

De Funiak: Handbook of Modern Equity

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such instances written laws *in plain language* enacted by democratic processes should contain, in so far as possible, the answer. Justice Holmes' dissents are approved as examples of "plain English" and in one place the author quotes approvingly one of Holmes' plain spoken utterances: "The common law is not a brooding omnipresence in the sky," which, as you might guess, is also the author's view.

Professor Rodell does not say how extensive he thinks such written laws would have to be or how they would avoid the problem of abstraction. He gives one chilling specific example. He complains that statutes which now provide that first degree murder is punishable by death are so abstract that they give to the fact finder virtually complete discretion to determine which killings are punishable by death. His substitute faces up boldly to this difficulty:

When a court (whether judge or jury or both, or some other kind of a deciding body) finds that one person has killed another person and believes that the killer deserves to be electrocuted, the court may order that he be electrocuted.¹

Putting aside any temptation toward macabre humor which this little piece of draftsmanship induces, there are still some questions which it leaves open. Is this an example of a situation where we could all agree on a just solution, or is it an example of the new code in a situation where we could not agree? If this is, as it seems to be, a situation where agreement is impossible, I would like to hear about some where we could all agree. It looks to me as though this proposed code would be either far more abstract than existing law or far more detailed and complicated and a little less abstract.

Naturally, *we* would resist and *we* would have to be eliminated. His last chapter, "Let's Lay Down the Law," begins on this note: "The first thing we do, let's kill all the lawyers. (William Shakespeare, Henry VI, Part II)." In his first chapter, Professor Rodell fondly recalls a bit of wisdom from Harold Laski: "In every revolution the lawyers lead the way to the guillotine or firing squad." Probably, as the saying goes, Harold Laski's bright eyes used to twinkle shyly behind his round glasses when he would impart this bit of learning. Could Fred Rodell's eyes be twinkling? In a 1939 review of the book² Arthur Garfield Hayes, who was no stranger to the baroque, pondered in his last paragraph: "I know Fred Rodell. He is a great kidder. I wonder if he is taking us for a ride. I trust my language is not too legalistic, but I have been trained as a lawyer." The author's foreword to the new edition contains the answer to this question: "No."

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¹ P. 174.

² 49 Yale L.J. 974, 976 (1940).

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Handbook of Modern Equity. By WILLIAM Q. DE FUNIAK. 2d ed. Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1956. Pp. ii, 269. \$4.75.

A favorable specimen of the author's manner is found in the first chapter, "Origin and Nature of Equity." He states:

I am in no better position than other writers to give a brief definition which will then permit me to embark on a presentation of modern equity, which is the purpose of this book. To understand modern equity and its application requires a knowledge of the origin and development of equity. These latter [*sic*] will be presented hereafter as concisely as possible to the probable sacrifice of what may constitute scholarship. In the meantime, the reader will have to be content with the statement, however inade-

quate, that equity is a system of jurisprudence which originated and developed outside the common law courts of England to supply to suitors remedial relief not obtainable in the common law courts.¹

Commenting upon "Equity Jurisprudence in the United States" and pointing out there is no merger of common law and equity, he states:

The bar in the way of complete merger of law and equity into one homogeneous system is the fact that the federal and state constitutions have made provision for the continuance of the two systems.²

In Chapter Two, "Means of Equitable Relief," there is a brief analysis of: "Equity Acts upon the Person," "Power in Rem in Contract and Property Cases," "Injunctions," "Contempt," "Enforcement (by) Means Generally Other than Contempt," "Ne-exeat," "Sequestration Receivership." After remarking on the doctrine of anticipatory relief and the practicability of enforcement, the chapter concludes on the point raised in the famous *Salton Sea Cases*,³ viz., jurisdiction to grant relief where an act outside the territorial jurisdiction, such as Mexico is causing damage in the United States.

"Requisites for Protection against Torts" is the topic of the third chapter. The general rule for injunctive relief is discussed. The technical meaning of "property rights" as an expression of art is explained. The meaning of the phrase "inadequacy of the remedy at law" and the doctrine of "irreparable injury" receive brief attention. He has pointed out that relief will be granted in equity to avoid a "multiplicity of actions at law." It is further noted that relief will be granted in equity where damages at law are either speculative or conjectural. If the defendant is insolvent, does that make the remedy at law inadequate? The maxim, "He who comes into equity must come with clean hands," is explained in conjunction with the maxims, "He who seeks equity must do equity," and "Equity aids the vigilant, not those who slumber on their rights." At this point it is natural to find the doctrine of *laches*. The chapter concludes with the confusing doctrine, "Balancing of equities or conveniences." It is confusing because all judges do not possess the same legal philosophy.

The torts of Waste, Trespass, and Nuisance are approached from an equity viewpoint. Even the tongue twister "Purpresture" is included under "Protection of Public or Social Welfare."

Since *business* is a property right, it and all its aspects fall within the ambit of equity jurisdiction. That includes quasi-criminal acts, copyrights, patents, trade secrets, concrete ideas, and trademarks.

Protection of personal or individual rights, not relating to property rights, is left to the common law as a general rule. But there have been many border-line cases in which equitable relief has been granted on the ground the interest involved was a property interest. Even injuries to personal reputation are not relieved in equity where there are no property rights involved. But the author points out that in Louisiana an injunction may be granted to protect personal rights. If the personal right is within the definition of the modern Right of Privacy, equity will usually protect it by an injunction. Equity has refused to injunct shadowing by a detective and refused to prevent the use of a photograph of a lawyer that solved a heinous crime; it has refused to injunct publication of a biography claimed to be libellous; it has granted an injunction on behalf of the alleged father to remove from the bureau of vital statistics the name

¹ P. 2.

² P. 8.

³ 172 Fed. 792 (1909).

of an illegitimate child registered as his child. A New York case said: "Equity cannot by injunction restrain conduct which merely injures a person's feelings and causes mental anguish." In that case one woman was using the married name of another woman. In Texas an injunction was granted to prevent a man from communicating in any manner with a married woman; while in Ohio an injunction sought by a wife against a "Vampire" was denied.

The confusion that exists in the jurisdiction of equity in the "civil rights" cases is pointed out. It is stated: "Judicial language on the point has tended to become more and more emphatic in favor of equitable relief."

Where "social rights" such as membership in a club are in dispute the court of equity is reluctant to interfere in its internal affairs. Still there are instances of equitable relief where a property right is mixed with a social right.

The general rule is that equity does not exercise jurisdiction in political disputes because there is an adequate remedy at law. If due to an emergency the remedy at law would be inadequate there is a chance for equitable relief.

The equitable remedy of specific performance is succinctly discussed in twenty sections. All the high spots are touched upon, such as *mutuality*, *time of the essence*, *partial performance with abatement or compensation*, *part performance and the Statute of Frauds*, *contracts to arbitrate*, *contracts to build or repair*, *real estate contracts*, and *contracts relating to personal property*.

Included under defenses to specific performance are: hardship and inadequacy of consideration; fraud, undue influence, and mistake; illegality or impossibility; unclean hands, laches, and limitation of actions.

To this edition there has been added a brief analysis of the doctrines of reformation, and rescission or cancellation.

The volume concludes with the mention of other equitable remedies or forms of relief, such as: *Contribution*; *Subrogation*; *Bill quia timet*; *Bill of Peace*; *Bill of Interpleader*.

A valuable array of footnotes accompany the text for reference purposes. One case that might be added is the leading Illinois case of *Gavin v. Curtin*.⁴

The volume contains an index of cases and also a topical index. It is an excellent handbook of equity set up in good typographic form. It should be required reading for all law students and lawyers who want to refresh their recollection of equity.

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⁴ 171 Ill. 640, 49 N.E. 523 (1898).

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