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Book Review: The Modern Law of Trusts, Second Edition, by David B. Parker and Anthony R. Mellows

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BOOK REVIEWS

REVUE DES LIVRES

The Modern Law of Trusts. Second Edition. By DAVID B. PARKER and ANTHONY R. MELLOWS. London: Sweet and Maxwell. 1970. Pp. xxx, 446. (No price given)

The continued existence of so many students' textbooks on the law of trusts is one of the more remarkable features of law book publishing in England. The appearance of new editions of the two most recent publications is some indication that there is as yet no glut on the market. One is probably justified in concluding that each of the texts currently available and more or less up to date has some desirable quality not to be found in the others. It would, however, be a mistake to assume that the distinguishing characteristic of the work under review is indicated by its title. The only significant concessions to modernity to be found within its pages are a preference for the latest available authorities and the now almost compulsory references to the taxation of trusts. In all other important respects the book is thoroughly traditional in its conception and treatment of the subject.

Despite the short compilation of purposes for which trusts are created and the passages devoted to taxation, the trust is treated on the whole as a static rather than a functional concept and the attention of the students who use the book will be directed mainly at traps to be avoided in the course of its creation and administration. They will not learn when to use the concept; nor will they receive much guidance as to the considerations which affect the choice of the terms or contents of the trust. This has been, of course, the traditional approach but one had thought that the number of law teachers who would defend it was steadily diminishing and not only on this continent. No one can deny that there is a place for practitioners' compendia of lawyers' and trustees' mistakes but it is more than a little depressing that this, the most recent of the works written for students, keeps so close to the traditional model. There is, to be sure, rather more discussion of the principles behind the rules relating, for example, to semi-secret trusts or to trusts of voluntary covenants than one would expect to find in *Lewin* or even *Snell* but essentially the approach is the same: irrespective of what we use it for or how we use it,

the trust concept is to be studied in sterile isolation.

It is perhaps a trifle unfair to direct the above comments at a book which gives rather more attention to the taxation of trusts than was customary in the older English texts. It is doubtful, however, whether there is much to be gained from the insertion of short summaries of complex revenue provisions into texts which are, in all other respects, constructed along the traditional lines. Rather than more students' manuals on the law of trusts, what would seem to be required both in England and in this country are books and courses in estate planning or, at least, with a much stronger planning emphasis. It is true that the trust is by no means exclusively an estate planning device. It is still, however, predominantly this and it can be most valuably studied in its estate planning context. The old view that "the three certainties", secret trusts and the definition of charity have considerable "intellectual" interest, but that the planning considerations which exercise the time and mental equipment of practising lawyers have none, is merely a comfortable prop for tired teachers.

If the general considerations are put on one side, it seems clear that brevity and comparative simplicity are the main distinguishing attributes of the work. These qualities should not be discounted. *Parker and Mellows* is neither as cryptic as *Snell*,¹ as turgid as *Pettit*² nor as discursive as the new *Hanbury*.³ As a short precise account of the present state of the substantive law of trusts in England it has considerable merit. In their preface to the second edition the authors mention that the work has been found to be useful to accountants and practitioners in other fields where questions of law are never far removed. This one can understand. Whether it is a suitable companion for law students at a university is another matter. The brevity of the work is here something of a drawback. The authors have attempted to do more than outline the effect of the cases and statutory law in the area. Some attempt is made to criticise particular decisions but when this is done it is most frequently on the basis of inconsistency with other decisions rather than by reference to basic principles or to functional and policy considerations. The excessive positivism does, of course, make the book particularly unsuitable for Canadian students. If such students are to be encouraged to reject at least the notion that decisions of English courts are necessarily the last word, this book will not help. Decisions of the courts of other common law countries are for the greater part ignored and the authors show no sign of having benefited from the manifold efforts of the team responsible for the *Annual Survey of Commonwealth Law*.

¹ *Snell's Principles of Equity* (26th ed., 1966).

² *Equity and the Law of Trusts* (2nd ed., 1970).

³ *Hanbury's Modern Equity* (9th ed., 1969).

In this second edition, account has been taken of the most recent English cases up to and including the decision of the House of Lords in *McPhail v. Doulton*.⁴ The authors incline to the view that, in that case, the majority of the House of Lords extended the principle of *Re Gulbenkian's Settlement Trusts*⁵ to all trusts and not merely to so-called "trust-powers". Whether this is an accurate prediction of the way in which the decision will be interpreted in cases in which trustees have no power to select the beneficiaries may be doubted. Where there is a duty to distribute a fund in fixed proportions among members of a class, something more than the *Gulbenkian* test is required. This does not mean that it is absolutely necessary to have a rule that each and every beneficiary must be ascertainable. Where the criterion to be applied is certain and the class is not so large as to make it unrealistic for the trustees to endeavour to ascertain its members, it may not matter that it is not possible to identify them all. It is undeniable that this more flexible approach would create difficulties for trustees in some cases. It may, however, be significant that in a recent Canadian case⁶ where such difficulties existed, no doubt was cast on the validity of the trust.

A decision which has received some curious comments in English journals is that of Goff J. in *Re Denley's Trust Deed*.⁷ It will be recalled that in that case the learned judge held that a trust to maintain land as a sports ground for the benefit of employees of a company was valid. Although Parker and Mellows seem to approve of the policy behind the decision they, too, doubt whether the approach of the learned judge was "correct in law".

It is not uncommon for settlors and testators to attach specific purposes to gifts and bequests made to identifiable beneficiaries. A trust for the establishment of the settlor's children in a profession or in business or for their general education is not void; nor is a testamentary trust which directs the trustees to publish the testator's manuscripts or to continue his business, for the benefit of specified individuals; nor is an investment trust. Why then should it be suggested that a trust to maintain a sports ground for the benefit of members of some other ascertainable class requires a different treatment? The reason given by the authors is that ". . . if a provision is framed as a purpose, even though it is for the benefit of individuals, it is the purpose which is the dominant factor and if it is non-charitable it should fail unless it falls within the recognized exceptions". This reasoning leads to a distinction more devoid of substance than that which the House of Lords re-

⁴ [1970] 3 W.L.R. 1110.

⁵ [1970] A.C. 508.

⁶ *Re Allanson*, [1971] 2 O.R. 279, rev. [1971] 3 O.R. 209 (C.A.).

⁷ [1968] 1 Ch. 373.

jected in *McPhail v. Doulton*. The truth is that the rigid dichotomy between trusts for persons and trusts for non-charitable purposes is more the creation of academics than of the courts. The proposition that, subject to exceptions and in the absence of any relevant statutory provision, trusts for non-charitable purposes are void may be a convenient way of summarising one line of cases founded on the decision in *Morice v. The Bishop of Durham*.⁸ The principle behind the proposition is, however, simply that ". . . a trust by English law, not being a charitable trust, in order to be effective, must have ascertained or ascertainable beneficiaries".⁹ On that basis, the decision in *Re Denley's Trust Deed* cannot be questioned.

Until the definitive Canadian text has been completed, law teachers in this country have no choice but to recommend one of the English books to their students. Professor Scott's treatise has still no peer as a work of reference but, of course, its cost places it far beyond the means of most students who wish to purchase a text. Of the existing English books, *Parker and Mellows* should not be ignored but, for the purposes of Canadian students, it is, in the reviewer's opinion, more than overshadowed by the new edition of *Hanbury*.

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⁸ (1805), 10 Ves. 522.

⁹ *Re Endacott*, [1960] Ch. 232 (C.A.), at p. 246, per Evershed M.R.

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¹ Cases on Carriage by Sea (1965); Cases on Sale of Goods (2nd ed., 1969); Chalmer's Marine Insurance Act (6th ed., 1966); General Principles of Insurance (2nd ed., 1970); Fire and Motor Insurance (1968); Casebook on Insurance (1969); Marine Insurance (1969); Topham and Ivamy's Company Law (1970).

² Preface, p. v.

³ Lawyers, doctors, dentists, architects, etc. are all required to exercise their profession in the form of partnership rather than incorporated associations.