RECENT DEVELOPMENTS IN NEBRASKA
TRUST LAW

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I. INTRODUCTION

The publication in 1935 of the Restatement of the Law of Trusts by the American Law Institute was followed, in 1942, by the publication of the Nebraska Annotations to the Restatement of the Law of Trusts. The Nebraska Annotations were prepared under the supervision of the late Dean Henry H. Foster of the University of Nebraska College of Law. Contemporaneous with the publication of the Nebraska Annotations Dean Foster authored a law review article in which he discussed the procedure employed in writing the Nebraska Annotations, and in an “Appendix” to his article detailed the areas in which Nebraska trust law was in “real or apparent” conflict with Restatement positions. This scholarly article provided an excellent summary of the highlights of Dean Foster’s research of Nebraska trust law and was a useful tool for those researching in that area.

In 1959 the American Law Institute published the Restatement (Second) of Trusts, a revision of its 1935 work. Some ten years after this date the Nebraska State Bar Foundation decided to sponsor publication of a revised Nebraska Annotations to the law of trusts. The result today is the publication by the Bar Foundation of the Nebraska Annotations to the Restatement (Second) of Trusts, prepared by the author of this article. This article will serve to basically update the Foster law review article, in that it will attempt to highlight significant Nebraska trust law decisions and the extent to which these decisions conform to Restatement (Second) thinking. By way of further explanation the following additional comments are offered:

(1) No attempt will be made in this article to point out all of the differences in the 1935 Restatement and the Restatement (Second).

(2) No attempt will be made to repeat materials covered in the Foster article, save for those instances in which there has been a change in Nebraska law since 1942.

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1. Although the American Law Institute cooperated in the publication of the Nebraska Annotations, the Annotations were not a product of the American Law Institute.


3. The new Annotations are being published in two volumes. Volume II, covering Restatement §§ 261-460, was published in September of 1971. Volume I, covering Restatement §§ 1-260, is in final phases of publication.
It should be explicitly recognized that the Restatement (Second), as was true with the 1935 edition, does not purport to cover all types of constructive trust cases. Constructive trusts are covered only "so far as they may arise as a result of the creation of an express trust or of an attempt to create an express trust." The coverage of Nebraska constructive trust cases will also be so limited. In this connection it should be noted that the principal problems encountered here center around the Statute of Frauds problem — sections 44 and 45 of the Restatement.

II. PERTINENT SECTIONS

A. DEFINITIONS AND DISTINCTIONS

1. Section 6 — Trust and Executorship or Administratorship

Although this section states that an executor or an administrator is not a trustee, a Nebraska statute provides in part that the executor "shall accept the trust." This language has prompted the Nebraska supreme court to declare that "(t)he statute of this state . . . recognizes that an executor is a trustee to execute the trust . . . ." No doubt the court is, in a somewhat roundabout manner, arriving at the conclusion reached in comment a of section 6 that "many of the rules applicable to trustees are applicable to executors . . . ." The court has followed a somewhat parallel line of reasoning in regard to the status occupied by an administrator or a guardian.

Comment a of this section also contains the following statement in discussing the distinction between executorship and trust:

In many States courts of probate normally enforce the duties of an executor, and courts of chancery . . . normally enforce the duties of a trustee, although by statute in many States courts of probate are given concurrent jurisdiction over the administration of testamentary trusts and sometimes over trusts created inter vivos.

In Nebraska the courts of chancery are the district courts, and until 1931 the district court exercised its exclusive equitable jurisdiction over trust estates. In 1931 the legislature passed a law which granted to the county courts, the Nebraska courts of probate, jurisdiction over a testamentary trust. A good discussion of the ef-

7. See In re Rhea's Estate, 126 Neb. 571, 253 N.W. 876 (1934) (syllabus 3).
9. Restatement (Second) of Trusts § 6, comment a (1959).
fect of the 1931 legislation is contained in the case of In re Estate of Grblny.\textsuperscript{12} The court in Grblny concluded that as a result of the 1931 legislation "the county court and the district court have concurrent jurisdiction in supervision over the administration of testamentary trusts."\textsuperscript{13} While it is not within the scope of this article to explore the problem in detail, suffice it so say that the Grblny opinion did not resolve all questions of county court jurisdiction over testamentary trusts.\textsuperscript{14}

2. \textbf{Section 8 — Trust and Agency}

The leading Nebraska case emphasizing the distinction between agency and trust relationships is O'connor v. Burns, Potter & Company.\textsuperscript{15} In O'Connor the plaintiffs under a written agreement placed securities in the hands of defendant investment company. The agreement stated that the purpose of the arrangement was to relieve plaintiff of the inconvenience of handling her investments, that defendant was to act as manager of the securities, that defendant could buy and sell according to his own judgment, and that risk of all investments was on plaintiff. Speaking for the Nebraska supreme court, Judge Carter held that the agreement created an agency rather than trust relationship. Judge Carter noted the following important factors: (1) The evidence failed to show an attempt to transfer legal title to the securities; (2) the fact that plaintiff's account was denominated "HIT" (held in trust) was not conclusive, as these words were used for identification purposes; (3) the agreement used the term "manager", which was not indicative of a trust relationship. The opinion incorporates many of the distinctions articulated by the comments of section 8 and is in total accord therewith.

3. \textbf{Section 10 — Trust and Equitable Charge}

\textbf{Dahlke v. Dahlke}\textsuperscript{16} is a case wherein the Nebraska supreme court cited extensively from comments under section 10. In Dahlke the court held that a provision in a deed placing a "charge" of $6,000 on the demised premises in favor of third parties, whether an equitable charge or trust, was not testamentary in character. While the court did not specifically so state, it appears to have favored the "equitable charge" theory which, under the circumstances, seems eminently correct. Dahlke is a case which, while articulating the difference between equitable charge and trust, is also instructive

\begin{itemize}
  \item \textsuperscript{12} 147 Neb. 117, 22 N.W.2d 488 (1946).
  \item \textsuperscript{13}  Id. at 125, 22 N.W.2d at 493.
  \item \textsuperscript{15} 151 Neb. 9, 36 N.W.2d 507 (1949).
  \item \textsuperscript{16} 155 Neb. 169, 51 N.W.2d 266 (1952).
\end{itemize}
on the following points: (1) The difference between a transfer made "on condition" which is subject to a forfeiture and a transfer made "on condition" which is not subject to forfeiture, and (b) the distinction between a testamentary transfer and a transfer where only the enjoyment of the interest is postponed until the settlor's death.

In view of the Dahlke case, and the earlier case of Howells State Bank v. Pont, it would not be in order to state that the court has made no distinction between an equitable charge and a trust. On the other hand, there are three cases which contain the following proposition: Where property is conveyed *inter vivos* subject to payment to third persons it constitutes an implied or constructive trust between the trustees and cestuis.

The early case of Fox v. Fox, which seemingly established this theory, involved a situation where a father deeded property to his sons, who in turn agreed to give each of their sisters $1500. One of the sons failed to make the payment and an action was brought by one of the sisters against his estate. The court held that a constructive trust arose and granted plaintiff relief. A postulated theory to explain the court's emphasis on constructive trust thinking rather than equitable charge principles is as follows: As the son's promise was apparently oral, the court was conscious of a possible Statute of Frauds problem, i.e., the person to whom the promise was made was given a beneficial interest in the realty conveyed to the son. If this beneficial interest were equated with that of a beneficiary of a trust then there is indeed a Statute of Frauds problem. The court, no doubt aware of the Pollard v. McKenney opinion, could find refuge in the broken promise thinking of that opinion and hold that the grantee-promisor, having made a promise he never intended to keep, was guilty of fraud and a proper subject for the equitable remedy of constructive trust. In Fox the court did not discuss whether the transferor manifested an intention to impose a duty on the son to deal with the property for the benefit of the daughter, but presumably this was not so. The case of Maca v. Sabata is similar to Fox in that the oral promise or agreement related to payments to be...

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17. See *Restatement (Second) of Trusts* § 16, comments f and g (1959).
18. See *Restatement (First) of Trusts* § 56, comment f (1935) (quoted by the court).
21. 77 Neb. 601, 110 N.W. 304 (1906).
22. 69 Neb. 742, 96 N.W. 679, 101 N.W. 9 (1903). This case was in fact cited by the court. 77 Neb. at 604, 110 N.W. at 305.
23. According to comment b of *Restatement (Second) of Trusts* § 52 (1959), this is the test to be employed in determining whether or not the transferor intended to create a trust.
24. 150 Neb. 213, 34 N.W.2d 267 (1948).
made to third parties by a grantee who took by an ostensible absolute conveyance. In this case the Statute of Frauds was specifically raised as an issue, and the court, after initially discussing third party beneficiary contract theory, concluded with the Fox theory of constructive trust. The third case repeating the Fox constructive trust theory, Viehler v. Malone,25 sheds little light on the problem. Perhaps the only valid conclusion to be drawn from the Fox line of cases is that whenever a transfer of property is made subject to an oral agreement wherein the grantee is to pay money to a third party, should the grantee later repudiate his promise the court might regard the situation as appropriate for the imposition of a constructive trust.

4. Section 16C — Trusts and Legal Estates

In a declaration reminiscent of the labels given to an executor or an administrator, the Nebraska supreme court has stated that “(t)he relation of a life tenant to his remainderman is that of a quasi-trustee.”26 Similarly, a tenant in common has been said to hold common property “in trust” for his co-tenants.” In both instances, the court was apparently grasping for a word similar in meaning to “fiduciary”; in any event, the results reached by the court in no way contradict the Restatement.

B. The Creation of a Trust

1. Section 44 — Effect of Failure of Oral Trust for the Settlor

One of the most frequently quoted sections of the Restatement is section 44, covering one of the more difficult problems of equity jurisprudence. There have been other articles written on the Nebraska cases covering this section;27 it is sufficient for the purposes of this article to note that in 1943 the Nebraska supreme court explicitly stated its intention to follow section 44,28 that the Restatement (Second) made no changes in the provisions of the section, and that no case decided since 1943 can be considered contrary to its provisions.

2. Section 52 — Trust of Property Other than Interests in Land

Comment b to section 52 indicates that an enforceable trust of a note secured by a mortgage may be created without a writing. In Wecker v. Wecker,29 the trustee of an express oral trust repudiated

28. 1 CREIGHTON L.Rrv. 95 (1968); 20 Nebr. L. Rev. 160 (1940).
30. 166 Neb. 19, 87 N.W.2d 624 (1958).
his obligation to the settlor-beneficiary, and the settlor-beneficiary brought suit. Deciding in favor of the settlor-beneficiary, the Nebraska supreme court employed constructive trust principles to find that the trustee, at the time he made his promise, never intended to perform, and thus the case was within the fraud category of section 44 (1)(a). Since the subject matter of the trust was a note and mortgage, comment b of section 52, as previously stated, would indicate no Statute of Frauds problem. The plaintiff's attorney seemingly agreed, as it appears that the action brought was simply one to enforce an oral agreement not subject to a Statute of Frauds defense. Apparently the court did not agree; in one passage it stated that the trustee "allegedly so obtained a legal title to an interest in real estate."

Thus viewed, the problem did become one involving the Statute of Frauds and the court was then forced to put the case into one of the section 44 categories. Ultimately the question was one of interpreting the Statute of Frauds, and was not in a true sense a trust case.

3. Section 56 — Disposition Inter Vivos Where Death of Settlor is a Condition Precedent

In Young v. McCoy a bank deposit was made in the name of Arthur E. Young with a notation on the ledger sheet "POD Mrs. Edith McCoy." The notation meant "pay on death," and it was undisputed that Mr. Young desired that the property remaining in his bank account on his death go to Mrs. McCoy. The Nebraska supreme court affirmed a district court ruling that upon Mr. Young's death the balance of the money on deposit was not the property of Mrs. McCoy, as the attempted transfer was testamentary in character and the statutory requirements for the execution of wills had not been met. It appears that one theory in behalf of Mrs. McCoy was that the bank became a trustee for Mrs. McCoy's benefit — a contention somewhat similar to the famous Totten trust cases. The court rejected the trust theory, citing section 56 of the Restatement as authority. It can be doubted whether section 56 was intended to cover the Young situation, where there was a complete failure to show an intent to create a trust, an essential element?

4. Section 57 — Disposition Inter Vivos Where Settlor Reserves Power to Revoke, Modify or Control

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31. Id. at 25, 87 N.W.2d at 628 (emphasis added).
32. 152 Neb. 138, 40 N.W.2d 540 (1950).
33. Of course the Totten trust cases involve situations where the depositor and not the bank is the trustee and is limited to situations involving savings deposits. For a discussion of the validity of Totten trusts see Restatement (Second) of Trusts § 58 (1959); there are no Nebraska cases on this subject.
34. Restatement (Second) of Trusts § 23 (1959).
Whalen v. Swircin is one of the most important Nebraska trust law decisions during the past thirty years. In Whalen, Judge Carter's opinion faced directly the question of whether a revocable trust is a valid trust or an attempted testamentary disposition void for non-compliance with the statute governing the execution of wills. Judge Carter cited section 57 in concluding that the power of revocation was consistent with a valid trust. He further noted that the reservation of income by the settlor and the power to make withdrawals of portions of the principal were consistent with the establishment of a valid trust. The court was careful to note, however, that there was a transfer of legal title to the trustee and that possession of the trust property was transferred to the trustee. In view of the current popularity of the revocable inter vivos trust as an estate planning tool, Whalen is an extremely valuable decision, one which is totally consistent with Restatement thinking.

5. Section 67 — The Statute of Uses

Since 1899 it has been firmly settled Nebraska law that the Statute of Uses is not of the law of this state. Although the Statute of Uses applies only to passive trusts and is not enforced in this state, the Nebraska supreme court has held on more than one occasion that equity courts still possess the power to terminate passive trusts under their general chancery powers. In these cases, the court indicated that a finding that a passive trust has been created allows the beneficiary to demand a conveyance from the trustee, not that the beneficiary acquires both legal and equitable title — the result if the Statute of Uses were in effect. The latest pronouncements by the supreme court on this topic do not settle the question.

C. The Trust Property

1. Section 76 — Indefinite Subject Matter

If the description of the subject matter of a trust is so indefinite that it cannot be ascertained, the trust fails. In an early decision involving the described subject matter as the "bulk of my estate," the Nebraska supreme court was somewhat troubled before even-

35. 141 Neb. 650, 4 N.W.2d 737 (1942).
38. Id.
39. Compare Cahill v. Armatys, 185 Neb. 539, 543, 177 N.W.2d 277, 280 (1970) stating that a passive trust "conveys the bare legal title to (the trustee) with all beneficial use passing to the cestui que trust," with Jones v. Shrigley, 150 Neb. 137, 144, 33 N.W.2d 510, 515 (1948) which held that if trust is passive, the legal title as well as the beneficial use passes to the cestui que trust.
tually deciding that the subject matter was sufficiently definite.\textsuperscript{40}
In a more recent case, Reed \textit{v. Ringsby},\textsuperscript{41} a trial court ruled that a valid trust was created despite the fact that the subject matter was described as "a substantial part" of the property. This ruling was not re-examined by the supreme court, thus avoiding the question of the indefiniteness of the language.

2. \textbf{Section 84 — Interest Subject to be Divested}

Under section 84 the question is raised concerning the interest of a beneficiary in an insurance policy as the proper subject matter of a trust. This in turn relates to the very fundamental question of the validity of the ordinary life insurance trust. Despite two earlier cases\textsuperscript{42} raising some doubts on the matter, Nebraska law seems quite clear that the ordinary life insurance trust is valid. If the case law\textsuperscript{43} is not convincing, then one should consider the fact that there are Nebraska statutes dealing with life insurance trusts\textsuperscript{44} and, according to one leading authority, "the considerable body of statute law affecting life insurance trusts is based on the assumption of the sufficiency of the policy as the subject matter of a trust."\textsuperscript{45}

D. The Trustee

1. \textbf{Section 99 — Beneficiary as Trustee}

The cases decided by the Nebraska supreme court are certainly in accord with the Restatement view as to the permissible circumstances under which the beneficiary or one of the beneficiaries may also be a or the trustee of an express trust. A 1948 case, Jones \textit{v. Shrigley},\textsuperscript{46} expressly cited and quoted portions of section 99. With respect to the well-established principle that the sole beneficiary of a trust cannot be the sole trustee of the trust, there was a quite interesting federal case arising out of Nebraska that grappled with one of the most difficult applications of the sole trustee-sole beneficiary rule. This case, Morsman \textit{v. Commissioner},\textsuperscript{47} decided by the

\textsuperscript{40} Smullin \textit{v. Wharton}, 73 Neb. 667, 690, 710, 106 N.W. 577, 112 N.W. 622, 113 N.W. 267 (1906-07).
\textsuperscript{41} 156 Neb. 33, 54 N.W.2d 318 (1952).
\textsuperscript{43} See \textit{In re Estate of Reynolds}, 131 Neb. 557, 268 N.W. 480 (1936).
\textsuperscript{45} C. BOGERT, TRUSTS & TRUSTEES § 235 at 15 (2d ed. 1964).
\textsuperscript{46} 150 Neb. 137, 33 N.W.2d 510 (1948).
\textsuperscript{47} 90 F.2d 18 (8th Cir. 1937), cert. denied, 302 U.S. 701 (1937). In this case the settlor, a bachelor not contemplating marriage, executed a declaration of trust under which income was payable to himself for life and on his death the principal was to be paid to his widow, his issue, and if there were no widow or issue, to his heirs. The majority opinion held that neither the settlor's potential widow, issue or heirs
Eighth Circuit Court of Appeals in 1937, was not mentioned by Dean Foster in either the 1942 *Nebraska Annotations* or his law review article. This is somewhat understandable since the case ultimately determined that a Nebraska taxpayer did not have to pay income tax during a specified period, the majority of the court ruling that the taxpayer had not created a valid trust. Thus it is possible to view the Morsman case as a tax case, not necessarily reflecting an unbiased view of trust law. Furthermore, as a pre-*Erie* case, it might be maintained that to the extent that the case was decided on trust principles, the court was not purporting to declare Nebraska trust law. For those who are interested, there are several discussions of this case in law reviews. 44

E. THE BENEFICIARY

1. **Section 121 — Relatives as Beneficiaries**

   In the case of *Applegate v. Brown*, the testator provided that the trustees were to hold property “in trust for the use, benefit, comfort and maintenance of my nieces and nephews and such others of my relatives as may in the discretion of (the trustees) warrant and require financial aid and assistance . . . .” The trial court held that the purported trust failed, *inter alia*, because the will failed to sufficiently identify the beneficiaries thereof. On appeal, the Nebraska supreme court considered not only this issue but also the issue of the possible existence of two classes of beneficiaries. With respect to the identity of the beneficiaries, the court concluded that the words “my nieces and nephews and such others of my relatives” included the testator’s mother, brothers and sisters, and nieces and nephews. Accepting this interpretation, the beneficiaries would be “the members of a definite class of persons” as stated under section 120. 51

Comment a of section 121 recognizes that in some instances the term “relatives” may be construed “to mean such relatives as constitutes the person’s immediate family, or some other definite group.” As indicated, this was the route taken by Chief Justice Simmons.

As to the second issue, whether there were in fact two classes of beneficiaries and since settlor was then the only beneficiary and the sole trustee, no trust was created. Both the majority and dissenting opinions cited Restatement sections. The majority opinion specifically distinguished the case at bar from one of the Restatement Illustrations (Illustration 6 under § 112) by noting that in the illustration the settlor and trustee were different parties. 90 F.2d at 24-25.


49. 168 Neb. 190, 95 N.W.2d 341 (1959).

50. Id. at 194-95, 95 N.W.2d at 345.

51. Restatement (Second) of Trusts § 120 (1959): “The members of a definite class of persons can be the beneficiaries of a trust.”
beneficiaries rather than one, the contention was made that the nieces and nephews constituted one class, and that the other class consisted of "such others of my relatives as may in the discretion of (the trustees) warrant and require financial aid and assistance." The court held that only one class was created, and that all members of the class were subject to the discretionary powers of the trustees. The rationale for this conclusion was found in a later paragraph of the will wherein the testator simply referred to the beneficiaries as "my relatives" and limited the benefits to such of them as may require financial aid and assistance. That conclusion will not be challenged; however, it is interesting to note that under section 121 it would be permissible to have a class of beneficiaries identified as the "relatives" of a designated person if the trustee has the power to select who among the relatives would take and in what proportions. In Applegate, the trustees were given this power and thus, even if the court could not have ascertained an identifiable class of beneficiaries, the powers given the trustees to allocate among the relatives would have satisfied the section 121 standards.

F. Transfer of the Interest of the Beneficiary

1. Section 157 — Particular Classes of Claimants

Section 157 provides that the interest of a beneficiary in a trust for support, or a spendthrift trust, can be reached in satisfaction of an enforceable claim against him for support by his wife and children. The Nebraska supreme court in In re Will of Sullivan, a case involving a trust for support, specifically cited and adopted this rule. The more difficult question presented in Sullivan was whether or not the trust could be categorized as a trust for support, or whether the trust was a so-called discretionary trust. Had the court found the trust to be of the latter type, section 155 indicates that no creditors can reach the interest of the beneficiary. The language of the will creating the trust provided that the trustees should apply so much of the income and principal as may be necessary for the "support and maintenance" of the beneficiary. The settlor had also provided that the trustee "shall have full and uncontrolled discretion" as to the application of the income and principal "for the uses aforesaid." In reconciling these two provisions, the court relied extensively on the provisions of Restatement section 187 and concluded that while the trustees could be unreasonable in providing for the beneficiary's support and maintenance, they could not fail to act. Judge Carter's analysis appears sound; the "uncontrolled dis-

52. 168 Neb. at 199, 95 N.W.2d at 347.
53. 144 Neb. 36, 12 N.W.2d 148 (1943).
54. Restatement (Second) of Trusts §155 (1959).
cretion" language should have been subordinated to the primary purpose of the settlor in establishing the trust, viz., the support and maintenance of the beneficiary.

The more recent case of Summers v. Summers, 55 while ultimately decided on the basis of res judicata, contains dicta that is seemingly contra to section 157 — a suggestion that the interest of a beneficiary of a spendthrift trust cannot be reached by an alimony claimant. Further analysis of the opinion would indicate that the court meant to suggest that the amount due an alimony claimant, when the claimant is relying on a sister state decree, will not be automatically enforced as to the amount accrued. Rather, the court enforcing the decree should look to the present circumstances of the claimant in determining to what extent invasion of the spendthrift trust would be permitted, and what would be reasonable for maintenance under the circumstances. As thus construed, the opinion is consistent with Restatement thinking.56

G. The Administration of the Trust

1. Section 187 — Control of Discretionary Powers

Scully v. Scully57 was an action by a thirty year old beneficiary to compel a testamentary trustee to terminate a trust. The trust instrument provided that the trustee could terminate the trust when the beneficiary reached thirty years of age provided that the trustee, in the exercise of his discretion, was satisfied that the beneficiary possessed the requisite experience, maturity, judgment and prudence to manage the estate. In holding that the district court erred in ordering the trust to be terminated, the Nebraska supreme court laboriously reviewed the factual setting of the complex trust estate. The court quoted certain of the comments of section 187 and concluded that the trustee had not arbitrarily abused his discretion in refusing to terminate the trust. Restatement guidelines were followed in determining whether there had been an abuse of the trustee's discretion.58

The case of In re Will of Sullivan59 is also in accord with this section, particularly in respect to the methods of control by the court of the trustee's discretion. Note that in Sullivan the remedy was that suggested by comment b: the court may control the exercise of the trustee's discretion "by directing him to act."60

55. 177 Neb. 365, 128 N.W.2d 829 (1964).
56. See Illustration 2 under comment b of § 157.
57. 162 Neb. 368, 76 N.W.2d 239 (1956).
58. Those guidelines are contained in comment d of this section.
59. 144 Neb. 36, 12 N.W.2d 148 (1943).
60. The Supreme Court of Nebraska stated that "the district court should have
H. Liabilities of Third Person

1. Section 304 — Satisfaction of Antecedent Debt as Value

It is an elementary principle of trust law that a beneficiary's interest in a trust may be cut off by a transfer by the trustee to a bona fide purchaser. This is true even though the transfer is in breach of the trustee's obligation, provided that the transferee can prove that he is a "person who takes for value and without notice of the breach of the trust, and who is not knowingly taking part in an illegal transaction . . . ." A troublesome and recurring problem has been the case of the transferee who receives trust property in satisfaction for a pre-existing debt or obligation. Has the "for value" requirement been satisfied in that situation? The Restatement (Second) of Trusts provides in subsection (1) of section 304 that, as a general rule, the transfer is not for value. In subsection (2) of this same section certain exceptions are listed, one of which states that the transfer is for value if the trust property transferred is money. The acceptance of this principle by the Nebraska supreme court has been cast in doubt by the Meier cases, although it is arguable that the court's insensitivity was not to the Restatement (Second) of Trusts but to the Restatement of Restitution.

The pattern of the Meier cases was similar in that in each of the cases the following routine was employed: A wrongdoer was advanced money by the plaintiffs upon the fraudulent misrepresentation that the money was to be loaned to third parties, to be secured by mortgages given by the third parties. The wrongdoer gave to the plaintiffs a forged mortgage indicating that the money had been advanced to the third parties, whereas in fact the wrongdoer deposited the money into his own bank account. A portion of this money was then used by the wrongdoer to discharge a pre-existing obligation owed by him to the defendants, who were unaware of the fraud practiced and the source of the funds. Upon discovery of the forgeries after the wrongdoer's death the plaintiffs sought to recover from the defendants the monies paid over to them by the wrongdoer. The plaintiffs' theory was that the fraud practiced by the wrongdoer resulted in his becoming a constructive trustee for the plaintiffs, that the transfer of the funds (the trust res) did not cut off the beneficiaries' interests since the transfers, having been made to discharge a pre-existing indebtedness, were not "for value," and thus

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61. Restatement (Second) of Trusts § 284(1) [1959].
defendants did not qualify as bona fide purchasers.

In each of the cases decided the Nebraska supreme court ruled in favor of the plaintiffs, basing its opinion on general rules from treatises and a prior case of questionable applicability. The court noted that the defendants failed to plead any change of circumstances "so as to give rise to any equitable defense . . . ." Conspicuously absent was any reference to a Restatement section or comment, although the briefs of counsel cited the Restatement of Trusts.

To the extent that the Nebraska supreme court stated and followed a general rule that a transfer in consideration of the extinguishment of a pre-existing obligation is not for value, the court was following the general rule enunciated in subsection (1) of section 304 of the Restatement of Trusts. To the extent that the court recognized an exception to this rule where there is a change of circumstances on the transferee's part, the court was recognizing the exception stated in subsection (2)(c) of that same section. Yet it would appear that court and counsel did not go far enough in their analysis.

Assuming arguendo the applicability of section 304, the most relevant part of this section, in relation to the Meier cases, would appear to be subsection (2)[a] in which it is stated that a transfer in satisfaction of a pre-existing obligation is for value where "the trust property transferred is a negotiable instrument or money." The res in the Meier cases was money, even though transfers were made through the medium of checks and bank drafts.

While one noted authority indicates that the Meier cases are

63. The "prior case of questionable applicability" was Allen Dudley & Co. v. First Nat. Bank, 122 Neb. 443, 240 N.W. 522 (1932). As another commentator has noted: "That case seems to have decided the very different question of the bank's right to set off a collateral debt of the depositor, without the depositor's knowledge, against a draft deposited in the account of the debtor, which draft the bank had reason to suppose was intended to cover checks issued by the debtor in payment for property of the plaintiff." 46 Mich. L. Rev. 116, n. 18 (1947).


65. Counsel for the appellant Geldis, who was arguing that the "for value" requirement had been satisfied, cited only the following Restatement sections: § 283 ("Where Transfer is Not in Breach of Trust" — not relevant to the instant case where the transfer was in breach of the trust) and § 284 (the general bona fide purchaser rule — see text at note 58 supra). Brief for Appellant at 13-14, Meier v. Geldis, 148 Neb. 304, 27 N.W.2d 215 (1947). Counsel for appellee pointed out that the question in the instant case revolved around the "for value" requirement of § 284, and as to what constitutes value, the relevant sections were §§ 298 to 309. Then, as stated by counsel for appellee, "Turning to Sections 304 and 305, Nebraska Supplement Annotations to the Restatement of Trusts, we find an 'antecedent debt' is not value, unless the creditor changed his position." Brief for Appellee at 39-40, Meier v. Geldis, 148 Neb. 304, 27 N.W.2d 215 (1947). No doubt the Nebraska supreme court felt that they were following prior Nebraska cases and Restatement thinking with their decisions in the Meier cases. Further analysis of the Meier cases in the text of this article will reveal how weak both counsel and court were in their analysis of this problem.
contra to section 304 of the Restatement of Trusts, this conclusion need not be reached. It is to be remembered that the wrongdoer in the Meier cases became a constructive trustee, and it should be recalled that the general subject matter of constructive trusts is not within the purview of the Restatement of Trusts.

The rules governing constructive trusts are found, in general, in the Restatement of Restitution. The "for value" requirement of the bona fide purchaser doctrine in the case of a transfer by a constructive trustee is enunciated in section 173 of the Restatement of Restitution:

(1) The rules as to what constitutes value in the Restatement of this Subject are the same as the rules stated in §§ 298-309 in the Restatement of Trusts, except as stated in subsection (2).

(2) Except in the case of a transfer by an express trustee, a transfer of property other than an interest in land in satisfaction of or as security for a pre-existing debt or other obligation is a transfer for value.

Thus it is seen that the "general rule" regarding antecedent indebtedness and the "for value" requirement is reversed in the case of the transfer by the constructive trustee. It is submitted that if the Nebraska supreme court's holdings in the Meier cases are contra to anything, it is to section 173(2) of the Restatement of Restitution, although the court's failure to distinguish between transfers made by an express trustee and a constructive trustee does cast some doubt on the court's acceptance of the rule stated in subsection (2)(a) of section 304 of the Restatement of Trusts.

2. Section 325 — Registration of Transfer of Securities Held by Trustee

Under the general topic of "Participation in Breach of Trust Otherwise Than by Receiving Transfer" is section 325 dealing with the registration of a transfer of securities held by a trustee, and the resulting corporate liability for registering such transfer. A remarkably frank note appended to this section is the statement that the rule enunciated in section 325 "is not a good rule" and that "it would be wise by statute to abolish the rule." The Nebraska unicameral has accomplished just that by enacting, in 1961, the Uniform Act

67. See text at note 4 supra.
68. Restatement of Restitution § 173 [1937].
69. I cannot help but point out that the court was not aided by counsel to any significant degree, as in the briefs for both parties no mention was made of the Restatement of Restitution; see text at note 62 supra.
70. Restatement (Second) of Trusts § 325, note [1959].
for Simplification of Fiduciary Security Transfers. 71

I. THE TERMINATION AND MODIFICATION OF THE TRUST

1. Section 335 — Accomplishment of Purposes Becoming Impossible or Illegal

In the case of Dennis v. Omaha National Bank 72 the Nebraska supreme court was confronted with a situation where a trust had become impossible of performance and was terminated even though the period fixed by the terms of the trust for its duration had not yet expired. In Dennis the testator created a testamentary trust for the purpose of preserving the corpus for distribution to a class consisting of the surviving issue or descendants of testator's children, the distribution to be made twenty years after the death of the testator's last surviving child. At the date of death of testator's last surviving child the testator's widow was deceased, and none of testator's three children were survived by issue or descendents. Under these circumstances the court held that since the purpose of the trust was to benefit a class which could not, under any circumstances, come into existence, the trust became impossible of performance and was terminated. The court's holding in Dennis is in complete accord with the spirit and intent of section 335, as it does appear that the "whole purpose" 73 of the trust had become impossible of accomplishment.

J. CHARITABLE TRUSTS

1. Section 348 — Definition of Charitable Trust

The question "Does a transfer of property to a charitable corporation create a charitable trust?" is worthy of discussion in light of Nebraska case law and the position taken by the Restatement (Second).

In the 1935 Restatement it was stated that "(w)here property is given to a charitable corporation, a charitable trust is not created . . . ." 74 The Restatement (Second), in discussing this same issue, notes that many courts have followed the language quoted, although there are many instances in which courts have stated that a charitable trust was created with the corporation as trustee. The fact is, as both editions of the Restatement acknowledge, the question often-times obscures the real issues presented, viz., whether and to what extent do the principles and rules applicable to charitable trusts

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72. 153 Neb. 865, 46 N.W.2d 606 (1951).
73. See comment a of this section.
74. Restatement of Trusts, Introductory Note to Chapter 11 at 1093 (1935).
apply to charitable corporations? The answer given by the Restatement (Second) is that "ordinarily" the rules applicable to charitable trusts are applicable to charitable corporations.75

Nebraska case law on this subject roughly parallels the positions taken by the two Restatements. In 1908, in Clarke v. Sisters of Society of the Holy Child Jesus,76 the Nebraska supreme court indicated that a conveyance to a charitable corporation did not create a charitable trust. In 1939 the court began to move away from a one-dimensional approach to the problem and to articulate the idea that a transfer to a charitable corporation, while not technically creating a charitable trust, does not preclude application of charitable trust principles to charitable corporations.77 In Rohlff v. German Old People's Home78 the court stated that "a gift to a charitable corporation is equivalent to a bequest upon a charitable trust and will ordinarily be governed by the same rules."79 This statement, which is in total accord with Restatement (Second) thinking, has been reiterated in subsequent cases.80

Hobbs v. Board of Education81 graphically illustrates the principle that in certain areas, such as creditor's rights, the rule applicable to charitable trusts is not applicable to charitable corporations, and in these areas the decision as to whether a charitable trust has been created becomes critical. In Hobbs the Nebraska supreme court determined that certain funds held by Grand Island College were held by the institution as trustee, and under the circumstances of the case could not be subjected to creditors' claims.

2. Section 391 — Who Can Enforce a Charitable Trust

Comment f to section 391 indicates that in a suit by the settlor's heirs to recover trust property, on the ground that the charitable trust established by the settlor has failed, the Attorney General is a necessary party to the action. The acceptance of this principle by the Nebraska supreme court has been cast in doubt by the case of Rohlff v. German Old People's Home.82 In Rohlff the testator bequeathed property to a charitable corporation for a particular purpose — the construction and maintenance of a home for aged persons of German extraction. When additional funds for the
project were not realized and the project was abandoned, the
testator's heirs brought suit alleging that the purpose for which the
"trust" was established had failed, that the doctrine of cy pres was
inapplicable, and that the property reverted to them. In the course
of its decision on this matter the court was asked to decide whether
or not the Attorney General was a necessary party. The court held
that he was not, conspicuously avoiding any Restatement reference
on the issue. The distinction emphasized by the court was one be-
tween a trust with a general charitable purpose and a trust with a
special charitable purpose. In a case involving the alleged failure
of a trust of the former type the Attorney General was deemed a
necessary party; in a case involving the alleged failure of a trust
of the latter type, he was not.

The Restatement does not make any such distinction. The Rohlff
decision is then the only case decided after 1942 in which the Ne-
braska court has held directly contra to the Restatement, albeit
the non-adherence is to a Restatement comment and not a section.
An authority in the field of trust law doubts the wisdom of the Rohlff
holding on the status of the Attorney General, noting that "in the
absence of the Attorney General there was no party adequately
representing the interest of the public."83

3. Section 399 — Failure of Particular Purpose Where Settlor Had
General Charitable Intention. The Doctrine of Cy Pres

Since 1902 the Nebraska supreme court has closely adhered to
the pertinent Restatement rules on the doctrine of cy pres. In Rohlff
v. German Old People's Home,4 involving the failure of a trust
because of an insufficient amount of funds, the court was careful
to declare a failure only after having found that "the settlor mani-
fested an intention to restrict his gift to the particular purpose
which he specified."45 In School District No. 70 v. Wood,86 involving
an alleged failure of a trust because the particular purpose of the
establishment of the trust had already been accomplished, the court
applied cy pres only after finding that the settlor's charitable in-
tent "was more general than the mere construction of a building."87

4. Section 402 — Liabilities for Tort

The direction of the law in the area of the tort liability of the

84. 143 Neb. 636, 10 N.W.2d 686 (1943).
85. The language is from comment j of § 399. In Rohlff the court concluded that
"[t]estator's purpose in making the gift was clearly limited to the building and main-
taining of a home for old people of German descent . . . ." 143 Neb. at 640, 10 N.W.2d
at 690.
86. 144 Neb. 241, 247, 13 N.W.2d 153, 157 (1944).
87. Id. at 247, 13 N.W.2d 157.
charitable trustee has been one of rapid change during the past three decades. The 1935 Restatement took the position that the ability of a party injured in the course of administration of a charitable trust to reach trust property was based upon the distinction between one receiving benefits from the charity and one not in this relationship. The result of this distinction was that an injured hospital patient could not obtain satisfaction out of trust property for torts committed by hospital employees, whereas an invitee who was negligently injured could obtain satisfaction. Nebraska law was in accord with this view.

Since 1935 the trend of judicial decisions has been toward the abrogation of the doctrine of charitable immunity, and it was this trend that prompted the changed position taken by the Restatement (Second) — a party against whom a tort has been committed in the course of the administration of a charitable trust can reach trust property in satisfaction of his claim. In 1955 the Nebraska supreme court reaffirmed its stand in favor of charitable immunity in the case of Muller v. Nebraska Methodist Hospital. In 1966 in Myers v. Drozda the court, without benefit of Restatement citation, adopted the view that "non-profit charitable hospitals are not exempt from tort liability . . . ." Judge Smith's opinion, which has been the subject of extensive analysis, provided that the new rule would apply to all causes of action arising prior to the date of the court's decision, but only if the hospital carried liability insurance and then only to the extent of its insurance coverage.

K. Resulting Trusts

1. Section 430 — General Rule (Where Express Trust Does Not Exhaust the Trust Estate)

The case of Applegate v. Brown appears to fit directly under illustration 3 of comment h. In Applegate there was a failure to dispose of the principal of the trust estate, and the Nebraska supreme court properly held that a resulting trust arose in favor of the settlor's estate.

2. Section 442 — Purchase in the Name of a Relative

90. Restatement (Second) of Trusts § 402 (1959).
91. 160 Neb. 279, 70 N.W.2d 86 (1955).
93. Id. at 187, 141 N.W.2d at 854.
95. 168 Neb. 190, 95 N.W.2d 341 (1959).
In the application of Restatement (Second) principles to Nebraska resulting trust cases only one discrepancy appears. In the instance where property is purchased with funds advanced by the husband and title is taken in the wife’s name, the presumption is that there has been a gift. Comment a of section 442 indicates that in a situation where the funds advanced are those of the wife and title of the property is taken in the husband’s name, the presumption is that of a resulting trust in favor of the wife. The Nebraska cases on this particular problem raise questions as to whether the Nebraska court does in fact follow Restatement thinking.

The three Nebraska cases that might be cited as contra to the Restatement position are Peterson v. Massey,96 Brodsky v. Brodsky,97 and Davis v. Davis.98 The Peterson and Brodsky cases are not clear holdings — in each case it is doubtful whether the wives did in fact “contribute” anything toward the purchase price other than their ordinary services as a housewife. In the Davis case it was clear that the wife paid for the property out of her own funds, and thus the issue was squarely presented as to whether the presumption is that of gift or resulting trust. The Nebraska supreme court seemed to place the burden on the wife to disprove that a gift was intended; it is arguable, on the facts of the case, that the court was influenced by the doctrine of laches.

On the other hand, in two other cases, Creason v. Wells99 and Cleghorn v. Obernalte,100 both involving attempts by creditors of the husband to set aside conveyances as fraudulent in situations where it was clear that the wives had furnished the consideration, the court indicated that the husbands held the land upon a resulting trust for their wives.

A suggested synthesis of the five cases is as follows: In the situation involving a wife-payor, husband-transferee, the presumption is not in favor of resulting trust, but rather of gift (Davis), but the presumption may be rebutted by showing that the property was deeded to the husband because of some mistake (Creason-Cleghorn).101

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96. 155 Neb. 829, 53 N.W.2d 912 (1952).
98. 112 Neb. 178, 199 N.W. 113 (1924).
100. 53 Neb. 687, 74 N.W. 62 (1898).
101. Creason v. Wells, 158 Neb. 78, 62 N.W.2d 327 (1954) ("she [the wife] was induced by incorrect information to accept deeds in which her husband was named as grantee"); Cleghorn v. Obernalte, 53 Neb. 687, 74 N.W. 62 (1898) ("the deed of this land to [the husband] was made by mistake or inadvertence").
While it is no longer possible to state that the Nebraska supreme court has cited the Trusts Restatements more frequently than any other, this does not necessarily mean that Nebraska trust law has been static over the past three decades. The period from 1941 to 1971 has been marked by a number of significant trust law decisions. This period has also been marked by a continued adherence to Restatement principles. The deviations from the Restatement have been slight, their significance minimal. Today, as true in 1942, there are still gaps remaining in Nebraska trust law. In the filling of those gaps or of clarifying existing Nebraska trust law, it is recommended that the Restatement be relied upon. In the words of the late Dean Foster, in speaking of its predecessor, the Restatement (Second) furnishes "an indispensable guide"; it is of "uniform excellence." Used in conjunction with the new edition of the Nebraska Annotations, the Restatement (Second) will no doubt enjoy continued popularity and respect.

102. The American Law Institute's publications brochure, dated October 1, 1970, indicates that the Nebraska supreme court has expressly cited sections of the Trusts Restatements a total of 91 times. The Restatement of Contracts has been expressly cited to 113 times. Since the publication of the brochure it may well be that the Nebraska court has cited the Torts Restatements more often than the Trusts Restatements; as of October 1, 1970, the citations to the Torts Restatements numbered 88.