CONTRACTS: CASES AND COMMENTARIES edited by Christine Boyle and David R. Percy. Carswell, Toronto, Canada, 1978, pp. xxxvi and 722.

Contract law seems to be coming of age in Canada. In the last few years we have seen publication of three indigenous textbooks of quite different character on the subject: Cote, *An Introduction to the Law of Contract* (Juriliber, Edmonton, Canada, 1974), Fridman, *The Law of Contract* (Carswell, Toronto, Canada, 1976), and Waddams, *The Law of Contracts* (Canada Law Book, Toronto, Canada, 1977). To that old standby teaching casebook, *Milner's Cases and Materials on Contracts* (University of Toronto Press, Toronto, Canada, 1977), now in its third edition under the aegis of Professor Waddams, have been added two more published works, Swan & Reiter, *Contracts — Cases, Notes and Materials* (Butterworths, Toronto, Canada, 1978), and now Boyle & Percy, *Contracts: Cases and Commentaries* (1978), the last of which forms the subject of this review.

Contracts: Cases and Commentaries seems destined for widespread use in Canada. For a start, the book grew up as a joint project amongst a number of contract teachers to produce a national casebook, and the sixteen chapters have been contributed by no less a number of contributors spread throughout most of the common law provinces. No doubt this in itself will provide the book with a ready market in many law schools. The very number of contributors, however, gives pause, for does not the axiom have it that a camel is a horse designed by a committee? Despite this, Professors Boyle and Percy have on the whole done an excellent job in ensuring some continuity of treatment and similarity of style between the various subject-matters and contributors. The editors correctly say in the preface that the "materials and their organizations are somewhat traditional". Eschewing the trend favoured by many American casebooks (and, for that matter, the other two Canadian casebooks mentioned above) of commencing with a treatment of remedies, the book starts conventionally with an analysis of contract formation (offer and acceptance, intention to create legal relations), proceeds into a discussion of certainty of terms and "agreements to agree", and then treats consideration theory. Privity and a chapter on the Statute of Frauds conclude this part of the materials somewhat misleadingly called "The Creation of the Obligation". Part 2 is entitled "The Scope of the Contract" and contains a chapter dealing with contingent agreements (the *Turney & Turney* v. *Zhilka* [1959] S.C.R. 578 line of cases), a chapter on representations and terms and a useful chapter on the interpretation of contracts. The latter begins with an introductory treatment of principles of interpretation and then descends into the particular by looking at contracts of adhesion and disclaimer clauses. A chapter on the parol evidence rule and the principles dealing with rectification winds up this section. Rectification sits a little oddly here; I prefer to deal with it as part of the techniques available for dealing with the consequences of mistake. But since mistake is dealt with in the first chapter of the next part entitled "Vitiating Factors", no great difficulty in adjustment is required. Also included under the heading of "Vitiating Factors" are frustration, duress, unconscionability and public policy. Less convincingly,

capacity to contract occurs here for the first time. One would expect it to have occurred somewhat earlier in a book traditionally organized. The final part and chapter deal with remedies. The coverage thus is superficially complete.

On the credit side, the book is attractively printed and easy to read, although those with a touch of myopia are going to have to get out their microscopes to deal with the notes. Apart from some exceptions to be mentioned, the cases are generally well chosen, and have a heavy emphasis on Canadian material. The irritating practice exemplified in some casebooks of presenting a case so hacked about as to be barely recognizable is on the whole studiously avoided.* Well thought out notes and questions are ubiquitous. Statutory reforms are included and generous cross-referencing to most provincial legislation (including, on occasion, the civil law counterparts) is provided.

Nonetheless, even within its stated object as a "traditional" casebook, *Contracts: Cases and Commentaries* is hardly faultless. Some faults are merely the result of editorial oversight or unnecessary deference to individual contributors — something which no doubt will be remedied in future editions. For example, it seems hardly worthwhile abridging the quite short case of *Eliason* v. *Henshaw* (1819) 1 Wheaton 225 on page 45, especially since the editing has been quite unsuccessful. Who is suing whom for what is obscure, and the highly relevant fact that the plaintiff — the defendant in error — knew that the waggoner would probably not return to Harper's Ferry is omitted. On the other hand, it seems hardly defensible not to edit *Jones* v. *Padavatton* [1969] 1 W.L.R. 328 on pages 87 *et seq.* by stating the facts in abridged form from the unnecesarily rambling oral judgment of Danckwerts L.J. Nor does there seem much point in including the whole of Lord Denning's judgment in *Wickman Machine Tool Sales Ltd.* v. *L. Schuler A.G.* [1972] 1 W.L.R. 840, especially when both a majority and a minority judgment on appeal [1974] A.C. 235 are also included (p. 324 *et seq.*). Equally, it is mystifying how one can deal with the subject of conditional agreements in Canada (chapter 7) without including *Turney & Turney* v. *Zhilka* [1959] S.C.R. 578 which is the source of most of the problems here. Commentaries on the Bible are no doubt fascinating in themselves, but fail to have much impact without the holy book in front of one.

On a more technical note, if attention to detail is what distinguishes leading lawyers from their merely competent or mediocre counterparts (as some try to instill in their students), one can hardly condone the practices adopted in this work involving case citation. Occasional editorial oversights such as incorrect use of square and round brackets (*Dickinson* v. *Dodds* (1876) 2 Ch. D. 463 (page 61); *Phillips* v. *Brooks* [1919] 2 K.B. 243 (page 531) or simply incorrect citation (*Paradine* v. *Jane* (1647) Aleyn 26; 82 E.R. 897; [1558-1774] All E.R. Rep. 172 (page 557)), may be passed over lightly. More irritating is the frequent citing of cases from the English Reports collection simply as, e.g., "*Adams* v. *Lindsell* (1818) 106 E.R. 250" (pages 52 and 60) rather than the customary "*Adams* v. *Lindsell* (1818) 1 B. & Ald. 681; 106

* Although I was surprised to see (pages 58-60) the majority judgment in *Holwell Securities Ltd.* v. *Hughes* [1974] 1 W.L.R. 155 (Russell L.J.) given such little emphasis. Similarly the more traditional judgment of Winn L.J. in *D. & C. Builders Ltd.*, v. *Rees* [1966] 2 Q.B. 617 surely should have been included, at least in part (page 168).

E.R. 250." Almost unforgiveable to persons brought up in (dare one say it?) the "traditional" school is the indifferent use in certain chapters of unofficial English reports rather than the official reports. One need hardly say that the proper method of citing English cases is to cite the official report (i.e., Q.B., Ch., A.C., Fam.); optionally any unofficial report, e.g., the All England Reports reference, may be cited in addition. Too often in this casebook this rule is ignored. Random examples are *Mountford* v. *Scott* [1975] Ch. 258 (page 63); *Law* v. *Jones* [1974] Ch. 112 and *Tiverton Estates Ltd.* v. *Wearwell Ltd.* [1975] Ch. 146 (page 131); *W.J. Alan & Co. Ltd.* v. *El Nasr Export & Import Co.* [1972] 2 Q.B. 189 (page 173), and *Steadman* v. *Steadman* [1976] A.C. 536 (page 246). Apart from mere pedantry, the desirability of paying nodding respect to the customs of another jurisdiction and the desideratum of setting an example of precise citation for students, there is the further consideration that the official report judgment is sometimes different from the unofficial one, because a judge has taken the opportunity to revise the expression of his reasons for the official report.

There are also some matters of content which deserve mention. For example, would it not be better in the chapter dealing with consideration to adopt a more functional approach to the question of contractual modification, and look rather more exhaustively at the various techniques utilised in this area — all the various forms of estoppel, waiver, voluntary acceptance of substituted performance, variation for consideration, mutual rescission and novation, etc., — rather than merely develop concepts of promissory estoppel, an exercise which smacks of tunnel vision? If one entitles a chapter "Capacity" (chapter 13), is it really sufficient to deal with lunatics and drunkards in five lines by saying the law is clearly summarised in an Alberta District Court judgment? I suspect that counsel not infrequently have to consider whether or not to plead incompetency or intoxication as a defence, whether on its own or as part of a wider plea of unconscionability or *non est factum*. However, if it is really thought not worthwhile to look at these matters, the chapter ought to be properly entitled "Minors' Contracts" rather than "Capacity". Turning to the chapter on illegality, one is surprised not to see *St. John Shipping Corp.* v. *Joseph Rank Ltd.* [1957] 1 Q.B. 267 even mentioned in a footnote, let alone set out extensively for discussion. The cases discussed in that section, while no doubt interesting, hardly provide the sort of exhaustive analytical and policy treatment which Devlin J.'s judgment contains.

The foregoing matters would not be such as to deter one from assigning this casebook. For me, however, two major matters would. One concerns content, the other concerns this casebook's philosophy.

So far as content is concerned, there are three principal problems. The first concerns the chapter on remedies. As the editors say in their preface, they have decided not to provide cases and materials on remedies, but rather only a "thorough introduction." "It was felt that this was justified by the fact that the materials now reflect the way in which remedies are usually taught in first-year materials .... In addition, many Canadian law schools now offer specialized courses in Remedies, for which the present materials may provide a useful grounding." If it is in fact true that contract courses in Canada do not emphasize questions of remedies, then I suggest there is considerable cause for alarm. Interestingly enough, not only do the two other published Canadian casebooks have chapters including extensive cases and materials

on remedies but also think the matter sufficiently important, both intrinsically and from the viewpoint of acquiring a proper understanding of the purposes and directions of contract law, to place those chapters first. This does not preclude the teacher from using these materials later in the course, but at least they are there to use as he chooses. One may add that it hardly seems a reason to exclude treatment of a highly important subject that it forms the basis of a subsequent optional course. Professor Percy, who is responsible for the chapter on remedies, recognizes the importance of the subject: "It often seems that the success of a remedial [sic] lawyer is measured in the minds of lay observers by the massive damages awards he secures at trial and retains on appeal. Damages awards are conspicuous and everyday, yet their attainment is fraught with difficulty" (page 684). Could one say more to justify inclusion of extensive materials on remedies? In practice, one's clients are hardly interested in the metaphysics of subjectivism and objectivism in contract law. They want to know whether it is worth their while pursuing or defending claims. What sum of money will lie at the end of the road if they are successful? Any lawyer who is not intimately familiar with the way in which damages are calculated or with the range of remedies available for breach of contract, cannot, in my opinion, call himself qualified in contract law. As Professor Percy himself recognizes, the subject is not an easy one. Just as in other areas of contract law, there has been considerable development in this subject since the nineteenth century. Although Professor Percy's chapter is quite useful, relegating it in its current form to the end of the book makes it a sort of half-hearted postscript, the traditional Cinderella of contract law. Indeed, one feels the author himself senses this, as he quotes extensively from cases and finally in apparent desperation is forced to include one or two as if for class discussion. I left this chapter with a sense of dissatisfaction. Though quite good generally, there are some sad omissions and mis-statements. Causation and remoteness, two separate principles, are on page 684 treated confusingly as if they were somehow facets of one principle. As Salmon, L.J. (as he then was) has said: "Although the foreseeability test is a handmaiden of the law, it is by no means a maid-of-all-work" *Quinn* v. *Burch Bros. (Builders) Ltd.* [1966] 2 Q.B. 370, 394. On page 686, the gross generalization is made that "most commercial litigation is actually fought out by insurers." *Much* perhaps, but certainly not *most*. To talk about punitive damages without further elaboration is unhelpful (see, e.g., *Broome* v. *Cassell & Co. Ltd.* [1972] A.C. 1027 and *A.* v. *B.* [1974] 1 N.Z.L.R. 673) (page 688). It is inadequate to talk about reliance damages without mentioning the possibility of recovery of precontractual expenditure (*Anglia Tv Ltd.* v. *Reed* [1972] 1 Q.B. 61) or the need to prevent the plaintiff from recovering more through a claim for reliance expenditure than he would be entitled to had he sought protection of his expectation interest (*Bowlay Logging Ltd.* v. *Domtar Ltd.* [1978] 4 W.W.R. 105) (page 692). Reducing the problem of penalties and liquidated damages to a few lines of text and a quote from Laskin C.J.C.'s judgment in *H.F. Clarke Ltd.* v. *Thermidaire Corp. Ltd.* (1974) 54 D.L.R. (3d) 385 may be an "introduction" but is scarcely "thorough".

A second major problem, though less serious, occurs in Chapter 6, "The Requirement of Writing", which combines the inclusion of some cases with considerable linking text. With all respect to its contributor, I did not find this exercise satisfactory, again perhaps because of the vastness of the area: see Williams, *The Statute of Frauds* (Cambridge University Press, Cam-

bridge, England, 1932) — by the way, nowhere referred to in this chapter. For example, the "channelling" function of a writing (stressed by Fuller in the article cited on page 266, "Consideration and Form" (1941) 41 Col. L.R. 799) is not mentioned. The exceptions when an unenforceable contract may nevertheless be given some effect appear to be stated in an exhaustive way on page 227; this is misleading. On page 230 the extraordinary statement is made that formalities may be necessary for guarantees because "[n]ormally no direct benefit flows to the guarantor". Many guarantees nowadays are given by shareholders or directors of companies to secure bank loans or extended lines of credit. It is not hard to see the direct benefit flowing to guarantors such as these. It is surprising to see the case of *Britain* v. *Rossiter* (1879) 11 Q.B.D. 234 included without any reference to the decision of the House of Lords in *United Scientific Holdings Ltd.* v. *Burnley B.C.* [1977] 2 W.L.R. 806, the reasoning of which appears to undercut much of the basis of the former case. All that one finds of the leading House of Lords' decision of *Steadman* v. *Steadman* [1976] A.C. 536 is a short reference in a note on page 246. Since, in any argument to reverse the traditional trend of Canadian decisions on part performance, this decision will likely be used as the mainstay, the treatment meted out to the careful reasoning contained in *Steadman* seems rather cavalier.

But perhaps the most serious defect concerning content is the treatment of performance and breach of contract. No systematic treatment is given to dependent and independent promises, repudiation, or discharge for breach. It escapes me how any course in contract can fail to dicuss the problems engendered by such cases as *White & Carter (Councils) Ltd.* v. *McGregor* [1962] A.C. 413 and its offshoots such as *Finelli* v. *Dee* (1968) 67 D.L.R. (2d) 393. These cases are only referred to in passing in one or two footnotes. Both as a matter of practice and theory, such problems are fundamental to contract law. Indeed, some of my colleagues consider them so fundamental that they commence the contract course with breach and discharge. For them, *Contracts: Cases and Commentaries* would be an impossible book to use. This area must be improved in subsequent editions. One might have thought that a lesson would have been learned from Australian casebooks such as the work of McGarvie, Pannam & Hocker, *Cases and Materials in Contracts* (Law Book Com., Sydney, Australia, 1966), which, after giving light treatment to performance and breach in its first edition, subsequently systematically expanded this area to an acceptable level.

Quite apart from these matters of content, for me, the real difficulty with this book concerns its philosophy. What impression of contract law does one gain from perusing this work? The impression I got is that contract law is a relatively static subject which looks for its solutions to an internally generated logic. In *Prenn* v. *Simmonds* [1971] 1 W.L.R. 1381, Lord Wilberforce said: "The time has long passed when agreements . . . were isolated from the matrix of facts in which they were set and interpreted purely on linguistic considerations . . . . We must . . . enquire beyond the language and see what the circumstances were with reference to which the words were used, and the object, appearing from those circumstances, which the person using them had in view" (1383-4). In a more macrocosmic way, this applies equally to a course in contracts. This book does not systematically examine where the law of contract came from and where it is going. Although learned articles are frequently cited in footnotes, almost none (the chapter on interpretation being a significant exception) is considered worthy of extensive

quotation. Such quotation would put a subject or an area as a whole in some sort of philosophical, economic, or social context. Why the wealth of sound, frequently inspirational, academic writing is overlooked in this way is enigmatic. The format of case followed by notes and questions repeated *ad nauseam* is good as far as it goes, but gives the erroneous impression that contract law is a purely deductive art with the occasional statutory incursion to mar its inexorable internal logic. The reason for this lack of direction and perspective seems evident: there are sixteen contributors each contributing a chapter as if he were an island unto himself. Whether this is a fault in editing or a fault in the conception of so many labouring on what ought to be an integrated text is something which the editors must consider afresh.

I do not think that any of the above criticism renders Boyle & Percy's work beyond redemption. The very fact that contributions come from so many individuals scattered throughout such a large range of Canadian law schools will no doubt mean that the work will be extensively used. Hopefully each individual instructor will provide his class with some conception of the richness of contract jurisprudence. However, it is hoped that future editions will build on this accumulated experience and that the result will be a casebook which will appeal to a wider class of contract professors.

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