

Contracts: Cases, Notes and Materials, By John Swan and Barry Reiter, Toronto: Butterworths, 1978. Pp. xxxii, 1106. \$60 (hardback), \$34.95 (paperback).

Contracts: Cases and Commentaries, Edited by Christine Boyle and David R. Percy, Toronto: Carswell, 1978. Pp. xxxvi, 722. \$41.50 (hardback), \$23.50 (paperback).

In the late summer of 1978 two of Canada's major law book companies, Butterworths and Carswell, produced lengthy casebooks in the area of contract law. The two books display differences in approach and philosophy to the teaching and studying of the law of contracts.

Contracts: Cases and Commentaries is the collective effort of a number of contracts teachers across Canada. As stated in the preface to the book, "It was inspired by a widely held feeling that there was a need for a national casebook in contracts which might command acceptance across the common law provinces." The idea for this collective effort had its inception in the contracts sub-section of the Canadian Association of Law Teachers. The book is the result of a number of years of work and collaboration on the part of the contributors.

The book, as the editors recognize, adopts what one can only call the "traditional" approach to the teaching of contracts. The book is divided into four major parts. The users of this book will be introduced in Part 1 to the concept of contractual obligation. As pointed out in the introduction to Chapter 1, the first prerequisite to contractual liability is that the parties must have reached an agreement. The materials in the first chapter of the book take the user through the standard problems involved in this process: invitation to treat, offer, communication of offer, acceptance, termination of offer. The remainder of Part 1 is devoted to intention to create legal relations, certainty, consideration, privity and the requirements of writing.

At the end of the materials in Part 1 the user should understand how a contractual obligation is created. Part 2 of the casebook deals with the scope of the contract. It will inform the user of the process involved, and the problems inherent, in the determination of the nature and content of the obligations undertaken by the parties to an agreement. Rather than commencing with a discussion of representations and terms and their significance, the Part begins with a fairly lengthy analysis of

contingent agreements. In Chapter 7 liberal use is made of Gwilym J. Davies' recent article entitled *Conditional Contracts For the sale of Land in Canada*.¹ While it is unquestionable that the approach taken by the Supreme Court of Canada to such agreements raises a number of problems, these might be better studied in a course on real estate transactions.

In Chapter 8, entitled "Representations and Terms", attention is directed to legislative enactments that have brought about changes in the law concerning representations. Specific reference is made to the Ontario legislation, but similar legislation has either been enacted or is being considered in all provinces. These statutory references serve as a much needed reminder to the first-year law student that contract law is frequently modified and, in some cases, radically changed by legislative activity.

Chapter 8 also contains a valuable section on concurrent liability in contract and tort, a subject that causes first year law students considerable conceptual difficulty. The materials effectively point out, through the use of recent cases from Canada and the United Kingdom, the ever changing face of the law in this area.

Part 3 deals with vitiating factors, and commences with a general discussion of mistake. Frustration, capacity, duress, undue influence and unconscionability are also dealt with in this part. The section on unconscionability addresses itself to "inequality of bargaining power", the problematic concept that has received so much attention from legal writers since Lord Denning's decision in *Lloyds Bank Ltd. v. Bundy*.²

Contracts: Cases and Commentaries concludes with Part 4, which deals with the subject of remedies. Remedies traditionally has been a major component of any basic course in contract law. Once a student appreciates the nature and scope of a contractual obligation it is imperative to develop an understanding of the remedies available when a contractual obligation is breached. While it is true, as stated in the preface, that most law schools offer separate courses in remedies, it is doubtful that such courses would be compulsory. Therefore, the first year contracts course must offer students more than a cursory look at remedies. In particular, the narrative on damages, while providing interesting reading and while incorporating in an abbreviated form many of the major cases on damages, does not seem to offer anything more than the most basic framework from which a student could begin the study of damages. Somewhat surprisingly, more time seems to be devoted to the equitable remedies of specific performance and injunction than to damages.

¹(1977) 55 Can. B. Rev. 289.

²[1975] Q.B. 326.

While one may question the order in which some of the subject areas are presented in the casebook (a personal matter for instructors who have their favourite methods of presentation), in general the presentation is well-ordered and the casebook provides an up-to-date collection of Canadian and British cases.

The editors are to be commended for keeping this casebook to a reasonable size and consequently one can appreciate, if not agree with, their decision to keep the materials on subjects such as remedies to a minimum. The benefits are reflected in the cost; this book costs twenty dollars less in hardback than its counterpart by Professors Swan and Reiter. In paperback, it is a very reasonable \$23.50. For casebooks designed to be used in the classroom, cost is an important consideration. Students can not be expected, nor should they be asked, to pay exorbitant amounts for softback legal casebooks.

The contributors to *Contracts: Cases and Commentaries* are also to be commended for their selection and presentation of cases. In any given area, these have been kept to a minimum (usually no more than five). They have been edited to give the student a sufficient statement of the facts to facilitate a clear understanding of the court's decision. The format is to be preferred to that of Milner's *Cases and Materials on Contracts*³ which relies too heavily on brief excerpts from a plethora of cases.

The editors have made liberal use of notes and questions at the end of cases and sections. The notes often refer to further cases relevant in the area, and many of the questions, designed to generate discussion and thought, are excellent.

The contributors, true to their desire that this be a casebook capable of national use, have included references to legislation from all provinces. One is not left with the impression that only in Ontario is contract law being modified or changed through legislative activity. It is unfortunate, however, that the editors did not see fit to include a table of statutes. Also omitted is a key-word index, but the editors do include a table of cases.

The overall impression of this casebook is favourable. Any casebook must be supplemented by materials that reflect the particular interests, biases and teaching style of the instructor using it, so the exclusion of comprehensive supplementary materials is to be viewed as a benefit.

Professors Swan and Reiter have produced quite a different casebook from that edited by Professors Boyle and Percy. The book is the product of their experience in the teaching of contracts at the University of Toronto. The reader is immediately struck by the size of this

³(3rd edition).

casebook. It is over 1100 pages, a fact reflected in the cost. In hardback the price is \$60.00 and in softback, \$34.95 (a price this writer feels prohibits its adoption as a required casebook). The casebook presents a more comprehensive, and in many respects more interesting and challenging, study of the law of contracts than that presented by Professors Boyle and Percy. Their book is divided into nine chapters, the first of which deals with the remedies available for breach of contract. While one may question (as this writer does) the wisdom of introducing a student to the law of contracts by informing him or her of the remedies that are available when this "thing" called a contract is breached, the authors do present a detailed study of the subject area.

Chapter 2 deals with the kinds of promises the law will enforce. Students using this casebook will not have been informed at this point as to the concepts of offer and acceptance, certainty or intention to create legal relations, but they will be asked to digest the concept of consideration, one of the most elusive of all concepts in contract law. It is interesting to note that in this chapter are included cases dealing with intention; *Balfour v. Balfour*, *Simpkins v. Pay*, and *Jones v. Padvatton* are tucked away at the end of this lengthy chapter.

In Chapter 3 the authors finally address the issue of how a contract is created through the process of offer and acceptance.

Chapter 4 deals with misunderstandings, misrepresentations and mistakes. Here one also finds a discussion of the parol evidence rule. As the authors admit, "there is no uniquely appropriate place to raise it, but since it bears on the issue of the terms of contract, it is raised here".⁴ It is also in this chapter that the authors address the question of concurrent liability in tort and contract. The issues of *non est factum* and mistaken identity are also dealt with briefly.

Chapter 5 is entitled "The Effects of Non-Performance by the Plaintiff". The authors state that "the focus of this chapter is on those situations where the party suing for breach of contract has not performed that which the contract has required him to do."⁵ It is in this chapter that discussion is found of conditional contracts for the sale of land. However, the emphasis placed on this particular subject is much less than that placed upon the subject by Professors Boyle and Percy.

Chapter 6 is entitled "The Control of Contract Power", and involves an in-depth analysis of the standard form contract, as well as a look at exemption clauses and the issue of unconscionability.

⁴At 13.

⁵At 1.

The final section of Chapter 6 is devoted to the "legislative response". This deals with the impact of legislation on the law of contracts. The authors examine "the possible impact of legislation in tracing the problems that can arise in the case of a simple, common consumer transaction: the purchase of a used car."⁶ This kind of exercise is extremely useful when attempting to impress upon students the inroads legislation is making, and will continue to make, on the law of contracts.

Chapter 7 deals with the *Statute of frauds* and Chapter 8 with illegal contracts. Chapter 9 offers a conclusion, or, perhaps in the eyes of the authors, a beginning of the subject of contracts.

Professors Swan and Reiter have included in this casebook extensive supplementary materials, which have added greatly to its length. Some of them would appear to be very useful; others would only be used if one shared the authors' approach to the teaching of contracts. There is also considerable use made of American material and there are frequent references to the *Uniform Commercial Code* and the *Restatement of Contracts*.

The authors have posed many stimulating questions and problems which should generate thought and discussion among students. They also have prepared a table of statutes, a table of cases and a key-word index. It would appear that almost all references in the table of statutes are to Ontario legislation. One small but aggravating point is that the pages of this casebook are not numbered consecutively; each chapter starts at page one.

In summary, Professors Swan and Reiter have produced a more comprehensive and what many may find a more interesting casebook than that edited by Professors Boyle and Percy. However, Professors Swan and Reiter have displayed in their casebook a highly personal approach to the teaching of the law of contracts, one that may not be readily adopted by others in the field. Consequently, their casebook appears to be less versatile than that of Boyle and Percy, and this, coupled with the steep price, may militate against its widespread use by teachers of contract law.

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⁶At 242.

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