

BOOK REVIEWS

Private International Law. By G. C. Cheshire. Oxford: The Clarendon Press, 1935. Pp. lx, 584.

The American student of the field of conflicts of laws is not without some reason to regard his English confrères with a degree of envy. For one thing, the source materials to be assimilated by the English student of the subject are for practical purposes limited to the judicial decisions and related statutes of a single jurisdiction. It is not forgotten, of course, that as early as 1838 the monumental work of William Burge, *Commentaries on Colonial and Foreign Laws*, exhibited the profuse variety in the laws in force in the respective dominions and colonies of the British Empire and so suggested a rich source of conflictual possibility. Nor has it been less obvious that, by virtue of the physical location of the British Isles and the commercial contacts of England with the continent of Europe, the repercussions between English jurisprudence and the legal systems of the principal continental nations might well have been accorded especial significance as an area of conflicts of laws. The labyrinthian avenues of inquiry suggested by these circumstances, however, cannot be said to have deflected in any essential respect the faithful singularity with which English legal scholarship in the field of private international law has concentrated upon the analysis and synthesis of English materials. Colonial and foreign jurisprudence and in less degree Scotch and Irish law, as it were, have been set in categories apart and have for the most part, so far as English doctrine is concerned, been subordinated to the relatively immature mercies of comparative law.

That this assumption of the unique significance of the English materials for the solution of conflicts of laws has been motivated by a sound, if insular, instinct is suggested by the marked superiority of the text-books which are available for the study of the English doctrines,—which, to the American student, is a second occasion for envious contemplation. The works of Westlake, Dicey, and Foote, not to mention more recent contributions, each of them distinguished by clarity, simplicity, and comprehensiveness in the treatment of the English sources, have conferred upon the English doctrines a corresponding coherence, necessarily denied to analogous but less sufficiently analyzed bodies of doctrine in other countries, such as, for example, that of the United States.

In a third respect, again, the problem of the English student of the field is relatively simplified. His function is conceived to be primarily that of analytical exposition rather than of scientific evaluation. For a variety of reasons more or less obscure,—perhaps including the effectiveness of reform by legislation, the high caliber of the English judges, or indeed the very lack of emphasis upon comparative studies of the subject,—English jurisprudence has seemed able hitherto to adhere in principle to what may be termed the formal, analytical method. At the very lair of the Benthamite movement, its methods have remained relatively unsullied by sociological jurisprudence, scientific objectivism, pragmatic functionalism, and their ilk, movements,

which, by diverting attention somewhat from the formal analysis of judicial opinions as the sole criterion of justice, have in these latter days at once disturbed and lent significance to the scene of American jurisprudence. But in England the movement of reform and even the developments in related fields of science do not appear much to have affected the even tenor of legal technique.

These factors obviously make for a simplicity in the analysis of the problems arising from conflicts of laws, which, the aspirations of the American Law Institute notwithstanding, is at present denied to legal doctrine in this country by the political and jurisdictional constitution of the United States. Under the given conditions, the equivalence of numerous legal systems and the consequent competition of divergent legal doctrines form a basic and necessary supposition of legal science, by reason of which simplicity and uniformity of law take on the virginal allure of unattainability. In such circumstances, either the diverse doctrines must be ascribed measurable equality according as they may be accepted in the several jurisdictions, (which is to abandon *ab initio* the search for simplicity and unity of doctrine), or it becomes essentially necessary to establish without the formal evidences of the law an adequate basis of choice among conflicting principles. The feeling that mere formal analysis of existing law can only serve to reveal, not cure, doctrinal disunity is at the root of the more significant recent developments in the jurisprudence of the United States. One method by which simplicity of doctrine is being sought is by emphasis upon the historical common law, as in the Restatement of the Law, which is in sum an appeal to the traditional sentiment of the bar; another method is uniform legislation; still another is the tendency to expand the function of the Federal Courts as a forum for the final solution of conflicts of jurisdiction and law. Meanwhile, the present doctrinal antinomies drive legal science in the more limited sense of the term to look beyond the formal analysis of opinions and *dicta* toward actualistic and comparative research as a test of legal principle. The variety of judicial opinions necessarily derogates from their apparent authority.

Obvious as these observations are, they are requisite to suggest the significance of the work which is under review. The product of one of the younger scholars at Oxford, more widely known through the excellent text, *The Modern Law of Real Property*, first published in 1925 and now in the third edition, this accession to the English literature on private international law may be said to fall quite within the traditions of that literature, as previously described. Here too, the Austinian theory of law and the doctrine of vested rights prevailing in England are assumed. The occupation is almost exclusively with the English authorities; the occasional references to continental practices are highly incidental, as are the supplementary citations of American decisions, which have been apparently culled exclusively from the two case-books of Beale and Lorenzen. Within these limits, the work has very definite merits; first, it provides a more recent and compact aperçu of the English authorities than is available in the more extensive and by now heavily annotated texts; second, the exposition follows a method which, if somewhat tendential, at the same time makes not only for clarity but also for acute analysis. This method is to consider the several problems first *in principle* and then to ascertain the extent to which the proposed doctrine can be supported by authority. In sum, in respect both of its merits and limitations and in no derogatory sense, the character of this succinct and useful treatise on private international law may perhaps best be described as thoroughly British.

In this connection, it may also be remarked that the critical emphasis of the volume may presumably be taken to indicate a slight shift in the attitude of English legal scholarship. A number of years ago, when the writer was studying law at Oxford, it was apparently a conclusive presumption that every utterance of a qualified English judge was The Law. In the present treatise, the presumption appears at times to be regarded as *prima facie*. Indeed, there are certain points, few to be sure, at which the discussion verges upon the bald suggestion that even the highest of British tribunals may have been mistaken as to the correct doctrine. For this reason as well as on account of the generally lucid presentation of the subjects discussed, it is not unreasonable to suppose that this is a treatise which will leave its mark upon the future course of British jurisprudence.

The American student of the subject will naturally be most interested in the divagations from and critical improvements upon, currently accepted English doctrine, which appear in the present volume. Without endeavoring to subject them to precise criticism, the following points of interest may be briefly noticed:

1. The attention given to the important theoretical question of "qualification" or, as it is coming to be termed, "classification,"¹ substantially following W. E. Beckett's treatment of the question in *British Yearbook of International Law*.²

2. The discussion of the domicil of corporations envisaged as a basis of securing jurisdiction,³ which indicates that, in a somewhat back-handed fashion, the English courts have come to define the corporate domicil for jurisdictional purposes in a sense which approximates the result more simply reached through the American concept of "doing business" as a basis of jurisdiction over foreign corporations.

3. The suggested solution of the *renvoi* question⁴ to the effect that, without incorporating the *renvoi* into English law, the English conflict of laws rule requires the application of the proper law "as meaning the law which the Sovereign" would administer in the case. It will not fail to be noticed, however, that this solution, which the author rests upon the cases of *In re Ross*,⁵ *In re Annesley*,⁶ and *In re Askew*,⁷ depends for its workability upon a fixation of the doctrine as to *renvoi* in the legal system to which reference is to be made. Obviously, as the author indeed perceives, if the rule of private international law with respect to the question be the same in that jurisdiction as the rule proposed, there appears no logical exit from an impasse.

4. The suggestion of the proper law of the contract, usually coinciding with the *lex loci contractus*, as the criterion of contractual capacity in the case of mercantile contracts,⁸ and in the case of matrimonial engagements, of the law of the matrimonial domicil, subject to the necessity of compliance in the case of marriage ceremonies with the *lex loci celebrationis*.⁹

5. The development of the theory of the proper law of the contract to govern questions of form as well as of essential validity and interpretation.¹⁰

¹ Cheshire, *Private International Law* 11 ff. (1935).

² Beckett, *British Yearbook of International Law* 46 ff. (1934).

³ Cheshire, *op. cit. supra* note 1, at 121 ff.

⁴ Cheshire, *id.*, at 133 ff.

⁵ [1930] 1 Ch. 377.

⁶ [1926] 1 Ch. 692.

⁷ [1930] 2 Ch. 259.

⁸ *Cf.* Cheshire, *op. cit. supra* note 1, at 150.

⁹ Cheshire, *id.*, at 152 ff.

¹⁰ Cheshire, *id.*, at 175 ff.

6. The critique of the English doctrines as to the selection of the law applicable to torts, on the ground that these doctrines give undue emphasis to the *lex fori*.¹¹

7. The very interesting distinction drawn with reference to the English decisions as to legitimacy between the law applicable to determine the status of the parents, e.g., in case of remarriage after obtaining a divorce not internationally recognized, and the law determining the status of the child, which is taken to be dependent upon the domicile of origin of the child.¹² The result is to suggest that, even in a case where the English courts may not be prepared to recognize a marriage as valid, yet they may appropriately regard the offspring as legitimate, conformably to the law governing their status.

8. The equally interesting analysis of the decisions as to the assignment of debts, to the effect that the *lex actus* of the original transaction by which the debt was contracted should control as the proper law.¹³

9. The incisive examination of the provisions in Lord Kingsdown's Act.¹⁴

10. The definite rejection¹⁵ of the accepted English doctrine established by *Abouloff v. Oppenheimer*,¹⁶ and *Vadala v. Lawes*,¹⁷ on the ground of inconsistency with the general principle that in an action on a foreign judgment there should be no retrial of the merits.

11. The equally emphatic declaration that the doctrine of *Leroux v. Brown*,¹⁸ is repugnant to the principles upon which the English system of private international law is based.¹⁹

12. The suggestion with respect to the distinction between "substance and procedure" in private international law, "that no rule of a remedial nature which the owner of a foreign acquired right cannot possibly observe should be treated as procedural."²⁰

The above catalog of random references will suffice to indicate the variety of problems with respect to which the analysis presented in this volume will be of interest to American readers, if only to supplement or to contrast with the doctrines in vogue in this country. As has been previously suggested, an outstanding merit of the work is the incisive analysis of judicial opinion, but it is to be added that the quality is from this point of view by no means uniform. Ingenious critique is interspersed with naïve acceptance of traditional views. This is a judgment which needs to be supported by a few illustrations, which are necessarily colored by the reviewer's analytical predilections.

Thus, in the first place, it can scarcely be said that the volume makes any significant contributions to the general theory of private international law. The vested rights theory, recently criticized in various quarters, is accepted without a qualifying qualm, and, as has been indicated, the analysis of the *renvoi* doctrine is unsatisfactory. In general, the concern is with discrete criticism of specific precedents rather than general principle, which leads, in the second place, to the perpetuation of occasional terminological ineptitudes. E.g., in discussing the basis of jurisdiction in matters of status, it is

¹¹ Cheshire, *id.*, at 215 ff.

¹² Cheshire, *id.*, at 295 ff.

¹³ Cheshire, *id.*, at 346 ff.

¹⁴ Cheshire, *id.*, at 418 ff.

¹⁵ Cheshire, *id.*, at 518 ff.

¹⁶ 10 Q.B.D. 295 (1882).

¹⁷ 25 Q.B.D. 310 (1890).

¹⁸ 12 C.B. 801 (1852).

¹⁹ Cheshire, *op. cit. supra* note 1, at 532 ff.

²⁰ Cheshire, *ibid.*

stated that "the only essential is to ascertain where this fictitious *res* (i.e., the status), is situated,"²¹ a foggy conception which cannot reasonably be thought to clarify the point of departure. And, in the third place, it may be suggested that a greater emphasis upon precision in general theory and upon the niceties of terminology might have resulted in a more complete integration of the implications of the respective analyses in the several sections of the work. There are respects in which the conclusions advocated in certain passages present inconsistencies.

For example, the author's cogent and effective rejection of the current English doctrine that fraud constitutes a peremptory exception from ordinary principles, whether in actions upon foreign judgments or in the interpretation of the Statute of Frauds, is to be found in close juxtaposition with a solemn assertion that "there is general agreement that statutes of limitation, if they are statutes which merely specify a certain time after which rights cannot be enforced by action, affect procedure, not substance,"²² and an uncritical exposition of the corresponding doctrine in vogue. Without attempting to consider whether this position is a desirable one, it may be noted that this conception of statutes of limitation as procedural is not more readily reconciled with the author's own rule as to what is procedure than the analogous conception of the Statute of Frauds; is not sustainable except by reference to the same distinction between "right" and "remedy" which is rejected in the interpretation of the Statute of Frauds by the author; and is not supported as an obvious principle of justice by comparison with other important legal systems.

Again, the notion of presence within the jurisdiction at the time of process served as the fundamental basis of jurisdictional power in ordinary personal actions, which is a prevalent notion, is apparently taken for granted, although the recent Foreign Judgments (Reciprocal Enforcement) Act,²³ to which the author properly devotes a section, may be taken to cast some doubt for English purposes upon the propriety of assuming that mere personal service without more is a sufficient basis of jurisdiction.²⁴ Irrespective of the position of the precedents, there is reason to believe that Lord Greer's Committee was entirely justified in supposing that the result of a statutory recognition of the doctrine would be inequitable. Incidentally, it is to be remarked that, in examining this legislation, the possible effects of the statutory principle of extension of judgments upon the conventional "legal obligation" theory of foreign judgments advocated by the author are not considered.

It may also be noticed that, in the discussion of the rule as to the non-enforcement of penal laws by foreign courts, difficulty is found in extending the doctrine to fiscal laws on the ground that such laws are not obviously penal in character; it does not seem to have occurred to the author that both doctrines may be species of a wider principle, i.e., that private international law is designed to enforce private and not public claims. Whatever objections there may be to the established doctrine that no state enforces the revenue laws of another, it is difficult to suppose that the validity of that doctrine is contingent merely upon the theoretical definition of the word "penal."

The examination by the author of the rules as to domicile, to which relatively extensive consideration is given, offers other instances of incomplete analysis. It is ap-

²¹ Cheshire, *id.*, at 56.

²³ 23 Geo. V, c. 13 (1933).

²² Cheshire, *id.*, at 534.

²⁴ *Cf.* 20 Geo. V, c. 15, § 4(3)(c) (1930).

parently assumed that "domicil" is a purely logical concept,—whatever that may be. Thus, extensive as is the discussion of the rules as to the ascertainment of domicil, it is not satisfactorily indicated that the diversity of contexts and purposes with respect to which the concept of domicil may be employed may conceivably have a bearing upon the content of the concept itself. The difficulty appears most clearly in the author's treatment of the problem of multiple domicil. For example, it is predicated that "it is logical to assume" that a person "cannot possess more than one domicil at the same time."²⁵ This might be granted, if it were added, "for the same purpose and in the same court." It is apparent that, as the author admits, a person may have more than one residence at the same time; moreover, although the suggestion is made that "unanswerable logic" requires a single "quasi-domicil" for each corporation at a given time, it is conceded that this unanswerable logic is answered by the actual decisions.²⁶ From a practical point of view, it may be arguable that a single person should be deemed to have at a given time a single domicil for all purposes and for all jurisdictions, but the mere assertion does not demonstrate the logical necessity of a fiction. The rules as to domicil are necessary mainly because the facts of a person's life may be and frequently are ambulatory.

It may be suggested that the primary difficulty in the situation is that the analysis of what is denoted by domicil as a technical legal term has not been carried through; it does not appear, for instance, whether the concept designates merely the evidence as to the residence and intention of the *de cuius* or whether it refers to the mode in which inferences shall be drawn from such evidence. If the concept be taken in the first sense, although it may be assumed that the facts of an individual's existence may be ascribed a hypothetical identity as of a given time, it does not follow that the actual proof of this identity will be the same in different courts or even in different proceedings in the same court. In other words, the logical identity of the domicil in this sense is no more than a perhaps useful hypothesis. On the other hand, if the concept of domicil be taken in the second sense as meaning the *legal inference* to be drawn from evidence of residence and intention, can there reasonably be asserted to be a *logical necessity* that the inferences made in different courts or in separate proceedings in the same court must be the same? The simple fact of the matter is that, as the Roman Law will demonstrate, there is no more logical difficulty in imagining multiple domicil than multiple residence. Preferably, domicil might be regarded, not as some logical substance adhering to legal personality, but rather as denoting the criteria for selecting the law which is to govern certain types of situations, criteria which, be it remarked, allow almost as much leeway in the determination of nice cases as does the concept of "the proper law" advocated by the author with respect to contracts. Which is to say that the rules as to domicil have a purpose analogous to that of the presumptions as to what constitutes the proper law of a contract.

In view of what he has accomplished, it is improper to press too hard upon such soft spots in the author's analytical armor as have been indicated, spots which contrast with the skill with which other matters, often related, are treated. Judgments upon these questions of general theory and terminology will vary. And, forsooth, if the arguments had all been driven home, as they have been in a few passages, the reception of the volume by the bench and bar would probably have been jeopardized. The Law

²⁵ Cheshire, *op. cit.* *supra* note 1, at 92.

²⁶ Cheshire, *id.*, at 125 ff.

is a mistress not merely jealous, but also pathetically slow in changing its doctrinal loves. From this point of view, it is doubtless advantageous that the incisive criticisms of certain lines of doctrine advocated by the author, should be set, like occasional jewels, upon a background of an uncritical acceptance of almost all the prevailing primitive conceptions of English doctrine in this controversial field of law.

The reviewer is constrained to notice in conclusion that this is the first volume which he has been asked to review in page proof, and this a volume published by the Clarendon Press. The circumstance is noted with a view of expressing the hope that, even in these times of economic depression, (which incidentally affect reviewers as well as publishers), such lapse in form, tolerable in the single instance, may not by repetition become a bad habit.

HESSEL E. YNTEMA*

* Professor of Law, University of Michigan Law School.

WANTED
the
NOVEMBER 1933 ISSUE
NUMBER 2 OF VOLUME I
of
THE UNIVERSITY OF CHICAGO
LAW REVIEW

The REVIEW will pay seventy-five cents or exchange for the current issue, as desired. Merely send your copy to THE UNIVERSITY OF CHICAGO PRESS, 5750 ELLIS AVENUE, CHICAGO, ILLINOIS.

The Judicial System of Metropolitan Chicago

By ALBERT LEPAWSKY, University of Chicago. ". . . vivid, accurate and illuminating, and his recommendations are sound. . . . Dr. Lepawsky's report should therefore be of extreme interest to all progressive lawyers, judges, students and civic leaders throughout the country."—MITCHELL DAWSON, *Dawson, Dawson & Schneberger*, Chicago. (\$3.00)

International Servitudes in Law and Practice

By HELEN DWIGHT REID, University of Buffalo. "International lawyers will be indebted for a long time to Miss Reid for her scholarly investigation and analysis, and above all for her careful classification of international servitudes."—HERBERT W. BRIGGS, *American Journal of International Law*. (\$3.00)

Conflicting Penal Theories in Statutory Criminal Law

By MABEL A. ELLIOTT, University of Kansas. ". . . both interesting and instructive. It is just the sort of book needed to make people question both the premises behind American criminal law, and the extent to which the law conforms to these premises."—SAM BASS WARNER, *Harvard Law Review*. (\$3.00)

Lying and Its Detection

By JOHN A. LARSON, M.D., Assistant State Criminologist of Illinois. The "lie-detector" and other legal-police-medical techniques for detecting falsehood. "The author is probably the best qualified person in the country to discuss the topic, having been a pioneer in the field and having devoted most of his interest to it in recent years. His treatment is scientific and conservative."—*New York University Law Quarterly Review*. (Illustrated, \$5.00)

The Lawyer and the Public

Radio lectures sponsored by the American Bar Association. (15 lectures bound together; paper, \$1.00)

THE UNIVERSITY OF CHICAGO PRESS

Please mention the REVIEW when answering advertisements