Carter in his book on *Law, its Origin, Growth and Function.* Mr. Carter, as is well known, took the position that the judges were the "discoverers" and not the "makers" of the law. In refuting this proposition Professor Gray took the extreme position that even statutes duly passed by the legislature are not "law," but merely "sources of law," upon which the judges draw in exercising their law-making powers (pp. 125 and 170 in the present edition). With these two extreme views the reader will be interested to compare the view taken by Judge Cardozo of the New York Court of Appeals in his delightful lectures upon *The Nature of the Judicial Process* recently delivered at the Yale Law School. (Yale University Press, 1921). The learned justice concludes that "the truth is midway between the extremes" represented by Carter and by Gray. This, however, is not the place in which to set forth the arguments offered in support of this statement, and the learned reader must therefore be left to obtain them for himself at first hand from Judge Cardozo's lectures.

WALTER WHEELER COOK

COLUMBIA LAW SCHOOL

TRUST ESTATES AS BUSINESS COMPANIES. By JOHN H. SEARS. Second Edition. Kansas City, Mo.: VERNON LAW BOOK CO. 1921. pp. xx, 782.

Two or more persons, co-partners, may form a corporation to carry on their business, provided there is a statute authorizing them to incorporate for such purpose. Thereafter, the rights as between the incorporated group and persons dealing with it, with respect to corporate torts, contracts and property, must be determined in actions by or against the corporation and not by and against the members of the group individually. The result of this is that the members of the group escape individual liability and the ownership of its property remains unaffected by a change in the membership of the group. This rule of procedure is not a mere arbitrary and technical requirement, but is essentially just, because it gives effect to the intention of the parties in interest and enforces and protects their rights as they understand them. And it would seem that courts might have adopted and applied this rule in every case where it appeared that the persons forming the corporation intended to act as a group and not individually. But, according to a rule settled at a remote period, courts cannot, without legislative sanction, recognize the members of this group as a unit distinct from the members. This usurpation on the part of the sovereign or legislative power has been the fruitful source of misconception of the nature of a corporation. Legislators think of corporations as creatures of their own, and, as such, subject to their power of life or death. They think of them as Frankensteins of vast wealth and resources, possessed of privileges with which the legislators have graciously endowed them. And, with a certain savage instinct, they can see no reason, economic or moral, why these creatures of theirs should not be subjected to special taxation and to all sorts of regulations and restrictions, overlooking the obvious fact that, after all, these regulations, restrictions and taxation are burdens upon the individuals composing the corporation just as they would be upon the members of a co-partnership, if treated in the same way.

To escape some of the difficulties and disadvantages resulting from this legislative policy, without losing the advantage of exemption from personal liability, and of an ownership of property unaffected by a change of the parties in interest, groups of individuals have in recent times adopted the device of the business trust. Instead of forming a corporation to be managed by its directors for its stockholders, they transfer their assets to trustees with authority to conduct the business, subject to the rules relating to trusts, for the benefit of themselves as

cestuis que trustent. And two states, Massachusetts, in 1909, and Oklahoma, in 1919, have enacted statutes expressly authorizing this arrangement. The Massachusetts statute is entitled "An Act Relative to Voluntary Associations Under Written Instruments." It is very short and simply provides for the filing of the trust instrument and for the issuing of transferable certificates to represent the interests of the beneficiaries in the trust estate. In 1916 the Massachusetts Legislature passed another short act, providing that the voluntary association under such a trust instrument may be sued and that the property of the associated beneficiaries shall be subject to attachment and execution in like manner as the property of a corporation. The Oklahoma statute provides in like manner for the filing of the trust instrument but omits any reference to transferable certificates. On the other hand, it contains two important provisions not in the Massachusetts statutes. It limits the duration of such trusts to a definite period of not to exceed twenty-one years or to the period of the life or lives of the beneficiaries thereof. And it expressly provides that the liability for the acts and obligations of the trustees shall extend to the whole trust estate and shall not attach to the trustees or the beneficiaries.

These trusts, usually referred to as "Massachusetts Trusts" (having been first used and first recognized by statute in Massachusetts), our author designates "Trust Estates as Business Companies." These form the subject of his treatise, which consists of 470 pages of text, with full citation of authorities, and an unusual appendix of 303 pages, containing copies of the trust instruments under which the principal trusts of this kind are operating. Mr. Sears has rendered a service to the profession in publishing these documents and in assembling these decisions and presenting the law as developed therein with respect to these comparatively new forms of business organizations. The principal criticisms which may be made of his work are that he is too diffuse and prolix and too prone to restate what is elementary and obvious. He quotes very freely from the cases cited, but it is a mistake to suppose that one is helped as much by copious extracts from the decisions as by a concise analysis of them and a clear statement of their substance and effect.

The principles applicable to these trusts are few and simple. The chief difficulty is to determine what is required to create a trust and to avoid the creation of a partnership association. If a valid trust, as distinguished from a partnership association, is created, the rights and liabilities of trustee, beneficiary and creditor are easily determined in accordance with the rules applicable to trusts. If a partnership association is created, we have the rights and liabilities of a partnership. In the case of a trust, it is clear that the beneficiary is, in general, exempt from liability and that the trustee is personally liable, unless he has expressly stipulated for exemption from liability. It is also settled that the trustee may stipulate for such exemption and that the creditor has certain rights as against the trust estate, whether the trustee is or is not also liable. In discussing this latter point, namely, the liability of the trust estate, the author omits to refer to the articles by Louis D. Brandeis[1] and Austin W. Scott.[2]

The question has been raised whether these trusts violate the rule against perpetuities and, if they are created in New York, whether they violate the New York rule against the suspension of the power of alienation or the accumulation of income.

In Chapter XIII, Mr. Sears deals with the subject of "Perpetuities and Restraints upon Alienation." He begins by stating in § 102:

"A perpetuity is obnoxious to American jurisprudence, primarily because

[1] (1881) 15 American Law Rev. 449.
[2] (1915) 28 Harvard Law Rev. 725.

it creates an absolute suspension of the power of alienation. The creation of a trust naturally suggests, though it does not necessarily involve, the idea of such suspension."

But in § 104, he quotes with approval from Gray on *Perpetuities* that it is a "mistaken idea that a trust violates the rule against perpetuities because it is to last indefinitely." And in § 103, he recognizes that the rule against perpetuities is aimed against the remote vesting of a future interest. Again in § 107 he refers to "the theory of undue restraint of trade," but this obviously has nothing to do with perpetuities or restraints upon alienation. In this section he also considers the effect of a power of sale with directions to reinvest upon the like trust. This is discussed at length in an article by Frank Dwight in the COLUMBIA LAW REVIEW[3] which is not mentioned by Mr. Sears.

Under the law as it existed prior to the enactment of the Revised Statutes of New York, these trusts involve neither a perpetuity in the sense of a too remote future interest, because the entire interest is a present and vested one, nor do they involve the suspension of the power of alienation, in so far as the interests of the *cestuis que trustent* are freely alienable. But, according to the doctrine prevailing in Massachusetts and some other states,[4] under certain circumstances trusts may be indestructible, although all interests are vested in a single person or class of persons and, therefore, trusts for an indefinite period may in these states be invalid as against public policy. And, according to the New York Revised Statutes, the interest of a *cestui que trust* in a trust created by a third person for the payment to him of the income during his life or a shorter term is inalienable. Hence, it would seem that trusts of this kind, if created by a testator in New York, must be limited in duration to the period of two lives in being, for the New York law forbids the suspension of the power of alienation for a longer period. On the other hand, it has been held that a trust to pay over income created for the benefit of the settlor himself gives him an alienable interest in the income. Such a trust, therefore, it would seem, does not involve a suspension of the power of alienation. If the trust is created by several persons, as by the members of a joint stock association or corporation, for their benefit, will the same rule be applied? Mr. Sears throws little new light upon any of these questions.

But, in spite of its defects, the practicing lawyer, who has occasion to advise with respect to this subject, will find the book a valuable aid in his study and investigations, and the second edition will undoubtedly be as widely used as the first edition. It may also be commended to the attention of our publicists, legislators and some of our judges. For, in pointing out this trust arrangement as a substitute for incorporation and a legal device for securing its substantial advantages without legislative sanction, it may furnish an antidote to the poison in the minds of those who vaguely conceive of a corporation as a real existence, created by legislative fiat and possessing extraordinary privileges, which may be oppressed and abused without effect upon its stockholders, the men, women and children who are the substantial owners of its property and income.

GEORGE F. CANFIELD

COLUMBIA LAW SCHOOL

A HANDBOOK ON THE LAW OF PERSONS AND DOMESTIC RELATIONS. By WALTER C. TIFFANY. Third editions, by ROGER W. COOLEY. St. Paul, Minn.: WEST PUBLISHING CO. 1921. pp. xv, 769.

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[3] (1907) 7 COLUMBIA LAW REV. 589.

[4] See Gray, *Perpetuities*, (3d ed. 1915) § 120ff.; (1915) 28 Harvard Law Rev. 725.