

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 promisee 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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style and presentation, which the reader should take into due account. The author is one of the cleverest dialecticians writing in the field of international law and politics today, and the reader would do well to be on guard on this score.

In substance the volume opens with an Introduction dealing in summary form with "the conception and rules of neutrality," "the United States and neutrality," "neutrality 1914-1917," and "the war and after," and then proceeds to a more extended discussion of the third of these topics and a discussion of "sanctions and neutrality," including some "conclusions." Appendices contain certain statistics concerning losses of ships and lives by the United States at sea during the years 1914-1918.

It would, of course, be impossible to examine, even in an extended review, the substance of each section, chapter, and paragraph of this book. In view of the nature of the subject-matter and the method of treatment, as mentioned above, nothing short of such an examination could suffice for an adequate appraisal. In default of such detailed examination, however, certain general comments may be made, and one or two detailed illustrations given.

Thus the author writes with a curious mixture of ferocity and cynicism concerning the League of Nations and all that it represents in the direction of organized international security. This being so he does not so much examine the possible value and practicability of that sort of thing, but treats it with scorn and denunciation out of hand. Moreover, it is not merely the obviously inadequate organization and practice of collective security under the present League that Professor Borchard decries, but like the National Socialist jurists of present day Germany, that sort of thing in general—and this, as has been said, with absolutely no adequate study of the fundamental problem involved (such as have been given us by Mitrany, Wilde, and other writers).

Secondly, there seem clearly to emerge in the treatment certain political preferences on the part of the author which simply cannot be overlooked or passed over in silence. Those consist of marked sympathy for Germany and Austria and something approaching strong antipathy toward Britain and France, in connection with the War and the peace settlement. The effect of this preference on the author's judgment concerning neutrality as such, collective security, American policy in the period of neutrality and in entering the War, and her policy today of mingled neutrality (new-style) and support for the effort to substitute peaceful change and organized cooperation for anarchy and violence in international relations is obvious.

The reviewer does not mean to imply that he would himself necessarily oppose the practice of neutrality, old-style, and insistence on neutral rights, or that he prefers the new-style of neutrality. Quite the contrary is true, and as long as we do not participate in collective security it seems that we should maintain our rights as a neutral. But this is said only by way of explaining the above comment on Professor Borchard and need not be elaborated.

As for the details of the substantive law of neutrality as set forth by Professor Borchard, the reviewer has little to say. With respect to the propriety and even legality of modification of these rules in application to concrete cases, in view of altered circumstances, while war is going on, and taking account of the rudimentary character of international legislative and administrative machinery before 1920, and the largely uncodified condition of the law of naval warfare, he probably would differ with the author considerably. But all this is largely beside the point except for the historical squabble over the neutral rights of the United States during the period 1914-1917.

One might admit the whole of Professor Borchard's case here without greatly affecting the main issue.

For that issue is whether states are or are not in point of fact materially and spiritually interested in eliminating war from international relations and in seeing the accepted principles and rules of international law applied. If they are, then neutrality—in any fundamental or significant sense, and Borchard is nothing if not thoroughgoing in his neutrality ideas—is simply out of the question. Even if it prove impracticable to organize sanctions to carry out the interests mentioned above, indifference on the part of any state toward the commission of violence and breach of the law of nations is inconceivable.

It is, of course, impossible to argue this case fully here.¹ Two or three favorite points of the author must, however, be noted and appraised. Thus, he is fond of casting scorn on those who would find a "short cut" to peace by sanctions against the aggressor. Second, he is very doubtful about this concept of the aggressor in any case, and particularly about the idea that some nations are more warlike than others. Finally, he seems to repudiate the idea that coercion can be effectively employed to maintain peace and order or suppress violent aggression.

As for the first it seems entirely permissible to ask Professor Borchard whether he seriously contends that the international community must wait for peace until the most violent and hysterical of its members comes to accept the pacific way of international life? If so can he say why this must be so in the international field when neither in relations among individuals in the national state nor in relations among states in the many federal unions in the world today is this doctrine admitted. If this is merely because of greater difficulties in degree no sensible person would deny those difficulties, but the objection in principle seems to fall to the ground in that case and all be a matter of seeing what can be accomplished year by year.

As for aggression, its definition, and aggressor states, does Professor Borchard think that war just happens, that no state ever so lowered itself as to stoop to aggression, or that definition of aggression is any more difficult than definition of piracy and slavery and murder, for the suppression of which we do not wait for a perfect definition? And does he really believe that there are no discernible and terribly important differences among the nations or their leaders in respect to their fondness for military adventure?

Finally, does Professor Borchard mean to go completely pacifist or anti-force and deny the justification and practicability of all physical restraint or compulsion? Have nations been compelled to do, or refrain from doing, thus and so, in the past or have they not? Granted that this is the most objectionable possible way in which to secure obedience to law and respect for peace; but if unhappily some state leaves no other possibility open, does Professor Borchard really mean that nothing is to be done about it but let the aggressor nation have its way?

As for the United States it is possible that Professor Borchard would argue that even if all these considerations were sound in general, the United States should keep out of it—because we are so far away from Europe, so different from Europe, and so on. He does not seem to be quite an isolationist, but independent-nationalist of some variety he certainly is (some of his alarmist remarks about our loss of independence seem too extreme even to quote). On that score one can only doubt whether materially

¹ See forthcoming pamphlet by reviewer on international security and peaceful change in University of Chicago Public Affairs series.

or psychologically such a course would be either beneficial or practical. It hardly seems possible for the United States to remain indifferent to the course of events in the rest of the world. Mr. Harding had that idea too, but he soon confessed, after becoming President, that it was impracticable. And if we are interested in fact, then it seems the height—or depth—of ostrichism to pretend that we are not, and the depth of negligence or cowardice to refrain from doing what we can, within the measure of the values at stake, to solve the problem.

We have here, then, an extremely able, but far from simple, *ex parte* plea in what without exaggeration may be described as the most important problem of human relations, social science, and American policy, of this age. It is full of personal and political feeling, dialectical subtlety—see the prejudicial statement in the first line of the Preface, and such items occur all through the book—, and bitter rhetoric. It is deplorable that such treatment should be given to a vital problem of broadest national and human importance. The fate of the present League of Nations is of very small moment indeed in comparison with it. The injustices, such as they are, of the present territorial and economic international distribution, are of limited and passing importance. The antagonism between the ultra-nationalist nations of today and the great body of nations which are trying to build up a system of pacific international order and progress,—even that is of subordinate importance and it is conceivable that Germany will become cooperative again and Poland violent. What is important is the conflict between two fundamental philosophies and techniques of international relations. On one side are solidarity, organization, cooperation, effectively sanctioned in the extreme case, if need be, and all this not merely in behalf of existing rights but in behalf of progressive change by pacific means. On the other, are anarchy, disorder, isolation, neutrality, and war. The present volume, without its author intending so entirely, is a contribution on the latter side.

PITMAN B. POTTER*

The Power to Govern. By Walton H. Hamilton and Douglass Adair. New York: W. W. Norton and Company, Inc., 1937. Pp. 254. \$2.50.

Selected Supreme Court Decisions. Edited by Myer Cohen, with a Foreword by Alexander Meiklejohn. New York: Harper and Brothers, 1937. Pp. xxi, 309. \$2.50.

Mr. Meiklejohn, under whose leadership Mr. Cohen, Mr. Hamilton and the reviewer have all taught, furnishes a foreword, not only to one of these books, but to the future teaching of law in the United States. In the light of his successful experience at Amherst, Wisconsin and San Francisco, he has concluded that our civilization can best be understood by concentrating attention first on our law, and particularly our constitutional law. He has been a leader in urging that education should be a coherent effort to understand our civilization. It is significant, therefore, to find him, as his view gains ground, arguing that for adults at least the starting place for education is the law. Every student should read his compact and instructive foreword to Mr. Cohen's collection of cases.

The cases themselves are well selected. Inevitably, in such a rapidly growing field,

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