

BOOK REVIEWS

THE LAW OF TRUSTS. By Austin Wakeman Scott. Little, Brown and Company, Boston, 1939. (4 volumes). Pp. xlv, 816; xvi, 817-1727; xvi, 1729-2604; 2605-2981. Price: \$35.00.

The American Law Institute has not only produced various *Restatements*, but it has also been the immediate intellectual support for the publication of several treatises such as Simes on *Future Interests* and Bogert on *Trusts*. Three Harvard professors, using the authorities and the material so collected, have now each prepared a treatise on the subject of which he was the Reporter. Beale on *Conflicts* appeared first. The second and much enlarged edition of Williston on *Contracts* was recently completed. Now Professor Scott has given us a four volume treatise on *Trusts*. Perhaps we may expect treatises on agency, restitution, property, and torts which, respectively, will show a similar standard of performance.

This treatise on *Trusts* follows the *Restatement* closely. It includes, however, the material on constructive trusts,¹ which subject is restated in Restitution,² and there is added an occasional section marked A, the subject matter of which is new material. The matter found in "Comments" under the various sections of the *Restatement* is expanded in the treatise under a decimal system of numbering which makes possible the insertion of further sections in case future developments should call for them.

In the introduction the author suggests that he has not dealt with all the possible questions relating to trusts. He mentions matters which he does not propose to discuss, among them being the use of the trust in security transactions. Some may feel that the treatise should be more inclusive than it is. It is hardly fair, however, to insist that the author should develop fully the law of wills or of conveyancing, or of taxation, since this would lead him afield and usurp the place that should be taken by other treatises. To go much farther in citing the statutory materials would seem to involve undue expansion and might lead the user to assume that further consultation of the statutes was not necessary. A completely exhaustive treatise on trusts could be nothing other than an encyclopedia. The present reviewer believes it is possible and desirable to make a dogmatic exposition of the rules of law in special fields. The author will, of course, be characterized as a conceptualist in some quarters, and though he may be, there is nothing mechanical in his treatment of the subject.

This reviewer calls attention to a few superficial matters which he thinks are deserving of some consideration as one uses this work. In Section 96.7, dealing in a single paragraph with merger and consolidation of the corporation trustee, there is no adequate discussion of the effect of the alteration of the corporation on the right to exercise the fiduciary powers possessed by its predecessor. There is a statement that in the absence of statutes it is generally held that where the old trustee ceases to exist, it is necessary to apply to the court for a new appointment. No authorities out of the considerable number available are cited. While Massachusetts does so hold, yet Illinois holds *contra*.³ The New York cases prior to the statute of 1930 were inconclusive. There may be those who prefer the Illinois

1. §§ 461-552.

2. §§ 160-215.

3. See *Chicago Title Co. v. Zinger*, 264 Ill. 31, 105 N. E. 718 (1914).

rule, not directly affected by statute, that the successor may exercise the power under the appointment. There are statutes, both federal and state, conferring the right to consolidate and to merge, but, except as to the more recent ones, they are probably insufficient to transfer fiduciary powers to the new corporation, if a statute thereto is necessary. If the new or altered corporation which proposes to assume fiduciary appointments is an essentially different entity, then an undue delegation of fiduciary duty would arise. If it is essentially the same corporation as the one named by will or deed, there arises no delegation of duties. Professor Bogert devotes about six pages to the matter.⁴ Presumably Professor Scott would relegate it to a treatise on Corporations.

The author states:

"And some [courts] are beginning to recognize that as a matter of policy the risk of loss from torts committed by the trustee in the administration of the trust should be borne by the trust estate rather than by the victim of the tort."⁵

In Section 267 four situations are stated in which the creditor should recover against the trustee as trustee: (a) when there is a right of exoneration; (b) an unjust enrichment; (c) a contract to that effect; (d) provision therefor in the trust instrument. A fifth situation is suggested upon which no position was taken in the *Restatement*, as in the case where a liability has arisen as a result of ownership of property and the trustee is sued. Perhaps he would also admit here a representative suit in many cases of equitable subrogation. I suppose *Whiting v. Hudson Trust Co.*⁶ would be brought under the unjust enrichment cases. While the nature of the proposed remedy in that case does not seem objectionable, the facts that the receivers of the stolen funds were *bona fide* purchasers, that there was no possibility of tracing, that it was no case for equitable subrogation, and so no unjust enrichment seem to have been obscured by the form of the action, which was against the substituted trustee as trustee. I should like to know if the author thinks there may be danger in the too great extension of this procedure and whether some caution might be suggested in this respect.

The somewhat comparable case of suits against the executor or administrator as representative might well have received some comment, even though this is not a treatise on the administration of decedents' estates.⁷ Incidentally, the powers and duties of joint executors might be accorded some comparison with those of joint trustees. Fiduciaries are not always technical trustees. Thus, there seems a certain degree of justification for the plaint of Mr. Powell⁸ respecting "beating at the barriers between 'trusts' and 'wills'."

In Section 135 I should like to have found more of a comparison and a discussion of certain typical situations of gratuitous assignments or gratuitous partial assignments, e. g., of a specialty, of an intangible chose in action, of an equitable interest in personal property, and of a legacy. Possibly it was thought this would carry too far afield. No comment was found upon the question arising where the donor of a general power of appointment of trust property appoints to trustees by deed or to executors

4. 3 BOGERT, TRUSTS (1935) § 531.

5. P. 1534.

6. 234 N. Y. 394, 138 N. E. 33 (1923).

7. See *Re Fitzgerald's Estate*, 252 Pa. 568, 97 Atl. 935 (1916). This was an action for personal injuries for tort of the executor in the management of the business of the testator. Recovery was allowed *de bonis testatoris*.

8. Powell, Book Review (1939) 39 COL. L. REV. 1453, 1456.

by will, whether the new trustees or the executors shall take possession and administer the trust under the power, or whether the prior trustees shall continue in possession.⁹ Likewise no discussion appears as to whether a trustee who lends or advances to the *cestui* without notice of prior assignment of the latter's interest is protected against the *bona fide* assignee.¹⁰ Section 480.4 deals with the failure of trusts created for non-charitable corporations. I was disappointed in not finding a reference to *Easum v. Bohon*,¹¹ which is much like the English case *Cummack v. Edwards*¹² and is a leading American decision. Section 494 seems to be superfluous.

In Section 170 it is declared that the trustee must administer the trust solely in the interest of the beneficiary. That assumes the impossibility of a divided loyalty. Suppose, however, that a trustee of a large percentage of the shares of a corporation finds it advisable to become a director or other officer of it. Is there not a possibility of a divided loyalty?¹³

The author differs from the policy of the black type statement of the *Restatement* occasionally, e. g., in Section 32.3 (no trustee named or is dead or incompetent) and Section 55.1 (oral promise by devisee to hold for a third person). Here he sets out the opposing arguments and many of the authorities. Courts may well follow hereafter the treatise rather than the *Restatement* unless they feel bound by *stare decisis*.¹⁴

If there were time and space, a comparison between this treatise and the earlier excellent one by Professor Bogert would be in place. One may at any rate say that Bogert's treatise is in some respects wider in range and more complete. Thus, he cites some 21,000 cases as against some 12,200 (both estimated) by Scott. He discusses more cases in detail and makes a good many more citations to periodical and text literature. Scott more or less neglects the literature that further develops some topics as, for example, where he is "beating against the barriers between trusts" and other subjects, such as incorporation by reference and his so-called "facts of independent significance" and the survival of powers.

This reviewer does not think that he has ever used a technical treatise the style of which was as pleasing as that found here. There is an unsurpassed clarity of statement and in general a thoroughness in the handling of difficult issues that indicate the master. This treatise as well as the author's articles might well serve as a model for legal writing. One hazards expressing the belief that this production compares favorably with the great treatises of Williston and Beale.

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CASES AND MATERIALS ON THE LAW OF CORPORATIONS. By Henry Winthrop Ballantine and Norman Dunham Lattin. Callaghan and Company, Chicago, 1939. Pp. xxxii, 917. Price: \$6.00.

This book contains fifteen chapters and an index. It consists of 886 pages of cases and text matter printed in readable type. No attempt is made to cover winding up and dissolution, reorganization, foreign corporations, and corporate securities other than common and preferred shares.

9. See *Philbrick's Settlement*, 34 L. J. (Ch. 1865).

10. See *Newman v. Newman*, 28 Ch. D. 674 (1885).

11. 180 Ky. 451, 202 S. W. 901 (1918).

12. 2 Ch. 679 (1896).

13. See Cahn, *Estate Corporations* (1937) 86 U. OF PA. L. REV. 136.

14. Cf. *Horsley v. Hrenchir*, 146 Kan. 767, 73 P. (2d) 1010 (1937).

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Otherwise, the usual topics found in this type of casebook are dealt with in the conventional mode.

There is here much excellent material. On the selection of cases—a matter of judgment—this reviewer is disposed to offer no general criticism. There is a fair sprinkling of the older decisions, where necessary to illustrate historical development, but the more recent cases seem to predominate.

The authors frequently cite a certain comprehensive work on corporations in over a score of volumes, by volume number and page reference. This reviewer does not believe that the maze of cases the student usually finds if he consults the reference is nearly so helpful as would be a citation of one or two carefully selected and authoritative cases from courts of last resort, where the student can see the actual application of the doctrine with a judicial exposition of principles. The average beginning student has neither time nor inclination to explore a dozen cases when he might have time to read one decision. A more frequent reference to such valuable single volume texts as Ballantine (1927) and Stevens (1936) would have been much more helpful.

The first chapter deals concisely and effectively with the distinguishing characteristics of the partnership, the common law joint stock company, the statutory joint stock company and the business trust.

The third chapter bears the title, The Separate Corporate Capacity or Entity Privilege and Its Limitations, and deals with what is sometimes referred to as the distinction between the corporation and its shareholders. Here the authors show clearly their dislike of certain terms and phrases, such as "corporate entity", "disregard of corporate entity", and the like. There are full notes and many well chosen cases cited and discussed.

In approximately twelve pages the authors give the student a glimpse into two or three of the labyrinthine passages of Blue Sky laws and the Securities and Exchange Acts of 1933 and 1934. There are numerous and valuable citations to articles and cases on this intricate subject. The authors have done as well as it seems possible to do in a volume where limitations of space are necessarily rigid. This topic obviously cannot receive much attention in an elementary casebook.

The vexing question concerning the power to create an executive committee of the board of directors, and then confer on it substantially all the powers of the board, is covered by one case and a note in Chapter V, Section 4. It seems to me that the case selected—*Hayes v. Canada, etc.*¹—offers the student no clue to the correct solution of the problem, nor does it intimate the real ground on which the courts divide. Better cases are available.² The directors in this case were obviously guilty of a breach of fiduciary duty in absorbing control of the corporation for personal gain, rather than of excess of authority purportedly given them and honestly exercised in their character as members of the executive committee.

Probably the best material in the book is in Chapter IX, on Stock Structure and Classes of Shares. It deals chiefly with preferred shares, the topical analysis is logical and the case selection appears excellent.

The authors of the book object to and advise against the use of the well known, and I think well understood, phrases, *legal person*, *capacity*, *intra vires*, *ultra vires*, and *corporate powers*, on the ground that they are not "realistic", or are "misleading terminology" or a "figure of speech". There is, of course, no end to the philosophic argument on what is *reality*,

1. 181 Fed. 289 (C. C. A. 1st, 1910).

2. Hoyt v. Thompson's Ex'r, 19 N. Y. 207 (1859); and contrasting view in Temple v. Dodge, 89 Tex. 69, 32 S. W. 514 (1895).

but there is little place for it in an elementary law course, where it is more important to find the law as it is than as a philosopher thinks it should be. Nearly, if not all, the cases in the book use the terms, and without apology. It is a *reality* in the law that the business activities of corporations are limited in scope by the articles, sometimes very strictly; it is a *reality* in the law that if they go beyond these limitations, their acts are open to legal challenge in various ways and are commonly described by lawyers and judges as *ultra vires*; and it is a *reality* in the law that in some situations and in most jurisdictions a corporation which goes beyond what the courts describe as its "powers" cannot be compelled to perform its engagements, nor can a recovery in damages be had against it for their breach. In short, this reviewer disapproves of advising against or decrying the use of words and phrases still standard in the vocabulary of courts, practicing lawyers, and bar examiners—the last we who teach are not permitted to forget. Aside from the fact that little attempt is here made to suggest how the concepts these words describe may be better labeled, the courts have no means of expressing thoughts other than *words*, and, therefore, we who teach the law cannot escape the necessity of clarifying exposition in the class room.

"A corporation itself has no powers and cannot act except by agents," say the authors in a note.³ With this statement I wonder if lawyers and lawmakers are as yet, prepared to agree. The second clause is correct, in so far as it means that a corporation can see, feel, hear and act only through human agents; the first part may be true from a philosophic standpoint, but to a beginning student it is incorrect and misleading, because a "corporation", as the courts and legislatures use the term, can "exist" without shareholders or capital, and it may continue to "exist" without officers or agents. The giving of "agents" to the corporation does not in the least enlarge the legal sphere within which it may act, but merely, as a practical matter, makes it possible for it to act. This concept, still fundamental in the law, the authors seem to reject, notwithstanding, as Justice Holmes has pointed out,⁴ the "leading purpose of such statutes is" to provide a non-conductor through which "it is impossible to see the men behind." As I read this book, the law student is bound to infer that these "agents" exercise original rather than delegated or derivative powers. When the directors of *X* utility, as its agents, move to take *A's* land by condemnation, lawyers and judges are not yet ready to concede that they are exercising a power or privilege conferred on them rather than *X*, "fiction" though *X* may be.

In the main, it seems to me, this casebook is an important contribution to the tools of the law teacher, as was to be expected from able and distinguished scholars like Professors Ballantine and Lattin. It has many admirably executed notes and is indubitably a scholarly volume.

Sveinbjorn Johnson. †

PAROLE WITH HONOR. By Wilbur La Roe, Jr. Princeton University Press, Princeton, 1939. Pp. x, 295. Price: \$3.00.

The value of this book lies in the fact that it records the experience and thinking of its author, a distinguished lawyer, as chairman of the District of Columbia Parole Board. It, therefore, gives its readers the sense

3. P. 199.

4. *Donnell v. Herring-Hall-Marvin Safe Co.*, 208 U. S. 267, 273 (1908).

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of first-hand contact with the prisoner as a human being and with the problems of parole as Mr. La Roe met them in his day-by-day work.

This book combines fascinating reading with a clear and sound exposition of the fundamental philosophy of parole. Adequate treatment is given to the essentials of parole, namely, its function in protecting society, its superiority over other forms of release from prison, the necessity for adequate parole machinery, improvement of parole supervision, the development of the social resources of the community in relation to supervision of paroled men, the recognition of the dependence of parole upon the preceding stages of the treatment of the criminal by the police, by the court, and in prison.

Mr. La Roe makes effective use of the data presented in the papers and recommendations of the National Parole Conference held in Washington, D. C., in April, 1939. Particularly valuable is his digest from the *Attorney General's Survey of Release Procedures* of the operation of parole machinery of the several states. The chief deficiencies of the book are the omission of the development of scientific methods of the study of the inmate as a basis for classification and parole, lack of reference to the Illinois Prison Survey with its recommendation for the integration of parole with the other factors of correctional treatment of the offender, and the absence of a bibliography upon parole.

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WORKMEN'S COMPENSATION INSURANCE INCLUDING EMPLOYERS' LIABILITY INSURANCE. By Clarence W. Hobbs. McGraw-Hill Book Co., Inc., New York, 1939. Pp. xviii, 707. Price: \$5.00.

There appears every once in a while a book which adequately satisfies the lay as well as the legal mind. This may well be said of the recently issued one volume work entitled *Workmen's Compensation Insurance Including Employers' Liability Insurance*. In the foreword it is stated that the book was originally intended as a revision of a book bearing the same title published in 1925 but written by others. This earlier work presented both the practical operations of workmen's compensation insurance and its economic and historical background. It is stated, however, that in the work of revision considerable portions of the text were abandoned and others rewritten to keep pace with the progress of the advancing times; as a result the book under review cannot be properly termed a revision. Mr. Hobbs has acknowledged graciously the valuable service rendered by the authors of the earlier book, G. F. Michelbocker and Thomas M. Neal, the general design of which is followed in the present work.

Mr. Hobbs's book is a well arranged, well written, interesting, and scholarly work. Its six hundred and thirty-four pages are divided into two parts. The first part is devoted to a discussion of Workmen's Compensation Acts. Part two treats of the matter of insurance of employers with respect to their liability to employees under the compensation acts.

Two features of the book strike one familiar with the subject matter discussed: one, its readableness; the other, the clarity with which decisions upon controversial issues in connection with the Workmen's Compensation Acts are presented. It is a book which may be as readily perused and as easily understood by a layman as by a lawyer. It is not in our opinion intended to be a textbook of law. No attempt is made to record the details

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of the numerous controversial questions arising out of conflicting court decisions, all of those matters being peculiarly within the province of a law text.

There has been no attempt upon the part of the author to cite authorities for each legal proposition referred to in discussing the Workmen's Compensation Acts, although in really important instances, that is to say, when the doctrine of a so-called leading case is adverted to, the case is duly cited. In reviewing the causes which lead to the evolving of the scheme of compensation embodied in Workmen's Compensation legislation, Mr. Hobbs points out that originally in case of personal injury sustained by one through fault of another, the rights and remedies of parties were governed by the common law rules—and the late Justice Holmes is aptly quoted as stating that "The life of the law is not logic, but experience." The author then traces the evolution of legal rights from the early legal concepts embodied in the master and servant doctrine, with especial reference to the defenses available and the inadequacy of this form of remedy under conditions existing in this country at the dawn of the twentieth century, to the origin and growth of workmen's compensation acts in this country. The author points out that workmen's compensation laws were in force in leading European countries a quarter of a century before the idea gained recognition in these United States. The principal obstacle encountered in connection with the early history of the acts seems to have been the constitutional objections, but those objections were quickly brushed aside by the Federal Supreme Court. In connection with his discussion of the desirability of a uniform federal compensation act and the propriety of such legislation by the Federal Government, the author not inaptly says:

"As interpreted by recent decisions of the Supreme Court, and as embodied in congressional legislation, already enacted or pending, the authority of Congress to enact such legislation is apparently much broader than was supposed. Congress has enacted a Social Security Act, including provisions for old-age pensions and unemployment benefits; congress has enacted legislation regulating the right of collective bargaining, and regulating wages and hours of labor. If it can do so much, the authority may conceivably exist to enact a comprehensive federal compensation act. Whether one federal act obligatory upon all throughout the country or the present system of separate state acts is wiser is now and will remain a debatable question. There are sound reasons in support of either view of the question. The advocate of the principle of permitting each state to take care of its own house has thus far prevailed."

There are two types of Workmen's Compensation Acts in force in the United States, of which one is elective in character and the other compulsory. Mr. Hobbs discusses in his work with commendable clarity, *inter alia*, the relation of employers and employees under the Acts; the class of injuries covered by the Acts; what does and what does not comprise a compensable injury; what injuries are considered as arising out of and in the course of the employment so as to permit compensation, and other subjects within the compensation theory as applied to injured employees.

Again, in dealing with cases not within the purview of the Act, such as injuries sustained in interstate commerce and in maritime employment, the author shows thorough familiarity with his subject and separates the wheat from the chaff with fine discrimination. Another branch of the subject—an abstruse as well as an important one—is that of extra-

territorial enforcement of compensation claims, and the doctrine of the cases governing this subject is clearly and understandingly presented by the author. The work is a worthy addition to the book-shelf of any one interested in the subject of workmen's compensation.

Part two treats of the organization of insurance carriers with especial reference to functional and business aspects. In this connection the policy contract, re-insurance, the annual statement, rate regulation, rate making, application of rates and kindred subjects are separately treated and very fully discussed. In the course of his observation in respect of this branch of the matter Mr. Hobbs very pertinently observes that an insurance company has a very important functional part in the economic and social fabric of the states; and that "there appears a steady movement in the direction of a closer organization of society; that the underwriter finds himself in a world where what he does is more and more a matter of public concern and that it is necessary for the various underwriting units to take note of this tendency and to take proper measures accurately to determine and faithfully to perform whatever they are supposed to do in the public interest." Insurance executives may well ponder these observations if their companies are to carry on successfully. The failure of insurance units to sense this situation is undoubtedly the cause of the growing tendency in the direction of intervention by the federal and state governments in this field of activity. When the citizenry of a country feels that it is not getting the protection to which it is entitled, there is then a demand that the government take over and fill the void. Insurance should not be considered entirely from the standpoint of profit, but there should be combined therewith the element of social service. This latter feature, however, seems to be lost sight of in some cases. For example, the unfairness from the public standpoint of the automatic cancellation of accident and health insurance policies when an insured most needs the protection, and other drastic cancellation reservations in contracts will inevitably result in federal form of policy as a prerequisite to the carrying on of interstate business. It is rather curious that there has been a lack of prescience in this respect upon part of responsible heads in view of the broad interpretation that is now being given to the commerce clause of the Constitution and the almost daily reversal of the earlier doctrines of limitation of federal powers in this respect. What is happening in the field of compensation insurance carriage may and probably will be extended at no distant date to other spheres of insurance activity. There will be less call for regulation when it is perceived by responsible heads that insurance is to be considered not from the profit standpoint solely but as a factor to be necessarily adjusted to our advancing social life and the wants of the people.

We commend Mr. Hobbs' work to the careful examination of those interested in the subject treated therein. The book is a well written work of a highly informative character and will fully repay one for the time devoted to it.

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