BOOK REVIEWS

Cases on Trusts. Selected and edited by H. A. J. FORD, S.J.D. (Harvard), LL.M. (Melb.), Reader in Law in the University of Melbourne. (The Law Book Co. of Australasia Pty Ltd, 1959) pp. xvi and (including index 8) 794. Price £4 15s.

All the world of legal education is divided into three parts: those who believe that only some form of case-method is an honest approach to the university study of law; those who hold that the method is irrelevant provided the professor (with a small 'p' to include all grades of academic staff) does his job well; and those who feel that all this explicit discussion of methods of university teaching is rather *infra dig.* The boundaries are not clear, of course, and the antagonism has certainly long ceased to be racial. As in the realm of parliamentary politics, each party comprehends a broad range of opinion from doctrinaire extremists to near-agnostics. Each also includes its hypocrites, such as the secret lecturer who pays lip-service to case-method puritanism when that wing is in power.

Moderate case-classers are sometimes alarmed at the extravagant claims made for this educational method. Those who believe that it can be justified by perfectly truthful argument wish people would not make such suggestions as that it enables the student to see how and why courts decide cases as they do. Actually, it enables the student to make some progress towards an insight as to how superior courts decide cases involving clashes of legal principle (but not why they do it that way). This useful though modest objective can be attained in other ways. The fundamental argument is against orthodox lecturing rather than in favour of any specific alternative. Non-spoon-feeding assists the spirit of inquiry, and discussion with scholars can guide it and feed it. Decided cases being the main raw material of the lawyer, the argument is in favour of case-classes instead of lectures, but is not against the use of the smaller discussion group, tutorial or seminar as well. Nor, as many moderate case-classers have pointed out before, is the professor who overtly gives an introductory or reflective lecture now and again necessarily a bounder. Nor, indeed, is legislation beyond the pale, nor hypothetical problems, nor reading periodical articles or books, nor even, in the eyes of the modern moderates, some published work actually written by the professor conducting the class (or writing the case-book). By way of anticipation, perhaps it would be in order to say here that Dr Ford seems to be a modern moderate case-classer.

As is being increasingly realized, even in the remoter regions of the United States of America, legal education through case-classes did not finally end in England with the Year Books, but is still practised today in scattered centres, of which Nottingham has made itself famous (though admittedly there was a slight gap of several hundred years). I taught equity and land law by one of the variants of case-method in Belfast for several years, and Malaya has been experiencing this technique recently. Australian legal education, almost an American sphere of influence though loyally resisting, has got to the stage when an assertion of the superiority of case-method causes raised eyebrows not on account of the novelty of the proposition but because of its 'Queen Anne's dead' nature. My experience is that, in case-classes as compared with magisterial lectures, on the average the student's standard of understanding

of a branch of law goes up, he becomes readier to argue and speedier at discerning what principles of law are arguably relevant to a given fact-situation, and, most confounding to the supporters of lectures, the student —even the first-year undergraduate straight from school—actually gets a clearer idea of what are generally conceived to be the basic elementary principles of the subject. Moreover, after the shock of the initial impact of having to work hard on their own, undergraduates on the whole enjoy the experience. In the United States, apparently case-class-boredom sets in after a while, and third-year LL.B. students now tend to be fed on a diet of seminars and practical exercises instead. Possessing the vision of one who contemplates from afar, it is possible to diagnose as the disease that tendency towards conformity exhibited by great believers in individual liberty. Never having been, as student or professor, in a law faculty where any two people used the same technique, I have never witnessed students getting bored with any particular method of teaching. They may become annoyed at someone's (real or seeming) incompetence, but that is not boredom with a method. So far as I know, I have never converted anyone to case-method and, though I try, my lack of success is pleasing for those who believe in variety. Those students who have case-classes, other discussion methods, 'stimulating' lectures, dictatorial lectures, practical exercises, and what have you, all slung at them at once may get exasperated, but hardly bored.

Case-method education is widely, almost universally, believed to require case-books. Dr Ford's case-book is designed for this purpose. It is important to stress this, because 'cases on' is often incorporated in the title of completely different kinds of law books. A case-class case-book is meant as a substitute for (or reproduction of) the real law reports themselves with regard to those cases included in the book. Some English 'case-books' are (occasionally excellent) textbooks, with extracts from judgments given at greater length than in more usual types of text-books. Anyone who regards such a book as a substitute for law reports is a fool or a rascal, and deserves the consequences of walking into the trap. Another style of 'case-book' is that where numbers of cases on a particular branch of law are summarily digested (or indigested) without narrative links. The same comment applies. Certainly if one is going to conduct a case-class, or 'cases and materials' discussion session, the cases must be read either in the authorized law reports or in some such book as Dr Ford's. In a law school the size of Melbourne the argument for the case-book against reliance on law reports is obvious. You can't possibly equip a law library to cope with three hundred students wanting the same case at once. But it is said that even in a small faculty the case-book is needed, so that each member of the class has the material for discussion in front of him. I believe, on the contrary, that it is quite a valuable part of his education that a law student should have to go to the original reports and compile his own summary for use in class. Excessive summarizing zeal is guarded against by providing each class with an epidiascope and one copy of each report to be discussed. Even then though, there is much in favour of the student keeping a good case-book like Dr Ford's in each subject (in which such a good case-book is available) at home. So far as using published case-books as a professorial tool is concerned, one difficulty is that it is or ought to be hard to get any two professors to agree on a precise selection of cases. But there will be a large measure of agreement on most of the cases in any given

subject in any given country, and the rest can be taken care of by additional mimeographed material. The same applies to keeping up with cases reported after the case-book editor has done his compiling, but it seems inevitable that fairly frequent supplements (which become a nuisance) or new editions (which become expensive) will be called for. There is already, for instance, a growing mountain of post-Ford cases on variation of trusts.

Dr Ford's *Cases on Trusts* is meant to embody all those features of a case-class case-book which have gradually come to be regarded as desirable by the moderates during the slow stages of evolution of their thinking about the matter since Langdell. In addition to the cases themselves, there are extracts from legislation, there are introductory, summarizing, or linking notes, which are admirable samples of compressed lucidity, and questions are asked and problems raised where this has seemed to the author an appropriate pedagogical device. Some professors will certainly wish to pursue other questions and problems, but that does not stop them using this book. It is regrettable that the footnotes do not include references to important periodical literature on the various subjects, but that is a matter of opinion as to the type of book you want to produce, and their omission is clearly a policy decision by the editor and not an oversight on his part.

The cases themselves are not reproduced in full from the original reports. Headnotes are invariably omitted—'naturally' (this word is quoted from 7 *Res Judicatae* 260). Omission of headnotes is a fundamental article of faith for case-classers, but heterodoxy is to be found in the best societies. The only arguments against including headnotes (apart from the argument that everybody does omit them) are, first, that good headnotes may prevent bad students from reading the cases; and secondly, that what a reporter has given as his opinion in a headnote may colour the reader's subsequent reading of the case. The first argument is feeble, the tendency will not stand up against good professorial work and searching assessment at moots and examinations, and in any case the unscrupulous, lazy and shrewd student (who is not necessarily typical) will find the headnote in the law report. The second feature of headnotes is one which should be squarely and openly faced and combated. The following are some arguments in favour of including headnotes in case-books: (1) in real life, law reports are prefaced by headnotes; (2) headnotes are part of the raw material for discussion of the relation between headnotes and law reports as to accuracy and authority; (3) judges giving judgment frequently quote headnotes of earlier cases without referring to any other part of the report, and discussion of why and when this is done and should or should not be done is healthier than omitting headnotes from case-books and pretending the beastly, delightful, things are not part of a lawyer's life.

Facts are often summarized rather than taken verbatim from the statement in the original report, arguments of counsel indicated briefly or omitted, and parts of judgments left out. All this is part of the effort to make the most of the space occupied in the interest of providing material for discussion of the law of trusts. The case-book editor has to reconcile the competing policies of teaching the embryo lawyer to use cases as he will meet them in law reports, and of keeping the price within some sort of bounds and giving direction to the discussion. Those who place great store on the inclusion of chaff, so that the student will

learn to separate it from the grain, sometimes disapprove of any tampering with reports, but Dr Ford leaves plenty of scope for teeth-cutting in techniques of selection. Besides, in some ways it is a pity that real chaff exists in real law reports. The student of trusts cannot expect many of the trust cases to be entirely about the law of trusts, but part of the trouble is that some judges talk too much—and quote too much.

'Lawyers' law' accounts for the entire contents of the book. Materials on the economic and social background and impact of trust cases are not provided. The cases chosen are almost all from England, Australia and New Zealand. This means that the book is addressed primarily to Australian and New Zealand customers. So far as discussion of the principles of the law of trusts is concerned, an English law student would do as well with Australasian cases as with the English. Yet consideration of principles of trust law, or any other branch of law, is inextricably bound up with the doctrine of precedent. It is no proposition about their relative quality to record that English decisions enjoy a higher authority in Australia than do Australian decisions in England. The lofty standard of the High Court of Australia, and the outstanding contribution to equity made by some Australian judges, are well known in other common-law countries, and scholars would not dream of ignoring their decisions. But the bar and bench have so far managed to rub along in England with but very occasional reference to authority from outside the United Kingdom. This affects the other common-law countries too. In Malaya (for whose contribution see page 655 of Ford, showing how widely the editor has cast his net), where neither is binding according to any explicit decision, English cases are the daily sustenance of the courts while Australian cases are probably not even available except in the office of Mr S. K. Das, who practises in Ipoh, and in the University of Malaya in Singapore. Use of them in court is rare indeed. But there are no Malayan case-books, and if courses in that country and others without native case-books are conducted by professors who employ that method, they should find Ford a suitable tool.

Despite its volume of English cases, it is very unlikely that many law students in England will buy Ford, even if every reviewer says that it ought to be on every English law student's shelf, unless it is made the book of a case-class. But every library should buy it, and those who have not got complete sets of Australian and New Zealand reports must.

The topics considered in the cases selected represent the more or less conventional scope of a book on trusts. It is tempting to set out in detail the table of contents, but it must be accepted as sufficient to indicate the scope in these general terms and to add that the classification of the cases, though minimal, is orderly and helpful to exposition. For example, the chapter on charitable trusts is divided into three sections: charitable purposes, the doctrine of cy-près, and remoteness. The cases on what purposes are charitable are not grouped under sub-heads, which would beg part of the student's task; on the other hand, possible classifications are indicated by the inclusion of the preamble to the Statute of Charitable Uses and an extract from Lord Macnaghten's speech in *Income Tax Commissioners v. Pemsel.*[1] By reading on, the extent of the influence of this speech becomes far more vividly apparent than if the whole section were sub-headed. Charity administration (except cy-près) has been omitted. As Dr Ford says in his preface:

[1] [1891] A.C. 531, 580.

> Some topics, such as capacity to be a trustee, appointment of new trustees and the functions of Public Trustees, have not been included because they are matters which require close attention to the details of local legislation. For similar reasons the chapter on Powers of Trustees provides a mere outline of the topic. In preparing the case-book I have assumed that each teacher will supplement it by his own treatment of local legislation. The text of some legislation [from several jurisdictions] has, however, been reproduced.

This attempt to avoid parochialism and to make the book of world-wide use is laudable and, though I have expressed pessimism, I hope it succeeds. Later on in the preface, explaining his mean treatment of constructive trusts, Dr Ford pleads shortage of space and 'a view that the constructive trust may be looked on by many as a remedial device rather than a medium of disposition. . . .' This is unfortunate, for where is a student to learn of constructive trusts if not in his trusts course? He should discuss them somewhere. The space problem ought not to be formidable, as many constructive trust cases are connected with other topics in the book, and fifteen of their own pages are there already. Remedies for breach of trust are, of course, fully covered.

By and large it is difficult to quarrel with the allocation of space among the various branches of trusts. At first sight it is a trifle startling to find 100 pages of Consideration, compared with 110 pages of Charities, but the cases on Consideration in the law of trusts are certainly confused and numerous. I still think Dr Ford has overdone Consideration to some extent by devoting attention to finer niceties of fact-distinction here than in other parts of the book.

The choice of cases is sensible on the criteria of maximum coverage of the law of trusts and maximum problem-raising. It is possible to argue here and there about whether this case would not have been apter than t'other, but the argument is not likely to be rewarding. No one could accuse Dr Ford of eccentricity, and I doubt whether anyone could produce a list of cases likely to found a greater measure of agreement. Every case-book must be used (probably even by its creator) on the basis that the professor adds or subtracts. Problem cases and leading cases may or may not coincide, as Dr Ford points out in his preface, but there are occasions when some people will find the omission of a leading case regrettable even though later cases may present the problems more effectively. For example, I should not care to have students discuss the trustee's duty of impartiality among the beneficiaries without their having read *Howe v. Lord Dartmouth*.[2] But many leading cases are there.

The editor maintains a nice blend of old and new. He has a general fancy for the modern case as against the old, and this is justifiable on two counts: later cases are likely to raise the problems in a form that incorporates knowledge of what has gone before; and the facts are more likely to touch the experience of the student. Old cases are never included merely because respect for their antiquity has made them cited to life. But the rock-bottom basic stuff of the law of property is never sacrificed just because it is ancient. Page one begins in 1417, and in the next item Bacon cites Coke with approval.

Dr Ford is an academic lawyer with profound knowledge of Chancery

[2] (1802) 7 Ves. 137.

cases. This book is not his first. His publications show an industry that suggests one should look forward to the next.

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Bilateral Studies: American—Australian Private International Law, by ZELMAN COWEN, M.A. (Oxon), B.C.L. (Oxon), B.A., LL.M., of Grey's Inn, Barrister-at-Law, (Oceana Publications, New York, 1957), pp. 1-108. Australian price £1 17s. 6d.

In a federal system one expects to find many cases with interstate elements. The present expansion of population and commerce in Australia, and particularly the growth of large companies carrying on business in more than one State, must lead to many more such cases. As a result the courts find themselves called upon more and more to grapple with the rules of private international law.

This problem has been faced for many years in the United States of America, and as a result a considerable body of case law has been built up in that country dealing with private international law particularly at the interstate level. This book is one of a series comparing the rules of private international law in America with those in other countries. In this short but admirable book Professor Cowen has set out to provide such a comparative study of the rules in the two federal systems of America and Australia. The book is short, there being only 80 pages of text, the balance being taken up with appendices, tables and a comprehensive and useful index. The author displays a complete grasp of the rules of private international law in the two systems, and in many ways shows how the American experience can provide a useful guide to the Australian courts, on the interstate level. Although in a book of this size it is impossible to discuss fully the whole range of private international law, Professor Cowen has briefly summarized all the main features of the subject. He has done more than achieve his stated object of comparing the two systems. He has seized the opportunity to ask some very stimulating questions of the Australian courts, and has forcefully advocated a new thinking in Australia on problems of interstate private international law.

The book contains references to a number of cases where Australian courts have made a distinct contribution to the English common law rules of private international law. Some of the fields dealt with are: renvoi; incapacity to marry imposed by the domicile of one of the parties to the marriage (where the High Court in *Miller v. Teale*[1] cast doubt on the doctrine of *Sottomayer v. De Barros (No. 2)*[2]; and choice of law in a suit for divorce where the petitioner relies on misconduct of the respondent, part of which occurred in some other country.

The greater part of the book, and the most interesting part, deals with cases where the common law rules have been modified, or in the author's opinion should be modified in cases on the interstate level. The author devotes a chapter to full faith and credit (section 118 of the Australian Constitution) and returns to the subject on a number of occasions throughout the rest of the book. His contention is that the Australian judges, unlike their American brothers, have failed to apply full faith and credit in many cases where it should have been relevant, and generally seem un-

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[1] [1954] Argus L.R. 1109.

[2] (1877) 2 P.D. 81.