

THE RESTATEMENT OF THE LAW OF TRUSTS

As a preface to a discussion of any of the tentative drafts of the restatement of law it is interesting to recall the situation which created the need for the American Law Institute, and the objects which its founders hoped to attain. Logic is a method of classification, and the logical machinery of the law is a classification of the opinions of appellate courts under titles or concepts. As rapidly as the increasingly numerous opinions appear, they are put under the protection of one of these abstractions, and, once there, automatically become part of the field of "law" for which the abstraction stands as a symbol. The more ingeniously the legal analogies and concepts are used, the more dissimilar become the cases grouped under any one classification, until at times these terms become almost meaningless. Yet prior to the American Law Institute no systematic reclassification had ever been attempted. The magnitude of the task was terrifying. The conservative acceptance of the old terms, drilled into students by law school courses, emphasized in text books and digests, had become part of the very fibre of conventional "law in books" as distinguished from "law in action."

"Law in books" takes various forms. Sometimes it consists of definite directions, called rules; sometimes inspirational sermons called principles; sometimes vague analogies called standards. If such principles, rules, and standards are applied to similar problems, they are generally understandable. But if such abstractions are applied to an assorted group of dissimilar situations, involving different problems, they begin to cut across the cases in zigzag lines which are impossible either to follow or predict, without endless refinement, reclassification, and qualifying abstractions. Thus our method of expression becomes more and more complicated. The number of irrelevant cases which appear to be governed by the same principles because of the common use of an ancient term becomes unlimited. New abstractions become necessary in order to be able to talk at all, and courts are constantly creating them.

Some of these new abstractions are useful and convenient; some of the old terms are made clear by skillful refinement. But others are useless, and these useless ones become an impediment to intelligible judicial speech, and a trap for the unwary judge or lawyer. Yet the natural conservatism of the judicial mind seems to prevent courts from destroying useless concepts. They do not know how much law they might be repealing if they say, for example, "The Statute of

Uses has no modern significance in the law of trusts." The idea expressed in the phrase "Where he (Justice Marshall) did not dare to go, others may well hesitate to venture,"¹ reappears again and again. Only the legislature can rescue the courts from the confusing classification of unlike cases under an unhappy phrase, and the legislature hesitates because they cannot understand what the problem is or why they should be called upon to extricate courts from self-created difficulties.

The situation is described by Elihu Root in a speech made at the time the American Law Institute was organized, when he said:

"It was apparent that the confusion, the uncertainty was growing worse from year to year. It was apparent that the vast multitude of decisions which our practitioners were obliged to consult was reaching a magnitude which made it impossible in ordinary practice to consult them."²

Into this situation the American Law Institute, with its corps of learned men and its supporting artillery of great names, was introduced to clear away the debris. Social and economic results of the law were only incidental to its investigation; legal philosophy was to be only a by-product. The important task was to relieve attorneys from the burden of examining and distinguishing the thousands of irrelevant cases which, bound together by the clasp of ancient concepts, could be thrown at the court. It becomes material therefore in discussing any new draft of the restatement of laws to inquire whether that task has been forgotten.

That inquiry leads us to ask whether the treatment of those cases where courts have seen fit to use the term trusts is not a departure from the real purpose of the Institute. Some of these cases would go well in a restatement of the law of future interests, others in a restatement of the law of the administration of insolvent estates, others in a restatement of equitable remedies for fraud.³

¹ *Potomac Mills & Ice Co. v. B. & O. R. Co.*, 217 Fed. 665 (D. Md. 1914), *per* Rose, J.

² *American Law Institute Is Organized* (1923) 9 A. B. A. J. 137.

³ Professor Richard Powell has combined most of the cases using the trust device with cases on wills and future interests in a course called "Trusts and Estates." In doing so he gains the great advantage of being able to discuss the problem which confronts the man of property in disposing of his estate unhindered by the need to reconcile other uses of the term. In his introduction to "Materials for Course in Future Interests and Non-Commercial Trusts" (1929) he says: "When the hypotheses of a curriculum reorganization along functional lines were first applied to the field of property law, some facts seemed evident forthwith. It became apparent (1) that when a human being accumulates wealth, one of his most absorbing activities centers about the dispositions of that wealth; (2) that such dispositions occasionally take the form of living trusts, but more frequently are embodied in wills; (3) that the recent increased use of insurance trusts has made this aspect of law of importance to a group many times larger than were heretofore interested therein; (4) that such dispositions normally involve both trusts and future interests; (5) that this body of law deals with a large area of characteristic

We presume that the answer of those responsible for the Institute's program would be that courts, lawyers, text book writers, and digesters are accustomed to treating of a thing they call the law of trusts. Since the restatement is for their use, it must follow the classifications to which they are accustomed, and in general that classification will be along the broad lines laid down by the conventional law school curriculum.⁴ To do anything else would be to make the restatement so unconventional in appearance as to prevent its usefulness as an immediate court room aid. The danger is that law schools and writers may in the future follow the more logical arrangement of Prof. Richard Powell of Columbia, leaving the law of trusts to suffer the fate of a poorly arranged index to case material.⁵ Until that time comes, however, it seems inevitable that the American Law Institute follow the classifications with which most courts and lawyers are familiar through their reading or because of the arrangement of the courses which they have studied.

Granted that Trusts is, at least for the present, a necessary classification of decided cases, it is certain that the formulae and rules clinging to this classification are badly in need of clarification. There remains a choice of methods of accomplishing this. One way is present modern ideas and current problems in the garb of ancient language—to show, for example, that the Statute of Uses passed by Henry VII, can by ingeniously twisting the terms still be made to pass for a rule of thumb in certain situations today. Thus we preserve as far as possible all of the logical machinery of the law. We include in our scheme all the logical devices which are in current use, and revive many of those which are obsolete. Our contribution is an orderly presentation of these devices all reconciled with one another and arranged in a systematic way—a complete philosophical system, by which every

human behavior, influenced by, if not based on the institution of the family; (6) that this body of law deals with an area of closely integrated techniques of the practicing lawyer; and lastly (7) that the body of law dealing with such dispositions forms a convenient unit for treatment as a law school course. . . . This course was designed to eliminate the courses theretofore given as 'Future Interests,' 'Wills' and the major part of 'Trusts.' Some parts of the traditional course on Trusts deal so exclusively with aspects of the law of banking that they are thought to be better handled in connection with a course in which related behavior of bankers and their customers is available for comparison."

⁴The arrangement of the restatement follows the general outlines of AMES, CASES ON TRUSTS, first published in 1882, as enlarged in SCOTT, CASES ON TRUSTS (1919) and in a later edition in 1931.

⁵In addition to Mr. Powell's arrangement (*supra* note 3) Mr. Homer Carey has recently published an excellent casebook which is in use at Michigan, in which the conceptual approach to trusts which begins by distinguishing the device from bailments, etc., is abandoned, and the situations in which the device appears are examined. At Yale, also, Mr. Gulliver and Mr. Townsend have reclassified the cases using the term. There seems to be a distinct movement away from "Trusts" as a body of definable principles.

possible case can be tested, those which do not contain trusts, rejected, and those which are trusts, solved.

A second method of treating the restatement is to examine the ancient language of trusts in the light of its utility in solving modern problems. Such a method frankly recognizes that no closed philosophical system of the law of trusts is possible, because the cases included under the term are too unlike. We therefore try to determine which formulae and rules are useful in deciding cases, and which are useless. We are dealing with an abstraction which cuts across a large number of complicated situations, changing its content with each one of them, and used in varying ways. It is certainly possible to describe the different uses of the device in each of these different types of situations, instead of trying to define it so that it will have the false appearance of being used in the same way in all of them. But this means that we must abandon definitions and deductions from definitions for a more descriptive method of statement.

The two methods are illustrated in the difference in point of view between the preface and the main body of the Restatement of a law of trusts.

The introductory note to the Restatement of Trusts begins as follows:

*"A trust is one of several judicial devices whereby one person is enabled to deal with property for the benefit of another person."*⁶

The introduction goes on to explain in general terms the kind of situation in which this device is used. Here we have a brief description of what the so-called law of trusts really is and why we have to use it. To the writer it appears to be an admirable approach to the law of trusts.

When we start the restatement itself we find ourselves in an entirely different atmosphere, with a different set of values. A trust is no longer a device, or a way of talking about things. It has become endowed with an independent existence. It is (when not qualified by the word "charitable," "resulting," or "constructive")

*"a fiduciary relationship with respect to property, arising out of a manifestation of an intention to create it, and subjecting the person in whom the property is vested to equitable duties to deal with the property for the benefit of another person."*⁷

⁶ RESTATEMENT OF THE LAW OF TRUSTS (Am. L. Inst. 1930) Introductory Note, at 11.

⁷ RESTATEMENT, § 2, p. 14, *Definition of Trust*.

It is at first difficult to understand how a trust can be a device and a relationship at the same time in the ordinary acceptance of these terms. A moment's reflection, however, clears up the inconsistency. It is apparent that in the introductory note a restatement of the law from a new point of view has been commenced and then suddenly abandoned. It is the point of view of one who wishes to describe accurately the results of cases where the courts employ a certain device, and the reasons, historical and logical, why they choose to talk about those results in the terms of that device. It is a way of saying that these are the facts and what follows are the abstractions.

With the opening definition of the restatement the attitude changes. The method is that of analysis of fundamental elements of concepts. Definition, not description, has become its aim.

That method compels us to pretend that a trust is a certain peculiar kind of human relationship, which can be identified and observed whether there is any law suit pending between the parties or not. This is done because we want to define trusts so that we can use it later to predict what courts will do in dissimilar cases. We must then distinguish it from a debt, a guardianship, a bailment, an equitable charge, and so on.⁸ We are no longer interested in why courts call these things trusts, or why they make these distinctions. For example when *A* delivers to *B* the possession of his horse which he directs *B* to keep in his stable, we simply observe the transaction, look at *A* and at *B* and at the horse in the stable, and say to ourselves, "It is evident that in the absence of a contrary intention no trust has arisen here."⁹ We then pass on to the next distinction.

In the second chapter our method forces us to try to define how these things called trusts come into being. The cases are so dissimilar that the best we can do is to say that they arise out of a mani-

⁸ The RESTATEMENT deals at length with the following distinctions:

Section 8. A bailment is not a trust.

Section 9. An executorship or an administratorship is not a trust.

Section 10. A guardianship is not a trust.

Section 11. An agency is not a trust.

Section 12. A mortgage or a pledge or a lien is not a trust.

Section 13. An equitable charge is not a trust.

Section 14. An interest subject to a condition subsequent is not, because of the condition, held in trust.

Section 15. A debt is not a trust.

Section 16. A contract to convey property is not a trust, whether or not the contract is specifically enforceable.

Section 17. A contract for the benefit of a third party is not a trust.

Section 18. If a chose in action is assigned, the assignor does not become trustee for the assignee.

⁹ RESTATEMENT, at 24. This illustration is used to show distinction between bailments and trusts. Similar illustrations appear under each of the distinctions quoted in note 8, *supra*.

festation of intention to create them. We find that some of them, the passive trusts in land, are very short lived indeed, because Henry VIII rises from his grave and executes them, unless by some happy chance they are clothed with affirmative duties, in which case he lets them alone.¹⁰

The third chapter¹¹ defines the Trust Property and shows what cannot be held in trust. Here we find some interesting cases of people who tried to create trusts and failed. It appears that *A* declared himself trustee of the next picture he was going to paint for *B*, but no trust materialized.¹² He then tried to declare himself trustee for *B* of the next calf his cow would have.¹³ Again he failed. Undiscouraged, he declared himself trustee of the next moose he would shoot, but without any better success.¹⁴ He didn't use the right words. Had he declared himself trustee of the canvas, and voluntarily agreed to paint a picture on it to improve the *res*, he might have been a trustee.¹⁵ Had he declared himself trustee of his agricultural business, goodwill and all, he might have been trustee of the calf, even, though the business consisted only of one cow.¹⁶ Had the trustee been possessed of a

¹⁰ RESTATEMENT, § 22: "The Statute of Uses does not execute active trusts.

"Comment:

"a. A trust is not active unless the trustee has by the terms of the trust affirmative duties to perform. If his sole duties are negative, that is, not to interfere with the beneficiary in his enjoyment of the property, the trust is passive. Prior to the enactment of the Statute of Uses a person who held land to the use of another had, in addition to his negative duties, the following two affirmative duties: (1) to protect the property against other persons than the beneficiary; (2) to convey the property to the beneficiary or in accordance with his directions. If there was a manifestation of an intention to impose additional affirmative duties, he held upon an active trust."

¹¹ Entitled "The Trust Property," RESTATEMENT, at 132, §§ 70-83.

¹² Illustration used to show that "An interest which has not come into existence or which has ceased to exist cannot be held in trust." RESTATEMENT, at 132, § 71.

¹³ See note 12, *supra*.

¹⁴ *Ibid*.

¹⁵ Cf. RESTATEMENT, at 146, § 79: "Non-Transferable Interest Created in Trust or Accruing to the Trustee.

"An interest which is of such a character that a person holding it for his own benefit could not transfer it may be held in trust if

"(a) it is created in trust; or

"(b) it accrues to a trustee of a trust already created."

At page 147: "Comment: (on above section)

"b. If a trust has been created, an interest may accrue to the trustee by reason of his title to the trust property, which interest he holds in trust, although a person holding such interest for his own benefit could not transfer it nor make himself trustee of it."

¹⁶ Cf. RESTATEMENT, at 148, § 80: "Interests in intangible things, if transferable, can be held in trust."

"Illustration: (to above section)

"2. *A* carries on a retail grocery business. He transfers the business including the good-will to *B* in trust for *C*. *B* holds the good-will as well as the other assets of the business in trust for *C*.

"The good-will of a business or a trade-mark cannot be transferred apart from the transfer of the business. Similarly the good-will or trade-mark cannot be transferred in trust apart from a transfer of the business, nor is a declaration of trust of the good-will or trade-mark valid apart from a declaration of trust of the business."

trade secret about the ways of shooting moose, he might have been trustee of that and *B* might have had his beneficial interest in the first moose shot.¹⁷

It is interesting to note that our method of definition, once adopted, prevents us from giving an indication why *A* was attempting to use the trust device in these cases. The supposition is that he was simply practicing. Thus the gap between the opening description of trusts in the introductory note and the opening definition becomes more and more apparent in the selection of these illustrations. If we had used the descriptive method we would have been forced by the very turn our language took, to explain for what purposes the device was used and in what situations. The case of the moose would come under the heading "The Use of the Trust Device in Moose Hunting." Described in this way it would appear of doubtful utility to predict results of litigation in this manly sport. But under the method adopted we are not in the least interested in what a trust is for; we do not admit that it may be just a way of talking—and therefore the fact that the illustration is taken from moose hunting does not bother us. Indeed, unreal illustrations are the only way of making unreal concepts clear. Actual cases hinder our task in two ways. They are likely to show that a trust is often not a relationship at all, but a method of logical transportation after we have decided where we want to go. Further they cannot be disassociated from the remedy. This remedy, according to our conceptual plan, must not be even mentioned until we have clearly in mind what a trust is, regardless of what the parties expect to gain by using it. Therefore we confine ourselves to cases which never happen.

This restatement of trusts from the point of view of the person who wants a system of abstractions is as well done as such a thing can be. But the point we raise here is that the abstractions are of such a character that they cannot be stated in terms of the actual situations where the trust device is used.

A further difficulty with the restatement as a system of concepts is the necessity of defining a trust in terms of itself. Concepts which are used to classify similar situations can be defined abstractly with much more ease than concepts which include dissimilar cases. The concept of trusts is used both as a means of transferring the benefits of property with a limited power of control, and also as a means of avoiding the logical implications of some rule of law, such as the statute of frauds, the statute of wills, the rule that creditors must share equally

¹⁷ Cf. RESTATEMENT, at 148: "Comment: d. A trade secret may be held in trust.

"Illustration: (to above comment)

"3. *A* invents a formula for manufacturing an ointment and proceeds to manufacture and sell such ointment. He communicates the formula to *B*, who agrees to manufacture and sell the ointment according to the formula for the benefit of *C*. *B* is trustee of the trade secret for *C*."

in an insolvent estate, the statutes of limitation, and many others. The definition of such an abstraction, if it is to be made without regard to the obvious differences in these cases, must therefore be in terms of itself. There is no escape from this dilemma.

For example let us examine the restatement definition of a trust. It is defined as a relationship.¹⁸ But a relationship here can only mean a right-duty relationship. It is said that it is a fiduciary relationship, and then a fiduciary is defined as one owing duties.¹⁹ It is said that it arises out of a manifestation of intention to create a trust. But the manifestation may consist of undescribed conduct.²⁰ Hence a trust is a right-duty relationship which arises when courts say it has arisen. The duties must be equitable, which means that they must be duties which a court of equity will enforce.²¹ Bailments, debts, agencies are not trusts because the duties are enforced by a court of law and by definition trust duties are those enforced by a court of equity. But not all equitable duties are trust duties. For example, a guardianship,²² partial assignment,²³ or mortgage²⁴ is not a trust. The reason is that not only

¹⁸ RESTATEMENT, at 14, § 2: "Definition of Trust.

"A trust, as the term is used in the Restatement of this Subject, when not qualified by the word 'charitable,' 'resulting' or 'constructive,' is a fiduciary relationship with respect to property, arising as a result of a manifestation of an intention to create it and subjecting the person in whom the property is vested to equitable duties to deal with the property for the benefit of another person."

¹⁹ RESTATEMENT, at 14: "b. *Fiduciary relation.* A person in a fiduciary relation to another is under a duty to act for the benefit of the other as to matters within the scope of the relation."

²⁰ RESTATEMENT, at 79, § 36:

"(1) The manifestation of intention to create a trust may be made by written or spoken words or by other conduct.

"(2) No particular form of words or conduct is necessary for the manifestation of intention to create a trust."

At 81, § 37:

"No trust is created unless the settlor manifests an intention to create enforceable duties."

²¹ RESTATEMENT, at 17:

"Comments:

"e. *Equitable Duty.* An equitable duty is a duty enforceable in a court of chancery or in a court having the powers of a court of chancery. In many States the same court has the powers of a court of law and a court of chancery. In some states courts of probate have to some extent the powers of a court of chancery."

²² RESTATEMENT, § 10: "A guardianship is not a trust."

²³ RESTATEMENT, at 54, § 19: "If a partial assignment of a chose in action is made, the assignor does not become trustee for the assignee."

"Comment:

"b. There is a fiduciary relation between trustee and beneficiary. In the case of a partial assignment as in the case of a total assignment, there is not a fiduciary relation between the assignor and the assignee."

"c. A partial assignment of a chose in action is to be distinguished from a total assignment in trust for the assignor as to a part of the chose in action."

Thus a partial assignment may become a trust at any moment by the discovery of a fiduciary relationship. Of course it must be the kind of a fiduciary relationship which we call a trust, as is indicated by the RESTATEMENT, at 15. "The scope of the transaction affected by the relation and the extent of the duties imposed are not identical in all fiduciary relations. The duties of a trustee are more extensive than the duties of some other fiduciaries. As to the duties of a trustee, see Chapter 7."

²⁴ RESTATEMENT, at 31, § 12: "A mortgage or a pledge or a lien is not a trust.

must the trust duties be equitable, but they must be the kind of equitable duties which we *call* trust duties. Thus, when we are through with the definitions and distinctions of the first fifty-six pages we have said in a great many words that a trust is, after all, a trust.

Of course the distinctions between bailments, agencies, and the like, and trusts do give us some picture of the ordinary situations in which these terms have been used, and so we feel that we see the thing more clearly. But the picture is necessarily confused as the illustrations show that a trust can change into one of these things at any moment, and change back with equal facility. For example, on page 42:

*"A employs B as his housekeeper. B hands over to A \$1000.00 of her savings on A's agreement 'to keep the money for her and to pay her 6% interest.' In the absence of a contrary intention A is a debtor and not a trustee."*²⁵

The contrary intention may be implied from undescribed conduct. In other words the above situation is a bailment where the courts call it a bailment and a trust where they call it a trust. Our problem may be stated as follows: (1) We must formulate a rule which will govern two dissimilar situations which have nothing in common except that the rule is to be applied to both of them; (2) Such a rule must be capable of taking on a different meaning in each situation without change of language; (3) The only way to accomplish this is to provide the rule with a verbal device by which it can automatically turn itself inside out. The phrase "in the absence of a contrary intention" does this admirably.²⁶ If the rule happens to be a useful one, which need change its meaning only occasionally, there is no objection to this. The objection lies in this that our attitude prevents us from discriminating between useful and useless rules because we refuse to describe their operation. The method of definition makes all uses of the device of trust appear of equal value. It is impossible to examine the utility of a concept and to state it as a fundamental truth at the same time.

This is shown in the treatment of the Statute of Uses. In the second chapter we find the statement that the Statute of Uses executes a passive trust in land by making legal the interest of the beneficiary.²⁷ Then

"c. There is a fiduciary relation between trustee and beneficiary, but not ordinarily between mortgagee and mortgagor. . . .

"There is, however, such a relation between mortgagor and mortgagee that the mortgagor may set aside a transaction between them in which the mortgagee has taken an unconscionable advantage of the necessitous condition of the mortgagor."

²⁵ RESTATEMENT, § 15, Illustration 7—used to show distinction between Trust and Debt.

²⁶ This same phrase is used in nine of the illustrations showing the distinction between a trust and a debt.

²⁷ RESTATEMENT, at 57, § 20: "The Statute of Uses.

"(1) The Statute of Uses provides that where a person is seised of land 'to

follow further definitions of what cases the statute will operate on. Nobody knows just what the results of this sudden legality are.²⁸ The existence of modern recording acts are not even hinted at. It appears that a man can have "legal title" to land and still have to go into a court of equity to compel the execution of a deed. A descriptive method might point out that this elaborate make-believe was used as a rule of thumb in certain disappearing procedural problems; that it might be used to confuse the issue as to whether a jury could be demanded, that the construction of quaintly phrased and obscure deeds might hang on it, that poorly drawn attachment statutes and statutes of limitation might be construed in its uncertain light. The Statute of Uses cannot be ignored, but its opportunities for confusing the issue might be limited to a few isolated cases—if indeed there are cases where it is useful. But under the method of definition we cannot do otherwise than the reporter has done in the restatement.

There are innumerable other uses of the trust device which demand descriptive examination. When an individual or a bank becomes insolvent, the question of what claims will be given preference appears to turn on conceptions of express and constructive trusts,²⁹ and the cases must be kept apart from family settlements by the shadowy distinctions

the use, confidence or trust' of any other person, the latter person shall be seised or possessed of the land in the same estate as he would otherwise have in use.

"(2) The effect of the Statute of Uses is to make legal those interests to which it applies, which but for the Statute would have been equitable interests.

"(3) The Statute of Uses 'executes' a use or trust when it makes legal the interest of the beneficiary of the use or trust."

²⁸ All that is said on this question is:

RESTATEMENT, at 58: "b. When the Statute of Uses executes a use or trust not only is the interest of the beneficiary made legal but the interest of the person who otherwise would hold subject to the use or trust is extinguished. The Statute thus has a double effect in turning the equitable interest of one person into a legal interest and extinguishing the legal interest of the other."

Such a statement made without any reference to any recording acts has no modern significance. If a man has a record title subject to a passive trust undisclosed on that record, his "legal title" from any practical point of view is far from extinguished.

²⁹ Mr. Bogert in a recent article, *Failed Banks and Preferences* (1931) 29 MICH. L. REV. 545, at 567, makes the following statement: "The present tendency of decisions and statutes to place collection losses on the general creditors of failed collecting banks and to give a preference to the forwarder on a trust theory is to be deplored." The unfortunate results of the application of the trust theory to bank cases in which Mr. Bogert complains, can only be realized when these cases are considered as a problem separate from the use of the trust device to solve other problems. The restatement in building up an abstract distinction between a trust and a debt which is to be applied anywhere and everywhere, makes possible and probable the loose use of the term which permits such preferences, because (1) it permits us to forget the real issue involved in a flood of irrelevant cases, and (2) because it allows us to use a case which goes too far in calling a trust a debt, a general precedent for any case no matter how different the situation. Cf. the treatment of this problem in the RESTATEMENT with Townsend, *Constructive Trusts and Bank Collection* (1930), 39 YALE L. J. 980, and Turner, *Bank Collections—The Direct Routing Practice* (1930), 39 YALE L. J. 468.

between constructive trusts and express trusts manifested by conduct.³⁰ Is it useful to ignore the policy of the rules requiring equal distribution of assets by pretending that we have found a rule of thumb? And are these rules of thumb as definite as the definition indicates? Only a description of the cases will disclose the answers.

Since the definition of the term "trust" cuts across so many different problems, the task of the person annotating the restatement is full of pitfalls. Cases using the term must be put somewhere in the footnotes and they must appear to support or contradict the general propositions of the text. To illustrate, let us take two typical cases and find out what they might be cited to prove. In a Pennsylvania case³¹ thirteen bonds were found in the safety deposit box of the deceased, enclosed in an envelope on the outside of which was written "thirteen bonds, \$1,000 each, held for Tom Smith Kelly." This, aided by other evidence showing that the deceased intended to give the bonds to Kelly, was held to be a trust. Actually the case had nothing whatever to do with trusts, but concerned only the question as to whether the Statute of Wills or the rule of delivery of gifts might be evaded under such circumstances. The trust device, however, enabled the court to decide the case without mentioning the Statute of Wills.

A New York case,³² deciding almost exactly the same question, can be cited to support an entirely different set of abstractions in the restatement. There bonds were found in the deceased's deposit box, in an envelope, with the inscription "whatever is in this envelope belongs to Miss Anna C. Miller." The trial court gave the bonds to Miss Miller. The Appellate Division took them away from her, because neither a trust nor a completed gift was shown.³³ The Court of Appeals finally decided that Miss Miller could have the bonds, because the writing was a declaration against interest which proved that the gift must have been completed during the lifetime of the deceased. This case thus reaches the same result as the Pennsylvania case, though the reasoning of the intermediate appellate court holding that there is no "trust" under such circumstances is not disapproved by the Court of Appeals.

Under the restatement both of these cases would be cited to show that "the owner of property can create a trust of the property by declaring himself trustee of it, although he receives no consideration for

³⁰ It is obviously impossible to tell whether many of these bank collection cases using the trust theory as a basis for a preference are constructive or express trusts, or constructive trusts arising out of the breach of express trusts, nor is it in any way material to make the distinction here.

³¹ Estate of Thomas Smith, 144 Pa. 428, 22 Atl. 916 (1891).

³² Miller v. Silverman, 247 N. Y. 447, 160 N. E. 910 (1928).

³³ Miller v. Silverman, 221 App. Div. 697, 224 N. Y. Supp. 609 (2d Dept. 1927).

the declaration of trust."³⁴ Also to show that "A trust can be created without notice to or acceptance by the beneficiary."³⁵ At this point, however, these two similar cases begin to quarrel. The Pennsylvania case may be used to prove the statement that "the manifestation of intention to create a trust may be by written or spoken words or other conduct."³⁶ The New York case will illustrate that "no trust is created unless the settlor manifests an intention to create enforceable duties."³⁷ It also proves that "a disposition to take effect on the death of the person making the disposition and as to which he has substantially the entire control until his death"³⁸ is a testamentary disposition and therefore "a trust cannot be created by a testamentary disposition unless the requirements of the statutes concerning wills are complied with."³⁹ It then disappears from the restatement of trusts, to reappear again in the restatement of evidence, which explains the result. The Pennsylvania case would have to be cited under these last two principles for the purpose of distinguishing it from an attempted testamentary disposition. We would have to say that since the court found a trust here, it must have been that the trustee lost control of the envelope containing the securities before he died. But a still better way is to avoid the troublesome problem by means of the comment which says "a statement of the general rules determining what is a testamentary disposition of property is not within the scope of this subject."⁴⁰

Suppose that the annotator is doubtful whether these cases involve any principles of trusts at all. Do these inscriptions on the envelope constitute the "manifestation of intention" required by the definition of a trust in Section 2? He turns for enlightenment to the comment below Section 2 and finds:

"g. The phrase 'manifestation of intention,' means the external expression of intention as distinguished from undisclosed intention. As to manifestation of intention to create a trust see Sections 33-38."

Hopefully he turns to Sections 33-38. Section 33 reads as follows:

"A trust is created only if the settlor manifests an intention to create a trust."

This is somewhat cryptic, so he reads the comment which says:

³⁴ RESTATEMENT, at 86, § 39.

³⁵ RESTATEMENT, at 101, § 47.

³⁶ RESTATEMENT, at 79, § 36; at 73, § 33: *Comment*: "It is immaterial whether the settlor knows that the intended relationship is called a trust." Also p. 20, § 2, comment g.

³⁷ RESTATEMENT, at 81, § 37.

³⁸ RESTATEMENT, at 119, § 61, comment a.

³⁹ RESTATEMENT, at 119, § 62.

⁴⁰ *Supra* note 38.

"a. In order to create a trust the settlor must manifest an intention to create such a relationship as constitutes a trust as defined in Section 2. It is immaterial whether the settlor knows that the intended relationship is called a trust."

Similar notions are found in the other Sections between 33 and 38.

At this point there is nothing further to do except to get off the merry-go-round.⁴¹ The fault is not with the Reporter, but with the attempt to restate trusts by deductions from definitions. If we could only use these cases to illustrate the use of the trust device as an artificial means of avoiding the implication of the Statute of Wills because directions in a safety deposit box accessible only to the deceased offered a substantial guarantee against perjury, there would be no difficulty. If there were thus classified, we would not care whether they were real "trusts" or not.

Instances of this kind may be multiplied indefinitely.

A recent case in West Virginia⁴² decided that the draft of an insolvent bank drawn on another bank was a preferred claim, because an express trust was found to exist. In annotating the restatement this case would have to be cited to show that West Virginia did not strictly adhere to the doctrine that there must be a definite *res*. If it were pointed out that the case was one where the trust was used only as a device, and that the court, for some reason not disclosed in the opinion, wanted to give holders of drafts preferred claims, the case could be re-examined on its merits, and the court might have to tell why it decided the case the way it did. Consider it as a case defining a trust as an abstraction, and there is no limit to the cases where it can be used as a confusing analogy.

The objections here raised are not criticisms of the skill of the Reporter. At the risk of being repetitious we wish to emphasize that it is impossible to remove them, because they are inherent in the nature of the subject, when approached from the angle of attempted definition.

⁴¹ Illustrations of the inevitable circles into which any systems of definitions of the elements of trusts drive us are numerous. For example, the concept of "capacity of the trustee."

"Section 85. A natural person has capacity to take property in trust to the extent he has capacity to take property for his own benefit."

"Comment: As to the meaning of capacity, see Section 28."

Turning to Section 28, we discover that:

"Section 28. A person has capacity to create a trust by declaring himself trustee of property to the extent he has capacity to transfer the property *inter vivos*."

"Comment c. As to capacity to be trustee, see Section 85."

Smaller circles are found in expressions like the following:

"Section 41. A *promise* to create a trust in the future is *enforceable* if, but only if, the requirements for an *enforceable contract* are complied with."

"Section 67. A trust cannot be created unless there is trust property of such a nature as to be the *proper subject of a trust* and a *proper beneficiary*."

⁴² *Central Trust Co. v. Bank of Mullins*, 108 W. Va. 12, 150 S. E. 137 (1929); see Note (1930) 36 W. VA. L. Q. 297.

The reason is that none of the classifications follow the lines of any particular set of comparable situations, to which a general policy is applicable.

Such classifications do not make the task of the lawyer easier by confining his citations to relevant cases. Instead they compel voluminous briefs and treatises, reconciling the different problems forced under the same abstraction. Yet it was to avoid the necessity of such refinement that the restatement was originally projected.

To avoid the confusion caused by the fact that all sorts of problems are included under the term "trust," we need only recognize the implications of the admission made in the introduction that "a trust is one of several juridical devices," and that it has been used in inconsistent ways. It is not the name of an organized philosophy; it is simply a bad piece of indexing. But paradoxically enough, the fact that so many people consider it as an organized philosophy and have written so many books from that point of view is the very reason why this conventional department of the law so badly needs the expert attention of the American Law Institute. The reclassification of the cases using this term, already under way, is hindered on every turn by the existence of this ancient and too inclusive concept. If the restatement is to clear away the debris and make a new arrangement possible, it must abandon definitions in favor of a simple descriptive process of the purposes for which this logical machine is used in different kinds of cases.

The phrase "descriptive method" of restatement has been constantly used in this article. Difficult as it is to outline a restatement of trusts in a few pages, some attempt must be made here to show how a restatement from that point of view would differ in form from the present set of definitions and how it would enable us to use as illustrations real problems, instead of unreal hypothetical cases.

The purpose of such a method would be an exposition of the different uses to which the trust device has been put, and a discussion of the utility of the device in solving the particular problem. In that exposition we must bear in mind two axioms: (1) That no trust was ever intentionally created by an individual or discovered by a court except for some purposes other than the desire to create a trust; (2) that the purpose of the use of the trust device by the individual at the time of the transaction, or by the court at the time of the suit, is our key to the classification of trust cases. A classification of purposes is not easy, but it seems that they may conveniently be divided into two kinds: (1) Where the trust device is intentionally used to convey property; (2) where it is used by way of analogy to enable the court to give a remedy which the logical implications of some rule of law might deny.

With this in mind we might start our restatement with a condensed history of the device, as is attempted in the introduction to the present draft. Here is an opportunity to examine critically much obsolete machinery. We can substitute for extended sections of the present draft, statements like the following:

Topic—The Effect of the Statute of Uses

THE STATUTE OF USES OF HENRY VIII IS THE ORIGIN OF CERTAIN ARTIFICIAL CONCEPTS WHICH HAVE NO UTILITY IN SOLVING MODERN PROBLEMS AND WHICH MAY THEREFORE BE DISCARDED AS A METHOD OF JUDICIAL EXPRESSION.

Comment a. It often happens either by virtue of the terms of a conveyance or by subsequent events that the beneficiary of a trust becomes entitled to the entire control over the property and the rights and duties of the trustee are merely nominal. In such cases it is unnecessary in order to give the property to the beneficiary to say that the Statute of Uses has executed a passive trust. Since the beneficiary may obtain the property whether the statute of uses is in force or not, in any jurisdiction, the use of the artificial machinery of the statute simply compels a court to cite or distinguish irrelevant cases.⁴³

Comment b. The conception of the execution of a passive trust by the statute of uses has been used in order to make the archaic language sometimes used in deeds and conveyancing statutes operate to convey title in the modern sense. A sensible recognition of the intention of the parties is all that is necessary to do this, and these conceptions are interesting only as an historical explanation of how that language came to be there.⁴⁴

Comment c. The conceptual machinery of the statute is also found in cases involving:

⁴³ BOGERT, TRUSTS (1921) 556: "Not only must the trust terminate because of the expiration of the period stated by the settlor to be the trust period, but also because the continuance of the trust would be useless. If the result sought to be reached by the establishment of the trust has been achieved, equity will either regard the trust as ended or will end it. Many courts have held that, on the accomplishment of the trust purpose, the legal title of the trustee ceases ipso facto, and the person entitled to the property after the end of the trust becomes automatically the holder of the legal title. Other courts have reached the same result on a different theory by holding that the accomplishment of the trust purpose caused the original trust to end, and left the trustee the holder of the legal title under a passive trust for the person next entitled. *This latter view would seem more logical and less apt to produce confusion in titles than a change of title without action or record.*"

See cases in footnotes to the above paragraph in Bogert for illustrations of how complicated the simple process of determining the *cestui's* rights may become by using the doctrine of Uses as a reason for the result.

⁴⁴ Many courts and writers indulge in the curious idea that a deed using the ancient language of bargain and sale would not convey legal title if courts forgot to use the concepts of the Statute of Uses. If this needs refutation, the fact that a large number of states seem to get along without the doctrine should be sufficient. PERRY, TREATISE ON THE LAW OF TRUSTS AND TRUSTEES (6th ed. 1911) § 279. Note (1908) 16 L. R. A. (N.S.) 1148.

- (1) Deeds which take effect in the future.⁴⁵
- (2) The construction of peculiar wills and deeds.⁴⁶
- (3) The construction of statutes providing for judgment liens or attachment statutes.⁴⁷
- (4) The determination of procedural questions such as the conflicting jurisdiction between courts of law and equity where this question is still important, or of questions as to whether the trustee should be joined in the suit.⁴⁸
- (5) The construction of Statutes of limitations.⁴⁹

In none of these cases does the machinery of the Statute offer either a real guide or a rational modern explanation.

It may be that these destructive generalizations may be thought to be too broad.⁵⁰ If so, a more conservative statement might be substituted to the effect that these conceptions furnish a convenient rule of thumb in a few cases. The restatement would then have the effect of isolating such cases and rendering them innocuous as general precedents.

⁴⁵ See Note (1921) 11 A. L. R. 23. In this exhaustive note it is significant to observe (1) that the machinery of the Statute of Uses appears in a comparatively few cases, most of them old; (2) that this machinery does not appear to cause different results from those in cases not using it; (3) that it makes the opinions more difficult to read and less intelligible.

⁴⁶ *Dixon v. Dixon*, 123 Me. 470, 124 Atl. 198 (1924), annotated in *COSTIGAN, CASES ON TRUSTS* (1925) 28-32.

⁴⁷ *Moll v. Gardner*, 214 Ill. 248, 73 N. E. 442 (1905) (doctrine of uses used to determine when judgments against beneficiaries become liens under Illinois Statute); *Hutchins v. Heywood*, 50 N. H. 491 (1871). Here the question arose as to the right of a creditor to satisfaction of his debt from an estate fraudulently conveyed by the debtor. The court reached its decision by first creating a resulting trust and then condemning it to immediate execution by the Statute of Uses. It is difficult to conceive of a more complicated way of obtaining an obvious result, or a method of expression further removed from the problem involved. The case later becomes an important authority on the question as to whether the Statute of Uses really "executes" a "resulting trust" in America, on which conception Mr. Costigan says there is a "conflict of authority," with the above case in the minority. *COSTIGAN, op. cit. supra* note 46, at 32, n. 33. It is in such ways that the use of these concepts complicates the law by enabling us to cite cases without regard to the problem involved.

⁴⁸ *Blake v. O'Neal*, 63 W. Va. 483, 61 S. E. 410 (1908). It is difficult to believe that the American Law Institute desires that questions of modern procedure and joinder of parties be determined on the basis of such concepts, or that it feels that there is no simpler way of doing it permitted by the rule of *stare decisis*. Yet that is one of the effects of a positive restatement of the Statute of Uses.

⁴⁹ *Schenk v. Wicks*, 23 Utah 576, 65 Pac. 732 (1901).

⁵⁰ This statement is made in deference to many respectable authorities on trusts and real property whom the writer has consulted. Some of them feel that disastrous consequences might follow the abandonment of the conceptual machinery of the ancient "Use." Just what these unfortunate consequences might be the writer has no idea. Nevertheless, if narrow limits do exist for the beneficial application of the device, they should be pointed out specifically. Otherwise there is no limit to the use by ingenious counsel or writers. For example Perry says: "The application of the statute has been very much modified in many of the States but the general idea is still acted on. Mr. Washburn remarks that it is not a fair inference that the doctrine of uses would be inapplicable in any state where they are declared not to exist, either because no case has arisen in the courts of the state to test the question, or because a form of deed not known under the statute of uses may have been declared by the statute of a state sufficient to convey lands." 1 *PERRY, op. cit. supra* note 44, at 511, 512.

As the restatement now stands, the Statute of Uses seems to operate automatically to execute all passive trusts. The recording statutes existing in all states are ignored, and the conceptions of the execution of equitable title are set out in black letter type as mandatory directions for courts to follow. There is no explanation of the kinds of cases in which they are useful, or the purposes for which they may be used.

Topic—Distinctions between Express, Resulting and Constructive Trusts

NO USEFUL CLASSIFICATION OF CASES UNDER THE DIVISIONS OF TRUSTS, CONSTRUCTIVE TRUSTS, RESULTING TRUSTS CAN BE MADE BY DEFINING THESE ABSTRACTIONS AND ANALYZING THEIR FUNDAMENTAL ELEMENTS IN THE ABSTRACT.

Comment: The reason for this is that no trust can be discussed in the abstract without considering its purpose. An attempt to do so leads us into elaborate distinctions between trusts and bailments, debts, equitable charges, business trusts, mortgages, contracts to convey, assignments, etc., which in turn must be discussed without regard to how the question arises. The result is that the decision whether a trust or something else has been created depends on the found intention of the parties, which is determined by the court's appraisal of their conduct; hence, the court can, by assigning such weight as it wishes to this criterion, erect any of these various kinds of trusts.

If the American Law Institute is really serious in its desire to relieve courts and attorneys from what Mr. Root calls "the vast multitude of decisions which our practitioners are obliged to consult," statements of this kind will accomplish more than hundreds of pages attempting to determine the exact difference between an active and passive trust in the abstract, or the fundamental distinctions between a debt, a trust, and a resulting trust, without regard to their purpose.

The topics set out above might form part of the initial discussion of the history of the trust device, sufficiently detailed to show that the conventional definitions of a trust are not convenient guides to groups of cases involving a single principle or policy. This task accomplished, the restatement should proceed to a classification of the cases using the term in the light of the purpose for which it was invoked. The following general classifications are ventured.

*I. The use of the trust device in cases where the owner of property desires to give one person the benefit and another the control of that property.*⁵¹

These are, for the most part, intentional uses of the trust device. They include the family settlement cases and the rapidly growing busi-

⁵¹ Professor Richard Powell of Columbia, in his course in Trusts and Estates, classifies these cases with cases in Future Interests and Wills. He divides his

ness done by great trust companies. They are entirely different in purpose from cases where the device is used by the court after the transaction is completed, to avoid some rule of law or give some special remedy. Under this group we could consider :

1. *Limitations on the character of the property to which the device may be applied.*

We would not try to do this by defining property, but by showing that courts had commenced by applying this broad concept to things like horses and land, and ended by including things like information and trade secrets. We could not say, as the restatement does, that "an interest which has not come into existence or which has ceased to exist cannot be held in trust" or that "an expectation or hope of receiving property in the future cannot be held in trust."⁵² We would explain that such definitions were historical rationalizations of the fact that things not ordinarily bought and sold are not permitted to be complicated in this way, at least until some necessity arises. When courts want to permit the transfer of such things, they are lumped under the concept of "good will,"⁵³ and immediately we find that expectations can be held in trust. For example the difference between the expectation of selling goods to future customers and getting a legacy from a future dead man, only the first of which is supposed to be capable of being held in trust, is simply confused by saying that one is property in existence and the other is property which has not come into existence.

Our conclusions would be that there are very few limitations on the kind of property which can be intentionally disposed of by the trust device, and that there is some recognized rule of policy other than definition of property which makes most of these limitations understandable.

Other possible steps in the discussion of intentional trusts might be :

2. *Limitations on the intentional use of the trust device imposed by*

- (a) *the statute of frauds*
- (b) *the statute of wills.*

materials generally into: I. Historical Introduction; II. Problems in Wealth Disposition; III. Social Limitations on Wealth Disposition; IV. Problems in Administration of Trusts and Other Interests Validly Created. Thus the trust cases are considered in their proper setting.

The RESTATEMENT, since it confines itself to the trust device, cannot make a reorganization such as Professor Powell's. It can, however, by describing the trust device, instead of defining it, pave the way for some such reclassification of the cases in the future. Such a classification is made difficult if we are to accept a set of principles governing trusts in all situations.

⁵² RESTATEMENT, at 138, § 74.

⁵³ RESTATEMENT, at 148, § 80, illustration 2.

Here we could discuss the formalities required of persons who intentionally resorted to the trust device, without confusing them with the cases where courts imposed a trust *ex post facto* to escape from the logical consequences of the application of these statutes.⁵⁴

3. *Limitations on the purposes for which the separation of the control and the benefit of the property can be made.*

We will not go further with these subdivisions, because it is not possible here to attempt any complete classification of the intentional use of the trust device. The classification made by Mr. Powell in his materials on Future Interests and Non-Commercial Trusts offers a sufficiently interesting comparison with the treatment of the restatement. It is sufficient to show the freedom which the descriptive method gives for the treatment of actual cases. The method of definition does not permit us to note differences between the operation of these rules in the different combinations of circumstances in which they may arise.

It is probable that the conventional rules fit fairly closely the cases involving intentional trusts, but the definitions found in the restatement do not help us to discover the actual effect of these rules.

The examination of the second group of cases, *i.e.*, those which use the trust machinery to enable the court to give an appropriate remedy or escape an inconvenient rule, would probably disclose many useless abstractions and might be mainly destructive in its effect. Such cases might be described as follows:

II. *The use of the trust device by the courts to escape the logical implication of some rule of law or statute without disturbing its verbal content.*

In this general group of cases we would include the court's use of "trusts" where the parties had not originally planned to employ the machinery when they entered into the transaction. For example, the intentional use of living trusts to avoid inheritance taxes would not be considered here, because it is one of the problems confronting a man in disposing of his property, on which his attorney advises him. Where, however, the court called a joint savings bank deposit a trust in order to carry out the intention of the deceased, we have the kind of a case we are here considering. In the first case the trust is a form of conveyance designed to obtain certain results; in the second it is a form of pleading, like the old common law writs. If the "writ" of trust lies,

⁵⁴ The present restatement assumes that these statutes are applied in the same way to an intentional trust and to one where the court erects the trust for some purpose on the conduct of parties who had no definite idea of using the device when the transactions occurred.

then the plaintiff recovers. If it fails, the plaintiff loses. Therefore we may expect to find developments of that form of pleading to cover new cases as they arise. This seems to disturb many legal writers who feel that odd cases using the device "confuse" the entire law of trusts, just as the common law pleading enthusiasts felt that even beneficial extensions in the old writs were confusing. Since they insist on classifying these cases with cases of intentional trusts, they feel that they must reconcile them.⁵⁵ If we simply set the cases apart, they no longer seem "logically wrong." They become interesting examples of the development of allegations in pleading, and are to be criticized only in the light of their results.

Here we might separately examine numerous groups of cases like the following:

(1) The trust device used to make gifts effective which would otherwise fail because of the rule requiring delivery, or because of the Statute of Wills.⁵⁶

(2) The trust device as a method of avoiding inequitable results indicated by a strict application of the Statute of Frauds.⁵⁷

⁵⁵ The joint deposit cases offer a typical instance of these difficulties of reconciliation. If the depositor is dead, it is easy to establish a trust; if he is alive and attempting to revoke, it is almost impossible; if the beneficiary predeceased the depositor, that factor unquestionably will influence the court. Various kinds of presumptions are used, and a doctrine of "tentative trusts" is evolved. See Note (1928) 37 YALE L. J. 1133; Note, L. R. A. 1917 C, 567; Note (1927) 48 A. L. R. 202. In such cases the chief difficulty in finding out what the court is doing comes from our attempts to make them fit in with the general principles of trusts. Results of such cases will always be difficult to predict, but the concern of the American Law Institute is to make that lack of predictability less complicated by considering these cases apart.

⁵⁶ This group is not intended to include cases where an *intended* trust failed because of the Statute of Wills or the rule requiring delivery of gifts. Instead it will cover instances where the attorneys used the trust analogy as a form of pleading or argument to prevent the Statute from reaching an inequitable result in a transaction *not* originally intended to be a trust. Space forbids describing these numerous cases in detail. Examples are found in notes 31 and 32, *supra*. The famous case of *Ex parte Pye*, 18 Ves. 140 (1811), where the trust device was used to secure an annuity to the deceased's relative, is the best known illustration.

⁵⁷ Every contract of sale can be called a trust in which the vendor has the legal and the vendee the equitable title, if the court is willing to stretch elastic words like fiduciary relationship, intent to create a trust implied from conduct even though the parties did not know what the term trust implied, *etc.* In cases involving hardship because of the statute of frauds, attorneys will shape their pleadings according to these formulae and very often succeed. The results of many of such cases are beyond criticism, excepting for the difficulties they may cause if we try to draw "principles" from them which may be used in other situations. Space permits only one example of this type of case. In *Tanner v. McCreary*, 88 W. Va. 658, 107 S. E. 405 (1921) the plaintiff purchased a lot from a partnership, paying in full, but receiving no memorandum. The title to the lot was in one of the partners, but plaintiff's dealings were with the other. In West Virginia, the payment of the purchase price without more does not take the case out of the statute of frauds. The lots had gone up in value, so that the return of plaintiff's money was not adequate relief. The court therefore called it a trust,

(3) The trust device as a method of giving a preferred claim in insolvency situations.⁵⁸

(4) The trust device used in assignments for the benefit of creditors.

(5) The trust device as an artificial method of determining questions of procedure.

(6) The trust device used as an analogy to escape the Statute of Limitations.

(7) The trust device as a method of permitting third party beneficiaries to recover on contracts.

There are many others.⁵⁹

Such a descriptive process would have the following advantages:

(a) It could explain the historical origin and the use of the device in a given situation.

(b) It could indicate whether the rules of trusts compelled the decision, or whether they were simply a stereotype method of judicial explanation.

(c) It would make the use of the device unnecessary in the cases where it appeared more enlightening to talk about the real reasons for the result.

An interesting example of how this can be done is found in Professor Corbin's recent article in the *Law Quarterly Review*.⁶⁰ By a

and gave the lot to the plaintiff. The result is obviously fair, and the case can be criticised only by those who fear its effect as a precedent on other "trust" cases. Considered as an instance of equitable relief against the hardship of the statute of frauds, the case presents no difficulties, nor has it bothered the West Virginia Court since it was decided.

⁵⁸ The use of the trust device in insolvency situations to secure preferred claims is capable of much subdivision. However, these subdivisions cannot be based on the distinctions between express and constructive trusts, because it makes no difference so far as obtaining the preferred claim whether the money was given as an express trust implied from conduct on which a constructive trust of the proceeds has arisen, or whether it was a constructive trust. The present restatement would appear to treat some of these cases under "trusts" and others, obtaining the same result, under "constructive trusts." Suppose that a bank receives money from the sale of an American Express traveler's draft. Do the principles of express or constructive trusts give the American Express Co. a preferred claim?

⁵⁹ It is obviously impossible in this article to give a complete classification of the purposes for which the trust device is used in cases where no trust was originally intended. It will, of course, be argued that the kind of classifications indicated is no more mutually exclusive than the concepts of express, resulting, and constructive trusts, and that they overlap in the same way. This is true. However, we are not bothered by this fact, because we are not pretending to set out definitions, but only to classify actual cases as best we can, so that irrelevant decisions cannot be cited because they come under the same term. Our idea is to simplify the task of the court by referring it to a group of situations which are as similar as the necessity of creating some kind of grouping will permit.

⁶⁰ Corbin, *Contracts for the Benefit of Third Parties* (1930) 46 L. Q. Rev. 12.

simple process of description of what the English courts are doing with the trust device in third party beneficiary cases in order to escape a supposed rule of law, Professor Corbin has made it unnecessary to talk about trusts at all in such cases. His pertinent concluding sentence is as follows:

"It is merely a question as to when independent judicial minds will recognize the fact that fiction has been employed, that a change has been worked in the law by its use, and that the time has come to state the result in terms which will no longer mislead able judges and mystify the lawyers who must advise their clients and predict judicial action."⁶¹

Certainly it would not be contended that Professor Corbin has discovered the only case where the trust device was a mere fiction. But we can never discover these cases by defining trusts. A restatement by definition is in effect saying to the courts: "You have started out to talk in these terms. You must continue to do so until the legislature permits you to talk differently, no matter how unintelligible your language is."

Of course a descriptive restatement of the law will not have the appearance of a set of rules, because the inevitable uncertainties in the law will appear without concealment. Since this is a departure from the form of other restatements, the conventional objections are many and must be taken seriously. The first one may be stated thus:

There appears to be a deep seated prejudice throughout the restatement against stating that any judicially recognized rule or concept has been shown to be useless. It is sometimes done by implication, but never directly. To say that a rule of law is simply a way of talking which conceals the real issue of the case seems to be reserved for law review articles and excluded from the restatement. Such a statement in black letter type would be a real innovation. It appears to be condemned as "destructive criticism" of the "law" instead of "restatement." The result of this attitude is that if all sorts of things have been called "trusts," we are under a positive duty to define trusts so that our definition includes all of them. Hence the broad and inclusive definition with which the restatement begins, and the conventional lines which it follows.

To the writer it seems that this attitude overlooks the most important contribution which the restatement can make. A large body of men cannot write as good a book as one man, but they can give more authority and prestige to what they say. Authority and prestige are the only forces which can destroy a useless verbalism. Judges never feel

⁶¹ *Ibid.*, at 45.

secure in abandoning an ancient way of talking, because they fear destructive effects on some other part of the law's "seamless web" if they do so. A long list of archaic concepts such as the law of criminal attempts, the fiction of the lost grant, the distinction between trespass and case, local and transitory actions, the Statute of Uses, the distinction between resulting and constructive trusts and many others, surviving in spite of their present ineptitude, bear witness to this fact. The occasional opinion which attempts to say that there is no utility in some so-called "well settled principle" is looked upon as an example of daring originality. It is usually followed by a concurring opinion which agrees with the result, but sternly points out the duty of the court to use the same language as its predecessors, no matter how far from reality that language may be.

This task of destruction in order that more rational classification may arise is therefore peculiarly the function of the American Law Institute, charged as it is with making the task of the courts easier by eliminating confusing refinements. The prestige of the Institute is such that they may do this by a simple process of description. Anyone else who attempts it runs the risk of being buried under a landslide of judicial dicta upholding the ancient formulae.

A second objection is that the restatements of other subjects all read like codes, and are definitely committed to the policy of definition, rather than description. Therefore the law of trusts must be uniform with what has already appeared. As a practical matter it is now too late to suggest that the restatement of conflicts, for example, be required to show that domicile means actually different things when it is invoked to collect taxes, when it is used in a prosecution for bigamy based on a void divorce, and when the question of the most convenient place for the trial of an action is in issue. The Institute appears to be committed to the notion that there should be one "principle" governing all these cases, which means that they think it is better to talk about "domicile" in each of them, rather than about the actual problem involved. Differences in the use of the term can always be ignored by calling them questions of the determination of the "fact" of domicile, which has nothing to do with the "law." But if it be too late to discuss the soundness of this position (of which the treatment of the concept "domicile" is only an illustration), nevertheless even those who think that a method of definition is useful in the so-called "legal subjects" might be the first to admit that the historic classification of "equity" deserves a different treatment.

The origin of equity and its persistence today are not due to the hatred of Roman law, or the conservatism of English judges, but rather

to the fact that any system which is compelled to reconcile its decisions with its formulated rules must have an escape from those rules. Equity furnished that escape originally. If we are to continue with abstractions, equity must continue to furnish that escape today, even though the two courts are consolidated. Even though we are committed to a treatment of legal subjects by definition because of our legal tradition, there is nothing in the history of equity or in its avowed purpose which compels us so to treat equitable subjects. A conceptual approach is a betrayal of its origin and purpose. If the tradition of common law requires abstractions, that same tradition requires that equity be free from them in order to make legal abstractions more elastic. Where equity fails to do this, then the law of evidence with its presumptions and burdens of proof will be called in to create an anomalous equity on equity, as happened in the New York case⁶² where a writing found in a deposit box proved a delivery of bonds which was never made. The descriptive process would eliminate many of the so-called rules of trusts, but what remained would be more understandable. Much apparent predictability would be lost, but equity has always been most effective when it has been most free from rules.

Professor Scott is to be congratulated on his concise and logical treatment of the concepts of the law of trusts. His unquestioned skill shown in the attempt to restate trusts as a philosophy is the best proof that it cannot be done. The criticisms here offered question only the utility of the approach. And he is particularly to be congratulated for having the frankness to point out in the introductory note the method of approach here advocated, which he appears to understand as fully as anyone, but which considerations of policy and uniformity have apparently prevented him from following.

THURMAN ARNOLD

YALE LAW SCHOOL

⁶² *Supra* note 32.