

BOOK REVIEW.

Garrow & Willis's Law of Wills and Administration. 3rd ed. by J. D. WILLIS S.M. 1960. lxxii and 775 pp. (including appendix and index). First Supplement 1963. viii and 12 pp. (Butterworth & Co. (New Zealand) Ltd. £A8. 6. 6).

The name of Garrow is so well-known to New Zealand lawyers, whose shelves are almost certain to hold Garrow, Criminal Law in New Zealand, Garrow's Real Property in New Zealand, Garrow and Gray, Personal Property in New Zealand, Garrow & Henderson, Law of Trusts and Trustees, and Garrow & Willis, Law of Evidence in New Zealand, that there is a danger of an uncritical acceptance of any book which bears his name. This is even more probable when the book has gone through several editions and seems to hold a commanding position in the field with which it deals. Criticism of such a book may appear to be lese-majeste.

In the present case the publishers have launched a new series, entitled Butterworths Standard N.Z. Textbooks, in which the Third Edition of Garrow & Willis's Law of Wills and Administration is the first to be placed before the legal profession. The honoured name of Garrow and the entrenched position of earlier editions of this work will probably ensure a wide circulation for the latest edition.

In these circumstances, what is the function of the reviewer? Certainly not uncritical acceptance. And yet on the other hand a review of a Third Edition should not be used as the occasion for visiting the sins of the author upon his editor, even where, as here, the editor was responsible for a previous edition. An editor must to a certain extent take his author as he finds him. And, though it may in New Zealand border upon heresy to suggest it, Garrow's work is not beyond criticism. This review will not deal with the structure of the book nor with the basic work of Garrow which still forms its foundation and a substantial part of its superstructure. Rather, it will be concerned with the contribution which as editor Mr. J. D. Willis S.M. has brought to this edition of Butterworth's Standard New Zealand Textbook No. 1. As the greater part of the developments in the law since the writing of the Second Edition in 1947 (published in September 1949) are statutory and related to the law of administration, this review will necessarily bear a similar emphasis.

The legal profession is entitled to expect that an edition published in December 1960 contains a reasonably full and accurate statement

of the law as at that date. If important changes in the law are made by statute before publication, it ought not to be too much to expect the publishers to withhold publication so that the editor may satisfy the reasonable expectations of the profession.

In some respects this edition is premature. Although the publication of a book always depends upon the co-operation of publisher and author, the major share of responsibility seems to rest with the publisher. In its advertisement the publisher asserts that "amending legislation passed during the 1960 session of Parliament has been included." The editor is more cautious. In his preface, which is dated October 1960, Mr. Willis says that "The Law is stated as at 31st August 1960, though brief reference has been made to the Administration Amendment Act 1960, which was passed by Parliament after the major part of the work had gone to press." In a book offered to the legal profession as a standard textbook brief reference to vital legislation is not good enough. The Administration Amendment Act 1960 contains two important provisions (sections 30A and 30B) relating to the protection of administrators and to the following of assets after an administrator or trustee has made a distribution. Those provisions are lengthy—occupying four-and-a-half pages in the statute book—and, in an age where legislation is rarely simple, they are unusually complicated. Brief reference to them will be quite inadequate.

But what exactly does the brief reference consist of? According to the Table of New Zealand Statutes, which was prepared by the publisher, there is only one reference to sections 30A and 30B (described in the Table as ss. 30(a), 30(b)) in the whole book. It is to be found on page 583 sandwiched between a paragraph headed "Discovery of Will or Subsequent Will" and a paragraph, with no heading, which deals with the position where there has been a grant of administration of the estate of a living person who was thought to be dead. The brief reference reads as follows: "See also ss. 30A and 30B of the Administration Act 1952, pp. 716, *et seq.*, *post.*" That is all. If the reader turns to pp. 716 *et seq.*, he will find that those pages (pp. 716-8) contain a reproduction, without any comment whatever, of ss. 30A, 30B. The third major change effected by the Administration Amendment Act 1960 receives similar treatment. It applied, but not until 1st January 1963, to the prohibition of grants of administration to non-trust companies. In the text of this book there is reference, at p. 560 in Chapter 43 (Executors and Administrators), and at pp. 593-4 in Chapter 44 (Probate), to the appointment of corporations as executors. In view of the fact that the Court will *not* grant probate to a non-trust corporation, but would at the time the book

was written and until 1st January 1963 grant letters of administration with will annexed to a nominee or syndic for the use and benefit of the corporation, a more appropriate environment for the discussion would have been Chapter 45 (Letters of Administration). The editor however deals chiefly with grants to non-trust corporations at pp. 593-4 under the general heading of "Names." In his treatment of the topic the editor fails to appreciate the position where a testator appoints as executors such specified number of directors of the company as may be nominated by resolution of the company. In such a case the testator is delegating to a designated person, as he is perfectly entitled to do, the nomination of his executors. Once those persons are nominated by the company, they receive a grant of administration, not as syndics for the company, but as executors in their own right. But not once in the discussion is the reader given the slightest inkling that after 1st January 1963 important changes were in this respect effected by s. 42A of the Administration Act 1952, which was enacted by s. 4 of the Administration Amendment Act 1960. This is brief reference with a vengeance.

It is only fair to mention that at p. 622 under the heading of trust companies the editor concludes his discussion of the point with the following paragraph:

"Letters of administration will not be granted to a syndic or nominee on behalf of a trust company. See the Administration Act 1952, s. 42, as amended by the Administration Amendment Act 1958, s. 2. See also s. 42A of the Administration Act 1952, p. 720, *post*. This s. 42A comes into force on 1 January 1963."

On that paragraph four comments may be made: firstly, none of the headings in the index which the reader might reasonably be expected to consult on the topic refers to it; secondly, there is a basic distinction, which is not made clear in the text, between trust companies and other corporations; thirdly, the first sentence is almost identical with s. 42(2) of the Administration Act 1952, which was *not* amended either by s. 2 of the Administration Amendment Act 1958 or by any other Act; and, finally—a small point—s. 42A is not to be found on "p. 720 *post*", but on p. 721, and then without a section heading at all and with no variation in type for the section number. At least s. 42A is printed in its proper sequence: this is more than can be said for s. 42(1), which is separated by fourteen pages (at p. 734) from its proper position before s. 42(2) on p. 720 in the Appendix.

But the tale is not yet told. In his treatment of commission to executors and administrators (pp. 578-583, 638) the editor completely

disregards the provisions of s. 72 of the Trustee Act 1956, which were substituted by s. 10 of the Trustee Amendment Act 1960 for s. 72 as originally enacted. There can be no justification for making "brief reference" to the Administration Amendment Act 1960 and none at all to the Trustee Amendment Act 1960, which was assented to on the same day. The consequence of this editorial silence is that the reader cannot be sure whether the discussions of protection for administrators against creditors and other claimants by means of advertisements (pp. 285, 584, 585); of the Court's power to authorise dealings with trust property (pp. 576, 676); and of the rule in *Allhusen v. Whittell* and its ramifications (pp. 299, 322, 636, 638)—whether these discussions take into account the statutory changes effected by ss. 4, 8, 14 of the Trustee Amendment Act 1960.

In one instance at least the editor is two moves behind the legislature. On pp. 582-3 there is some discussion of the assets liable for the payment of commission. The reader is told that "Section 72 gives the Court jurisdiction to pay commission 'out of the assets of any deceased person'—that is, out of the general assets available for the payment of administration expenses of which the executor's remuneration is a part." The truth is that the words quoted did appear in s. 31(1) of the Administration Act 1952, but that provision was repealed by s. 89(1), and replaced by s. 72(1), of the Trustee Act 1956. And, as has already been mentioned, s. 72(1) in its original form has been changed by s. 10 of the Trustee Amendment Act 1960.

There are even more significant omissions. Lawyers would probably agree that the administrator is under an obligation to pay creditors and to transfer the balance of the estate to the persons beneficially entitled. That much is clear. The difficulty arises when it is not known who the creditors or beneficiaries are. The editor discusses the protection given by the Legislature in s. 35 of the Trustee Act 1956 to administrators, by means of advertisements, against creditors and certain other claimants—without any reference to the changes made by s. 4 of the Trustee Amendment Act 1960. The protection afforded by s. 75 of the Trustee Act 1956 for the barring of claims receives scant treatment on p. 584 (the Table of New Zealand Statutes prepared by the publisher is defective in not giving this reference), and the provisions of s. 76 dealing with the distribution of shares of missing beneficiaries are not even mentioned. Consequently there is no discussion of *In re Sheridan*,¹ which emasculated s. 76, and, of course, there is no reference to the three page long section 76, which was

¹ [1959] N.Z.L.R. 1069.

substituted for the original by s. 12 of the Trustee Amendment Act 1960.

Even where the editor does include recent relevant legislation, he is content with reproducing the enactment in the body of the text with little comment or explanation. Thus, most of the provisions of the Law Reform (Testamentary Promises) Act 1949 are set out on pp. 22-4; the Wills Amendment Act 1955 on pp. 77-81; and the Simultaneous Deaths Act 1958 on pp. 230-2. It is difficult to imagine a less satisfactory method of informing the mind of practitioner or student about the effect of such legislation.

Recent case law does not suffer to the same extent. Perhaps this is a sign of the comparative value placed by the legal profession upon case law and statute law. But even here there appears to be evidence of a scissors-and-paste approach. Thus cases decided in the ten years immediately before publication are inserted rather than woven into the text. The discussion of recent cases on mutual wills (pp. 20-1) is typical. After dealing with this topic in two clear and coherent paragraphs the editor continues:

“Reference should also be made to *Guardian, Trust, and Executors Co. of New Zealand Ltd. v. Inwood* [1946] N.Z.L.R. 614 (two sisters making identical wills apart from the life interest given to each other: by mistake each giving and executing the will that should have been signed by her sister). This case was distinguished in one of a similar type, application for probate being refused because applicant failed to prove that testator intended the document he signed to operate as his will: *In re Foster (decd.)* [1956] N.Z.L.R. 44.

The draftsman instructed to draft wills in identical terms, *mutatis mutandis*, or which have other elements indicating mutuality, should enquire whether they are intended to be irrevocable without the consent of both parties. If they are, then the agreement not to revoke should be recited in unequivocal terms in each will; if they are not, then it is almost equally desirable to negative the imposition of any trust on the estate of the survivor.

See also, *Re Green, Lindner v. Green* [1950] 2 All E.R. 913.” A number of points arise: firstly, neither *Inwood's* case nor *Foster's* case really raises a question of mutual wills at all; secondly, there are no means of knowing that *Inwood's* case was decided by the Court of Appeal and *Foster's* case by the Full Court; thirdly, no hint is given of the actual decision either in *Inwood's* case or *Foster's* case; fourthly, the grounds for distinguishing *Foster's* case from *Inwood's* case are

not clearly stated; and, finally, the bare reference to *Re Green* is unhelpful and there is no reason for omitting the Law Reports citation ([1951] Ch. 148), especially when the two reports are by no means identical.

It might have been thought that the publication of the 1963 Supplement would have afforded the editor with an opportunity of remedying many of the deficiencies in the 1960 edition. Some of the more glaring omissions in relevant statutory material have been cured. The Supplement now gives a reference (p. 11) to the new s. 72 of the Trustee Act 1956, as enacted by s. 10 of the Trustee Amendment Act 1960. It also notes the changes effected by ss. 4, 14 of the Trustee Amendment Act 1960 to the law relating respectively to protection for administrators against creditors and other claimants by means of advertisements (p. 8) and to the rule in *Allhusen v. Whittel* (p. 9). Even so the Supplement is not free from omissions of relevant statutory provisions.

It is difficult to understand what purpose the Supplement was supposed to achieve. Of the twelve pages in the Supplement almost three are devoted to a verbatim statement of the provisions of the Law Reform (Testamentary Promises) Amendment Act 1961, but with no explanatory material, and a page to a reproduction of the Wills Amendment Act 1962. No attempt has been made to explain to the reader the effect of any of the legislation enacted since 31st August 1960. In the result, the editor has adopted one of three courses: to repeat the exact words of statutes considered to be relevant; to make brief reference to such statutes; or to omit all reference to certain statutes. The editor's treatment of case law is no easier to understand. Of the thirty-seven cases mentioned in the Table of Cases eleven were decided and reported prior to 1960, when the Third Edition was published. Only fourteen of the remaining twenty-six are decisions of New Zealand Courts: one case is given a New Zealand citation, but it is a decision of an English Court.

Garrow & Willis's Law of Wills and Administration is the leading textbook in New Zealand on its subject. This is a melancholy thought. New Zealand lawyers deserve better service, but at least they have the necessary statutes and judicial decisions at hand to enable them to find their own law. For the enquirer outside New Zealand such self-help is extremely difficult. For him this book can only be classed as a snare and delusion.

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