

Book Review: Cases and Materials on Contracts, by J. B. Milner (ed)

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Book Review

Citation Information

Weiler, P. C.. "Book Review: Cases and Materials on Contracts, by J. B. Milner (ed)." *Osgoode Hall Law Journal* 3.1 (1964) : 157-161.
<http://digitalcommons.osgoode.yorku.ca/ohlj/vol3/iss1/21>

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Cases and Materials on Contracts, EDITED BY J. B. MILNER. TORONTO: UNIVERSITY OF TORONTO PRESS. (1963). pp. xxvii, 897. \$22.00.

In recent years, several casebooks prepared by Canadian professors of law have become available to the Canadian law student. An important addition to the list is *Cases and Materials on Contracts*, edited by Professor J. B. Milner. The occasion of this publication warrants an analysis not only of the new book itself but also of the significance of the whole paedagogical development of casebook materials from the point of view of the student.

A parochial disregard of the achievements of other legal jurisdictions is not a necessary condition for the development of a distinctively Canadian jurisprudence. In fact, the gathering together of the Canadian materials from the various provinces, in conjunction with those from the United Kingdom, the United States, Australia and New Zealand might have a very invigorating effect on the development of Canadian law. In particular it might help to dispel the sycophantish colonial outlook of Canadian courts in regard to English decisions, viz: the extent to which rules of stare decisis in Canada entail, in practice, the binding effect of English decisions here.

If Canadian students are made aware early of the truth that various approaches to special problems have been attempted by the different provinces, and that not only are there gaps in each but also definite contradictions inter se, then certain principles of jurisprudence may become widely accepted: first, that each province in Canada may have a different line of "binding" precedents on a problem, to the extent that no solution has been propounded by the Supreme Court of Canada; second, that no approach taken by the court of another jurisdiction is of any authoritative value until it is adopted by the instant court; third, that decisions from other jurisdictions will have relevance to the solution of the problems in a case only to the extent each has substantive merit, and not according to the "name" of the court which uttered them.

Only then will Canadian courts experience fully, as a conscious fact, the freedom of choice which is necessarily present in the making of every decision. It is submitted that the only possible result of conscious judicial choice (as opposed to subservient reliance upon English decisions) can be the creation of a higher quality of Canadian law.

Yet the addition of Canadian materials to the more widely known decisions in a particular field of the other jurisdictions will not be sufficient per se to induce in the student this sense of judicial freedom. In *Contracts*, the actual working of the legal process is more obscured by the seeming inevitability of logical analysis of a small number of basic axioms than in any other field, except perhaps, the *Conflict of Laws*.

No fruitful insights will result from a mere reading of English and Canadian decisions together, unless the correct questions are posed. To bring this type of answer to the law student, a casebook requires a combination of judicious editing of the cases, juxtaposition of various cases in novel and unexpected ways, interposition of selected legal readings and non-legal materials and the proposal of certain inquiries conducive to the raising of important issues, all in the context of the overall arrangement of the course.

Two broad tendencies are discernable in the selection and arrangement of casebook materials. The first emphasizes the importance of logic in the law and attempts to make the order of the casebook conform to that of the leading texts in the field. For each step in the orderly or logical arrangement of the rules (i.e. of contracts) there is included a corresponding case which almost inevitably is the leading judicial pronouncement on the point. In the Canadian context, this is inevitably either from the Supreme Court or from the highest English court which has dealt with the problem. Attention is paid to specific configurations of facts (i.e. regarding offers to auctions, advertisements, price quotations, etc.) but only insofar as there has developed a specific rule applicable to these facts, and only to the extent of including the case upon which this rule depends.

The other broad tendency has as its basis a conception of the legal process as one of the various means whereby society achieves and sustains certain ends and of legal decisions of value only insofar as it conduces to this task. The casebook is one of the principal tools used to train the permanent participants in the process and its contents and arrangements have no other *raison d'être* than the development of "law-men" adequate for their roles. A particular case is viewed basically as "a little segment of human history, history of an event or of an idea, or of both." An adequately trained legal mind does not determine the desirable result to this "segment of history" by means of logically impeccable syllogisms or precise dissection of expressions in previous authorities. Rather it seeks to fashion a "type-situation" upon which consciously articulated value judgments can be brought to bear. It is my opinion that Professor Milner's casebook falls within the latter category and in this review I shall attempt to show how.

The first chapter is devoted to an analysis of the various remedies available for a breach of contract. From the logical viewpoint, this is the reverse of the proper order. However, if one considers that the law is basically a means to an end and not a pure logical entity sufficient unto itself, then nothing is more important for an evaluation of it as an *ongoing process* than the knowledge of what will be the result of its intervention in a particular situation. It might be noted that at Osgoode Hall Law School, the course in Contracts is given in the first year while any consideration of remedies is left to the second year (damages in the course in Sale of Goods and specific performance in the course in Equity).

The next chapter attempts a definition of the various outside limits of the enforcement by the courts of promises. Grouped together are such "logically discrete" subjects as seals, consideration, intention to create legal relations, illegal or immoral contracts and the Statute of Frauds. The functional problems raised in respect of the first three are almost identical and the unnecessary anomalies which are caused in this regard by a too rigid adherence to a basic opinion are amply demonstrated in a group of cases, entitled merely "Alternatives to Consideration." A brief excursus into comparative law, in the form of an investigation of the civil law basis of jurisdiction over contracts, is a very useful "eye-opener" for any first year student intrigued by the possibility of a near mathematical necessity in the common law principle of contracts. What the editor feels perhaps may be inferred from his rather dry understatement to the effect that "the people of some civil law countries seem to be both happy and prosperous."

The following chapter, the heart of the course, analyzes the attitude of the Courts towards the negotiation process and assesses the occasions when the court should and will feel the transaction has sufficiently progressed that its intervention is justified. The labels the courts use are 'offer', "acceptance", "revocation", etc., (supplemented by Hohfield and Corbin with the terms "power", "liability", "privilege", "right", "duty", etc.). However, the emphasis in arrangement of the cases and the interspersed questions and notes point the student towards the more substantial considerations underlying the language. As an example, one whole section is devoted to cases involving negotiations where the parties are not face to face, and furnishes an excellent opportunity for assessment of the utility of such concepts as "consensus ad idem", still seen in the cases. The editor also performs a service in logic by his separation of the problems raised in such cases as *Raffles v. Wichelhaus* and *Smith v. Hughes* into a separate category called "ambiguity of terms". Analysis in terms of sufficiency of negotiation is preferable to a grouping into an overall class of "mistake". That logic, even if it has no inherent efficacy toward good, may do a great deal of harm, is demonstrated by what would happen under the latter type of analysis if Hughes had sued Smith. In any event, the "type-situation" problems raised are completely different from those present in the so-called "common mistake" cases which are probably better posed in conjunction with the analysis of "unexpected changes in circumstances."

The editor again groups in the same chapter, under the heading "written contracts and standard forms", three problems ordinarily considered to have no logical connection: the "Tickets Cases", Non Est Factum, and the Parole Evidence Rule. The common factor in the cases is not a formal one, but rather is the fact that they involve contracts of adhesion. They are best understood as attempts by the courts, by means of "interstitial legislation", to fit modern oligopolistic enterprise into legal rules developed from the philosophy of a bygone age. Even the conservative judge no longer acts according

to the view that a contract is merely the free expression of two morally autonomous wills (in a pseudo-Kantian sense) and thus beyond the regulative purview of the law.

The limitations inherent in the judicial process may be grasped by reflection upon the efforts of courts to treat contract-making as a private, delegated or subordinate, legislative power, and to work out rules governing this private-law-creation.

What may be the best chapter in the book deals with the problems of the "condition" and the various legal effects that have been attributed to a situation by judges through the use of this word. Integrated into the discussion of condition as a fact and as a promise (and as distinguished from a warranty) is a consideration of the problems of misrepresentation (fraudulent and innocent) and common misapprehension (*Solle v. Butcher*), and of the various legal effects and remedies thereof (especially the concept of rescission). In my opinion the Contracts course at Osgoode Hall should be altered to allow all these problems to be discussed together in order that each be more fully understood. In this chapter, the editor performs another service by grouping into two sections a variety of cases involving building and employment contracts respectively. This is of value for two reasons: first, it enables the student to test his analytic powers by evaluating various approaches to one functional situation; second, it is the only place in the course of studies where these problems can be dealt with as one separate integrated whole.

The reviewer has one important reservation concerning the value of this casebook. Besides frequent reference to Fuller, *Basic Contract Law*, there is almost a complete absence of recognition of scholarly work in contracts law. Not only is there very little incorporation of supplementary materials into the text itself, but there is no attempt at all to *systematically indicate*—to the student the better, outside reading available. The editor explains as his reason for this omission, that he is afraid that the student will be kept from developing his own powers of independent analysis by a search for the answer to all problems in the statement of others. Although this is a valid point, it is perhaps misdirected in the case of a first-year law student in a course such as contracts. In my opinion the real danger is rather that the student will accept the reasoning of the cases as inevitable and unquestionable, and go no farther in analysis than attempting to make them all consistent. Surely the best antidote towards this is acquaintance with several different and intelligent (though perhaps inconsistent) criticisms of a line of decisions. Nor can open-minded scepticism be induced by the teacher's criticism alone, for the inevitable impulse towards certainty will merely be transferred to his interpretation.

This one caveat notwithstanding, Professor Milner has performed for the benefit of students of the law of contracts a very creditable service. As one who believes that, from an existential point of view, the law is not "a brooding omnipresence in the sky", but rather a developed ability to *think* in a particular way, I would commend the use of this book by all teachers endeavouring to educe this capacity in law students.

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