

Law of Trusts (Book Review)

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Indeed, the Supreme Court's constitutional judgments are more than technical constructions of our organic law: they represent the shaping of a national policy.

There is abundant precedent for interpreting the Constitution in order to cope with emergencies or changed conditions or in order to effectuate new habits of life or thought. Such interpretation, however, must not be inconsistent with the plain unmistakable mandate of the Constitution. This re-examination of first principles because of changing conditions merely allows the Court to refuse to be bound by case precedents that dealt with facts or conditions which have been completely supplanted by a changing world.

It is true that of necessity judicial discretion has a substantial place in the decisions of the Supreme Court. The learned constitutional law authority, Professor Corwin, once emphasized this discretion thus, "Judicial review, from being an instrument for the application of the Constitution, tends to supplant it. In other words, the discretion of the judges tends to supplant it."⁴

Discretion, however, must exist somewhere and additional ideas must be supplied by some agency if controversies are to be determined. Judicial review, as we have it, is a component part of one method of dividing between the executive, the legislature and the judiciary the task of supplying the discretion needed. Whatever method is adopted, a body of interpretation will be developed around the Constitution. This body of interpretation and the method by which it is produced can hardly be said to supplant the Constitution, unless it is inconsistent with it. The idea of inconsistency, then, involves a judgment of the true meaning and, if the true meaning can be accurately ascertained by clear historical evidence as presented by Professor O'Neill, then it is submitted that any other meaning of necessity is inconsistent with the Constitution.

Indeed, if Professor O'Neill is correct, it would seem apparent that the Supreme Court by its present attempts to amend the Constitution in the guise of judicial construction has divorced itself from its former consistent support of constitutional principles. Our hope for the future, then, is that in time to come it may have the resilience and support to enable it to resume its proper position in our scheme of government under the Constitution.

EDWARD THOMAS FAGAN, JR.*

LAW OF TRUSTS. By Ralph A. Newman.¹ Brooklyn: The Foundation Press, Inc., 1949. Pp. XI, 452. \$4.50.

In the preface of this relatively brief work on the law of trusts the author comments upon "what appears . . . to be the inadequacy of judicial thinking in this branch of the law."² Because of the obscurity of the subject, he feels

⁴ CORWIN, *THE CONSTITUTION AND WHAT IT MEANS TODAY*, preface (10th ed. 1948).

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² P. III.

"that it offers a particular challenge to clarify judicial thinking and affords an excellent vehicle for developing in students effective legal techniques in the process of exploring the soundness of the judicial reasoning which has led so frequently to bland judicial complacency in bizarre conclusions."³ Hence, Professor Newman sets forth the twofold objectives of this book, namely, legal clarification and the development of legal techniques.

In view of the Gargantuan task which Professor Newman avowedly set forth for himself in writing this book, the reviewer read the text with more than ordinary care. Although he found much that is commendable, he cannot say that he believes Professor Newman's objectives are attained. In fact, can any one clarify in a small volume the judicial thinking on such a broad subject as Trusts? The reviewer recalls the words of Jairus Ware Perry, who wrote in the preface to the first edition of his work on Trusts, "Conscious of defects in the execution of his work, he [the author] trusts that a liberal profession will rather consider how much of a difficult task has been accomplished, than how much has been omitted or imperfectly done."

In Professor Newman's book there are twenty-one chapters, covering such titles as The Nature of Trusts, Early History, The Statute of Uses, The Creation of Trusts, The Trust Res, The Trustee, The Cestui Que Trust, The Nature of the Cestui's Interest, Permitted Trusts and Related Concepts in New York, Honorary Trusts, Charitable Trusts, Resulting Trusts, and Taxation of Trusts. There are also: a bibliography (two pages) listing approximately sixty-five works and treatises referred to in the text, a list of law review articles and law review notes (four pages) cited in the text, a table of cases (nineteen pages) cited by the author, and a fairly complete index of thirty-two pages. The book is well set up with ample margins, particularly suitable for notes or comments. Unlike treatises giving a more complete treatment of the law, it is not heavily footnoted. The print is large and readable. The publishing company is to be congratulated for its consideration of the reader in these respects.

The reviewer was impressed by the detailed exactness in the listing of the cases in the Table of Cases. It is believed, however, that instead of giving only the name of the case and the page cited in the text, the Table should have contained the complete citation of the case. This would be helpful to a reader who is primarily interested in the law of his jurisdiction. The reviewer checked at random three pages of the cases cited (eighty-eight cases) and found only two trivial mistakes. This is an indication of the care with which the book was prepared. Professor Newman and the publishing company are to be commended for such minute exactness.

Although the primary emphasis in this book is upon New York law (approximately half of the cases cited are New York cases), it offers valuable material to students in those states which have statutory trust systems modeled after that of New York. Chapter 9, the longest chapter in the book (fifty-seven pages), is devoted to Permitted Trusts and Related Concepts in New York. Professor Newman comes closest to attaining his objectives in this

³ Pp. III-IV.

chapter in his analysis of the cases and discussion of the theories involved. A careful study of the chapter is well worth the time devoted to it.

Another commendable feature of this book is the reliance placed upon recent cases. It appears that wherever possible Professor Newman has cited as authority cases decided within the last two or three years. Due regard, however, has been given to older, leading cases in the law of trusts.

Another feature of this book, of special interest to the reviewer, who has the task of emphasizing local law, was the author's frequent citation of Georgia statutory and case law. Approximately three pages of the chapter on Resulting Trusts (total of twenty-three pages) were devoted to an analysis of *Jackson v. Jackson*.⁴ The case involved an express oral agreement by the grantee (wife) to hold land in trust for her husband, who had paid the purchase price. Justice (now Senator) Walter F. George, speaking for the court, held that the trust, which arises in such a case from the facts and the nature of the transaction, is not destroyed by the express verbal, and therefore unenforceable, agreement of the wife to hold the title for the use of the husband. Professor Newman, in accordance with the views of Dean Ames and Professor Costigan (authorities rejected by the court), is of the opinion that the decision is "clearly wrong."⁵ He is furthermore critical of the Georgia court for following the "error of its ways"⁶ in later cases in which the issues involved were essentially the same.

Although this reviewer concedes that Georgia courts may on occasion be in error, he finds it difficult to agree with the author in his analysis of this particular case. It appears to him that the Georgia court in this instance contributed to the clarification of judicial thinking when it refused to accept the views expressed by counsel, that is, that a resulting trust could not arise in the circumstances. As Professor Scott has expressed it, "It is difficult to see why the presence of an oral agreement supporting the presumption of a resulting trust should prevent such a trust from arising."⁷

Professor Newman has one chapter on Taxation of Trusts (fourteen and one-half pages), in which he devotes approximately three pages to the Income Tax, three and one-half pages to the Estate Tax, and one page to the Gift Tax. The last three pages of the chapter are devoted to Marital Deduction. Since these topics are all important aspects of tax and trust law which call for careful and thorough analytical treatment, it is submitted that this chapter will not prove very helpful to the student.

The reviewer did not find Professor Newman's style altogether pleasing, since some of the passages were difficult to follow. Nor did lengthy sentence structure, as well as involved sentences, contribute to clarity of thought, which the author indicated as an objective. Illustrations of confusing sentences may be found on pages 97, 111, 122, 131-2, 133, 147, and 380-1. When

⁴ 150 Ga. 544, 104 S. E. 236 (1920).

⁵ P. 221.

⁶ P. 222.

⁷ Scott, *Resulting Trusts Arising Upon the Purchase of Land*, 40 HARV. L. REV. 669, n. 31 (1927).

the demand calls for the next edition of this work, Professor Newman should be able to erase this criticism.

Professor Newman's book will be helpful to the student who needs text material to supplement the case book. Considering the fact that in a text of less than 395 pages an effort has been made to "present a rounded picture"⁸ of trust law, the author can feel he has made a worthwhile contribution to the law of trusts.

JAMES J. LENOIR.*

CASES AND MATERIALS ON CORPORATIONS (2nd Ed.). By Louis Prashker.¹ Brooklyn: St. John's University School of Law, 1949. Pp. 930. \$10.00.

The second edition of Professor Prashker's case book consolidates the first edition, its supplement, and new material. This consolidation has brought the book up to date, and rigorous pruning has accomplished a considerable saving in bulk without vital loss.

I have not attempted to test the excellence of the book as a teaching tool by searching minutely for all my favorite cases on the subject. Suffice it to say that I have found it wholly admirable in conception and entirely successful in execution. The conception is novel in its candor, but full of the wisdom which is the reflection of Professor Prashker's long and successful teaching career.

In his introduction he frankly announces that if a case book becomes overly long and complex, students have been known to find shortcuts to knowledge, no matter how carefully it is withheld from them.

This insight needs to be propagated more widely among law teachers, too many of whom seem wedded to the principle that legal knowledge must be shielded by obscurity, like Brünhilde by a ring of fire, lest the unworthy defile her. Of course, law teaching must deal with method even more than with knowledge, but teachers of law are competing with an educational underworld of outlines, etc., and educational tools, if they are to be used, in addition to being required, must prove their worth against that competition.

In this competition the case book that limits itself to "cases" does not stand up too well. Generally, the case method, as the exclusive method of lawyer training, is no longer unquestionably considered the best; and perhaps it is now nowhere applied in its pure form. Many causes undoubtedly joined to bring this about. Among them is what Mr. Justice Jackson² referred to as "inflation" of precedents; the vast outpouring of precedents, which correspondingly reduces the unit value. Also, the field of law has become so vast that it can be covered only in small part by intensive concentration on cases. Last, but not least, is the notion stressed particularly by Jerome Frank³ that

⁸ P. IV.

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² Robert H. Jackson, Address of May 9, 1944, to the American Law Institute, 28 J. AM. JUD. SOC'Y 6.

³ FRANK, COURTS ON TRIAL (1949), *passim*.