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Some Problems of Equity

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The instant case nevertheless pursues the modern trend toward stricter liability evidenced in the field of automobile accidents.[29] It presents practitioners with a potent means of avoiding the defenses of unavoidable accident and of contributory negligence in factual situations of this type. Once a wrongful entry is established, a member of the landowner's household may bring trespass to the person for injuries resulting from the trespass to land. On the other hand, a physically harmed landowner himself may bring trespass *quare clausum fregit* and allege his injuries by way of aggravation. In either event, by virtue of the combination of trespass to the person and trespass to land, the absence of negligence on the part of the defendant and contributory negligence of the plaintiff are both ruled out as possible defenses.

V. MORRIS SMITH, JR.

BOOK REVIEWS

SOME PROBLEMS OF EQUITY. By Zechariah Chafee, Jr. Ann Arbor: University of Michigan Law School. 1950. Pp. xiv, 380, table of cases and index. $4.50.

Today much attention is being focused on procedural reform to the end that a more expeditious justice may be made available for all. But the law needs more than to be expedited. A juster justice, geared to the social needs of our time, should be included in any program of law reform. In past centuries equity was the principal engine for the reform of the substantive law of the English legal system. But of recent years the tendency has been to leave substantive reform to legislation, and many of the tools of equity have become dulled by the accumulated scale of rules long since outmoded.

In the series of lectures reprinted in *Some Problems of Equity,* Professor Chafee, who in former years almost singlehandedly brought about the modernization of interpleader, brings the hone of his pragmatic mind to bear on a number of other weapons of equity and points the way toward refurbishing them for more useful service in the hands of today's jurists.

[29]See James, *Accident Liability Reconsidered: The Impact of Liability Insurance,* 57 YALE L. J. 549 (1948), and cases therein cited.

For purposes of examination the book may be conveniently divided into four parts. The first part, consisting of the first three chapters, deals with the clean-hands maxim. After careful analysis, Professor Chafee comes to the conclusion that this supposed general equitable principle is not peculiar to equity but ". . . is really a bundle of rules relating to quite diverse subjects, [and] that insofar as it is a principle it is not very helpful but is at times capable of causing considerable harm" (p. 2). He finds it used in eighteen different types of suits, running the gamut from protection of copyrights to matrimonial litigation, and recommends a functional approach to these various types of proceedings as the only method of adequately understanding its application to the various fact situations analyzed.

Professor Chafee concludes that the maxim has often done harm in the past by making courts oversensitive to the ethical conduct of the complainant, and that, especially in matrimonial suits, it should be replaced by a sort of pragmatic balancing of the social policies involved. The Florida doctrine of mutual recrimination,[1] under which a divorce may be granted to the less guilty of two "unclean" spouses, is a step in this direction.

Chafee's rejection of the clean-hands doctrine in the matrimonial cases does not necessarily mean that it should be done away with entirely. The real culprit in many of the cases he cites is not the clean-hands doctrine itself but the fact that the courts have used it as an easy out to avoid getting into the larger issues at stake. What is needed is not the rejection of the clean-hands maxim but rather a more liberal application of the doctrine in the light of all of the ends of justice in the particular case – a balancing of social interests in the sense of Dean Pound,[2] with the interest in the general morals included in its proper perspective along with the other social interests involved. Professor Chafee himself does not completely reject the clean-hands doctrine, but rather recommends a shift in emphasis from that maxim, which relates to past transgressions, to the maxim that "he who seeks equity must do equity," which looks to the future instead of the past. This shift would allow relief in many cases in which an uncritical application of the clean-hands doctrine would result in its denial, and seems desirable provided that care is taken to see that no future wrongdoing is thereby sanctioned.

The second major subdivision of the book deals with another

[1]See Note, 1 U. OF FLA. L. REV. 62 (1948), for an analysis of this doctrine.
[2]See Pound, *A Survey of Social Interests*, 57 HARV. L. REV. 1 (1943).

equitable maxim, that "equity follows the law." This part of the book is a reprint of a law review article first published in 1926. Here Professor Chafee argues for a relaxation in the application of the maxim to allow for growth of the law of torts through the granting of equitable relief in the case of new torts not yet recognized as actionable on the law side of the court. If this course is followed, he anticipates the development of equitable protection against injuries to personality even in the absence of the recognition of a law action for damages for injury caused by such invasion. It is interesting to note that in the interval since this article was first written the reverse development has taken place in Florida, which now allows an action for damages for invasion of the right of privacy[3] but has not yet recognized the injunction as a means of protecting this right. The general principles advanced in this section, however, still seem eminently sound.

The third subdivision of the book, consisting of Chapters 5 through 7, deals with multiple-party suits and sets forth Professor Chafee's recommendations for modernizing multiple-party procedure. Chapter 5, again a reprint of an earlier law review article, deals with bills of peace and the artificial limitations, such as the requirement of "privity," that were placed on them during their early development. The author strips off these limitations and finds at bottom that the basic issue is a conflict between the policy of guaranteeing a jury trial in cases involving issues such as negligence or title to land, and the policy of avoiding multiple actions through consolidation in equity. For Chafee the avoidance of multiple suits is of itself sufficient to confer equitable jurisdiction, and overrides the constitutional guarantee of a jury trial; the problem then becomes a pragmatic one of balancing the value of a jury trial against the economy of time and expense gained through consolidation through the bill of peace.

Chapters 6 and 7 deal with another type of multiple-party suit, the class suit, in which the adjudication becomes binding on all members of the class, whether they actually participate in the suit or not. Here Chapter 6 deals with the historical development of the remedy and the problem of notice to unnamed members of the class, and Chapter 7 provides an analysis of Federal Rule 23 governing representative suits in the federal courts. Here Professor Chafee's objection to the rigid categories of class suits set up in Rule 23 strikes at the weak

[3]Cason v. Baskin, 155 Fla. 198, 20 So.2d 243 (1944); Cason v. Baskin, 159 Fla. 31, 30 So.2d 653 (1947); see 21 FLA. L.J. 276.

point in the rule. If his suggestions for improvement were adopted, a much more workable rule would result.

The final part of the work, consisting of the last two chapters, deals with the problem of whether lack of "equity jurisdiction" makes an erroneously issued decree void or merely voidable, a problem that seriously concerned Mr. John L. Lewis a few short years ago. Chafee admits as the traditional view that a court, even though possessed of jurisdiction over the person and the subject matter of the suit, still lacks power to grant equitable relief unless the complainant has a valid reason for coming into equity. But he advocates the opposite view, namely, that in jurisdictions where law and equity are merged the court, if it has jurisdiction of the subject matter and the parties, can render a decree that is valid and that must be obeyed until set aside, even though the court lacks "equity jurisdiction" and hence is acting erroneously. Applied to the *United Mine Workers* case of 1947,[4] Chafee argues, this approach would have clarified an extremely confusing opinion in which the majority held Lewis in contempt for failing to obey a decree that the same majority considered possibly void, the principle enunciated being that even void decrees must be obeyed until reversed unless the question of jurisdiction is "frivolous and not substantial."

Chafee admits that to make his approach workable it would be necessary to establish some new provision for speedy review on the question of equity jurisdiction in cases involving what he would classify as voidable decrees. Until such expeditious review is provided for, however, most courts will probably continue to classify such decrees as void, so that a speedy review may be had through the writ of habeas corpus after a defendant violates a decree he believes to be unlawful and is committed for contempt of court. Chafee's proposed solution would do much to cut down the disrespect for law and order fostered by the present method of testing objectionable decrees by disobedience.

This review has been necessarily overlong because *Some Problems of Equity,* being a series of lectures and articles, lacks a single focus. But the book is a stimulating and thought-provoking one in which the author, by applying to various equitable concepts the pragmatic test of their usefulness to contemporary society, makes a valuable contribution toward the modernization and integration of present-day equity in the American system of law. While aiming at this serious goal,

[4]United States v. U.M.W. of America, 330 U.S. 258 (1947).

Professor Chafee preserves a sparkling sense of humor rarely found in a work of this type. The book is in no sense a practitioner's manual, but it is heartily recommended to any lawyer who, to quote from the dedication, has not "let practice deaden his eager interest in theory and has so placed the windows of the mind that he can watch the charted courses of the law and turning gaze at the open sea."

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DEMOCRACY AND THE INDIVIDUAL. By Carleton Kemp Allen.* London and New York: Oxford University Press. Second Impression 1945. Pp. 103. $1.25.

Here is a book that appeared several years ago and is perhaps more timely today. It is an excellent brief refutation of the superficial analysis of democracy in Mr. Justice Douglas' article "Democracy Charts Its Course."[1] Doctor Allen's thoughts contained in this little volume are worth reading not for their meager philosophic content but for the light they shed on such matters as "Democracy," "The Majority Principle" and "Universal Suffrage."

In principle, government is a necessary evil. There is very little about these difficult questions of which we can be sure. But for the Western world we can, I think, be sure that the individual is all-important, that the State is made for man and not man for the State, Hobbes, Hitler and Stalin to the contrary notwithstanding. Liberty, however, is relative, and where the line shall be drawn is debatable. We can also be sure that justice, though hard to define, must be the ideal for which as civilized people we will continue to strive; therefore we reject the Holmesian idea of force which would degrade us to the level of the beasts. Our justice should take the form of uniform laws impartially administered.

Though the word "democracy" is much in use, it cannot be accurately defined, and at most it seems to mean opposition to autocratic rule. It is a state of mind rather than a clear and formulated definition. We must cease to think of it as having any godlike or magical basis or as being the permanent form of government, for

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[1]U. OF FLA. L. REV. 133 (1948).