

BOOK REVIEWS

Jacobs' Law of Trusts in Australia, Fourth edition by R. P. Meagher and W. M. C. Gummow, (Butterworths Pty Ltd, Australia, 1977), pp. i-iv, 1-810, Index 811-32. ISBN 0 409 37103 3.

Soon after the first edition of *Jacobs' Law of Trusts in New South Wales* was published in 1958 it became a valuable work of reference not only in that State but elsewhere in Australia. The second and third editions, published in 1967 and 1971, enhanced the book's reputation. Stocks of the third edition having been exhausted the editors of that edition have now taken the opportunity to add to the book's usefulness.

They have modified the text to take account of important recent decisions. In the discussion of what are public purposes in relation to charitable trusts the decision of the House of Lords in *Dingle v. Turner*¹ is noted. The editors greet it with no great enthusiasm and regard it as having thrown the principles into some confusion. They animadvert on other decisions of the House of Lords. *McPhail v. Douulton*² sets up criteria which 'carry considerable difficulty in application' and 'there remain some difficulties posed by *Barclays Bank Ltd v. Quistclose Investments Ltd*'.³ In relation to the last case they raise a query as to 'why beneficial title to the moneys was not vested in the shareholders immediately the loan was made'. The answer may be that the declaration of a dividend creates a debt owing to a shareholder and that the company cannot unilaterally change its character from debtor to trustee. Although a beneficiary's position is often better than a creditor's it is not so invariably: a trustee is not an insurer of the trust fund. Be that as it may, the editors share little relish for the 'new era of legal neo-colonialism' which, according to their preface, is inaugurated if Gibbs J. is correct in the view expressed by him in *Public Transport Commission N.S.W. v. J. Murray-More (N.S.W.) Pty Ltd*⁴ that decisions of the English Court of Appeal bind all Australian courts other than the High Court of Australia. In the treatment of resulting trusts they examine the English cases on property disputes between husband and wife since *Pettitt v. Pettitt*⁵ and their assessment is that, with 'the honourable exception' of Bagnall J.'s judgment in *Cowcher v. Cowcher*,⁶ they are 'a wilderness of single instances, productive of no principle and indicative only of decay in legal technique'.

Decisions in England and Australia since 1971 account for many additions to the text but not all. In chapter 2, which is aimed at distinguishing a trust from other legal institutions, there is now a much enlarged treatment of contracts for the benefit of third parties and of trusts and powers. There has been added to chapter 2 a discussion of testamentary contracts which provides a clear treatment of the topic but the points of contrast with a trust are not made manifest and some deviation from the aims of chapter 2 is evident. The explanation of the capacity of minors in chapter 4 takes account of recent legislation. In the same chapter there is some new writing in which the relevance of *Gibbons v. Wright*⁷ to trusts is noticed.

¹ [1972] A.C. 601.

² [1971] A.C. 424.

³ [1970] A.C. 567.

⁴ (1975) 6 A.L.R. 271, 282.

⁵ [1970] A.C. 777.

⁶ [1972] 1 W.L.R. 425.

⁷ (1954) 91 C.L.R. 423.

In chapter 6 there is a more extensive discussion of *Re Pryce*.⁸ Incidentally, is *McFadden v. Jenkyns*⁹ really an authority for the proposition for which it is cited on p. 78? Chapter 7 contains an enlarged discussion of the rationale of the secret trust. The discussion of the rule against perpetuities in chapter 9 now takes account of the legislative changes in Victoria, Queensland and Western Australia.

In chapter 10 on charitable trusts there is an enlarged treatment of the principles on which courts determine whether a purpose is within the 'spirit and intendment' of the Statute of Charitable Uses 1601.

Chapter 13 on constructive trusts has been added to by a re-written discussion of the position of a vendor of land, a close examination of *Lister v. Stubbs*¹⁰ which bears out the anomalous character of that troublesome decision, a revised treatment of the position of strangers receiving trust property and a critical review of recent decisions of the English Court of Appeal which have imposed constructive trusts when deciding property disputes between husband and wife. The treatment in chapter 23 of the rights of beneficiaries to extinguish a trust has been extended and special attention has been given to the position of beneficiaries under a discretionary trust. Chapter 27 on tracing has also been further developed.

Other improvements over the last edition have been made by the addition of a new chapter on trusts in the conflict of laws and a new chapter entitled 'Trusts and Revenue Law'. This last chapter on taxation law affecting trusts provides a good balanced account much of which will still be operative when the charmed life of discretionary trusts as instruments of tax avoidance comes to an end.

In a further departure from the earlier edition the editors have set out to encompass within the book the whole of the law of trusts in Australia, both statutory and 'judge made'. In the earlier edition relevant New South Wales legislation was often reproduced in the text. This method has been followed in the new edition with the addition of references to comparable legislation in other States. Legislation of another State which differs markedly from that of New South Wales is reproduced in the text. In aiming to refer to all relevant legislation the editors set themselves a daunting task. For the most part they have performed the task well but inevitably there are omissions and they are mentioned here for attention in the next edition: at p. 102 the Victorian Status of Children Act 1974 deserves reference in relation to the construction of the word 'children'; at p. 123 the effect of provisions like s. 16 of the Victorian Perpetuities and Accumulations Act 1968 on determinable and conditional interests merits notice; the Victorian Marriage Act 1958 s. 161 is relevant to property disputes between husband and wife as a provision modifying the impact of *Wirth v. Wirth*¹¹ and at p. 244 the description of *Percival v. Wright*¹² needs the addition of a footnote referring to legislation on insidertrading.

The existence of the Family Law Act 1975 (Cth) is noted without discussion in chapter 12 in relation to the doctrine of resulting trusts but it is not mentioned in the discussion in chapter 9 of the occasions on which a trust may be avoided. The text at p. 391 takes no account of the Tasmanian Apportionment Act 1871. The statement at p. 427 that Queensland has no counterpart of s. 27A of the Trustee Act 1925 (N.S.W.) overlooks s. 220 of the Property Law Act 1974. In the absence of a governmental policy of seeking uniformity in the naming of Acts it is very easy to overlook relevant provisions. The law of Australian jurisdictions would become more accessible if there could be developed some machinery for introducing and maintaining uniform nomenclature. Perhaps the various Law Reform Commissions could assist.

To accommodate new material in the text and to provide the full text of each State's Trustee Act in appendices while restraining the addition of pages the publishers have compressed the text by consolidating paragraphs and printing more words to a line. The text which occupied 584 pages in the last edition now takes up 626 pages.

⁸ [1917] 1 Ch. 234.

⁹ (1842) 1 Hare 458, 1 Ph. 153; 41 E.R. 589.

¹⁰ (1890) 45 Ch. D. 1.

¹¹ (1956) 98 C.L.R. 228.

¹² [1902] 2 Ch. 421.

Jacobs' is an impressive compilation and is obviously a prime work of reference for anybody concerned with trusts. No book is beyond possibility of improvement and the following suggestions are offered for consideration in relation to future editions. Should not unit trusts be described? *Re Tyrie (No. 1)*¹³ merits inclusion in the treatment of lapse of gifts to charitable institutions. Is it the law in all States that a corporation can hold property in joint tenancy with individuals (compare p. 259 with p. 288)? In the case where a trustee has a right of indemnity against a beneficiary personally can a creditor of the trustee be subrogated to the trustee? In the bankruptcy of a trustee can a beneficiary who provides funds by way of indemnity insist on the funds being paid to a particular creditor? Can there be added to the treatment of bankruptcy of an individual trustee some discussion of what should happen when a corporate trustee goes into liquidation? The utility of the book would be further improved by the inclusion of a Table of Statutes. A comparative table for the various Trustee Acts is provided but there is much legislation relevant to trusts outside those Acts.

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Lawyers, by Julian Disney, John Basten, Paul Redmond and Stan Ross, (Law Book Co. Ltd, Sydney, 1977), pp. i-xliii, 1-748, Index 749-58. ISBN 0 455 19501 3.

There have been very few publications that have discussed the structure, composition and operation of the legal profession in Australia. It is, I believe, significant that this book, which attempts to cover this ground, has been published at a time when the legal profession is under considerable scrutiny and attack.

Its main purpose is to assist law students to understand and analyse the structure, composition and operation of the legal profession in Australia. This is, I believe, a commendable aim as in the past, students have not been given the benefit of such an insight, which could be very valuable to them as they pass through law school and subsequently into practice. The secondary purpose of the book is to facilitate and stimulate greater public and professional discussion of the role of the legal profession in a modern society. Again I believe that this is a very commendable and important object.

The book is a much needed one and nothing like it has previously been published in Australia. My experience would show that law students have little or no knowledge of the structure and workings of the profession they will eventually enter and that they are looking for more information and guidance about the profession. It is therefore a book that will no doubt be read and studied by all law students but, just as importantly, should be read by every lawyer, particularly private practitioners.

The authors have assembled considerable valuable resource material on the structure of the profession. There is, in my view, occasional unfair implied criticism arising from their comments. For example, at p. 83, they state '[d]espite the importance of analysis and prediction of supply and demand in relation to legal practitioners, the universities and professional associations have failed to keep adequate statistics and to do the necessary research and collation'. I believe that this is unfair as far as law societies are concerned because, firstly, they are bound to admit graduates to practice, secondly, they do not have the necessary resources to carry out such research and analysis and thirdly, it is very difficult for them to obtain this information.

Another example is at p. 179 where the authors deal with the social background of lawyers and state that no comprehensive statistical analysis has been made 'of the social background of Australian practising lawyers in terms of the socio-economic status of their parents, their religious or political affiliations, their educational back-

¹³ [1972] V.R. 168.

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