

1937

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Edmond B. Butler

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Recommended Citation

Edmond B. Butler, *Some Reflections on the Restatement of the Law of Trusts*, 6 Fordham L. Rev. 228 (1937).

Available at: <https://ir.lawnet.fordham.edu/flr/vol6/iss2/4>

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Some Reflections on the Restatement of the Law of Trusts

Cover Page Footnote

Professor of Law, Fordham University, School of Law

SOME REFLECTIONS ON THE RESTATEMENT OF THE LAW OF TRUSTS

EDMOND B. BUTLER†

IT IS now more than a year since the Restatement of the Law of Trusts in its final form has been published. It followed the publication of Professor Bogert's seven volume work on Trusts and Trustees.¹ It is not within the scope of this article to review or criticize the latter work.² It is intended in this article to examine the Restatement of the Law of Trusts to find out what need it fulfills theoretically, and whether, practically, the desired result has been accomplished.

Perhaps in no jurisdiction in the United States has the trust been more used than within the State of New York, particularly within the past decade. Much the same campaign of advertising effective in popularizing a brand of cigarettes has been used in popularizing the trust idea here, so that residents of this community have become "trust conscious." Of necessity a very great burden has been cast upon lawyers with little actual experience in trust work. Their clients have more and more sought the creation of trusts. The problem presented by the financial situation of a client, varying in every instance, usually must be met without a long period available for research. Death-bed wills are not uncommon and it is the average lawyer and not the trust specialist who draws most of the wills containing trusts. The profession in general needed some authoritative work written in a style comprehensible by even the average lawyer, which would guide him quickly and surely in his task. We looked forward to the Restatement of the Law of Trusts as a document which might properly fill this long felt want. There were, of course, several works on trusts available but either they were not complete or they were written in such a fashion that it was difficult to find a quick solution of the particular question. It is from that angle, the need of the average practicing lawyer, that the Restatement of the Law of Trusts is herein considered.

That it is intelligible, clearly and concisely written, everyone must concede. Its physical make-up follows the historic development of the law of Trusts presented by the late Professor Ames and modified and extended by Professor Scott in the first and second editions of his casebook on Trusts. It is natural to find this development not only because of the fact that the reporter was Professor Austin W. Scott of Harvard Law School, but also because the pattern first formed by the

† Professor of Law, Fordham University, School of Law.

1. 1935.

2. A very interesting commentary on and comparison of the RESTATEMENT OF THE LAW OF TRUSTS and Professor Bogert's edition of TRUSTS AND TRUSTEES has been written by Professor Vanneman, *Trusts—Restated and Rewritten* (1935) 34 MICH. L. REV. 1109.

late Professor Ames was very logical and one naturally followed. If one be captious, he might criticise the development of the topics under "The Creation of a Trust"³ because of certain inclusions which *prima facie* do not seem to belong there. Such criticism, however, would exhibit ignorance of the origin of trusts. It is impossible to discuss the creation of a trust without bringing in such questions as "Consideration"⁴ and "The Effect of the Statute of Uses."⁵

The authors have seen fit to relegate charitable trusts to a sort of excrescence upon the express trust in a somewhat analogous category to resulting trusts.⁶ This may be a convenient method of approach but a student is likely to draw an erroneous but natural inference that charitable trusts are not express trusts and are not subject to the rules applicable to express trusts. True, the reader is advised parenthetically that "many of the rules applicable to private trusts are also applied to charitable trusts."⁷ But experience teaches that frequently a visual-minded student will not give heed to such a warning.

We may dismiss this phase of the Restatement of the Law of Trusts by saying that the physical make-up of the Restatement is all that could be expected and the book contains a comprehensive index.

The Content of the Restatement

In the opening of the Restatement the scope of the work is set forth.⁸ Business trusts, security trusts (mortgages), and constructive trusts are excluded. True, it is stated, that those constructive trusts that "arise out of express trusts or attempts to create express trusts"⁹ are included. It seems unfortunate that such an important topic as constructive trusts should be eliminated and relegated to the Restatement of Restitution and Unjust Enrichment. While a constructive trust is not a trust but a legal fiction or device used by a Court of Equity to work justice, where it finds the title to property in one person which rightfully belongs to another, still, having been declared by a court of competent jurisdiction, it becomes a trust and if some constructive trusts are to be included then all should be included. Furthermore, an unfortunate grouping must

3. C. 2.

4. C. 2, topic 4.

5. C. 2, topic 15.

6. See § 1, comment *c*. Charitable trusts are discussed in Chapter 11, §§ 348-403, immediately following Chapter 10 dealing with the termination of the trust and concluding express trusts as defined in § 2. The next and last chapter deals with resulting trusts.

7. § 1, comment *c*. This *caveat* is repeated in Chapter 11, Introductory Note, dealing with charitable trusts.

8. § 1, comments *a* - *e*.

9. § 1, comment *e*.

necessarily arise if constructive trusts are to be considered under the topic of unjust enrichment. An action to recover based upon the theory of unjust enrichment—an action in quasi-contracts—is an action at law and not every case of unjust enrichment gives rise to a constructive trust. The identity of the trust *res* and the title to that property are not involved in the ordinary case of unjust enrichment but they are involved in every case of constructive trust.

While the Restatement in its limitation under the topic "Scope of Restatement"¹⁰ does not refer to the so-called "Rule against Perpetuities," still the text points out that no effort is made to restate the rule as it affects trusts and to this extent it would appear that the Restatement is deficient.

The creation of a trust by the average lawyer requires the consideration of the effect of the rule against the unlawful suspension of the power of alienation, the rule against the remoteness of vesting, and the statutes governing accumulations. One could have mastered the entire Restatement of the Law of Trusts and not be able to create a valid trust. In every trust the question of its duration and of the vesting of interest arises whether it be the creation of a trust in New York or in a jurisdiction applying the common law rule or a modification of it. The draftsman must know the law applicable thereto. It is not necessary that the Restatement contain a treatise on future interests.¹¹

At the very outset of the work there is a regrettable departure from the avowed purpose to restate the law. The definition of an express trust reads as follows:

"A trust . . . is a fiduciary relationship with respect to property, subjecting the person by whom the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of a manifestation of an intention to create it."¹²

When we add to this the comment explaining what is meant by fiduciary relationship, we have a definition which does not define:

"Fiduciary relationships include not only the relation of trustee and beneficiary, but also, among others, those of guardian and ward, agent and principal, attorney and client. Each member of a partnership is in fiduciary relationship to the other partners. The scope of the transactions affected by the relation and the extent of the duties imposed are not identical in all fiduciary relations."¹³

The effect of this definition is to remove the essential distinguishing characteristics of a trust, namely, the holding of *title* to specific property

10. § 1.

11. This is contained in 2 RESTATEMENT, PROPERTY (1936) Division III.

12. § 2.

13. § 2, comment *b*.

by the trustee. The definition of the Restatement would permit the inclusion of the relationship of attorney and client. For example, a client has written a book. He does not wish it known that he is the author. He turns the manuscript over to his attorney and asks him to negotiate for the sale of it to a publisher. The attorney has not title either to the manuscript or to the book but he "owes a fiduciary relationship with respect to property." He is subjected to equitable duties to deal with the property for the benefit of his client and this relationship arises as the result of "a manifestation of an intention to create it." Yet there is nothing clearer in the law or in the fact than that the attorney in such a case is not a trustee because he has not title.

In 1921 Professor Bogert edited an extremely valuable, though compact, textbook on the Law of Trusts. The first sentence in this book contains his then definition of a trust:

"A trust is a relationship in which one person is the holder of the title to property, subject to an equitable obligation to keep or use the property for the benefit of another."¹⁴

Since writing that book Professor Bogert became a member of the American Law Institute's Committee on Trusts. In 1935 Professor Bogert published his latest work, "Trusts and Trustees" in seven volumes. His definition of a trust now reads:

"A trust may be defined as a fiduciary relationship in which one person holds a property interest, subject to an equitable obligation to keep or use that interest for the benefit of another."¹⁵

One might wonder what has happened to the "title" which formed part of his original definition. The effect of his collaboration with the members of the committee on the Restatement of the Law of Trusts is apparent. One of the difficulties that has always existed in acquiring a clear idea of trusts is the failure of authors to express themselves, on many of the difficult problems, in clear and succinct terms.

In order to avoid inaccuracies the Restatement of the Law of Trusts has fallen into a far worse error in its definition of a trust. Apparently the explanation of the change appears in Bogert's "Trusts and Trustees."¹⁶ The fear was that the statement, "title to property," would be inaccurate because a trust may be created in an interest other than an outright interest. Professor Bogert suggests that the trustee might be "trustee of an estate for years or of the right to use an automobile for six months."¹⁷ With this we agree but unquestionably the trustee holds the title to that interest, whatever it is.

14. BOGERT, HANDBOOK OF THE LAW OF TRUSTS (1921) § 1.

15. 1 BOGERT, TRUSTS AND TRUSTEES (1935) § 1.

16. *Id.* § 11.

17. *Ibid.*

The Restatement indicates that "title" means something other than the ownership of a right. "The phrase 'title to a thing' denotes an aggregate of interests in the thing of such an extent that if the person who has the title is not under a duty to deal with the interests for the benefit of another person, he is the owner of the thing."¹⁸ And again:

"Thus the term 'title,' unlike 'ownership,' is a colorless word; to say without more that a person has title to certain property does not indicate whether he holds such property for his own benefit or as a trustee."¹⁹

To make clear that a person need not have the sum total of all the rights in a piece of property, whether real or personal, in order to be a trustee, the Restatement goes far afield and describes situations in the definition which cannot be trusts. Even today a definition should still "define"—limit the topic—but if we define a trust in such terms that it will include a relationship of attorney and client, then the definition has failed to define. It seems incredible that anyone could have read the definition which Professor Bogert gave in 1921 and not understood what he meant by "title."

If proof be necessary that title in the trustee is the essential distinguishing characteristic of a trust, we find it in the Restatement itself. Beginning with Topic 2,²⁰ various legal relationships are distinguished from the trust relationship. In Section 5 a trust is distinguished from a bailment.²¹ In Comment *b* thereof the following appears:

"A bailee of a chattel has possession of but does not have *title* to the chattel. . . . A trustee of a chattel has *title* to the chattel."²²

In Comment *d*:

"A bailee, having merely possession of and not *title* to the chattel normally has no power to transfer the chattel free of the bailor's interest. On the other hand, a trustee of a chattel has power to transfer the chattel free of the trust to a bona fide purchaser, since the trustee has *title* to the chattel although holding it subject to the equity of the beneficiary, and can transfer it free of equities."

In Section 7 a guardianship is distinguished from a trust. There we find the following:

"A trustee has *title* to the trust property; a guardian of property does not have *title* to the property, but has only certain powers and duties to deal

18. § 2, comment *d*.

19. *Ibid*.

20. C. 1, p. 19.

21. *Ibid*.

22. In this and the four following excerpts, the writer has italicized the word "title."

therewith for the benefit of the ward, the ward having *title* to the property."²³

In Section 8 an agency is distinguished from a trust. In Comment *a* we find the following:

"A trustee has *title* to the trust property; an agent as such does not have *title* to the property of his principal, although he may have powers with respect to it."

And again:

If an agent is entrusted with the *title* to property for his principal he is a trustee of that property."²⁴

Certainly the New York Court of Appeals has recognized this distinction in the case of *Farmers Loan & Trust Co. v. Winthrop*.²⁵ In pointing out the reasons why a trust was not created, the court said:

"The donee never got title and so could not hold it for another."²⁶

Any criticism of the Restatement would be incomplete which did not comment upon the clarity of the language used. Many illustrations could be given of it but one is sufficient.²⁷

23. Comment *a*.

24. § 8, comment *f*.

25. 238 N. Y. 477, 144 N. E. 686 (1924).

26. *Id.* at 487, 144 N. E. at 688.

27. In Topic 5, Investment of Trust Funds, Section 227, not only is the rule stated with great clarity but the comments are exceptionally well written. For example, in comment *e* we find the following:

"*Requirement of caution.* In making investments not only is the trustee under a duty to use due care and skill, but he must use the caution of a prudent man. In the absence of provisions in the terms of the trust or statutory provisions, the investments which a trustee can properly make are those which a prudent man would make in investing his property outside of ordinary business risks and with a view to the safety of the principal and to the securing of an income reasonable in amount and payable with regularity. It should be the policy of a trustee so to invest the trust property as to preserve its value, while making it reasonably productive of income, rather than so to invest it as to jeopardize its preservation in the hope of increasing its value or increasing the income.

"In making investments, however, a loss is always possible, since in any investment there is always some risk. The question of the amount of risk, however, is a question of degree. No man of intelligence would make a disposition of property where in view of the price the risk of loss is out of proportion to the opportunity for gain. Where, however, the risk is not out of proportion, a man of intelligence may make a disposition which is speculative in character with a view to increasing his property instead of merely preserving it. Such a disposition is not a proper trust investment, because it is not a disposition which makes the preservation of the fund a primary consideration.

"It is not ordinarily the duty of a trustee to invest only in the very safest and most conservative securities available. Thus, assuming that United States government bonds are the safest and most conservative securities available but that the income yield

Occasionally there are errors of omission but they are so negligible that they do not take away from the general excellence of the Restatement. For example, referring to the types of investments which ordinarily may be made by a trustee, a statement is made that he may invest "in first mortgages on land."²⁸ Of course, if the land be unproductive it would hardly be a prudent investment considering the fact that the trustee must look to the productivity of the investment as his duty to the life beneficiary, and he should therefore look not only to the financial security afforded by the bond of the mortgagor but also to the condition which will exist in the event of default upon the bond and the consequent foreclosure.

The only possible criticism of the style of the Restatement is the habitual resorting to previous sections to limit the rule being restated. For example, in Chapter 10, Section 330, Revocation of Trust by Settlor, dealing with the termination and modification of the trust, the rule is stated thus:

"(1) The settlor has power to revoke a trust if and to the extent that by the terms of the trust he reserves such a power.

(2) Except as stated in §§ 332 and 333, the settlor cannot revoke the trust if, by the terms of the trust he did not reserve a power of revocation."

Or again, in Chapter 5, Section 123, where we find the following:

"Where the owner of property transfers it upon an intended trust for indefinite or general purposes, not limited to charitable purposes, or declares himself trustee for such purposes, and there is no definite or definitely ascertainable beneficiary designated, no trust is created except as stated in § 398 (2-4)."

While appreciating the necessity for accuracy and the desire not to repeat rules already stated, this form detracts somewhat from the clarity and smoothness of the style of the Restatement. Again, in certain places in the Restatement, while the correct principle is eventually set forth, a general statement is sometimes made which on first reading would appear to be incorrect. One example of this will suffice. In Chapter 11, Section 354, under the rule, "A Charitable Trust Can Be Created Without Notice To or Acceptance by the Trustee," the comment reads as follows:

thereon is lower than other securities, it is not necessarily the duty of the trustee to invest the whole trust property, or even any part of it, in such bonds, even when no question of favoring one beneficiary over another is involved. The reason for this is that by the use of care, skill and caution, an investment can ordinarily be made which will yield a higher income and as to which there is no reason to anticipate a loss of principal."

28. § 227, comment *f*.

a. Disclaimer by Trustee. When a charitable trust is created by a transfer inter vivos or by a will to a person as trustee, the trustee may disclaim if he has not by words or conduct manifested his consent to act as trustee. The effect of such disclaimer, however, although it relieves the trustee of liability, does not destroy the trust (compare as to private trusts, § 35)."

The natural reaction when reading this section is to recall the case of *In re President and Fellows of Yale College*,²⁹ where a trust was held to be invalid because the sovereign State of Connecticut, designated as trustee, disclaimed, the court holding that the particular trustee designated was essential to the settlor's scheme, and since the State of Connecticut disclaimed, the trust failed. Yet there is, in another part of the section dealing with Charitable Trusts, a limitation of this first general principle, and categories are set up, one of which would include the case of *In re President and Fellows of Yale College*.

In Section 397 it is provided:

"(1) Except as stated in Subsection (2), a disposition for charitable purposes will not fail because of the failure of the trustee to act or for want of a trustee.

(2) If the settlor manifests an intention that the intended charitable trust shall not arise or shall not continue unless the person named by him acts as trustee, or if the purposes of the trust cannot be carried out unless the person named by him acts as trustee, the intended charitable trust fails unless the person named by him as trustee acts as trustee."

Under this rule it is possible to bring in trusts where the sovereign is designated as trustee and refuses to act. There are other instances of this confusion of language throughout the Restatement but they are not numerous and do not detract from the general excellency of the work.

We come now to a consideration of an appraisal of the value of the Restatement of the Law of Trusts. That it is clearly and succinctly written must be conceded. Will it fill the need of the practicing lawyer? A lawyer practices in a particular locality and the law of that community is essential for his needs. The Restatement of the Law of Trusts is not written to pronounce the law of any particular locality. It states its principles in general terms. It states a rule of law. It purports to restate the common law. It needs no citation to establish the fact that jurisdictions differ vastly on their interpretation of the common law. Many principles are stated in the Restatement which will not be subscribed to by the courts of this state. All that it can afford to the practicing lawyer is a general rule of law which may or may not apply in his particular jurisdiction. It gives him a thesis to prove and in the ordinary case, the court before which he practices will rely on the

29. 67 Conn. 237, 34 Atl. 1036 (1896).

decided cases of last resort in that jurisdiction. The authorities upon which the committee relied are not recited. While it is true that the Restatement is entitled to great respect, more than that is needed. Professor Vanneman has stated the position of authority of the authors of the Restatement very well. "Behind the trust restatement is a galaxy of great names. Names carrying greater weight in this field could not have been chosen."³⁰ But rarely will a court on an ordinary question of law give consideration to authorities apart from the decided cases in that jurisdiction. One might approach a Surrogate or a Judge sitting at Special Term or even an Appellate Division of the Surpeme Court in this state, and on a question of law submit as his authority the opinion of every author of note in the country. All his adversary needs to win, is one case in the Court of Appeals, or even in the Appellate Division, to the contrary. It would appear that the field open for the use of the Restatement other than by students, to which reference shall be made later, is either one wherein there are no decided cases, or in which there is some conflict in the decisions, or which is before the court of last resort in an attempt to induce that court to reverse itself. Certainly, in the first group of cases a work like the Restatement of the Law of Trusts is invaluable to the court. Questions of first instance naturally present a difficult problem to any court and so complex a branch of the law as Trusts, which has a very real place in the life of the community, is constantly presenting questions of first instance. Some of the leading jurists of this state are constantly presented with problems affecting investment of trust funds and the administration of trusts. Many of these questions have hardly even been thought of by judges in the past and here sharp conflict arises. For example, in the Surrogate's Court in New York County, the problem of whether or not a trustee may pay to the life beneficiary any part of the surplus earnings of real property taken by the trustee in foreclosure, was decided differently by the two surrogates at almost the same time.³¹ Here, unquestionably, the authority of the Restatement would be very beneficial to the lawyer presenting the case and to the court in deciding it. This case certainly presents a problem where on appeal both counsel and the appellate court should be benefited by the use of the Restatement. Finally, many principles of law have become embedded in our law which now seem obsolete. They are based upon erroneous premises.

The only difficulty is that in many questions where the law is not settled, the authors of the Restatement have resorted to what they are

30. Vanneman, *supra* note 1, at 1118.

31. *In re Otis' Estate*, 158 Misc. 808, 287 N. Y. Supp. 758 (1936) (Foley, S.); *In re Crimmins' Estate*, 159 Misc. 499, 288 N. Y. Supp. 552 (1936) (Delehanty, S.).

pleased to call "*caveats*." Perhaps in no field of the law of Trusts has there been more litigation than over the liability of a trustee for losses during the past six years, and yet we find in such questions as these a failure upon the part of the Restatement to take a definite position. In two places we find the following:

"*Caveat*: Nothing in the rule stated in this Section is intended to express an opinion whether there may or may not be circumstances under which a trustee is held to a standard of skill higher than the ordinary standard, where though he does not possess a higher degree of skill, he has procured his appointment by representing that he has such skill, either by holding himself out generally as possessing a higher degree of skill than he has or by a representation made to the settlor in order to secure his appointment as trustee."³²

If we look at Section 222, Comment *d*, dealing with exculpatory provisions contained in trust instruments, where the contention is that it was inserted as the result of an abuse by the trustee of a fiduciary or confidential relationship existing between the trustee and the settlor at the time of the creation of the trust, we find the following *caveat*:

"The authorities do not justify any statement on the question to what extent a provision relieving the trustee of liability is ineffective in the case of a corporate trustee where the trust instrument is drawn by an attorney regularly retained by the trustee or an attorney recommended by the trustee."

Certainly, even though there be no authority on the subject, the Restatement would have fulfilled its purpose to a far greater degree if it had stated the position of these authorities on a topic such as this.

Again in Section 213, Comment *f*, which deals with the general subject of balancing losses against gains, the Restatement refuses to take a position on two important questions.

Another example of this deficiency will be found in Section 157 which deals with the right of creditors to reach the interest of a beneficiary of a spendthrift trust.

And again, in Section 265, which deals with the liability of a trustee to third persons by reason of the fact that he holds the title to the trust property, the Restatement refuses

" . . . to express any opinion on the question whether the trustee is personally liable as holder of the title to the trust property where the trust estate is insufficient to indemnify him, and where the trustee was in no way at fault in incurring the liability and was not responsible for the insufficiency of the estate to indemnify him."

Summing up these *caveats* it would appear that where there is no authority on the subject, the Restatement has avoided expressing any

32. § 174, comment *a*; also § 227, comment *c*.

opinion and therefore in many of the questions of first instance which come before the court, the work falls short of what one would expect of it.

In an accounting action in the Supreme Court in New York County, one of the questions dealt with the validity of a clause in the trust instrument, whereby the settlor of a living trust permitted the corporate trustee to purchase securities from its corporate affiliate. Many of the questions, and there were numerous ones involved, which were presented by the parties, were questions which had not been authoritatively decided here or elsewhere. The Restatement of the Law of Trusts was used in those instances. It presented clearly the principles of law which governed the decision of most of the questions but these were principles which were amply supported by decisions of the Court of Appeals of this state, but on this most important question of the validity of this clause which had been inserted in the trust agreement, revised by the attorneys for the settlor, the Restatement was silent.

Strange as it may seem, in New York the question of whether a corporation may be the beneficiary of a trust has not arisen squarely except in one case. In Section 116 of the Restatement, Comment *c*, it is stated:

"A corporation, municipal or private, may be the beneficiary of a trust of property if it has capacity to take and hold the legal title to such property."

This, of course, refers to a private trust. In *Matter of De Forest*³³ the court held that the corporation in that case could not be the beneficiary of a private trust. The learned Surrogate in that case said:

"A search of the reported cases in this State fails to reveal, so far as ascertainable, any decision supporting the validity of a trust for the benefit of a strictly business corporation. Certain text-writers appear to indicate that without express statutory authority to create such a trust, or express statutory capacity on the part of the corporation to take as a beneficiary, such a trust would be void. Other text-writers state that a corporation may be a beneficiary but either furnish no authorities to sustain their view or else cite cases involving charitable corporations. (Chaplin Express Trusts & Powers, § 363, p. 249; Perry Trusts & Trustees [7th ed.], vol. I, §§ 60-64; Lewin Trusts [13th ed.], p. 38; Page Wills [2d ed.], § 1051 and §§ 220, 221; Thompson Construction of Wills, § 565.)

"The Real Property Law, and particularly Section 96, seems to indicate that both the measuring lives of a trust (*Matter of Howells*, 145 Misc. 557) and the beneficiaries must be human beings. It would seem, therefore, that under the decisions and statutes of the State, a business corporation may not be the beneficiary of a trust even where the trust period does not exceed the statutory period of limitation."³⁴

33. 147 Misc. 82, 263 N. Y. Supp. 135 (Surr. Ct. 1933).

34. *Id.* at 86, 263 N. Y. Supp. at 139.

The decision of this question in *Matter of De Forest* was a very vital one—counsel experienced and the surrogate an acknowledged authority—and yet no decided case was cited to substantiate the contrasted principle contained in Section 116 of the Restatement. Of course, the court turned to the statutory limitations in this jurisdiction, but these statutory limitations do not differ from the common law rule which would require the measuring lives to be lives in being.

To give another illustration of the fact that the Restatement is in conflict with the law in particular jurisdictions, we may look at Section 321 which deals with the liability of third persons and in particular the liability of an obligor making payment to a trustee, where there is participation in the diversion through knowledge. Comment *d* is as follows:

“Payment with notice of breach of trust. If a chose in action is held in trust and the obligor pays the trustee with notice that the trustee is committing a breach of trust in receiving the payment or that he intends to misapply the money paid, the obligor is liable to the beneficiary therefor.”

In New York, the committee of an incompetent received twenty-six monthly checks from the United States Veterans' Administration payable to his order as committee and a few to his order as guardian. These were deposited in his own account in his bank. They showed on their face that they were payments to him for the benefit of the incompetent for war insurance; he likewise received twenty-one similar monthly checks from the Veterans' Administration for disability compensation and these checks also were deposited, for the most part, in his individual account. The bank allowed him to withdraw this money by his personal check and he misappropriated it. When he was appointed committee he was directed to deposit the funds of the incompetent in a different bank which was designated as depository. Certainly, the bank knew that they were “trust” moneys and it would also appear that they were placed upon notice by reason of the withdrawal of the funds on his individual check, and the fact that he deposited the money in a bank other than the bank of deposit in accordance with the provision of the order. The court said “a fiduciary may legally deposit trust funds in a bank to his individual account and credit”³⁵ and held the bank of deposit not liable, relying upon its own decision of *Bischoff v. Yorkville Bank*.³⁶ Yet, for a long period of time in New York County it was the uniform custom in the order of appointment of a committee, to designate a depository. The Court of Appeals held that the failure to deposit the

35. *Clarke v. Public Nat. Bank & Trust Co.*, 259 N. Y. 285, 289, 181 N. E. 574, 575 (1932).

36. 218 N. Y. 106, 112 N. E. 759 (1916).

money in the bank of deposit was not a conversion, pointing out that it had previously held that the mandatory provisions of the Surrogate's Court Act with reference to deposits by executors, administrators, testamentary trustees and guardians did not make a bank liable for accepting moneys deposited by such fiduciary in his individual account.³⁷

These illustrations do not point to any carelessness on the part of the authors of the Restatement. It merely indicates that the practicing attorney in any locality cannot accept the Restatement of the Law of Trusts as gospel. As I previously stated, all it affords him is a thesis stated with remarkable clarity and precision which he must still prove.

Before closing I feel the obligation to issue a word of warning to students in the use of the Restatement of the Law of Trusts. The temptation to use it in the same manner as a translation was used in the study of Latin and Greek must necessarily be very great. If used in this fashion it will be a serious detriment to the study of the law. The student thus using it will perhaps shine with great brilliance in class but he will acquire little or no benefit from his course. The student should complete his own examination of the law and participate in the classroom discussions without the assistance of the Restatement. If he does this and then uses the Restatement for review purposes, his reading of it will be beneficial. If he uses it in the manner in which a translation was used in connection with the study of Latin and Greek, his knowledge on the subject of Trusts will have the same longevity as his knowledge of Latin and Greek.

37. *Manufacturers Trust Co. v. United States Mortgage & Trust Co.*, 244 N. Y. 550, 155 N. E. 893 (1926).

FORDHAM LAW REVIEW

Published in January, May and November

VOLUME VI

MAY, 1937

NUMBER 2

Subscription price, \$2.00 a year

Single issue, 75 cents

Edited by the Students of the Fordham Law School

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PAUL J. SHINE
THEODORE VELSOR

WALTER B. KENNEDY
Faculty Advisor

Editorial and General Offices, Woolworth Building, New York

CONTRIBUTORS TO THIS ISSUE

IGNATIUS M. WILKINSON, A.B., 1908, College of St. Francis Xavier, New York; LL.B., 1911, Fordham University, School of Law; A.M., 1913, LL.D., 1924, Fordham University. Lecturer in Law, 1912-1916, Associate Professor of Law, 1916-1919, Professor of Law, 1919 to date, Fordham University, School of Law. Dean, 1923 to date, Fordham University, School of Law.

FRANK I SCHECHTER, A.B., 1912, Columbia University; A.M., LL.B., 1914, Columbia University; J.D., 1925, Columbia University. Author of *THE HISTORICAL FOUNDATIONS OF TRADE-MARK LAW* (Columbia Legal Studies, Vol. I, 1925); *The Early History of the Tradition of the Constitution* (1915) 9 AMER. POL. SCI. REV. 707; *Popular Law and Common Law in Medieval England* (1928) 28 COL. L. REV. 269, and other articles in law reviews.

PHILIP MARCUS, A.B., 1929, Union College; LL.B., 1932, Columbia University. Research Assistant for the New York Law Revision Commission and for the revised edition of WILLISTON, *CONTRACTS*.

EDMOND B. BUTLER, A.B., 1916, A.M., 1917, LL.B., 1920, Fordham University. Professor of Law, Fordham University, School of Law. Author of *CASES ON TRUSTS* (1930).