

BOOK REVIEWS

RESTATEMENT OF THE LAW OF RESTITUTION. American Law Institute, St. Paul, 1937. Pp. xxxv, 1033. Price: \$9.50.

Upon another occasion¹ I have mentioned the limits which confine a reviewer of one of the American Law Institute's Restatements who feels no impulsion to question either purpose or method. In the year 1937 these limits have become all the more binding, since the time when criticism of the sort last mentioned could be of any use is long past. With respect to the Restatement of Restitution they are especially strong, since the volume measures up in every respect to the expectations aroused by the collaboration of Professors Seavey and Scott with the distinguished advisers making up the Committee on Restitution. Of its high quality one need say no more.

To one comparing this Restatement with its predecessors, its most striking feature is that it involves an adventure in remaking traditional analysis and terminology. It is an attempt to end the disunity arising from the historical accident that relief in essentially similar situations was awarded in different tribunals employing diverse procedure and affording unlike remedies. Now quasi contract, equitable restitution, specific or monetary, constructive trusts and equitable lien are all to be brought together under the rubric of Restitution. Thus we are to have introduced into our legal system a new and a unifying concept, breaking in upon ancient modes of expression and wonted patterns of thought. Adjustment thereto doubtless may be somewhat irksome to the profession. Upon this ground some reviewers of the Trusts Restatement have deplored the omission of constructive trusts therefrom.² It seems likely that many practitioners, although they may not express themselves in the pages of legal journals, will feel a similar annoyance at being asked to forsake accustomed analysis and to adopt a new terminology. The benefit to accrue from systematic and unified treatment of the doctrine relating to what is, after all, a single problem is great. We may well ask these dissentient brethren to suffer the inconvenience inhering in adjustment to the new classification as their contribution to the progress of the law.

If the opposition to new ideas presented by man's natural inertia is to be overcome and the benefit of grouping these related doctrines under this new concept of Restitution is to be fully realized, I suspect that much will have to be done subsequent to the publication of this volume. To adopt the language of our medical brethren, many things are "indicated". Those judges, particularly of appellate courts, who have taken so lively an interest in the work of the Institute (and, presumably, have approved making Restitution a subject for restatement), may well take it upon themselves to familiarize the profession with the new concept by employing it in their judicial pronouncements, and by insisting upon being informed as to the Restatement rule in arguments before them. Another aid to the ready acceptance of the concept of Restitution would be the amplification and authentication of the Restatement by an adequately documented treatise on the subject. Preferably this should come from the pens of Messrs. Seavey and Scott. If they cannot be persuaded to undertake the task, perhaps some of their distinguished advisers might be prevailed upon to fill the need. Yet another suggestion,

1. See review of Agency Restatement, Merrill, Book Review (1934) 43 YALE L. J. 678.

2. Gardner, Book Review (1936) 22 AM. B. A. J. 271. ("One is surprised, if indeed not disappointed . . ."); Glenn, 25 GEO. L. J. 212, 214 (1936) ("may be some reason for criticism"); Evens, 11 IND. L. J. 397, 398 (1936) ("inconvenience which such treatment will cause the profession").

of chief value for the lawyers of the future, is that law faculties may be under the obligation of recasting their curricula to include therein a course in Restitution organized along the line of the Restatement. No doubt it may be effectively used in connection with the present courses in Quasi Contract, Trusts and other subjects, but most fruitful results probably will come from teaching Restitution as a unified subject. This will call for new casebooks. Even Cook's third volume on Equity is inadequate for such a course. The teacher of Trusts, particularly if he has but two semester-hours for the subject, undoubtedly will be very happy to give up this material. The teacher of Quasi Contracts, who is more likely to find his subject changed to Restitution, will not be so pleased unless he can wangle additional time in which to present the expanded topic. Current proposals in various quarters for expanding the curriculum, and at the same time curtailing the time allotted to instruction in the traditional topics, may induce caution in the production of new teaching materials until we see what comes from all this ferment. Nonetheless, the appearance of this Restatement does suggest the need for considering a revision of the scope and content of the Trusts and the Quasi Contracts courses.

Trusts and Quasi Contracts are not the only subjects levied upon by the present Restatement. Indemnity and Contribution³ bring up matters of high import in the law of Suretyship. Much that the law has dealt with heretofore under the head of Conventional Subrogation, often upon the slimmest fiction of compact, has been more fitly treated as a form of Restitution.⁴

Section 147, stating the rule that satisfaction of judgment, against one of two persons severally under a duty of restitution, is the point at which a plaintiff is barred from proceeding against the other, is highly gratifying to one who deplores the adoption of the election by judgment rule in respect to suits against the principal and the agent in undisclosed principal situations.⁵ That Professor Seavey and his advisers were able to commit the American Law Institute to this principle in the present Restatement affords added proof of the unwisdom of the action taken in the Restatement of Agency overruling the Reporter's original statement of a similar rule to govern the undisclosed principal situation.⁶ The phenomena are substantially alike. It is deeply regrettable that Agency should have been committed to a conflicting rule, for which at best but five American courts can be cited, because of an exaggerated notion of the authority to be accorded the mistakes of Massachusetts and New York. It may be hoped that the broad general rule laid down in the Restatement of Restitution may aid the courts in that overwhelming majority of jurisdictions wherein the question is open to repudiate the lamentable position adopted in the Restatement of Agency.⁷

This Restatement should be particularly useful in setting proper limits to two erroneous notions which have gained a wide currency. I refer to the impression that there can be no relief for mistake of law and to the belief that there can be neither indemnity nor contribution between tortfeasors. In setting forth rules which demonstrate how limited is the proper application of these broadly stated generalizations, and in how many instances the judges have afforded relief, the way is opened for removing the undue influence which they have exerted on

3. RESTATEMENT, RESTITUTION (1937) §§ 76-85.

4. *Ibid.*, §§ 43, 54.

5. RESTATEMENT, AGENCY (1933) §§ 210, 337.

6. See 7 PROCEEDINGS OF THE AMERICAN LAW INSTITUTE 256 (1929).

7. See my articles, *Election Between Agent and Undisclosed Principal: Shall We Follow the Restatement?* (1933) 12 NEB. L. BUL. 100; and *Election Between Agent and Undisclosed Principal: Should Oklahoma Follow the Restatement?* (1933) 4 OKLA. ST. B. J. 172, in which the problem is discussed at greater length, with an examination of the relevant authorities.

our law.⁸ Of course, in particular jurisdictions there may be decisions contrary to the law as expressed in the Restatement, induced by these erroneous generalizations. State annotations must be relied upon to reveal these instances. The sound judgment of the local judiciary may then determine whether the particular rule has become so embedded in the regional law as to make it unwise to overrule it in favor of the general current of authority. However this may be in some states, it seems indubitable that the development of the law of the country in general on these points will be influenced greatly by the Restatement.

It appears useless to comment at length upon particular doctrines. The resolutions which have been made upon debatable points do not seem to me likely to produce seriously undesirable results. In the absence of such a conviction of impolicy, a decent regard for the ability and the labors of those who have worked upon the Restatement commands that captious criticism upon minor points be silenced. I close with a final suggestion. Practicing lawyers have been inclined to express disappointment because the Restatements have lacked citations to support their doctrinal statements. Obviously, this is a disadvantage to the practitioner, who must demonstrate to the bench the applications which have been made of the principle on which he relies. Some disinclination to consult or to employ the Restatements has sprung from this disappointment. This disinclination should not lead to ignoring the Restatement of Restitution. Its potentialities for unifying and clarifying portions of our law which have been divided and clouded by historical accidents of procedure make it invaluable to the lawyer in search of a basic theory for his client's cause.

Maurice H. Merrill.†

NEUTRALITY FOR THE UNITED STATES. By Edwin Borchard and William Potter Lage. Yale University Press, New Haven, 1937. Pp. viii, 380. Price: \$3.50.

This is a book revealing wide research and painstaking study of controversial subjects and baffling problems. Its contents are grouped in three parts: "Introduction", "The Period of 'Neutrality', 1914-1917" and "Sanctions *versus* Neutrality". The largest portion of the work is devoted to legal and diplomatic questions that arose during the World War. One may be inclined to feel that only those who were intensively concerned in dealing officially in a practical way with those questions can have a thorough knowledge of measures taken or omitted in relation to them; that published records furnish insufficient information. But it is readily perceived that there is no trace of superficiality in the labors of the authors. Use has been made of public records and private writings. Conclusions are based on exhaustive examination and careful analysis of those materials.

It is of course impossible in brief comments to discuss specific, condensed and extensive treatment by the authors of diplomatic and other correspondence, writings, and recently enacted statutes, often referred to as "neutrality laws". Very severe criticism is pronounced on the diplomacy of Secretary of State Lansing. In connection with censures of that official, use is profusely made of his own pronouncements, official and private. Quotations are given frequently from Mr. Lansing's *Memoirs*. This is, of course, entirely justifiable and appropriate. But it may not be a rash suggestion, that too much importance may perhaps easily be attached to some materials found in that book as indicative of Mr. Lansing's thoughts and activities during the period of the war. It is probably not

8. For mistake of law, see RESTATEMENT, RESTITUTION (1937) §§ 44-55; for indemnity and contribution between tortfeasors, see *ibid.* §§ 86-102.

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unfair to suggest that, in writing memoirs long after the war, Mr. Lansing may, to some extent, in retrospect, have unconsciously attributed to himself concrete plans and understandings of problems with respect to which his mind was not so definite in its conclusions and activities at a time when grave problems were pressing for solutions.

In the interesting book written by Messrs. Borchard and Lage, there is considerable discussion of the attitude of President Wilson and Mr. Lansing with respect to action proposed in Congress to keep American citizens off merchant vessels of belligerent nations. Quotation is made from Mr. Lansing's *Memoirs* of the statement that a warning to American citizens "would have been contrary to the dignity of the United States" and would have been condemned by those who "believed that it would be pusillanimous for our government not to insist that those rights should be respected whatever might be the consequences of such insistence". One can well believe in upholding the dignity of the Government and yet feel, as perhaps is generally felt throughout our country at present, that it would not be inconsistent with the dignity of the Government to put some appropriate legal restrictions on activities of Americans in time of war with a view to avoiding friction with authorities of belligerent nations.

But this declaration by Mr. Lansing with respect to the upholding of dignity and rights seems to be out of harmony with another passage in the *Memoirs* to which Messrs. Borchard and Lage repeatedly refer. Writing regarding diplomatic representations to the Government of Great Britain, Mr. Lansing says:

"The notes that were sent were long and exhaustive treatises which opened up new subjects of discussion rather than closing those in controversy. Short and emphatic notes were dangerous. Everything was submerged in verbosity. It was done with deliberate purpose. It insured continuance of the controversies and left the questions unsettled, which was necessary in order to leave this country free to act and even to act illegally when it entered the war."

Whatever may be said of representations made by the Government of the United States during the war to both sets of belligerents, it is to be hoped that this passage is not truly descriptive of American diplomacy during this period, and that in a measure it indicates an unconscious flight of fancy. But a memorandum prepared by Mr. Lansing in 1914 which is quoted by Messrs. Borchard and Lage is of course something realistic. In that memorandum, Mr. Page, American Ambassador to Great Britain, was authorized to make suggestions to the British Government as to the use of measures of interference with neutral commerce. Advice was given with respect to the issuance of Orders in Council, increases in the British contraband list, and, most remarkably of all, a novel scheme that the British Government should, under certain conditions, declare neutral territory to have "enemy character".

The memorandum is interesting indeed when read in connection with other passages of the *Memoirs*. Elsewhere Mr. Lansing severely condemns British measures of interfering with neutral commerce. British contraband lists, it is said, were "illegal and indefensible". Still more interesting is the authorization to the Ambassador to advise the British Foreign Office, when read in connection with Mr. Lansing's criticism of an interview Secretary of State Bryan had with the Austro-Hungarian Ambassador, Mr. Dumba, as "indiscreet" and "unfortunate".

There was, not unnaturally, widespread sympathy in the United States for the cause of the Allies. It may provoke a smile to read Mr. Lansing's conclusions to the effect that school books dealing with the Revolutionary War and the War

of 1812 had created childhood prejudices which "weakened American sympathy toward the Allies".

Persons high in authority criticized measures employed by both sets of belligerents. Our Government could undertake to justify entry into the war on national policy, or on legal grounds. But one does not like to vision our Government described as committed to a policy of hypocrisy. If the view is taken that a powerful neutral government has a trust to uphold and vindicate law against encroachments; that impartial attempts to do so must not necessarily result in plunging a nation into war; and that the most effective way to maintain the law and to avoid war is to ground a government's position in all serious crises on a rock foundation of right under the law, then one may not have much sympathy with Mr. Lansing's declared policy to submerge issues in "verbosity" to insure "continuance of controversies" and to lay foundations to enable the country to be free to "act illegally" when that is considered to be expedient.

Fred K. Nielsen.†

TRUSTS ON THE CONTINENT OF EUROPE. By F. Weiser. Sweet & Maxwell, London, 1936. Pp. viii, 103. Price: 7s. 6d.

This book by an author with unusual experience in international finance transactions will be welcome when, in some perhaps not very remote future, foreign loans will again attract the interest of investors, bankers, and lawyers. Then it may help preventing the reappearance of such nonsensical contract clauses as those which Doctor Weiser describes in the chapter of his book called "International Practices and Malpractices". It seems that most of the loan agreements between British and American investors and European borrowers, especially European governments, contain a clause appointing one or more persons trustee for the bondholders, without indicating, however, what the trustee's powers and duties are to be. The insurmountable legal difficulties resulting from this clause are well pointed out by Doctor Weiser. They are largely due to the lack in the continental European laws of institutions corresponding to the Anglo-American trust. It seems that in recent years a legend was growing up that, although no exact counterpart of the trust could be found in the laws of the continent, most of its effects could be achieved there by ingenious combinations of other legal institutions. M. Lepaulle's influential "Traité Théorique et Pratique des Trusts" went even as far as asserting that the trust could be transplanted wholesale into French law. These legends are justly destroyed by Doctor Weiser in the principal part of his book, where he surveys all the devices which were or might be applied to reach trust-like effects in the laws of Germany, Austria (and the other Succession States), Switzerland, France, and Italy. None of these manifold devices proves to be satisfactory. In all Civil Law countries, the principle of the so-called *numerus clausus* of rights *in rem*, combined with the impossibility of creating restraints upon alienation, forbids the introduction of the trust as a fully developed institution. Most of the devices described by Doctor Weiser are of a complicated nature. He succeeds, nevertheless, in making them understandable to Common Law trained readers, as well as in compressing the difficult material into some fifty, exceedingly well readable pages.

It results from Doctor Weiser's book that almost desperate attempts of domesticating the foreign institution of the trust were made in post-war Germany, while such attempts were almost totally absent in the other continental countries.

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The lack of institutions corresponding to the Anglo-American trust does not mean that legitimate purposes achieved in Common Law countries by means of the trust could not also be achieved in the Civil Law countries. Their laws provide for a large number of different institutions, each of them designed to achieve one particular purpose. What they do not have is such a catch-all institution as the trust, able to achieve a hundred different legitimate purposes at once, and a good many illegitimate ones in addition. For the protection of bondholders of non-governmental loans, most of the European countries have special statutes, providing for special representatives, and regulating in detail their rights and duties. Doctor Weiser shows, how, through intelligent draftsmanship, an analogous protection can be achieved for bondholders of governmental loans, a protection far more effective than that achievable with naive attempts of using trusts impossible of application in the legal atmosphere of the continent.

Max Rheinstein.†

TRADE AGREEMENTS AND THE ANTI-TRUST LAWS. By H. A. Toulmin, Jr. W. H. Anderson Co., Cincinnati, 1937. Pp. ix, 540. Price: \$7.50.

If timeliness makes the book, as the occasion does the man, then the author of "Trade Agreements and the Anti-Trust Laws" should be riding safely on the crest of the waves. At a time when the Federal Trade Commission is reorganizing its machinery under the Robinson-Patman Act and at a time when state legislation, through fair trade acts, is circumventing certain phases of the Sherman Anti-Trust Laws by successfully legalizing resale price maintenance contracts, it may be well to attempt to digest that great body of legislation directed at the control of competition and observe the reaction of business to this legislation through its many codes of fair play. This Mr. Toulmin has undertaken to do by combining a study of the fact material from which industrial codes are made and of the anti-trust laws and court decisions with which these trade practice agreements must comply.

Like all Gaul, the chief study of this volume is divided into three parts. There is a fourth division in which the author has assembled typical trade practice rules and agreements, patent license agreements, cross-license contracts, codes of fair competition, and forms for complaints and answers under the Robinson-Patman Act. In addition to these typical agreements and forms, this part of the work also contains a copy of all the anti-trust legislation from the Sherman Act down to the Robinson-Patman bill, including typical state fair trade acts.

Parts I and II deal chiefly with the nature of the facts and materials that are used in making trade practice agreements and with the preparation of these contracts so that the industrial codes, when completed, will conform with the legal restrictions enforced by the Federal Trade Commission. In these chapters the author attempts to pull back the curtain, exposing industrial conference rooms to the public eye, conferences wherein the competitors in a particular industry with their attorneys, accountants, economists, and business executives meet together with a member of the Federal Trade Commission in an effort to formulate rules of conduct for the industry.

To the lawyer, if not to the business man, Part III contains, it would seem, the real meat of the volume, for here it is that the author presents the operations of the industrial codes under the restrictions of anti-trust legislation. In this part may be found the various topics with a large selection of cases and materials that are usually included in any standard text on trade regulation.

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A large number of the 176 sections in the volume are developed in a style similar to that of the Hornbook Series. A discussion follows a statement of the point involved in each section, and the conclusion of this discussion is supported by a collection of cases, each of which the author carefully briefs.

One who has an eye for cases and facts only may become a little weary reading paragraph after paragraph of advice on business ethics. There is also an abundance of material on how industrial codes are formed and function. One should keep in mind, however, that the book is written for both layman and lawyer and that, for this reason, the author has torn apart and replaced in some detail the wheels of the various industrial associations, showing how and why they are so constructed as to be efficient, ethical, and free from governmental interference through rules enforceable by the Federal Trade Commission. One should also bear in mind that long before the golden era of the Blue Eagle of N. R. A. fame the Federal Trade Commission had quietly formed codes of fair competition in more than 140 separate industries. The submittal materials, the forms, and the legal restrictions for these industrial codes must of necessity demand much of the author's space. In the end, it may be refreshing, even to a lawyer, to trade case material space for descriptive paragraphs on the organization of the industrial machine, a matter about which too many lawyers are surprisingly uninformed.

The material in this volume, it seems, should be of real value to instructors and students in courses in trade regulation, as well as to business executives and their attorneys, for in this work the author attempts to tie the legal rules involved in trade regulation into the organization of the industrial codes.

Henry A. Shimm.†

BOOK NOTES

THE SUPREME COURT; ITS POWER OF JUDICIAL REVIEW WITH RESPECT TO CONGRESSIONAL LEGISLATION. Selected References. Compiled by Mildred R. Senior. George Washington Univ., Washington, D. C., 1937. Pp. 75. Price: \$1.00.

This bibliography constitutes volume one of the publications of the Division of Library Science, George Washington University. It is a well classified arrangement calculated to save time for the research worker and make available information for anyone desiring material on some aspect either of the Supreme Court controversy or of the broader problem of judicial review in general. Miss Senior's collection contains in a slender volume a very extensive list of articles, addresses, books, and legislation.

The references are classified under three separate headings: first, references to articles and addresses on the Supreme Court and its power of judicial review; second, bills introduced in Congress relating to the exercise of the power of judicial review between 1789-1936; third, editorials from newspapers on the question of limiting the power of the Supreme Court. The compiler by the use of asterisks has made it possible for the reader to determine at a glance whether a particular reference in the first and third grouping (1) favors the present system; (2) advocates some modification; (3) is general, explanatory, unbiased, or noncommittal.

The first group of items is listed alphabetically according to the author. The compiler gives each citation very completely and exactly, so that the prac-

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tical use of the volume is greatly facilitated. The articles are not restricted to contemporary comment, the earliest having been published June, 1890. The practice of including a pertinent quotation form, or a key analysis of the contents of each item provides exceedingly valuable information and aids the reader in his selection of material.

Helen L. Glick.†

HENRY CLAY. By Bernard Mayo. Houghton Mifflin Co., Boston, 1937. Pp. xii, 570. Price: \$4.50.

The history of a nation can best be told by biographies of its leaders; therefore, the story of Henry Clay is an excellent means by which the growing pains of the United States may be depicted. That the author was aware of this fact is evident. Although the book is avowedly a biography, the career of Henry Clay seems to be only a woof, about which is woven the important economic, political, and social developments of the young republic which he led.

This book is but the first in a projected trilogy. It is undeniably scholarly, erudite, and the product of sustained research. The bibliography and footnotes give the reader a glimpse of the wealth of material which the author must have combed. In fact, the omission of a few of the more obvious and unimportant footnotes would not have detracted from the value of the book, and might be deemed advisable because the reader's attention would not be distracted by them.

However, the casual tone of the book is never lost. The facile pen of the author makes the frontier lawyer again rise in defense of the downtrodden, again indulge in oratorical flourishes which "fulfilled the popular conception of the great trial lawyer—dominating, hypnotic, ingratiating, with a church-organ voice and unlimited command over tears and laughter; one who could shrivel up witnesses with a flash of the eye, convince jurors that black was white, and elevate a petty case into a drama of such intense human interest that it was worth coming miles to see". By the time Henry Clay was 26, it is reported, "Major Morrison, an executor of the George Nicholas estate, considered it good insurance to retain young Clay and thus prevent claimants from employing him". Before his thirtieth birthday he had defended a former Vice-President of the United States at a treason trial and had been sworn in as a Senator.

Like all good serials, the book ends on a note of suspense. President Madison, in the very last sentence, signs an act declaring that between the United States and Great Britain there exists a state of war—the War of 1812.

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