equitable remedies is a discretionary and sensitive business. The experience of the chancery courts is an invaluable store of instructive lore. Ignorance of that experience is too often reflected in the maladministration of equitable remedies by the "new chancellors," particularly in the federal district courts.

3. How much Restitution? The Dobbs book and the current Remedies casebooks could be drastically cut in size if the substantive content relating to "Unjust Enrichment" were excised. For example, a chapter on Remedies for "Mistake" is a misnomer, since the only remedies are restitutionary and the bulk of the chapter is really about the circumstances from which unjust enrichment may be inferred. The same applies to much of the chapter on "Duress, Undue Influence, and Other Unconscionable Conduct" and the chapter on "Unenforceable Contracts." Again Professor Dobbs has elected to include the substantive material, and I can perceive no alternative, absent the unlikely creation of a course on "Unjust Enrichment" to go along with "Torts" and "Contracts." For the present, any book which pretends to include "Restitution" must accept the whole bag as the authors of York and Bauman's casebook on "Remedies" learned from the first edition. The second edition perforce added a chapter on "Restitution" and "Unjust Enrichment"—considerations of logical analysis and aesthetic symmetry being laid aside upon the recognition that too much is otherwise lost.

4. Should other material have been included? If such problems as the classification of a mistake as "basic" or only "material" (with reference to the rescission of contracts) are considered of such importance in a course labelled "Remedies," why are such matters as class actions, taxpayers' suits, *qui tam* actions, or civil actions by governmental agencies given practically no space? This question is particularly troubling for these have become prime vehicles for effecting major social and economic reforms through judicial means. Or, if pregnant cows really have much to do with "Remedies," then why not a good deal more space on *mandamus*, *quo warranto*, *habeas corpus*, prohibition? These are fundamental queries as to the nature of the subject—and doubtless will soon affect its evolution—but the burden of inclusion is not to be venturously assumed in a hornbook.

In sum, the author has ranged over the whole conglomerate which is currently accepted as comprising the subject of "Remedies," with an organizational coherence better than might be expected from the somewhat heterogeneous nature of the materials—certainly the reviewer can do nothing other than commend the organization of a West Publishing Company hornbook which so well complements that of a West Publishing Company casebook.

At the same time this is not, in another sense, a model of the traditional hornbook. Expository in style and unremittingly didactic, the book may disconcert the student or researcher looking for the quick "bold face rule—majority—minority—Kentucky exception—here are the citations and what they say," form. Having avoided the practice of quantitative footnoting which has crowded out the text in a number of hornbook type works, Professor Dobbs has left himself considerable room to exercise his particular stylistic talents. He has done his homework, reached definite opinions, and advanced them without hesitation. The total effect is surprising to one accustomed to the use of a hornbook for a hurried reference as to what a half-forgotten citation was all about, or "here we need a rule, let's find a rule." Instead, the reader finds himself taken up in quibbles with the author's statements, engaged, if you will, in a dialogue with, of all things, a hornbook.

Item: On page 94 the author writes with emphasis:

The final judgment at law is not an *order* to the defendant; it is an *adjudication* of his rights or liabilities.

Comment: Wait a minute. A judgment at law is not simply a declaratory judgment. A judgment for damages is an *in personam order* to pay damages (or have some unpleasanties) just as much as a specific performance decree in equity. Walter Wheeler Cook explained all that back in 1915.

Item: On pages 140-41 the following hypothetical is posed (It is based on *Cohen v. Lovitz*, 255 F. Supp. 302 (D.D.C. 1966), except that there the contract for resale was made after the original contract of purchase was entered into):

The inaccuracy of the general measures of damages does not always favor the plaintiff. Perhaps the inaccuracy runs more often in favor of the defendant, especially when special damages are denied. For example, suppose a case in which Purchaser contracts to buy Blackacre from Vendor for \$100,000, deed to be delivered June 1. The market

value of Blackacre on June 1 is only \$102,000. The general measure of damages for the vendor's bad faith breach in such a case is the contract-market differential of \$2,000. Suppose now that Purchaser had a contract with Syndicate to re-sell Blackacre to Syndicate for \$125,000. If the vendor had not breached, Purchaser would have made a "profit" of \$25,000 in the transaction, and the breach clearly cost him that profit. But the general damages measure takes no account of expected profits on a resale; it looks instead to the *market* value. Thus the plaintiff would be obliged to claim the loss of profits on resale as "special" rather than general damages. This will subject him to the reluctance of courts to award special damages, and specifically to the limitations mentioned above. Very probably, the disappointed Purchaser will recover none of his expected profit, and will be limited to the \$2,000 recovery under the general damages rule.

Comment: That the vendor will recover no special damages seems indisputable, but not because of "inaccuracy of the general measures of damages" or the "reluctance of courts to award special damages." Rather it is because no problem is really there. To set the conditions for special damages would make somebody a candidate for immediate commitment—in which case the deal would be avoidable irrespective of measure of damage questions. (There really isn't a "Syndicate" out there dealing in land futures, is there?)

Item: On page 359 we read that:

In 1970, New York rejected its older cases and accepted the doctrine that some balancing was necessary. As a result the Court of Appeals [*Boomer v. Atlantic Cement Co.* 287 N.Y.S. 2d 112 (1967)] denied an injunction that would have closed a \$45 million cement plant and granted permanent damages instead. This decision may well draw into the majority camp any remaining holdouts against the balancing doctrine.

Comment: What the New York court did in *Boomer* was not to embrace the "balancing of the equities" principle in nuisance cases, but something far more drastic. It in effect denied equitable jurisdiction in complex air pollution cases except to the extent of substituting damages relief.

This sort of interlocution is by no means intended to suggest any sort of running disagreement with the author; such samples are trivial and rare. On the contrary, the reader or researcher will repeatedly find gratification for a distinctly clarifying bit of writing (*e.g.*, on interest and damages) or the reinforcement of positions long accepted, but now reviewed with freshness of insight. These are not the reactions one associates with traditional hornbooks; and this itself is a special

accomplishment. No serious reader will come away from it without having his thoughts rearranged, without a new appreciation for the logic and utility of bringing about the accretion of a course on "Remedies" from the loose material about, and without an admiration for the range of interest, monumental determination, and the free wheeling yet also acute scholarship, which accomplished the task which had deterred so many.