

BOOK REVIEWS

TUTORIALS IN CONTRACT, by F. Collinge. Sydney. The Law Book Company, 1981. 343 pp. including index and appendices. Paperback. New Zealand price \$17.50.

There are two possible ways of approaching this text. The first is to treat the author's work as a new treatise on the substantive law of contract, and then to compare similar works in order to assess the value of its content.

On assuming this approach one is immediately struck by the somewhat superficial treatment given to most aspects of contract law. Although the full gamut is covered, from formation to termination of contract, the text presents the law in a very much simplified manner.

However, the second approach one must take is to examine the book within the context set by its author, and to evaluate its success in that regard. The book cover states that the purpose of the text is "to enable students and teachers alike to make the best possible use of the tutorial system of teaching. It is not intended to be a substitute for lectures, but concentrates on particular principles to enable them to be examined in depth. It is designed to supplement lectures, to encourage independent research, and to provide basic materials for use in tutorials."

The format of the book is designed to meet this end. As previously mentioned, each section consists of, first, the author's brief statement of the particular legal principle; secondly, reference to the facts of an authoritative case; thirdly, some relevant quote from the decision; and fourthly, a series of questions to the reader based on the issues arising from the foregoing discussion.

In his Preface, Mr Collinge explains the significance of this approach:

it is intended that this book should, in addition to providing source material on each of the major issues raised, assist students to analyse and to understand for themselves the issues and to apply the principles to new situations for themselves.

Thus, rather than simply serving as a compendium of contract law knowledge, the style and content of this text are specifically designed to develop and promote in the initiate, the peculiar but essential skill of able legal reasoning, and, on the whole in this regard, the text-book is undoubtedly successful. The author's formulations of principle are clear, the case facts full, and the questions intelligent and thought-

provoking. A diligent student would therefore derive great benefit from supplementing lecture notes with study from Mr Collinge's text.

In conclusion, although the text is not particularly substantive in its content, its emphasis on the process of legal reasoning makes it an extremely worthwhile investment for the student about to embark on legal studies.

M.A.

AUSTRALIAN CIVIL PROCEDURE, by Bernard C. Cairns. Sydney. The Law Book Company. 573 pp. including index. New Zealand price \$45.00; paperback \$32.00.

As everyone who ever moots soon discovers, the law of civil procedure is probably one of the most important yet neglected areas in legal literature. A vain search is made for some sort of text which will describe what is required in a statement of claim, or answers questions as to what sort, and how much detail should be included in a statement of defence.

The same sort of problem is faced by newly graduated law clerks who find that of at least as much importance as their knowledge of the substantial doctrines of contract, administrative and company law is the need to know how to harness such knowledge to the demands of a court system. For instance, whether it is best to commence a particular proceeding by way of originating summons or by action. Again there is a need for some sort of explanation of how to pick one's way through the potential quicksands of interlocutory and discovery proceedings; how to serve a party who is now outside jurisdiction, and when and how to serve a notice of discontinuance.

For the detailed annotations such as Sim & Cain's *Code of Civil Procedure* to be used to their full value there must be some understanding of the aims, objectives and general techniques of procedural law. Yet at the present time there is no text which does this. Most learning is done by the time consuming and nerve wracking process of trial and error.

Bernard Cairns, an Australian practitioner and law lecturer has written a book which seeks to meet these various needs. The book is both a detailed study of the body of law arising out of the rules of civil procedure and an overview of the general principles of pleading and procedure, which together form the general law of civil procedure. It aims to meet the demands of students and practitioners alike.

Because the text is limited to a consideration of the rules of

Australian state jurisdictions this former aspect of the book is of limited value to New Zealand readers. Each chapter starts with a general discussion of its subject as most of the rules are fairly uniform. Then where various State differences are important they are individually discussed. It would appear that in general the New Zealand rules coincide with their Australian counterparts. If this book included a section noting the variations peculiar to New Zealand law, then New Zealand law students and practitioners could get the full benefit of the author's obvious expertise and scholarship. An example of a text of similar format, put out by the same publisher, where this has in fact occurred is Pannams *Law of Moneylenders in Australia and New Zealand*.

The general overview of the law of civil procedure, which forms the other aspect of this book, suffers from no such limitations. Indeed some chapters, particularly those on the nature and functions of pleadings, should be required reading for those who take part in moots, or hope to practise in the common law arena.

The author starts right at the beginning of a subject, imparting information which everyone assumes students have acquired, usually incorrectly, and then builds on these basics to an extent which even experienced practitioners will find useful. An example of this refreshing approach can be seen at the start of the author's discussion of statements of claim:

Generally the statement of claim must fulfil two pleading functions. It must allege the facts the plaintiff claims confer a cause of action, and second it must claim the relief sought in respect of the wrong done by the defendant.

To reveal a cause of action the statement of claim must show a connection between the plaintiff, the facts alleged, and the relief. All the material facts essential to the cause of action must be stated in summary form according to the rules of pleading. They must be stated with sufficient particularity to make the defendant aware of the case made against him. A recognised cause of action must be disclosed. If it is not, the pleading stands liable to be struck out and the action may be terminated summarily. Evidence must not be pleaded, nor may any matter which is irrelevant to the cause of action. Such matter may embarrass, prejudice or delay the fair trial of the action and accordingly it is liable to be struck out.

These are the requirements of the pleading rules, and the statement of claim must adhere to them. . . . (p.197)

This text helps fill a large gap, albeit with some limitations for New Zealand readers, in an area whose importance is fully recognised by practitioners and often only vaguely guessed at by students. The book is well indexed and considerable care is evident in the preparation of the Tables of Cases, Rules and Statutes.

The lack of New Zealand case law and discussion of our Code of Civil Procedure is not the major drawback it would initially appear to be as these areas are covered in Sim & Cain. When read together the two complement each other excellently.

THE LAW OF PARTNERSHIP IN AUSTRALIA AND NEW ZEALAND, by P.F.P. Higgins & K.L. Fletcher. 4th Edition. Sydney. Law Book Company. 1980. lxiii & 383 pp. New Zealand price : cloth \$35.00; limp \$25.00.

It is not uncommon for Australian legal writers to include a chapter on, or at least references to, comparable New Zealand jurisprudence; but it must be recognised that with other than a compendious treatise, an exclusively New Zealand text enjoys a real advantage, both in terms of scope and relevancy. The authors concede this limitation in their preface, but conclude that there is a sufficient discussion of New Zealand partnership law and legislation to warrant retaining the reference to this country in the title.

The volume, as I shall discuss in more detail shortly, is divided into three primary parts, and at least in respect of the first two, New Zealand practitioners and students should find informative discussion of relevant law. One feature of the book which is immediately apparent as with past editions, is the extensive citation of English authorities, which, together with the similarity of partnership legislation in all jurisdictions overcomes what might otherwise be a heavy Australian bias.

There are other partnership books embracing both countries, for example Joske on Partnership, but this volume is the most substantial, and forms a complementary edition to *Webb & Webb*, the New Zealand text. Whereas the student is likely to feel more at home with the latter, *Law of Partnership in Australia and New Zealand* develops discussion of principles into the more practical aspects of their application, and appears primarily, although by no means exclusively, a practitioners' book.

Part I contains chapters on the function of Partnerships and trading corporations, and the formation of the contract of partnership. The authors range widely over the evolution of trading associations from Roman times, the position at common law and in equity prior to the passing of the Acts, and the earlier difficulties which have been ameliorated by subsequent legislation. In particular, the enforcement of judgments, the position of the non-partner participating in profits in the event of bankruptcy, the non-assignability of a partner's interest, and the right to participate in the management of the partnership. There is also a discussion of the single entity and unlimited liability concepts, and an additional section on the interpretation of the Acts, an invaluable appendage to specialist texts which is all too often overlooked.

The chapter on the formation of the contract discusses capacity, illegality, and formalities. Insofar as New Zealand legislation differs

from those Australian states which have either themselves supplanted the common law or retained it, there is by necessity a certain degree of irrelevancy. This is true with the capacity of minors, married women, and the effect of illegality. However where the position remains essentially the same on both sides of the Tasman, for example in respect of persons of unsound mind, the text is relevant and helpful. As, however, a necessary corollary of differences in approach, discussion of the New Zealand legislation, for example the Illegal Contracts Act 1970, is not so thorough as to be of real assistance; but because perhaps the matter is to some extent collateral, the authors may have felt it sufficient to merely raise it.

Again, under the sub-chapter on formalities, portions of the learning concerning the enforcement of oral contracts for dealings with land, or where the contract will not be performed in one year, are not relevant in this country.

Part II which forms the bulk of the work, is concerned with the Partnership Acts themselves. The authors have here used the traditional categorisation into chapters on the nature of partnership, the relationship of the partners to persons dealing with them, the relationship of the partners to one another, and the dissolution of the partnership. As mentioned previously, both the Australian and New Zealand legislation had their genesis in the English Partnership Acts, so that the various chapters contain an amalgam of case law from all three jurisdictions, but with New Zealand not unexpectedly or unjustifiably, being very much the junior partner.

There are several points which deserve comment. First the New Zealand courts have interpreted the meaning of 'business' more broadly than elsewhere, in particular in respect of an isolated act; but it is disappointing to find that such a favourite of students, at least in this country, as *Welch v. Jess* [1976] N.Z. Recent Law (N.S.) 185, should not merit inclusion. Naturally the rule in *Cox v. Hickman* (1860) 8 H.L.Cas. 268 and subsequent legislation and cases forms a substantial part of the chapter on the nature of partnership, including discussion of the *Canny Gabriel Castle* case (1974) 48 A.L.J.R. 217, which was omitted from the third edition of the book.

The following chapter concerns the relationship of the partners to persons dealing with them. It discusses the power of one partner to bind the firm, doing things in the 'usual' course of business and the effect of express notice to the contrary, liability of partners, misapplication of money, doctrine of 'holding out', representations, notice, and effect of change in the composition of the firm. There is in particular an interesting discussion of the difficult case of *Watteau v. Fenwick* (1893) 1 Q.B. 346, and the mooted lacunae in the Act whereby the decision has not been affected by legislation if there are

more than two partners; although the authors suggest this is not as great as has been thought.

The chapter on the relations of the partners inter se deals with variation, all aspects of partnership property, rules as to interests and duties, expulsion and retirement, accountability, duty not to compete, and the rights of an assignee. Discussion under these heads generally follow the relevant statutory provisions. This is also true of the following chapter on dissolution, which examines the different events which may cause the partnership to dissolve, and the rights of the partners and third parties on that occurrence. The section on the rights of partners to the application of partnership property is particularly thorough, including sub-headings on liens, the rule in *Clayton's case*, the rights of an assignee, and the valuation of goodwill, especially as there is not a great deal of New Zealand authority in this area. As a further, minor point, the discussion in this chapter on rescission for fraud or misrepresentation may now have to be read in the light of the Contractual Remedies Act 1979 (N.Z.).

Part III of the Act is the section least relevant to New Zealand practice. It is divided into four chapters; bankruptcy, procedure in partnership actions, Taxation of partnership income in Australia, and Registration of Business Names. Insofar as the first chapter on bankruptcy is concerned it would be fair to suggest that the main thrust of the text follows the Australian provisions, and the New Zealand and English statutes where these differ, are relegated to foot notation. This is even more evident in the following chapter on procedure, and the practitioner in this country would be better to stay with the specialist New Zealand texts on this subject.

As the authors are at pains to point out in the preface, the concluding chapters on taxation and business name legislation has no reference to the law in New Zealand, especially as we have no counterpart to the Uniform Business Names Acts. Some of the more general principles of taxation of partnerships may, however, be relevant to the New Zealand legislation. It should also be noted that the book has a comparative table of Partnership Acts in the preliminary pages, and precedents for common partnership deeds in the Appendix.

Notwithstanding the inherent disadvantages of combining two jurisdictions within the ambit of one book, there is sufficient of common import to make this a text which can be recommended to the New Zealand practitioner or student, as a definitive exposition of the law in this area.