BOOK REVIEWS

LAW OF CONTRACT By Cheshire & Fifoot, 4th Australian edition by J. G. Starke and P. F. Higgins, assisted by N. C. Seddon. Butterworths, Sydney, 1981

There was once a time when Australian students had to rely principally on English textbooks, for the very necessary reason that there were very few home-produced Australian texts available. In the last ten or twenty years, all this has changed. There seems to have been something of an explosion in Australian legal writing, and in most areas there are now good Australian textbooks which can be prescribed for student use. But for some inexplicable reason, this has not really happened in the area of contract. Although there are several Australian casebooks—and, in Pannam and Hocker's 'Cases and Materials on Contract', at least one very good one—there is no fully Australian textbook.[1] The nearest approach is the work under review—an Australian version of a well-known English text, edited by two professors one of whom is now based in Italy and the other in Wales, although of course both have spent much of their academic careers in Australia.

The book is of course produced as an Australian text, and attempts to set out the principles of the Australian law of contract. Now in its fourth edition, it is well established. It is the automatic source to which one must turn for information as to the Australian law—if for no other reason, because of the scarcity of other books in the field—and as such its value must not be under-estimated. And yet the circumstances of its origin and construction leave one with the feeling that what is really needed for a totally satisfactory Australian textbook on contract is an entirely fresh start.

The first Australian edition,[2] would seem to have been based on the sixth English edition.[3] The authors took over the English text, slotting in Australian material where appropriate, either in addition to or in substitution for the English material. The process of rewriting has con-

1 (C.C.H. Australia, who produces B. A. Caffrey's 'Guidebook to Contract Law in Australia', might dispute this, and certainly that book is a book written for an Australian audience—but it seems to contain rather a high percentage of American cases).

2 Produced in 1966.

3 Produced in 1964.

tinued gradually over the three subsequent editions. In essence, therefore, the book's merits or defects are the merits or defects of the sixth English edition, and of the new work that has been done. The English Cheshire and Fifoot, of course, has had a high reputation for a long period, but has not been without its critics, for example Professor Atiyah, who feels that, because of its perpetuation of a now outdated model of contract, it "has had a very unsatisfactory influence on the law of contract over the past 25 years".[4] The present reviewer certainly feels that the English Cheshire and Fifoot has always been rather unsatisfactory in a number of respects, particularly in its separation of 'Contents of the Contract' from 'Discharge by Breach' by about 400 pages of text, and its assignment of the difference between conditions and warranties to the former rather than the latter chapter; and the Australian edition is of course imprisoned in the structure of the original English work. The latest editor of the English edition, Professor Furmston, while not effecting any fundamental alteration to the structure, has by a substantial rewriting, brought about a number of improvements—none of which are found in the Australian edition because it is based on the text of the sixth English edition. The Australian editors might, with advantage, look at some of the rewritten English sections, for example those dealing with contents of a contract and breach of contract, to see whether any subsequent Australian edition could be improved in the light of them.

Generally speaking, it is where the book stays closest to the original English text that it now appears most dated and unsatisfactory. To take just one example, how useful is it to an Australian student to be told on page 31 that "It would be ludicrous to suppose that businessmen couch their communications in the form of a catechism or reduce their negotiations to such a species of interrogatory as was formulated in the Roman 'Stipulatio'"? By contrast, it is where the book branches out on its own that it is at its best. Chapters such as those on Infants and Privity, both of which involved fundamental rewriting because of the differences between English and Australian law, are generally very good and helpful—because they are original and not secondhand. One qualification must be introduced here, unfortunately: the book still contains the highly original sections[5] in which the editors argue that equitable estoppel has been held not to be part of Australian law by the High Court. The case of *Je Maintiendrai* v. *Quaglia*[6] in which the Supreme

4 Atiyah, *Introduction to the Law of Contract*, 2nd ed. (1971); see also Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 686.

5 At 86-91, 603-608.

6 (1980) 26 S.A.S.R. 101.

Court of South Australia accepted the doctrine as law in South Australia, presumably came just too late for inclusion in this edition, but the remarks of the judges in that case about the Australian editors' views may give them a little food for thought before the appearance of the next edition.

One of the book's principal advantages is that it is a compendium of all the Australian authorities on contract of any importance. These are worked into the original text—sometimes in addition to the original English cases, but sometimes by excluding them or relegating them to a footnote. This means that whether the book deals with an English case depends not so much on the standing of that case but on whether there is an equivalent Australian case—which makes the coverage of English authorities a little patchy. On the whole, one much prefers the technique of Fleming on Torts, which seeks to cite all relevant authorities on a point, whether Australian or English, and to give them all approximately equal importance. Where the authorities concerned merely illustrate the same principle, the point being made is perhaps unimportant, and the editorial policy justifiable; but where the English and the Australian law differs the result is that the book sometimes gives an inadequate picture of the English, as opposed to the Australian, position. Where High Court authority exists then this obviously concludes the matter, but if the Australian position is based only on authorities from one or two State Supreme Courts then there can be no certainty that the Supreme Court of a third State is going to prefer such authorities to the English ones.

In this edition the paragraph headings (which replaced the traditional Cheshire sidenotes and are much more effective) have been numbered in the style now becoming usual in Australia, and case references have been inserted into the text, as have some authorities formerly cited only in footnotes. The effect is to reduce footnotes considerably, but to clutter the text up with references—a better answer, surely might be to cite all references in the Table of Cases and content oneself with citing name, date and jurisdiction in the text. The book is nicely produced, and in particular the cover of the paperback edition, which features a reproduction of the famous Carbolic Smoke Ball Company advertisement, deserves high commendation—how many other books are there which allow one to use the front cover as a teaching aid? But one still feels some hesitation about prescribing it as a contract text. This Law School, for one, still feels inclined to prescribe Treitel's 'Law of Contract', although it is English and not Australian. My own purely personal view is that in view of the limitations of Treitel for an Australian audience, and the difficulties with Cheshire and Fifoot summarised in

this review, one might as well relegate both to the category of recommended reading and prescribe Pannam and Hocker.

PETER HANDFORD

THE MORTGAGEE'S POWER OF SALE By C. E. Croft. Butterworths Pty. Ltd., Australia, 1980. Recommended retail price $19.

The secured creditor, further to his right to sue on the personal promise of the debtor, has recourse to the property of the debtor in order to enforce the discharge of the latter's obligation. He is thus not obliged to rely solely on his contractual remedy in the event of the debtor's insolvency. The mortgage represents one of the most common kinds of security. Legal practitioners are regularly called upon to advise a party of his or her rights in relation to a mortgage; more specifically, advice is particularly sought when a mortgagor makes default under a mortgage. It is at this point, when creditor and debtor alike are scrambling to ascertain their respective rights and obligations, that Croft's book has made a substantial contribution to Australian legal literature.

The extensive use of the mortgagee's power of sale and, to a lesser extent, of the power to appoint a receiver, represent a virtual abandonment of the other remedies available to the secured creditor.[1] The importance of Croft's book lies in his exhaustive treatment of the mortgagee's most common choice of remedy upon the default of the mortgagor—sale out of court.

The subject matter of the book is arranged, as the preface points out, so as to correspond chronologically with the steps that a mortgagee would take in exercising his power of sale. Hence, after a short discussion in Chapter One of types and definitions of mortgages, the source of the power of sale (Chapter Two), the conditions precedent to its exercise (Chapter Three), and the mortgagee's rights in relation to the possession of the mortgaged property (Chapters Four and Five), are discussed.

The materials are arranged, for the most part, by dividing chapters into general law mortgages and registered ('Torrens') land mortgages. The book adopts a system of consecutively numbering paragraphs and makes liberal use of headings and sub-headings so as to enable quick reference to the point of law sought. A notable feature of Croft's exposition is the lack of consistent analysis of and commentary on the authorities. While practitioners are well served by the book's concise and

[1] See Henchman, 'Remedies of the Secured Creditor', (1971) 10 *U.W.A.L. Rev.* 20.