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The Law of Trusts. Austin W. Scott.

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BOOK REVIEWS

THE LAW OF TRUSTS. Austin W. Scott. Boston, Mass.: Little Brown & Co., 1956.
5 Vols., Pp. 4056. \$100.00.

Justice Holmes, in his *The Path of the Law*, suggests that it's "a great mistake to be frightened by the ever increasing number of reports. The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view. We could reconstruct the corpus from them if all that went before were burned." It is perhaps the fear of this latter fact that leads publishers of treatises to be certain of a new edition every generation, even if it is only a typographical incorporation of previous pocket parts which characterizes the new edition. After a while, of course, the treatise no longer states the law from the present point of view and no further editions of what has become Jones' Smith's Brown on— will be absorbed by the profession. Thus the English Lewin on *Trusts* gave way under the pressure of new points of view to the American Perry on *Trusts and Trustees* which, after many editions, gave way in turn to Bogert on *Trusts and Trustees* (1935) and Scott on *Trusts* (1939).

Professor Scott has now come out with the second edition of his great treatise and if we were to ask whether, compared to the first edition, this restates the law from a new point of view the answer would have to be no. In his preface to this edition Professor Scott comments that "the growth in the law of trusts is shown in the thousands of cases which have been decided since the First Edition went to press (and) . . . the numerous statutes enacted within the last few years." If the point of view has not changed it might be said that the growth has been one in the volume rather than the body of law; for, despite the growing number of cases, especially from the Western states, and—what is apparent to any practitioner—the dominating influence of tax laws on the use and misuse of the trust institution, still it seems clear that lawyers look upon trusts and analyze trust problems pretty much the way they did in 1939 and so we can look to Professor Scott only for refining, expanding, and clarifying his point of view.

The Scott point of view in the first edition was criticized for its cursory treatment of statute law; the logical isolation within which the subject was treated, without an integrated treatment of related areas like future interests or incorporation by reference; and its failure to discuss the various functions trusts serve, or the commercial and social aims for which they are utilized. In line with these criticisms it was observed that there was insufficient detailed analysis of all the authorities and inadequate factual exploration of the cases discussed.¹ To what

1. Although the reception of the first edition was generally excellent, these criticisms were made variously in reviews by Powell [39 COLUM. L. REV. 1453 (1939)], Bogert [28 GEO. L. J. 567 (1940)], and Mechem [25 IOWA L. REV. 408 (1940)].

BOOK REVIEWS

extent these criticisms were or are valid I will consider in a moment. For now, it might be noted that Professor Scott has taken them in small measure to heart in the new edition. The consideration given statute law is more detailed and complete, both in the text and the footnote citations; as well, there have been added short subsections on Legislation (§1.11), Statutory trusts (§17.5), Statutory distributive share of surviving spouse (§146A), the Uniform Principal and Income Act (§241A), and Tax problems in creating a trust (§16B). This last section merely effects the caveat: Lawyers, there are tax problems in creating a trust! Other than these changes and additions, and a more extensive treatment of the rule against perpetuities—expanding §62.10 from 3 to 20 pages—Professor Scott has not been moved to pour this second edition from any other mold but that used in the first. It is still organized on the basis of the Restatement of Trusts and sections 160 to 215 of the Restatement of Restitution (covering constructive trusts) of which he was Reporter; it still avoids extensive discussion of those areas of law (e.g., taxes, security transactions, future interests) which border on if not invade the law of trusts, or consideration of the functions or aims of trusts; it persists in using leading cases as the best tool for extracting, analyzing and weighing principle, rather than comparing the whole body of reported cases on the subject; it does not contain forms; the newly written parts have the same fine, clear, persuasive style as the parts retained. Has the sanction of twenty years, preoccupied with the functions of the trust and its tax problems, made the criticism of the Scott approach more effective against the unrepentent professor? I suggest not.

To satisfy the profession's proper concern the tax consequences of any subject having tax consequences, there has been a plethora of practical books, services, form books, symposia, articles, etc., examining every angle and corner of every question with every turn or change in regulation, ruling, decision—or in the make-up of a congressional committee. The function of this body of material is no doubt an important one but it is by now realized that a treatise which, in a sense, holds the fort of basic legal principles, cannot enter this field without giving up the fort and becoming a "service." And, of course, the best of this material is fairly useless without the underlying body of understanding represented by a good treatise such as Scott's. As for the functions of the trust in modern commercial society, I cannot see how this can be treated—except superficially—in a law treatise, unless the author were willing to undertake a serious excursion into economics, sociology, politics and the Statistical Abstract of the United States. Professor Scott has been wise to avoid both. On the point of detail, Professor Scott seems to assume quite properly that lawyers using his treatise have recourse to other research tools—the digests, A.L.R.—by which they can gather all the cases in their jurisdiction; and further, that the function of his treatise, to provide analytic guides in handling a case, can be better achieved by some economy of treatment of authorities. With this I would agree, though it might be noted that

this second edition, although continuing to discuss leading cases in the text, cites almost every pertinent case decided since the first edition. There are also complete references to A.L.R. articles, although the references to law review articles are at times rather spare.

The only criticism which seems to hold up is that somewhat formalistic approach leads at times to reading cases into categories they do not exactly fit, or discussing a significant subject from artificially different aspects only because the Restatement has formally dealt with the subject in different sections. At times one senses an impulse by the author to relate analogous areas or extend the discussion to various subtleties, only to find the impulse stifled by the necessity of keeping the sections so *logically interdependent* that they seem *factually independent*. The arrangement of a code is not necessarily the most illuminating arrangement for a treatise.² An example of these tendencies is the author's treatment of the trustee's duty of undivided loyalty. In general this is dealt with under the section relating to the "duty" (§§170-170.25), broken down into various types of breaches of the duty. Whether the trustee who breaches is subject to removal, or can receive compensation, or holds the fruits of his breach as a constructive trustee, is covered in other sections.³ Although this repetition, with adequate internal cross-references, may not be too harmful, it has in fact left the main discussion of the duty in §170 *et seq.* strangely adumbrated. All the subtleties that are suggested in cases which happen to involve the issue of removal, or compensation, are lost. There is an excellent discussion, much expanded from the first edition, of the problems arising from a corporate trustee's holding its own stock in trust, and the author observes that "a general authorization to retain original investments is a waiver of the rule of undivided loyalty."⁴ But doesn't this principle of waiver apply to other situations? Won't the court imply such a waiver by the settlor from other general circumstances attending the appointment of the trustee? Does it apply to an individual trustee's right to act and receive compensation as an officer of a corporation the stock of which he holds in trust? There are a number of cases which seem to answer these questions in the affirmative, but the cursory treatment in separate subsections of the trustee's receipt of other compensation, and other breaches of the duty of undivided loyalty, lead the author to neglect a significant trend in the cases, if not a new principle: that where the settlor knew or could

2. Professor Mechem in his review, *op. cit. supra*, note 1, perceives this point with fine insight: "[R]estatements tend to be conceived and executed in terms of the purest logic. Often this leads to a sequence and grouping of parts, which, however formally logical, is far from the one a writer would adopt for the most effective presentation of his ideas. And the restatement form leads to repetition; for the sake of formal completeness what is really one body of doctrine may have to be restated in full from three or four only formally different angles." (25 IOWA L. REV. at 409). In this extended review there is an excellent critique of Professor Scott's rather formalistic views on the statute of frauds and constructive trusts.

3. §§ 107.1, 243 and 502 respectively.

4. § 170.15.

foresee the trustee's prospective conflict of interest he will be deemed to have authorized conduct in the conflicting positions and, to this extent, waived the rule of undivided loyalty, whether or not the instrument itself authorizes the trustee to so act.⁵ The author's treatment of *Flagg Estate*,⁶ involving an attack on the acts of a trustee in a position of divided loyalties—as trustee, executive and stockholder of a corporation whose stock was held in trust—is in point. Although Dean Niles wrote an article somewhat around this case on the question of the settlor's implied waiver of the duty of undivided loyalty and the policies involved,⁷ the author gives, as the court's reason for sustaining the trustee's acts that "he acted reasonably and in good faith." A New York lawyer would know that this is not a sufficient answer in the face of the so-called "no further inquiry rule"—that is, where a trustee is in a position of conflict the court will make no further inquiry into the reasonableness of his conduct or his good faith but will consider his acts a breach of trust.⁸ The lower court in the *Flagg* case in fact applied the Pennsylvania version of this rule when it considered that the mere "existence of the conflict of interests ipso facto disqualified [the trustee] from acting . . . it is the conflict of interests rather than bad faith which is the determinative factor." The Supreme Court of Pennsylvania in overruling did so on the theory that the settlor impliedly authorized action in the conflicting positions and so "necessarily modified or displaced the otherwise absolute limitation against self-dealing." Of course, after so holding the trustee qualified to act, to sustain his acts the court also found he acted reasonably and in good faith. Professor Scott ignores the "no further inquiry rule," for what reason one cannot say. Many people do not like the rule, and it has perhaps fallen into disuse, but to ignore it, or subsume it in the Restatement's definition of the rule of undivided loyalty, is to neglect a significant aspect of the problem and the basis of the law in the major trust jurisdiction—New York. If the author felt the rule an anomaly, or a fiction, or a corruption of proper principles, one would have hoped he might have subjected it to his close analysis and severe criticism. Perhaps it was because the "rule" was originally laid down in a case involving self-dealing by a corporate officer that led the author to neglect it as dealing more with the law of corporations than trusts; but no matter what the origin, the rule has been a powerful fact to deal with in New York in cases

5. For cases and discussion, see Niles, *The Divided Loyalty Rule*, 91 TRUSTS & ESTATES 734 (1952). Many cases cited by Scott in other contexts seem to bear out this tendency. *E.g.*, where the settlor names a trustee a beneficiary and gives him discretionary powers with respect to invading principal, the courts consider that the settlor, in placing the trustee in conflicting positions, has to this extent waived the rule (§ 107.1); or where the settlor names a creditor a trustee he is deemed to have waived the rule and authorized the trustee to deal with himself. (*In re Farrell's Will*, 91 N.Y.S. 2d 89 (Surr. Ct. 1949), cited in § 170.23, n. 10).

6. 365 Pa. 82, 73 A.2d 411 (1950).

7. Niles, *op. cit. supra*, note 5.

8. For an extended discussion of this "rule" see Haggerty, *Conflicting Interests of Estate Fiduciaries and the "No Further Inquiry" Rule*, 18 FORDHAM L. REV. 1 (1949).

involving all fiduciaries,⁹ especially when supported by Judge Cardozo's rhetoric in *Wendt v. Fischer*¹⁰ and *Meinhard v. Salmon*.¹¹ Although the author, at another time,¹² recognized that the current policy of facilitating business has begun to prevail over the older policy of removal of temptation (at least in corporate officer cases), his failure to explore this tendency—especially in cases involving family corporations—has left the discussion of the trustee's duty of loyalty with principle largely divorced from policy.¹³

But one differs with Professor Scott only with trepidation. In general, it is rare that one finds anything to argue about. In the new material, the important changes in tendency are noted, and leading cases well presented. The sections on charitable trusts have been significantly expanded (from 250 to some 460 pages) so that they could make in themselves an outstanding treatise on the law of charities. Among other changes, there is an excellent discussion, much expanded, of the disposition of property by will into an inter vivos trust (§54.3); and new sections on restrictions on testamentary dispositions, including the place of the Totten trust vis-a-vis testator's creditors and surviving spouse (§§58.5, 58.6), with a perceptive analysis of the recent *Matter of Halpern*¹⁴ in New York. His criticism of this latter case bears the marks of the author's usual precision and economy: "But surely it is possible to hold that by the creation of such a trust the settlor may avoid the formalities in the making of a will, but may not accomplish a result which he could not accomplish by a will, namely to cut out the surviving spouse."

A New York lawyer will find extended consideration of all the details of New York case and statute law pertaining to trusts. At a time when we are inundated with "services" which encourage a kind of mechanical jurisprudence, every law office should have a copy of the new Scott on *Trusts* as the best way of taking a great legal mind into the firm.

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9. The rule was first laid down in *Munson v. Syracuse, G. & C. R.R.*, 103 N. Y. 58, 8 N. E. 355 (1886). This may be considered an interesting historical example of a principle from one area—trusts—being utilized in another—corporations—and, rigidly formulated, coming back to plague the original source.

10. 243 N. Y. 439, 154 N. E. 303 (1926).

11. 249 N. Y. 458, 164 N. E. 545 (1928).

12. In an article, *The Fiduciary Principle*, 37 CALIF. L. REV. 539, 555 n. 30 (1949).

13. One also regrets that Professor Scott did not relate the problem in this area to the problem of the *Auditore* case, that is, the trustee's duty to the trust to act properly toward a corporation (whose stock he holds in trust) for which he is an officer or director. This problem has been relegated for cursory treatment into § 193 under the trustee's "power with respect to shares of stock."

14. 303 N. Y. 33, 100 N. E. 2d 120 (1951).