BOOK REVIEWS

MILNER'S CASES AND MATERIALS ON CONTRACTS: Edited by S. M. Waddams. University of Toronto Press, Third Edition. 1977. Pp. 869.

In reviewing a case book one ought to look at such things as scope of coverage, organization and editing. Obviously, the manner in which a case book is organized and the decisions on which cases to include are, for the most part, a matter of personal preference. For example, the first chapter of this book is Remedies for Breach of Promise. I do not agree with this, yet I concede that other instructors who approach their course in a different way might find it useful.

The actual editing of the cases has been well done. By and large, unnecessary parts of judgments have been deleted, yet done in such a manner so as not to affect the continuity of the judgment. One improvement that would make the book easier to read would be to set out the important cases in larger type, using a somewhat smaller type for notes, questions, problems and case summarizations intended to be discussed in conjunction with that particular case.

The third edition of *Milner's Cases and Materials on Contracts* contains some important changes in the organization of the materials and in the emphasis given to various topics. A very useful change is the addition of a new chapter on Protection of the Weaker Party.[1] The section on this topic in the second edition included the sub-topics of infancy, unconscionability and consumer protection. It has been changed to a chapter which now also includes forfeiture clauses and exclusion clauses. As well, there are considerably *more* materials on unconscionability and consumer protection. This new emphasis reflects, I think, quite rightly, the important case law development of unconscionable transactions and the enactment of consumer protection statutes which has occurred since the second edition was published.

Another organizational change of some merit is the addition in Chapter 2 of a new section on non-bargain promises.[2] However, I do not agree with the selection of the sub-topic headings in that section. Surely in a chapter titled "The Kinds of Promises Legally Enforced", the section "Non-Bargain Promises" should include only those types of promises which, while not falling within the orthodox structure of contracts as a bargain, are nonetheless legally enforceable. Yet included under the section are the traditional cases on past consideration. Such cases illustrate either promises failing for want of consideration[3] or enforceable as being supported by a traditional "bargained for consideration".[4] Likewise, under the topic, "Subsequent Reliance" is a sub-topic heading "Charitable Subscriptions". However, at common law charitable subscriptions are enforceable only if they are supported by consideration in the

1. Chapter 7, p. 528.

2. P. 282.

3. *Roscorla* v. *Thomas* (1882) 3 Q.B. 234; 114 E.R. 496 found in Milner at 293.

4. *E.g., Lampeigh* v. *Brathwait* (1615) 80 E.R. 255, found in Milner at 292; *Stewart* v. *Casey* [1892] 1 Chp. 104, found in Milner at 294. In his new text, Waddams, *The Law of Contracts*, (1977), at pp. 118, 119, the editor does express the view that the real explanation for the past consideration cases is that of unjust enrichment. This is, however, contrary to more orthodox explanations.

traditional sense.[5] The organization of Chapter II in this fashion will obviously not make much difference to the instructor using the book; it may, however, be confusing to some first year law students.

The two chapters on Assignment and Agency in the second edition, which had a combined total of 82 pages, have been condensed into one chapter of eleven pages.[6] Even these materials are probably unnecessary and duplicative of what is found in most basic contracts texts. Indeed, it is difficult to see how a contracts instructor could make any use of the statutory materials on mercantile agents and buyers and sellers in possession. Probably assignment and agency (together with insurance, restrictive covenants on land, etc.) should simply be noted in the privity of contract chapter under a heading of exceptions to the privity rule.

Other more cosmetic changes include the elevation in status of what was a section on immoral and illegal contracts to a new chapter on Public Policy,[7] and a re-organization of the materials on mistake, misrepresentation and contractual terms. (There are no substantive changes in the Public Policy chapter; although one new case has been added, the materials still basically deal with illegality.)

By and large most of the traditional leading cases can be found in this book and the third edition includes the most important recent judicial developments. I do have some relatively minor criticisms here. First, I was somewhat surprised to find no excerpt of *Gilbert Steel Ltd.* vs. *University Construction.*[8] Being a recent Appellate decision, involving a fundamental issue of consideration (pre-existing obligation) and raising all kinds of problems in an interesting factual situation, it should probably have been included.[9] I also thought that *Ward* v. *Byham*[10] and *Williams* v. *Williams*[11] should at least have been noted as casting some doubt on the principle that performance of, or a promise to perform, a pre-existing public obligation, is not good consideration.

An area which could have been illustrated more clearly is the nature of a condition precedent, including the very real problem in Canada of when it can be waived. There has been a large number of recent contradictory cases in Canada.[12] The Canadian materials in the book consist of very brief excerpts from the leading cases of *Turney* v. *Zhilka*[13] and *Barnett* v. *Harrison.*[14] This area could have been dealt with in more depth simply by having a longer excerpt of Dickson J.'s judgment in *Barnett* v. *Harrison* and by including part of Laskin C.J.'s dissenting opinion.

Besides the re-organization and addition of new materials, Professor Waddams has considerably changed the format of the book by adding many more problems and questions. This is bound to improve its usefulness as a teaching tool. I think, however, that there is room for even

5. The only case included under this heading is *Dalhousie College* v. *Boutilier Estate* [1934] S.C.R., found in Milner at 304, in which a theory of injurious reliance was rejected. In his new text, Professor Waddams discusses charitable subscriptions in the context of bargain promises.

6. Chapter 4, p. 399.

7. Chapter 8, p. 608.

8. (1976) 12 O.R. (2d) 19 (C.A.). A reference to the case is made, at p. 255, in the context of a problem.

9. Indeed the editor of the book found it sufficiently interesting to comment on the case. *See* Waddams, *Variations of Contracts and the Requirement of Consideration: Gilbert Steel Ltd.* v. *University Construction Ltd.* (1977) 2 Can. Bus. L.J. 232.

10. [1956] 1 W.L.R. 496.

11. [1957] 1 W.L.R. 148.

12. *See* Davies, *Conditional Contracts for the Sale of Land in Canada* (1977) 55 C.B.R. 289.

13. (1959) 18 D.L.R. (2d) 497 (S.C.C.), found in Milner at 679.

14. (1975) 57 D.L.R. (3d) 225 (S.C.C.), found in Milner at 680.

more problems and questions, particularly in those areas which first year law students often find to be conceptually difficult.[15] Adding a second Analytical Table of Contents which contains the cases and statutes under various headings is a good idea. For someone familiar with the subject it is easier to find a page reference for a case in this manner than by thumbing through a Table of Cases.

One important criticism which I do have is that where there are excerpts of statutes, which quite understandably are usually Ontario Statutes, not only are there no citations of equivalent statutory provisions in other provincial jurisdictions, there is usually no mention that equivalent enactments even exist outside Ontario. By way of example, the book includes, at page 259, section 16 of the Mercantile Law Amendment Act[16] which substantially changes the rule in *Foakes* v. *Beer*.[17] It so happens that, with minor modifications, similar provisions have been enacted in most other provinces.[18] Not only is this not noted at all, but, almost immediately following this excerpt is the following statement:[19]

> *Some American states* have adopted similar legislation. *See*, for example, California Civil Code, s. 1524. (the emphasis is mine)

At the risk of appearing overly sensitive, I would like to believe that other Canadian jurisdictions are as worthy of mention as, say, California or Michigan. Certainly any casebook attempting to cater to a national market should not have omissions of this type.

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15. *E.g.*, following the classic case of *Carlill* v. *Carbolic Smoke Ball* [1893] 1 Q.B. 256, found in Milner at 346, there are no questions or problems. Compare this with the treatment of the case in Smith & Thomas, *A Casebook on Contract*, (5th ed. 1973), p. 42.

16. R.S.O. 1970, c. 272.

17. (1884) 9 App. Cas. 605.

18. Equivalent enactments exist in British Columbia, Alberta, Saskatchewan, Manitoba, the Northwest Territories and the Yukon.

19. P. 259. While there are no direct references to other provincial enactments the case immediately following is *Rommerill* v. *Gardener* (1962) 35 D.L.R. (2d) 717, dealing with the British Columbia enactment, and adverting to others. Similar omissions occur in respect of the Frustrated Contracts Act, p. 831, and Consumer Protection Statutes, p. 594, *et seq*.

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BEYOND CONTROL: STATUS OFFENDERS IN THE JUVENILE COURT: Edited by Lee E. Teitelbaum and Aidan R. Gough. Ballinger Publishing Company: Cambridge, Massachusetts, U.S.A. 1977.

A status offender is a child whose conduct is unlawful because he is a child and would not be unlawful if he were adult. Status offences are thought to comprise no less than one-third and probably close to one-half the workload of the juvenile courts in the United States (pp. 271, 291). In 1967 the President's Commission on Law Enforcement recommended that "serious consideration" should be given to their elimination; in 1974 the National Council on Crime and Delinquency and in 1971 the California Committee on Criminal Procedure concluded that all status offences should be removed from court jurisdiction. Nevertheless, the contributors to this book found there was "a devastating lack of information" about such offences. Their contribution not only fills the gap with a wealth of information about hearings in respect of status offences in the United