THE EVOLUTION OF THE AMERICAN CASEBOOK

By H. A. J. FORD*

THIS article is the outcome of a request to review Cases on *Decedents' Estates*[1] edited by Professor Max Rheinstein.[2]

Designed for use in a forty class-hours' course of the University of Chicago Law School the work is concerned with such topics as intestate succession, rights of surviving spouse, execution and revocation of wills, probate and administration, transactions *inter vivos* which have testamentary effects, problems of interpretation and the techniques of estate planning and will drafting. An Australian lawyer looking into this volume would find much law with which he is familiar although he might occasionally be intrigued by some aspects of American law as, for example, the preservation and strengthening of dower in a number of American states. The form of the book would, however, be more striking than its subject matter. While it consists of some text written by the editor the bulk of the work is made up of judgments and opinions of courts, extracts from law review articles by various authors, notes referring the reader to reports, law review articles etc., and problems.

If, for example, he looks at chapter 7, dealing with the formalities of execution of witnessed wills, he will find a short opening section written by the editor dealing with the policies underlying formal requirements relating to wills. Following this is a number of questions and references. After these there appears a four-page extract from a law review article by Professor Lon L. Fuller, in which the functions performed by legal formalities are considered. Then follows the text of various statutory provisions prescribing formalities required for wills. These include the Statute of Frauds, the Wills Act 1837, New York's Decedent Estate Law, Pennsylvania's statutory provision and the Model Execution of Wills Act 1940 drafted under the auspices of the Commissioners on Uniform State Laws. After these, each element of the formal requirement is treated by providing cases. For the most part only the court opinion is printed and headnotes do not appear.

To a person nourished on a steady diet of text-books this book could appear somewhat unfinished. But therein lies its value to American teachers as a teaching tool. In what follows hereafter an attempt is made to show the evolution of the modern American

* LL.M. (Melb.), Senior Lecturer in Law, University of Melbourne.

[1] Second edition, The Bobbs-Merrill Co. Inc., Indianapolis, 1955, pp. i-xv, 1-875. No price stated. Copy supplied by the publishers.

[2] Max Pam Professor of Comparative Law, University of Chicago.

casebook, and to indicate the controversies which lie behind the form which Professor Rheinstein's casebook has assumed.

If in this treatment there appears to be undue emphasis on the form of this casebook as against its subject matter, the justification urged is that a conventional review of the book is not likely to be meaningful in the absence of any widespread appreciation in Australia of the reasons why American law teachers set such store by these legal anthologies.

The Langdell Type of Casebook

Any treatment of the development of casebooks must begin with the contribution of Professor Christopher Columbus Langdell, who became Dane Professor of Law at Harvard Law School in 1870, at the age of forty-three. He approached the teaching of law with a conviction that the teaching from text-books which had hitherto been in vogue in Harvard Law School could be improved upon. His opinion was that students would be better equipped if they were trained to do what had previously been done for them by the text writers; that is to say, they should work from the original authorities of the law, the reported cases, rather than the general propositions which text writers had distilled from the cases.

The idea of studying from reported cases was not new. Students in the medieval Inns of Court had perforce to study from the Year Books. But whereas the publication of a text-book had been generally looked upon as taking the place of many reported cases as objects of study, Langdell's view was distinctive in that he was not prepared to allow that the added convenience provided by the text-book synthesis outweighed the lawyerly training which came from working with the original cases.

To put his views into practice Langdell had to make the original authorities available to his students and in 1871 there was published his first casebook entitled *Selection of Cases on the Law of Contracts*, described as having been prepared 'for use as a text-book in Harvard Law School.' In the preface he stated his aims. To give systematic instruction successfully in the courses assigned to him, 'it was necessary, first, that the efforts of the pupils should go hand in hand with mine, that is, that they should study with direct reference to my instruction; secondly, that the study thus required of them should be of the kind from which they might reap the greatest and most lasting benefits; thirdly, that the instruction should be of such a character that the pupils might at least derive a greater advantage from attending it than from devoting the same

time to private study.' To carry out this three-fold objective, a carefully selected series of cases was to be the subject of study and instruction. The selection of cases had to be made on some principle. Langdell stated that principle, as follows:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless, and worse than useless, for any purpose of systematic study. Moreover, the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.[3]

Fifteen years after the above remarks were written Langdell, speaking at the celebration of the 250th anniversary of Harvard University, said:

> My associates and myself, therefore, have constantly acted upon the view that law is a science, and that a well-equipped university is the true place for teaching and learning that science. Accordingly the law library has been the object of our greatest and most constant solicitude. We have not done for it all that we should have been glad to do, but we have done much. Indeed, in the library of today one would find it difficult to recognize the library of seventeen years ago. We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all what the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.[4]

[3] Langdell, *Cases on Contracts* (1st ed., 1871), Preface.
[4] (1887) 21 *American Law Review* 124.

These quotations have been extracted at some length because they assist understanding of Langdell's legal philosophy and what it was he was attempting to do. His references to the slow evolution of legal principles show a regard for the past, suggestive of sympathy with the views of the historical school of jurisprudence. His conception of law appears to have been of a system of coherent principles each having inherent worth regardless of variation in social context. All that the student had to do was to extract those principles from the original sources which evidenced their evolution.

In putting forward his own views of teaching, Langdell did not entirely break with the tradition of the treatise writers. Part of the service given to legal development by treatise writers has been systematization of the mass of material found in the reports. Langdell's casebook did not mirror the confusion of the reports. His aim was systematic study and he was prepared to give the student some of the assistance which the text writers gave, by arranging the cases in a systematic order. The organization of chapters and sections of chapters was on what later writers on legal education might call a conceptualistic pattern but it gave the student a measure of assistance; he was not left at large in a field labelled simply 'Contracts'. That there was need for organization of legal sources upon a conceptualistic pattern seems to be borne out by one review of Langdell's casebook. This reviewer found it worthy of note that:

> A contract concerning coal is not indexed under the head Coal, nor even under the popular name of the contract, as Charter-party or Insurance. . . . The cases are referred to under the general principle of the law of contracts, which they illustrate and this ought to be enough for lawyers. . . . If the present generation is to improve upon the text-books of the last, as it easily may, it must work in the direction followed by Mr Langdell by discarding popular and adopting legal distinctions.[5]

Langdell's casebook in time inspired the method of teaching known as the case method, the distinctive feature of which in the minds of many is the Socratic method. Langdell does not clearly indicate that he had this particular technique in mind when he compiled his casebook. In the address delivered in 1886, referred to above, Langdell explained his view of a law teacher as 'a person who accompanies his pupils on a road which is new to them, but with which he is well acquainted from having often travelled it before'.[6]

The form of the casebook on Contracts reflected his aims. It con-

[5] (1872) 6 *American Law Review* 353.
[6] *Centennial History of the Harvard Law School* (1817-1917) p. 233.

tained only cases and of these there was a minimum of editing. Naturally the headnotes were omitted, but otherwise the original report was reproduced, with the full unvaried statement of facts, counsel's arguments and, in most cases, all the opinions that were given. Only occasionally was a part of the report omitted. This is consistent with his theory that students should get used to working with the original sources and original sources meant the cases as found in the reports. Some of the cases would make heavy going to a modern American student accustomed to heavily edited cases. For example, the report of a Scottish case, *Thomson v. James*,[7] extends to over thirty pages. Ames has told us that Langdell was a conservative.[8] This seems to be reinforced by a perusal of the cases he selected. That he had a strong sense of the continuity of Anglo-American tradition seems to be borne out by the number of comparatively early English cases included. The book was undefiled by statutes. A perusal of the second edition fails to disclose any copy of the Statute of Frauds within its pages. Statutes of Limitation were significant only in so far as they gave rise to cases as to the enforceability of new promises to pay statute-barred debts.[9] Their text was not reproduced.

In 1872 Langdell's *Selection of Cases on Sales of Personal Property* appeared. In composition it was little different from the Contracts casebook. The arrangement of topics was again systematic being based on parts of *Blackburn on Sale.*

Much of the discussion about changes in American legal education in the last eighty years sees the change as one from emphasis on imparting information to one of emphasis on developing skills. Certainly, Professor Langdell's innovation represented a departure from the pure imparting of information but it was not a radical change to skill training. From what we are told of his manner of teaching it would appear that his method depended not so much on spurring students to develop skills largely by their own efforts as on demonstration. The advantage over the old system was that the students had the skills of case analysis, discernment of the interrelation of cases and the extraction of principles demonstrated to them in the process of acquiring information. In the second edition of the casebook on Contracts, Langdell included a summary of the topics covered by the cases. This summary, which ran to over one hundred pages in a work containing almost one thousand one hun-

[7] (1855) 18 Dunlop 1. Langdell, *Cases on Contracts* (2nd ed., 1879), pp. 125-56.
[8] *Centennial History of the Harvard Law School* (1817-1917), 234.
[9] Langdell, *Cases on Contracts* (2nd ed., 1879), Summary ss. 72, 73.

dred pages, was a statement of principles very little different from that contained in a text-book. Its presence argues that Langdell was not concerned to depart very far from the informing technique.

In an unsigned review of the work in the *American Law Review*,[10] by Oliver Wendell Holmes, Jr., it seemed to the reviewer that though there could not be found in the legal literature of America, 'such a *tour de force* of patient and profound intellect working out original theory through a mass of detail, and evolving consistency out of what seemed a chaos of conflicting atoms,' the work was not wholly acceptable because Langdell's ideal in the law seemed to be *elegantia iuris* and that Langdell did not appreciate that the life of the law had not been logic. This review neared its conclusion with a statement which would read strangely now to many modern American teachers:

> But it is to be remembered that the book is published for use at a law school, and that for that purpose dogmatic teaching is a necessity, if any thing is to be taught within the limited time of a student's course. A professor must start with a system as an arbitrary fact, and the most which can be hoped for is to make the student see how it hangs together, and thus to send him into practice with something more than a rag-bag of details. For this purpose it is believed that Mr Langdell's teachings, published and unpublished, have been of unequalled value.

Meanwhile, one of Langdell's pupils, James Barr Ames, had begun teaching at Harvard Law School in 1873, and being impressed with Langdell's approach, he produced in 1881 two volumes containing *A Selection of Cases on the Law of Bills and Notes and other Negotiable Paper*. This work followed the general pattern of Langdell's casebooks. In it were reprinted as many as six hundred and thirty-nine cases as they appeared in the reports minus the head-notes. Bills and Notes not having a connection with the common law earlier than the seventeenth century, the subject did not allow much scope for the more remote historical references by which the legal historian in Ames might have set store, but a number of sections of the collection are introduced by cases from the seventeenth century in a manner suggestive of historical treatment.

In one respect Ames was more ambitious than Langdell, for with 'the design of rendering these volumes useful to the practising lawyer' he 'attempted to collect in foot-notes all the cumulative and adverse authorities, English and American, upon the points

[10] (1880) 14 *American Law Review* 233.

decided in the principal cases, indicating by the words *accord* and *contra* whether these additional cases agree or disagree with the decisions in the principal cases.'[11] In view of the primary aim of the work, some of these notes were quite lengthy. For example, a survey of the law in the various states on the subject of anomalous endorsement occupied almost four pages of fine print. Features of this kind, while commending the work to book reviewers who were practitioners, would have drawn criticism from the law teachers who later came to review casebooks.

In 1894, when Williston produced a one-volume casebook in Contracts to supplement Langdell's selection, the need to economize space was becoming apparent. Williston met this by omitting the reports of argument of counsel and when the facts of the case appeared with sufficient fullness in the opinion, by printing only the opinion therein. Further space was saved by omitting concurring opinions from many cases. Unlike Langdell, Williston did not provide his students with a summary of principle, but in other respects the book was similar to its predecessors.

By 1903, Williston considered that the development of the law of Contracts during the previous thirty years had made it desirable to substitute a new casebook for that of Langdell, and in that year his two-volume selection of cases appeared. Although the historical approach necessitating inclusion of early English cases was maintained, reliance on American decisions given after 1871 is noticeable. Unlike the earlier casebooks on Contracts, this work contained footnotes giving references to law review articles, dicta from opinions not thought worthy of inclusion as principal cases and lists of cases in accord with or opposed to the principal authorities. Part of the object of this elaboration was probably a desire to make the work of some assistance to practising lawyers without defeating the pedagogical purpose of making the students work out the principle from a detailed study of the cases. Emphasis on this teaching aim also accounted for a less minute subdivision of topics than that which characterized Langdell's book, and it probably accounted for the absence of anything like Langdell's summary of principle.

The casebooks of these three famous American teachers may be regarded as typical of the books which gradually carried the case method of teaching beyond Harvard Law School to other American law schools. From about 1880 the law reviews had resounded with the clash of pro and con about the new method of teaching ushered in by Langdell's casebook. It suffices to say that by the turn of the

[11] Ames, *Cases on the Law of Bills and Notes* (1881), Preface.

century the new method had been so widely adopted that attempts to argue against it became attempts to plough the sands. The only significant live issues left after a time were as to the form which a casebook should assume.

Selection of Cases. From One Jurisdiction or from Many?

One feature of the early casebooks was a wide selection of cases for lawyerly analysis. Concerned as they were with showing the emergence of basic common law principles and compiled on the premise that those principles were true irrespective of time and place, the early casebooks included cases from many different common law jurisdictions. In addition to American, English and Scottish decisions, the reports of Canada and occasionally those of Australia were drawn upon. The ubiquitous character of common law principles was emphasized and local variations were minimized.

Since the first casebooks were designed for use in Harvard Law School, which drew its students from all parts of the United States, this failure to concentrate on the law of any one jurisdiction was understandable. Langdell's conception of legal education as a training in legal science did not require detailed attention to the law of any one jurisdiction. This catholicity did not lack critics. Probably the most forceful of them was Albert M. Kales.

Starting from the premise that the proper aim of a law school was to turn out lawyers well equipped for practice and instancing his own experience that it had taken him three years of steady work to check the cases of one jurisdiction, Illinois, in the narrow field of future interests, Kales thought that the Harvard casebook did not provide sufficient assistance for the student who would eventually practise in one jurisdiction. His proposal for improvement was that:

> The subject-matter of the casebook be so altered that it shall present a true picture of the present state of the law in a particular jurisdiction – for example, Illinois, – with the same fidelity that it now gives us a correct understanding of the law of England prior to modern statutory changes, or of the law of that ideal jurisdiction which the compiler of the present Harvard Law School casebook has made for himself.[12]

[12] Kales, 'The Next Step in the Evolution of the Casebook', (1907) 21 *Harvard Law Review* 92, 107. Kales taught at Northwestern University School of Law from 1902 until 1916. He came to Harvard Law School as Professor of Law in 1916-17. It was said of him, 'Whether teaching at Cambridge or regrettably absent *in partibus infidelium* he has always put Harvard Law School on its mettle.' *Centennial History of the Harvard Law School* (1817-1917), p. 222.

This criticism, though aimed in terms at the casebook, was really a criticism of the policy of legal education followed at Harvard Law School. The criticism does not appear to have had any noticeable effect, for casebooks appearing after 1907 continued to draw their cases from more than one jurisdiction, and this has remained true of the casebooks published in recent years.

Although compilers of casebooks continue to draw on many jurisdictions, the reasons for this diversity have changed. Langdell's reliance on many jurisdictions was based on the view that American law was one science little different in principle from the common law of England. Some departure from this belief in the existence of a core of abiding principle which underlay local surface variations is evident in the structure of casebooks published after 1920. The influence of the functional school of jurisprudence as against logical positivism was becoming apparent. When Professor Corbin's *Cases on the Law of Contracts* was published in 1921, the editor, like Holmes, was concerned to deny that 'law consisted of one set of rules, consistent, uniform, and logically constructed.' The law 'must be taught as it is—inconsistent, variable, illogical, growing and changing with the growth of civilization. As the mores change, the prevailing notions of social and economic welfare, the conscious and unconscious customs of men, the practices of business affairs, even as the notions of individual groups and of individual men change, so also change the stated rules of law.'[13] One implication of this change of approach for the compiler of a casebook would be the need for emphasis on modern cases in order to illustrate modern social and business customs and their impact on legal rules. It would still be necessary to include some earlier cases for the purpose of making the point that social change was reflected in changes in the law, but the proportion of these cases appearing in new casebooks would be smaller than heretofore. Of the five hundred and ninety-four cases in Corbin's collection, two hundred and fifty-eight had been decided since 1900, two hundred and twenty-four between 1800 and 1899, and one hundred and twelve prior to 1800. The compilation was designed to assist the student to determine what American courts would decide in the future. Corbin did not think that it was his function to give a comprehensive knowledge of earlier periods, and the change in approach is pointed up by his recommendation to those who wished to study the period between 1550 and 1850 that they should study Langdell's casebook.[14]

[13] Corbin, *Cases on the Law of Contracts* (1st ed., 1921), ix.
[14] *Ibid.*

Though the scheme of compilation had changed in some ways, the new plan of emphasis on modern cases required selection of cases from more than one American jurisdiction if sufficient illustrations of legal response to changing custom in the recent past were to be obtained. Thus a new reason had arisen to maintain that refusal to concentrate upon the cases of any one jurisdiction which Kales had criticized so strongly.[15]

Probably the real weakness of Kales's criticism was that fundamentally it was another plea for more emphasis on the imparting of information at the expense of skill training. The criticism has not had effect because the better American law schools have remained true to the belief that their function is to train students in lawyerly skills which can be applied in any jurisdiction for the purpose of finding and evaluating local variations. In apparent recognition of this Rheinstein's *Cases on Decedent's Estates* includes not only cases from many American states but also many cases decided in England.

Editing of Cases. Restrained or Bold?

To some the Langdell type of casebook merited criticism because the restrained editing of cases required 'the student to swallow so much chaff to get such a little bit of legal nourishment';[16] it wasted too much of the already inadequate time available for training law students. From the foregoing examination of Langdell's aims it seems obvious that one of his objectives had been to train the student to sift grain from chaff. As the curriculum of each law school expanded, however, the time-consuming aspects of the Langdell type of casebook could not be ignored even by the most devout adherents to the case system.

One remedy would be selection of fewer cases and severer editing of the cases included. Williston in his first edition had abandoned the arguments of counsel, statements of facts and concurring opinions but he had not attempted to edit out any extraneous material from the opinion printed.

In casebooks appearing by 1910 further steps had been taken to meet this criticism. In a preface to the first editions of the American Casebook Series written in 1910 by the general editor, James Brown Scott, the keynote was that training and knowledge should go hand

[15] Another subsidiary reason for choosing cases from a wide variety of jurisdictions is implicit in the belief of some law teachers that cases with dramatic facts are to be preferred since they are more likely to be effective on the student's mind than more prosaic illustrations. Vance, 'Of the Making of Casebooks', (1926) 6 *American Law Schools Review* 4.

[16] Carusi, 'A Criticism of the Case System', (1908) 2 *American Law Schools Review* 213.

in hand. Casebooks had got out of hand and had become so bulky that it was impossible to cover a particular subject according to the scheme of the casebook in the class time allotted to the subject. In this way knowledge had been sacrificed to training. Accordingly, the plan of this new series envisaged casebooks designed to cover a subject which would at the same time be of a size permitting them to be completely studied in the time available. Historical and scientific development was still to be a feature of each collection. In an early edition of this series, *Cases on Bills and Notes* by Smith and Moore, published in 1910, the results of this policy are shown. Whereas Ames in his two-volume collection of cases on this subject had reprinted six hundred and thirty-nine cases, Smith and Moore were content to cover the subject with less than four hundred. In a number of the cases, editing now extended to abridging the statement of facts and omitting some extraneous matter from the opinion chosen for printing. But the matter left was extensive enough to provide plenty of chaff and Langdell's original aim was still catered for.

Another attempted remedy was the compilation of a set of condensed cases or as they came to be called, digests. An early example of this was a work in Contracts by Dean Ashley of the New York University Law School which ran to two editions in this form. The second edition had only one hundred and thirty-one cases, and of these sixty were condensed. The result was a volume of three hundred and sixty pages as against one thousand three hundred and ten in Williston's two volumes. Ashley's condensed case was similar to the problem cases set in many modern casebooks, being merely a short statement of the facts in the case followed by a reference to the report. Though it had the merit of enabling the ground to be covered while still permitting the class discussion which had become a feature of the case method, Dean Ashley[17] decided against publishing a third edition in this form and expressed the belief that in the long run better results would be achieved by using something more like the Langdell type of collation.

So long as a teacher's aims were the same as those of Professor Langdell, the digest case was of questionable value. But many law teachers found Langdell's aims inadequate. In suggesting additional aims they have provided a useful function for the digest case. In the introduction to his one-volume *Cases and Materials on Sales*, published in 1930, Professor Karl Llewellyn expressed his faith in the value of digests as a means whereby a student's facility for

[17] (1908) 2 *American Law Schools Review* 257.

synthesis could be developed alongside a facility for analysis. As he saw it, emphasis on case analysis was required in first year but a second year student (for whose use his casebook was designed) should be taken to have learned how to read a case. A second year student was 'ripe to learn how to use secondary authorities'.[18] At this stage the widest possible variety of cases should be brought to his attention. For this purpose he considered the digest valuable. When Langdell began using his casebook not all his colleagues used the same method. John Chipman Gray continued to lecture for some time after Langdell and Ames had successfully used the case system.[19] But once all teachers in a law school used the case method there was the danger that training in case analysis would occupy a disproportionately large part of an ever-expanding curriculum.

Accordingly, in Llewellyn's book 33 per cent of the working space was allotted to standard main cases, 36 per cent to digests, 3 per cent to text of statutes and the remaining 28 per cent to text material in the form of annotation and discussion which by this time had become a feature of casebooks. Of the cases one hundred and eight were standard main cases and over six hundred of the digests were full enough to allow discussion in class on the basis of the digest alone. The digests took the form of a cryptic statement of the facts, the decision and the propositions which led to the decision. Many of them did not run beyond half a page in length.

By 1941 Llewellyn's view seems to have changed. In the course of an article[20] he explained that what slowed up case instruction was the student's lack of grasp of the background of life and meaning. Students were limited to learning doctrine, and stopping there, instead of going on to work with it because they had no adequate fact-bases to work from. The phenomenon noticed by many teachers, that the edge was off a second year student, was explicable by their having trouble because they lacked 'the fact-stuff which shows the law-stuff at work'.

> It [the edge] is off because we – as we made our instruction-books – have taken it off. We have been known, even, to edit down or edit out the facts. We make slight effort to get hold of counsel's argument, and so to present the case as an exercise in dealing with cases from *in front*.

This appears to suggest that some of the edge had been taken off Llewellyn's enthusiasm for digests.

[18] Llewellyn, *Cases and Materials on Sales* (1st ed., 1930), xvii.
[19] *Centennial History of the Harvard Law School* (1817-1917), pp. 210-11.
[20] Llewellyn, 'On Teaching "Private" Law', (1941) 54 *Harvard Law Review* 775.

The digest has been characterized as being at once useful and dangerous, on the ground that it 'serves the student a high measure of pre-digested food'.[21]

There would appear to be no final answer as to the exact proportion of digested cases which should be put into a casebook. The matter seems to be one of compromise between the demand of coverage and training in case analysis. Some casebooks issued in recent years continue to use them. As against the text form of informational supplement, they have the merit of showing a legal proposition in an illustrative fact context and providing some spur to the imaginative case-putting required of a fully trained lawyer.

Another method of meeting the problem of covering a subject without having too bulky a casebook is the inclusion in the casebook of problem cases. This method is exemplified in Rheinstein's book. The appearance of this element in many casebooks owes something to another criticism of the limited range of skills with which the Langdell type of casebook was concerned.

Some teachers while agreeing with Langdell that the process of principle extracting was a skill in which students should be trained, thought that something more was needed for the training of the complete lawyer. To have a store of principles was not enough; it was necessary to develop a facility for applying them to various fact-situations. As one teacher put it:

> The difficulty with the casebooks in use at present is that they themselves contain the application of the rules to the facts. The consequence is that if the teacher does not know how to teach — does not know how to make the student himself apply the rule to the facts of the case – the student will merely learn what the opinion says, and will not develop, as he should, his power of analyzing the facts and reasoning on the application of rules.[22]

In the fully developed case method of teaching which involved class discussion, the good teacher would frame fact situations different from those in the cases printed, thus developing in the students the skill of principle application. Thus the omission of problem cases from a casebook would not preclude development of that skill. But the criticism still had some force, because the skill which it was desirable for a student to attain was a skill in applying a principle to a fact situation in a manner more deliberate than

[21] Jaffe, Book Review (Gellhorn, *Cases and Comments on Administrative Law*), (1941) 54 *Harvard Law Review* 367, at 368.

[22] Peterson, 'A Defense of the Case System and a Criticism of Casebooks', (1913) 3 *American Law Schools Review* 249.

that involved in coping with a fact situation met for the first time in the class-room.

This same criticism was at the basis of a suggestion of another writer who thought it was necessary to provide the student with books of 'concrete facts or skeleton cases raising the important and crucial issues of the different topics of the law'.[23] The problems were to be 'so arranged as properly to develop and unfold the various branches of the law'. The student might be given some aid in the matter of references and citations, but it was up to him to find the principles by working from the original reports in the law library. The specific suggestion that the books envisaged should take the place of casebooks ignored the problem of congestion in the law library which prompted the prototype of all casebooks, but the general idea provided a useful supplement to Langdell's aims.

Many modern casebooks insert additional cases as problems in various ways. The more usual method is to give the facts and omit both the decision and the opinion. Some editors do not give a reference to the original report, thus making the problem case serve the sole function of developing skill in applying principles derived from the main cases. Others do give a reference to the original report. When this is done, the editor is in effect providing a hybrid between the digest and the problem. He is attempting to further two aims; first, to include cases supplementary to the main cases and, secondly, to test skill in applying principles. The two aims are not compatible and there is danger that neither will be served by this method. If the editor expects the students to go to the reports, one valuable aspect of the casebook is lost for the many students who will be content to read only the headnote. If Llewellyn's view that cases may properly be read in digested form by students beyond the first year be accepted, this point may lose some of its force. Even then the practice represents delegation of the editor's function to the writer of the headnote to the report. It may be thought desirable to include the report reference if the casebook is intended for use by other teachers. But this can be met by giving the references in a teacher's manual and leaving it to the discretion of each teacher as to which aim he wishes the problem case to serve. Inclusion of the report reference appears to deprive the problem case of its value as a test in the application of principles since the student may not consider the matter without the aid of the report.

[23] Ballantine, 'Adapting the Case Book to the Needs of Professional Training' (1908) 2 *American Law School Review* 135. A similar suggestion is made by Cole, 'A Case Book Suggestion', (1912) 3 *American Law School Review* 128.

The need for covering the ground has also forced the inclusion of textual material in the casebooks to such an extent that many now bear the title *Cases and Materials in . . . .* Revulsion from the formerly much reviled teaching by lecture and text fostered the idea that the casebook compiler should not himself state his view of the law. Many editors introduced text material in the form of short extracts from treatises and law review articles. The merit of this practice as against the compiler writing his own textual material is not always easy to see. The short extract from a law review article frequently has the appearance of being a mere snippet and cannot have been what Langdell contemplated when he said that students should work from original sources.

There may be occasions when it would be preferable to include an excerpt from some other person's writing instead of the editor himself providing the material. Such an occasion is well met by Professor Fuller in his Contracts casebook when he includes an extract from Adam Smith's *The Wealth of Nations.*[24] The justification here is that the attempt to acquaint the student with the ethical bases of the law and to remind him of its relation to other disciplines is rendered more effective by the half-unexpected encounter with a classic name in another field. But for most occasions it would seem that the person who compiles the casebook should write the text note. There are indications that this aspect of editorial bashfulness is disappearing under the pressure of a congested curriculum.[25] Much of the material in Rheinstein's casebook written by the editor results from his desire to follow the functional approach. Judgments of courts do not ordinarily disclose the social purposes of the law in question and supplementary text is required if a functional approach is to be maintained.

Much of a lawyer's knowledge of the law developed in litigation is acquired for the purpose of keeping his client out of litigation. The need for developing a facility for counselling in students has been met by casebook editors posing fact situations either hypothetical or based on actual cases, and asking the student to advise the client as to a course of action, or asking him to state the considerations by which he would be guided in preparing a document or carrying through a particular transaction.[26]

[24] Fuller, *Basic Contract Law* (1st ed., 1947), pp. 329-30.

[25] *Ibid.*, at 940-81 in which the Statute of Frauds is dealt with by text written by the editor.

[26] Llewellyn, *Cases and Materials on the Law of Sales* (1st ed., 1930), is studded with questions for the student, many of which are of counselling character. See also Havighurst, *Cases and Materials on the Law of Contracts* (2nd ed., 1950). Examples at 197, 333, 336 and 441.

New ideas in the post-Langdell era as to the skills in which students should be trained account for many changes in the form of casebooks and enlargement of the role of the casebook editor.

Arrangement of Cases: Conceptualistic or Functional?

One feature of the Langdell type of casebook was the arrangement of the selected cases in groups according to the variety of legal concept involved rather than the business nature of the transaction. This arrangement was made so that the breadth of application of a principle over a variety of transactions might be demonstrated. Stemming as it did from the logical positivist philosophy of law, it might have been thought that when Corbin denied the immutability of legal principle he would have adopted some other arrangement. His collection was, however, organized in much the same conceptual compartments as those of Langdell and Williston, the chapters carrying such labels as Offer and Acceptance, Consideration, Contracts under Seal, Operation of Contract, etc.

In the thirties, however, some editors departed from the conceptualistic classification. This was part of the influence of the realist school of legal philosophy whose adherents could not see that organic unity of the common law which had been so clearly apparent to Langdell and Ames. An illustration of this new form of organization for a casebook on Contracts was provided by Professor Harold C. Havighurst's *Selection of Contract Cases and Related Quasi-Contract Cases* published in 1934. Its contents were arranged as follows:

PART I

Services

Chapter 1	Regular Employment	50 cases
Chapter 2	Commission Agents	3 cases
Chapter 3	Real Estate Brokers	9 cases
Chapter 4	Physicians	7 cases
Chapter 5	Services in the Home, Care of Sick and Aged	9 cases
Chapter 6	Rescues, Recovery of Property, Apprehension of Criminals	7 cases
Chapter 7	Building and Construction	39 cases

PART II

Gratuities

Chapter 1	Gratuities to Friends and Relations	19 cases
Chapter 2	Charitable Subscriptions	4 cases

272 *Res Judicatae*

PART III

Loans

Chapter 1	In General	32 cases
Chapter 2	Small Loans	3 cases

PART IV

Contracts for the Sale of Goods

Chapter 1	Auction Sales	2 cases
Chapter 2	In General	89 cases
		273 cases

In addition there were four hundred and thirty-five brief abstracts of cases. This outline of contents shows the greater attention given to facts which the realist view of law emphasized. The editor's prefatory statement of his belief as to the advantages of this system ran:

> It enables the student more easily to master the facts of a case and to see each situation as a living problem rather than as merely dead material for logical dissection. Rules and doctrines are viewed in a truer perspective; and at the same time their constant repetition facilitates the learning process. The student's power of analysis is more rapidly developed. More emphasis is placed upon the construction and interpretation of the language used in contracts. The part that relationship, circumstance, and custom play in moulding the bargain becomes more readily apparent. Restrictions on bargaining freedom, statutory and otherwise, may be studied in connection with the type of transaction to which they are applicable.[27]

It may be that the appearance in 1932 of the American Law Institute's Restatement of the Law of Contracts expressing the 'result of a careful analysis of the subject and a thorough examination and discussion of pertinent cases'[28] emboldened Contract casebook editors to forsake the arrangement on conceptualistic lines. Professor Havighurst's casebook contains frequent citations of the

[27] Havighurst, *A Selection of Contract Cases and Related Quasi-Contract Cases* (1st ed., 1934), iii.

[28] *Restatement, Contracts* (1932), xi-xii.

Restatement, thus according to it the status of a doctrinal framework linking the new type of casebook with the old in such a way that the new departure was not as radical as might at first blush appear. The new arrangement involved repeated encounters with similar doctrine. Unlike Langdell its proponents saw merit in studying the 'many different guises in which the same doctrine is constantly making its appearance'. This would be more time consuming than the old arrangement and there would be little room for historical treatment. Professor Havighurst was content to list a number of law review articles to which the students were referred for historical background. He felt justified in this, for it was his view that the student would be better prepared for and more interested in tracing the development of a rule after he had had at least some opportunity to see it operate in a modern setting.[29]

Another instance of a casebook in which the material was presented according to the business nature of the transaction is Professor Steffen's *Cases on Commercial and Investment Paper,* first published in 1939 and which appeared in a second edition in 1954 in a form not radically different from that of the first.[30]

One of the objectives of this new arrangement of topics was to enable the student to 'see each situation as a living problem'. Many teachers of courses other than Torts or Criminal Law have been conscious of the advantages which the teachers of those courses have in the fact-situations treated in those courses. Though the student may not have any basis as yet for technical interest, the human interest of the cases assists in his acquiring the technical interest. Some teachers of courses which to the student of limited experience do not on the surface appear to touch 'life in the raw' have felt the need to highlight the human interest angle. Departure from the conceptualistic arrangement was one way of doing this. A more determined effort in this direction is represented by Professor Addison Mueller's *Contract in Context* which was published in 1952 and which is described as a 'collection of materials organized around the agreements and disagreements incident to a long-term commercial project with the aim of bringing into sharper focus for the beginning law student both the structure and the operation of our law of private agreement'.[31] The scheme of this casebook is to

[29] Havighurst, *A Selection of Contract Cases and Related Quasi-Contract Cases,* v.

[30] The first edition inspired a lengthy review by Llewellyn in (1941) 54 *Harvard Law Review* 775-810.

[31] The editor is not concerned to have other teachers adopt his book. He has said, 'There ought to be as many ways to teach law as there are law teachers;

choose arbitrarily a particular type of transaction, in this case a construction project by one Alfred J. Ohner, and to create fact-situations producing various forms of agreements (and disagreements). Creation of the fact-situations so as to invest them with human interest calls for some of the qualities of the novelist. Various business vicissitudes of the hero provide pegs upon which to hang the cases to be discussed. Thus in chapter 1 the legal effect of a promise to lend money to Ohner to enable him to develop his land by building becomes relevant after the promise is withdrawn. The circumstances in which the offer is made are so framed as to raise questions concerning the nature of an enforceable promise, the nature of consideration and whether it includes moral obligation, conditional promises as consideration, adequacy of consideration, action in reliance, compensation for loss of bargain and the impact of the Statute of Frauds. In chapter 2 Ohner gets his loan from other sources and then enters into a contract with an architect who draws the plans but friction develops between them with the result that Ohner's legal position again needs consideration. This raises problems of meeting of minds, interpretation of a written agreement, the parol evidence rule, compensation for lost opportunities and *quantum meruit*. Relations between Ohner and the builders occupy chapter 3, while in chapters 4, 5, 6 and 7, the builders and sub-contractors produce further occasions for consideration of cases. Finally, in chapter 8 with the building substantially complete and the architect refusing his final certificate because the builders have failed to perform faithfully one of the specifications, Ohner is faced with the last legal crisis of the work.

One of the more impressive features of this form of casebook is the valuable introduction to the business problems which arise in the type of transaction considered. The narrative of imagined facts not only quickens the interest but conveys an appreciation of the manner in which individuals commonly react in the frequently recurring situations of the kind typified. In some measure, this book met Llewellyn's view uttered in 1941, that the older casebooks were inadequate because students lacked 'the fact-stuff which shows the law-stuff at work.'[32]

---

every man who thinks stamps his subject with the mark of his own intellect. The sad fact is that some teachers do not seem to understand this. Year after year, they blissfully teach other men's courses from other men's casebooks in other men's ways.'—'There is Madness in Our Methods' (1950-1) 3 *Journal of Legal Education* 93-6.

[32] Llewellyn, 'On Teaching "Private" Law', (1941) 54 *Harvard Law Review* 775, at 793.

Rheinstein's casebook does not attempt any novel arrangement of the law, but this does not mean that the student will fail to see that he is dealing with 'living problems'. The last two chapters of the book are concerned with estate planning and will drafting. They are apt to dispel any notion that a study of the foregoing decisions of appellate courts is an unrealistic exercise. It is in these final chapters that the everyday significance of the earlier theoretical study is made apparent. Systematic study of theory with a view to the practical setting ensures that graduates will not feel that they are entering a new world when they join the profession. More importantly, once in the profession they will probably be able to recognize more readily the occasions on which their theory may prove useful.

The American casebook provides a reconciliation of various needs in legal education. It meets the need for systematic study. It provides knowledge of the principles only after the student has exercised the primary skill of a lawyer, analysis. It shows something of the everyday setting of each principle. Above all it eschews the oft-stated notion that all a student needs to have is a collection of general propositions which he can apply to particular cases when in practice. That notion not only ignores the process by which the law has developed and will develop but also assumes too much as to the students' ability to apply principles when he engages in professional practice. It may be that the American experience has lessons for Australian legal education.