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Restatment of the Law of Trusts (Book Review)

Edward J. O'Toole

measure of social and economic reform contemplated by the statute under consideration. I am still one of those optimists who believes that the judicial process, even under our existing fundamental law, can effectively deal with the problem presented. I still believe that our courts will not stand in the way of the inexorable march of progress and say that because of interference with an illusory "freedom of contract", and an equally fictitious power of bargaining, a state may not prohibit, as inimical to the public welfare, the employment of women in industry at starvation wages inconsistent with their reasonable worth.

B. L. S.

RESTATEMENT OF THE LAW OF TRUSTS. Two Volumes. St. Paul: American Law Institute Publishers, 1935, pp. xxxii, 1–807; pp. xxiv, 809–1496.

I

The apparently incongruous qualities of certainty and elasticity in the common law have long been the boast and frequently the bane of English and American jurists. From the governed comes the plea, and a just one it is, that the law be certain. From the jurist comes the answer that were the law to be certain in that it is unalterable, it might in the end disrupt the society it is ordained to protect.[1]

In the reconciliation of the claims of the judge and the judged, it seems inevitable that just causes be wrecked occasionally on the treacherous shoals of *stare decisis*. Courts, however, dare not be too elastic, lest they be accused of betraying their trust to administer law as it is.

When a court does become so bold as to venture on the discovery of a new certainty as distinguished from stretching the old certainty to the breaking point, awe overcomes the judicial world. But gradually, this discovery, if it be a true one, is conceded by other jurisdictions, until, finally, that which was originally an unauthorized departure soon becomes what is affectionately referred to as the weight of authority.

Although the weight of authority is not necessarily truth in its most abstract connotation, it does furnish a rule of thumb by which society may conduct itself. It is to the restatement of legal certainties that the American Law Institute has dedicated itself, not merely for the purpose of establishing certainty in the sense above mentioned, but also to avoid "the adoption in its (common law) place of rigid legislative codes."[2] This worthy object is ample justification of the Restatement. Indeed, no lengthy discussion should be required to prove how inadequate a fixed legal code would be to further the aspirations and the ideals of the people of our country.

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[1] "One of the reasons why our law needs to be restated is that judges strive at times after the certainty that is sham instead of the certainty that is genuine." CARDOZO, THE GROWTH OF THE LAW (1924) 17.

[2] Introduction, p. ix.

To what extent has the American Law Institute accomplished its purpose? The reactions to the completed projects of the American Law Institute have been far from uniform. There have been qualified approvals,[3] commendations with real reservations,[4] and substantial disapprovals with qualifications.[5] Wherefore, it ought not to be amiss at this time to state some of the more important criticisms adverse to the current publication of the Restatement of the Law. It has been urged among other things, (1) that "the position that the law should be restated as it is defies justification," [6] (2) that it is a species of potential if private codification,[7] (3) that the failure of the Restatement of the Law to include adequate citation of authority[8] is indefensible, (4) and that because of the lack of assurance "that the final conclusion represents the mature judgment of the experts working on the Restatement, our courts would not be justified in basing their decisions upon any of the rules announced in the Restatement regarding which there is serious doubt." [9]

For reasons of economy of space, only the first and third of the adverse criticisms will be considered. In regard to the first objection, it would appear that the only proper method of restating the law would be to restate it as it is. If we are striving to improve our law it becomes necessary to know in the first place what it is. If we are attempting to bring certainty in the administration of justice, it seems essential that we know what courts have held the law to be. It is small consolation to the unsuccessful litigant to tell him that true law, as distinguished from law as it is, would not have favored his adversary. Fur-

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[3] *E.g.*, Book Review, *Restatement of the Law of Contracts*, Frederick A. Whitney (1934) 8 ST. JOHN'S L. REV. 440.

[4] *E.g.*, Book Review, *Restatement of the Law of Torts*, James P. Gifford (1935) 9 ST. JOHN'S L. REV. 488.

[5] Yntema, *The Restatement of the Law of Conflict of Laws* (1936) 36 COL. L. REV. 184.

[6] *Id.* at 191.

[7] *Id.* at 192.

[8] *Id.* at 193.

[9] Lorenzen and Heilmant, *The Restatement of the Conflict of Laws* (1935) 83 U. OF PA. L. REV. 555.

In connection with the objection above set forth, it is interesting to note the following statement of Professor Scott in an article entitled *The Trustee's Duty of Loyalty* (1936) 46 HARV. L. REV. 521.

"When the question whether a trust company can properly deposit funds held by it as trustee in its banking department was first submitted to the Members of the American Law Institute, it was stated in the tentative draft that such a deposit is improper. When a revised draft was presented to the Council of the Institute a majority of the Council present favored the presentation to the Members of a draft expressing the view that such a deposit is not improper if under all the circumstances it was reasonable and prudent to make the deposit; but that such a deposit is improper if the trust company did not act for the interest of the beneficiaries in making the deposit, as where it had reason to believe that there was danger that it might fail, or where it did not properly earmark the deposit as a deposit made by it as trustee, or where it left the money on deposit for an unreasonably long time. When the matter was presented at the meeting of the Members in 1935 for its final determination, after a considerable discussion it was decided to state the rule as it was originally presented, to the effect that a trust company or bank which makes in its own banking department a general deposit of funds held by it as trustee it is authorized to do so."

thermore, it would seem that legislators might read the Restatement with considerable profit. If on reading, they find the adjudicated certainties which influence their courts to be adverse to the best interests of the people, or if they find that *stare decisis* prevents the application of elasticity by the courts in a manner sufficient to meet current demands of society, then the right and duty is theirs to reform the law by statute to satisfy the present needs. Courts under our system of separate powers must enforce the law as it is. Hence that part of any legal treatise which indicates what the law should be, as distinguished from what it is, can of necessity be of particular interest only to federal and state executives, members of legislatures, legal scholars, and other advocates of legal reform. The Restatement fulfills its function if it enables the courts and those before these legal tribunals to know more clearly and certainly what the law is.

In reference to the third adverse criticism, to wit, that the failure of the Restatement of the Law to include "adequate citation of authority is indefensible," it is submitted that such objection is untenable. Certainly no rules of conduct have had so direct and so enobling an influence on the human race as the Ten Commandments. They were promulgated *without annotation* and derived their authority from their Author and their general acceptance from their adaptability to the moral and social needs of mankind. In the field of jurisprudence, no one has questioned the ability or the learning of those who have been engaged in the Restatement.[10] None can speak with authority if they are unable to do so. The time has come when we must look to real authority to disentangle the variegated enigmas of conflicting decisions. To compel such respectable authority to cite the sources of its determination means not only a continuation of legalistic chaos but also the inevitable adoption of the rigid code.

II

In form the Restatement of the Law of Trusts is much the same as the previous publications of the American Law Institute. The "Hornbook method" has been followed. Definitions and legal generalities appear in heavy type, followed in lighter type by the comments, which either qualify or amplify the main definition or generality. Frequently the generalities and comments are supplemented further by hypothetical cases intended to add clarity to that which has preceded. Occasional "caveats" indicate instances where the reporters

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[10] The American Law Institute's Committee on Trusts consisted of Austin W. Scott, Harvard University, Reporter; Ralph J. Baker, Harrisburg, Pa.; George G. Bogert, University of Chicago; Elliott E. Cheatham, Columbia University; *George P. Costigan, Jr., University of California School of Jurisprudence; Robert G. Dodge, Boston, Mass.; Mansfield Ferry, New York City; Everett Fraser, University of Minnesota; Erwin N. Griswold, Harvard University; Daniel N. Kirby, St. Louis, Mo.; Julian W. Mack, New York City; W. Foster Reeve, III, University of Pennsylvania; Warren A. Leavey, Harvard University; Edward S. Thurston, Harvard University; Harrison Tweed, New York City. [* Died November 18, 1934.]

believe the law to be unsettled[11] and here and there are found pertinent historical notes which are efficient aids in comprehension.[12]

To anyone who is generally in accord with the purpose and scope of the Restatement, the substance of the publication on Trusts will call for little adverse comment. What disappointment there is will be caused by the omissions, total or partial, in the two volumes. In the first place, the Introduction announces "that the rules applicable to constructive trusts or attempts to create express trusts should not be dealt with in the Restatement of Trusts, but should be dealt with in a separate Restatement of Restitution and Unjust Enrichment * * *."[13] In such an elimination and realignment it is possible to discern the influence of the exponents of the functional approach. While it is true that the constructive trust is essentially remedial in its origin and application, it seems in final result to be more at home among the express trusts than it would be among its new associates. To consider trusts without reference to constructive trusts seems like an unnecessary if not cruel separation of the child from its parent. As a matter of fact, the Restatement necessarily refers time and time again to the constructive trust in its treatment of the various topics. The striking unorthodoxy of such a separation puts upon the reporters the burden of justifying this re-classification.

Whereas the Restatement may be invaluable to the law student, who may use it as a model in deduction or to "gain information as to what the law is on matters not covered in case discussion,"[14] its chief advantage to bench and bar lies in its conclusions as to mooted questions in various jurisdictions. Only by a settlement of these questions will the Restatement exercise a definite influence on the judicial decision of the future.

What has been done in respect to some of the unsettled yet basic problems in trusts? Whether the nature of the beneficiary's right is one *in rem* against the trust *res,* or one *in personam* against the trustee is a fundamental though mooted question.[15] And yet in the Restatement's section on the Nature of the Beneficiary's Interest[16] no reference is made to this problem. It seems that a real opportunity to clarify and influence has been passed.

Another extremely complicated, if not actually mooted question in Trusts is found in the law in regard to deposits of commercial paper for collection, especially when the bank of deposit forwards the paper to some sub-agent bank for collection and remittance. In the section on Trust and Debt[17] the discussion is primarily on the evolvement of a constructive trust, when a bank fraudulently induces one to make a deposit. It would seem that the whole question of commercial paper from the viewpoint of debt and trust should have been

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[11] *E.g.,* §§ 156, 222, 265, 268, 257.

[12] See, in particular, the historical notes in Chap. 11, on Charitable Trusts.

[13] Introduction, p. xi.

[14] William Draper Lewis, *The Value and Use of American Law Institute Restatements in the Teaching of Law* (1932) 7 AM. L. SCH. REV. 735.

[15] See article by Roscoe Pound (1913) 26 HARV. L. REV. 462 and article by Justice Harlan F. Stone (1917) 17 COL. L. REV. 467.

[16] § 130.

[17] § 12, Comment h.

treated here and that the constructive trust discussion should have been banned by the stated scope of the work.[18]

Among other fundamentals on which no position seems to have been taken are the testamentary or non-testamentary character of tentative trusts,[19] the numerous problems in respect to accumulations as they affect express trusts,[20] and the rule in respect to charitable purposes of a charitable trust in so far as a trust for "charity" would be sufficiently definite.[21] Perhaps it is the intention of the editors that all of these matters be fully treated in the various state annotations. The annotations, however, are not intended to represent the high authority of the reporters of the major work. It is to the latter rather than to the annotators that we look for the settlement of our queries.

In writing about the economic interpretation of law and its various ramifications, Roscoe Pound remarked that "we cannot tell such complicated stories in such simple fashion."[22] In like manner it would seem that what the Restatement gains in simplicity, it must lose in thoroughness. The gain, however, seems far more important than the loss. Legal fundamentals have sunk by force of their weight to the bottom of the pile. Much that lies on top is debris in the guise of tinsel. It is high time to consign the tinsel to the flames, lest the fundamentals become as useless as buried treasure.

EDWARD J. O'TOOLE.*

THE POLITICAL CLUBS OF NEW YORK CITY. By Roy V. Peel. New York: G. P. Putnam's Sons, 1935, pp. xii, 360.

Many professional Republican and Democratic political workers will be surprised at the frank and earnest discussion by Roy V. Peel in "The Political Clubs of New York City." The facts publicly discussed in the pages of this book include many which have been deemed, in a sense, to be the private property of the members and political workers within the political clubs.

The information contained in this volume, with few exceptions, gives a fairly accurate picture of the day-to-day life and activity of the local district political clubs throughout the city. On the whole, the author approaches the subject of local political organizations with an open mind, with an air of frank disclosure, and with a very obvious and refreshing absence of partisanship. The clubs of the major and minor political parties are all treated objectively, without any attempt to paint a better picture for one party than the other. The author presents the facts as he has found them, in a straightforward, concise and detached manner.

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[18] See note 13.

[19] § 58. It is extremely unfortunate that this problem is not discussed.

[20] In § 62 the matter is treated in a very general manner.

[21] § 368 contains an excellent discussion of charitable purposes and is highly recommended.

[22] ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY (1930) 103.

* Professor of Law, St. John's University School of Law.