

BOOK REVIEWS

Cases on Remedies II: Restitution at Law and in Equity. By Edgar N. Durfee and John P. Dawson. Indianapolis: Bobbs-Merrill Co., 1939. Pp. xxxvii, 964. \$6.50.

Quasi-contract is the Little Orphan Annie of the law school curriculum. At first she sunned herself in the interstices of procedure. Professor Keener built for her a spacious mansion in two volumes¹ which remained on the outskirts of the curriculum. Like other suburban homes this one became obsolete in the course of a generation. Professor Thurston's compact bungalow² was better suited to the urban overcrowding, yet the child was still rather neglected. Professor Cook was the first to conceive the idea of housing her in a multiple-family dwelling, along with another waif known as Equity III.³ More recently she has found a home in the family hotel known as Contracts.⁴ Professors Durfee and Dawson have rescued her from this large and noisy family by placing her in one wing of the Remedies house, along with Equity III and constructive trusts. These three are now happily united, with the blessing of the American Law Institute, under the good old Roman family name, Restitution.⁵ The plans of Professors Durfee and Dawson resemble those of Architect Cook. However, this latest edifice is not a low-cost housing project, for its 955 pages will require a substantial allowance from the student's carefully budgeted time.

As I have no doubt of the excellence of this casebook, both as a scholarly piece of work and as a teaching tool for the purpose which the editors have in mind, my only question is as to its relation to the law school curriculum as a whole. Assuming that this course in Remedies II will be an elective course and will, in the normal competition of elective courses, be taken by substantially less than all of the students who go through the school, I am troubled by the prospect of placing Restitution on a side track. The basic division of the law of (private) obligations into contracts, torts and quasi-contracts (restitution) still has pedagogical value as a means of understanding historic continuity and as a set of elemental intellectual tools. The conception that one should make return for benefits conferred by another is at least as old and as pervasive as the conception that one should make reparation for wrongful harm or that one should fulfill one's promises. Contracts and torts (that is, a *part* of the subject matter of each) are required courses. Why should not a part of the subject matter of restitution be also a part of a required course?

¹ 1, 2 Keener, *A Selection of Cases on the Law of Quasi-contracts* (1888, 1889).

² Thurston, *Cases on Quasi-contracts* (1st ed. 1916). Of course, there are other well-known casebooks on quasi-contracts: Scott (1905); Woodruff (1905); Laube (1933 edition of Woodruff).

³ Cook, *Cases on Equity* (1st ed. 1924, 2d ed. 1932).

⁴ Havighurst, *Cases on Contracts* (mimeographed ed. 4 vols. 1932, printed ed. 1934).
1, 2 Patterson, *Cases on Contracts II* (1935). Goble, *Cases on Contracts I* (1937) contains some material on quasi-contract. Gardner, *Cases and Materials on the Law of Contracts* (1939) and the *Restatement of Contracts* (1932) both contain discussions of restitution.

⁵ Rest., *Restitution* (1937).

It may be argued that the doctrines of contract law and tort law are far more pervasive than is the law of restitution, that the student needs the former as indispensable tools in all courses. This may be true of contracts but it certainly is not of torts. The doctrines of restitution turn up in a good many fields of law, in a good many typical situations, which are not included in this casebook or in any other devoted wholly or in part to an exposition of restitution. Thus, contribution and indemnity in suretyship, and subrogation in insurance, are a good deal clarified by concepts of restitution. Some doctrines of agency also exemplify the principle of unjust enrichment. Professors Durfee and Dawson have not, as far as I can see, shown us the way in which the conception of restitution as an adaptable intellectual tool can be made available to the same extent as are the basic conceptions of contracts and torts.

Restitution in its manifold applications has many traditional and conceptual affinities. Considered as remedial devices, quasi-contract and constructive trust were historically separated by the division between law and equity; they may now be appropriately brought together in a course on remedies. Insofar as the obligation to make restitution is imposed on an individual regardless of his consent, it has a close resemblance to tort obligations. Yet most of the cases in which the obligation to make restitution is imposed arise out of consensual relations or attempts thereat. The best way to introduce restitution in the law school curriculum is therefore in the context of the law of contracts. This introductory material may well be supplemented by a specialized course in which the instances of restitution are more fully explored by those students who have enough interest to take the time for it.

In thus expressing my prejudices on the subject, I hope I am not aligning myself with either of the three well-known schools of thought on curriculum revision: One is that everything should be taught in the first year in order to prepare the student for what comes later. Another is that everything should be postponed until the third year in order that the student may be properly prepared for it. The third, the Maitland or "seamless web" school, believes that it is just as good (or bad) to plunge into the law at one place as another.

However that may be, Messrs. Durfee and Dawson have selected a group of generally interesting and representative cases, and have glossed them with copious editorial notes which show informed diligence and, at times, scholarly brilliance. I liked particularly the note on the bill for an accounting.⁶ There are only about 225 main cases in 955 pages, although the cases have been well condensed. The editorial matter, consisting of footnotes and textual notes, occupies perhaps a third of the space. (In the first 100 pages I estimated 40 pages of such matter.) The index seems inadequate to unlock this treasure for the reader who might use the book as a reference work. However, the table of cases cited is a novel and valuable feature which makes available the editors' comments on, or allusions to, about 2,000 cited cases, in addition to the main cases. The practitioner who realizes how hard it is to find quasi-contract cases in a trackless wilderness of digest will find this casebook a useful guide to pertinent analogies. Messrs. Durfee and Dawson have produced a stimulating and scholarly instrument of instruction.

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⁶ Pp. 61-6.

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