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Review of “Cases on Restitution,” By Edward S. Thurston

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continuous focus the special theme of the book—legal realism, its meaning and its contribution to the science and the practice of law.

Apparently that contribution lies mainly in the field of the judicial process—the “judge’s justice.” For it is only in the sphere of that justice that the realist movement is appraised in this book. Justice “with respect to the community of all living things” is dealt with only incidentally. Allowing for this limitation on the scope of the discussion, the book presents the most thoughtful, certainly the most comprehensive, examination and evaluation of the realist trend in modern law that has yet appeared in print. In the reviewer’s opinion, it is the best small book in jurisprudence that has come out since the publication of Cardozo’s *Paradoxes of Legal Science*. The publishers do not exaggerate when they refer to the author as “a young philosopher—full of promise.” It is good to know that the law has acquired a lien on his talents.

ISRAEL TREIMAN.†

CASES ON RESTITUTION. By Edward S. Thurston. St. Paul: West Publishing Co., 1940. Pp. xxviii, 964. \$6.00.

Although the above title is broad enough to cover the entire field, the subtitle preceding Chapter I, which is an introduction, adds Quasi Contract and Relief in Equity. The scope is therefore the field of restitutionary rights enforceable by the familiar action of general assumpsit or by a bill in equity. The writer expected that the materials included would be aligned with the treatment adopted in the Restatement of the Law of Restitution inasmuch as no casebook following the latter treatment had come to his attention. The American Law Institute publication, however, includes constructive trusts, whereas Professor Thurston has chosen to leave the treatment of the doctrine of constructive trusts to be studied in connection with the law of trusts.

It would seem that the convincing arguments given by the editor for embodying other forms of equitable relief in his Cases on Restitution would be fully as strong for including the subject matter treated under constructive trusts in the Restatement. The reasons for including constructive trusts in the field of restitution and unjust enrichment have been so clearly stated in the article by Messrs. Seavey and Scott in the *Law Quarterly Review* as to seem almost uncontroversial.¹ They fully negate any need for a continued treatment of constructive trusts in connection with the teaching of trusts.

The influence of the earlier works of Professor Ames, and of Professor Cook’s combination of common law and equity material in the third volume of his *Cases on Equity* is evident and is acknowledged by the editor in his preface. If we are to be consistent in following the plan of including all of the remedies available to correct situations of unjust enrichment, the constructive trusts and allied material of the Restatement should be divorced

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1. (1938) 54 *Law Quarterly Rev.* 40, et seq.

from trusts as such. If we take the modern view that procedure is to include all remedial measures and avoid the line of cleavage between equitable and legal remedies as followed in the modern codes, the same conclusion would be reached.

However, an editor is entitled to his own individuality in treatment, whether or not it coincides with the views of others. Professor Thurston's introduction contains a brief historical sketch of the development of the doctrine of unjust enrichment, supplemented by very complete notes and well selected cases. Of course, *Moses v. MacFerlan* and *Hertzog v. Hertzog* are included, but the modern application is found in cases of recent date, as late as 1934 and 1936. In *McCall v. Superior Court* (p. 32) the law student is introduced to a fascinating discussion of the difference between rescission *in pais* and rescission in equity.

Following the general introduction to the subject, Professor Thurston takes up the topic of Benefits Tortiously Acquired. This division does not appear in the Restatement until Chapter VII. While there is no necessity for conformity, and one using this book as a teaching tool may refer to the proper chapters of the Restatement so as to give the student the benefit of the latter, it does seem that the subject matter might have been arranged to fit in with the Restatement. In this particular as in others, Professor Thurston has chosen to arrange his cases and materials in an order of his own without reference to the plan adopted by the American Law Institute's Committee on Restitution. The writer feels that some concessions in this respect might very well be made to the efforts represented by the work of the Institute. The writer is heartily in accord with the inclusion of the remedies of rescission, cancellation, and reformation, as well as the remedies included under quasi-contract. The excellent arrangement, the very generous notes and comments, law review references, and other contributions of the editor, are of the highest quality.

The cases included embrace most of the leading cases which we have found in the earlier books on quasi-contract, from Keener down through Woodruff and Woodward, but in addition the 900 pages include a vast amount of modern cases in which the common law and equitable remedies have been used to combat unjust enrichment.

The availability of this excellent casebook for use in connection with any particular law school curriculum will depend a great deal upon the allotment of time and emphasis placed upon first, the equitable remedies as such, and second, upon whether the course in trusts is to include constructive trusts.

If the law school curriculum and the number of faculty members permit, as they do at Harvard Law School, students may have a choice. The catalog of the Harvard Law School indicates that students may take Professor Thurston's course in quasi-contracts, and in that case they will use his casebook on quasi-contracts and presumably study equitable remedies elsewhere. They may not, however, elect to take both the course in quasi-contracts and the course in restitution.

In schools which cannot make as broad a choice available to students, it

would seem desirable to have the course in restitution and use a casebook like Professor Thurston's. This is in line with the more recent tendency to eliminate the courses in equitable remedies as such and treat them in conjunction with and parallel to legal remedies.

A most desirable end would be obtained if the bar could become well acquainted with the Restatement of Restitution and Unjust Enrichment and with the very illuminating materials and notes of Professor Thurston. Various ways must be devised to bring home to the bar the merits of this Restatement as a contribution to legal scholarship through the selection of related matter from other fields under one title, such as was accomplished when "the collective name of 'Torts' was given in a treatise to the wrongs for which actions of trespass on the case were permitted in a great variety of situations."²

CHARLES E. CULLEN.†

INDUSTRIAL DISPUTES AND FEDERAL LEGISLATION. By Thomas Russell Fisher. New York: Columbia University Press, 1940. Pp. 370. \$4.75. c

This book, one of the Columbia University Studies in History, Economics, and Public Law, is a critical survey of federal legislation relating to labor disputes from 1900 to 1939. It contains special studies of the railroad, coal and steel industries, but these are chiefly used to illuminate the more general problem of federal control over industrial relations. The author's theme is that the strike and lockout are damaging to the participants and to the public, and that the most effective remedy is government intervention through mediation and arbitration.

For convenience, the book may be divided into three main parts. The first, consisting of four chapters, is an introduction to the general field. It contains a discussion of the background of industrial disputes, and a survey of relevant federal legislation since 1900. The second part consists of three chapters which cover briefly the history of labor relations in the railroad, coal, and steel industries respectively. These chapters, which are, in the opinion of the reviewer, the best in the book, tell the principal facts about past labor disputes in the three industries, and place the pertinent federal statutes and commissions in this historical background. The third part of the book consists of four chapters dealing respectively with the prevention and settling of labor disputes, employee representation plans, the function of government in labor disputes, and the need for social legislation in this field.

The best and the worst that can be said of this book is that it is a survey. Considering the length of time and amount of material covered, it would be impossible in the space of three hundred and seventy pages to do more than sketch the facts and suggest solutions. Perhaps the most serious criticism of the book is that although the author seems to have convictions they are nowhere clearly set out. In fact, his conclusions seem contradictory. For example, on page 153, arbitration "by boards of unqualified

2. (1938) 54 Law Quarterly Rev. 33.

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