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Book Reviews: Trusts and Trustees, Cases and Materials

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overall educational value of the book since many points of debate about correctional reform are discussed through Mr. Oswald's review of his career. The author tries to make the case that he was as qualified to handle the Attica situation as anyone, and, though he is at times a little over-anxious to do so, he is not overbearing in his manner and is generally successful in his purpose.

Society must find the best ways to deal with one of its most pressing problems: criminal justice, a complex situation that goes far beyond the overcrowded prisons, a major focus of this book. We cannot understand the field of corrections, however, without knowing as much as possible about its various components. Russell G. Oswald's personal experiences provide a valuable means to gain useful insight into the overall situation of criminal justice as it related to penology. It is well worth reading.

TRUSTS AND TRUSTEES, CASES AND MATERIALS. By R. H. Maudsley and E. H. Burn. London: Butterworth and Company. 1972. Pp. 660. $11.00. Professor Maudsley is Professor of Law at Kings College, University of London. His specialties are Equity, Trusts and Estates, Land Law, Estate Planning and related subjects. Mr. Burn is a lecturer in the Law of Land in the Inns of Court. Reviewed by Harold D. Cunningham, Jr.*

Ever since Langdell developed his celebrated "case method" at Harvard over one hundred years ago, the principal teaching tool in use in American law schools has been the "casebook." Langdell would hardly recognize contemporary American casebooks, but they still retain their original character as tools for the Socratic technique of probing inquiry. These case holdings are not set forth in black-letter fashion: the student is expected to dig out the legal principles on his own. In contrast to the American "casebook," casebooks in Britain have traditionally not been designed to be the student's primary study tool. Casebooks have been used there for some time, but not as widely as in the United States, and their thrust and structure have been different from their American counterparts. The fact that lectures, rather than "classes" or seminars, have provided the dominant law teaching milieu at British Universities, plus the fact that British law students, be they reading English or Scots law, generally have only one jurisdiction to worry about, has tended to make the approach of British casebook authors more didactic. Their authors have been less tempted to pose a problem and leave it for the student to figure out. Instead they have "laid it out" in a manner unfamiliar to (but perhaps

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sometimes desired by) American students. For example, in Winfield's celebrated little casebook,[1] each case selection is prefaced by a statement of the applicable rule. Thus, the case is there to illustrate the author's formulation of the rule and not as a vehicle for its deduction by the student.

The foregoing excursus has been necessary to provide a backdrop for a consideration of an English casebook which in this reviewer's opinion goes far toward successfully bridging the gap between the two methods of law teaching. Like other English casebooks, it is not designed as the primary vehicle of instruction. Students attending Professor Maudsley's lectures at Kings College, London, or Mr. Burn's lectures in the Inns of Court, will still be expected to have read one or more of the standard texts.[2]

On the other hand, the case and cognate material the authors set forth is not intended to illustrate previously posited black letter rules. Although (in keeping with the English practice) the reader is usually informed of the holding of the case at the outset, sources and explanatory comments are woven together in a format that requires the student to synthesize his own body of principles. On the other hand, in the fashion of an American casebook, there are questions and problems and copious references to collateral readings after each group of cases and materials, thus emphasizing the book's utility as a classroom tool.

The authors have been successful collaborators in the field of Equity and Property and are adept at casebook preparation.[3] In Professor Maudsley's case, his experience with the case method goes back at least to 1949. In that year, he and Professor Hanbury[4] (then on the eve of his election to the Vinerian chair of English Law at Oxford) inaugurated a "class" or seminar-type meeting in which leading cases in the field of Equity and Trusts were discussed in a fashion very much like that found in American law schools. Professor Maudsley has also had extensive experience as a student and teacher in American law schools.[5]

The casebook under review understandably tracks very closely Professor Maudsley's edition of *Hanbury's Modern Equity*; but the

1. P. WINFIELD, CASES ON THE LAW OF TORT (4th ed. 1948).
2. *E.g.*, H. HANBURY, MODERN EQUITY (9th ed. R. Maudsley 1969); P. PETTIT, EQUITY AND THE LAW OF TRUSTS (1966); D. PARKER & A. MELLOWS, THE MODERN LAW OF TRUSTS (1966); and E. SNELL, PRINCIPLES OF EQUITY (25th ed. R. Megarry & P. Baker 1960).
3. Professor Maudsley, formerly a fellow of Brasenose College, Oxford, acknowledged his debt to Mr. Burn, his former Oxford colleague in the preface to the ninth edition of *Hanbury's Modern Equity*, which Professor Maudsley edited in 1969. Together they wrote R. MAUDSLEY & E. BURN, LAND LAW, CASES AND MATERIALS (2d ed. 1970).
4. Professor Hanbury was my tutor at Lincoln College, Oxford when I began my studies there in 1949. This seminar not only marked the beginning of my long friendship with Professor Maudsley, it also proved to be one of the high points of my Oxford experience.
5. As a Commonwealth Fellow at Harvard, he earned an S.J.D. He has held visiting law professorships at the Universities of Chicago, Cornell, Miami and San Diego. He has also lectured at the University of Baltimore and at Cornell.

nature of the subject favors compatibility between casebook and textbook treatment of a given topic. Many of the issues have been carefully honed by numerous precedents and subjected to critical scrutiny by teachers and practitioners. Thus the very need to respond to criticism tends to perpetuate a format and approach to the problem under discussion compatible with other current works on the subject.

Turning now to substance, how is the material of the subject presented? The development of the topics discussed is straight-forward without being stereotyped or pedantic. After a lucid introductory section, an approach to a definition of a Trust is suggested. This is done by way of extracts from Maitland, Underhill, Scott, and finally Hanbury.[6] Particularly useful to American law teachers and students is the account that follows in which the trust is distinguished from other relationships such as bailment, agency, contract, debt, third party beneficiary relations, conditions, equitable charges, powers and other relations.[7] Chapter 2, "The Requirements of a Trust," covers the formalities by setting forth pertinent statutory provisions dealing with the requirement of a writing, and develops the problem of certainty by the insertion of case material, in particular, the recent case of *McPhail v. Doulton.*[8] The special problems pertinent to unincorporated associations are also noted.[9]

Chapter 3 deals with volunteers and other aspects of the constitution of trusts, including trusts involving property to be acquired in the future. Chapter 4 covers, *inter alia*, topics frequently stressed in American casebooks on Wills and Trusts, such as incorporation by reference, facts of independent legal significance and secret trusts. The doctrine of facts of independent legal significance is succinctly presented via a brief extract from *Scott on Trusts.*[10] The Uniform Testamentary Additions to Trusts Act is also quoted.[11] Except for a single case,[12] some explanatory comment (incorporating an extract from *Hanbury*[13]) and the proceedings of the Conference on Uniform Legislation in Canada (1965-1968),[14] this is all the authors say directly about incorporation by reference, facts of independent legal significance and gifts to trustees of an existing settlement.

American readers who have been teased by the cryptic references to English cases on these topics in casebooks such as *Leach on Wills* and *Scott on Trusts* may be disappointed that the authors did not choose

6. R. MAUDSLEY & E. BURN, TRUSTS AND TRUSTEES, CASES AND MATERIALS, 4-6 (1972) [hereinafter cited as MAUDSLEY & BURN].
7. *Id.* 6-30.
8. [1971] A.C. 424; MAUDSLEY & BURN 44-55.
9. MAUDSLEY & BURN 55-72.
10. A. SCOTT, LAW OF TRUSTS § 54.2 (3rd ed. 1967); MAUDSLEY & BURN 111.
11. MAUDSLEY & BURN 117.
12. In the Goods of Smart, [1902] P. 238; MAUDSLEY & BURN 109.
13. HANBURY, *supra* note 2, 158-160; MAUDSLEY & BURN 113.
14. MAUDSLEY & BURN 115-117.

to include more case material on these points. The section on Secret Trusts[15] does, however, contain extracts from the leading cases,[16] and comments or footnote references to many others.

Ever since the case of *Morice v. Bishop of Durham*,[17] courts have been plagued by the problem of how to treat the gifts of donors whose donative acts did not fit into the category of charitable dispositions but who clearly did not make the usual private gift. The problem has not disappeared, and the usual result has been to enforce such "trusts" if they can be construed as "certain," and for the benefit of individuals rather than for "purposes or objects."[18] The authors have provided a balanced treatment of this topic in Chapter 5, in which the anomalous animal and monument cases and the perpetuities aspects of the problem are well covered.[19]

Law students are frequently confused by the somewhat schizoid manner in which the law uses the trust as an intent-enforcing, as well as a remedial, mechanism. Although there may be some conceptual problems,[20] the cause of the difficulty is possibly the loose manner in which courts have used the adjectives, "constructive" and "resulting," in connection with the word "trust." Professor Maudsley and Mr. Burn are clearly right when they assert that in some cases these adjectival designations make little difference from the viewpoint of the applicable legal consequences.[21]

In the main, however, the authors follow the orthodox approach and treat the resulting trust in Chapter 6 as a partly remedial and partly intent-enforcing device influenced by a number of presumptions that are brought into play to cope with the situation of a failure of an express trust. The constructive trust, discussion of which is deferred until Chapter 9, is clearly and accurately distinguished from a resulting trust. While each can be said in a sense to be a trust arising by operation of law, the guiding principle of constructive trusts is unjust enrichment, rather than failure to comply with formalities.

The American reader will probably be most interested in Chapter 7 (Trusts and Creditors) and Chapter 8 (Tax Saving Trusts) from the viewpoint of comparative law. English law does not recognize spend-thrift trusts, but the gap is almost entirely filled by varieties of protective trusts.[22]

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15. *Id.* 118–134.
16. McCormack v. Grogan, L.R. 4 H.L. 82 (1869); MAUDSLEY & BURN 119; Blackwell v. Blackwell, [1929] A.C. 318; MAUDSLEY & BURN 123; *Re* Keen, [1937] Ch. 236, 1 All E.R. 452 (1937); MAUDSLEY & BURN 126.
17. 9 Ves. 399 (1804), *aff'd*, 10 Ves. 522 (1805).
18. *Re* Denley's Trust Deed, [1969] 1 Ch. 373, 3 All E.R. 65 (1968); MAUDSLEY & BURN 137.
19. MAUDSLEY & BURN 156–158.
20. *See* A. GULLIVER, E. CLARK, L. LUSKY & A. MURPHY, GRATUITOUS TRANSFERS 411 (1967).
21. MAUDSLEY & BURN 160.
22. A. SCOTT, ABRIDGEMENT OF THE LAW OF TRUSTS 282 (1960); MAUDSLEY & BURN 200. The English student reader is referred to American sources at p. 213 and asked if he would favor the introduction of Spendthrift Trusts in England.

The impact of the tax collector on the trust device (Chapter 8) is covered with technical precision. American readers versed in estate planning will doubtless be pleased to learn that the subject is no less complicated in England than it is here.[23]

The Trust portion of the book is concluded by three lengthy chapters on the subject of charities. Although the Charities Act of 1960[24] has made some substantial changes, American readers will feel at home with the author's treatment of charities, cy pres, and the problems of the administration of charities.

Part III of the casebook deals with Trustees. Here again there is much that is familiar to American readers, however, a caveat is necessary. The applicable rules and principles wear common law garb but there have been many statutory changes, the most important of which was the Trustee Act of 1925.[25] Thus, the materials in Chapter 13 (General Principles Relating to Trustees), Chapter 14 (Duties of Trustees), Chapter 15 (Powers of Trustees), Chapter 16 (Variation of Trusts), Chapter 17 (Fiduciary Position of Trustees), and Chapter 18 (Breach of Trusts) must be read carefully with an eye to the special English statutory experience. Some noteworthy cases are quoted with reference to problems that may today defy solution in any jurisdiction,[26] and which come up again and again.[27] The last case in the book is the celebrated *Re Diplock*[28] which applied the doctrine of tracing to permit next of kin to recover in part monies paid to the beneficiaries of a trust subsequently declared void.

So much for a sketch of content, now for an assessment: from the viewpoint of scholarship, I cannot fault the authors' effort. The casebook is a teaching tool, not a thesis, and thus, it is not the most appropriate vehicle for the defense of doctrinal points. I noticed no errors of commission, and what I might proffer as an error of omission, someone else might regard as a badge of excellence.

It is better then, to assess the book's utility for both British and American readers. As for the former, it is of course a "must" at the academic level for both students and teachers. English practitioners nurtured on the older textbooks and desiring a convenient collection of

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23. Professor Maudsley has summarized this topic for American readers in his article, "Tax Planning in England," 9 SAN DIEGO L. REV. 264 (1972); MAUDSLEY & BURN 227.
24. 8 & 9 Eliz. 2, c. 58 (1960). Section 13 of this act changed the rules relating to Cy Pres. The statute generally gave more control and supervision of the administration of charities to charity commissioners and less to the courts; MAUDSLEY & BURN 391.
25. 15 & 16 Geo. 5, c. 19 (1925); MAUDSLEY & BURN 425.
26. *Re* Beloved Wilkes's Charity, 3 Mac. & G. 440 (1957); MAUDSLEY & BURN 458. *Cf.* RESTATEMENT (SECOND) OF TRUSTS § 187 (1959).
27. Boardman v. Phipps, [1967] 2 A.C. 46, 3 All E.R. 721 (1966); MAUDSLEY & BURN 602 (involving the duty of fiduciaries to account for profits acquired from their office); Bahnin v. Hughes, 31 Ch. D. 390 (1886); MAUDSLEY & BURN 618 (joint and several liability of trustees); *Re* Hallett's Estate, 13 Ch. D. 696 (1880); MAUDSLEY & BURN 637 (tracing funds converted by trustee).
28. [1948] Ch. 465, 2 All E.R. 318 (1948); MAUDSLEY & BURN 644.

case materials would doubtless find the book well worth the investment. On the American side, the book's reading public is obviously much more limited. Every law school library should have a copy to place alongside *Hanbury's Modern Equity* and *Lewin on Trusts*, or similar English works. American professors of Trusts and Estates will find its coverage of familiar subjects clear and refreshing. More often than not, unfamiliar areas will be worth dipping into for insights that can be passed along to students. Finally, American law students trying to understand basic concepts or reviewing for exams will profit from the time spent in browsing through the pages of the book.

To return now to the pedagogical theme posited at the outset of this review, *Trusts & Estates, Cases & Materials*, by Maudsley and Burn, richly deserves a place among the category of "course-books" on the law. It is not intended to do the job of an American casebook but it will do much to give English readers a feel for the case method. Conversely, for American readers it shows the English case and statutory materials as products of a living system and not simply as examples of what used to be "at common law" or "in equity" in England.

HOW TO PROVE DAMAGES IN WRONGFUL PERSONAL INJURY AND DEATH CASES. By I. Duke Avnet, Englewood Cliffs, New Jersey: Prentice-Hall, Inc. 1973. Pp. 280. $16.00. Mr. Avnet received his A.B. and J.D. from New York University in 1932, and is now practicing law in Baltimore, Maryland. Reviewed by Eugene J. Davidson.*

It is not uncommon to hear of large dollar negligence verdicts where the liability was somewhat dubious and the injuries were less than substantial, and of minimal verdicts where both liability and substantial injuries seemingly were clear. Indeed this reviewer can recall an instance in which two suits arising from the same accident were tried on the same day by different counsel. One verdict was almost four times as great as the other, although the difference in the injuries was not that significant. The logical question is why? Was it because of the trial judge? Jury composition? Defense counsel? Plaintiff's mannerisms? None of these factors could be said to account for the disparity in the verdicts, as the judge in each case was equally accustomed to negligence litigation, the jurors came from the same panel, defense counsel were from the same insurance carrier's stable of trial counsel, and there was no ostensible difference in the conduct or appearance of the plaintiffs. There was, however, a clear distinction in the trial strategy of plaintiff's

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