

## REVIEWS

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THE LAW OF TRUSTS. By Austin Wakeman Scott. Boston: Little, Brown and Company, 2d ed., 1956. 5 Volumes, pp. 4056. \$100.00.

THERE has never been any doubt as to the standing of *Scott on Trusts* with the legal profession. In an Epilogue to both the first and second editions Professor Scott, with characteristic conciseness, says of his work: "This, as I understand it, is the Anglo-American law of trusts."<sup>1</sup> Because the author is a distinguished teacher who has spent a lifetime working in the field, it is to be expected that no one "understands" the subject better. And this has been the judgment of the profession, as demonstrated by the critical acclaim which greeted the first edition, the prominent position which these volumes occupy in the nation's law libraries, and the frequency with which citations to *Scott* occur in every decision and brief pertaining to trusts.

Practicing lawyers in particular like what they find here. The author has culled from the flow of decisions those principles which the courts have treated as authoritative and has woven them together into orderly patterns. The result is a set of sourcebooks which are compact, readable and completely reliable as to citation of authority. If in the two decades since these volumes first appeared these qualities of craftsmanship have come to be taken for granted, the recent publication of a second edition demonstrates anew the author's skill in synthesizing case materials.

In basic organization, the new edition differs only slightly from its predecessor. There are some twenty or more new sections or subsections. They seldom, however, introduce new topics. Rather, the arrangement of subjects has been altered here and there to give, by separation, more emphasis to materials which previously appeared as parts of other sections. The original four volumes, three fat and one spare, have now been expanded to five volumes of more uniform size. The increase results from the updating of the text and footnotes to include the last twenty years of decisions and statutes. Throughout, the integration of old and new is achieved without noticeable dislocation, so that while the new edition has all the good characteristics of the original, it speaks unmistakably from the year 1956.

After reviewing the historical evolution of the trust, Professor Scott opens the working sections of his treatise with a chapter defining and distinguishing his subject matter. Once defined, the trust is broken down in successive chapters into methods of creation, identification of the trust property, trustee and beneficiaries, transfer of interests, administration, liability of parties and termination. Particular types of trusts are treated as they fit into one of the above

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1. 2d ed., p. 3439.

categories. Only charitable, resulting and constructive trusts are, because of their nature and importance, given separate chapter headings.<sup>2</sup>

The style is well suited to maximize coverage. The sections proceed in orderly fashion: first, a statement of the legal principle to be discussed, then a description of relevant case material, and finally a statement of the author's preference if there is a conflict in authority. There is no equivocation. In no more than a handful of situations is the author without a definition or compelled to conclude that the law is what the judges say it is.<sup>3</sup>

Technically, there is little to criticize in his exposition of doctrine. Attention must therefore be directed to the philosophy underlying his use, selection and organization of that doctrine. Unlike other writers who treat the traditional language of the law as only a means—Wigmore, for instance, who wrote to reform the law of evidence, or Corbin, who found the dynamics of the law of contracts in the interplay of fact and policy—Scott accepts a clear statement of doctrine as an end in itself. These volumes are, in short, the Restatement of Trusts, expanded to include the authority from which the blackletter principles were derived.<sup>4</sup>

A restatement of the law is an enterprise of bold ambition. If done well, as in these volumes, its contributions are considerable. Quantitatively, the property law of trusts is all here. A busy practitioner who has his facts and claims already assorted can rely on these volumes in the tough task of analyzing and synthesizing the relevant cases into a form suitable for brief or argument. It is, however, a paradox of the restatement principle that the very breadth of its purpose sharply curtails the means whereby that purpose can be achieved. No one has devised an easy method for collecting the multitude of variables which go to make up the law. A restatement simply avoids the problem. In order to satisfy the expectations which it has raised it confines its search for the law to the single source of reported cases.<sup>5</sup>

Hence, all the traditional criticisms of a blackletter restatement apply here.<sup>6</sup>

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2. The author suggests that it might be more logical to treat the subject of constructive trusts elsewhere. He bows, however, to the traditional arrangement and makes it the last major topic of the treatise. For his reasons, see § 461.

3. For examples of this rare form of frustration, see pp. 321-22 (definition of a confidential relationship) and p. 520 ("it is impossible to reduce a question of public policy to a formula."). This is not to suggest that Professor Scott believes only in rigid categories. Where there is a conflict in authority his preference is invariably in favor of the more flexible, liberal interpretation. His preference is, however, always consistent with his previous statement of the applicable rule.

4. The section numbers correspond with the section numbers of the *Restatement of Trusts*. The materials on constructive trusts appear in the *Restatement of Restitution*. The author provides a table of cross references at p. 3099. Professor Scott was, of course, the reporter of the *Trust Restatement* and of those sections of the *Restitution Restatement* which pertain to trusts.

5. Except in some areas of trust administration, statutes are relatively unimportant as a source of trust law.

6. The type of criticism made herein is practically as old as the first restatement. The most comprehensive presentation of a restatement's deficiencies appears in McDougal,

It must, of necessity, be deficient because it accepts at face the language courts use to justify their decisions, with only incidental reference to the factors which persuaded the court to make that decision in the first place. Professor Scott anticipates this line of criticism. He warns that language alone does not control and that there are dangers in being overly conceptualistic.<sup>7</sup> He proceeds, nonetheless, without too much care for his admonitions.

The chapter on definitions and distinctions, for example, presents a bewildering array of cases ranging far and wide throughout the law. Some involve liability, others construction of instruments, the statute of limitations or jurisdiction of courts. The author does not categorize these problems by their facts, the claims made by the parties or the policies which might be relevant. His groupings depend on the label—trust, bailment, agency, equitable charge and the like—by which courts have traditionally explained their decisions. As these cases themselves demonstrate, the label does not actually determine the results; it is at most an alternative way of stating the problem to be decided. Thus, in section 5 it is stated that a trust is not a bailment because the trustee has legal title (a bailee mere possession), a trustee can convey title to a bona fide purchaser (a bailee cannot), and a trustee is suable in equity (a bailee elsewhere). An obvious question is whether these characteristics identify the category or whether they are the consequences which follow after the identification has previously been made. Scott suggests that ultimately the basis of distinction is to be found in the intent of the parties. "If [the transferor] . . . manifested an intention to transfer the title and not merely possession, a trust is created; if to give possession merely, a bailment is created."<sup>8</sup> The intent test is scarcely less ambiguous. The transferor either did not have an intent or it cannot reliably be found. The court must therefore construct his intent with the result that intent is as much in issue as the label which the intent is supposed to supply. The author, while he would certainly not go as far, does concede that in close cases intent is a matter of "guess."<sup>9</sup>

In certain areas of trust law, doctrine does play a vital, even controlling, role in the decision-making process. This happens in cases involving the allocation of principal and income. The issues are capable of being narrowly defined. There are only a certain, relatively small, number of forms that a receipt of property can take, and these forms can be determined rather arbitrarily by referring to a few external characteristics. The trend of decision and statute, in frank pursuit of a policy of administrative convenience and regularity, has been toward formalizing the methods of allocation even to the extent that ap-

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*Future Interests Restated: Tradition Versus Clarification and Reform*, 55 HARV. L. REV. 1077 (1942). On the *Restatement of Trusts* see Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800 (1931), and Professor Scott's reply, 31 COLUM. L. REV. 1266 (1931). On how a restatement evolves, see Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643 (1933).

7. See, e.g., pp. 36, 46, 47, 617, 618.

8. P. 51.

9. P. 52.

parent injustice has resulted in individual cases.<sup>10</sup> Professor Scott's analysis is admirably suited to present this material.<sup>11</sup> Indeed, it may well be that in this area he has had his greatest influence in clarifying and shaping the law.

As doctrine seeks to generalize for an infinite number of fact situations, it becomes illusive as a guide. Trust law provides one of the most dramatic examples of the unreliability of legal abstractions as a basis for solving concrete cases. A recurring challenge to the judicial process has been the transfer designed to give away property while retaining all its practical benefits. The rule, briefly stated, is that the transfer is valid if the transferor divested himself of dominion and control. The cases, however, indicate that the rule is empty of meaning without reference to the persons who invoke it. In *Newman v. Dore*,<sup>12</sup> for instance, the New York Court of Appeals held an inter vivos trust ineffective as a means of disinheriting the wife. But the court conceded that the same trust might be valid as to persons claiming in any other capacity, although the test of validity did not admit to such variations. This case, unique only in that the controlling facts and policies were so apparent, suggests the minimum discriminations which must be made if the process of adjudication is to be accurately described.

Experience shows that even a breakdown into facts and policies is only a start. For almost thirty years the New York courts have sought a rule to protect the spouse from disinheritance by trust transfers which pass title and nothing much else. Congress, the Treasury and the federal courts have grappled with a somewhat similar problem in extending the reach of the estate tax to include trusts measured by the transferor's life. In both instances, the problems, although narrowly defined, have defied solution. The bold promise which for the New York spouse was contained in *Newman v. Dore*<sup>13</sup> and for the federal tax commissioner in *Helvering v. Hallock*<sup>14</sup> has degenerated into the confusion typified respectively by *Matter of Halpern*<sup>15</sup> and section 2037 of the Internal Revenue Code of 1954. Certainty, it would seem, cannot be found short of the most minute itemization of facts, claims, policies, competence and prejudices of judges, and the like.

The text provides other examples. The sections on the declaration of trusts,<sup>16</sup> construction of precatory language,<sup>17</sup> evasion of the Statute of Frauds,<sup>18</sup>

10. The presence of a discretionary allocation clause does not appreciably change this result. The trustee still tends to follow recognized forms of allocation in order to establish the reasonableness of his conduct.

11. §§ 232-41A.

12. 275 N.Y. 371, 9 N.E.2d 966 (1937), discussed and approved in the text, pp. 471-73.

13. *Ibid.*

14. 309 U.S. 106 (1940).

15. 303 N.Y. 33, 100 N.E.2d 120 (1951), discussed and disapproved in the text, pp. 498-501.

16. §§ 17.1, 23, 24, 56.6.

17. § 25.

18. §§ 44, 45.

the active-passive dichotomy,<sup>19</sup> the insurance trust,<sup>20</sup> termination and modification,<sup>21</sup> the trust res,<sup>22</sup> and the nature of a charitable gift<sup>23</sup> often reveal the same confusion of facts, claims, policies, labels and results. In fairness to Professor Scott it must be noted that he frequently speaks of the difficulty in generalizing the law.<sup>24</sup> But this insight is not pursued in specific terms. His trust emerges simple, neat and disciplined. The aberrations noted are rather summarily excused. In contrast to this image is the evolution of the trust as an outlaw, a device permitting property owners to make wills and avoid taxes in defiance of the laws of the time. Although the ensuing centuries have given the trust a measure of respectability, they have not kept it from frequently reverting to type. Property owners use the trust for an infinite variety of reasons, some not so nice. Courts, in much the same manner, talk trusts as a means of justifying results which the law would not otherwise allow. It is this unlimited availability of the trust which makes it so illusive to those who would restate it.

The law's complexity is the principal casualty of the author's analysis. But in at least two other respects the trust does not receive its full due. First, its institutional significance is largely ignored. To measure the trust's utility exclusively in legal terms is to overlook its vital contributions to the economy, the family, private philanthropy and society in general. Second, case materials do not sufficiently emphasize the trust's capacity to grow and adapt. In the sections on investments, for instance, all the traditional rules are set out in detail.<sup>25</sup> What does not clearly emerge is the really exciting story of an institution, sorely challenged, responding and growing to meet that challenge. In a very real sense the last few decades have seen a revolution in trust practices as fundamental as any since the enactment of the Statute of Uses. Wars, depressions, inflation and taxes have brought about a thorough reappraisal of traditional assumptions about investments. Old rules have given way as more flexible devices have evolved. Out of it all has come a transformation of the trustee's office from an easy sinecure to an exacting job requiring skill and careful attention.

In short, these books are a boon to the lawyer who is always in search for the one case which will mean victory. For the rest, scholars and students, something is missing. If trust law is "living law," as Professor Scott asserts both at the beginning and end of his monumental work,<sup>26</sup> then the vital spark of life and growth has often eluded him.

ELIAS CLARK†

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19. §§ 67-70.

20. §§ 57.3, 84.1.

21. § 337.

22. §§ 86, 87.

23. §§ 368-77.

24. Pp. 243, 2629.

25. §§ 227-227.16.

26. Preface to the Second Edition, and Epilogue, p. 3440.

†Associate Professor of Law, Yale Law School.