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Professor Geoffrey Cheshire (1886–1978) and Professor Cecil Fifoot (1899–1975)

Warren Swain

Don clerical, Don ordinary,
Don self-absorbed and solitary;
Don here-and-there, Don epileptic;
Don puffed and empty, Don dyspeptic;
Don middle-class, Don sycophantic,
Don dull, Don brutish, Don pedantic;
Don hypocritical, Don bad,
Don furtive, Don three-quarters mad;[1]

Today, Geoffrey Chevalier Cheshire and Cecil Herbert Stuart Fifoot seem to us to be figures from another world. After all, they were born during the reign of Queen Victoria. Both men were involved in a particular academic milieu, termed by Noel Annan as a 'golden-age'.[2] Designations of golden ages run the risk of caricature but it is not too fanciful to regard the inter-war period as a continuation of the nineteenth-century university – captured by Evelyn Waugh's description of Oxford in the 1920s as 'still a city of aquatint'.[3] In 1912, the year Cheshire was elected to a Fellowship at Exeter College, the number of law teachers in England and Wales was tiny.[4] Although a few of those teaching law at the time were serious scholars,

[1] H Belloc, *Verses* (London, Duckworth & Co, 1910).

[2] N Annan, *The Dons Mentors, Eccentrics and Geniuses* (London, Harper Collins, 2000) 136. Care, of course, needs to be taken with this sort of generalisation which is only likely to fit with a certain section of Oxford society. For one element of Oxford between the wars, see L Mitchell, *Maurice Bowra: A Life* (Oxford, Oxford University Press, 2009) 151–77.

[3] E Waugh, *Brideshead Revisited* (London, Penguin, 1962) 23.

[4] It has been estimated that there were around 100 law teachers in 1908 – the Inns of Court and the Law Society are included in that figure. The vast majority of academic lawyers were in Oxford, Cambridge and London (F

most were not.[5] Law had only existed as a separate Jurisprudence School at Oxford since 1872.[6] It can be argued that only comparatively recently has the subject been consistently taken seriously as an academic discipline in England. Amongst some dons in nineteenth-century Oxford, Jurisprudence enjoyed the same poor standing which media studies does in the popular imagination today. These attitudes persisted until the 1950s when, in Brian Simpson's account, law emerged as a proper academic enterprise in Oxford.[7] Even then and for quite a long time afterwards, most legal research in Britain was what might be called 'black letter' or 'expository'. This began to change in the 1970s partly because some legal academics in England and Wales became interested in ideas from the United States, including the Critical Legal Studies and Law and Society movements.[8] Since that time, legal scholarship has become more varied – although that does not necessarily mean that it has become particularly perceptive or more worthwhile.[9]

Cheshire and Fifoot were within an older tradition of legal writers who saw their role as providing exposition. Yet neither man was a narrow specialist. Even by the standards of the time, Cheshire had wide interests which went beyond the confines of one narrow legal discipline. He is perhaps best remembered today as an early pioneer of private international law rather than as a writer on contract law. Fifoot retains his reputation through his writings on legal history. This was a time when academic lawyers with broad concerns within the legal discipline were common. These days they hardly exist at all.

Cownie and R Cocks, *'A Great and Noble Occupation!' The History of the Society of Legal Scholars* (Oxford, Hart Publishing, 2009) 3–4).

[5] A minority of nineteenth-century law professors like Frederic Maitland would be significant figures in any era.

[6] B Nicholas, 'Jurisprudence' in MG Brock and MC Curthoys, *The History of the University of Oxford: Volume VII: Nineteenth-Century Oxford, Part 2* (Oxford, Oxford University Press, 2000) 385, 389–96.

[7] AWB Simpson, *Reflections on the Concept of Law* (Oxford, Oxford University Press, 2011).

[8] W Twinning, *Blackstone's Tower The English Law School* (London, Sweet & Maxwell, 1994) 141–46.

[9] Some judges, particularly in the United States, have been critical of the modern direction of legal scholarship: HT Edwards, 'The Growing Disjunction between Legal Education and the Legal Profession' (1991–92) 91 *Michigan Law Review* 34; B Gardner, 'Interviews with United States Supreme Court Justices: Chief Justice John G Roberts Jr' (2010) 13 *Scribes Journal of Legal Writing* 5, 37 ('What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law'). It is perhaps best not to contemplate too carefully the value of large amounts of legal scholarship that is now produced. For a more optimistic view see: A Burrows, 'Challenges for Private Law in the 21st Century' in K Barker et al (eds), *Private Law in the 21st Century* (Oxford, Hart Publishing, 2017) 29, 32–40.

Cheshire and Fifoot's treatise on contract law, *The Law of Contracts*[10] (hereinafter referred to as *Cheshire and Fifoot*) was first published in 1945 but in some respects it resembled books on the law of contract published during the late nineteenth century when legal treatises were the dominant form of legal literature.[11] It was one of the last new books of this genre – although new editions of earlier works continue to appear with some regularity.[12] The volume was important for another reason. Editions of *Cheshire and Fifoot* appeared in Australia and then in New Zealand during the 1960s. These editions provide valuable insight into the state of the law of contract in those jurisdictions; they trace the declining influence of the English law of contract.

I. GC Cheshire: A Brief Biography

Geoffrey Chevalier Cheshire was born in 1886.[13] His father was a solicitor and Registrar of Northwich County Court. Cheshire matriculated in Jurisprudence at Merton College, in 1905. Merton, one of the oldest and wealthiest colleges,[14] had by then quickly established a reputation in Law. FE Smith, the future Lord Chancellor Lord Birkenhead, was elected to a Law Fellowship in 1896.[15] His replacement as Law Fellow, JC (later Sir John) Miles, taught Cheshire. Miles who had no great claims as a legal scholar would become Warden of Merton

[10] GC Cheshire and CHS Fifoot, *The Law of Contracts*, 1st edn (London, Butterworth, 1945).

[11] AWB Simpson, 'The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature' (1981) 48 *University of Chicago Law Review* 632; W Swain, 'The Legal Treatise and the History of the Common Law' [2014] *Queensland Legal Year Book* 132.

[12] It was not quite the last major book in this tradition. A later work appeared in 1962, GH Treitel, *The Law of Contract*, 1st edn (London, Stevens & Sons, 1962). For a discussion of Professor Treitel, see chapter 13 by Lord Burrows in this volume.

[13] For more detailed biographical information, see FH Lawson, 'Geoffrey Chevalier Cheshire 1886–1978' (1980) 65 *Proceedings of the British Academy* 610; FH Lawson, P North, revised edn, 'Cheshire, Geoffrey Chevalier (1886–1978)' (*Oxford Dictionary of National Biography*, 23 September 2004), available at www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-30922?mediaType=Article.

[14] On Merton at the time, see GH Martin and JRL Highfield, *A History of Merton College* (Oxford, Oxford University Press, 1997) 325–29.

[15] J Campbell, *FE Smith First Earl of Birkenhead* (London, Jonathan Cape, 1983) 65–85. EA Knox and AA Prankerd had previously taught the subject for the college (FH Lawson, *The Oxford Law School 1850-1965* (Oxford, Clarendon Press, 1968) 51–52, 80–81, 254).

in 1936.[16] After reading for the BCL, Cheshire lectured for a few years at University College of Wales, Aberystwyth. In 1911, he was called to the Bar at Lincoln's Inn, although he never seems to have practised. He subsequently returned to his old college as a stipendiary lecturer in 1911 before being elected a Tutorial Fellow at Exeter College the following year. Following the outbreak of the First World War, Cheshire obtained an army commission and spent the last few years of the War in the Royal Flying Corps in a balloon reconnaissance unit.[17] During the War, Cheshire married Primrose Barstow and they went on to have two sons, one of whom was the well-known Second World War pilot and philanthropist, Leonard.[18] After the War, Cheshire returned to Exeter College, where from 1919 to 1933 he was also Bursar.[19]

Hanbury remembered attending Cheshire's lectures:

> To demonstrate Cheshire's outstanding abilities as a lecturer, one need only recall his lectures on Future Estates in Real Property, which he delivered in Exeter in Michaelmas Term, 1920. The hour he chose was 9 a.m., the winter was cold, and some of his auditors had a long way to come; yet his class was larger at the end than at the beginning.[20]

Cheshire's dry sense of humour was no doubt a factor in his popularity with undergraduates. One of his sons recalled how Cheshire confused more than one visiting scholar by telling them he was thinking of writing a legal textbook, *The Rights of Dogs*.[21] Following the death of Sir William Holdsworth in 1944, Cheshire was elected as the Vinerian Chair of English Law which is based at All Souls.[22] He retired from Oxford in 1949. For a further decade following formal retirement he taught Property Law and Conflict of Laws at the Council for Legal Education. While the focus of this volume is on contract scholarship, Cheshire wrote on many diverse topics. This is unsurprising given that Tutorial Fellows of his vintage were

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[16] Miles produced a casebook on contract law, J Miles, *Cases Illustrating General Principles of the Law of Contract* (Oxford, Clarendon Press, 1923). This was designed as a companion to Anson's contract treatise but consisted of little more than extracts from decisions without commentary.

[17] Balloon reconnaissance was used to assist artillery battalions. It was dangerous work.

[18] R Morris, *Cheshire: The Biography of Leonard Cheshire, VC, OM* (London, Penguin, 2000). Leonard also read Jurisprudence at Merton like his father.

[19] The arrangement whereby a Tutorial Fellow was also Bursar was not uncommon at the time and was a useful extra source of income for the Fellow concerned.

[20] HG Hanbury, *The Vinerian Chair and Legal Education* (Oxford, Basil Blackwell, 1958) 242.

[21] Morris (n 18) 7.

[22] Hanbury (n 20) 242–43.

expected to teach a range of subjects.[23] Most of his published writing on contract law came towards the end of his career. One early article considered the tort of unlawful molestation;[24] his first major work, however, concerned real property. After many decades of delay,[25] a series of statutes had finally reformed English real property law in the mid-1920s.[26] Cheshire's, *The Modern Law of Real Property*,[27] came at an opportune time and quickly established itself as the leading work on the new legislation.[28] Cheshire was able to use his connections to steal a march on other authors. Miles's friendship with FF Liddell, the draftsman of the legislation, meant that he was able to receive advanced copies of the Bills as work progressed on drafting.[29] As Cheshire explained in the preface, '[d]espite the short time available, I felt that something was required, before the new era dawned in January, 1926, to enable students to envisage a legal system which is, in many respects, widely different from that described in existing books'.[30] Under the title *Cheshire and Burn's Modern Law of Real Property*,[31] this work remains in press.

Cheshire became All Souls Lecturer in Private International Law in 1922. In 1935, he published *Private International Law*.[32] Although private international law had been an interest of the prominent jurist AV Dicey, it had not yet become a mainstream area of study.[33] In a *Law Quarterly Review* article coinciding with the publication of his treatise, Cheshire gave an overview of the subject in which he observed:

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[23] To some extent this is still true of course in both Oxford and Cambridge.

[24] GC Cheshire, 'Unlawful Molestation' (1923) 39 *LQR* 193.

[25] This story is documented in detail in JS Anderson, *Lawyers and The Making of English Land Law 1832-1940* (Oxford, Oxford University Press, 1992).

[26] Law of Property Act 1925; Land Registration Act 1925; Land Charges Act 1925; Settled Land Act 1925; Settled Land Act 1925.

[27] GC Cheshire, *The Modern Law of Real Property* (London, Butterworths, 1925).

[28] This book also generated a steady income (Morris (n 18) 5). Professor Beale was told in the 1970s that Cheshire made the then enormous sum of £17,000 a year in royalties from his books.

[29] Anderson (n 25) 312.

[30] Cheshire (n 27) vi.

[31] EH Burn and J Cartwright (eds), *Cheshire and Burn's Modern Law of Real Property* (Oxford, Oxford University Press, 2011).

[32] GC Cheshire, *Private International Law* (Oxford, Clarendon Press, 1935). The work is still in print, P Torremans et al, *Cheshire, North & Fawcett Private International Law* (Oxford, Oxford University Press, 2017).

[33] AV Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (London, Sweet & Maxwell, 1908). In addition to Dicey's treatise there was a second earlier work: J Westlake, *A Treatise on Private International Law* (London, W Maxwell, 1858) but this was of course dated.

> It is true that of all the main branches of English jurisprudence Private International Law can claim the most recent birth; it is true that the events which call it into operation could scarcely occur with frequency until the peace that succeeded the Napoleonic wars ushered in the industrial age and fostered the growth of international trade and travel; it is true that no book was published on the subject in England until 1858; but nevertheless a perusal of the authorities shows that the main principles had been established and the lines of future development laid down before the first issue of this Journal in 1885.[34]

One reviewer, having noted the need for a new treatment of the subject, praised Cheshire's willingness to criticise orthodox opinion.[35] Cheshire would return to the subject of private international law over the following decades.[36]

II. CHS Fifoot: A Brief Biography

Cecil Fifoot was born in Wales in 1899.[37] Commissioned in the Royal Field Artillery in the First World War, he was wounded and left partially deaf. After the War, Fifoot went up to Exeter College which brought him into contact with Cheshire. Having graduated in Jurisprudence, he was called to the Bar by the Middle Temple in 1922. Unlike Cheshire, Fifoot practised law full time for a couple of years. While in practice in South Wales he married a Norwegian, Hjördis Baars.[38] After a short time, he returned to Oxford in 1924 as a Tutorial Fellow at Hertford College. In addition to tutorials, he also undertook various college offices including Bursar and Dean. Hertford at the time was not a wealthy or glamourous college. Its new foundation had occurred less than a century earlier. Evelyn Waugh, who had been a

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[34] GC Cheshire, 'Private International Law' (1935) 51 *LQR* 76.

[35] (1935) *The Journal of the Society of Public Teachers of Law* 65. The same point was made by others; another reviewer referred to 'constructive criticism', see (1935) 16 *British Yearbook of International Law* 218. In the preface, Cheshire (n 32) vii, Cheshire spoke of 'a spirit of constructive criticism'.

[36] A Mendelssohn-Bartholdy and GC Cheshire (eds), *Renvoi in Modern English Law* (Oxford, Clarendon Press, 1937); GC Cheshire, *The English Private International Law of Husband and Wife* (London, Martinus Nijhoff Publishers, 1963).

[37] For a more detailed biography, see GC Cheshire, 'Fifoot, Cecil Herbert Stuart, 1899–1975' (1976) 61 *Proceedings of the British Academy* 428.

[38] They had a son Richard Fifoot who became the Bodleian's Librarian.

Hertford undergraduate in the 1920s, described his college as 'a respectable but rather dreary little college' to which he added 'there was no scholar of importance among the dons'.[39]

Edward Burn, later a Student at Christ Church, and author of editions of Cheshire's work on real property, described Fifoot's teaching style:

> He immediately established a rapport with his audience. A thin stooping figure, he looked as he lectured if he were defying us not to listen to him. None could defy him. Authoritative and learned he sparkled with humour. We listened and chuckled with him, and so the more readily transcribed into our notebooks the apt phrases which illustrated his argument.[40]

Anne Smart, an undergraduate in the 1950s, remembered Fifoot's lectures too: '[he] had no difficulty in filling to capacity the Hall at Hertford College on a Saturday morning'.[41] A correspondent to *The Times*, writing after Fifoot's death, recalled that he used to say to his classes: 'I am trying not only to put the law in a nutshell but to keep it there'.[42] Although he may have been a good lecturer, some of the descriptions of him suggest a rather aloof and even prickly personality. He was described by an undergraduate as 'quite brilliant, cold, but cheerful and efficient'.[43] Fifoot was one of the few Hertford Fellows of the era who was married. As a result, he lived out of college, which may offer part of the explanation for this less than warm description of his personality. However, there was probably more to it. Cheshire commented that Fifoot did not

> take kindly to criticism. Once he had reached a conclusion after much thought, to persuade him that he might possibly be mistaken was a task not lightly to be undertaken. The discussion

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[39] E Waugh, *A Little Learning* (London, Penguin, 1983) 164. His father was of a different view, pointing out in a letter to his son that the scholarships at Hertford were larger than other colleges (Arthur Waugh to Evelyn Waugh 15 December 1921 in A Waugh and A Bell (eds), *The Complete Works of Evelyn Waugh Volume 30 Personal Writings 1903–1921 Precocious Waugh* (Oxford, Oxford University Press, 2017)).

[40] Cheshire (n 37) 431.

[41] A Smart, 'Reading Roman Law with Edward Burn' in J Getzler (ed), *Rationalising Property, Equity and Trusts Essays in Honour of Edward Burn* (Oxford, Oxford University Press, 2003) 324, 326.

[42] *The Times* (27 March 1975).

[43] A Goudie (ed), *Seven Hundred Years of an Oxford College: Hertford College, 1284–1984* (Oxford, Hertford College, 1999) 83.

> might engender a certain heat at times, perhaps a trace of arrogance, but however stormy the argument might have been he never harboured the slightest resentment.[44]

Cheshire also observed that '[i]t would be an exaggeration to describe him as an optimist. Like many others, he took a grim view of the world in general and particularly of England'. His pessimism, however, proved to be a useful characteristic when it came to winning bets against other members of the Senior Common Room during the Second World War.[45]

Fifoot wrote several books on English legal history. The broadest ranging of these was *English Law and its Background*.[46] One obituarist described this as 'a short light hearted book … which already showed his highly individual style, and still remains the most interesting short account of English legal history for the layman or the beginner in law'.[47] A second book, *Lord Mansfield*[48] had been, until relatively recently, the standard legal biography of the Chief Justice.[49] In that book, he had a good deal to say about mid-eighteenth century contract law. His main thesis was that he saw a distinction between the way that Lord Mansfield developed commercial law and contract law. The former, he argued, was much more influenced by the needs of merchants than the latter. In fact there is no need to draw the line so sharply.[50] There are also points of detail on which it is possible to take issue with Fifoot's analysis, particularly the suggestion that Lord Mansfield had intended to develop a principle of 'moral obligation'. The better interpretation, however, may be that it was simply an attempt by the common law to encroach into the jurisdiction of the Court of Chancery.[51]

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[44] Cheshire (n 37) 434. Fifoot's failure to be elected to the Vinerian Chair in succession to Cheshire, which he might reasonably have expected, may also have contributed to his gloom. I am grateful to Professor Reynolds for this information.

[45] The wager book still sits in the Senior Common Room of Hertford College – a selection of wartime bets can be found in Goudie (n 43) 105–106.

[46] CHS Fifoot, *English Law and its Background* (London, C Bell & Sons, 1932).

[47] *The Times* (7 February 1975) reproduced in the Hertford College magazine. I am grateful to the Hertford College Archivist, Dr Lucy Rutherford, for sending me a copy of the magazine.

[48] CHS Fifoot, *Lord Mansfield* (Oxford, Oxford University Press, 1936).

[49] This has been superseded by J Oldham, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century 2 vols* (Chapel Hill, University of North Carolina Press, 1992) and NS Poser, *Lord Mansfield Justice in the Age of Reason* (Montreal and Kingston, McGill-Queen's University Press, 2013).

[50] W Swain, *The Law of Contract 1670–1870* (Cambridge, Cambridge University Press, 2015) 42–106.

[51] Fifoot (n 48) 137; W Swain, 'The Changing Nature of the Doctrine of Consideration 1750–1850' (2005) 26 *Journal of Legal History* 55, 62–65.

Having produced a volume of Maitland's letters for the Selden Society,[52] Fifoot went on to write a short biography of England's greatest legal historian.[53] More than perhaps any of his other books, the biography of Maitland gives a very good sense of Fifoot's authorial voice which was spare, clear and concise. There is the occasional flash of wit of a donnish sort[54] and some unexpected emotional insight.[55] A few years before his death, Fifoot also delivered a lecture on Pollock and Maitland's *The History of English Law Before the Time of Edward I*,[56] which was then published as a pamphlet.[57] Fifoot was also one of the first scholars to consider the influence of jurists on legal development. He chose the nineteenth century as the subject of the Hamlyn Lecture in 1959. His *Judge and Jurist in the Reign of Queen Victoria*[58] is an example of what some have called 'conservative' legal history.[59] The idea that individuals shaped the development of the law was unfashionable for decades but until recently has come back into favour.[60] Fifoot's central thesis was that there was a large gap between the law as promoted by jurists and the law applied by judges.[61] The lectures were given using material planned for a larger book on the subject of judges and jurists; the book was unfortunately never written.[62]

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[52] CHS Fifoot, *Letters of FW Maitland* (London, Selden Society, 1965).

[53] CHS Fifoot, *Frederic William Maitland: A Life* (Cambridge, MA, Harvard University Press, 1971).

[54] See, eg, *ibid* 13 ('pamphlets, even when relieved by *jeux d'esprit*, are not a satisfying diet for middle age').

[55] Fifoot is particularly good on Maitland's decision to leave the Bar. He of course spoke from personal experience on this issue.

[56] F Pollock and FW Maitland, *The History of English Law Before the Time of Edward I* (Cambridge, Cambridge University Press, 1895).

[57] CHS Fifoot, *Pollock and Maitland* (Glasgow, University of Glasgow, 1971).

[58] CHS Fifoot, *Judge and Jurist in the Reign of Queen Victoria* (London, Sweet & Maxwell, 1959).

[59] M Horwitz, 'The Conservative Tradition in the Writing of American Legal History' (1973) 17 *American Journal of Legal History* 251.

[60] See, eg, the Legal Biography Project at LSE: www.lse.ac.uk/law/legal-biography-project.

[61] The relationship between jurists and judges continues to cause debate: RA Posner, *Divergent Paths: The Academy and the Judiciary* (Cambridge, MA, Harvard University Press, 2016).

[62] Cheshire (n 37) 432.

III. Writing on Contract Law in Addition to Cheshire and Fifoot

In 1928 Cheshire became the general editor of the nineteenth edition of *Stephen's Commentaries on the Law of England*.[63] This work was in the same tradition as Sir William Blackstone's *Commentaries on the Laws of England*.[64] The first edition appeared in four volumes between 1841 and 1845.[65] Cheshire replaced a long-standing editor, Edward Jenks, and set about remodelling the commentaries. In the preface he wrote, 'This edition of Stephen's Commentaries has been entirely rearranged and rewritten'.[66] Although the overall work was reduced in size, the sections on contract and tort were expanded.[67] Volume three on contract and tort was the first collaboration between Cheshire and Fifoot. Fifoot contributed the historical introduction, the section on agency and co-authored the part on tort law together with Cheshire and CK Allen.[68] The general contract part was written by CK Allen. Much of the material in the historical introduction would be reused in *Cheshire and Fifoot*.

Stephen's Commentaries aside, neither man wrote very much about modern contract law beyond *Cheshire and Fifoot*. The subject nevertheless did intersect with their other interests. Cheshire would consider contract law as applied in private international law.[69] He also wrote a little on English contract law. In the *Law Quarterly Review*, he considered 'the proverbially difficult' subject of mistake of fact.[70] This article would later go on to form the basis of the relevant section in *Cheshire and Fifoot*. Fifoot's main contribution to contract scholarship, aside from *Cheshire and Fifoot*, was found in his *History and Sources of the Common Law*.[71] This volume collected printed historical sources on contract and tort to which

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[63] GC Cheshire et al (eds), *Stephen's Commentaries on the Laws of England* (London, Butterworth, 1928).

[64] Published in the 1760s.

[65] HJ Stephen, *New Commentaries on the Laws of England (Partly Founded on Blackstone)*, 1st edn (London, Butterworth, 1841–45).

[66] Cheshire et al (n 63) v.

[67] *ibid* vi.

[68] ET Williams, T Honoré, revised edn, 'Allen, Sir Carleton Kemp (1887–1966)' (*Oxford Dictionary of National Biography*, 23 September 2004), available at www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-30383?rskey=Eqq6DB&result=6. Allen is best known for his KC Allen, *Law in the Making* (Oxford, Oxford University Press, 1927) which went to appear in seven editions.

[69] JHC Morris and GC Cheshire, 'The Proper Law of a Contract in the Conflict of Laws' (1940) 56 *LQR* 320.

[70] GC Cheshire, 'Mistake as Affecting Contractual Consent' (1944) 60 *LQR* 175.

[71] CHS Fifoot, *History and Sources of the Common* (London, Stevens & Sons, 1949).

Fifoot added a commentary. The primary audience were students. Fifoot believed that it was important for law students to understand where the modern law had come from through primary sources.[72] The introductory commentaries at the beginning of each chapter, arranged by form of action, is still perfectly serviceable today as an introduction to the history of contract and tort. As a collection of materials, however, it has since been superseded by *Baker and Milsom Sources of English Legal History*[73] which contains manuscript as well as printed sources.

In the late 1940s, in a jointly written and extensive casenote,[74] Cheshire and Fifoot would consider the controversial decision of Denning J in *Central London Property Trust v High Trees House Ltd*.[75] The authors were supportive of this departure from orthodoxy which they argued was based on 'a slim but sufficient catena of authority'.[76] The article provided an opportunity to analyse the rule in *Pinnel's Case*,[77] also known as the rule in *Foakes v Beer*.[78] The authors were uneasy with the established position that the acceptance of a lower sum could not amount to satisfaction of, and good consideration for, a larger debt. Their comments also illustrate their methodology as writers. They trace the history of the exclusory rule and the precedents which underpinned Denning J's attempt to circumvent some of its effects. This led them into a discussion of the rules of waiver and the role of Equity. Their whole approach was premised on the idea that the law of contract had some internal logic and that within the doctrine of precedent, there was an answer that made sense. This meant that although the House of Lords before 1966 did not have the power to not overturn its own decision in *Foakes v Beer*, Denning J's solution was presented as a valuable way of blunting the impact of a rule that they disliked. Given the later celebrity of Lord Denning, it is perhaps unsurprising that the decision has attracted such a lot of attention since. However, back in 1947, Denning J was just another newly appointed High Court judge. Here, the personal connection shared between Denning J and Cheshire was significant. It was Cheshire who used his position to promote the cause of

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[72] Cheshire (n 37) 432.

[73] J Baker (ed), *Baker and Milsom Sources of English Legal History*, 2nd edn (Oxford, Oxford University Press, 2010).

[74] GC Cheshire and CHS Fifoot, 'Central London Property Trust Ltd. v. High Trees House Ltd' (1947) 63 *LQR* 283.

[75] *Central London Property Trust v High Trees House Ltd* [1947] KB 130 (KBD).

[76] Cheshire and Fifoot (n 74) 288.

[77] *Pinnel's Case* (1602) 5 Co Rep 117a, 77 ER 237.

[78] *Foakes v Beer* (1884) 9 App Cas 605 (HL).

his friend, Denning.[79] It was by no means inevitable that *High Trees* would become such a prominent authority. Without this push, it might have suffered the same fate of another first instance judgment a year earlier which had also bypassed *Foakes v Beer* but just as quickly had been forgotten about.[80] The wider point is that Cheshire and Fifoot were willing to criticise the status quo but ultimately had faith in the common law to come up with pragmatic solutions.

IV. The Law of Contracts within an Intellectual Tradition

By the time that the first edition of *The Law of Contract* appeared in 1945,[81] both authors were secure in their reputations. Cheshire held the Vinerian Chair, and Fifoot was the All Souls Reader in English Law. Their treatise was a work of mature reflection compiled after many years spent teaching the subject. In the preface to their treatise, the authors set out a statement of their aims that is worth quoting in full:

> We profess to examine the principles underlying the English law of Contract, to indicate the difficulties which surround their application, to illustrate them from the accidents of litigation and the practices of life, and, where such a course seems profitable, to justify or excuse their vagaries by reference to their history.[82]

The emphasis on 'principles underlying the English law of Contract' puts Cheshire and Fifoot within the nineteenth-century classical contract tradition.[83] One of the leading treatise writers

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[79] Lord Denning, *The Discipline of Law* (London, Butterworths, 1979) 200; Lord Denning, *The Family Story* (London, Butterworths, 1981) 78.

[80] *Buttery v Pickard* (1946) 62 TLR 241 (KBD) was noted by PV Baker (1947) 63 *LQR* 278 but otherwise disappeared into obscurity. Interestingly, *High Trees* did not appear in the All England Reports until 1956.

[81] Cheshire and Fifoot (n 10).

[82] *ibid* iii.

[83] S Waddams, 'What *Were* the Principles of Nineteenth-Century Contract Law?' in A Lewis et al (eds), *Law in the City: Proceedings of the Seventeenth British Legal History Conference* (Dublin, Four Courts Press, 2007) 305–18.

of that earlier time, Sir William Anson, explained in the preface to his *Principles of the Law of Contract* that:

> The main object with which I have set out has been to delineate the general principles which govern the contractual relation from its beginning to its end. I have tried to show how a contract is made, what is needed to make it binding, what its effect is, how its terms are interpreted, and how it is discharged and comes to an end.[84]

Anson was not the first writer to try to place the law of contract within a methodical structure. As far back as the early eighteenth-century, Jeffrey Gilbert had attempted to construct some sort of rationale framework for the law of contract.[85] Over a century and a half, various other writers tried to do the same.[86] Over time, these works became more comprehensive and more highly developed as well as lengthy. Most of these writers were influenced to varying degrees by Robert Joseph Pothier's idea that contracts were formed by a meeting of wills.[87]

By the time that *Cheshire and Fifoot* came along, there were three main competitor works, all of which had begun life in the nineteenth century. A possible twentieth century rival by Sir John Salmond was published posthumously[88] and only ran to two editions. The first edition was edited by Percy Winfield in 1927 and the second edition had James Williams as editor and appeared in 1945.[89] Reviewing the book in 1946, Denning, wrote that, 'the book cannot be pronounced a good one' and compared the work unfavourably with *Cheshire and Fifoot*, which he reviewed at the same time and described as 'a good book'.[90]

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[84] WR Anson, *Principles of the Law of Contract* (Oxford, Clarendon Press, 1879) v.

[85] His work has only recently been published, see M Lobban (ed), *Jeffrey Gilbert on Property and Contract Volume 1* (London, Selden Society, 2019) cliii.

[86] As well as those mentioned elsewhere in the text, these include H Ballow, *Treatise of Equity* (London, E & R Nutt, 1737); JJ Powell, *Essay Upon the Law of Contracts and Agreements*, 2 vols (London, J Johnson, 1790); HT Colebrooke*, A Treatise on the Law of Obligations and Contracts* (London, Colebrooke, 1818); S Leake, *The Elements of the Law of Contract* (London, Stevens & Sons, 1867).

[87] Pothier appeared in an English translation in 1806: W Evans (trans), R Pothier, *A Treatise on the Law of Obligations or Contracts*, 2 vols (London, A Strahan, 1806).

[88] I am grateful to Professor Hugh Collins for drawing this book to my attention. For some details of this work, see A Frame, *Salmond Southern Jurist* (Wellington, Victoria University Press, 1995) 236–37.

[89] P Winfield, *Principles of the Law of Contract by the late Sir John Salmond and Percy H Winfield*, 1st edn (London, Sweet & Maxwell, 1927); J Williams, *Principles of the Law of Contract by the late Sir John Salmond and James Williams*, 2nd edn (London, Sweet & Maxwell, 1945).

[90] (1946) 62 *LQR* 190, 191.

The first of the nineteenth century treatises by Joseph Chitty appeared in 1826.[91] A nineteenth edition was published just before the Second World War.[92] From the beginning, Chitty's treatise was aimed at legal practitioners and over time it had grown in length and contained a mass of authority. The second treatise, written by Sir William Anson, was designed for law students and was the closest in its conception to *Cheshire and Fifoot*. Anson's approach as a writer was made clear in a letter that he enclosed in with a copy of his treatise to his friend, Thesiger LJ, where he admitted: 'Writing as I have done for students and beginners I have ventured on a definitiveness of statement as to the results of cases which would have been presumptuous in a book of practice'.[93]

The nineteenth edition of Anson's book, edited by James Brierly, and which appeared in the same year as *Cheshire and Fifoot*[94] was beginning to show its age. Cheshire and Fifoot made the perceptive point that while Anson's book 'has directed the steps, not only of the present authors, but of generations of pupils', the 'mode of treatment, apposite sixty years ago, may be thought out of focus with present needs'.[95] Sitting mid-way between these two treatises, a third, by Sir Frederick Pollock, could be read by practitioners or law students. *Principles of Contract at Law and in Equity*[96] offered a more complex and nuanced analysis than the two other works. However, at its centre was a tension between Pollock's theoretical framework and the law as it was applied by the courts.[97] When it came to Pollock's treatise, Cheshire and Fifoot claimed rather oddly that it was not comprehensive – which is perhaps not the most obvious of its faults. The final edition written by Pollock was published in 1921.[98] The editor of the eleventh edition which appeared in 1942, Sir Percy Winfield, was himself a distinguished jurist.[99] This was a large work of over 600 pages of text. Unlike Anson's treatise, it had nearly

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[91] J Chitty, *A Practical Treatise on the Law of Contracts not Under Seal* (London, S Sweet, 1826).

[92] C Odgers (ed), *Chitty's Treatise on the Law of Contract*, 19th edn (London, Sweet & Maxwell, 1937).

[93] The letter dated 20 March 1879 is reproduced in S Waddams, *Principle and Policy in Contract Law* (Cambridge, Cambridge University Press, 2011) 212.

[94] JL Brierly (ed), *Anson's Law of Contract: Principles of the English Law of Contract*, 19th edn (Oxford, Clarendon Press, 1945).

[95] Cheshire and Fifoot (n 10) (preface).

[96] F Pollock, *Principles of Contract at Law and in Equity*, 1st edn (London, Stevens & Son, 1876).

[97] N Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford, Oxford University Press, 2004) 196.

[98] F Pollock, *Principles of Contract at Law and in Equity*, 9th edn (London, Stevens & Sons, 1921).

[99] P Winfield, *Pollock's Principles of Contract*, 11th edn (London, Stevens & Sons, 1942).

reached the end of its life. The final thirteenth edition was published in 1950, three years before Winfield's death.

Cheshire and Fifoot owed a great deal to these earlier authors, especially Anson, as they themselves recognise. Their own treatise was hardly novel in its conception. The pattern of writing about contract law was already well established. The most important feature of this tradition was the way that contract law was presented as a single body of legal doctrine rather than as an accumulation of rules which attached to different forms of action or different types of contract. While this gave the subject much-needed coherence – in contrast for example to the law of tort[100] – it involved several assumptions. For example, it was premised on the idea that contracts are the product of negotiation between two roughly equal parties which then produces an agreement. There were a number of issues with this paradigm not least of which was that by the nineteenth century, standard form contracting had become commonplace.[101] Cheshire and Fifoot did not diverge from this pattern.

Because treatises in the classical tradition are premised on the core concept of an agreement, they always begin with an examination of the nature of agreement and the doctrine of offer and acceptance. In traditional fashion, *Cheshire and Fifoot* emphasised the centrality of agreement: 'The idea of mutual assent, however elusive in practice, was at the root of contract'. [102] The standard arrangement was also followed with offer and acceptance, consideration, intention to create legal relations, content of a contract, enforceability, vitiating factors, capacity, privity, discharge and remedies. A final chapter considered quasi-contract. This structure was relatively similar to the way that Anson ordered his material in his first edition. This ordering of the material is still reflected in modern treatises that are part of this

[100] The literature on tort law in the nineteenth century was rather sparse in contrast to that on contract and of the English writers only Pollock made a serious attempt to provide a level of intellectual coherence to the subject: F Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (London, Stevens & Sons, 1887). For a critique of Pollock's tort scholarship, see R Stevens, 'Professor Sir Frederick Pollock (1845-1937): Jurist as Mayfly' in J Goudkamp and D Nolan (eds), *Scholars of Tort Law* (Oxford, Hart Publishing, 2019) 75–101.

[101] Horse sales were an early example of standard form contracting, see W Swain, 'Horse Sales: the Problem of Consumer Contracts from a Historical Perspective' in J Devenney and M Kenny (eds), *European Consumer Protection Theory and Practice* (Cambridge, Cambridge University Press, 2012) 282, 297. For other examples, see R Cranston, 'The Rise and Rise of Standard Form Contracts: International Commodity Sales 1800–1970' in R Cranston et al (eds), *Commercial Law Challenges in the Twenty First Century* (Stockholm, Iustus Forlag, 2001) 11–71.

[102] Cheshire and Fifoot (n 10) 19.

tradition.[103] Quasi-contract has gradually disappeared from contract treatises with the emergence of a distinct legal doctrine of unjust enrichment or restitution.[104]

One feature of *Cheshire and Fifoot* distinguishes the work from the other contract treatises. The history of contract features much more prominently. The first edition contained a 17-page overview on the history of the subject. History intruded at other points as well. The topic of consideration is prefaced with a historical introduction,[105] as is the Statute of Frauds.[106] This approach is not entirely unusual, but the extent to which history featured was novel and is notable for reflecting Fifoot's strong belief that the modern law needed to be understood in its historical context. It remains a feature of the book in later editions. From the ninth edition, after Fifoot's death, the historical introduction was re-written by the leading legal historian, AWB Simpson.[107]

V. The Law of Contracts: Description and Critique

It might be expected that *Cheshire and Fifoot* would contain an accurate description of the law of contract in 1945. It was up-to-date with the analysis of the case law which never feels so excessive that it weighs the book down. Rather, the focus is on the most important authorities.[108] There is some reference to academic writing as well.[109] But it also provided a critique of various

[103] In the modern edition of *Anson* for example, Jack Beatson et al, *Anson's Law of Contract*, 31st edn (Oxford, Oxford University Press, 2020).

[104] This process began in 1966 with R Goff and G Jones, *The Law of Restitution* (London, Sweet & Maxwell, 1966).

[105] Cheshire and Fifoot (n 10) 42–44.

[106] *ibid* 106–109.

[107] MP Furmston, *Cheshire and Fifoot's Law of Contract*, 9th edn (London, Butterworths, 1976).

[108] By way of contrast see the comments by Lord Burrows on Professor Treitel in chapter 13 of this volume. Dr Jonathan Morgan has made the useful observation to me in correspondence that the suitability of *Cheshire and Fifoot* for students may have unfairly damaged its reputation as a serious work in contrast to Treitel's book, which is a less useful work for law students.

[109] The reference to academic commentary was picked up by Denning in his book review (Denning (n 90) 191). It is notable that the academic authorities referred to are a surprisingly eclectic mix for the period, including Canadian and American writers, which went beyond men like Ames and Story, see, eg, Cheshire and Fifoot (n 10) 33, 37.

aspects of contract doctrine, albeit by modern standards, a rather cautious one. Nevertheless, it was still a step forward from the previous generation of contract scholars. Of the nineteenth-century writers, Pollock, more than his contemporaries, went beyond pure description and drew parallels elsewhere including with Equity and the Indian Contract Act 1872. There was also some critical comment, for example, in relation to the rule in *Foakes v Beer*.[110] Although the fact of his criticism was usual, Pollock was no radical. He often found himself conflicted. In private correspondence, he was prepared to criticise the doctrine of consideration. In a letter to Goodhart, he would declare that 'I see no defence for the doctrine as it stands'.[111] However, none of these criticisms made their way onto the public pages of his treatise.

By the time that *Cheshire and Fifoot* appeared there was at least some appetite for reforming contract law. The Law Revision Committee had published a report in which it had recommended major reforms of consideration.[112] Lord Wright, who chaired the Committee, had earlier concluded that consideration 'is a mere incumbrance'.[113] He argued that it could be replaced by simply asking if a contract was intended. The Committee stopped short of such a radical measure. Instead, it accepted that consideration should be retained but made several proposals for modification of the existing law. These deliberations provided the backdrop for Cheshire and Fifoot to consider the current state of the doctrine of consideration. Their discussion also reflects the way that they thought about contract law and law reform.

Cheshire and Fifoot were not radicals. Tearing everything up and starting over was incompatible with the importance that they placed on the history of contract law. Instead, they preferred to accept the status quo and argue for minor improvements. Their first response to those who criticised the doctrine of consideration was to defend it: 'once it is concluded that the English law seeks to enforce not promises but bargains, the element of mutuality, which is the essence of consideration, becomes intelligible and appropriate'.[114] It was also argued that in practice, consideration caused few problems because the requirement was almost always

[110] *Foakes v Beer* (n 78).

[111] Duxbury (n 977) 204.

[112] Law Revision Committee, *Sixth Interim Report (Statute of Frauds and the Doctrine of Consideration)* (Cmd 5449, 1937).

[113] Lord Wright, 'Ought the Doctrine of Consideration to be Abolished from the Common Law?' (1936) 49 *Harvard Law Review* 1225, 1251.

[114] Cheshire and Fifoot (n 10) 72.

satisfied in business transactions.[115] The proposal of the Law Revision Committee to allow writing to be treated as equivalent to consideration was also criticised as amounting to 'a strange confusion of thought'. They were probably correct in the theory that the Committee ultimately 'lacked the courage of their convictions' and, as a result, were forced into an unhappy compromise between retaining the current law and abandoning consideration as had been advocated for by Lord Wright.[116]

Some of the more modest Committee proposals met a more favourable reception from Cheshire and Fifoot. Their reaction to the suggestion to abolish the rule in *Foakes v Beer* was that it 'would certainly bring the law into accord with business practice',[117] recognising that it could only be changed by statute. In their note on *Central London Property Trust v High Trees House Ltd*,[118] they concluded that 'the sting of the rule … may justly be said to have been drawn',[119] albeit noting that estoppel could only be raised by way of a defence. The marginal note to the second edition of *Cheshire and Fifoot* summed up their analysis of the decision: 'new way of escape suggested'. Having then conceded that there was little prospect of legislative intervention, they would conclude that 'whilst the rule cannot now be abolished by judicial action, it may still be neutralised by the exercise of a beneficent ingenuity'.[120] They explained further that 'while it cannot directly negative the rule in Foakes v Beer, can at least neutralise its results'. All of this shows their great faith in the common law method which was made quite explicit in the remark that '[i]n this, as in other problems of English law, an accumulation of experience is necessary before a final solution can be reached'.[121] The same philosophy was implicit in the publication of a companion casebook to *Cheshire and Fifoot*.[122]

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[115] *ibid*.

[116] *ibid*.

[117] *ibid* 73.

[118] *Central London Property Trust v High Trees House Ltd* (n 75).

[119] Cheshire and Fifoot (n 74) 289.

[120] CG Cheshire and CHS Fifoot, *The Law of Contract*, 2nd edn (London, Butterworth, 1949) 69.

[121] *ibid* 70.

[122] CG Cheshire and CHS Fifoot, *Cases on the Law of Contract*, 1st edn (London, Butterworth, 1946). The last edition appeared in 1977 (MP Furmston, *Cheshire and Fifoot's Cases on the Law of Contract*, 7th edn (London, Butterworths, 1977)).

In this volume, the cases are left to speak for themselves without any exposition or critical commentary. This approach is out of step with more modern casebooks.[123]

Michael Furmston joined Cheshire and Fifoot as a co-author on the eighth edition in 1972. The work remained an Oxford enterprise – at the time Furmston was a Fellow of Cheshire's own college.[124] Furmston took over as the sole author on the ninth edition in 1976.[125] By the tenth edition, both of the original authors had died. Yet as Furmston made clear in the preface to the tenth edition in 1981, 'in content and style it [Cheshire and Fifoot] remains predominantly theirs'.[126] Today, it remains a conservative work; a point that can be illustrated by the way the topic of quasi-contracts was only omitted from the 15th edition in 2006 – over a decade after the recognition of unjust enrichment as a distinct body of law in England.[127] History continues to play an important part in the work; indeed the historical introduction was rewritten for the current 17th edition.[128] The fact that since its conception *Cheshire and Fifoot* has remained largely unchanged is not necessarily a weakness, especially given the work's iconic status in England and overseas.

VI. Overseas Editions of *Cheshire and Fifoot*

Cheshire and Fifoot soon began to be cited in the High Court of Australia.[129] Yet Australian judges did not necessarily accept its analysis uncritically. In *Coulls v Bagot's Executor &*

[123] Including one co-authored by Furmston: HG Beale et al, *Contract: Cases and Materials* (London, Butterworths, 1985).

[124] Furmston was subsequently a Pro-Vice Chancellor, Dean, Professor at the University of Bristol and Dean and Professor at Singapore Management University.

[125] MP Furmston, *Cheshire and Fifoot's Law of Contract*, 9th edn (London, Butterworths, 1976).

[126] MP Furmston, *Cheshire and Fifoot's Law of Contract*, 10th edn (London, Butterworths, 1981) v.

[127] MP Furmston, *Cheshire, Fifoot, & Furmston's Law of Contract*, 15th edn (Oxford, Oxford University Press, 2006) v. The House of Lords recognised unjust enrichment in *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 548 (HL).

[128] MP Furmston, *Cheshire, Fifoot, & Furmston's Law of Contract*, 17th edn (Oxford, Oxford University Press, 2017). This section is now written by Professor David Ibbetson.

[129] *Steele v Tardiani* (1946) 72 CLR 386 (HCA) 402 (Dixon J).

Trustee Co Ltd,[130] Windeyer J said he disagreed with the idea (new in the sixth edition) that the rule that consideration move from the promisee and the rule that only those who are parties to a contract could bring a claim were the same rule.[131] A few years later, however, the same judge praised the work in a different context.[132] *Cheshire and Fifoot* was also cited by the Supreme Court of New Zealand.[133] In the early 1960s, as the former British colonies began to develop their distinctive legal traditions, homegrown editions of *Cheshire and Fifoot* began to appear.[134] This development reflects the iconic status that the book had already acquired by then, but perhaps more prosaically, the fact that the then publisher, Butterworths, had overseas divisions. *Cheshire and Fifoot* also had the advantage that it could be adapted fairly easily to local circumstances. These overseas versions not only preserved the English legal tradition but were also critical in challenging it. By providing an authoritative account of contract law, these editions provided a basis for reassessing the place of English law in these jurisdictions. In New Zealand in the decades that followed, the Contract and Commercial Law Reform Committee set about creating a series of statutes. By the 1980s, much of the country's contract law was contained in statute.[135] In Australia, outside of the confines of the Trade Practices Act 1974, statute played a more marginal role. Within the Federal system, an authoritative statement of precedent was nevertheless important in providing a platform for the High Court in the 1980s to push more aggressively Australian contract law in a new direction.

The first of the overseas editions of *Cheshire and Fifoot* appeared in New Zealand in 1961. Its editor was the legendary Auckland Law Faculty Dean, Professor John Frederick 'Jack' Northey.[136] Northey summed up in the preface precisely why a New Zealand edition was so important:

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[130] *Coulls v Bagot's Executor & Trustee Co Ltd* (1967) 119 CLR 460 (HCA).

[131] *ibid* 494; see also CG Cheshire and CHS Fifoot, *The Law of Contract*, 6th edn (London, Butterworths, 1964) 65.

[132] *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353 (HCA) 366.

[133] *Angelo v Kean Clarke Brothers* [1950] NZLR 1 (SC) 6 (Finlay J).

[134] New Zealand and Australia editions were joined much later on by a Singapore version: A Phang, *Cheshire, Fifoot and Furmston's Law of Contract*, 2nd edn (Singapore, Butterworths, 1998).

[135] For this process see: W Swain, 'Who pays for the Grog? The Contractual and Commercial Law Reform Committee, Law Reform in New Zealand' (2019) 25 *New Zealand Business Law Quarterly* 17–29; W Swain, 'A Reputation For Boldness: Statutory Reform of Contract Law in New Zealand' in J Steele and TT Arvind (eds), *Contract Law and the Legislature* (London, Bloomsbury, 2020) 107–24.

[136] Northey was Dean of the Auckland Law Faculty for nearly 20 years (B Coote, *Learned in the Law: The Auckland Law School 1883-2008* (Auckland, Legal Research Foundation, 2009) 72).

> New Zealand lawyers have been denied access for far too long to a comprehensive text-book on the New Zealand Law of Contract. They have been obliged to make use of books published in the United Kingdom containing few references to New Zealand and Commonwealth decisions. It was therefore necessary to supplement the English texts and to discover the New Zealand statutory provisions corresponding to those discussed in the text.[137]

The New Zealand version of *Cheshire and Fifoot* would eventually evolve from 1997 into, *Burrows, Finn and Todd on Law of Contract in New Zealand*,[138] where it remains the pre-eminent contract treatise in the jurisdiction. It is difficult to understate the value of the New Zealand edition in providing a definitive statement of the law in the years just before the Contract and Commercial Law Reform Committee began work on the contract statutes. It inevitably raised the profile of New Zealand decisions and helped the law in that jurisdiction to find its voice.

The situation across the Tasman was much the same. An Australian edition of *Cheshire and Fifoot* was published in 1966.[139] It soon began to be referred to by the High Court.[140] Like Northey, Starke and Higgins were at pains to stress the local character of the law of contract:

> The Australian law of contract, although largely founded upon the English law, is in a number of important respects not identical with it. It is true that so far as common law principles are expressed or reflected in English case-law, Australian judges treat the English decisions with respect, and if not as binding, at least as having persuasive authority. Yet even here, one finds tides or currents of Australian judge-made contract law moving sometimes in a different direction.[141]

As it developed, the Australian editions came to be more critical of long-established English doctrines. By the 1980s, the High Court began to promote a more characteristically Australian

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[137] JF Northey, *Cheshire and Fifoot's Law of Contract, New Zealand Edition* (Wellington, Butterworths, 1961) v.

[138] In the current edition: J Finn et al, *Burrows, Finn and Todd on the Law of Contract in New Zealand*, 6th edn (Wellington, Lexis Nexis, 2018).

[139] JG Starke and PFP Higgins, *Cheshire and Fifoot's Law of Contract* (Sydney, Butterworths, 1966).

[140] *Thomas National Transport (Melbourne) Pty Ltd v May & Baker (Australia) Pty Ltd* (1966) 115 CLR 353 (HCA) 375 (Windeyer J).

[141] Starke and Higgins (n 1399) 5.

law of contract.[142] As a result, it was necessary to change the whole ethos and organisation of the Australian edition of Cheshire and Fifoot from the sixth edition.[143] Very tellingly the historical introduction now appears at the back alongside a section on Australian history.[144] Estoppel[145] and the principle of unconscionability more broadly[146] are much more central to contract law in Australia than in England and this began to be reflected in the treatise.[147] For the past few decades, the Australian editions have criticised long-standing English contract doctrine. Some judges have picked up on this. For example in the leading modern authority on privity of contract, *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*,[148] Toohey J, who favoured an exception to the rule for contracts of insurance, drew on a passage in the Australian *Cheshire and Fifoot*,[149] which described the trust instrument as a 'disappointing and unreliable' solution to privity. On other occasions, an idea promoted in *Cheshire and Fifoot* gained less support. In *Butcher v Lachlan Elder Realty*,[150] Kirby J in his dissent referred to a passage in *Cheshire and Fifoot* which suggested that an exemption clause was of no effect in the face of a claim under section 52 of the Trade Practice Act 1974.[151] The same judge, once again dissenting in *Koompahtoo Local Aboriginal Land Council v Sanpine*,[152] referred to the Australian *Cheshire and Fifoot* which stated there was no third 'intermediate' category of terms alongside conditions and warranties.[153] The majority on both occasions disagreed.

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[142] For an introduction to these developments, see JW Carter and A Stewart, 'Commerce and Conscience: The High Court's Developing View of Contract' (1993) 23 *University of Western Australia Law Review* 49.

[143] JG Starke et al, *Cheshire and Fifoot's Law of Contract*, 6th edn (Sydney, Butterworths, 1992).

[144] NC Seddon and RA Bigwood, *Cheshire & Fifoot's Law of Contract*, 11th edn (Sydney, Lexis Nexis, 2017). In contrast, in New Zealand the current edition of *Burrows, Finn and Todd* contains a historical introduction at the start of the book although it does now contain a brief discussion of the New Zealand history.

[145] Following *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 (HCA). For the development of this doctrine, see A Stewart et al, *Contract Law Principles and Context* (Cambridge, Cambridge University Press, 2019) 118–32.

[146] Unconscionability is reflected in various Australian contract doctrines most obviously in the rules relating to relief from unconscionable bargains, see Stewart et al (n 145) 380.

[147] Starke et al (n 143) 152–68, 422–35.

[148] *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 (HCA) 169.

[149] JG Starke et al, *Cheshire and Fifoot's Law of Contract*, 5th edn (Sydney, Butterworths, 1988) para 1535.

[150] *Butcher v Lachlan Elder Realty* (2004) 218 CLR 592 (HCA).

[151] *ibid* 657, which refers to NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 8th edn (Sydney, Butterworths, 1997) 591–92.

[152] *Koompahtoo Local Aboriginal Land Council v Sanpine* (2007) 233 CLR 115 (HCA).

[153] *ibid* 158, which refers to NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th edn (Sydney, Butterworths, 2008) 1032.

VII. *Cheshire and Fifoot* in the English Courts

In 1963, nearly two decades after it was first published, Megaw J described *Cheshire and Fifoot* as 'a well-known textbook'.[154] He would use the same description again a decade later.[155] At the time there was still a convention against citing a living author. The convention was never an absolute one[156] and after the Second World War, it began to break down. Citation of living authors was still relatively uncommon in the 1950s. But by the 1970s, the practice was more frequent.[157] By the late 1940s, *Cheshire and Fifoot* had begun to be cited by counsel in the course of argument in the House of Lords.[158] Into the 1950s and 1960s, the work was sometimes referred to in argument by itself[159] or alongside other authoritative works like *Anson* or *Chitty*.[160] References to *Cheshire and Fifoot* by counsel in reported cases increased in the 1960s.[161]

It was rarer for *Cheshire and Fifoot* to be cited by judges at least to begin with – but this may just reflect the wider practice of the time. One judge who did cite the work from the early 1950s was Lord Denning.[162] Given his friendship with Cheshire, this is perhaps

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[154] *Edwards v Skyways Ltd* [1964] 1 WLR 349 (QBD) 366.

[155] *Lewis v Averay* [1972] 1 QB 198 (CA) 209.

[156] For detailed discussion of the convention and its application see, N Duxbury, *Jurists and Judges: An Essay on Influence* (Oxford, Hart Publishing, 2001) 62–84; S Waddams, 'The Authority of Treatises in English Law' in M Godfrey (ed), *Law and Authority in British Legal History 1200-1900* (Cambridge, Cambridge University Press, 2016) 274–92.

[157] Duxbury *ibid* 81; A Paterson, *The Law Lords* (London, Macmillan, 1982) 16.

[158] *Comptoir D'Achat et de Vente du Boerenbond Belge SA v Luis de Ridder Limitada (The Julia)* [1948] AC 293 (HL) 305; *Hill v William Hill (Park Lane Ltd)* [1949] AC 530 (HL).

[159] *Mason v Clarke* [1955] AC 778 (HL) 783; *Shamia v Joory* [1958] 1 QB 448 (QBD) 455; *Port Line Ltd v Ben Line Steamers Ltd* [1958] 2 QB 146 (QBD) 155.

[160] *Bell House Ltd v City Wall Properties Ltd* [1966] 1 QB 207 (QBD) 212 (*Anson*); *Burnett v Westminster Bank* [1966] 1 QB 742 (QBD) 754 (*Anson*); *Frisby v BBC* [1967] Ch 932 (Ch D) 935 (*Chitty*); *Rondel v Worsley* [1969] 1 AC 191 (HL) 212 (*Chitty*).

[161] In addition to those cases otherwise cited: *Muskham Finance Ltd v Howard* [1963] 1 QB 904 (CA) 909; *Rookes v Barnard* [1964] AC 1129 (HL) 1140; *Car and Universal Finance Co Ltd v Caldwell* [1965] 1 QB 525 (CA) 546; *Suisse Atlantique Sociétéd'Armement Martitime SA v NV Rotterdamsche Kolen Centrale (The Silvretta)* [1967] 1 AC 361 (HL) 375; *Teheran-Europe Co Ltd v ST Belton (Tractors) Ltd* [1968] 2 QB 545 (CA) 548.

[162] *Bennett v Bennett* [1952] 1 KB 249 (CA) 260.

unsurprising. He also cited Fifoot's historical work.[163] By the 1960s, *Cheshire and Fifoot* became to be cited more widely in judgments, and on occasion, quite lengthy passages were quoted.[164] Although containing some critical comment, *Cheshire and Fifoot* did not challenge the status quo. In this respect, it was not unlike the approach of the vast majority of appellant judges of the era. In turn, *Cheshire and Fifoot* was usually aligned with a judicial opinion.[165] The nature of the work meant that it was particularly well suited to be used as an authoritative description of areas of contract doctrine as a reliable statement of the law of contract at a given time.[166] An example of this can be found in a speech of Lord Wilberforce from the late 1960s in *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd*[167] when he used *Cheshire and Fifoot* to make the point that contracts in restraint of trade could be listed and classified. In this respect, *Cheshire and Fifoot* was very much in the same category as much longer established works like *Chitty* and *Anson* which it was sometimes cited alongside.[168] From the late 1960s, a number of appellant judges in addition to Lord Denning began to use *Cheshire and Fifoot* to state orthodoxy in their judgments. The treatise was also particularly popular with Sachs LJ, born the year after Fifoot, and an Oxford graduate,[169] who in the course of one judgment, explained that the law was 'compactly and accurately stated' in *Cheshire and Fifoot*.[170] On occasion, judges would raise the work in the course of argument for much the same purpose.[171]

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[163] *Southport Corp v Esso Petroleum Ltd* [1954] 2 QB 182 (CA) 196.

[164] *Beswick v Beswick* [1966] Ch 538 (CA) 550; *Rodriguez v RJ Parker* [1967] 1 QB 116 (QBD) 133; *Tote Investors v Smoker* [1968] 1 QB 509 (CA) 517; *Gallie v Lee* [1969] 2 Ch 17 (CA) 31.

[165] A good example can be found in the judgment of Sellers LJ in *Ingram v Little* [1961] 1 QB 3 (CA) 54. For other examples not otherwise mentioned, see *Jones v Padavatton* [1969] 1 WLR 328 (CA) 331.

[166] For a contrary argument that the work is wrong, see *Eastern Distributors Ltd v Goldring* [1957] 2 QB 600 (CA) 603

[167] *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 (HL) 337.

[168] *Bell House Ltd v City Wall Properties Ltd* [1966] 1 QB 207 (QBD) 220 (*Anson*).

[169] Lord Roskill, 'Sachs, Sir Eric Leopold Otho (1898–1979)' (*Oxford Dictionary of National Biography*, 23 September 2004) available at

www.oxforddnb.com/view/10.1093/ref:odnb/9780198614128.001.0001/odnb-9780198614128-e-31646

[170] *Bolton v Mahadeva* [1972] 1 WLR 1009 (CA) 1015. For other examples from this judge see: *Connell v Motor Insurers' Bureau* [1969] 3 WLR 231 (CA) 238; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 WLR 361 (CA) 374.

[171] *Empresa Cubanna de Fletes v Lagonisi Shipping Co Ltd* [1971] 1 QB 488 (CA) 498 (Phillimore LJ).

Into the 1970s, *Cheshire and Fifoot* continued to fulfil the role as a reliable statement of the current law of contract.[172] In *Wickman Machine Tool Sales Ltd v L Schuler AG*,[173] the leading decision on contractual interpretation, Lord Simon referred to *Cheshire and Fifoot* alongside *Anson* and *Halsbury's Laws of England*.[174] The same judge referred to *Cheshire and Fifoot* again in *Banning v Wright*,[175] and even engaged with the substance of the work when he remarked that 'This tends to suggest that Cheshire and Fifoot are right, that there is no essential juridical difference between waiver and variation'.[176]

Cheshire and Fifoot was in the hands of a new author from 1976 but it continued to be cited by judges in much the same way as before – as a definitive statement of the current law of contract.[177] This also made it a useful resource for counsel. In *Levison v Patent Steam Carpet Cleaning Co Ltd*,[178] when Michael Beloff referred to a majority of academic option, he cited *Cheshire and Fifoot* alongside several other works including *Chitty* and *Treitel*.[179] Given Lord Denning's admiration for *Cheshire and Fifoot*, there was some tactical sense in referring to them on this occasion.[180] Beloff lost the appeal for other reasons, but the case provides as good an illustration of the way that *Cheshire and Fifoot* had quickly become a repository of largely orthodox opinion which appellate judges felt comfortable in relying on for analysis.[181] When Lord Hailsham concluded that the question of whether leases could be frustrated was not settled by authority but had to be decided on principle, one important source for reaching that

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[172] Other examples include: *Holwell Securities Ltd v Hughes* [1974] 1 WLR 155 (CA) 161 (Lawton LJ); *Lloyds Bank v Bundy* [1975] QB 326 (CA) 333 (Lord Denning MR); *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (CA) 826 (Ormrod LJ); *Barton v Armstrong* [1976] AC 104 (HL) 119 (Lord Cross); *Owen v Tate* [1976] QB 402 (CA) 413 (Stephenson LJ).

[173] *Wickman Machine Tool Sales Ltd v L Schuler AG* [1974] AC 235 (HL).

[174] *ibid* 240.

[175] *Banning v Wright* [1972] 1 WLR 972 (HL).

[176] *ibid* 991.

[177] *Shell (UK) Ltd v Lostock Garage Ltd* [1976] 1 WLR 1187 (CA) 1202 (Lord Denning MR).

[178] *Levison v Patent Steam Carpet Cleaning Co Ltd* [1978] QB 69 (CA).

[179] *ibid* 75.

[180] Beloff was not alone in seeing the attraction of reference to *Cheshire and Fifoot* when appearing before Lord Denning (*H Parsons (Livestock) Ltd v Uttley Ingham & Co Ltd* [1978] QB 791 (CA) 794).

[181] *Gibson v Manchester City Council* [1979] 1 WLR 294 (HL) 302 (Lord Edmund-Davis); *Alec Lobb (Garages) Ltd v Total Oil (Great Britain) Ltd* [1985] 1 WLR 173 (CA) 191 (Waller LJ); *Lombard North Central Plc v Butterworth* [1987] QB 527 (CA) 536 (Mustill LJ).

conclusion was *Cheshire and Fifoot*.[182] The treatise continues to be cited in England into modern times.[183]

VIII. The Role of *Cheshire and Fifoot*

It is one thing for a legal writer to be cited or even quoted and quite another to be influential on the outcome of the decision. Citation should not necessarily be equated with influence.[184] Lord Denning was unusual amongst appellate judges of his generation in being prepared to admit that he was influenced by academic commentary.[185] While some academic writers have undoubtedly influenced the development of the law, it is fair to say that the impact of legal scholarship is somewhat sporadic.[186] A few elements of the process of influence can be illustrated with reference to Lord Denning. In *Associated Japanese Bank (International) Ltd v Crédit du Nord SA*,[187] Steyn J suggested that Lord Denning's analysis of *Bell v Lever Brothers Ltd*[188] in *Magee v Pennine Insurance Co Ltd*[189] was influenced by *Cheshire and Fifoot*. Cheshire and Fifoot had consistently argued for a narrow interpretation of *Bell v Lever Brothers Ltd*[190] in which common law mistake could only vitiate a contract where it concerned the existence of the subject-matter of the contract. There is a pleasing symmetry in the way in which Cheshire and Fifoot used a decision of Lord Denning in *Solle v Butcher*[191] to support

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[182] *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675 (HL) 690.

[183] Examples include: *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832, [2021] AC 275 [62]; *Simantob v Shavleyan* [2019] EWCA Civ 1105 [48] (Simon LJ); *Sunrise Brokers LLP v Rodgers* [2014] EWCA Civ 1373, [2015] ICR 272, 292 (Longmore LJ).

[184] Duxbury (n 156) 82–84.

[185] Paterson (n 157) 18.

[186] For a more optimistic view, see Lord Rodger, 'Judges and Academics in the United Kingdom' (2010) 29 *University of Queensland Law Journal* 29; J Beatson, 'Legal Academics: Forgotten Players or Interlopers?' in A Burrows et al (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (Oxford, Oxford University Press, 2013) 523–41.

[187] *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1989] 1 WLR 255 (QBD) 267.

[188] *Bell v Lever Brothers Ltd* [1932] AC 161 (HL).

[189] *Magee v Pennine Insurance Co Ltd* [1969] 2 QB 507 (CA).

[190] *Bell* (n 188).

[191] *Solle v Butcher* [1950] 1 KB 671 (CA).

their analysis.[192] They seized on the fact that Lord Denning took a very narrow view of *Bell v Lever Brothers Ltd* when he explained that a contract should only be set aside for mistake when there was a 'failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground'.[193] On this view, a common mistake, even a fundamental one, was not sufficient at law to vitiate a contract. It would be necessary to resort to Equity in such cases. The narrow view of *Bell v Lever Brothers Ltd* and the existence of a separate doctrine of equitable mistake however now seem very doubtful following *Great Peace Shipping Ltd v Tsarvliris Salvage (International) Ltd*.[194]

The debate around the doctrine of mistake, if nothing else, demonstrates that the impact of judges, even one as important as Lord Denning, as well as legal writers, is often transitory. *Cheshire and Fifoot* has achieved the standing that it has partly because it is 75 years old. But there is more to it than that. Over three-quarters of a century, it has only had one author in addition to the original two.[195] This means that while the current edition is not identical to the first edition (it is much longer for a start), it retains much of the character of the first edition.[196] A cursory glance at the table of contents shows that. The only major differences are the exclusion of the chapter on quasi-contract and the inclusion of a chapter 'Some Factors Affecting Modern Contract' which considers some contextual factors (such as EU law, consumer law, globalisation and human rights) which would not have been relevant in 1945. This gives the work a sense of stability and continuity which, when combined with clear exposition, explains its popularity. In an area like contract law in which legal doctrine develops relatively slowly, these qualities may explain why the work has endured so long. At the same time, the treatise has proved to be adaptable. The Australian edition especially is quite different from its English counterpart. Nonetheless, these various editions in different jurisdictions over time still have a common thread which can be traced back to the contract treatises of the late nineteenth century.

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[192] GH Cheshire and CHS Fifoot, *The Law of Contract*, 3rd edn (London, Butterworths, 1952) 180.

[193] *Solle* (n 1911) 691.

[194] *Great Peace Shipping Ltd v Tsarvliris Salvage (International) Ltd* [2003] QB 679 (CA).

[195] Following the death of Professor Furmston in 2020, any new edition will have a new author.

[196] The main text excluding the front matter and the index is 435 pages. The current 17th[t] edition is 817 pages long.