

## Foreword

### Chief Justice Robert French AC

*Leading Cases in Australian Law* takes its place in a venerable publishing tradition now brought to this country by this volume. The Introduction links the book historically to compilations of leading cases published in England and the United States in the 19th and 20th centuries. The editors have mentioned, in particular, *Smith's Leading Cases* which dates back to 1837. As demonstrated by a passage quoted from the Introduction to that work, it served the need of the student lawyer for a guide 'amid the masses of accumulated lore which the Reports present'. The lawyer in practice was also said to feel the need for a plausible collection of the cases which 'he [as "he" then was] has most frequently occasion to consult, and which, consequently, he would, if it were practicable, willingly carry into court or round the circuit with him'. Now it may be supposed that collections of such cases can be carried around still in their full textual glory on an iPad or Kindle device. That facility, however, does not meet the demand for the compression of legal knowledge into the intellectual equivalent of finger food.

That demand is insatiable and perhaps even infinitely regressive. The publication of *Smith's Leading Cases* gave rise to its abridgment in the *Epitome of Leading Common Law Cases*, first published in 1873 by John Indermaur, a solicitor and 'Clifford's Inn Prizeman, Michaelmas Term, 1872'. Mr Indermaur's academic success had involved some devotion to the study of Smith. As pointed out in the Preface to his first edition, it had occurred to him that:

[M]any articulated clerks not having sufficient time to fully peruse the large volumes of 'Leading Cases' – a short *Epitome*, giving those decisions most important to be read and remembered would be very useful to them.<sup>1</sup>

It was also thought to be useful as a memory jogger for those who had attentively read the large volumes.<sup>2</sup> The *American Law Review* said of the *Epitome* what could well be said of the present volume:

The cases themselves are stated with admirable brevity and clearness, and the notes turn out to be more full and instructive than their material size would seem to indicate.

---

1 J Indermaur, *An Epitome of Leading Common Law Cases with Some Short Notes Thereon: Chiefly Intended as a Guide to 'Smith's Leading Cases'* (Stevens & Haynes, 1st ed, 1873).

2 *Ibid.*

Another publication, *The Law Journal*, said that the compiler of the book knew the value of skilful ‘cram’ in law examinations.<sup>3</sup>

There is a question which some might pose – what is the point of a compilation of leading cases in an age of searchable legal databases and citators and online law reports, an age in which a small legal library can be carried around on an iPad or personal computer? There is probably more than one answer to that question. The first perhaps reflects this writer’s age and generation. That is to say, there is much to be said for reading text on paper in a hardcopy book. It presents information with visual cues in two dimensions comprising the eight corners of the pages when the book is opened, and in three dimensions by the thickness of the book as the reader progresses through it. All of that is linked to the tactile experience. That combination cannot be reproduced on a flat screen with a cursor telling the reader what percentage of the book remains to be read.

The preceding remarks are by way of general observation. As for this particular book, the legal reader holding an old text or report of the 19th or early 20th centuries has a tangible connection with the past and the continuity and sweep of legal history that cannot be reproduced in electronic form. This book of *Leading Cases* does not do that directly but it does something similar indirectly. As explained in the Introduction, it expressly places its readers in the traditions of the generations of lawyers who used *Smith’s Leading Cases* and other compilations in the United Kingdom and the United States and even Mr Indermaur’s *Epitomes*. Those who are conscious of that ancestry may view these *Leading Cases*, and the personal experience of learning about and applying them, in a larger historical perspective than the immediate purpose of their publication.

The book sets out a list of 200 cases. It does not order them alphabetically or chronologically or by subject matter. They are simply ranked by the frequency by which they have been cited in later decisions. That frequency is reflected by the spectrum of familiarity which is experienced by the reader scanning the list. However, unreflective familiarity can breed superficiality. It is a frequent phenomenon of legal practice that leading cases are cited like minor spells or cantrips in the hope that beneficial effects will flow simply from the invocation of their names and without consideration of the particularity of what they said and how what they said engages with the case in point. It is always a rewarding exercise to read the leading case and rediscover the principle for which it stands. For those to whom reading a full judgment is like cold calling a slight acquaintance for a serious favour, this text provides the requisite introduction to a closer and more beneficial relationship.

The text provides an outline in each case of that aspect of the case which is indispensable for an understanding of what it was about – namely its facts. In each case it seeks to encapsulate the propositions for which the case is cited and

---

3 The above quotations appear in an advertisement for ‘Mr Indermaur’s books for students’ appearing in the advertisement pages of Thomas Pitt Taswell-Langmead’s Text, *English Constitutional History: A Textbook for Students and Others* (Stevens & Haynes, 1875).

key statements in the judgment. A very brief commentary and cross-references are added. There is, of course, no substitute for reading the full judgment and indeed the summary of argument if available in a law report. It is only with such a reading that the propositions in the case may be understood in their factual context which may bear with it concessions, qualifications or limitations affecting the scope of the propositions for which the case is authority. It is through such a reading that it may better be understood whether the proposition for which the case is cited had the character of a sufficient condition or a necessary condition of some legal consequence. It is not unusual to find legal propositions in leading cases being read as sufficient conditions when they are merely necessary or as necessary conditions when they are sufficient because such characterisation readily attracts the acceptance or rejection of some desired or undesired legal outcome.

For those who wish to embed in their minds an 'Epitome' of the leading cases listed, Appendix 1 sets out a single proposition for which each of the cases (now alphabetically ordered) is most commonly cited. Appendix 2 organises the cases within the subject matter areas defined by the Priestley 11 subjects required in Law School curricula and in order of descending citation frequency. Appendix 3 sets out the top 20 English authorities up to 1986 which are included in the list and again ranked according to their citation frequency in Australia.

Appendix 4 ranks Judges of the Court by the frequency with which each has contributed to key statements in the leading judgments. The temporal sweep of the list can give some comfort to those more recently appointed to the High Court who rank lower in it. That weighted devaluing is offset in Appendix 5 which identifies what are called 'fast risers', being cases decided in the past five years which have been cited at such a rate that if they had only been decided earlier in time they would have been included in the top 200 cases. The list is said to measure and rank each case based on the number of citations it has received quarterly so that it is the judgment's potency rather than its long standing which is measured.

The text provides what a reader in the modern age might understand as good quality flat pack furnishing for the mind of the law student and newer and perhaps not so new legal practitioners. Its assembly into a basic fitout is a significant step on the way to that kind of legal intelligence which used to be called 'well furnished'. The book is an instructive compilation which continues a venerable and still very useful tradition in legal education and reference. I commend the editors for reviving this tool and bringing it to our Australian shores.