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The Role of the Trust Treatise in the 1990s

D.W.M. Waters*

I. INTRODUCTION

The attainment, the volume and the range of the publications he left behind are truly remarkable, but for many Canadian lawyers, as surely for lawyers throughout the common law world beyond American shores, the name of William F. Fratcher is associated with Scott on Trusts,1 a work that everywhere has long been recognised as a classic. Yet, curiously enough, neither he nor his great contemporary, Austin W. Scott, appears to have recorded for posterity his thoughts at any stage on the role of the treatise (or text) in legal literature and sources. Today that subject is a matter of debate, and this article, in order to mark the distinguished work of Scott’s first editor, sets out to examine, in the context of the common law jurisdictions of the Commonwealth (formerly the British Commonwealth), the present day situation of the trust treatise.

II. THE TRADITION OF THE TREATISE

In 1837 one Thomas Lewin, Esq., of Lincoln’s Inn, Barrister at Law, saw published his new work, A Practical Treatise of the Law of Trusts and Trustees. The publisher, whose establishment was to be found at the historic legal centre of London and in the precincts of Chancery, was Alexander Maxwell of 32, Bell Yard, Lincoln’s Inn,2 the predecessor of the present London publishers, Sweet & Maxwell, who will shortly be publishing the seventeenth edition of Lewin’s work. Lewin himself in 1837 wrote no preface explaining his aim in writing the book; the work was obviously in his mind self-explanatory as to what it aimed to accomplish. The first American edition appeared under the editorship of James H. Flint in 1888, based on the eighth edition of Lewin which itself was the first edition following Thomas Lewin’s death to be edited by another.3

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Lewin broke new ground with the conception, depth and length of his work, but he was not the first to write a sustained explanatory text on the trust. It was Francis Williams Sanders who must surely take that honour with his Essay on the Nature and Laws of Uses and Trusts including a Treatise on Conveyances at Common Law; and those deriving their effect from the Statute of Uses, a book published in 1791, also, like its famous successor, in London in Bell Yard, Temple Bar. Sanders explained in his preface that his object was "to elucidate and explain the very abstruse branch of our law relating to the nature and doctrines of uses and trusts", and 266 pages later when he was about to turn to the Treatise on Conveyances he said he hoped "these few observations on the nature of trusts will . . . be sufficient to give an idea of the manner in which they affect conveyances [which he was about to particularise—feoffments, grants, bargain and sale, lease and release, appointment, and covenant to stand seised] at this day."  

Since its early seventeenth century origin the "trust" had, of course, belonged to the conveyancer and the will drafter, but the conveyancing law of England during the eighteenth and first half of the nineteenth centuries was "abstruse" indeed. People like Sanders and Lewin were attempting to "elucidate and explain," essentially for practitioners, but also for students-at-law in barristers’ chambers, a mass of centuries-old case law and a few historic statutes encrusted with judicial interpretation over the same number of centuries. Indeed, legal education became a major concern of the second half of the nineteenth century. After Lewin had published his work in 1837 a number of works on the law of trusts from other authors (James Hill, Arthur Underhill, Henry Godefroi, and in the U.S. Professor James B. Ames and Charles F. Beach) followed during the next fifty years. Their aims were the same as Sanders, but their techniques were different. While Sanders and particularly Lewin wrote in a sustained prose explaining the law in a logical

4. Sanders published a second edition in 1799, a third in 1813, and a fourth in 1824. He died in 1831. So four editions under his hand had been published before Thomas Lewin’s work appeared. The fifth edition of Sanders’ Essay was published in 1844 by George Williams Sanders and John Warner, both London barristers practising in Chancery. American editions were published in 1830 (based on the English 4th edition) and in 1855 (based on the English 5th edition). An unnamed "member of the Philadelphia Bar" supplied references to the latest English and American cases in the second American edition, published by Robert H. Small, Law Bookseller, of Philadelphia. The preface to the 1855 American edition describes the work as "partly historical . . . yet the value of it as a practical treatise, containing an able exposition of the law upon the subject to which it relates, has been universally acknowledged by the profession." The editors seek to enhance its use "for the purpose of reference" by a fuller index than was previously supplied. GEORGE W. SANDERS, AN ESSAY ON USES AND TRUSTS vi (Philadelphia, R.H. Small 1855).
and systematic manner, others—like Henry Godefroi, for example, in 1879—gave what he saw as the ratios or established principles of isolated, but numerous and connected cases. The tradition of that type of work for the use of practitioners has its beginnings in the eighteenth century and is now long outdated, but it can still be seen, for instance, the current third edition in Canada of Widdifield on Executors' Accounts, published in 1967. Students of the time for their part looked for didactic material, not the precedent that solved the problem on the treatise-consulting practitioner's desk, the provision of which was the aim of Godefroi; and in England perhaps the best example of a nineteenth century effort to meet this need was Arthur Underhill's Practical and Concise Manual of the Law Relating to Private Trusts and Trustees. In his first edition in 1878 he pays tribute to "Mr. Lewin's Model Treatise on Trusts," but he notes that, while the libraries are rich with works of reference, they are comparatively poor "in manuals giving a systematic view of those principles of the law—the oases in 'the wilderness of single instances'—with which every lawyer ought to be mentally furnished." His concern, he says, is for the student, and the practical solicitor advising a trustee; his object is to provide such a "work of moderate size." He is evidently proud that he has done it, as he feels, with just 76 "Articles." 

The age of the trust treatise was born in London, England, with Lewin, but as early as 1871 in Massachusetts a practitioner, Jairus Ware Perry, published his single volume Treatise on the Law of Trusts and Trustees, a work based on American case law that was to become a two-volume treatment in the author's second edition, and go into its seventh edition in 1929. Trust law being a matter under state jurisdiction, the sheer volume of the case law and the different nuances adopted in different state courts as to what was the law necessitated early on the work that Perry undertook. It is interesting that James Hill's Practical Treatise on the Law Relating to Trustees, published in England in 1845, was very soon thereafter the subject of American editions.

5. HENRY GODEFROI, A DIGEST OF THE PRINCIPLES OF THE LAW OF TRUSTS AND TRUSTEES (London, Stevens & Sons, Ltd. 1891). Subsequent editions appeared in 1891, 1907, 1915, and the fifth in 1927. The editor of the last edition in 1927 was Harold Greville Hanbury, an Oxford don who later published his own student text (infra note 24). In later editors' hands the attempt was made to move the Digest to more of a continuous prose presentation, but case authorities and the report references still appear in the text. Essentially it remained a case collection.

6. UNDERHILL'S, LAW RELATING TO TRUSTS AND TRUSTEES (David S. Hayton ed., 1987), is now in its 14th edition, and is widely regarded as the leading U.K. treatise. Until this year the latest edition of Lewin was the 16th, 1964.

7. The American tradition of treatise writing dates back to Joseph Story's Commentaries on the Law of Bailments, published in 1832. Perry's work appears to have been the first American treatise on trusts law that was not based on an English text.

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The fourth American edition appeared in 1867 already. Charles F. Beach, a counsellor at law, who produced in 1897 a two-volume set of Commentaries on the law of trusts, justified his original American work precisely because of the weight of unconsidered case law in each of the states of the Union. It is evident to anyone who looks into the matter that the treatise was an inevitable response of the American profession and the academic community to the increasing enormity of the volume of partially collected and undistilled case law, and the treatise of George Gleason Bogert, a professor at the University of Chicago, in 1935 was a major organizational, research, and writing achievement. It remains, in the hands of George Taylor Bogert, one of the two major multi-volume works on the subject in the common law world, now in its second revised edition.

Austin Wakeman Scott was early associated with the casebook presentation of trust law, a teaching instrument introduced by Langdell in the nineteenth century that swept all before it. In 1919, as a professor at Harvard, he produced a study that was later to go into a number of editions, and in his 1919 preface he warmly acknowledges his indebtedness for manuscript and inspiration to Professor James B. Ames whose pupil Scott had been and whose casebook on trusts, introduced in 1882, so excited the young Scott. The treatise in 1939, however, the famous *Scott On Trusts*, a then four volume work, was a product twenty years later of another inspiration. This was the mature professor’s desire to share with the profession his own explanation, as Reporter on the trust law project of the American Law Institute, for the "rules" the Institute finally adopted in 1935. The Institute published the *Restatement of Trusts*, following extensive discussions, as a representation in the form of rules, with comments, of the law of trusts in all the American states.

Institute members felt that the citation and discussion of the supporting U.S. state and English case authorities, interpretation of such decisions being a very individual judgment, was not for the collectivity that is the Institute and its "Advisers." To Scott it seemed clear, however, "that in some form or other

8. **George G. Bogert, The Law of Trusts and Trustees** (1985). The subtitle describes the work as a "treatise covering the law relating to trusts and allied subjects affecting trust creation and administration."

9. **Austin W. Scott, Select Cases and Other Authorities on the Law of Trusts** (1919). The 5th edition in 1966 was the co-operative work of Austin W. Scott and his son, Austin W. Scott Jr.


11. Scott was then Dane Professor of Law in Harvard University, and is described also as Reporter on Trusts for the American Law Institute. **Austin W. Scott, The Law of Trusts** (1939).

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the decisions upon which the Restatement is based, and a more complete consideration of the reasons underlying the rules, should be made available to the profession.\textsuperscript{13} The rules were arrived at "after prolonged and repeated consideration of the decisions of the courts throughout the United States and in England and of the reasons behind these decisions."\textsuperscript{14} Where the authorities were in agreement, the Institute members, the Reporter, and their Advisers formulated the appropriate rule, regardless of whether they themselves considered the substance of the rule to be wise, and where there was conflict among those authorities they forged a rule "in the light of their [own] judgment based upon their varied experience."\textsuperscript{15} That co-operative work of trust specialists from academe, the practising profession, and retired judges educated (as he says himself) and inspired Scott. He wanted to share that unique round table experience with those who daily judged, practised, and taught law in the United States. And Scott was a teacher—wherever there was no statute and the case authorities revealed a judicial conflict, so that the round table forged a rule the discussants thought wise, and he was of the personal opinion that the courts would not be "justified in adopting"\textsuperscript{16} that rule, Scott on Trusts says as much and gives reasons for the criticism. A treatise it was and multi-volume it remains, but it is a very personal analysis and—particularly—synthesis; it is the work of a mind capable of embracing wide areas of scholarship, and of a strong, confident personality.

The increasing growth and significance of common law jurisdictions, other than England and Wales, and the United States, in the first half of the twentieth century gave rise in those countries to comparable treatises (or textbooks or texts, as law schools and practice now called such productions). In 1919 Professor James M.E. Garrow of the Victoria University College, Wellington, published The Law of Trusts and Trustees dealing with the law in New Zealand, a text which is now in its sixth edition, and in 1958 Kenneth S. Jacobs, a barrister and later a judge of the High Court of Australia, brought out The Law of Trusts in New South Wales, a work which as The Law of Trusts in Australia is now in its fifth edition.\textsuperscript{17} In 1974 the present writer’s own text on The Law of Trusts in Canada was published, and is now in its second edition. The Republic of Ireland has been part of the common law world associated with England and Wales since the Norman invasion of Ireland in 1169, but its first trust law text was published only in 1930 in O’Neill Kiely’s Principles of Equity. The current and leading Irish text,
Equity and the Law of Trusts in the Republic of Ireland, was written by Judge Rowan Keane, and published in 1988.

Textbooks have also been originated on the law of trusts in mixed common law and civil law jurisdictions, like Scotland and South Africa. The Scots authors include Charles Howden, advocate;18 A.J.P. Menzies, advocate;19 A. Mackenzie Stuart, a professor of Aberdeen University;20 and currently W.A. Wilson and A.G.M. Duncan, both of the University of Edinburgh.21 Professor Tony Honoré’s work, now in its third edition under the author’s hand, on The South African Law of Trusts is the pre-eminent authority for that country.

New student manuals of various kinds, some being shortened forms of the treatise approach, others in monographic form, continue, particularly in England, to come on to the market, and, like the "hornbook" in the United States, but more frequently so, English student texts are themselves the subject of even more recent editions. Some of these student texts are comparable in their scholarship and comprehensiveness with the more extended texts, just mentioned, that are allied in the reader’s mind with the established treatise, and they are frequently cited by Commonwealth courts. Snell’s Equity, which includes the law of trusts, used widely by practitioners and students for over 125 years, is the most famous of these shorter texts.22 Indeed, with the publication in 1934 by George W. Keeton of the first edition of his student text on The Law of Trusts, and by Harold G. Hanbury of his Modern Equity, including the law of trusts, in 1935, a rich tradition of writing for students was started in England,23 and has continued to this day. Traditionally these narrative texts have been used for student instructional purposes, not only in England where university lecturers produce them, but throughout the Commonwealth countries and jurisdictions of the world.24 Similar student

18. CHARLES HOWDER, TRUSTS, TRUSTEES, AND THE TRUSTS ACTS IN SCOTLAND (Edinburgh, W. Green 1893).
23. George Keeton and Harold Hanbury each went on to a distinguished professorial career, the former in the University of London, and the latter at Oxford.
texts have now appeared in Australia.\textsuperscript{25} Traditionally also these texts, whether closer to the treatise (or extended text) or written essentially for students, have adopted the \textit{Lewin} and \textit{Underhill} categorisation of the subject. However, new editions of treatises and comprehensive textbooks also appear, and one of the latest of these was the second edition of an Australian work—\textit{Principles of the Law of Trusts}, by two well-known university teachers, Harold Ford and Anthony Lee—of which the first edition was as recent as 1983.\textsuperscript{26}

III. A \textbf{C}ontemporary \textbf{E}valuation of the \textbf{U}tility of the \textbf{T}reatise

It is this 1991 publication which brings me to the core of what I wish to remark upon in this article, because it was greeted by a long and thoughtful review in the Sydney Law Review that was in fact highly critical.\textsuperscript{27} It was not the quality of the research or the writing style, that was questioned; the review did not seek to suggest that this book, so warmly welcomed in its first appearance in 1983 as a scholarly work of the first order, was none of that. The reviewer's thesis is that this book, like its \textit{genre}, presents the law of trusts not as a living, evolving body of law, serving and responding to the calls of the here and now, but as a static categorization of rules developed in the epoch of Thomas Lewin. Treatises and texts on trusts like this treatise, continues the reviewer, follow with little variation the Lewin headings and sub-headings. If a new decision does not fit within this accepted structure, it has to be "interpreted" until it does so. There is no place for innovative judicial thinking in this process; the orthodox alone prevails.

\textsuperscript{25} \textit{E.g.}, Donald R. Chalmers, \textit{Introduction to Trusts} (1988).

\textsuperscript{26} The terms—treatise, comprehensive text, and student text—embrace the spectrum of works of sustained, explanatory or descriptive prose, with case and statutory citations relegated to footnotes. The treatise is an exposition of the principles of a subject, and a text is an author's own composition apart from citations or the comment of others. Clearly the works to which this article is addressed are both treatises and texts. Modern usage seems to favour the term, text, to cover both the multi-volume reference work and the student instructional work, and it is evident that today the single volume text may be aimed at both the practitioner and the student market. Ford and Lee would fall into this latter category. In this article I have kept the terms \textit{treatise} and \textit{text} apart because the former is often seen as more lengthy and comprehensive than instances of the latter. The \textit{text} I have distinguished as comprehensive, or exclusively designed for the student. The manual is a primer, for whomever designed.

As the present writer understands this evaluation, and other contemporary writing like it (for the reviewer can justly point to weighty supporting views in other current writing, particularly that of the legal realists), treatises and textbooks, certainly the more substantial textbooks, as is Ford and Lee, share one major fault. They retain the mould of a form of legal scholarship that is now 150 years old. Indeed, says this school of thought, if one goes outside the law of trusts to other fields of law, such as contract, the tradition of such writing is even older. That tradition, in its heyday between 1845 and 1939, had its roots in the nineteenth century scholastic belief that law is a science, and can and should be organized as a rational and logical schema of propositions. Between 1845 and 1875, Lewin, in successive editions of his own book, developed divisions and sub-divisions of rules and principles that ultimately by the turn of the century the Bench itself had adopted. This manner of thinking and Lewin's schemata entered the pages of the law reports as axiomatic, such was the eminence of the authors and the conviction of the century as to the scientific nature of law. The treatise writers' excrescence on the law—the divisions and subdivisions—had become part of the law. Critics would say that instead of a loose and unorganized body of general principles, as it had been until about the end of the eighteenth century, and an array of case authorities each addressing distinct factual circumstances within the penumbra of the general principles, all had changed. Where, to the eighteenth century, sense of principle and the application of general principle to facts had mattered more than precision of word meaning and a symmetry of ideas, the law of trusts has become the legal scientist's version of theological structure and internal consistency.

To return to the review of the new Ford and Lee, the reviewer, Patrick Parkinson, concludes: "The law of trusts cannot be presented as if it were timeless and without social context. . . . The future of scholarship in the law of trusts must be with an attention to context and an explanation of the use of the trust by individuals, corporations and judges to achieve a variety of goals. . . . The trust can no longer be taught as a logical abstraction . . . [if we do so teach it, we] hide that which is most interesting for understanding directions the law may take in the future."28

What makes Patrick Parkinson's review of special interest for anyone who has regard for the incredible degree of worldwide scholarship poured into trust treatises and comprehensive texts in so many countries, a regard the reviewer in large measure shares, is that he expressly says he is not speaking as a legal realist, nor from the vantage point of critical legal studies. The views of the proponents of those schools of legal philosophy concerning doctrinal writing have been well known for many years. Indeed, Parkinson himself is an established equity teacher and author, and he writes without the

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28. Id. at 240.

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journal critic's tongue-in-cheek when he concedes "the important place" left to the treatise.

I turn, then, to explore what has happened to the law of trusts in recent years, both in practice and in the law school, and then to suggest, given the treatise tradition in the law of trusts, how trust writing for the profession and the classroom can meet the challenge that Parkinson throws out.

IV. THE NATURE AND THE CRITICISM OF THE TREATISE

A. Nature

As Professor Simpson, an English scholar, has demonstrated in a meticulously researched article, the history of legal writing in common law England has moved through a series of epochs. From collections of case decisions, reported in varying degrees of quality, organized at first alphabetically and later under headings drawn from procedure and pleading, the coming in the late sixteenth and seventeenth centuries of descriptive, and to an extent analytical, writing based on the "maxims" of law was the epoch that immediately preceded the introduction of the treatise. "Maxims," some in English, others in Latin or Norman French, were probably the legal coinage of the day in discussions and "shop talk" in the Inns of Court and at Westminster Hall, and they were the first to emphasize principles associated with the substance of the law. That form of writing, as Simpson has shown, was in decline in the late eighteenth century, and it disappeared for all serious purposes in the first quarter of the nineteenth century. However, even today, though the equitable maxims of the Court of Chancery and the Equity side of the Court of Exchequer may no longer be the organizational basis of writing about the law of equity, they are still used as shorthand descriptions of the raison d'être and the aim of equitable principles. This is no doubt because the historic origin of equity lay in rectifying the results of a timeless phenomenon, namely, unconscionable behaviour (fraud, the taking advantage of another's mistake, or breach of fiduciary obligation). This shorthand mode of presentation suited the eighteenth-century mind, and at equity the maxim continues to suggest the precept that guides the court. For instance, the "clean hands" phraseology can be heard on the lips of all judges, both those theoretically and those pragmatically disposed.

Nevertheless, the maxim appeared to the nineteenth century lawyer to be more poetic or lyrical than analytical and, as a modus of organization of case law and of statute for the use of practitioners and increasingly the Bench of

29. Id. at 236.
the superior courts, its once apparent value would be rejected. One of the
difficulties that was new in the nineteenth century, even more so in England
after the commencement in 1830 of the "century of reform," was the sheer
volume of material that had to be digested by the law practitioner. This was
the century in which specialization began, albeit on a limited scale and in the
larger cities only, and it was specialization not merely for the barrister
appearing regularly before a particular set of courts (common law, Chancery,
Exchequer, maritime). The solicitor also in London or Manchester, for
instance, might be concentrating his time, skill, and experience in a particular
area of practice. The amalgamation of the probate, divorce, and maritime
courts into a single division of the new High Court in England during the last
quarter of the century was a gently humorous combination even then. In
the present writer's opinion the industrial revolution, the growth of a world-
wide commerce, and the increasing significance of London as a financial
centre, were added factors for the demand for a more sophisticated method of
making the law available in law offices. Moreover, while the advocate's life
has always been contention and argument, the life of the solicitor or the
attorney—with the client across the desk—leads him or her to put a high value
on doctrinal certainty, and predictability as to the outcome of proposed
actions.

Legal writing for the profession and secondarily for student instructional
purposes was therefore bound to change, and it changed to the adoption of the
treatise mould. Professor Simpson in his paper on the subject of the treatise defined it as essentially the analysis of doctrine. It is abstract study
of the substance (as opposed to the procedure) of the law, and, unlike the
modus of writing that preceded it, concerned with a conceptual or theoretical
whole within the law. The whole is treated as being distinctive from other
legal concepts operating within the law. It is not necessarily limited to a
single jurisdiction; it can be comparative inside a state with two or more
jurisdictions concerned with the concept in question, or international and inter-
jurisdictional. It has no inevitable coincidence in scope with practice areas.
A subject like Evidence, for instance, unlike Contract or Torts, is not itself
conceptual, but it can be treated as a single area of concern—the written or

31. The long period in office of the Tory party came to a close in this year with
the election of a reform-minded Whig administration under Lord Grey. For one
hundred years thereafter successive Liberal and Conservative governments transformed
the English social, economic, and legal scene.

32. The work of these three sets of courts in fact constituted the legal fields of
practice of the barristers of Doctors' Commons, a learned corporate society of London
practitioners of civil law tradition and distinction which did not survive the reforms of
the second half of the century.

33. See Simpson, supra note 30.
oral fact that may be brought before a court concerned with the trial of an issue—and made an abstract, conceptual study.

As to the treatment of the concept, or the area of concern to be treated conceptually, Simpson describes the process as the arrangement of the existing material into first principles; these form the major divisions of the subject area, and deductions are made from the first principles. These deductions give rise to subdivisions, and divisions within those sub-divisions, until there is a pyramidal hierarchy of logical deductions from the first principles. The top of the pyramid constitutes those first principles. The result is a system and a logical progression of doctrinal analyses, which permit the lecturer or the reader to see where the legal materials (case decisions, statutes, regulation, etc.) are aberrant because the law on that matter remains controversial, unsettled, or undeveloped. The raw material is examined in the first place in order that the principles of law which deliberately or unconsciously they are expressing can be extracted. Each principle is then itself analysed in order to determine whether it is basic (or first) in character, or in its origin is derived from a basic principle. Basic principles and derivative principles are in this way determined. Early treatise writers in any of the subject-matter areas would have found that a good deal of the case law, however carefully considered, did not yield up any discernible principle for the solution that was given. In these instances, as Austin Scott explained, 34 having attended and chaired so many round table discussions among experts concerning the proposed "rules" of the Restatement of Trusts, 35 the task is to classify this material, using such basic or derivative principles as already exist and appear to explain the material.

Of course, in an inductive system, which is the common law, it may be that the decision that lends itself to no ready interpretation is itself a thrust out into new country. The treatise author must obviously be careful to ensure that, if that interpretation is at all possible, he or she has not passed it by in favour of the easier solution, namely, to associate the aberrant-decision with some part of his already distilled hierarchy of principles. Such a solution is obviously destructive of the whole purpose of this examination of the inductively produced raw material. No one who has been engaged in codification endeavours would be other than aware of this siren song. From beginning to end, as Scott recognized, the codifier and the treatise writer must be absolutely honest to the materials. He or she is searching for the thoughts of others, even when those thoughts are at their most elusive and he is sorely tempted to conclude the search with a conclusion that springs essentially from his own reflections.

34. SCOTT, supra note 11, at vii.
35. See supra note 12.
The treatise that Lewin produced in 1837 bears in its headings and subheadings, its first principles and derivative principles, a recognisable link with the arrangement of current treatises. Refinements were made by Lewin himself in successive editions until 1875, and the look of modern treatises is in many respects quite different from the print style and page arrangements of the nineteenth century works, but it is not unreasonable to say that in its essentials the pyramidal hierarchy is already present in that first edition.

B. Criticism

This similarity of the hierarchical structure then and now may have much to do with the criticism of treatise-writing that, first, it imposes a structure of basic principles and a set of deductions upon the raw material (essentially case law, whether common law or arising out of the construction of statute), and then so interprets case authorities which vary from this structure that they do fit into its hierarchy. The writer of the nineteenth century treatises, it is said, motivated by the belief that law is a science and therefore that it can be revealed as a set of logical propositions, "discovered" the now familiar structure of principles inherent within a particular (probably a conceptual) area of law, and then sought to bring all new case law into line as illustrative of one or more principles in that structure. Moreover, even assuming that the approach is valid and the structure as originally conceived was correct at the time of its first formulation, it is now as if one "frame" from a particular point in time of a moving picture is taken to be the picture for all time.

Another reflective article on this subject, to which Patrick Parkinson draws attention, was written by Robert Austin, another Australian, a professor of the University of Sydney, from which Mr. Parkinson also writes. Austin's prime concern is with the remedial trust, namely, constructive and resulting trusts, and he develops the view that the remedial trust has no part in a university course on "Trusts." "The traditional law of trusts neither explains current developments nor adequately justifies results in remedial cases," he says, the law concerning expressly created trusts is distinct precisely because of the intention of a party or parties to create a trust, and it is concerned with very different issues. The remedial trust is not the creature of party intention; it is part of the law concerned with imposed obligation and remedy for breach. Such a subject he would hope to find taught in a course on "Equity" that excludes the trust, and examines the various bases of

36. Robert P. Austin, The Melting Down of the Remedial Trust, 11 U. NEW SOUTH WALES L. J. 66 (1988). Professor Austin speaks of Lewin having "prescribed the monolithic trust," while "Seavey and Scott's prescription was that the remedial part of trusts be united with quasi-contract to become restitution." Id. at 70.

37. Id. at 85.
obligation imposed because of unconscionable circumstances (reliance to
detriment, unjust enrichment, and the prevention of fraud), together with the
range of possible equitable remedies. These remedies include proprietary
relief.

Parkinson, whose review concerns a book covering express trust and the
remedial trust, wants the textbook on trust law to eschew the traditional
classification of doctrinal elements and to recognize a current disorder in the
law. The courts, he demonstrates, are applying the rules in non-traditional
ways, and the "classical model of the trust\textsuperscript{38} has broken down. Texts that
are exponents of that model do not explain what is happening; he wants the
text to examine the case law that is unorthodox, but from the alternative
perspective of the unorthodox being an aid both to understanding the law
today and to discerning the direction the law appears to be taking. He would
have the textbook seek within the disorder "the patterns which explain the
course of judicial decision-making where it departs from the traditional model
of the trust."\textsuperscript{39} To this end he commends the new approach to trusts taken
by Graham Moffat and Michael Chesterman in their book, published in 1988
for law school use entitled, \textit{Trust Law: Text and Materials}.\textsuperscript{40} In this English
publication, of which American readers may not be aware, the authors explain
the doctrine in the setting of English sociological phenomena, taxation
concerns, and the different uses to which in that country the trust has been
put. Parkinson turns his back on a text technique that "no longer [has] the
explanatory power" that it once had, and that continues to insist "on an
analysis of the modern law by reference only to its internal consistency."\textsuperscript{41}
He argues that the courts of the Commonwealth (in particular, Australia, New
Zealand, Canada, and England) approach the trust employed in family matters,
and the trust employed in commerce, in different ways. It is much easier, for
instance, to convince a court that a husband vested with title to assets acquired
to enhance the quality of the married life was to be a trustee of a share of
those assets for his wife, than to demonstrate, when A contracted with B to
act for the benefit of C (a stranger to the contract), that B was intended to
become on behalf of C a trustee of the contractual promise of benefit. The
first is an expectation of society, the second constitutes a setting aside of the
privity of contract rule which in terms of policy is regarded as inherent to the
common law conception of contract. Parkinson therefore concludes that a
successive consideration of individual types of trusts in different family and

\begin{thebibliography}{12}
\bibitem{38} Parkinson, \textit{supra} note 27, at 230.
\bibitem{39} \textit{Id.} at 238.
\bibitem{40} Graham Moffat and Michael Chesterman, \textit{Trust Law: Text and
Materials} (1988). Published in the "Law in Context" series by Weidenfeld and
\bibitem{41} Parkinson, \textit{supra} note 27, at 240.
\end{thebibliography}
commercial settings is the appropriate mode of presentation of each, because explanation of the legal principles and their application is then made in the context of the particular social or commercial circumstances in question. These are considerations of which the could would have been aware.

V. AUTHORITY AND SECONDARY SOURCE; THE LIMITATIONS IMPOSED ON THE TREATISE

Codification always occurs after a period of considerable doctrinal activity, in the form of growth or change or both, followed by a period of consolidation. Codifiers seek to distill the material that remains significant after the settling down period, to isolate the principles and to construct the rules that the significant materials imply. The principles and rules must be so caught by the written word that those words both capture the judgments of the material and also leave room for continued growth. Growth will principally occur through judicial interpretation of the word in the context of the "Article" as a whole, the Chapter, and the Chapter within the particular "Book" of the code. Following production of the code, deductive reasoning takes the form of an exegesis that lays stress upon the core of the Article's principle or rule but that is concerned with the possible interpretation of that principle or rule against the background of the entire code. Thus a wide range of distinct factual situations is embraced by the one "Article."

Because nineteenth century treatises responded so much to an enthusiasm of the time, and because they analysed and synthesised so persuasively that courts themselves adopted their thinking as axiomatic (certainly in the case of the most celebrated of the treatises), the treatises of the common law countries both recorded the law and through the courts made law. It is surely quite true that codification and treatise writing are twin arts. The late eighteenth and particularly the nineteenth century treatises were undoubtedly inspired by the writings of Pothier and the Napoleonic codification of 1804, and then by the century of Latin and Germanic codification that followed throughout the civil law world. Civil law exegetical writing, explaining the particular code with which the author was concerned and postulating on the manner of interpretation of its "articles" in the light of particular factual situations, was the counterpart scholarly activity in civil law countries to the conviction, drive, and scholarship that were productive of the treatises in common law countries.

The distinction between them, however, is that while the code once adopted has the force of law, the treatise is not an authority. It is as good

42. It is not without significance, I believe, that Arthur Underhill chose to name his principles of the law of trusts as "Articles." See supra text accompanying note 5. See also, Simpson, supra note 30, at 666-67.

43. Exegetical writing in the civil law tradition is therefore concerned with the
as the courts, and more immediately those practising, regard it as being, and they will judge it in terms of its reliability in recording what the law is, and of its comprehensiveness. Its perceptiveness and its insights are measured, not for any scholarly speculation or viewpoint, however learned, as to the directions the law may or—in particular—should take in future, but by its degree of clear exposition and its persuasive conclusions as to the status quo where the then current law is found unclear, controversial, inconclusive, or silent. In common law countries authority belongs to the courts and the legislature, not to the writer of the treatise. Nineteenth century treatise writers, for the most part obscure and literary minded practitioners, some established, others not and hoping to make their name, as Professor Simpson has noted,\textsuperscript{44} well knew of their tenuous position. Even given much of the fulsome expression of the time, the obsequiousness of the dedication of so many of their works to one judicially august person or another of their particular time can make uncomfortable reading for those who come across it today. Thomas Lewin in 1837 chose to make his oblation to the then Sir Edward Sugden, "late Lord High Chancellor of Ireland," in a typically obeisant manner. Since treatise authorship was the first scholarly mode of writing the legal profession had seen, and university schools teaching the common law as a distinct discipline became a feature of higher education for the first time just before the last quarter of the nineteenth century, law professors became the preponderant authors thereafter. But they too were the commentators of their time, and their practitioner and increasingly judicial readers looked for the same reliability and comprehensiveness as had previous readers.

Codes, once legislatively adopted, are the law, and future developments will occur through judicial interpretation of those articles. The touchstone, however, and however many years hence, is the same code, unless it has been amended legislatively or a new codification has taken its place. The common law system is different. Though increasingly legislatures today are preempting law making, and statute presents a not wholly dissimilar interpretation process from that of civil law jurisdictions interpreting a code, traditionally case law is the source and driving force of the common law and equity. The process is one of constant movement and the evolution of doctrine. Even though the treatise writer attempts to expound the law where it is unclear, controversial, inconclusive or silent, he is always looking, to adopt a phrase, in the rear mirror. The practitioner and for almost all purposes the courts want nothing else; if the writer wants to speculate as to the future, or present an argument as to the how the law should develop, the treatise—as a statement about the existing law—is not the place.

\textsuperscript{44} Simpson, supra note 30, at 664, 667-68.
VI. EQUITY'S RENAISSANCE IN THE COMMONWEALTH COUNTRIES

The treatise has not therefore proved in most countries to be the medium for argument as to the direction the law should be taking, or even for speculation as to where it might be heading. On the other hand, as Parkinson and Austin among others have emphasized, throughout the Commonwealth countries of England, Australia, New Zealand, and Canada there has been a renaissance since the middle 1960s in the influence of equity and equitable doctrines within the courts. Equity and perhaps the trust itself could be said to have been in a constant state of change and an environment of new thinking in each of those countries. The doctrines of equity, bequeathed by England's Court of Chancery which was abolished by statute just before the last quarter of the nineteenth century, retain a distinct character in the Commonwealth countries—though to what extent they remain distinct is a matter of controversy—and the essential principles of equity are once again having a profound influence upon the whole field of private law. When breach of fiduciary relationship is held to occur upon a father sexually interfering with his minor child, it is evident—whatever tortious or criminal wrong has also taken place—that the equitable concept of fiduciary relationship (as an example) has now, because of the principle upon which it is founded, an application that would have been foreign only ten years ago.

In Australia, and particularly in Canada, the fiduciary relationship has been so readily introduced into situations, previously beyond its range, with consequent extra-contractual obligations, that in the Commonwealth countries pleading has given rise to a constant reassessment by the courts of the nature of the fiduciary relationship. This, of course, has been accompanied by frequent evaluations of the factual character of relationships in order that courts may judge as to whether they are indeed fiduciary. In England in the last thirty years, and most recently in Australia, common law and equitable estoppel law have been re-examined, and in Australia case law in the High Court is moving rapidly towards a thesis as to the circumstances in which estoppel in general will arise, whatever its jurisdictional source. In England reliance-based obligation has steadily become the most widely supported rationale as to the nature of the legal duty created for himself by the

45. Supreme Court of Judicature Act, 1873, 36 & 37 Vict., c.66.
party who acts unconscionably vis-a-vis another. In Australia, which historically has been closer in outlook to English jurisprudence than judicial influences from any other quarter, there is the same inclination to prefer reliance-based thinking and a concern for the conduct of the wrongdoer (rather than the circumstances of unfairness, however those circumstances come about) as the explanation of equity's response to unconscionability between parties. Until recent years in Australia estoppel had long slumbered in the form in which the nineteenth century had left it, though occasionally an interesting appellate judgment might have had the result of fomenting new thought. The scene is now one of volatility where the future—how far this concept, whether it be substance or remedy, will be carried—is a matter for speculation. It depends, as so often, on those unpredictable human factors as to where and when and in which form litigation arises, and who are the judicial personalities to whose opportunity it arises to hear the dispute.

The span of the remedies that originated in equity might be said to have caught the New Zealand judicial imagination, and the case law is constantly searching further to achieve the assimilation of law and equity. The dichotomy of obligation and remedy is the jurisprudential framework to which these courts have moved, and their able judicial analyses of legal history and of doctrine, whether those elements are common law or equity in origin, are tuned to the goal of a rationalisation in totally contemporary terms. Some see in this an almost reckless disregard for traditionally-recognized doctrine in the pursuit of what is thought by the particular court to be "right"; others see it as some of the most advanced, courageous, thoughtful and promising judicial activity in the Commonwealth. But one thing is recognisable by all, the case law is again moving apace, and the future, depending as it does on the same human factors, has its own unknown.

The law of trusts, part of the law of equity, has also been the subject of continuing change in all Commonwealth courts since the 1960s. Up until that time for upwards of a century little had changed that went to the roots of the system. Change there had been, but it was slow and measured and—to the informed—predictable. The most notable development was brought about by social and economic change in the early twentieth century, change that was quickened by World War I. Practice was reshaped. There disappeared in England, in particular after 1914, the centuries old "settlement," the trust of land, settled upon a particular family, with its generations of beneficiaries, the invariable fixed interests, the host of cross-contingent remainders, and not least the battery of trustee powers to manage an extensive land holding, with its

"big house," village houses, and tenanted farms. The famous Trustee Act, 1925, 51 whose provisions were copied throughout the countries of the then British Empire, was little more than an up-dated consolidation of the Trustee Act of 1893, 52 but trust doctrine had been enriched after 1850 with a century of eminent doctrinal judgments, and there was an increasing significance attaching throughout the century after 1850 (the beginning of facilitating trust legislation) to the so-called "trader's trust" or trust for sale. This was the trust of urban property, the successful entrepreneur's family home, together in all probability with a portfolio of securities, the whole to be regarded not as "settled" land but as assets to be invested and re-invested with a view to obtaining the highest return that was compatible with prudence. However, it is arguable that the change was more a conveyancers' change than any marked change of direction in the doctrinal trusts law. It is evidently a matter of viewpoint, but in the present writer's opinion the framework of trusts law doctrine as we knew it in the 1950s was already in place by the middle of the nineteenth century. Express, implied, resulting, and constructive trusts were looked upon in the 1850s as they were in the 1950s; sub-classifications were less agreed upon than they were at the end of the century, but the contents and the conclusions of judgments at the close of that century, one would suggest, were not of the kind that would have been puzzling to the mid-nineteenth century.

In the United States the 1930s in doctrinal terms was the decade of Restitution, 53 and the American Law Institute consigned the "Constructive Trust" to the Restitution heading as part of the law associated with the remediying of unjust enrichment. Austin Scott in his treatise of that decade did not, 54 it appeared in his presentation as part of the law of trusts. In the Commonwealth countries, however, neither the rubric of Restitution nor the notion of unjust enrichment took hold. Lord Wright's judicial advocacy of these ideas in the same epoch was pooh-poohed by his English brethren, 55 and that was the end of that. Constructive trust theory, such as it then was, continued to be the accepted judicial position in England and throughout the Commonwealth.

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51. 15 & 16 Geo. V., c. 19 (England and Wales).
52. 56 & 57 Vict., c. 53 (England and Wales).
54. Scott, supra note 11.
A. The Remedial Trust

It was the Second World War that led to the dynamism in the Commonwealth law of remedial trusts that is described by Professor Austin and referred to by Patrick Parkinson. It is here the law of trusts has so dramatically changed in character. In the 1960s the pressure upon the courts became immense. Women and men worked side by side during the War, and women now sought that on a marriage breakdown the courts divide fairly between the spouses the assets that had been acquired by them during the marriage. It mattered not, said the complainants, if title was in the man's name. That was a traditional practice in any event. The woman had contributed to the acquisition of assets by her own efforts, and equity would recognize this. Most English courts took the position at the time that they had no authority to take property in A's name and give it to B; that that was for the legislature, if it was to be done at all. Moreover, the legislature had the opportunity, withheld from the courts by the nature of the judicial process, to consider the merits of the argument seen from every angle, including the social and economic. Some English courts, notably that of Lord Denning in the Court of Appeal, did not share that view. He would have used the "remedial trust," essentially the constructive trust, but he would include also the resulting trust, to give divorcing wives the equity they sought.\(^{56}\) Throughout the 1960s and the 1970s the contention between these two schools of thought was pursued with vigour, as it was, when the same disputes reached them, by courts in Canada and Australasia. Following Lord Denning's retirement in 1982, opinion in England as to the nature of the constructive trust reverted uniformly to the more conservative position that a constructive trust arises in a defined number of circumstances, i.e., fiduciary relationship or implied intention, when the courts will order personal or proprietary relief for the deprived party. Canadian courts, however, support Lord Denning's position, and take the view that the constructive trust is an available proprietary remedy in those circumstances where one party is found to have been unjustly enriched to the deprivation of another.\(^{57}\) Australian and New Zealand courts appear to take a middle ground; the constructive trust is a remedy, but "constructive trust" embraces both liability and remedy stricto sensu.\(^{58}\) A constructive trust order will be awarded if it is only conscionable (Australia)—within the reasonable

\(^{56}\) Though the case did not concern a marriage breakdown, Hussey v. Palmer, 1 W.L.R. 1286, 3 All E.R. 744 (C.A.1972), affords an excellent demonstration of Lord Denning's views.


expectations of the parties (New Zealand)\textsuperscript{59}—that one party should account for specific property to another.

The law of constructive trusts today across the Commonwealth is a law in the process of change to a new concept. To date agreement eludes the Commonwealth legal community. A New Zealand judge recently wrote, "The case law is in chaotic disarray, and attempts to clarify the essential principles by reference to past authorities are destined to disappoint the investigator."\textsuperscript{60} The law in Canada may appear to be the most clear and settled, but doctrinally it is not yet fully thought through, and elsewhere in the Commonwealth, where unjust enrichment as a principle of liability has yet only the beginnings of a foothold, the lack of clarity is more evident because it is obvious that agreement does not exist. Many, like Professor Austin, cannot accept that unjust enrichment is an adequate basis upon which to build change. Instead they see the 'Restitutionists' as on the march.

\textit{B. The express trust}

So far as the law of express trusts is concerned, that is, trusts arising because of the intention of a party or parties to bring a trust into existence, the pace of change is considerable, but this time it is not taking place in the courts. The present writer would think that undoubtedly the most dramatic change in the Commonwealth countries between the 1950s and today, so far as case decisions on express trusts are concerned, is the decision of the House of Lords in \textit{McPhail v. Doulton},\textsuperscript{61} where it was held that no uncertainty of discretionary trust objects exists if it can be said of any person whether or not he is or is not a member of the described object class. Imagine a class of past and present employees, and their dependants, scattered everywhere, and it is not difficult to see what a profound change there has been from the 1950s when certainty meant the ability of trustees to enumerate every member of the class. Since that decision in 1970 low key doctrinal change has continued to flow in the same vein of relaxing significantly the required elements of a trust that were considered in the 1950s to be axiomatic and to be met to the letter. Only taxing statutes continue to require the courts to analyse minutely the language to be interpreted. For tax purposes courts are expected to draw black and white lines; there are lines, for instance, to determine whether or not a beneficiary has an interest not only in the trust property as a fund, but in the specific assets that make up the trust property at any one point in time, and to determine where "trust" ends and "agency" begins. Beyond tax issues, however, the undercurrent of a change of judicial attitude, typified as it was inaugurated by \textit{McPhail v. Doulton}, is constant. Indeed, more and more

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\textsuperscript{60} The Hon. E.W. Thomas in a paper delivered before the Ninth Annual Banking Law and Practice Conference, Queensland, Australia, May 1, 1992.

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alterations in trust drafting practice in the traditional family property area are not reflected in case law or statute. In an age of liberalism, so far as doctrinal tenets are concerned, usage changes in the manner of distribution (i.e., the modern discretionary trust with its extremely broad powers as to trustee discriminatory selection among beneficiaries and what the selected shall have) and extensive trustee administrative powers (i.e., "shall have full power and authority to administer the trust fund in whatever manner they may from time to time determine"), are clearly acceptable to settlors, their beneficiaries, and the practising profession, without court intervention. Those who challenge the relaxation of the "stop" and "go" signs of the 1950s may well find that the court is not at all hostile to the relaxation if the process carried out was fair and reasonable so far as all parties’ interests are concerned, and the outcome of the process is within the range of what might reasonably have been expected by them.

The three certainties (of intention to create a trust, of property, and of objects) are not doctrinal axioms for a valid express trust; they are administrative requirements only. The parties’ arrangement cannot be a trust if they had in mind that it would operate in some other way, and the trust is unworkable if there is no trust property, or no ascertainable persons or purposes that are to have the benefit of the trust. Beyond that, certainty is only insisted upon if the court essentially has other concerns. The courts today may well infer intention from the fact merely that a division of legal and beneficial interests was in the mind of the settlor(s). For the 1990s that division is probably the one essential distinctive mark of a trust. "[Ten dollars] and such other property as [the settlor or third parties] shall transfer to the Trustees" satisfies the requirement of certainty of property, though the trust will of course have no economic significance if—which of course is not intended—$10 remains as the only trust property. And it may be that the need of even the initial $10 will one day be dispensed with provided that there is at least some property under the trustees’ control when the trust is to take effect. There is no administrative necessity for any property being vested in the trustees prior to the instrument of trust taking effect; why then should some specific asset be under the trustees’ control at the earlier date when the instrument is signed? But that, of course, is to speculate as to the future law. What can be said of the existing law is that McPhail v. Doulton continues the trend of introducing pragmatism in place of the former strict rule, this time the rule of I.R.C. v. Broadway Cottages Trust.62 Provided, said Lord Wilberforce, the trustees of the discretionary trust, when they are exercising their discretion, are able to have in mind a wider and more comprehensive number of members of the class than would be necessary for the exercise of a mere power, then that is enough. It is obvious that certainty now means the trustees must be initially

clear what the description of the class means, and be able to apply that meaning, but that who they select for benefit may be chosen from those whom they might reasonably have been expected in the circumstances to have made themselves aware.

To complete the creation of a trust property the settlor must ensure that if the trustees are not vested with title to trust property, they do have the means to compel transfer. This is obviously not a problem for testamentary trusts, and, judging by the absence of contemporary case law, this is not a significant hurdle for *inter vivos* settlors. A tax-planned *inter vivos* trust can very easily be structured, by way of a bank loan to the intended trustee, guaranteed by the settlor; the settlor and the trustee then enter into a contract of sale and purchase. This means that the settlor's death prior to the transfer does not frustrate the efficiency of the trust, since action for performance can be brought against the settlor's estate. Indeed, there is no need for a professionally-drawn trust to come before the court at any stage. Though he obviously cannot contravene public policy, a well-advised settlor or testator can achieve exactly what he wishes with his trust instrument. He has to ensure that the duties and powers of the trustee(s) are appropriate, adequate, and well-worded. That is very nearly the most important task of the settlor. He then ensures that the trustee(s) for the time being have the power of variation of the dispositive and administrative provisions of the trust, that they have the power to terminate the trust, and finally the power to resettle on the terms they think best. This avoids any need of application to the court under variation of trusts legislation. The first and most important task of the settlor today is to choose the trustee(s), and who their successors, if necessary, shall be. With a modern trust instrument this selection is crucial to its success. Extensive discretions of all kinds are given to the modern trustee, and the integrity, skill and vigilance of that person are relied upon implicitly.

However, the doctrinal changes in the law of express trusts, including *McPhail v. Doulton*, are in the writer's opinion changes of emphasis. The change in the judicial approach appears to be from enforcing rules because they exist to assessing what it is the party or parties are trying to achieve, and in measuring, albeit against the background of the traditional rules, how far what they are seeking to do is in accordance with accepted standards of appropriate behaviour, and, if those standards are met, whether their scheme of things is administratively feasible. Outside the courts trust practice has spread into other fields of law; this, it seems, is the most significant change.

There is today a variety of uses that are made of the trust concept, but very few of these in the Commonwealth countries have been the subject of reported litigation. The action, so to speak, is again taking place in the office of solicitors or attorneys. Traditionally the trust was either the "settlement"
or "trust for sale" of land, or the testamentary trust of residue or specific estate assets. All our treatises and texts reflect that from cover to cover, analytical as they essentially are of case law; this is where the trust originated and—for much the greater part—is still to be found. Now the trust is widely employed in commerce and business as either a holding or a security device, and as a medium for public investment (the sole and very extensive use in Japan). It is one of the cornerstones of corporate and institutional pension plan design throughout the whole common law world, and recently a similar usage has appeared in Canada in the area of environmental land reclamation. Lawyers specialising in corporate and commercial law, in labour law, and in environmental law have joined the wills and estate planning specialists and the tax experts in the use of the trust. The traditional trusts practitioner was, and remains, familiar with the subject-matter that is the concern of the reported case law and with the relevant property legislation; the expert in areas other than "Probate, Trusts and Property" or "Wills and Trusts" does not have that advantage. Where does that specialist go to determine how to employ the trust in his field of law, and indeed to learn in the first place what exactly is this concept that no treatise or text writer seems willing to define? The trust of the conveyancer and will drafter suggests little to the specialist in other areas who wishes to know what powers and duties should—and can—be given to trustees in commercial, pension and environmental trusts. Only pension trusts, largely because of the surplus issue, have been the subject-matter in Commonwealth countries of any significant case law. And even the case law as to surplus is unsettled and controversial.

Once change is no longer reflected other than in practitioners' notes in loose-leaf professional publications, the question has to be asked as to what it is the contemporary treatise, including "texts" and "textbooks," should aim to do. Patrick Parkinson concluded that the text he was reviewing did not mirror the fact and the depth of change. "Disorder is masked," he says, "rather than being identified and discussed." Professor Austin, speaking with regard to constructive and resulting trusts, reiterates that in his opinion "the traditional law of trusts neither explains current developments nor adequately justifies results in remedial cases." He develops this theme with the following, "we need relevant propositions which are relatively general,

63. Francis Williams Sanders (supra text accompanying note 4) was a member in his time of the "Conveyancing Counsel's Club" (SANDERS, supra note 4, preface to his 3rd edition), and Thomas Lewin also was a conveyancing counsel to the Court of Chancery.

64. Section titles in the American Bar Association and Canadian Bar Association respectively.

65. Parkinson, supra note 27, at 237.

66. Austin, supra note 36, at 85.
desirable, and with explanatory and justificatory force—explanatory and justificatory in a way which can be taken into account by judges and which will provide generative norms for legal development.67

VII. THE PLACE OF THE TREATISE; THE STUDY OF "DISORDER," AND THE DEVELOPMENT OF "PROPOSITIONS"

The history of legal writing in the common law system, as Professor Simpson has shown, is a story of collections of cases and of statutes. At first the collections were concerned mainly to record cases and statutes for personal or group use; then, as law reporting became more copious and a separate activity, the material was arranged under titles drawn from the pleading system and listed within titles in alphabetical order. From this early structuring sprung the nineteenth century tradition of treatises—analytical prose text set out under systematized headings and sub-headings that are abstract in character. The problem posed by Parkinson and Austin, therefore, is to determine what study of the current doctrinal "disorder," and the development of "propositions," could most usefully mean when the future of a treatise writing is being undertaken.

A. The User of the Treatise, and the User’s Impact

The first consideration must be of the person who uses the treatise, and what that person seeks. If he or she is a solicitor or attorney, the principal use may well be as a source of information on a specific matter of obligation or remedy when a dispute has arisen over trustee behavior or beneficiary expectations. It may also be a source when original drafting is being undertaken. The trial advocate will seek for all the case authorities the treatise author has thought sufficiently relevant to cite in support of a proposition, argument, or statement in the text. The prose text will mostly serve in this instance to lead to the footnote. Thereafter the advocate will make his or her own argument with the authority to which he or she has been directed, or to which the cited authorities lead. The court in its turn may consult the text for viewpoint on a given matter. Having come to its decision, it may quote in its written judgment any passage in the treatise which appears sufficiently correct, clear and succinct that it both encapsulates what the court would have said for itself, and provides for the contending parties evidence of the agreement of a specialist and disinterested third party with the court. Solicitor, advocate, and judge are all interested in what the law is, whatever led them to consult the treatise.

67. Id.
https://scholarship.law.missouri.edu/mlr/vol59/iss1/10
Legal education in law schools, however, has a quite different role, namely, the training of lay minds to think and to present, and hence to evaluate and criticise, on the basis of the written sources of law. Some would say the goal is to have students capable of performing as do members of the legal profession in the practice of that profession; others would say this is a likely outcome, but not the goal of a university law school which is concerned, in teaching a discipline, with critical examination. The law school's interest is law in the context also of interdisciplinary studies. For the purposes of the law undergraduate, whatever studies the legal educator may prescribe, the treatise is too detailed and lengthy a treatment of the subject-matter for anything but an occasional usage; the undergraduate law student's text needs are met by the market, as Professor Simpson has said, with "elementary . . . guides to the law that serve as a sort of map to unfamiliar territory." He is referring there to "hornbooks," "nutshells," and outlines. The graduate student will use the treatise as part of his or her research, seeking textual information but essentially authorities for what is planned as an original research title. This student market would welcome critical argument concerning the state of the existing law, law reform proposals, and speculation as to likely or possible future developments.

Evidently, if these observations are correct, any major change of direction towards the study of possible patterns in contemporary case law would jeopardise present markets. The student would continue to look for the short, simplified explanation, combined, if available, with a portable collection of abridged leading cases, and the profession, with the courts, would turn to modern forms of the extended abridgement, like Halsbury's Laws of England, a descriptive prose text with footnote reference to case authorities and explanatory literature.

This means that the treatise author, and the deceased author's later editor, though they will hope to attract the student reader, must accept that their efforts will likely be used as a reference work by professionals, whether specialist or generalist, who have problems before them and who wish to obtain a specialist opinion, both of the state of the law on the subject and of the relevant (and latest) authorities. The regular supplement is intended both to alert the reader to the existence of later authorities and in most instances to supply some viewpoint as to the significance of those authorities. As for law reform proposals and arguments concerning what the law should provide, the graduate student and the professional who has need of this information, would expect to find this in footnote references to the journal and monographic literature, and the reports of law reform agencies.

68. Simpson, supra note 30, at 678.
69. Now in its fourth edition (1973 - to date).
It therefore seems likely that the treatise will and probably must remain concerned exclusively with what would most widely be regarded as the existing law; and within the term, treatise, as has previously been said, is included both the multi-volume work and the single volume that constitutes a comprehensive and detailed examination of the area of law in question. Moreover, it is the footnote that is likely to continue giving references, where it alludes at all, to material that argues what the law should be.

B. Keeping Abreast of Change

Nevertheless, this does not mean that the treatise is unable to keep its readers abreast of the trends and judicial reasoning that the most recent case law reveals. That indeed must surely be its task. In the present writer's view both Parkinson and Austin have underlined developments in trusts law that are undeniably taking place. Moreover, a glance at Professor Fratcher's preface in 1989 to the fourth edition of Scott on Trusts70 will show that he too had very much in mind those kinds of developments in the substantive law of the express trust.

It may well be that the issue becomes one of presentation, of the manner in which the treatise presents material that reveals new trends and considerations in judicial thinking. So far as the remedial trust is concerned, Austin is concerned to have "explanatory and justificatory . . . generative norms for legal development"71 that can also be taken into account by judges. Such is the confusion in the Commonwealth, taken as a whole, as to what now is "the constructive trust" and therefore what role it plays in the legal system, that it is difficult at this point to see what character these "norms" would have. Historically, the equitable maxim played a somewhat similar part, as we have seen, but Austin does not mean this. He appears to have in mind principles and statements that reflect a doctrinal dichotomy of liability and remedy, and that are rooted in evident common sense. On the other hand he does not find Pettus v. Becker72 a helpful decision; there the Supreme Court of Canada set out criteria which must be met if unjust enrichment is to be established. These criteria, he says, are not "generative norms."73 Whether he would regard the fiduciary relationship criteria in Hospital Products,74 or in the Canadian Supreme Court decision of LAC Minerals,75 as any better is

71. Austin, supra note 36, at 85.
73. Austin, supra note 36, at 85.
doubtful. Criteria of any kind are not what he is discussing. All in all, the would-be author who speculates as to their meaning is likely to find the "propositions" sought by Austin as being treacherous country during the foreseeable future for any treatise writer. This is a subject for law review journals until the smoke has cleared, and there is at least some degree of clarity and agreement within and between the jurisdictions as to what now constitutes the law.

The express trust presents another type of challenge. Here it seems to the present writer that something can be done. The manner of writing can leave the person who consults the treatise with the sense of movement that is inherent in the case law, especially in today's renaissance of equity. Interpretation of cases can be angled so that what the law is, and which attitudes and philosophies are apparently affecting the courts, are both dealt with, however each treatise writer decides to introduce the latter. One would have thought there are many treatises and textbooks on the market that are of this character. Indeed, the refreshing nature of Austin Scott's multivolume treatise was always that it reflected at every turn the mind, the drive, the scholarship, and the strongly held opinions of the author. The personality and the classroom energy and conviction that must have been Scott's are never absent, and, in the first edition that Scott did not prepare, Professor Fratcher was anxious, as he implies in his preface, 76 to retain that special individuality of the work.

Nor perhaps should one overrate the significance of the current changes in the law that are taking place. As Cardozo said, the philosophy of the common law is at bottom the philosophy of pragmatism. 77 Its truth is relative, not absolute. In the Commonwealth the second half of the nineteenth century and the first half of the twentieth were a high tide of common law conceptualism and the determination that rules, not judicial discretion, should decide cases. Certainty and predictability were prized more highly than the shifting doctrine and the encouragement of litigation that are seen as the twofold outcome of a search for a vaguely conceived justice as between contending parties. Since the 1960s throughout the whole Commonwealth the tide has been receding, the ebbing of that tide having been more marked in Canada and New Zealand than Australia, and in Australia more than England and Wales. Pragmatism that has taken the place of rule determination does not mean, however, that concept is abandoned; it is simply more loosely employed, the courts being prepared to have more regard for what commonly accepted standards within society suggest would be the reasonable expectations of the parties upon their entering into the particular transaction or relationship.

76. SCOTT, supra note 11, at Vol. I, xxi-xxii.
So far as the three certainties, the nature of the trust beneficiary's interest, and issues of that kind are concerned, this loose conceptualism is now very much in evidence. Indeed, in that odd little corner known as the "secret trust" the courts were prepared to be pragmatic even in the eighteenth and nineteenth centuries. Treasises for their part must reflect the pragmatism and loose application of conceptual rules. The effort today is to emphasize that which will make the trust work, not to bring down what it is the parties have attempted to accomplish. Re Astor's Settlement Trust gave rise to a result which present day courts, at least in Canada, would no doubt regard as a reproach to the law, and the treatise in the present writer's view would have to make this apparent.

C. The Cross-Fertilization of Conceptual Ideas

The price of loose conceptualism, however, is that, as legal notions such as the trust are introduced into areas of the law other than the traditional areas of estates and conveyancing, there is increasing difficulty for the practising profession and courts alike in determining which conceptual rules are involved, let alone how the rules shall be applied. It is here, the writer believes, that the authors have their main problem. Traditionally, all trust treatises compare and contrast the characteristics of the trust concept with concepts A, and then B, and then C, and so on. It is a familiar professional instructional medium. But, if the concept of trust is loosening in application, how then do we characterize what type of transaction or relationship it is the parties have? This is a problem for the practitioner and the court with which both would expect the treatise writer to deal. For example, the concepts of trust and bailment at law are not easily separated and this has been a problem for a long time. The Hague Convention on the Recognition of Trusts, the text of which since 1987 is now implemented in the United Kingdom, in Australia, and in five provinces of Canada, describes a trust as existing

78. For the subject of secret trusts, see UNDERHILL AND HAYTON: LAW RELATING TO TRUSTS AND TRUSTEES 193-204 (14th ed. 1987).
79. Ch. 534, 1 All E.R. 1067 (1952).
82. Ratified October 17, 1991. The Convention had been earlier ratified by Italy on February 21, 1990.
83. Ratified by Canada on October 20, 1991, for British Columbia, Alberta, New Brunswick, Prince Edward Island, and Newfoundland. Manitoba is also in the
when trust property is under the "control" of a trustee. Is that description applicable only in the context of issues involving the conflict of laws (the substance of the implementing legislation), or is it more widely applicable so that control may prove to include exclusive possession rights, and trust and bailment therefore appear to overlap even further? The choice as between them will then depend on the outcome on the particular facts the court thinks appropriate. Trust and debt also often arise on the same facts.

Another area of present dispute is the defined benefit "trusteed pension plan." Contract and trust are both elements of the institution, but their inter-relationship or the part each plays in the make-up and operation of the pension plan is controversial. For instance, Ontario courts appear to take the view that once the employer pays moneys to the trustees, those moneys remain trust moneys for the benefit of the plan beneficiaries, unless the plan was created with the included term that the employer may recover moneys that are surplus to meeting the stated plan benefits of members. In a more recent British Columbia Court of Appeal case, however, that Court concluded that the pension arrangement is essentially contractual, and the trust serves the simple device of holding contributed moneys. It does this until future events determine the individual entitlements of members further to the pension plan benefit provisions, and of the employer to surplus, if any. Much has been written on this subject, including as to the relationship of contract and trust within the superannuation or pension plan structure, but the basic issue for the courts remains this—what part of the "trusteed" scheme is to be measured by contractual and which by trust principles? No legislation in the Commonwealth tackles the question, largely one suspects because passions run high on the subject, and the opposing policy arguments are each individually so compelling. As a result the courts are left with a problem that is therefore necessarily fought, almost always, in the narrow context of the proper construction of the trust deed in question, and the pension or superannuation plan incorporated into that deed.

In Hockin v. Bank of British Columbia the bank as employer had the obligation to contribute to the plan (defined benefit) in those circumstances only when actuaries certified that the members' contributions left an unfunded obligation to members of the plan. Whatever might be said concerning the existence of trust and contract elements, the Court was of the view that, having regard to the "classic or standard trust" of the inter vivos estate process of ratification.

84. Convention, supra note 81, Article 2.
86. Id. at 19 (D.L.R.), 391 (B.C.L.R.), 286 (E.T.R.).
planning or testamentary kind, what is a trust was itself brought into question. The "classic" trust was described by the Court in this way—certain property specified by the settlor is transferred by that settlor to and held and administered by the trustee; it is then distributed by that trustee to beneficiaries who are ascertained, being described by the settlor, or who are ascertainable, being determined by the trustee under a power of appointment.

The Court continued:87

Here, the bank [the employer] as settlor does not settle the trust with a specific property but with the plan. Fundamentally it is a trust, not of property, but for a purpose. Neither is it an executory trust. The settlor's contributions to the trust are not by the direction of the settlor or trustee ascertained or ascertainable but are calculated and certified from time to time by the actuary. The beneficiaries of the trust, that is the members and others claiming through them, come and go and are determined at any given time not by the settlor or the trustee but by the pension committee. It is the pension committee, not the settlor or the trustee, that dictates payment by the trustee out of the fund of specific pension benefits to specific beneficiaries. In certain circumstances, the pension committee, not the settlor or the trustee, directs a refund from the trust of an ex-employee's own contributions with interest. Here the bank is not alone as settlor. Strange as it may seem, it is to be observed that the beneficiary employees themselves also effect settlement of the trust with their own contributions.

The conclusion reached was that "the trustee is, in this case, entrusted with the contributions of the employer and employees more in the character of a stakeholder than a trustee."88

This in the writer's view puts neatly, and bluntly, the issues faced by the author of a trusts treatise. It is not an issue that is contained within the traditional scope of family trusts which historically have been the successive concerns of conveyancers and estate distribution planners, with the marriage breakdown practitioner and the litigator lately interested in the remedial trust. It is the trust concept operating in a totally different setting, essentially within the law of employment. Indeed, it was the Court of Appeal's conclusion that this trust was of a totally different nature from the "classic or standard trust." It was this decision which assisted it in reaching the view that the trust fund was not irrevocably committed to the benefit of the members and their dependants, which would have excluded the employer from ultimate surplus.

88. *Id.* at 29 (D.L.R.), 392 (B.C.L.R.), 287 (E.T.R.).
The trust was not irrevocable, said the Court, because there was an intention to reserve a power to revoke. This interpretation of the trust and plan had been stoutly resisted by the members, on the grounds that such a power was incompatible with the intended disposition of the fund. But in vain. "The intention to reserve a power of revocation," said the Court, "need not be manifested by an express provision to that effect; it can be indicated by the use of language from which it may be inferred."

However, these words the Court cited directly from, and acknowledged, Scott on Trusts, 4th, making no reference to Commonwealth texts which show that the Commonwealth countries have by no means shown the same sanguine attitude towards the inferred power of revocation, even in voluntary trusts created by the settlor for family beneficiaries. English law, followed in that respect throughout the Commonwealth, has never shown the concern for the settlor's interests that from the beginning has marked United States law. It has always leaned instead towards the beneficiary as the "beneficial owner" of the trust property. Hence, for instance, we have the rule in Saunders v. Vautier in the Commonwealth countries, and its almost total rejection in the U.S. Another example is found in the fact that, while the restraint on alienation of capital in the U.S. spendthrift trust law is well established in the U.S., it is denied to the settlor in all Commonwealth common law jurisdictions. Nor did the Court examine Scott's supporting authorities, neither of which concerns the trust other than in a standard voluntary trust setting. Yet this was a pension plan trust, a commercial trust. The employer's contribution obligation was obviously not the voluntary dispositive gesture of a propertied individual in favour of his or her family members; it constituted remuneration for employment services, and in many employment situations, if not this one, that obligation would have been the outcome of collective bargaining.

Nevertheless, having decided that the trust was a mere safekeeping device for funds, available at the pension committee's call, the Court of Appeal went on to decide that, though any surplus on trust "termination" was expressly to be applied under the terms of the plan for the benefit of members and their dependants, it was the correct interpretation of the plan that, if the power of amendment was used to "revoke" the plan, as it was, the employer could

89. Id. at 19 (D.L.R.), 391 (B.C.L.R.), 286 (E.T.R.).
91. 41 E.R. 482 (1841), All E.R. 58 (1835-42).
thereby take any surplus, after meeting all defined benefits, for itself. This agreement was essentially an arrangement for the paying of specific benefits, said the Court; it was not a trust of a fund. The Ontario decisions were distinguished. Yet if one stands back for a moment it beggars belief that the parties in a commercial setting like this would so contract that one party is enabled to take a $21 million surplus at the expense of the other by instead revoking, on the eve of what effectively was and could have taken place as a termination. The employer's assets had been bought up, and it was going out of business. Looked at simply from the interpretational angle, let alone the policy considerations, the termination clause of the plan was thus rendered inoperative by the interpretation given to the immediately preceding amendment clause of the same plan.

Conceding that the trust deed and the plan in this case were to some extent contradictory, one still has to conclude that in this Court's opinion a defined benefit pension plan promises delivery of a defined benefit only; the pre-delivery funding of that promise is intended to provide security to the beneficiaries, not an entitlement of the beneficiaries to a fund. The trust merely holds (and invests) the fund that provides the defined benefit; its purpose is fulfilled when those benefits are paid. Surplus is not required for the discharge of the trust's purpose; the settlor therefore takes at this point, through revocation, moneys not required for the purpose of the trust. If in any circumstances the beneficiaries are to have the totality of the fund, those circumstances must be clearly described.

Who then is correct? What was the intention of the employer and employees? Perhaps the employee/beneficiaries' intention was irrelevant, if they were simply contributing to a plan sponsored and "settled" by the employer. Yet the Court of Appeal described them as "settlers" because of their contributions; but this would make their intention highly relevant, as well as give them the right, it would appear, to claim surplus. Or were they not "settlers," but payors into another's trust, when their intention is truly irrelevant? Equally possible was it that no one had ever thought through all the 'intentions' expressed in the plan arrangement. So many of these plans have come together with the input of many professionals, over a period of time, using precedents gleaned from others and assumed to be what was needed. At bottom several positions can be taken as to what a "trusteed" pension plan means and what is the role of the trust so employed. If the parties, employer and employee, are not agreed on those basic issues, what hope can there be that their "intentions" are clearly set out in the instrumentation?

Trust and contract is one problem. Similar issues are continually arising as between trust and agency, trust and debt, and trust and conditional transfer. The distinction in each case cannot be dismissed as an academic exercise, where characteristics of one concept are compared and contrasted with another. These are practical problems, occurring daily in business and
commerce, and their very occurrence may be due to the fact that courts and practitioners are today prepared to think across the traditional lines, not merely in accordance with those lines, as a previous century was content to do. At the most practical level, as in the writer's view the Hockin decision demonstrates, there is a cross-pollination of conceptual thinking and a puzzlement among those whose business is the law.

The content of law is also different as between countries, because law reflects the values of the society from which it emanates. The attitude of society towards the entrepreneur and individualism has always differed between the U.S.A. and the Commonwealth countries (the U.K., Canada, Australia and New Zealand). That is evident in the law of trusts of these two traditions, as we have seen. Now it is becoming clear that reliance upon the treatise of another country can be a misguided practice, unless it has been reliably established by the court that the account there given of the foreign concept correctly represents the law also in the court's own jurisdiction. As the Chief Justice of Australia has recently said, something treatise authors must surely note, "Comparative law was once considered the province of academics. But now it is important that the focus of practitioners also should extend beyond the domestic boundaries and embrace an awareness of developments in other legal systems."94

VIII. SUMMARY AND CONCLUSION

Criticism of the legal treatise (or textbook) by legal realists, and in recent times by the advocates of critical studies, has been taking place for fifty years. Its "black-letter" rules—its revelation of discovered principles—and its associated doctrinal analysis of case law are dismissed as based upon a fanciful assumption that law is other than the immediate and changing expression of social, economic, and essentially political forces. From a not dissimilar position the secularist dismisses the theologian. However, the complaint is now also made by writers not of the realist or critical studies persuasion that the treatise has imposed upon a fact-oriented and infinitely varied case law an author-designed structure of divisions and subdivisions, the existence of which over the last century has been increasingly accepted by the courts and woven into the texture of the case law. Put in place over a century ago, the organizational structure is rigid and static, unresponsive to the advance of independent judicial thought.

In the Commonwealth countries during the past thirty years there has been and there continues to be an increasing volume of change of perspective in the law of remedial trusts and of express trusts. The first question is

whether the Commonwealth treatises are the place where these developments, actual and possible in the future, should be recorded. Even as to the development that has already occurred, its nature and significance are often a matter of personal interpretation. The answer in the writer’s opinion is that unquestionably the treatise as a record of the existing law should reflect the fact that law in any particular is in the process of change. It should also reflect the significance of such change; that is, the theoretical structure of the subject’s presentation should also reflect developments that have occurred. There is no apparent reason also why doctrinal change should not cause the treatise author to re-assess the continuing validity of the organizational structure. Where the treatise, as a secondary source, should not go is into advocacy of what the law ought to be. That is the province of the journal article and the monograph. Desirable developments should also be the concern of the student text and manual; the more probing the questions there asked, the better for instructional needs. The reporting of law reform proposals by a treatise is one thing; advocacy and even disinterested speculation as to the future is another. The task of the treatise is to go to the frontiers of what is the law, including those matters on which there is a difference of opinion or actual controversy. But the treatise author is a commentator on the times; the author is constantly attempting to be as objective, exact, and comprehensive as possible.

How the author presents law in the process of change, and how that author conceives of the required objectivity in those areas of the law that are the subject-matter of differences of opinion, will be for each author to judge. There are no conventional practices, nor should there be. Some critics will applaud, others denigrate the author’s efforts; the author must accept both.

The second question is for whom this type of writing is today of value. For the first law degree student its comprehensiveness is likely to be a disadvantage, but for the graduate research student it will be a reference, both as to text and footnote. Essentially, however, it is for the practitioner and the courts. The Librarian of the Berkeley Law School has inferred that American practitioners continue to use "a research system that imposes a structure of organization derived from the grand scheme" of subject-arrangement only because they are "far from academic debates." But for the writer’s part this is a conclusion he would not reach. Professor Berring concedes that the full-text on line systems, LEXIS and WESTLAW, require an expertise and a sophisticated vocabulary in the user, and that this skill must be in place before any such case search, based on words and clusters of words, is a realistic alternative. Indeed, Professor Berring is of the view that "[a]s a result [of these systems], law is likely to atomize and specialize even further"; he

foresees new generations of lawyers "without the old conceptual restraints" who will take the law into "more positivist, specialized categories." In the Commonwealth countries, however, there is none of the comprehensive law reporting and the volume of annual case authority that is familiar in the U.S. These countries, also, have unitary or few jurisdictions and substantially smaller populations. It is much too early to say where on line computer research may eventually take them. Canada is probably closer to U.S. research techniques than any other Commonwealth country, and in this country for any substantial research task, at least in the writer's experience, computer research is more of a "start up" and "topping up" activity, i.e., to ensure quickly that nothing, particularly of very recent occurrence, has been missed. It also allows the researcher to obtain that which is not available in print. Libraries without the required printed material make full text database recovery especially valuable.

Moreover, the restraints of practice are different. The character of practice is a client with a problem in the context of the law that is in force; the consistent feature of the American and Canadian law school is an examination for students that is based upon an approach to the subject, and supporting material, that the professor has chosen to adopt for the course. In Commonwealth countries other than Canada the only noticeable difference is that a syllabus will be imposed upon the instructor. As a result of the demands of practice the practitioner lives in a judicially-controlled world of rules and principles, not as a theorist, but as one who has experience of those rubrics and abstract ideas in the context of reaching satisfactory conclusions for the client in activities such as settlement discussions, litigation, and contact with government departments and corporate institutions. A complete understanding of the modi of operation of such organizational bureaucracies, and of the ethos of courts and tribunals, is a hallmark of the successful practitioner. For all but the full-time litigator information retrieval is but a small part of his or her total practice world. Time also is precious, and the loose-leaf services of the commercial publishing houses have come to reflect well the combination of the latest information, digest, annotation, and comment that the busy practitioner can turn to for a thirty minute consultation on the entire issue under consideration. Nutshell sessions these may be, but the treatise (or subject-matter text) is available for more concentrated and in-depth specialist research.

As for the judges themselves, who continue to speak ex cathedra in terms of the private law principles, and who because of the length of cause lists everywhere are heavily reliant in most cases on the quality and comprehen-

96. Id. at 27. He concludes, "[t]his could be the signal for a new examination of the meaning of law in our society, or it could be the final stage in our devolution into plumbers." Id.
siveness of counsel's written and oral arguments, the writer sees no readily recognizable future change of direction in the character of reserved judgments. The respect given by the courts to such distinguished, if secondary, sources as the Restatements and Scott on Trusts shows no observable sign of abating. Change in this area, as with practice, there will be, but prediction as to the outcome of change occurring, and yet to occur, must be for academic writing. Judges inevitably are and, one would have thought, must be most circumspect; their task is to determine the law as it is with regard to the parties and the dispute before them. Wisdom also counsels, especially at the appellate level, that they be wary of the unforeseen doctrinal issue tomorrow may bring.

It is evident that the writer is not of the view that the character of a treatise in the Commonwealth countries today should respond to any current "disorder" by abandoning the so-called classical model. This conclusion, it seems to him, follows from the uses by the courts and the profession of the treatise (or comprehensive text). On the other hand student casebooks on the lines of Moffat and Chesterman, Trust Law: Text and Materials,97 he would warmly welcome, though even here it is interesting how often this casebook is used in England together with a classical student text. This perhaps is a measure of the times.

Such being said, it is surely right to contend that the winds of change must blow through the contemporary text. New conceptual frameworks in judicial thinking, and recognised doctrinal development—with at least an explanatory footnote for the unorthodox in the courts—must find a place. Indeed, if the organizational structure and the categorisation of the treatise cannot reasonably be justified, even given the role of the treatise for which this paper has argued, then re-thinking and adjustment there must be.

However, to capture change when the nature of the observed change is controversial, and still to satisfy those who seek to know the law as it is, constitutes no small task. It always was the challenge, and everything suggests to the present writer that that is how the challenge will remain for the foreseeable future, intensified though it certainly is and will continue to be.

97. Moffat & Chesterman, supra note 41.