Casebook on the Law of Contract, by J. G. Starke, Q.C., P. F. P. Higgins and J. P. Swanton (Butterworths Pty. Ltd., Australia, 1975), pp. i-xxviii, 1-524. Recommended Australian Price, Hard cover $21.00, Soft cover $16.00 ISBN 0409 43847, ISBN 0409 43846.

The creation and development of the casebook method of instruction can be traced to one man, C.C. Langdell, the first Dean of Harvard Law School. Langdell prefaced the first casebook ever written, namely *A Selection of Cases on the Law of Contracts* (1871) with the following remarks:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless and worse than useless for any purpose of systematic study. Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension.[1]

The casebook method of instruction has a great many advantages. By forcing students to distill principles by a purely analytical process from actual cases, the casebook method prevents the *a priori* acceptance of any doctrine or rule of law. Most importantly, it constitutes an empirical method of teaching which heightens and refines a student's ability to think logically and systematically. Each student must independently evaluate and assimilate the cases.

Before Langdell's innovation, legal education was characterized by the dogmatic enunciation of a unified and fixed body of rules. In contrast, the casebook method perceives and emphasises the fluidity and flexibility of legal doctrines. Moreover, not only does the casebook method teach students to think, it also instils life and meaning into dry legal principles. As Thayer once said, it rouses students and engages 'as its allies their awakened sympathetic and co-operating faculties'.[2]

Of course, it would be wrong to exaggerate the importance of the casebook method. The orthodox lecture, text-books and learned articles are all important teaching aids which should be utilized.[3] But it seems to me that, initially, while a student is being trained to think logically and analytically, and while he is studying basic subjects such as Contract and Property, the overwhelming emphasis should be on the casebook method. Once a student has been taught to think, the text book, learned article and orthodox lecture become increasingly valuable.[4]

[1] C. C. Langdell: 'A Selection of Cases on the Law of Contracts: With References and Citations, prepared for Use as a Text-Book in Harvard Law School,' Boston, 1871.

[2] James Bradley Thayer, 'Cases on Constitutional Law', Cambridge 1865 p. vi.

[3] Some commentators have been critical of the tendency to over-exaggerate the importance of the casebook method: Llewellyn, 'Some Realism about Realism — Responding to Dean Pound' (1931) 44 *Harvard Law Review;* Radin, 'Scientific Method and the Law' (1931) 19 *Calif. Law Review* 164. These criticisms have not gone unheeded. The casebook method is no longer practised as a narrow scientific approach to teaching. Most law teachers make extensive use of secondary authorities. The study of cases, however, remains the fundamental characteristic of legal education in the United States: Merryman, 'Legal Education There and Here: A Comparison' (1975) 27 *Stanford Law Review* 859.

[4] Professor Karl Llewellyn expressed a similar view in the introduction to his 'Cases and Materials on Sales' (1st ed., 1930), xvii.

Each case extracted in this volume is preceded by a short headnote indicating the precise point or points for which the case is an authority. In the Preface, the authors assert that '[p]ractical experience in teaching the law with the use of cases has led the authors to think that students not only prefer, but do benefit more from a casebook providing such headnotes than from one without headnotes'.[5] It may be that students prefer headnotes, but I cannot agree with the rest of the proposition. As already stated, a casebook is designed to develop analytical skills by encouraging students to read and to evaluate cases, and to independently derive legal principles from them. The use of headnotes largely, and perhaps wholly given the notorious apathy of many Australian law students, defeats that purpose.

Furthermore, it is an ambitious and dangerous project to attempt to reduce every judicial decision to a single proposition, or even to a number of propositions. There are decisions which defy such analysis. It is not surprising then that some of the headnotes appearing in this book are somewhat misleading. For instance, the headnote given to *Abbott v. Lance*[6] reads as follows:

> Where a promise is offered in return for the performance of an act, the offer may not be withdrawn until the promisee has had a reasonable time in which to complete performance. The part performance of the act is sufficient consideration for the implied promise to keep the offer open.[7]

In the first place, it is by no means clear that *Abbott v. Lance* stands for any such proposition. Secondly, that proposition purports to be universally applicable. *Abbott v. Lance* can no longer be regarded as establishing any such general proposition in view of the House of Lords' decision in *Luxor Ltd. v. Cooper*.[8] *Re Casey's Patents, Stewart v. Casey*[9] provides another instance. The headnote states:

> Where the fact of a past service raises an implication that at the time it was rendered it was to be paid for, a subsequent promise to pay may be treated either as an admission which evidences, or as a positive bargain fixing what is a reasonable sum to be paid.[10]

The headnote suggests that if there is an implication that a past service is to be paid for, then a subsequent promise to pay is enforceable. In fact Bowen L.J. said that the fact of a past service *raises* an implication that it was to be paid for, and if that implication is not rebutted, then a subsequent promise to pay will be enforceable.[11]

For these reasons, I consider the adoption of headnotes to be basically misconceived.

There are a number of other general criticisms. Essentially, a casebook is a loose-limbed response to various needs in legal education. This book attempts to develop the primary legal skill of analysis through the systematic study of source material. In this context, however, the usefulness of this casebook is seriously undermined by the complete absence of any textual comment by the authors. It throws the onus entirely on the lecturer by failing to give the student any guide in his personal evaluation of each case, and in the comparison and assimilation of various principles. Such commentary could also indicate the dual significance of cases such as *Popiw v. Popiw*[12] *and P. v. P.*[13]

[5] Casebook, p.v.
[6] (1860) Legge 1283.
[7] Casebook, p.23.
[8] [1941] A.C. 108. See the recent discussion of this case by P. S. Atiyah, (1971) A.N.U. Press.
[9] [1892] 1 Ch. 104.
[10] Casebook, p.39.
[11] Casebook, p.40.
[12] [1959] V.R. 197.
[13] [1957] N.Z.L.R. 854.

The complete absence of comment is justified by the fact that the casebook is to be used in conjunction with the third Australian edition of *Cheshire and Fifoot on Contract*. To facilitate this, the authors have adopted the same layout of chapters and order of topics as in *Cheshire and Fifoot*. The immediate comment is that this is not a casebook in the full sense of the word. It is more in the nature of an addendum containing source material, which undoubtedly transforms *Cheshire and Fifoot* into a more valuable teaching tool. In itself, that is a valuable accomplishment. The authors, however, seem to have assumed that *Cheshire and Fifoot* is prescribed and used as a basic textbook throughout Australia and New Zealand. Otherwise, this casebook would be of limited usefulness. But whether that assumption is fully justified may be open to doubt. There is some suggestion that its structure and layout, particularly in the chapters dealing with Formation of a Contract and Contents of a Contract, is now outdated. Another criticism is that Cheshire and Fifoot contains a multiplicity of decisions which obscure the fundamental principles. Such critics would regard this casebook as perpetuating the deficiencies of *Cheshire and Fifoot*.

Even accepting the narrow purpose of this book, there is another criticism. As a companion to *Cheshire and Fifoot*, the casebook is subordinated to the text, and to me this is unsatisfactory in a formative subject such as Contract where analytical skills are only just developing.

Subject to the above criticisms, this casebook would develop analytical skills, and thereby enhances the value of *Cheshire and Fifoot*. Analysis may be the primary skill of a lawyer, but he must also develop an ability to synthesize complex materials and an ability to apply principles to various fact situations. Taken by itself, this casebook makes no concerted attempt to develop these other essential legal skills by including textual comments referring to other illustrative cases and fact situations and to secondary authorities.[14] If viewed in conjunction with *Cheshire and Fifoot*, these skills are still not taught; rather they are performed for the student by the text-writer.

The selection and placement of individual cases is also open to criticism. Obviously, where space is limited selection is difficult and it is very easy to volunteer criticisms. There are, however, a number of inexplicable omissions. The two cases extracted on uncertainty, *Whitlock v. Brew*[15] *and Fitzgerald v. Masters*[16], deal with the severance of uncertain and meaningless clauses. There is no attempt to illustrate the more important question of what degree of uncertainty will render a contract unenforceable. Moreover, there is no attempt to deal with cases involving deliberate uncertainty — where some term is left to further agreement as in *Sykes v. Fine Fare Ltd.*,[17] or where an agreement is stated to be 'subject to contract' as in *Masters v. Cameron*[18] and *Godecke v. Kirwan*.[19]

Chapter 4 on The Contents of the Contract is particularly patchy. No 'ticket case' is extracted dealing with the incorporation of terms displayed and delivered. Similarly, no case is extracted dealing with terms implied from a course of dealing. Inexplicably, *Couchman v. Hill*[20] is extracted in preference to *Oscar Chess Ltd. v. Williams*[21] or *Dick Bentley Productions Ltd. v. Harold Smith (Motors) Ltd.*[22] A glaring omission from the Chapter on Mistake is the important High Court decision in *Svanosio v. McNamara*.[23]

[14] For a discussion of the purposes of a casebook, see H. A. J. Ford 'The Evolution of the American Casebook' (1955-57) 7 *Res Judicatae* 256.
[15] (1968) 118 C.L.R. 445.
[16] (1956) 95 C.L.R. 420.
[17] [1967] 1 Lloyd's Rep. 205.
[18] [1954] 91 C.L.R. 353.
[19] [1974] 1 A.L.R. 457.
[20] [1947] K.B. 554.
[21] [1957] 1 W.L.R. 370.
[22] [1965] 2 All E.R. 65.
[23] [1956] 96 C.L.R. 186.

The major omissions occur in the initial chapters dealing with Formation and Content. To a large extent, the omissions seem to reflect the inadequate treatment given these areas by Cheshire and Fifoot. In other chapters, the selection of cases is comprehensive and up to date. Important recent decisions such as *Schaefer v. Schuhmann,*[24] *Lewis v. Averay,*[25] *Snelling v. John G. Snelling Ltd.*[26] and *New Zealand Shipping Co. Ltd. v. A. M. Satterthwaite & Co. Ltd.*[27] have been extracted.

Given the declared intention of producing a book of manageable size, the inclusion of some cases is puzzling. First, in view of language difficulties, the Historical Introduction adds little or nothing to the discussion in *Cheshire and Fifoot* and could easily have been omitted. Secondly, it is difficult to explain the inclusion of *Varley v. Whipp*[28] and *George Wills & Co. Ltd. v. Davids Pty. Ltd.,*[29] as both cases concern the 'sale of goods by description' under the Goods Act 1958.

The placement of certain cases may also cause confusion. *Saunders v. Anglia Building Society*[30] is found in the Chapter on Mistake. That is a common placement, but in my opinion the case is more appropriately dealt with when considering *L'Estrange v. Graucob*[31] and the effect of a signature on a contract. The inclusion of cases dealing with the characterization of contractual terms as conditions or warranties in Chapter 4 is also confusing. These cases more appropriately concern the legal operation of the contract, and questions of discharge and breach.

Lastly, it is doubtful whether, in the absence of textual comment, the full presentation of cases gives students any real assistance in understanding the process of litigation.

For the most part, this book contains a full and updated selection of cases, but it is of limited usefulness and its value as a casebook is open to doubt. It would be singularly appropriate if a course in Contract placed heavy reliance on the 3rd Australian Edition of *Cheshire and Fifoot on Contract.*

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[24] [1972] A.C. 572.
[25] [1972] 1 Q.B. 198.
[26] [1972] 1 All E.R. 79.
[27] [1974] 1 All E.R. 1015.
[28] [1900] 1 Q.B. 513.
[29] [1956] S.R. (N.S.W.) 237.
[30] [1971] A.C. 1004.
[31] [1934] 2 K.B. 394.

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