BOOK REVIEWS

Restatement of Restitution and Unjust Enrichment. St. Paul: The American Law Institute, 1937. Pp. xvi, 682.

The restatement of the rules of law traditionally classified under the procedural headings quasi contract and constructive trust illustrates the virtues and the self-imposed limitations of the co-operative treatises prepared by the American Law Institute. It brings together in a helpful form a composite judgment of the best scholars about the existing pattern of judicial decisions. By limiting itself to this purpose, it indicates clearly points at which the existing decisions lack consistency. It suggests a direction for future creative work, whether by legislators or courts. By combining quasi contract and constructive trust it suggests, without fully developing, the large part which notions of unjust enrichment play in our law.

It is not to be expected that serious questions will be raised about the accuracy of the Restatement. The authors have, for example, incorporated a number of fundamental ideas expressed in the Restatement of the Law of Contracts. As a result it seems to the reviewer that the notion of a "basic" mistake is left somewhat more vague than it need be. The decisions seem to show a reluctance to treat any mistake as basic if it seems at all possible to the trier of the issue of mistake that the parties have taken the risk of such a mistake as that in question. Reluctance to grant relief for mistake is intelligible in view of our concern for commercial good faith, though it may be that it is carried to something of an extreme in the cases. At any rate the cautious approach of the courts seems discernible and might well be a subject for comment. Again the Restatement of Restitution adopts the view of the Restatement of Contracts about the effect of unilateral mistake. The cases seem less clear on the point than the authors' categorical statements would lead an ordinary reader to expect.

The subject of unilateral mistake suggests a more significant limitation of the Restatements in question. It is difficult to frame any very general principle about relief for mistake which does not require relief for unilateral as well as mutual mistake. It is still more difficult, as is generally recognized, to frame any general principle which does not require relief for mistake of law. In the case of promissory estoppel the authors of the Contracts Restatement felt themselves justified in basing a new generalization on cases which had been regarded as exceptional but which seemed to be developing a comprehensive and just principle. It would seem that the authors of the Restatement of Restitution might have adopted a similar policy with respect to mistake of law. Instead they have felt themselves bound to state the traditional opinion that relief for mistake of law will not be allowed; and then state the many qualifications which doubtless in time will destroy this supposed qualification of the general principle with respect to mistake.

In thus bringing clearly to light internal inconsistencies in the law, the authors of the Restatement have indeed prepared the way for progress. Other examples of similar services could be given. The authors of the present Restatement have simply incorporated the statements of the Contracts Restatement about the rights of parties to

contracts which have been partially performed, to secure restitution. In this field the difficulty of reconciling the rule governing the rights of the workman or builder who is in default after part performance with the rule governing the rights of sellers and lenders has been a subject of discussion; and the confusion and inconsistency in the cases defining the measure of recovery in different situations have also been observed. Again the present Restatement repeats the familiar limitations on the rights of a person who has voluntarily and "without mistake, coercion, or request" conferred a valuable benefit on another. The rule denying a volunteer who pays a debt the right to subrogation has been shown to be the result of old notions which at one time hindered the development of our law of assignments; and the rule itself seems inconsistent with the general principle governing subrogation. It is thus thinkable that a rational Restatement might treat it as obsolete. Somewhat similarly the limitations upon the rights of one who has rendered services by mistake to one who does not know of them seem inconsistent with the general principles governing relief against unjust enrichment. Their injustice is indicated by the common development of statutory relief in case of improvements to land.

Finally, while the Restatement of Restitution takes a useful step in indicating the common basis for quasi contractual and constructive trust relief, it is difficult for such a work to indicate with sufficient breadth the large part which notions of unjust enrichment play in our law. Many of the familiar defenses to actions for breach of contract are of course designed to prevent unjust enrichment, and it is for this reason that rules governing duress, fraud, mistake, default, impossibility, appear in the Restatement of Contracts as well as the Restatement of Restitution. It seems that the best justification for the rules defining consideration so as to exclude performance or promise of what a promissee is already under obligation to a promisor to do, is to be found in notions of economic duress. More important, the application of rules of "constructive trust" governing fiduciaries, to corporate officials and "bankers," has been much obscured by the confused notion of a "quasi-fiduciary" relation. The Restatement of Restitution, while observing that the directors of a corporation are fiduciaries, expressly declines to explore the limitations upon their obligations. By neglecting this field, the authors of the Restatement have failed to complete their study at an important point. It is to be hoped that the American Law Institute will eventually give an authoritative statement of existing quasi-fiduciary notions, perhaps in a business organization Restatement.

MALCOLM SHARP*

Neutrality for the United States. By Edwin M. Borchard and William P. Lage. New Haven: Yale University Press, 1937. Pp. xii, 380. $3.50.

The present volume is obviously, if not candidly, an appeal and an argument rather than a scientific study. The object of the appeal is indicated by the title. Its author could, of course, have attempted to do the other sort of thing, *viz.* study the problem of neutrality and American foreign policy connected therewith from a detached and objective point of view. The most important thing to remember in reading this book is that he deliberately chose to make it a brief, a polemic, and not a scientific study.

This is revealed throughout by all sorts of devices or usages, not to say tricks, of

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