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Dicey's Conflict of Laws

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BOOK REVIEWS

DICEY'S CONFLICT OF LAWS, 6TH EDITION. Edited by J. H. C. Morris.[1] London: Stevens and Sons, Ltd. 1949. Pp. cxxix, 912. 4 pounds 10 shillings.

Few, if any, books on the conflict of laws have ever reached a sixth edition. The mere fact that the demand for Dicey's treatise has continued for more than fifty years from one edition to the next bespeaks the almost unique position of this work. Its success and far-reaching influence have been well-deserved. Indeed, Dicey's treatise on the conflict of laws reflects that rare combination of talents which has constituted the basis of his fame and influence. Solid knowledge of the law, a fine gift of analytical penetration, a high talent for lucid presentation, and an acute awareness of the needs of legal practice have all contributed toward rendering Dicey on the *Conflict of Laws* both attractive for the student in the field and indispensable for the practitioner. Dicey's work indeed belongs to that small group of legal texts which can be cited, not only to, but even by, an English court with an authority almost equalling that of a judicial pronouncement. No higher distinction can come to an English law book.

During the fifty years that have elapsed since the publication of Dicey's first edition, the conflict of laws has gone through a continuous process of development. There has been not only a steady stream of judicial decisions often concerned with entirely new problems, but there has also been carried on during these more than five decades a vivid discussion among the scholars of many lands, in which the very basic policies and concepts of the conflict of laws have been tested and re-tested, in the course of which entirely new problems, including quite a few pseudo-problems, were discovered, and during which old "theories" were criticized and new theories propounded, attacked, fought over, clarified, rejected or refined.

All these developments have been reflected in the successive editions of Dicey, the first three of which were published by himself in 1896, 1908, and 1922 respectively, the fourth and fifth, edited respectively in 1927 and 1932 by A. Berriedale Keith, professor of Sanskrit and Comparative Philology in Edinburgh, and the present sixth edition by Mr. Morris of Gray's Inn and Magdalen College, Oxford, and his impressive staff of "specialist editors." During all these editions the book has retained those characteristic features which have constituted the basis of its influence and reputation. Although constituting a "Digest of the Law of England with reference to the Conflict of Laws," as the earlier editions were meticulously entitled, the book has been more than a digest, since both Dicey and his successors have been anxious to place the English cases and statutes within a broad framework of ideas evolved in the discussions of the scholars of the world. The new edition no longer cites

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American cases,[2] but in every chapter the reader is referred to those passages of the American standard works in which these cases can be found; and, what is more important, all those learned writings and discussions which have so deeply influenced the American conflict of laws during the last few decades have been carefully considered by the editors, are constantly referred to and discussed by them, and have obviously been influential in moulding their own views, methods and opinions. While American cases as such have thus disappeared from the footnotes, there have now been inserted copious references to decisions in the Dominions, so that the book truly constitutes a treatise of the conflict of laws not only of England but of the Commonwealth. References to continental literature are, as in the former editions, numerous but mercifully selective.

Dicey seems to have been one of the earliest among modern scholars to use that technique of presentation which has now become popular in such works as the American Law Institute's Restatement of the Law, the West Publishing Company's Hornbook Series, or Edward Jenks' eminent *Digest of the English Civil Law, i.e.* the articulation of the law derived from the authorities in lapidary "rules," which are then accompanied by a presentation of the authorities and amplifying explanatory comments and illustrations. As in the other editions, the text is preceded by a "Table of Principles and [one-hundred and ninety-four] Rules," which are then repeated at the beginning of each section of the main body of the text and which, in their totality, read very much like a legislatively enacted "code." The easy quotability of a work so arranged has undoubtedly contributed to its popularity. This characteristic feature of Dicey's has, properly, been preserved. The use of italics makes conspicuous the changes in the blackletter text of the rules that have been made since Dicey's last (1922) edition. These changes have been fairly extensive in a few chapters, especially those dealing with admiralty jurisdiction, divorce, legitimation or currency. They have been surprisingly few in those other topics which have been less exposed to the impact of political events. Their durability stands as a monument to both Dicey's perspicacity and influence.

The basic theories upon which the new edition has been based can, probably, best be deduced from Dr. Lipstein's introductory chapter and those sections which, written by Mr. Morris himself, are devoted to what may be called the "new" problems of conflict of laws, *viz.*, renvoi, characterization and preliminary question. In his basic theoretical approach, Dicey never made a clear choice between vested rights and local law theory. Although he properly insisted that the English rules of conflict of laws were part of the law of England rather than of some imaginary supranational law, he spoke of the enforcement and recognition by English courts of rights "duly acquired under the law of a foreign country."[3] But

[2] The first edition contained extensive notes of American cases by John Bassett Moore.

[3] See his General Principles Nos. 1 and 2.

how can an English court know whether or not a right has at all been acquired under the law of a foreign country, unless it is directed to look to the law of that particular country by some rule of law. This rule of law must, of necessity, be one either of a legal system superior to English law or English law. Dr. Lipstein has modified Dicey's old formulation by clearly indicating that the right to be enforced or recognized by the English court must have been acquired under that foreign law "which is applicable according to the English rules of the conflict of laws." As soon as this insertion is made, there arises the theoretical question of whether the right to be enforced or recognized by the English court can still properly be described as one acquired under foreign law or whether, in jurisdiprudential analysis, it would not be more correct to speak of a right created by English law upon the pattern of the foreign law referred to by the English choice of law rule; and if that is done, why not drop altogether the talk about enforcement of rights and simply speak of the application of some law, English or foreign, as directed by the English choice of law rule? What good beyond the avoidance of too radical a break with the tradition of the master's language can possibly be achieved with the preservation of a terminology reminiscent of the vested rights theory? Dicey never subscribed to that theory, but his language made it possible, superficially at least, to count him among its supporters and thus to give added respectability to an approach which has been one of the most influential factors in creating the confusion from which the conflict of laws is presently suffering in this country.

The problem of renvoi, hardly recognized as existing in Dicey's days, came to be broadly treated in the editions of the book revised by Professor Keith, who interpreted the well known series of recent English cases as expressive of a general principle ordering English courts to decide cases under exactly the same law under which that case would be decided by a court of the country referred to by the English conflict of laws rule. Mr. Morris, largely following Falconbridge's cautious analysis, has not only receded from this general formula but invites the courts to reconsider their position toward the renvoi even in those situations in which it clearly applies under the present state of the English cases. In contracts cases, where English courts, unperturbed by doctrinal objections, have consistently continued in their sensible approach of applying the law actually or presumptively contemplated by the parties, the renvoi has obviously no place, and, with the exception of one isolated American case,[4] has never been applied or advocated. In torts cases British courts have continued, again in spite of theoretical criticism, simply to apply the lex fori, mitigated by an exception from liability in those situations in which the conduct was "justified" under the law of the place of acting. Under this simple, thoroughly just and practical approach, there is again no room for the

[4] Duskin v. Pennsylvania Central Airlines Corp., 167 F. 2d 727 (6th Cir. 1948); *cf.* Note, 16 CHI. L. REV. 157 (1948).

renvoi. But why should British courts revise that position which they have now consistently followed for a considerable length of time in cases involving personal status and succession to movables? The alleged disadvantages of the renvoi seem to be as imaginary as its alleged advantages. Following Maugham, J.,[5] Mr. Morris maintains that it is more difficult to ascertain whether or not a foreign country has adopted the renvoi in its conflict of laws than it is to ascertain the foreign law on some point of substantive private law. Is that really true? Have we not come to know pretty well by now all of the major countries' attitudes toward the renvoi, for instance that in cases of personal status and succession to movables the renvoi, *qua* "simple renvoi" is consistently applied by French and German courts, consistently not applied by Italian and American courts, and consistently applied as "double renvoi" by British courts. It is this very consistency of diversity which has prevented the international ping-pong which is again held up as a bugaboo by Mr. Morris. The problem of the renvoi seems to be one where it does not matter so much which solution one chooses than that some one solution be clearly adopted. The world has come to look upon England as *the* country of the double renvoi, and international harmony of decision has to a remarkable extent come to be predicated upon this assumption, in conjunction with the corresponding stabilization of the renvoi practices of the other major countries. Besides, there exists for England an additional argument which, while it should not be decisive, ought not to be glanced over in complete silence. In contrast to the European continent, where the technique of occasionally deciding cases under some law other than the forum's own, was developed as early as in the 13th century, England followed an entirely different technique well into the late 18th century. An English common law court simply would not decide a case under any law other than its own law, but would either decide under the common law of England or, holding that it had no jurisdiction, not decide it at all.[6] When from the latter part of the 18th century on, English courts learned, by way of Huberus, Mansfield and later, Story, of the continental technique of choice of law, it was quite natural for them to combine that technique with their old jurisdictional approach and, when referred to the law of some foreign country by the gradually developing English conflict of laws rules, to think of themselves as standing in the shoes of the courts of that country and thus to be directed to decide the case under those rules which such a court would apply. Expressions of such a view are quite conspicuous in the English cases and constitute the basis for the otherwise inexplainable application of the double renvoi. Repudiation of these decisions would thus constitute a break with a long historical tradition.

As to the much belabored problem of characterization, Mr. Morris follows by and large the *via media* of Falconbridge. In our review of

[5] *In re* Askew [1930] 2 Ch. 259, 278.

[6] For details, see Sack, *Conflicts of Laws in the History of the English Law*, 3 LAW, A CENTURY OF PROGRESS 342 (1937).

Falconbridge's work[7] we have already tried to indicate that this approach, while helpful in several respects, cannot be the last word and that it will particularly become apparent that there have been lumped together under the general heading of characterization a number of problems every one of which requires separate treatment. What we have said in that connection equally applies to Mr. Morris' statements.

Mr. Morris' section on the "incidental or preliminary question" constitutes a completely new part of the book. This cautious discussion, which is based, among others, especially upon the writings of Robertson and Wolff, is suggestive, but the problem would seem to require much further treatment.

In all its "substantive" parts, the new Dicey has been carefully brought down to date. Subtle changes have been worked in so carefully that their discovery is not always easy. Special reference should be made to Mr. Zelman Cowen's revision of the chapter on domicile and his very helpful new section on the place of wrong; also of Doctor Kahn-Freund's far reaching revision of the chapter on Contracts, and particularly his discussion of *Vita Food Products Inc. v. Unus Shipping Co., Ltd.*,[8] by which new light is thrown upon the much belabored problem of the extent to which parties to a contract may stipulate the law which is to determine controversies that may arise out of their transaction. Doctor Lipstein has contributed an entirely new chapter on quasi-contracts. Mr. Cross has extensively rewritten the chapters dealing with the various conflict of laws aspects of marriage and divorce. Mr. Welsh has reappraised the problems of legitimation and adoption. Mr. Parry has brought down to date the parts dealing with succession upon death and foreign judgments and Professor Wortley those dealing with jurisdiction.

In its new shape *Dicey's Conflict of Laws* will again be more than a reliable guide to the English cases and statutes. It is a book in which there have been carefully stated and appraised all the important ideas which have stirred up conflict of laws thinking in England, in this country and abroad. While definitely British in its immediate task, the new Dicey, as the old, is again an indispensable tool for anyone looking for helpful ideas and well-balanced judgment.

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[7] Rheinstein, Book Review, 15 CHI. L. REV. 478 (1948).

[8] Vita Food Products Inc. v. Unus Shipping Co., Ltd., [1939] A. C. 277.

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