

# EQUITABLE REMEDIES, RESTITUTION AND DAMAGES

CASES AND MATERIALS

Seventh Edition

Robert N. Leavell

Jean C. Love

Grant S. Nelson

Candace S. Kovacic-Fleischer

---

*American Casebook Series®*

THOMSON



WEST

# CASES AND MATERIALS ON EQUITABLE REMEDIES, RESTITUTION AND DAMAGES

**Seventh Edition**

By

**Robert N. Leavell**

1924–2004

*Late Alumni Association Professor of Law, Emeritus  
University of Georgia*

**Jean C. Love**

*Martha-Ellen Tye Distinguished Professor of Law  
University of Iowa*

**Grant S. Nelson**

*Professor of Law  
University of California, Los Angeles*

**Candace S. Kovacic-Fleischer**

*Professor of Law  
Washington College of Law  
The American University*

**AMERICAN CASEBOOK SERIES®**

**THOMSON**  
—★—™  
**WEST**

Thomson/West have created this publication to provide you with accurate and authoritative information concerning the subject matter covered. However, this publication was not necessarily prepared by persons licensed to practice law in a particular jurisdiction. Thomson/West are not engaged in rendering legal or other professional advice, and this publication is not a substitute for the advice of an attorney. If you require legal or other expert advice, you should seek the services of a competent attorney or other professional.

*American Casebook Series* and West Group are trademarks registered in the U.S. Patent and Trademark Office.

COPYRIGHT © 1959, 1973, 1980, 1986, 1994 WEST PUBLISHING CO.

© West, a Thomson business, 2000

© 2005 Thomson/West

610 Opperman Drive

P.O. Box 64526

St. Paul, MN 55164-0526

1-800-328-9352

Printed in the United States of America

ISBN 0-314-15074-9



TEXT IS PRINTED ON 10% POST  
CONSUMER RECYCLED PAPER



*To Bob—Whose dedication to this book  
continues to inspire us.*

*J.C.L., G.S.N., C.S.K-F*

\* \* \* \* \*

*To Pat.*

*J.C.L.*

*To Judy.*

*G.S.N.*

*To Walter and Ilona.*

*C.S.K-F*

\*

## Preface to Seventh Edition

---

The Seventh Edition of Cases and Materials on Equitable Remedies, Restitution and Damages builds upon the organization and the classic cases of the Sixth Edition, continuing to provide comprehensive coverage of the legal and equitable remedies that are available in actions for both public and private wrongs. At the same time, the Seventh Edition contains over 90 new cases and completely updated note materials. This casebook continues to feature discussion-provoking cases, and offers innumerable opportunities to debate competing remedial policies in the classroom.

Although this casebook is designed for a Remedies course (of any length), it is also suitable for a separate course in Equity, Injunctions, Restitution, or Damages. In fact, the first edition of this casebook was designed exclusively for a course in Equity, and only gradually did it evolve into a comprehensive Remedies text, as detailed in the Preface to the Sixth Edition. The first half of the Seventh Edition introduces the “basic principles” of injunctive relief, damages, restitution, and declaratory relief, in that order. The second half of the Seventh Edition provides an opportunity to consider these four types of relief as remedies for various types of harms in actions for tortious misconduct, breach of contract, and unjust enrichment.

The Seventh Edition contains extensive revisions to the early chapters on “basic principles.” The chapter on injunctive relief now features federal cases so that the reader can focus on a single set of procedures for seeking to obtain injunctive relief. Also, the cases in that chapter are now evenly balanced between actions for public and private wrongs. The chapter on damages has been greatly expanded, so that it is now equal in length to the chapter on injunctive relief. The chapter on damages focuses on a close comparison of the damages recoverable in actions for tortious misconduct and for breach of contract, and then ends with a section on damages for harm to the person which facilitates consideration of the many remedial issues posed by contemporary tort reform. The chapter on restitution has been reorganized to emphasize the distinctions between legal and equitable restitutionary remedies, and it now gives greater emphasis to the importance of proving a “benefit to the defendant” as a predicate to the recovery of restitutionary relief. The chapter on declaratory judgments now devotes more space to the history of the development of this modern statutory remedy, and the cases in that chapter are now evenly balanced between actions for public and private wrongs.

The second half of the casebook is filled with cases of current interest, such as the line of cases seeking injunctive relief that culminated in *Bush v. Gore*. In Chapter 6 (on tort remedies), the reader will consider such topics as whether there should be a cause of action for loss of consortium of a com-

panion animal, whether right to farm statutes are unconstitutional, whether presumed general damages should be available for violations of constitutional rights, and whether defamatory statements may be enjoined. In Chapter 7 (on contractual remedies), the reader will consider the distinction between the remedies for affirming and for disaffirming a contract, as well as the distinction between the remedies for breach of contract and for fraud. At the end of Chapter 7, the reader will have an opportunity to consider the explosive expansion in the use of arbitration, with a special focus on the questions of when an arbitration agreement is unconscionable and when an arbitration award may be vacated. In Chapter 8 (on the right to jury trial), the reader will study the distinction between the federal approach and the various state approaches to the right to jury trial.

While new cases have been added to the Seventh Edition, this casebook continues to feature cases on such topics as the legal and equitable remedies available to the victims of discrimination; emotional distress damages for the breach of a contract to provide child care or to construct a house; remedies for the breach of a surrogate mother contract; remedies for the breach of a promise to provide services during marriage or cohabitation; injunctions against nude dancing, gang activities, or activities related to prostitution; injunctions against abortion protests; and restitution to governments for the costs of tobacco-related illnesses. It also continues to feature cases involving environmental interests, commercial interests, and intellectual property law.

As in prior editions, we have edited our cases carefully, retaining each court's description of the relevant facts and of the competing legal principles that govern the remedial issues at hand, while deleting string cites, footnotes, and irrelevant textual material. Our deletions are marked by three asterisks; the court's deletions are marked by ellipses. We have retained the numbering of the footnotes as they appear in the original works; our footnotes are marked by an asterisk. Our manuscript went to press in December 2004, and we will be supplementing the Seventh Edition in the future to keep it up to date on recent developments.

We are very sad to report that our lead co-author, Bob Leavell, passed away in July of 2004. Bob was a brilliant contributor to this book and an important mentor for the three of us who remain responsible for this new edition. His influence endures.

For their support and encouragement of this casebook, we thank our respective law schools. In addition, we owe particular gratitude to our wonderful lead secretary, Melanie Stutzman, University of Iowa, and to our primary research assistant, Bill Fritz, for the endless hours that it took them to produce the Seventh Edition in its sleek new format. We are similarly grateful to Frankie Winchester, American University, who was the talented lead secretary on the Sixth Edition, and who has contributed substantially to the production of the Seventh Edition. We are also grateful to Christopher Clinton, Phil Lerch, Ebony Robinson, Kathleen Tam, and Josh Weide-

mann for their research assistance, and to Elizabeth Craig and Michelle Roddy for their painstaking proofreading. Finally, as always, we want to express special gratitude to our families and friends for their support, encouragement, and understanding during the preparation of this text.

JEAN C. LOVE

GRANT S. NELSON

CANDACE S. KOVACIC-FLEISCHER

April, 2005

\*

## Preface to Sixth Edition

---

In the Preface to the First Edition of this book in 1958, Professor M. T. Van Hecke noted that since 1948 the course in Equity had been modified so that it received fewer credit hours, was dispersed among other courses, or was limited to a course entitled Equitable Remedies. He noted that at the same time courts and legislatures were improving equitable remedies “to be used more effectively in times of changing conditions and needs.” Fifteen years later, in the Preface to the Second Edition of this book, Professors Robert N. Leavell and Grant S. Nelson noted that “the trend to which Professor Van Hecke alluded in his Preface has continued unabated.” Professors Leavell and Nelson also noted that courses in Remedies and Restitution fared better than a course in Equity, but that even those courses “are still rather grudgingly given the hours in the single quarter or semester allotted to them”. In the Preface to the Third Edition, Professors Leavell, Nelson and Jean Love optimistically believed that the result of developments in public law would “certainly” lead to “curriculum adjustment in many law schools, with increased emphasis upon the study of courses such as ‘Remedies’.” The Fourth Edition was expanded for use in a variety of Remedies or Equity courses, and the Fifth Edition emphasized a “full purpose text.”

Despite all of the developments described in earlier Prefaces, the trend identified by Professor Van Hecke and confirmed by Professors Leavell and Nelson, seems for the most part to continue still. Although areas of substantive law have increased enormously since 1958, both through the statutes and common law, the remedial aspects of those developments have not been given as great an emphasis in law schools as they deserve. Except in jurisdictions where Remedies is a category on the Bar Examination, the course is generally not required and its popularity varies. Few schools seem to have multiple offerings in Remedies, such as separate courses in Equity, Restitution, or Damages, each of which would contain enough substance to warrant an entire course.

Nonetheless, the Sixth Edition continues to be a full purpose text, which can be used for a variety of Remedies courses. In most schools, however, the Remedies professors will use the book for one course. The Sixth Edition contains cases from a variety of subject areas from which professors can choose to teach remedial principles. The Sixth Edition uses the same organizational structure as the Fifth although Chapter 8, “Restitution as the Only Remedy” has been folded into Chapter 4, “Restitution”. More explanatory material has also been added to that Chapter because Restitution continues to be underutilized and not well understood.

While new cases have been added to the Sixth Edition to reflect new developments in the substantive law in many areas, the Sixth Edition has retained many of the cases from the Fifth Edition. To make room for the new



cases, the remaining cases have been tightly edited, and some of the older cases and older string cites of authorities have been removed. As with the prior editions we have omitted from all of the cases string cites, footnotes and discussion not material to the remedial issues at hand. Those deletions have been marked with ellipses. We have retained the original footnote numbering of the cases and use asterisks for the footnotes we have supplied.

We want to thank our respective law schools for their generous encouragement and support. We would like to thank the talented and dedicated students who worked with us, as well as the talented and dedicated administrative assistants, without whose technical expertise we could not have completed this text in the era of computers. We would also like to thank the talented staff at West Group who moved the production along efficiently, but with tact, and whose production abilities we admire. Finally, as always, we want to express special gratitude to our families and friends for their support, encouragement and understanding during the preparation of this text.

ROBERT N. LEAVELL  
JEAN C. LOVE  
GRANT S. NELSON  
CANDACE S. KOVACIC-FLEISCHER

April, 2000

## Preface to Fifth Edition

---

In this edition we added three new chapters or subchapters—one on Basic Principles of Damages, the others on equitable defenses and personal injury—in order to make the book a full purpose remedies text. At the same time we retained the book's basic organization, its traditional emphasis and its examination of contemporary issues. We kept many of the discussion-provoking, classic cases, and also added many current cases that we expect will be good teaching vehicles.

We made one organizational change, rearranging the restitution materials. Those materials retain the same comprehensive coverage. There is an introductory chapter that contains cases and materials which explore the fundamentals of all restitutionary remedies, both legal and equitable. The remainder of restitution is dispersed throughout the book to integrate that material with other remedial concepts and to illustrate the uses of the various remedies in a wide variety of factual contexts. Any teacher wishing to teach restitution as a separate unit can still do so by assigning the units titled Restitution in order.

Despite these changes we believe that we have sufficiently preserved the approach and content of the earlier Edition so that the book will seem quite familiar to those teachers now using it. As in prior editions, we have omitted strings of citations, footnotes and dissenting opinions not useful for teaching purposes. We have marked citation and textual deletions with ellipses. We have retained the numbering of footnotes in the original works, and have used asterisks to indicate our footnotes.

We are grateful to our respective law schools and administrations for their substantial encouragement and assistance. We would like to thank the talented students who worked with us on the manuscript, galleys and pageproofs. Finally, we express special gratitude to our families for their support and understanding during the period that we were preparing this edition of the casebook.

ROBERT N. LEAVELL  
JEAN C. LOVE  
GRANT S. NELSON  
CANDACE S. KOVACIC-FLEISCHER

June, 1994

\*

## Preface to Fourth Edition

---

The change in the title of the Fourth Edition (from “Equitable Remedies and Restitution” to “Equitable Remedies, Restitution and Damages”) 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. The new edition is designed for a 3 or 4 hour course in Remedies, but the materials can be used selectively for shorter courses.

The organization of the Fourth Edition is primarily by types of equitable remedies, starting with an expanded chapter on injunctive relief. We believe that this is the preferable organization for a course that focuses on remedies (as opposed to substantive bases for imposing liability). Within each chapter, we frequently cluster the cases by subject matter. At the same time, we often sequence the cases so that the student focuses first on the plaintiff's case for equitable relief, then on the defenses to the remedy, and finally on the nature of the equitable decree. As part of the discussion of the plaintiff's case for equitable relief, we consider the plaintiff's legal remedies (emphasizing damages) because traditionally a plaintiff may obtain equitable relief only upon proof that the legal remedy is inadequate. Tort damages are covered in the chapter on injunctions; breach of contract damages are discussed in the chapter on specific performance; and fraud damages are examined in the chapter on rescission.

The Fourth Edition also develops a theoretical perspective by which remedies may be evaluated. It presents contrasting perspectives on the economic efficiency of damages and equitable remedies. These materials offer an opportunity to discuss important social policy issues raised by the law of remedies.

This edition has been thoroughly updated and it examines such contemporary social issues as the use of contempt to enforce child support decrees, the measure of restitutionary recovery in *Marvin*-type cases, the use of injunctive and legal relief to enforce surrogate mother contracts, and the development of common law remedies for retaliatory discharge and sexual harassment. In addition, it contains completely revised sections on the private enforcement of public nuisance law and the remedial discretion exercised by federal courts in environmental litigation. Finally, remedies for violations of constitutional and civil rights receive expanded coverage in this edition, although the coverage is pervasive throughout the book, rather than concentrated in one chapter (as in the prior edition).

While the casebook has been revised and updated, users of the earlier edition should feel comfortable with the Fourth Edition because it evolved

quite naturally from the Third Edition. Neither the fundamental style nor organization of the book has been changed. The book is longer, but that is due primarily to our decision to publish the text in a single-column format. We expect that readers of the Fourth Edition will welcome this modification.

As in prior editions, we have omitted strings of citations, footnotes and dissenting opinions not useful for teaching purposes. We have marked textual deletions with ellipses. Footnotes are ours unless otherwise indicated.

We are grateful to our respective law schools and administrations for their substantial encouragement and assistance. We would like to thank the talented students who worked with us on the manuscript, galleys and pageproofs. Finally, we express special gratitude to our families for their support and understanding during the period that we were preparing this edition of the casebook.

ROBERT N. LEAVELL  
JEAN C. LOVE  
GRANT S. NELSON

June, 1986

## Preface to Third Edition

---

At the time of the publication of the last Edition the equity and restitution areas were drawing special attention because of developments in the public law area, especially where civil rights are involved. This interest has increased as the courts continue to experiment with such remedies as the injunction, receivers and masters. Recent expressions of a need to return to a focus upon basics in law teaching and in lawyer preparation have added to a “renaissance” in the remedies area. Such statements have come from, among others, Chief Justice Warren Burger; the American Bar Association in its recently published report, “Lawyer Competence: The Role of Law Schools”; the supreme courts of several states, and; the federal courts of appeal in their revisions of standards for both admission and the privilege of continuing in the federal court practice.

One result of these developments is certain to be curriculum adjustment in many law schools, with increased emphasis upon the study of courses such as “Remedies.” Especially attractive will be those courses which consider current remedies developments in the public law area and which offer a general examination of traditional legal and equitable remedies in a variety of contexts.

This Edition is organized with those objectives in mind. It retains the coverage of basic remedies materials to be found in the earlier Edition, together with greatly expanded material on damages. The Third Edition contains a substantial amount of new material, including over 100 new cases and dozens of textual notes. Also, a significant new chapter has been added, entitled “Traditional Relief in a Modern Context: Selected Civil Rights Remedies.”

Despite these additions we feel we have sufficiently preserved the approach and content of the earlier Edition so that the book will seem quite familiar to those teachers using it now. For example, substantial attention continues to be given to the history of equity, specific performance, injunctions, practicability concerns, reformation, rescission, restitution, enforcement of decrees and law-equity merger problems. Moreover, this expansion in coverage has been accomplished without adding to the length of the book.

We are grateful to our respective law schools and administrations for their substantial encouragement and assistance. We also wish to thank those students who assisted us in the preparation of this Edition.

ROBERT N. LEAVELL  
JEAN C. LOVE  
GRANT S. NELSON

April, 1980

\*

## Preface to Second Edition

---

In the fifteen years since the First Edition the trend to which Professor Van Hecke alluded in his Preface has continued unabated. As a course, Equity finds it difficult to compete at all. Courses in Remedies and Restitution fair somewhat better; however, they are still rather grudgingly given the hours in the single quarter or semester allotted to them.

How this has come about is not easy to understand. Practitioners—and bar examiners—do not appear to have followed the academicians' tendency, and continue to indicate their feeling about the importance of this material in the education of a lawyer. It is due in part to the increasing complexity of several areas of public law, and the need to give more time and classroom hours to them. Recently, courses in environmental law, consumer protection, special problems of the poor, civil rights, and the like, have added to the brisk competition for classroom hours. This latter development, however, should stimulate a renewed interest in the basic course in equitable remedies and restitution.

Indeed, it is when new social demands make special demands upon the growth capacity of the law that the value of an understanding of equity and remedies is most apparent. Teachers with interests in such fields as those just mentioned will recognize the need for a grounding in equitable remedies and related legal remedies such as quasi-contract, and an appreciation of the origin and the creative spirit which infuses them.

Although we generally have followed Professor Van Hecke's organization, we also have found it necessary to add a substantial amount of new material to reflect recent developments. New material is especially evident in Chapter 6, reflecting the increasing use of the injunctive remedy in new and varied contexts. In a few areas we have made important changes in coverage and arrangement. Recent developments with respect to the right to trial by jury in situations involving mixed questions of law and equity require more attention than could be given to them if developed in relation to part of the content of one or more chapters. For this reason we have devoted a short chapter to this and related problems. Secondly, in the interests of keeping the book lean and readily adaptable to use in those courses where the teacher feels the hours allocated to the course are relatively small, we have reduced to very brief note status the material which deals with "Lack of Power and Mistaken Exercise of Power." However, we have sought to emphasize throughout the book the modifications which are taking place in the election of remedies situations, and the general impact upon this area of the merger of law and equity and the modern procedural systems. Finally, we have reduced substantially materials on Bills of Peace and Quieting Title in order to provide for consideration of Receiverships, Masters, Monitors and Sequestration.

We have added to the title the term “Restitution”, to make it more descriptive of the book as conceived by Professor Van Hecke. The extensive treatment given by him to quasi-contract, placed alongside the restitutionary material from equity, is continued in the current edition.

The cases and materials have been closely edited. Save in special situations, strings of citations, footnotes and dissenting opinions not useful for teaching purposes have been omitted. Footnotes are ours unless otherwise specified.

We express our appreciation for the permission granted by the publishers and authors of the selections from books and articles reproduced herein. We are also grateful for the assistance and encouragement of our law school administrations and for the valuable contributions of student research.

Finally, to our wives and families we express special gratitude for their patience and understanding during the period we worked on the Second Edition.

ROBERT N. LEAVELL  
GRANT S. NELSON

May, 1973

## Preface to First Edition

---

There have been two significant developments in Equity since the publication in 1948 of the Fourth Edition of Cook's Cases and Materials. (1) The status of the course in Equity in the law schools has been increasingly modified to conform to other changes in the curriculum. The modifications have taken these forms: dropping the separate course and distributing parts of the subject matter to other courses, including new courses in Equitable Remedies; retaining the separate course and considerably reducing the number of class-room hours available. (2) Meanwhile, uninhibited by these considerations, the courts and legislatures have continued to improve the equitable and related statutory remedies, so that the flexibility, discretionary concern for the individual situation and capacity for growth of these remedies might enable them to be used more effectively in times of changing conditions and needs. This casebook on Equitable Remedies is an effort to meet these developments.

It is substantially a new book, both in content and arrangement. The areas of substantive equity taught elsewhere in today's curriculum have been largely omitted. The cases and materials here presented, most of them the products of the last fifteen years, hew closely to the equitable and statutory remedies and to their operation, especially in courts where law and equity have been at least administratively merged.

The declaratory judgment cases are distributed for immediate contrast with the handling of comparable problems by the other remedies; the section on Declaratory Judgments is therefore largely a point of reference for the basic literature and statutes. Because the chapter on Jurisdiction seems to become more meaningful after the class has seen the various remedies in operation, it is placed last. However, those who prefer to take Jurisdiction first and to make other changes in the arrangement and order of chapters and sections will incur no appreciable loss.

The cases and materials have been closely edited. Save in special situations, strings of citations, footnotes and dissenting opinions not useful for teaching purposes have been omitted.

I want to thank the teachers of Equity in some forty schools who helpfully responded to my requests for advice and suggestions as to inclusion and exclusion, order and arrangement. I also want record my indebtedness to Mr. W. E. Bondurant, Jr., of the Roswell, New Mexico, Bar, to Mr. John P. Frank, of the Phoenix, Arizona, Bar, to Chief Judge Charles E. Clark, of the U.S. Court of Appeals for the Second Circuit, to Professor J. Francis Paschal, of Duke University, and to the late Professor Edgar N. Durfee, of the University of Michigan, for guidance and counsel.



And, I want to dedicate this book to Mrs. Van Hecke for her encouraging, companionable assistance.

M. T. VAN HECKE

Chapel Hill, North Carolina  
December, 1958