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Recommended Citation

Robert S. Pasley, *Robert Sproule Stevens His Contribution to Equity Jurisprudence*, 50 Cornell L. Rev. 663 (1965)
Available at: <http://scholarship.law.cornell.edu/clr/vol50/iss4/7>

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ROBERT SPROULE STEVENS: HIS CONTRIBUTION TO EQUITY JURISPRUDENCE

Robert S. Pasley†

A prospective law student, perusing the 1919-1920 Announcement of the College of Law of Cornell University, might have read the following description of one of the required second-year courses:

23. **Equity Jurisdiction.** Three hours. Case book to be announced.
Assistant Professor _____

Attention is paid to the origin and development of chancery jurisdiction; but the aim of the course is to present the existing status of the jurisdiction as modified by the American courts, and to show the availability and effectiveness of equitable remedies. A study is made of the specific performance of contracts, injunctions against torts, and such bills as interpleader, bills of peace, and those for reformation or rescission.¹

The following year the blanks were filled in: the book was to be Ames's *Cases in Equity*, the instructor the newly appointed Lecturer on Law, Mr. Stevens.² Robert Stevens had actually joined the faculty in 1919, and had immediately been assigned the course in Equity Jurisdiction. This course was no innovation at Cornell. It had been required of second year law students³ as far back as 1887, when the Law School first opened its doors,⁴ and had been taught by such outstanding jurists as Professor Harry B. Hutchins, later Dean of Michigan Law School, Professor Ernest W. Huffcut, later Dean of the Cornell Law School, and Professor Henry White Edgerton, who recently retired as Chief Judge of the United States Court of Appeals for the District of Columbia.

Nevertheless, Robert Stevens' designation in 1919 to teach "Equity Jurisdiction" marked the beginning of an era which was to last until 1954, when the then Dean Stevens became Professor Robert S. Stevens, Emeritus, and retired from full-time teaching. There were interruptions for occasional sabbaticals and for several years of government service in

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¹ 10 Cornell University, Official Publication "Announcement of the College of Law 1919-1920" No. 5, 1919, p. 8.

² 11 *id.* "Announcement of the College of Law 1920-1921" No. 11, 1920, p. 9.

³ The term "second year student" was not actually used at first. The Cornell Law School did not become a graduate school until 1924. Prior to that time, students were admitted without a college degree, first on the basis of written and oral examinations, then on a high school diploma, and then, successively, after one, and then after two years of college. See Henn, *The Cornell Law School—Its History and Traditions*, 37 N.Y.S.B.J. 139 (1965). Until 1897 the law school course lasted only two years. Perhaps in recognition of this, and perhaps because many of the students in fact had done two years of college work before embarking on the study of law, the older announcements referred to the second year of law as the student's "Senior Year." In 1897, however, the law school course was extended to three years, and the terms First, Second, and Third Year came into use.

⁴ From 1900 to 1907, the announcements show Trusts as included in "Equity Jurisdiction," but beginning in 1909 Trusts was offered separately.

Washington during World War II but, as if to make up for lost time, even after retirement Stevens taught Equity twice again, in 1957-58 and in 1958-59.

During this period of thirty-five years the name of the course was shortened from "Equity Jurisdiction" to "Equity," but its content grew and flourished. In 1921, it was increased from three to five hours and from one semester to two. In 1922, the first half was made a required first year course, while the second half remained a second year course, originally required but later an elective. In 1928, the course was increased to six hours and placed entirely in the second year, but in 1931 the prior arrangement of two hours in the first year and three in the second was restored. So it stood when the author was privileged to study Equity under Professor Stevens in 1934. So it remained when he had the even greater privilege of inheriting Equity from Dean Stevens in 1954.

There had been a few minor changes during the intervening twenty years. After becoming Dean in 1937, Stevens shared the course for several years with Professor Edgerton and Professor William H. Farnham, and Professor Farnham took over the course in its entirety while Stevens was in Washington on government service from 1942 to 1945. During the accelerated program which was adopted during and immediately after the war years, the course content, sequence, and number of hours were occasionally rearranged.

Nevertheless, when all is said and done, for thirty-five years, more or less, Equity at Cornell *was* Robert Stevens. For thirty-five law school classes, Robert Stevens was Equity at Cornell. He loved the subject, and the students found the course an unforgettable experience. For Stevens was a master of the Socratic method, so often praised but so rarely followed. The assigned cases were only the starting point. That they had been studied and understood was assumed. In class, Stevens would propound a hypothetical situation to a student, ring the changes on it, throw forth a series of baffling questions, probe the inadequacies of the student's replies, refute his arguments, explore with him the historical antecedents, the possible future developments, and the deeper implications of the problem, and conclude, never with a solution, but with a citation to a case which, if we looked it up (and most of us did), afforded not *the* answer, but a starting point for the problem and *an* answer to one phase of it. Then on to the next hypothetical situation. Such a program of instruction, several hours a week, thirty weeks a year, was law school teaching at its peak. It either made lawyers out of tyros, or else exposed them as dolts.

But important as teaching method is, even more important, to Stevens

at least, was the content of Equity. Stevens saw in Equity the great reforming agency of our law, an unfailing source of those ethical and moral principles without which the law would become rigid and unjust, sterile and lifeless, finally to be cast aside as irrelevant to the needs of a developing society. This pervading sense of the ethical and moral content of Equity not only manifested itself in every classroom lecture Stevens gave, but showed forth in all that he wrote on the subject. Although the corpus of his publications on Equity subjects is small, compared with his work in other areas, it is of a quality not often attained in law review writing.

Appropriately, it begins with an article which appeared only two years after Stevens' appointment as Lecturer at the Cornell Law School, but which was destined immediately to become a classic. *Involuntary Servitude by Injunction—The Doctrine of Lumley v. Wagner Considered*⁵ is a frontal attack on the rule, first announced by Lord St. Leonards in *Lumley v. Wagner*,⁶ the famous case of the talented opera singer, that, while equity may not affirmatively compel performance of a personal services contract, it may, at least where the services are considered "unique," do so indirectly by enjoining breach of a negative covenant not to perform the same services for anyone else. Characteristically, Stevens went back to first principles:

It is believed that an examination of the fundamental principles which controlled the earlier decisions [*i.e.*, those contrary to *Lumley v. Wagner*] will show those principles to be as cogent and inviolable today as they were then, and that this comparatively modern practice of 'negative specific performance' is condemnable as contrary to the principles of equity and as enforcing a condition of involuntary servitude.⁷

In an article which is a masterpiece of clear, cogent, and convincing argumentation, he then proceeded to demonstrate the validity of both these propositions, reaching the following result:

If the reasoning advanced up to this point has been sound and if the interpretation of the authorities considered in support thereof has been justifiable, then it follows that since equity can not, should not and will not specifically enforce a contract of personal service, it ought not attempt to enforce such a contract indirectly by the use of the injunction. That is, a negative covenant ought not be used as a lever to compel performance of the affirmative. If an express negative covenant ought not be so used, then, *a fortiori*, a negative covenant should not be implied for that sole purpose.⁸

This is not to say that a negative covenant should never be enforced by injunction. Stevens laid down three conditions for such enforcement:

⁵ 6 Cornell L.Q. 235 (1921), in Re, Selected Essays on Equity 287 (1955).

⁶ 1 De G.M. & G. 604, 42 Eng. Rep. 687 (Ch. 1852).

⁷ Stevens, "Involuntary Servitude by Injunction—The Doctrine of Lumley v. Wagner Considered," 6 Cornell L.Q. 235 (1921).

⁸ Id. at 261.

First. The negative covenant, whether express or implied, must be a reasonable one. [That is, it should not be so broad in scope that its enforcement would result in economic pressure to compel the defendant to serve the plaintiff.]

. . . .

Second. There must be a breach of the negative covenant, either actual or threatened. [That is, an injunction should not be granted merely because the defendant threatens to do something inconsistent with performance of his affirmative covenant. He must be threatening to break his negative covenant, express or implied, and it is irrelevant whether he continues to perform the affirmative.]

Third. It must appear that the breach of the negative will cause injury to the plaintiff and that for such injury money damages will not be adequate compensation. [That is, the real basis of the plaintiff's claim for relief must be breach of the negative per se, and not merely as an excuse for indirectly enforcing the affirmative.]⁹

In applying these criteria, the concept of "uniqueness" is irrelevant, except insofar as it may tend to show that monetary damages are inadequate. Otherwise, the law is applying one standard to the talented, allowing his freedom to be infringed, while it sedulously protects the right of the mediocre to be free from involuntary servitude, a result which is illogical at the best and invidious at the worst.

To a limited extent, Stevens' position had been anticipated by Dean Roscoe Pound in an article which had appeared only a year previously.¹⁰ Pound also had stressed the importance of finding damages arising from breach of the negative covenant, over and above any damages for breach of the affirmative, before an injunction should issue. But Pound drew a distinction between personal services in general and "service of a confining nature and under the direction of the employer as to details."¹¹ He agreed that the latter should not be coerced, but as to other kinds of personal services, he saw no problem of involuntary servitude. Even on "service of a confining nature," Pound's position was ambiguous: apparently he saw no objection to enjoining breach of a negative covenant if independent damage flowed therefrom, even if it "may tend to enforce an affirmative that ought to be performed."¹² But whatever Pound meant, Stevens would have none of his subtle distinctions.¹³

It cannot be said that Stevens' article immediately changed the course of judicial decision. The British courts have continued to regard them-

⁹ Id. at 263-70. [Emphasis in original.]

¹⁰ Pound, "The Proffess of the Law, 1918-1919—Equity," 33 Harv. L. Rev. 420, 438-40 (1920).

¹¹ Id. at 439, citing *Clyatt v. United States*, 197 U.S. 207 (1905).

¹² Pound, *supra* note 10, at 440.

¹³ Stevens, *supra* note 7, at 258-60.

selves as bound by *Lumley v. Wagner*; ¹⁴ they have, however, shown reluctance to extend it to imply an enforceable negative covenant where none is expressed. ¹⁵ American courts have in the main followed *Lumley v. Wagner*, and have not hesitated to imply a negative covenant which could be enforced by injunction. ¹⁶ Many of the writers on Equity have supported this attitude. ¹⁷ But others are more sympathetic to Stevens' views. ¹⁸ Probably the most impressive support which his analysis has had is found at section 380 of the Restatement of Contracts, which, with its accompanying comments and illustration, virtually restates Stevens' conclusions. All this has not been without its effect: while most American courts still follow *Lumley v. Wagner*, it seems fair to say that they do so more critically, and are unwilling to grant an injunction except in clear cases of actual breach of a valid negative covenant, which is not unreasonable in its terms and which is still legally in effect. ¹⁹ At the very least, the approach to a *Lumley v. Wagner* problem was never to be the same after Stevens' devastating critique.

For the next twelve years, Stevens limited his writings in the field of Equity to a series of book reviews. ²⁰ Several of these included perceptive comments on legal education, e.g., the desirability of teaching the basic principles of Equity as units without regard to the areas of substantive law involved, ²¹ and, then as now a voice crying in the wilderness, an affirmation of Hanbury's plea in favor of teaching Roman law. ²²

It was not until 1952 that Stevens turned again to a full-length article on an equitable subject. Strictly speaking, *Ethics and the Statute of Frauds* ²³ dealt with a problem of contract law: May a defendant admit in his pleadings or testimony the making of the alleged oral contract, and

¹⁴ *Marco Prods., Ltd. v. Pagola*, [1945] 1 K.B. 111; *Warner Bros. Pictures, Inc. v. Nelson*, [1937] 1 K.B. 209.

¹⁵ *Mortimer v. Beckett*, [1920] 1 Ch. 571; *Whitwood Chem. Co. v. Hardman*, [1891] 2 Ch. 416.

¹⁶ *Madison Square Garden Corp., Ill. v. Carnera*, 52 F.2d 47 (2d Cir. 1931); *Harry Rogers Theatrical Enterprises, Inc. v. Comstock*, 225 App. Div. 34, 232 N.Y. Supp. 1 (1st Dep't 1928); 5 Williston, *Contracts* § 1449 (rev. ed. 1937).

¹⁷ DeFuniak, *Modern Equity* § 73 (2d ed. 1956); Wm. F. Walsh, *A Treatise on Equity* § 66 (1930); Parks, "Equitable Relief in Contracts Involving Personal Services," 66 U. Pa. L. Rev. 251 (1918).

¹⁸ *McClintock*, *Equity* § 65 (2d ed. 1948); Simpson, "Equity," 1946 *Ann. Survey Am. L.* 829, 836-37 (1947); cf. 5 Williston, *Contracts* §§ 1450-50A (rev. ed. 1937).

¹⁹ See, e.g., *Madison Square Garden Corp. v. Braddock*, 90 F.2d 924 (3d Cir. 1937); *Machen v. Johansson*, 174 F. Supp. 522 (S.D.N.Y. 1959).

²⁰ Between 1923 and 1934, reviews by Stevens of the following books on Equity or related subjects appeared: Frey, *The Labor Injunction* (1922): 8 *Cornell L.Q.* 196 (1923); Oliphant, *Cases on Trade Regulations* (1923): 8 id. 405 (1923); 1 Cook, *Cases and Other Authorities on Equity* (1923): 9 id. 87 (1923); Chafee, *Cases on Equitable Relief Against Torts* (1924): 10 id. 95 (1924); Fox, *The History of Contempt of Court* (1927): 13 id. 337 (1928); Hanbury, *Essays in Equity* (1934): 43 *Yale L.J.* 1359 (1934).

²¹ *Book Review*, 10 *Cornell L.Q.* 95-96 (1924).

²² *Book Review*, 43 *Yale L.J.* 1359, 1362 (1934).

²³ 37 *Cornell L.Q.* 355 (1952).

at the same time plead the Statute of Frauds as a defense? But in arguing that he should not be allowed to do so, Stevens drew an analogy to the equitable doctrines of part performance, estoppel, and fraud as taking a case out of the statute. More than this, he saw the problem as essentially one of ethics and morals, ideals which had always inspired the course of equity jurisprudence.

In a scholarly review of the authorities, Stevens showed that the rule in England had once been that an admission by the defendant of the making of the alleged contract precluded him from pleading the statute: its very purpose, to prevent frauds and perjuries, was served as well by defendant's admission as by proof of a writing.²⁴ But about the end of the eighteenth century, a different rule began to prevail, under which defendant was allowed to plead the statute, despite his admission of the making of the contract.²⁵ The newer English view has been espoused in a majority of American jurisdictions,²⁶ although a minority continues to follow the older rule.²⁷ An Iowa statute, over a hundred years old, incorporates the minority view.²⁸ Recently, Alaska followed Iowa's example.²⁹ More important, the minority view, at least in part, is now the rule of the Uniform Commercial Code, applicable to contracts for the sale of goods.³⁰

Actually, Stevens would go further and, in line with the older English view, refuse to permit the defendant to raise the defense of the Statute of Frauds by way of demurrer, but compel him by answer to admit or deny the making of the alleged contract; only if he denied the contract could he plead the statute. It is uncertain whether the Uniform Commer-

²⁴ *Id.* at 378-79.

²⁵ *Jackson v. Oglander*, 2 *Hem. & M.* 465, 71 *Eng. Rep.* 544 (Ch. 1865); *Rowe v. Teed*, 15 *Ves. Jr.* 375, 33 *Eng. Rep.* 794 (Ch. 1808); *Moore v. Edwards*, 4 *Ves. Jr.* 23, 31 *Eng. Rep.* 12 (Ch. 1798).

²⁶ *Thompson v. Jamesson*, 23 *Fed. Cas.* 1051 (No. 13,960) (C.C.D.C. 1806); *Brandeis v. Neustadt*, 13 *Wis.* 158 (1860).

²⁷ *Sealock v. Hackley*, 186 *Md.* 49, 45 *A.2d* 744 (1946); *Degheri v. Carobine*, 100 *N.J. Eq.* 493, 135 *Atl.* 518 (Ch. 1927); *Zlotziver v. Zlotziver*, 355 *Pa.* 299, 49 *A.2d* 779 (1946) (discussed at 15 *A.L.R.2d* 1349 (1946)). But cf. *Haskell v. Heathcote*, 363 *Pa.* 184, 69 *A.2d* 71 (1949).

²⁸ *Iowa Code Ann.* §§ 622.34-35 (1950).

²⁹ *Alaska Stat.* § 09.25.020 (1962). This statute was drafted by a former student of Dean Stevens.

³⁰ *UCC* § 2-201(3) provides:

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted;

.....

cial Code goes so far,³¹ but this does seem to be the result of the Iowa statute, as currently in effect.³²

Robert Stevens was not among those scholars of Equity, condemned by Walter Wheeler Cook in 1912,³³ who, by their insistence on teaching Equity as a separate system, distinct from law, were following a "belated and reactionary"³⁴ course, oblivious of the merger of law and equity sought to be accomplished under the codes. Rather, Stevens believed whole-heartedly in this merger, and thought it should go beyond a mere procedural mechanism and bring about a profound change in the substantive law as well.

Nowhere was this point of view better exemplified than in Stevens's Irvine Lecture, given at Cornell in 1956 and subsequently published under the title, *A Plea for the Extension of Equitable Principles and Remedies*.³⁵ This lecture discussed two principal questions:

- I. To what extent can and should the court, sitting as a court of law, adopt the same principles and attitude that have been and will be characteristic of it when sitting as an equity court?
- II. To what extent can and should the court, when sitting in equity, be more liberal in the granting of equitable remedies?³⁶

With much learning, and with examples drawn from many areas, Stevens answered the first question by demonstrating "how easily and how soundly the practice of adopting the equitable attitude in actions at law can be more generally followed . . ."³⁷ In answer to the second, he proposed a wider use of equitable relief, by eliminating or minimizing the traditional requirement that the "remedy at law" be inadequate, by protecting political rights, by a discreet use of equitable remedies in the area of criminal law, and by frank recognition that equity can and will protect personal rights as well as property rights.³⁸ The cases, and he found not a few, which supported these views were, he concluded:

[T]he happy result of an understanding of the history of our Anglo-American law and of an appreciation of the desirable consequences of a transition from a period of competing courts of law and equity to a new era in which we have a single court administering both law and equity. This

³¹ See "Study of Uniform Commercial Code: Article 2—Sales," 1955 N.Y. Law Revision Comm'n 355, 372, citing Stevens' article.

³² Iowa Code Ann. § 622.34 (1950); see Stevens, "Ethics and the Statutes of Frauds," 37 Cornell L.Q. 355, 373 (1952).

³³ Cook, "The Place of Equity in Our Legal System," 3 Am. L. School Rev. 173 (1912).

³⁴ Id. at 174. The phrase was Maitland's, in his *Equity* 21-22 (1909).

³⁵ 41 Cornell L.Q. 351 (1956).

³⁶ Id. at 353.

³⁷ Id. at 369.

³⁸ Id. at 370-385.

understanding and appreciation is all that is needed for a more complete and perfect merger of law and equity and for the further Progress of Equity.³⁹

Stevens returned to this theme in a note published in 1958,⁴⁰ commenting on a recent decision of the Maryland Court of Appeals,⁴¹ a case which reached a satisfactory solution of the problem which had plagued the New York Court of Appeals in the celebrated cases of *Hahl v. Sugo*⁴² and *City of Syracuse v. Hogan*,⁴³ a solution which Stevens hailed as "a commendable step forward in bringing about a true merger of law and equity."⁴⁴

A review of Professor Ralph A. Newman's *Equity and Law: A Comparative Study* (1961)⁴⁵ reiterated this thesis: "Professor Newman's comparative study of Anglo-American and other legal systems demonstrates that our separateness of law and equity is not only anomalous but unnecessary."⁴⁶

These scholarly articles were seminal and significant. But it was as a classroom teacher that Stevens made his greatest contribution to Equity, and it is for this I believe he would most wish to be remembered. But alas, the course in Equity has fallen on evil days. It has been dropped as a separate offering at most American law schools, and its subject matter has been dismembered and spread through other portions of the curriculum where the instructor, if he is lucky, may "get to it." Even at Cornell, Equity has been reduced to a two-hour course, which has vacillated between a first-year required course and an upper-class elective. In the book review just mentioned, Stevens deplored this trend,⁴⁷ and it formed the subject matter of a full-length article, with which this brief tribute may fittingly conclude. In *A Brief on Behalf of a Course in Equity*,⁴⁸ Stevens made his point at once: "The scrapping of the course in Equity is an unfortunate retrogression in curricular planning."⁴⁹ He made clear that he was not advocating a renewed emphasis on the ancient distinction between law and equity; quite the contrary:

³⁹ *Id.* at 385.

⁴⁰ Note, "Ejection: Power of a Court of Law to Order Defendant to Remove Encroachment After the Sheriff Has Filed a Return of Inability to Execute a Writ of Dispossession," 43 Cornell L.Q. 691 (1958). With characteristic modesty, he signed the note, like any law review competitor, merely as "Robert S. Stevens."

⁴¹ *Dundalk Holding Co. v. Easter*, 215 Md. 549, 137 A.2d 667 (1958).

⁴² 169 N.Y. 109, 62 N.E. 135 (1901).

⁴³ 234 N.Y. 457, 138 N.E. 406 (1923); cf. *Johnson v. Purpura*, 208 App. Div. 505, 203 N.Y. Supp. 581 (3d Dep't 1924). Now see N.Y. Real Prop. Actions Law § 539.

⁴⁴ Note, 43 Cornell L.Q. 691, 696 (1958).

⁴⁵ Stevens, Book Review, 30 Geo. Wash. L. Rev. 778 (1962).

⁴⁶ *Id.* at 780.

⁴⁷ *Id.* at 783.

⁴⁸ 8 J. Legal Ed. 422 (1956).

⁴⁹ *Ibid.*

It is only from the study of abundant illustrations of equity's attitude toward requests for relief that the student will acquire a comprehension of the spirit of equity, the way in which equity thinks and acts, the present-day distinctions between law and equity, and, perhaps, be inspired to inquire whether the administration of legal remedies might not be improved by a further adoption of the equitable attitude.⁵⁰

And again:

A faculty of law must lead its students to see law as a means of implementing prevailing moral standards, current economic and political policies, and contemporaneous attitudes toward social problems. And, so, a faculty should not confine itself to any one approach or method of instruction, the historical, the analytical, the jurisprudential, the sociological, or the functional. All must be suitably considered and employed if the student is to comprehend and appreciate the judicial and the legislative processes and is to be a learned and socially useful lawyer, prepared for changes that make for improvement and a champion of such growth and development. Of all the courses that have been introduced into law school curricula, Equity best demonstrates most of the methods of thinking and accomplishes these purposes.⁵¹

EPILOGUE

Historically, the function of Equity in Anglo-American law has been to ameliorate the rigors of a strict application of the common law, to reform and improve the law, to serve as a well-spring of ethical and moral principles, and, in short, to be an exemplar and teacher of lawyers, legislators, and judges. And so with Robert Stevens: his has been the rare achievement of being a great historian of Equity, a great reformer of the law, an inspiring source of ethical values, and, above all, a superb teacher of law, equity, and morals.

⁵⁰ *Id.* at 423.

⁵¹ *Id.* at 424.