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Book Review (reviewing Austin Wakeman Scott, Laws of Trusts (1939))

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BOOK REVIEWS


Professor Scott’s text is bound closely to the Restatement of Trusts and to that portion of the Restatement of Restitution having to do with constructive trusts. The section numbering and headings of Sections one to 460 of the text are identical with those of the Restatement of Trusts. Subdivisions of the sections of the text are given separate headings and decimal numbers. Sections 461-521 of the text treat the material covered in Sections 160-215 of the Restatement on Restitution. Sections 523-552 of the text are not related to any Restatement. They concern claims against banks on constructive or express trust theories. Volume four contains a table of cases and an index.

Professor Scott’s method of treatment is to set forth the rules and principles given in the sections of the Restatement and the comments thereon, but not usually to quote them; to explain the history, meaning, and theory of these rules; to show relevant case law in footnotes; to discuss the facts and holdings of a few leading cases; and to express his opinions of existing law and of possible reform in it.

It will be no surprise to those who know the ability, training and experience of the author, that a very large amount of useful material is here presented with skill, force, and clarity. The greater part of the law of trusts is discussed against the background of the Restatement, with the purpose not only of expounding the law to lawyer and judge, but also, and perhaps primarily, of justifying the work of the Institute in the trust field and promoting its use in the court room and office. With the Restatement in one hand and Mr. Scott’s text in the other the seeker for guidance can learn why the Restatement was worded as it is, what it was intended to mean, and to some extent what case and statutory backing it has.

To all those who are not willing to accept the Restatement on faith, Mr. Scott’s material will be welcome as a key to the cases which, in the opinion of its draftsman, give the work validity and persuasive force.

The author has in his preface imposed upon himself certain limitations which restrict the scope of his work. He does not attempt a detailed exposition of tax law relating to trusts, or of business trusts, deeds of trust or other trusts in the nature of mortgages, the application of the

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rule against perpetuities to trusts, or questions of conflict of laws affecting trust creation or administration. These topics are not touched in the Restatement of Trusts and a lengthy treatment of them does not seem to Mr. Scott appropriate in a trust text. The latest edition of Lewin\(^1\) covers none of the special topics excluded by Scott; while Perry\(^2\) treats powers, perpetuities and accumulations, assignments for creditors, and trusts for bondholders; and the reviewer’s book\(^3\) has chapters on the trust in tax work, perpetuities, accumulations, the business trust, and a brief treatment of trusts for bondholders. No one can categorically define the ideal content of a trust text. Each author must strive to meet what he imagines to be the needs and reasonable desires of draftsmen, trust administrators, judges, and lawyers.

Certain other self-imposed limitations on the scope of Professor Scott’s text are observable on an inspection of the book. First, the amount of material on the interpretation and construction of facts is quite small. For example, Section 58 covers the so-called savings bank or Totten trust. There are scores of cases where a deposit was made in trust for another and a question arose as to the effect of various acts or omissions by the depositor as bearing on his intent with regard to the account. Sections 58 to 58.5 give only a small part of this material. So, also, Section 227.14 discusses terms in the trust instrument expanding or contracting the trustee’s normal powers as to investments, and gives a small number of decisions on what language authorizes buying non-legals, but only a fraction of the numerous opinions on the interpretation of investment clauses is given. These decisions on the fixing of canons of construction and the weighing of evidence are, of course, of secondary importance. It may be said that no trust instrument has a brother. But it is believed that careful studies of them are often useful to those who must try to get, from the field of precedent, some light on the construction of facts.

Secondly, the author has no interest in discussing the purposes which can be served by the use of the trust, the business and social aims achieved by various types of trusts. He says: “Some writers on the law of trusts think that it is useful and important to enumerate the purposes for which trusts have been or can be created. Any attempt to enumerate the purposes for which a trust can be created is bound to be futile.”\(^4\)

\(^1\)LEWIN, TRUSTS (13th ed. 1928).
\(^2\)PERRY, TRUSTS (7th ed. 1929).
\(^3\)ROBERT, TRUSTS (1935).
\(^4\)P. 371.
He, therefore, gives little material on the use of trusts to minimize income, inheritance, and estate taxation; on personal and business insurance trusts and their functions in conserving and distributing wealth; on the comparison of the business trust and the corporation as units for carrying on a business enterprise, and other similar matters. It seems to the writer that Professor Scott ignores the fact that many lawyers have objects which they wish to attain for their clients, and that these lawyers are often seeking the most convenient and profitable means of reaching their ends. Frequently they are faced with the drafting of wills and the consideration of the consequent tax questions. They want to know the relative advantages of outright gifts, trusts, powers of appointment, gifts inter vivos, and other methods. A discussion of the utility of the trust in this field, in the light of relevant tax statutes and trust and property doctrines, would seem to the writer to be far from futile; in fact, to be highly utilitarian. In enumerating and describing common trust purposes no writer does so with the thought that the list is closed or that he is setting limits for those purposes. He does not write such a chapter as a matter of academic interest, as one might, from idle curiosity, count the number of leaves on a shrub. He knows that lawyers are considering desired results and the best methods of reaching those results.

Thirdly, Professor Scott does not attempt to give a full statement concerning the extent to which the "common equity" of trusts has been modified by acts of legislatures. It is true that there are numerous references to statutes in the footnotes, as, for example, the description of the Georgia restriction of the trust to the aid of persons non sui juris, and the mention of the New York restrictions as to real property trust purposes. But the treatment is evidently not intended to be exhaustive as to description and construction of the statutes or references to them. For example, in Sections 59.1 and 68.1, where the New York restrictions are presented, no construction of the New York and related statutes is given. A footnote states that similar statutes were at one time in force in eight other named states, but no reference is given to the statutes of these states, and it is stated in the text that the statutes outside New York have been repealed or modified, but no references are given to the acts which accomplished these results. The most extreme illustration of this type is to be found with reference to the investment statutes which are not quoted or discussed to any appreciable extent.

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5 P. 588.
6 § 68.1.
7 P. 1224.
It is true that it is extremely difficult for a text book to give a description of these investment statutes. They are often long and are frequently changed. But it seems to the reviewer that the gist of them, at least, with appropriate references, should appear in a book purporting to cover trust law.

Fourthly, the author does not attempt an encyclopedic treatment of the cases, with a discussion of small variations and distinctions and an effort to give all the authorities if the number is small, or leading cases from all the states which have considered the problem if the number is large. He is content with a short discussion of the leading principles and a citation of a generous number of important cases. For example, Sections 224.2 to 224.4—deal with the liability of an inactive co-trustee for delegation, failure to supervise, and acquiescence in a breach. The text and footnotes cover less than three pages, and approximately forty cases and one statute of indirect importance are cited. In an article in the *Harvard Law Review* this subject was treated with an attempt at completeness. The article covered 24 pages and discussed and cited many more cases and a number of statutes directly affecting the problem in the British Empire and the United States. Other examples of similar brief, condensed treatment could be given. When an executor may as trustee carry on the business of his testator, and the incidents of such an operation, are topics treated by Mr. Scott in Sections 230.4 and 268.4 within the limits of about two pages. The article by Mr. Adelman on these subjects which appeared in the *Michigan Law Review* extends over 39 pages.

Fifthly, no forms are included. While the slavish use of forms copied from a book is a dangerous practice, it is believed that a trust text which aims to be comprehensive should offer samples of tested types of instruments. The law which trust parties make for themselves is often as important as the rules of the appellate courts. Perhaps, however, in a book built so closely around the *Restatement* the addition of a supplement on forms would seem somewhat incongruous.

The use of law review material is liberal. There is no attempt to insert all the references to be found in the index to legal periodicals. Notes and articles which the author considered valuable are mentioned. There are also some references to authoritative texts, as, for example, to Gray on *Perpetuities*, and Gray on *Restraints*. Notes in A. L. R. are frequently

*Bogert, The Liability of an Inactive Co-Trustee (1921) 34 Harv. L. Rev. 483.

cited. The author follows the useful device of inserting in parentheses, following some case citations, condensed digests or key phrases. Note is made in the footnotes of cases citing the Restatement, and also of the rare instances where the Restatement was rejected.\footnote{P. 791.}

Mr. Scott's comments on the Restatement are nearly always illuminating and helpful. In rare cases one wishes his discussion had been more extensive. Even in the four years which have elapsed since the Restatement of Trusts was completed there have been occasional judicial proofs that no group of men can prepare a restatement which will cover all past and future problems. In Smith v. Rizzuto,\footnote{133 Neb. 655, 276 N. W. 406 (1937).} and Mr. Scott's text at Sections 264 and 265, there is an illustration of this fact. In that case the defendant was named trustee of realty by will. After the death of the testator, but before the trustee had filed a bond and accepted the trust, the plaintiff, a tenant of the trust realty, was injured, due to ice which had accumulated on the porch of the house. She sued the defendant personally to recover damages. The defendant demurred. The Nebraska Supreme Court held it error to sustain the demurrer and that the liability of the defendant was as title holder only, and hence was limited by the value of the trust property from which the defendant could be indemnified, citing Section 265 of the Restatement. The Restatement does not tell us whether the liability of a trustee in a case like the Nebraska case is a "tort liability," and so unlimited under Section 264 of the Restatement, or a liability "as title holder" and so covered by Section 265 which states that the trustee is liable at least to the extent to which the trust estate is sufficient to indemnify him and that the Institute expresses no opinion on greater liability. The Nebraska Supreme Court thus found itself faced with one problem recognized by the Institute but not decided. Mr. Scott indicates that he believes the liability of the Nebraska trustee was as title holder merely, and that it should have been limited to the value of the trust property. He thus supplements the Restatement and agrees with the court.

This case also raises in the mind of the reviewer another question; namely, why did the restaters of the law of trusts express no opinion on some problems, as in the above-mentioned Section 265, and again in Sections 44 and 45 where the question was whether a constructive trust should be fastened on a grantee by deed who took on oral trust and refused to perform? Section 2 of the By-Laws of the Institute states that one of its objects is to promote the clarification and simplification...
of the law. Professor Scott states in the preface to his work: "Where, however, the authorities were in conflict, or where there was little or no authority, they (the reporter and his advisers) felt free to choose the rule which, in the light of their judgment based upon varied experience, seemed to be the wiser rule." Mr. Scott states in his text, in discussing Section 265, that the original draft placed no limits on the trustee's liability as title holder, but that, "It was subsequently determined, however, that the state of the authorities did not justify this unequivocal statement." Apparently, Mr. Scott found only one case directly in point and that imposed full liability. Mr. Scott indicates that he personally thinks limited liability would be a fairer rule. When the authorities were so slight, why did not the draftsmen of the Restatement choose the rule which seemed to be the wiser rule instead of taking no position whatever? The text does not answer this question.

The caveats to the effect that the Institute takes no position upon the constructive trust question where the grantee of land on oral trust for the grantor or another refuses to carry out his trust, are found immediately following Sections 44 and 45 of the Restatement. Sections 44 and 45 of Scott discuss the state of the decisions on this problem, showing that the majority of the American cases create no constructive trust, and then the author expresses his view that a constructive trust for the grantor should be imposed, in accordance with the English holdings. No mention is made in Sections 44 and 45 of Scott of the reasons for the failure of the Restatement to take a stand on this constructive trust question and for the insertion of the caveats. One may conjecture that the reporter and his advisers wanted to state the English view as American law, but were deterred by the great weight of American cases contra. It would seem that an explanation of some sort in the Restatement or in Scott would be welcomed by the bar. If the reason was repugnance to the prevalent American rule, a statement to that effect might have been made, with the suggestion of a statute. Mr. Scott does not notice at this point the beginning toward a reform in this direction made by Section 16 of the Uniform Trusts Act, adopted in North Carolina.

In one case where the Institute made a choice between sharply conflicting lines of authority, the capital and income problem concerning stock dividends, where a decision had to be made between the Massa-
chusetts and Pennsylvania rules, Professor Scott outlines the arguments in favor of both rules but does not tell us why he selected the Pennsylvania rule. The vote of his advisers on this question was quite close. It would be interesting to know what were the determining factors which led the reporter to cast the weight of the Institute behind the admittedly waning Pennsylvania rule.

Further explanation would have been helpful also where the Institute adopted a minority rule. For example, Section 153 of the *Restatement of Trusts* states that a spendthrift trust is not valid insofar as it restrains the voluntary or involuntary alienation of the capital of the trust, with one minor exception not relevant at this point. In his discussion of the cases on this point in Section 153.3 of his text, Professor Scott states that the courts are divided as to the validity of such a clause. He cites no cases holding it invalid, and refers to several cases supporting the clause, including recent cases from California, Minnesota, and Texas. It is a well known fact that a large proportion of skillfully drawn trust instruments contain a clause restricting alienation of the right to capital and that most trust officers assume without much thought that such a provision will be supported by the courts. Since the *Restatement* is going against the tide of judicial and professional thought on this topic, would it not have been wise to explain fully the reasons for such action?

Professor Scott's work is prepared with care and accuracy. Here and there a casual inspection seems to show minor errors or instances of doubtful construction of the cases. But these are of trifling importance. A few instances of such flaws are mentioned by way of illustration.

*Collins v. Collins*\(^\text{15}\) is cited by Mr. Scott in Section 405 as holding that no trust results to the grantor in a voluntary conveyance merely because the deed was without consideration. It would seem that the court held that the primary presumption in such a case is a gift to the grantee, but that this presumption is rebuttable, and was in the case at hand rebutted by oral evidence of an intent that the grantee hold for the grantor. The court called the grantee a resulting trustee.

In Section 101.1 Professor Scott treats *Louisville & Nashville Railroad Company v. Powers*\(^\text{16}\) as deciding that where a trust is personal to the originally named trustee, and he disclaims the trust, the beneficiary will

\(^{15}\) 46 Ariz. 485, 52 P. (2d) 1169 (1935).

\(^{16}\) 68 Ky. 491, 105 S. W. (2d) 591 (1937).
be entitled to the trust property if, but only if, the settlor so intended. To the writer the case seems to hold that in such a case the trust becomes a dry trust and is executed by the Statute of Uses, and so that beneficiary has full title.

On page 1929 the statement is made that "Today all of the states recognize the validity of charitable trusts." No mention is made of the serious limitations in Mississippi by virtue of Sections 269 and 270 of the constitution of the state.

On page 1532 the statement is made that the Uniform Trusts Act was approved by the Commissioners on Uniform State Laws in 1927. This should be 1937. The author makes no mention of the adoption of this act by Louisiana in 1938 and by North Carolina in 1939.

In discussing the Nebraska case previously mentioned, Smith v. Rizzuto, the author states that the trustee there disclaimed and that the case should have been decided on the ground that he was not liable for the defective condition of the trust realty, because he never was trustee. Although a very brief note in the Harvard Law Review makes this same statement, the writer is unable to find any evidence of disclaimer in the opinion of the court, and the writers of notes in the Nebraska Law Bulletin, Minnesota Law Review, and the Iowa Law Review construe the case as based on an acceptance by the trustee.

These defects are of the type which any specialist could find in the best books in his field. Professor Scott has accomplished well the task he set for himself. He has given his interpretation and justification of the Restatement of Trusts. He has expounded Anglo-American trust law, as it was, as it is, and as it ought to be, in the light of his intensive and extensive study of the subject. His volumes constitute a very valuable addition to the library of the law.

GEORGE G. BOGERT*

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*Note (1918) 31 HARV. L. REV. 1453.
*Note (1939) 18 NEB. L. BULL. 99.
*Note (1938) 22 MINN. L. REV. 907.
*Note (1938) 23 IOWA L. REV. 669.
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