REVIEWS

RESTATEMENT OF THE LAW. RESTITUTION. Warren A. Seavey and Austin W. Scott, Reporters. Adopted and promulgated by the American Law Institute. St. Paul: American Law Institute Publishers, 1937. Pp. xxv, 1033.

THIS Restatement embraces roughly the subject matter of Quasi Contracts and Constructive Trusts. Of the three parts into which Quasi Contracts was divided by Ames[1] and Keener,[2] the Restatement omits two, namely, the action on a judgment and the action based upon a customary, statutory or official duty. By lopping off these gnarled branches the Restatement takes "unjust enrichment" as the primary basis of the quasi contractual obligation, and thus brings a more plausible unity into the diverse doctrines here brought together. In this the Restatement follows the lead of Professor Woodward's admirable little treatise.[3] The rubric, quasi-contract, has long been a catch-all heading,[4] and the Restatement has furthered the movement to make it an intelligible basic class of legal obligations.

Yet the scope of restitution has been extended beyond the conception of Ames and Keener, which included only the common law actions for a money judgment. The Restatement embraces also obligations based upon unjust enrichment which are enforceable by a suit in equity, and includes restitution in specie as well as the money judgment (§ 4). Historical limitations upon the field of quasi contracts are thus broken down in furtherance of the modern trends in procedure, and the basis of the obligation rather than the historical or procedural character of the remedy is made the basis of classification. However, in Part II ("Constructive Trusts and Analogous Equitable Remedies") the basis of subdivision is still the availability of one or more equitable remedies for the enforcement of a constructive trust, an equitable lien or subrogation (p. 640). This is a recognition not merely of historical necessity but of distinct remedial rights.

The Restatement of Restitution supplements the volumes heretofore published on Contracts and Trusts. The former, prophetically, brought forth a subdivision on "Restitution",[5] which includes the rules as to recovery by or against a person in default under a contract; and that Restatement also includes the right of restitution under a contract which has become impossible of performance or which is unenforceable because of the Statute of Frauds or of illegality. These parts of the earlier work are covered by a cross-reference section (§ 108) in the present volume. The right to restitution under a transaction induced by fraud, duress or undue influence is stated here (§§ 28, 70) with a cross-reference to the Contracts Restatement for a fuller

1. Ames, *The History of Assumpsit* (1888) 2 HARV. L. REV. 64.
2. KEENER, A TREATISE ON THE LAW OF QUASI-CONTRACTS (1892) 16.
3. WOODWARD, QUASI-CONTRACTS (1913).
4. Dig. 44, 7, De O. et A., 5.
5. RESTATEMENT, CONTRACTS (1932) §§ 347-357.

statement of the grounds of recovery. The important subject of mistake is, on the other hand, fully elaborated in the present Restatement (§§ 6-69). Although the investigation of a problem of mistake in a transaction *inter vivos* will require the use of both volumes, there is very little overlapping or duplication. The Restatement of Trusts was so planned as to exclude constructive trusts, and there is practically no duplication in this instance.

In adopting the single word "Restitution" as the distinctive title of the volume, the Institute took a bold step. The very choice of a new title for this fugitive body of legal doctrine was an invitation to depart from the conservative conception denoted by the general title, "Restatement". The unfamiliarity of the new title should not, however, give rise to any fears on the part of the bar that the law professors have been playing the game with the deuces running wild. There are some of us who regret that in some instances the professional hunch for just law, even when the courts have disagreed, was not given freer play. The Restatement of Restitution has not justly enriched the law as much as it might have.

The rivalry between "Restitution" and "Unjust Enrichment" as basic ideologies or terminologies goes back to the appearance of Keener's pioneer treatise on quasi contracts.[6] The earlier controversy was apparently one of ideology, that is, what is the deontological (ethical) basis of the doctrines of quasi contracts? In the formulation of this Restatement the problem was rather one of terminology, that is, what short title will suggest the contents of the volume and bear the strain of fairly indicating its contents? The term "unjust enrichment" seems more suggestive, but its appearance with the prestige of the American Law Institute might have the same unfortunate effect upon a sorely troubled profession which, according to former Dean Pound, the title of Ward's "Dynamic Sociology" had upon the Russian Imperial censor—it suggested "dynamite" and "socialism". At all events brevity was the decisive factor in the final choice. Yet each rival gains a victory. "Restitution" gains the titular honor, while "unjust enrichment" is recognized as the basic principle underlying the whole subject matter (§ 1). That the two concepts do not exactly coincide[7] will be relatively unimportant unless those who use the volume attempt to give them exact meanings and apply them deductively.

The subdivision of this amorphous body of legal doctrine involved further difficulties in terminology and classification. Part I is entitled "The Right to Restitution", while Part II is headed "Constructive Trusts and Analogous Equitable Remedies". The two parts are not mutually exclusive divisions of the subject matter, since Part I states propositions as to restitution which are applicable to constructive trusts[8] and Part II states additional propositions as to the right to restitution which are peculiarly applicable to constructive trusts[9] and analogous remedial rights. The subdivision is thus based on expediency and tradition. Traditionally the subject matter of constructive

6. Abbott, *Keener on Quasi Contracts* (1896) 10 HARV. L. REV. 226; Learned Hand, *Restitution or Unjust Enrichment* (1897) 11 HARV. L. REV. 249. See Patterson, *The Scope of Restitution and Unjust Enrichment* (1936) 1 MO. L. REV. 223, 231.

7. See Patterson, *supra* note 6, at 230.

8. See, for example, § 163.

9. See, for example, § 164.

trusts has developed under separate rubrics in digest and treatise, and procedural differences have kept it apart from quasi contracts. The division of labor in formulating this fusion of subject matter suggested, if it did not require, such a partition. All of this may seem pretty obvious; yet it indicates the conservative character of the Restatement as an articulation of case law.

The chapter headings in Part I display considerable ingenuity in classification. After Chapter 2 ("Mistake, Including Fraud") comes "Coercion", which is made to serve as a blanket not only for duress and undue influence, but also for judgments, taxes, indemnity and contribution.[10] "Benefits Conferred at Request" (Chapter 4) includes the rights of restitution incidental to contract, and "Benefits Tortiously Acquired" (Chapter 7) completes the traditional divisions of quasi contracts. Two catch-all headings confine the cats and dogs:—"Benefits Voluntarily Conferred Without Mistake, Coercion or Request" (Chapter 5) and "Benefits Lawfully Acquired Which Are Not Conferred by the Person Claiming Restitution" (Chapter 6). The former deals with the Good Samaritans who are not too officious, and the latter includes confusion of goods, accession, finders and other situations which cannot repose comfortably elsewhere.

The inclusion with the bound volume of a pamphlet containing Notes on this Restatement, compiled by the Reporters, is a welcome departure from the usual practice of the American Law Institute. The theory that the Restatement rests upon the expertness and authority of the men who drafted it and of the Institute which corrected and approved it, rather than upon judicial precedents, is in conflict with the basic theory of the Restatement and with the practice of those who formulated it.[11] The Restatement is primarily built from the precedents upward into general principles rather than from general principles downward into particular rules. The precedents are not the scaffolding but the foundation of the structure. The legal profession should therefore be given a list of the precedents used in the work. Especially is this true in the field of quasi contracts. Here precedents are scattered under different headings in digest, encyclopedia and treatise, and are rendered difficult of interpretation (especially the older ones) because the opinions are confused by the language of "implied contract". Moreover, the precedents for some common situations are scanty because the amounts ordinarily involved do not make it worth while to take the litigation to a court whose decisions are published. Hence it is to be regretted that the pamphlet contains notes on less than half of the 215 sections of the Restatement. Even the scarcity of precedents on a particular section is significant. Since the Restatement style does not permit the expression of any doubts (except through the formal Caveats), propositions upon which the precedents are few or doubtful and those on which there was difference of opinion in the advisory group are stated with the same assurance of certainty as those which are well established. The publication of fuller Notes would have helped to indicate these differences. The very thorough Index (155 pages) adds greatly to the accessibility of the contents of the volume.

10. Here following Woodward, *op. cit. supra* note 3, Part III.

11. But *cf.* James, Book Review (1938) 47 YALE L. J. 1238.

As a self-consistent and well ordered set of propositions about a field of law which is relatively inaccessible through the usual sources and which is designed to aid in adjusting the conflicts arising from some of the recurrent abnormalities of human conduct, this Restatement should prove valuable to lawyers, judges and legal scholars.

EDWIN W. PATTERSON †

New York, N. Y.

A LEGISLATIVE HISTORY OF THE MOTOR CARRIER ACT, 1935. By W. H. Wagner. Denton, Md.: Rue Pub. Co., 1935. Pp. 155. $2.75.

FEDERAL MOTOR CARRIER REGULATION. By P. McCollester and F. J. Clarke. New York: The Traffic Pub. Co., 1935. Pp. x, 340. $4.00.

THE FIRST book presents the text of the Act with annotations showing discussions of and changes in the bill between the time it was reported out of committee and the time it was passed by both Houses of Congress. In addition, there is a list and brief summary of state and federal court decisions relating to state motor carrier laws. All of this material appears without comment. The book is merely a compilation for reference use by those interested in the formal development of the law in its last stages in Congress.

The second book has a broader purpose. It discusses the growth of the motor vehicle as a transportation facility and various aspects of state regulation; and then reviews each item of the Motor Carrier Act itself, interpreting where possible the probable meaning of those items in the light of past decisions in the railroad cases. In an appendix the act itself is reproduced and some of the early procedural requirements are presented. This material provides a valuable working manual for those in the motor carrier business, though changes are occurring so rapidly that it will be necessary to supplement this material with current information.

Neither of these books, however, makes any effort to present the broad implications of the Motor Carrier Act in relation to the general field of business regulation. These implications are significant because the Motor Carrier Act is the latest of a long line of laws passed by Congress to regulate transportation enterprises, and as such the Act illustrates the ultimate motives which may be expected to broaden the scope of economic regulation in general. A brief review of the principal motives behind each step of economic regulation—economic regulation is used in contrast to technical regulation covering control of safety standards and the like—will demonstrate the point.

Originally, federal regulation of railroads was proposed in response to complaint of the farmers against high rates. It was concluded at the time that the problem was to be solved by enforcing competition rather than by regulation. In the next thirteen years competition and technical advances accomplished the desired results, but simultaneously there started a reaction to competition in the form of consolidations, pools and traffic agreements which did not augur well for the future maintenance of that competition.

†Professor of Law, Columbia University, Member of the American Law Institute's Committee on Restitution.

Further, those twin evils, discrimination and rebating, loomed into a prominence which could not be ignored even by a Senate not too anxious to intrude in the field of private enterprise. The Interstate Commerce Act of 1887 was the result. The subsequent erosion of the supposed powers of the Commission by repeated adverse decisions of the Supreme Court is a matter of history. The same forces, growth and abuse of monopoly and the evils of discrimination, together with a revulsion against the financial scandals of the railroads gave a Roosevelt and his successor the ammunition to make the early type of regulation really effective by passage of reinforcing legislation from 1903 to 1910. With 1920, regulation was advanced still further, control over security issues, new construction and abandonments, excess earnings and consolidations was introduced, and rate and service control was expanded to provide affirmative powers.

The monopoly power of the railroads, the magnitude of their operations and the power it engendered, the high proportion of common costs and the difficulty presented in determining costs for particular shipments or traffic, the importance of railroad securities to investors and the financial markets, and the essential part railroad transportation played in the national economy were all characteristics that directly or indirectly lead to the growing sheaf of regulations. But when we come to the motor carriers, not a single one of these characteristics were present. Before the Motor Carrier Act, interstate highway transportation was as highly competitive and non-discriminatory as the strongest exponent of *laissez faire* could ask. The size of highway operators was with few exceptions dwarfed into insignificance by a multitude of existing industrial organizations. The cost of motor operations largely consisted of direct costs which could, at least, be estimated by all who were interested. Scarcely any securities were issued to the public. The railroads were still the backbone of the transportation of the country. So far as the old reasons for regulation, as applied to the railroads, were concerned, there was no more reason for economic regulation of the motor carrier than of corner drug stores.

A significantly new set of motives for economic regulation appeared. First and most active was the desire of that already regulated facility, the railroad, to get relief from motor competition. It was a desire behind which the railroad managers, security holders and labor could be joined to produce a tremendous pressure group. Secondly, within the motor carrier industry itself, some of the bigger units were tired of cut-throat competition, though that competition was scarcely more than the ordinary small businessman takes as a matter of course in depression times, so that those units were sympathetic to control of rates and of new entries in the field. And lastly there were the motives of those whose philosophy was that of increasing government entrance into business. They took in their stride the extension of transportation regulation to cover tens of thousands of motor carriers, eager to join hands with those of contrary philosophy who sought the regulation for reasons of defense. The one old-time motive present was that of the request for federal action because state action seemed inadequate, but that state action itself was motivated primarily by the three new factors, so the old motive was merely an amplifier of the new.

The appearance of this new type of motivation is of significance in forecasting what may happen in the future in the business world at large. This fact should not be lost sight of because it is in that special field, transportation, where the constitutional powers of the government have long been recognized, rather than in the general business field where the government's powers are largely yet to be formed.

KENT HEALY†

New Haven, Conn.

TRADE MARK PROTECTION AND UNFAIR TRADING. By Walter J. Derenberg. Albany, N. Y.: Matthew Bender & Co., Inc., 1936. Pp. lxviii, 1162. $20.

The author, a German scholar, has contributed one of the most important works on trade-marks and unfair competition published in this country. His work, unlike so many of our textbooks, is not an uncritical digest of the law with a classification of cases and a collection of citations, nor merely an analytical or historical presentation of the law as disclosed by the decisions. It is rather a critical restatement of the law at the present time which includes a selection of earlier cases underlying the modern development. The exposition is alive and inspired.

The present book is an expansion of a work in German published by the author in 1931.[1] This may explain the author's first chapter dealing with certain aspects of our law and procedure, with which American practitioners are well acquainted. The second chapter on the development of the modern law of trade-marks and unfair trading is easily the most significant in the book. In clearly written and fully documented pages the author traces the development of the trade-mark from the "origin and ownership" view to the notion that "the mark sells the goods"; of the conception that a trade-mark is "property" to that of expectancy of custom or goodwill as the subject of protection; of the consequent recognition that the law of trade-marks was but a part of the broader law of unfair competition; and of the expansion of the "passing-off" action into the modern law on unfair trading. The author very properly follows this chapter by tracing the jurisdiction and activities of the Federal Trade Commission in unfair methods of competition. He shows the impotency of the Commission's work by reason of its limited jurisdiction, restricted by the reviewing courts, and its confinement to interstate commerce.

The remaining chapters in the book are the conventional ones on what constitutes a valid trade-mark, secondary meaning, the right to use one's own name, the scope of the trade-mark rights, the territorial extent of trade-mark rights, the acquisition and loss of such rights, the effects of Federal registration, remedies, etc. These are characterized by the same manner of presentation of the law, critical tracing of development, clarity, and good documentation. Particularly stimulating in this connection is the discussion con-

†Assistant Professor of Political Economy, Yale University.

1. WARENZEICHEN UND WETTBEWERBSRECHT IN DER VEREINIGTEN STAATEN VON AMERICA (1931.)

cerning geographical names,[2] descriptive and suggestive words,[3] loss of trade-mark upon expiration of a patent,[4] the defense of unclean hands,[5] and assignments and licenses of trade-marks.[6] Some of the matters discussed, particularly that of assignments and licenses, should probably have been further explored. For example, there is no discussion of the questions of use of the same trade-mark by associated companies ("Club Cracker" case), term assignment by a foreign manufacturer to a local exclusive agent (Scandinavia Belting Co. case), and assignment of one trade-mark by a manufacturer owning several marks for similar goods.

Leaving aside questions of detail, some analysis or conclusion with which the reviewer may not agree—and these are not many—he would have wished, in such a fine study, a greater emphasis on the economic and social interests involved, rather than a purely legalistic interpretation. The author probably thought this beyond the scope of his book. It is hoped, however, that he may employ his exceptional faculties to this end at some future time.

STEPHEN P. LADAS†

New York City.

RECORDS OF A YORKSHIRE MANOR. By Sir Thomas Lawson-Tancred. London: Edward Arnold and Co. 1937. Pp. 384, xii.

STRICTLY applied, the title fits only the first 193 pages of the book—a history of the medieval manor of Aldborough. The remainder of the volume is concerned with the parliamentary history of the boroughs of Aldborough and Boroughbridge, from the middle of the seventeenth century till just before the Reform Bill of 1832.

Rambling and amateurish, and in some places almost naive, the book is nevertheless far from being uninteresting; it contains a mass of varied information—some of it hardly to be had elsewhere—which is not the less instructive because of the jumbled way in which it is presented. What might have been an element of decided value in the first part is missing because a mass of early records are given only in translation, and so the text is lacking in the original technical expressions necessary for the minute and exact information desired by professional historians.

The second part, made up largely of private letters which are given in full, furnishes an unusually intimate, though not always attractive, picture of electioneering in northern England in the days when a very limited suffrage put power at the polls in the hands of a comparative few.

The book is very much in need of an index.

G. E. WOODBINE†

New Haven, Conn.

2. Pp. 238 ff.
3. Pp. 257 ff.
4. Pp. 619 ff.
5. Pp. 659 ff.
6. Pp. 571 ff.

†Member of the New York Bar.

† Professor of History, Yale University.