Tatham v. *Huxtable*[25] is an unfortunate decision in that it converts a rule which had been verbally accepted, but for practical purposes ignored, into a real threat to certain types of testamentary disposition. It deprives the Australian Courts of the privilege still enjoyed by English Courts of combining verbal acceptance and practical disregard of the rule. One can only express the hope that the reasoning will be reviewed at the earliest opportunity and the forgotten principle reinstated that courts of construction are concerned only with giving effect to instruments which come to them with their testamentary character already fixed.

F. C. HUTLEY *

OF AMERICAN AND ENGLISH CASE-LAW OF CONTRACT A REVIEW COMMENT

I

The significant divergence between the English and American law of contract may be an unexpected, but is now an indisputable phenomenon. There remain, to add the immediate qualification, an essential link and an underlying likeness; but this link and likeness are the function of a common language and common stock of doctrine; they no longer represent that post-Blackstonian unity which ended, roughly speaking, with the first world war. Story, Parsons and Langdell as well as (with some modification) Page and Williston, fall squarely within the English classical tradition; rather as Addison's or Pollock's[1] early works on contract had practical relevance for even an average American lawyer. However, Corbin and even more Llewellyn belong to a newer contractual school; their contributions are often entirely new stuff. Yet, fortunately, another circumstance may prevent too radical an Anglo-American divergence and may still make for the preservation of some lasting bond. For it is a curious fact that while English lawyers, practical and academic, have virtually shut their eyes to the American experience, the Americans have not allowed English law to pass by unattended. In the contractual as indeed in other fields, they have included English developments within their scholarly province. They have tended to regard England as just another jurisdiction, as a relatively small addition to their own growing mass of decisions from forty-eight states and a further hierarchy of federal courts. And confronted by this staggering material, it was perhaps easier for American lawyers to take all the proffered riches in their stride and to digest even the English menu. "Easier" however only in one sense, for the strides themselves have required much hard work and extensive learning.

But though it certainly is true that it is the Americans who have assumed trusteeship for continuing a transatlantically *common* law of contract, it would be wrong to draw from this unduly harsh conclusions, conclusions that would unreservedly imply smug isolation on the part of English lawyers. However unfortunate it is that in England all too little notice is taken of American legal contributions, it always needs to be remembered that English law is a self-sufficient unit. In America, on the other hand, no single state (with at most three or four exceptions) provides, despite its jurisdictional autonomy, a similarly complete system, that is, a system that would operate (in practice) without cross-reference and cross-fertilisation. Deeply related with this situation is at least one main justification for the American case-method in teaching. For

[25] *Ibid.*

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[1] In the United States Pollock's treatise soon became famous as Wald's *Pollock on Contract*, after Gustavus H. Wald, of Cincinnati, who edited and annotated the first American edition. Later, Professor Williston became the editor, but the book remained "Wald's Pollock". See on this, Williston, *Life and Law* (An Autobiography), (1941) 261-2.

even though the United States has no "national" law of contract, at any rate its major law schools drive at an "all-American" or national perspective. The case-technique, to be really efficient must therefore build not only on a vast selection, but also on the real or apparent dissimilarity of the relevant decisions. Its job is both to portray the jurisdictional diversity and to sort out and unify the disorderly experience; to separate a possibly common denominator from the purely parochial variation. Doing this job will mean that taught law is inevitably tough law[2] simply because "the law" is so hard to come by.

In a unitary state like England these specific difficulties are absent. With only one set of cases, the ordinary judicial process already achieves a sort of national systematisation which to the American contract lawyer is not given: the latter must first cope with possibly very different legal strands even within one class of problem, and he must first compare (say) a Massachusett doctrine with that of Alabama before he can proceed to direct analysis and integration. Great analytical difficulties of course remain even within the English system, for the judge-made *ratio* or reconciliation may either be technically faulty or may merely conceal a profound policy-departure. My sole point is, however, that because an English lawyer can operate within a unitary field, he is (as it were) put one considerable jump ahead of his American confrere; and because of this it is, in another sense, perhaps not impossible to say that the text-book is as natural an expression of English law as the case-book fittingly reflects a different U.S. picture. I am not now at all arguing for or against the case-method, and would even concede its great pedagogical advantage; all I want to say (though cannot ever really prove) is that, in view of these different conditions, there is a rationally valid basis for the English text-book quite apart from traditional predilections.

II

These Anglo-American differences in approach receive an almost graphic demonstration when we come to consider two case-books recently published: an American book by Professors Kessler and Sharp,[3] and an English book (now in its second edition) coming from Dr. Cheshire and Mr. Fifoot.[4] Of Kessler and Sharp it must immediately be said that theirs is an outstanding contribution. The bulk of their book consists of well over 250 decisions, some English, most American, with often full but always pertinently abridged judgments. A similar number of cases are interspersed in so-called "Notes", the latter containing in addition not only acute comments and suggestions for further legal problems, but also giving most useful references to the literature on the particular topic. This bibliography alone is a treasure-house of knowledge; as it also is an appropriate reminder of the magnificent research and thinking done by American contract lawyers. But Kessler and Sharp is not merely a vast collection of cases and materials. The whole book is linked together, especially in its earlier part, by a commentary either penned by the editors themselves or culled from other books and articles. The book is further kept together by an exceedingly skilful arrangement of what would otherwise constitute a virtual chaos of material. This arrangement has another very great merit. By

[2] In using these words from the brilliant Rede Lecture, I am aware that Maitland in saying that "taught law is tough law" or that "law schools make tough law" was mainly referring to the enormous durability in time that a taught tradition can foster, thinking in particular of the astonishingly tough survival of Lombardy law in Italy from the eleventh century until the Code Napoleon. I am therefore using Maitland's phrase with a different meaning, though I am (I hope) not doing unlawful violence to its spirit so rich in alternative suggestions.

[3] F. Kessler and M. P. Sharp, *Contracts: Cases and Materials* (New York, 1953) published by Prentice-Hall, Inc.

[4] G. C. Cheshire and C. H. S. Fifoot, *Cases on the Law of Contract* (London, 1954) published by Butterworth & Co. (Publishers) Ltd.

displaying the doctrinal antinomies within each relevant segment, the attempt is made to penetrate to the basic questions that lie behind (what Mr. Justice Frankfurter has called)[5] the "carved pigeon-holes" of our classical law of contract. The book does not, perhaps cannot, establish order from the intractable case-law; the resulting order operates rather on another level: it teaches to ask, though not always to answer, the really significant and inter-connected questions. The book still clarifies by desperately asking "why?", even if it does not precisely tell us "whither?".

To compare, then, Kessler and Sharp with Cheshire and Fifoot may appear an unfair procedure; for Cheshire and Fifoot's case-book is clearly far less ambitious, being meant as an aid and companion to their well-known and popular text-book. Nevertheless their case-book, however modest in its purpose, still manages to portray the main structure and substance of the specifically English law of contract; indeed its most modern substance since (as we are told in the preface and only a cursory glance at the previous edition makes obvious) much old authority has been replaced by more recent.[6] It is just this broad picture that is presently useful, and may be put beside Kessler and Sharp's vastly more complex canvas. But any such juxtaposition calls for an immediate warning. As regards these two books, no juxtaposition can be a substitute for the intimate knowledge that can be gleaned only by the reader, since mere description is hard put to convey all the differences of form, and of tone and temper. For where Kessler and Sharp are sophisticated impressionists, Cheshire and Fifoot's brush-work seems elementary; where the former push towards originality, the latter are content (and because of their limited purpose, are legitimately content) to remain derivative. What follows is no more than a primitive bird's-eye-view of the main differences of treatment.

Cheshire and Fifoot classify their cases in the conventional manner. Beginning with contractual formation[7] and consideration, they print six decisions illustrating what they call the "Contents of the Contract" (another name for that judicial interpretation by which contractual terms are either excluded or implied). After exemplifying the operation of the Statute of Frauds, they include a dozen cases on mistake which certainly is a happy inspiration. Misrepresentation and undue influence (combining eleven decisions) are followed by more isolated topics such as wagering and illegal contracts as well as infants. However, their next rubric, Privity of Contract, is a most diverse mixture covering such things as *Tweddle* v. *Atkinson*,[8] the *Strathcona Case*,[9] and decisions on agency and assignment (though the absence of that vital agency-case, *Watteau* v. *Fenwick*,[10] seems a somewhat unfortunate omission). The book then proceeds to "Discharge" and "Remedies" and closes with five good examples concerning quasi-contract.

If we take this English scheme of contract law as our yardstick, then Kessler and Sharp move in an entirely different dimension. The American editors do not organise their material around the customary subjects; there is *prima facie* nothing, in their book, to remind us of the traditional topography which an English lawyer immediately associates with a course on contract.

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[5] *Cf. United States* v. *Bethlehem Steel Corporation* (1942) 315 U.S. 289 (see Kessler and Sharp, *op. cit.* 270).

[6] It must be added that Cheshire and Fifoot manage to make the substance of English contract law more concise by the pithy headnotes they append to most of their chosen cases. Apart from this, however, the editors let the cases speak for themselves, only occasionally adding some explanatory notes of their own (see such a note at 325, and the interesting remarks at 337, n. 4). Some may regard it as a matter for regret that the editors should not have intervened more often.

[7] Observe here the inclusion of two important recent decisions: *Pharmaceutical Society of Great Britain* v. *Boots Cash Chemists (Southern) Ltd.* (1952) 2 Q.B. 795 and *Nicolene Ltd.* v. *Simmonds* (1953) 1 Q.B. 543. Australian lawyers may also feel most gratified at the appropriate inclusion of *The Crown* v. *Watson* (1927) 40 C.L.R. 227.

[8] (1861) 1 B. & S. 393.

[9] *Lord Strathcona Steamship Co.* v. *Dominion Coal Co.* (1926) A.C. 108.

[10] (1893) 1 Q.B. 346.

Of course, Kessler and Sharp deal with offer and acceptance, consideration and similar official topics; but their treatment of them is unorthodox and their chapter-headings are unusual, headings which incidentally are most illuminating for they neatly express what the editors are after. To give a few examples: (i) Consideration is placed in the broader context of "Freedom of Contract and the Ideal of Reciprocity" or of "Bargain-principle v. Reliance-principle"; and this discussion immediately brings to light the main function of the doctrine of consideration, which is to restrict enforceable simple contracts to bargains, thus excluding mere agreements. (ii) The problem of offer and acceptance is not (as in English books) treated *en bloc*, but dispersed among three to four different sections, ranging from "preliminary negotiations", "firm offers" to "assent and its mysteries" and finally to "contracts by correspondence". This underlines the important, but too often neglected, differences between contracts by letter and the more straightforward bargains *inter presentes*; and here the pregnant question is asked whether "it would not be more profitable to develop independent rules (of contractual formation) based on fairness and commercial convenience for each fact situation rather than applying one rule across the board" (p. 155). This, needless to say, is a question which still awaits much more detailed study. (iii) Similarly the bulk of "mistake" is dealt with in a large chapter devoted to the problem of the "security of transactions" and the "objective theory of contracts"; but then mistake is also taken up in other sections, in particular mistake of identity which finds a place among the "basic ideals of an individualistic law of contract". (iv) The reader will find a great deal on wages as well as on "Contract and Labor". Again, the reader will not find a homogeneous treatment of "illegal contracts". Several references to illegal bargains (lotteries, usury, Sunday laws) are strewn all over the book, but there is a complete and particularly useful (later) chapter on restraint of trade where contract becomes a "device for industrial integration". (v) Agency, too, is completely dispersed, but specific chapters cover third-party beneficiaries and assignment, the latter containing some first-rate material.

Once these "topographical" peculiarities are mastered, even an uninitiated English or Australian lawyer would find the rest of this American case-book quite plain sailing. He will, if his bent be "jurisprudential", greatly enjoy and profit by those most stimulating preliminary chapters in which Professors Kessler and Sharp build their own philosophy of contract; he will, if his bent be more "practical", learn enormously from the three chapters dedicated to impossibility and frustration as well as from a masterly chapter on "damages". Yet in spite of its very great merits, this case-book also suffers from two deficiencies which must not be left unnoticed. The first is the regrettable omission of the law of misrepresentation. Our contractual concepts, though variegated and seemingly independent, are closely related one with the other; they are, as Professor Havighurst has somewhere pointed out, like the members of one team. Without an understanding of misrepresentation, much of our law of contractual mistake can easily become either arbitrary or incomprehensible; and however objective our theory of contract, the rules which provide for the avoidance of a bargain induced by fraudulent or innocently false statements forcibly remind us about that part of contract law in which assent and agreement are still strictly subjective. One can go further and say that misrepresentation is as much based on an "ideal of reciprocity" as is consideration; and the proof of this can be seen in the close historical connection not only between deceit and assumpsit, but even more between misrepresentation and the warranties of quality and of title. The second deficiency concerns Kessler and Sharp's treatment of discharge of contracts, or what they call the "Protection of the Exchange Relationship". This chapter does not do complete justice to what might be broadly described as the contracting parties' "performatory" rights and duties, i.e. the rights and duties so slowly and confusingly developed

in the long history of dependent and independent promises; in short, the contractual history of conditions. This is the sort of problem that Langdell was mainly concerned with in his *Summary of Contracts*, or that Williston and Corbin have tried to explain in (chiefly) the third volume of their respective treatises. In fairness, however, it must be added that these "performatory" rights and duties still represent what is, from an analytical point of view, the least satisfactory and worked-out area in the whole law of contract. And it could not be expected that the editors should pay as much attention to this as they have to other problems.

This brief survey will suffice to convey an impression of the nature of the American book, its imaginative range and its minor limitations. This praise, to repeat, implies no criticsm of Cheshire and Fifoot seeing the subordinate part it plays to their primary text-book. But as the American work is so obviously the more important and independent contribution, it deserves some further comments particularly in relation to its underlying theory of contract. To Professors Kessler and Sharp the dominant modern theme in contract is "a principle of order", which means a principle of social control and which is merely another way of saying, with Durkheim, that not everything is contractual in a contract. For "in large sectors of our social and economic life contract is no longer an individual and private affair, but a social institution affecting more than the interests of the two contracting parties. An analysis, therefore, of present-day contract exclusively in terms of volition and agreement does not do justice to contract as a social institution".[11] With this very broad statement it is unfashionable, as it is impossible, really to disagree. Obviously this statement says something of importance, so easily and often overlooked in a strictly vocational approach. Obviously we must appreciate the institutional significance of contract before we can even begin to understand those social and economic changes which have altered many aspects of contract law. But once we have admitted this, what else is there in the principle of order or of social control? Is not, in the final analysis, social control the rationale of all our law, that is, the control of those co-operative activities where government intervenes in our social life? To have law is to have a postulate principle of order; it is to have social control. It is in this sense that Roman lawyers could speak of private contracts as being law, simply because within its own domain a contract imposed just the same "obligations" or "controls" as the "controls" or commands of prince or paterfamilias.

But the principle of order also has another meaning. For it connects intimately with the advent of "compulsory", or "institutional", or "adhesive" contracts, which have caused the pendulum to swing from (free) contract back to (predetermined) status, in the same way as (according to Maine) it had once swung in the opposite direction. But are we not here too credulously accepting Maine's attractive historical generalisation? If this cyclical theory only means that our societies have moved into, or out of, economic *laissez-faire*, the point may be well taken.[12] But the cycle is intended to mean more; it is intended to indicate a development between two polarised stages (roughly mediæval and nineteenth century) of legal attitudes to freedom of contract. If so, is it really true that there was more contractual freedom in the later than in the earlier period? Is it, for example, true that the nineteenth century factory worker had more contractual freedom than the mediæval village labourer? Or, again, is it true that the businessman (say) fifty years ago had more freedom than a merchant three, or four, or five centuries earlier? For it must not be forgotten that although mediæval merchants could not buy and sell steam-engines and similar things, they were amazingly free in their commercial dealings: they had impressive freedom of contract in their courts merchant,

[11] At 9.

[12] But see J. Stone, "The Myths of Planning and Laissez-Faire: A Re-orientation" (1949) 18 *Geo. Wash. L.R.* 1.

and they could otherwise make almost any contract by way of bond and the covenant, instruments which were elaborately used until the enforcement of simple contracts. I make these points not, for the present, with any deep critical intention. -My intention is merely to draw attention to the difficulties involved in any single gospel or generalisation. It seems to me that in contract above all must we beware of monistic explanations, whether they be principles of order, control, freedom or status. The reason is that of all our legal devices contract is the most versatile and many-sided, as it is also the most natural and basic. For we might live our lives, our social lives, without committing torts or crimes or even without the formal marriage. But we cannot dispense with making agreements either to ensure the exchange of goods and services or to make possible other reliable means of social co-operation.

III

And there is a final observation. While the English lawyer (with the possible exception of Sir Frederick Pollock) has usually been content to remain within the strict limits of technical contract, modern American lawyers are not at all unwilling to make contract the starting-point for much wider theoretical legal thinking. Indeed, in the United States there has, in recent years, been a surprisingly close connection between "contract" and "jurisprudence": witness, for example, the well-known dual interests of such men as Llewellyn, Patterson, Goble and Fuller. Is there for this a deeper reason, a reason that goes beyond the merely accidental or subjective? If there is, the objective reason would have to include several factors. Perhaps first and foremost is the extraordinary richness of material which is continuously to hand and always presents a challenge to the American contract expert. A second factor is, without doubt, the dynamic of the major American law schools, their great intellectual activity that tends to become a competitive quest for the better approach and the more inclusive explanation. The third factor, however, must be found in the enormous scale of American contract problems. At the one end of the scale is the constitutional problem of the impairment of obligations. At the other end, there are the great economic questions thrown up by price-fixing or market-sharing agreements only vaguely controlled by the anti-trust legislation. And in between, American lawyers also had to find, through the law of contract (i.e. through enforceable charitable subscription promises) a dependable financial basis for the operation of the voluntary foundation. These pulls, at any rate, must have helped to tear open what to an English lawyer could remain a technically "closed" system; and once the system was forced open, it also prepared the way for that more theoretical (or fundamentalist) thinking that characterises the Americans' approach to their case-law of contract. The "kingless commonwealths on the other shore of the Atlantic Ocean"[13] may at one time have been but the receivers of English law from Bracton to Blackstone; assuredly they have now become the pioneers of Anglo-American contractual jurisprudence.

SAMUEL J. STOLJAR *

A FIRST COURSE IN LAW

It may seem odd to do much more than note the appearance of the second edition of an introductory text-book for students, even if the book has undergone a considerable change since its first appearance.† It is not inappropriate,

[13] *Cf.* 2 F. Pollock and F. W. Maitland, *History of English Law*, 674.

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† *A First Book of English Law* by O. Hood-Phillips, M.A., B.C.L. (Oxon.), of Gray's Inn, Barrister-at-Law, Dean of the Faculty of Law and Barber Professor of Jurisprudence in the University of Birmingham. 2 ed. 1953, Sweet & Maxwell Ltd., xxiv - 293. £1/4/6 in Australia.