Reviews and Notices

Modern Equity: The Principles of Equity. By HAROLD GREVILLE HANBURY, D.C.L. Sixth edition. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited. 1952. Pp. xl, 774. ($12.00)

To review the sixth edition of Hanbury's *Modern Equity* from the standpoint of style, the capacity of the author for intensive research and the accuracy of his views on moot problems would entail a repetition, with minor variations, of much that has been said in reviews of the earlier editions published in the short period between 1935 and 1949.

The most substantial difference between the sixth edition and its predecessors is that it yields much more fully to the assertion that the distinction between common law and equity is no longer of any value, large parts of the law can be restated without using it at all, we are approaching slowly but surely the point of fusion between the two branches, and it is difficult nowadays to formulate a problem which any court would be free to determine exclusively in the light of equitable principles. The change in direction is mentioned in the preface; in it Dr. Hanbury states that until a little while ago he had followed resolutely in the footsteps of Maitland in maintaining that law and equity are not fused, but that he now concedes that rigid adherence to this doctrine would denote indifference to much contemporary thought. The impact of that change is reflected throughout the book and, not less naturally, in a reviewer's eventual reaction to it.

Dr. Hanbury appears to proceed, if only tacitly, on the assumption that the cardinal function of a modern text on equity is the presentation of the law in the various fields where equity has intervened. To accomplish that purpose, he devotes by far the larger part of his text to the major departments of equity—trusts, mortgages, executors and administrators, specific performance, and injunctions. One drawback of his approach is that, instead of delineating equity as an integrated jurisprudence that permeated all these fields, and dominated some of them, his single volume is, in substance, a collection of texts on subjects so diverse that most

readers can scarcely perceive the relation between them. Those chapters that do not present specific fields are introductory and, inevitably, ancillary and even subordinate.

The chapters on the individual subjects are, on the whole, well-written and, above all else, interesting, but they never seem to rise above the level of a preliminary survey. The blame for this cannot be entirely imputed to the author. It is a natural product of the increasing departmentalization of our law and of our consequent inclination to specialize. The main territories once occupied by equity have long since developed to the point where they have become independent domains in their own right and have produced their own specialized texts. For a general text on equity to contain a complete exposition of the law in all the spheres where equity once asserted its jurisdiction is no longer possible unless it is to match the size of *Pomeroy's Equity Jurisprudence. Hanbury, Snell* and *Ashburner*, despite their efforts at full-fledged introductions, are overshadowed by texts that, of choice, concentrate on particular fields. So many topics have been pre-empted by specialists that it is far from certain whether any work on equity can again reach the eminence attained by *Story's Equity Jurisprudence* in its day.

The twelve chapters on trusts constitute more than one-third of the book, and to them is allotted the position of prominence immediately following the introductory chapters. No one would dispute the excellence of the summary contained in these chapters or the importance of the subject. But this is a field where the book must compete with *Lewin, Underhill, Godefroi, Scott* and others. Part 4 (Executors and Administrators) cannot avoid the impulse to turn to a discussion of the mechanics of administration, complete even to an explanation of the various types of personal representatives. The truth is that here is a place where common law, probate and chancery courts all collaborated. The territory is so complex that many of its own writers are confining themselves to particular areas—probate practice, the interpretation of wills or the rights and duties of personal representatives. It becomes a matter of extreme doubt whether extensive resort will be made in future to equity texts for authorities on the administration of estates.

What we need far more than a partial repetition of doctrines so thoroughly canvassed by Lewin, Coote, Williams, Fry, Kerr and others is a commanding exposition of equity as a remedial institution. Equity must continue as one of the forces that assist in keeping law adaptable to the point where it can discard old solutions and cope adequately with new cases as they arise. Somewhere on our shelves there should be a book that instils a knowledge of equity as a powerful calculus available for the solving of new problems whose facts have not yet called for decision.

To do this should be the cardinal function of the general text on equity. The gradual development of discernible fields, each with its own galaxy of texts, may even accentuate the need. What is contained in them is regarded as static, confined within rigid boundaries and incapable of extension. What is not contained in them is regarded as non-existent. Their very air of completeness and perfection conceals the possible existence of unexplored fields and leads to the impression that the process of growth and classification is complete.

In one sense it may be true enough to say that the cry of fusion is in the air and that the distinctions between law and equity are out of date, but the recognition of fusion must not be carried to the point where it leads, if only subconsciously, to the belief that the list of legal categories is closed and that the work of equity as a remedial institution is finished.

The power of equity is not yet exhausted. Its accomplishments may not be as notable as in the seventeenth and eighteenth centuries, but, as recently as *Berry* v. *Berry*[1] and *Harmer* v. *Armstrong*,[2] both within the last twenty-five years, we find equitable principles providing an escape from the effects of undesirable precedents. Still more recently, in the *Diplock* case[3] and *Reading* v. *Attorney-General*,[4] the House of Lords applied doctrines of equity to provide solutions for situations that could not be neatly fitted into any known category. None of these cases was completely without precedent. Some of them might even have been solved by the use of common law principles. But in all of them the decisions might well have been different had it not been for the possibility of applying principles that were flexible in their applicability and peculiarly equitable in their origin. Each presented a new problem where the influence of equity was still necessary and it cannot be said with certainty that texts on contracts, agency, trusts, master and servant, and executors and administrators would provide a complete grasp of the necessary technique.

If any part of the book is devoted to presenting equity as a force that still retains its dynamic power of remedying the deficiencies of the law it is the Introductory Part consisting of the first 112 pages. Even here it does not succeed in accomplishing the purpose I have in mind. The intermingling of history with current theory and the constant subordination of the whole introduction to the problem of fusion has a tendency to obscure the potentiality of equity as a continuing factor in the future growth of law. It does, at page 112, on the threshold of turning to trusts as the first of its paramount projects, conclude that we are still removed from

[1] [1929] 2 K.B. 316.
[2] [1934] Ch. 65.
[3] *Sub. nom., Ministry of Health* v. *Simpson*, [1951] A.C. 251.
[4] [1951] A.C. 507.

fusion by a march of many days, but when the introduction is read in the light of the preface, it is clear that it was written in the belief that fusion is inescapable and that the rest of the route, as well as the ultimate destination, have already been inexorably determined.

Chapter 2 (The Maxims of Equity) gives some promise of providing what is wanted, but it is a relatively short chapter of 30 pages. Its purpose is quite clearly merely introductory and subordinate and too often it is forced to share pertinent material with some later chapter on a substantive topic. We need to be taught how the vitality of equity depends on the scope and power of the maxims that equity will not suffer a wrong to be without a remedy, aids the vigilant and not the dilatory, looks to the intent rather than to the form, looks on that as done which ought to be done and imputes an intention to fulfil an obligation. Each by itself is nothing more than an epigram, possibly more dangerous than helpful. But clustered around them and among them was a fluid and powerful jurisprudence.

To present the future potentialities of that jurisprudence, even after it has been fused with, but not obliterated by, a contrasting jurisprudence, is, I believe, the true function of a text such as this. Trusts, mortgages, and so on, may be the major fields where the maxims of equity have already become manifest, but in this class of text they should be presented rather as illustrations of principles that are epitomized in the maxims than on their own behalf as systematic divisions of our law.

Dr. Hanbury's sixth edition well deserves to be regarded as essential and probably, though comparisons are invidious, as the best existing text-book on equity, but it does not explore the unknown gaps that lie between the accepted categories of contracts, torts, trusts, ownership of property, prerogative writs and so forth. The task will be difficult, because the boundary lines are vague and the authorities incomplete. The writer may experience a sense of futility for, whenever a topic develops substance, he will see it appropriated by some special text. That, so this review insists, has happened in the past; it will happen again. It is the all too common fate of the pioneer. But, unless it is content to slip placidly into a secondary rôle, the text on modern equity must develop a distinctive theme of its own and accept as its main task the portraying of equity as a method of approach, of a group of general principles so flexible and all pervading that no degree of fusion can obscure their existence or convey the impression that their mission has been accomplished.

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Law and Order in Canadian Democracy: Crime and Police Work in Canada. Published by the Royal Canadian Mounted Police. Revised edition. Ottawa: The Queen's Printer. 1952. Pp. ix, 273. ($1.00)

This series of lectures by personnel of the Royal Canadian Mounted Police amounts to a treatise on many aspects of Canadian criminology, penology and law enforcement. The revised edition, as well as the first published in 1948, was edited by a committee under the chairmanship of the Honourable Wilfrid Bovey, Q.C., O.B.E., Honorary Counsel to the Committee on International Relations of the International Association of Chiefs of Police. The purpose of the lectures is thus explained in the introduction by the Commissioner of the R.C.M.P., "they are instructive and cannot help but fill a long-felt want, which the policeman has known for years, and which can be brought to the attention of the public in no better way".

Probably this is the most realistic attempt to combine a police manual with public information that has come out since an anonymous lawyer, described only as the author of *The Cabinet Lawyer*, wrote his *Treatise on the Police and Crimes of the [London] Metropolis* and Longman & Co. of London published it in 1829. Both books seek to define police functions and crime causation, at a distance of more than a hundred years, and a comparison of viewpoints may not be without interest for the curious.

1829	1952
The police is a branch of that extensive system instituted to protect the community from fraud, annoyance, violence and depredation.	The police are servants of the public and their primary function is the impartial, strict enforcement of law and order.
The great problem in preventive justice is to obtain the most economical and efficient establishment with the least possible infringement of civil liberty.	In a democracy everything possible is done to guard personal liberties but some freedoms have to be partially limited in the interest of social order and social good.
Police officers ought to be well acquainted with life . . . [possessing] general knowledge, acuteness, presence of mind, probity, command of temper, sobriety, courage, . . . personal strength and activity. . . . If the emoluments of police are mean, so will be the candidates for them.	The policeman must have a sound general knowledge . . . the capacity to think quickly and reason clearly . . . moral and physical courage. . . . A policeman's profession requires long training and years of experience, many of which may involve much hardship and not too much material reward.
The chief mass of criminals is derived from the thousands of	Crime breeds in congested areas. A large city is like a wheel, the hub

children taking refuge in sheds, under stalls and about brick-kilns; they have no homes; others have homes with their parents in obscure lodging houses. . . . Now the origin of criminality being ascertained, it is afflictive to humanity and a reproach to preventive justice, that more effective measures are not employed to assail the evil at the source.

representing the original section which has many old tenements, flop joints, cheap rooming-houses, junk yards and railway yards. This slum is frequented by the petty thief, the safe blower, . . . the pimps, prostitutes and perverts. People are born and brought up there. They play and learn there. . . . Every active police officer knows of instances where the criminal did not have a chance from the beginning.

Law and Order in Canadian Democracy contains twenty-one chapters. It necessarily emphasizes such specialized R.C.M.P. concerns as treason, sedition, narcotics, counterfeiting and protection of national revenue and of national resources, but it also covers other more general criminological matters, such as crime prevention, organized crime, punishment of crime, and treatment of convicted prisoners. It has chapters on Communism and Fascism. ("A Fascist organization within a democracy is much like that of a Communist organization in status. It is not necessarily illegal. Both have their 'fellow-travellers'. Fascist fellow-travellers pose a problem for law-enforcement officers just as Communist fellow-travellers do.") Quotations are well chosen-and authorities widely cited. The editing has been generally careful, even if Dr. F. Cyril James is described as "then Principal of McGill University" and the name of the Penitentiary Commissioner in 1913 is spelled "George M. MacDonald, K.C." instead of "Macdonnell". The book is, however, sadly in need of an index.

Lawyers and others concerned with penal reform will have special interest in the chapters on "The Treatment of Convicted Prisoners" and "The Punishment of Crime". One under-statement deserves to be quoted: "While we have not as yet reached the end of the road in penal reform, we have at least travelled a long way in the right direction. One has only to compare our present system of punishment with that which existed a hundred, or even fifty, years ago, to be assured of this." If these sentences refer to Canada's penitentiaries, one could add that the major reforms commenced only in 1946. More emphasis could perhaps have been placed on the reduction in crime which comes through the rehabilitation of discharged prisoners. It is heartening to read in a police publication that "no matter what punishment a man may suffer in prison, often a very real punishment commences after his release" and "it is true also that many cases of recidivism can be attributed directly to society's non-acceptance of and failure to assist the released prisoner", but it might also have been stressed that modern police methods discourage the interference with, or embarrassment of ex-prisoners by police authorities. Not all our Canadian police

forces are as understanding as the R.C.M.P., and the job of many a well-intentioned dischargee has been lost in the past because of police tactlessness.

It is fair to say that this is a volume of considerable utility and deserving of wide distribution. It should constitute required reading for every law enforcement officer in Canada, even if all cannot, or will not, absorb its factual information and basic philosophy. The more, also, it is read by the general public, the more will be appreciated what Colonel Bovey has called "the heavy responsibility of the policeman and his need for public co-operation".

J. ALEX. EDMISON*

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The Doctrine of the Separation of Powers and Its Present-day Significance. Second Lectures in the Roscoe Pound Lectureship Series. By ARTHUR T. VANDERBILT. The University of Nebraska Press. 1953. Pp. 144. (No price given)

The Control of Delegated Legislation: Being a study of the doctrine of Ultra Vires in relation to the Legislative Powers of the Executive Government, with special reference to Great Britain, Australia, New Zealand and Canada. By D. J. HEWITT, LL.M. With a foreword by SIR CECIL T. CARR, K.C.B., Q.C., LL.D. Toronto: Butterworth & Co. (Canada) Ltd. 1953. Pp. xxi, 195. ($7.50)

These two volumes are alike only in that they both deal with important aspects of administrative law. The first reconsiders the doctrine of the separation of powers in the light of recent American and Continental experience; the second confines itself to the ultra vires doctrine in certain Commonwealth countries. It is significant of the difference between American and British constitutional theory that the subject matter of the first book does not even rate a heading in the index to the second. It is also a little surprising that the first pays almost no attention to British experience and the second omits any reference to the United States.

Chief Justice Vanderbilt of New Jersey writes from a wide knowledge and experience as judge, administrator and jurist. These three lectures, given at the University of Nebraska, compress a great deal of comparative constitutional theory and American administrative history into a small compass. The text is extensively footnoted. The first lecture traces the doctrine of the

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separation of powers in its origins and development in the United States, Latin America and Continental Europe; the second treats of the dominance of the federal government over the states and of the federal executive over the legislative branch as a threat to the separation of powers and to constitutional government; the last analyses the "judicial deference" which, in the author's opinion, is a grave cause of constitutional imbalance. As will be evident from this brief statement of the contents, the book sustains the thesis that the doctrine of the separation of powers is being seriously undermined in the United States and ought to be restored to its rightful place.

Since this is a political rather than a legal proposition, a reviewer cannot avoid judging the book on other than legal grounds. It would be invidious for a Canadian either to agree that the American constitution is at present out of balance, or to disagree, though he would probably have a thought or two on the matter. Some comments may not be out of place, however, on the manner in which the thesis is developed. In the first place, the statement is made that many functions have been taken over by the federal government which could better, or as well, be performed by the states, and that the first step needed to restore the imbalance is to return to the state and local governments "that which is truly theirs". Unfortunately we are nowhere told what these functions are or how they are to be distinguished from the functions which must be centralized if they are to be performed successfully. One is led to suspect that the author does not like the state performing certain functions at all: for instance, after showing that the federal government in the United States now provides direct medical care to some twenty-four million persons, he asks, "how much longer can socialized medicine be avoided?". He is staggered at the amount of land owned by the federal government—about twenty per cent of the total. (In Canada the federal Crown must own twice as much.) He is prone to attribute to an evil personality called "Washington" a sinister political intention to aggrandize itself at the expense of the fundamental human liberties. In short, this is an attack upon big government, which seems to reflect very closely current political trends in the United States.

Besides these political arguments, however, there is much shrewd comment on judicial decisions, and in particular the discussion of the Hoover Commission Report and the Administrative Procedure Act is suggestive. The book deserves an index.

Mr. Hewitt, a New Zealand practitioner and lecturer in constitutional law at Canterbury University College, sticks closely to the law of ultra vires as applied to delegated legislation. He believes that the chief concern today is "the control over delegated legislative powers rather than the regulation of administrative

tribunals". Since almost all administrative tribunals exercise delegated legislative powers, it is difficult to understand his distinction, which is nowhere elaborated. It is noticeable, however, that in confining himself to ultra vires questions, however defined in his own mind, he omits any reference to principles of statutory interpretation—surely a prime concern of the courts in determining ultra vires—and of natural justice. Cases as leading as *Liversidge* v. *Anderson* and *Local Government Board* v. *Arlidge* are not included. In the former the whole question involved ultra vires, and the natural justice cases seem to be, in theory, merely the reading of implied limitations into the enabling statutes in the absence of express words to the contrary. Hence they too are examples of ultra vires. No such intellectual problems, however, complicate the book. The author has collected a number of decisions relating to various topics, such as real estate, education, shipping, control of industry by licence (fifteen pages), and devoted a chapter to each, briefly noting the reasons for judgment and adding "conclusions", which merely repeat the headnotes. The claim in the sub-title that "special reference" has been made to Canada, among other countries, can best be gauged by the fact that twenty-one Canadian cases are cited, none later than 1938.

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A Manual of International Law. By GEORG SCHWARZENBERGER, Ph.D., Dr. Jur. Third edition. London: Stevens & Sons Limited. Toronto: The Carswell Company, Limited, 1952. Pp. lii, 441. ($6.75)

The purpose, scope and arrangement of Dr. Schwarzenberger's manual remain the same, but in matters of substance the changes necessary to bring it up-to-date have been made.The cases, treaties, statutes and literature that have appeared since the last edition are reflected in the text and have been added to the Study Outlines in Part II and to the bibliography in Part III. For example, the decision of the International Court of Justice in the *Anglo-Norwegian Fisheries* case led to a revision of the text dealing with the methods of fixing the base line of territorial seas and also to the omission from the appendices of Professor H. A. Smith's diagram illustrating the use of the "double-radius rule". At the same time some of the material formerly included has been carefully pruned out. But many of the controversial issues of recent years, such as the recognition of the Chinese Communist government and its representation in the United Nations, the "police action" in Korea and the

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"uniting for peace plan" adopted by the General Assembly, have not been discussed in the text, although they are referred to in the Study Outlines. The author's reason for thus dealing with them is that they have not affected the law as he has stated it in the text and that they "can be explained better in a political than in a legal context".

A book that has reached a third edition in the short period since the first edition appeared in 1947 has demonstrated some measure of merit. The *Manual* has undoubtedly been popular with many people. Its merits are a clear and concise statement of the principles of international law, which will give the layman or the student a general view of the whole field of international law and institutions (Part I, pages 1 to 156); detailed and comprehensive study outlines for each chapter of the text, so that serious students may themselves explore the source materials of international law (Part II, pages 161 to 352); ample bibliographical references in Part II and again in Part III, which contains "material for further reference"; and a glossary of terms and maxims that beginners will find useful.

In spite of the merits of the *Manual*, I find it an unsatisfactory book. Part I is aimed at those who have no knowledge of international law, at either the student who is a beginner or the layman. It is, therefore, a compressed and generalized statement, but one, unfortunately, that often gives an impression of certainty to many things that are not certain. Another defect of Part I is the general absence of reference to source materials either in the text or footnotes. It is true that the Study Outlines contain a great number of references to materials from which one may attempt to formulate the principles of international law. But do the references in the Study Outlines take the place of footnotes attached to the text? When an author refers to the authority for his statement of a principle of law, the reader is not only provided with a ready means of checking the correctness of the statement but is also given an insight into the technique of legal analysis. It is said in the preface that the inductive method is being used, but the use of that method and its advantages will not be apparent to readers who are presented merely with a terse summary of the principles of international law without any reference to the materials upon which the generalizations are based.

Part II is completely different from Part I. In Part II there is no statement of principles, only a listing of questions and of reference materials from which answers may be worked out. The interest of these Study Outlines can only be to the student. And one wonders whether they meet the needs of a student, especially one who is under instruction at a university, as most students of international law will be. The teacher, if he is fulfilling his function, will raise

proper questions in the student's mind. And, as for the bibliographical material in Parts II and III, such short cuts will not aid the student much, for he is better off in the long run if he acquires skill in finding his own source material and in learning the proper use of his library.

I find this book unsatisfactory, then, firstly, because there are better books for the student of international law (including some of Dr. Schwarzenberger's own) and, secondly, because the general reader, who is merely curious about international law and whom Part I suits very well, will never use Parts II and III.

The last chapter in Part I, "Patterns of International Law and Organization in the Atomic Age", is a masterly statement of Dr. Schwarzenberger's realistic views about the state of international law to-day and its prospects in the years to come. It is a chapter that can be read with profit by layman and expert alike. The author's opinion is that the choice before the peoples of the world is not between a world state and the continuation of the present "state system", with its inevitable power politics, but between the *methods* of arriving at a world state. Either a world state will be set up peacefully and voluntarily soon, or it will come of its own accord through a terrible war which leaves one of the powerful states in complete domination of the world. A note of pessimism runs through the chapter and makes one doubt that rational solutions to international problems will be found.

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Impressions of Trial by Jury

I am, after a fortnight, still a juryman on the same case [a libel action for statements arising out of the Amritsar massacre in 1919]; and at a guess I should hazard the opinion that the case will last another ten days. It is, of course, very tiring; but I believe it is the biggest thing of its kind since Warren Hastings, and I am not sorry to devote time to it. Also I have learned much. I am sure of the following things. (1) The average juryman is quite incapable of appreciating the technique of evidence. (2) He is moved by curiously irrelevant things—*e.g.*, the appearance of counsel, the remarks *obiter* of the judge, the length of the case, etc. (3) He is hopelessly at sea immediately the locale of a case involves imagination; India is to him as devoid of meaning as Laputa. If a Viceroy appears in the box to say that the Lieutenant Governor of the Punjab did his duty he thinks further discussion useless. (4) He cannot even begin to grasp points of law. I have spent hours in the box trying to explain to the others why hearsay evidence is not admissible, but utterly in vain. On the other hand, I think he is most eager to do the right thing. Unless special prejudices are involved (like the colour difficulty in this case) his general impression of the evidence is not broadly inaccurate. His main defect is his intense servility. He literally cannot grasp the fact that an official can lie. (Harold J. Laski to Mr. Justice Holmes, May 11th, 1924, Holmes-Laski Letters (1953))

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