BOOK REVIEWS

AUSTRALIAN DIVORCE LAW AND PRACTICE, *by Paul Toose, Ray Watson and David Benjafield.* With Historical Introduction by Malcolm Brown. The Law Book Co. Ltd., 1968, pp. i-cvi, 1-1162.

There has been a felicitous association among the three authors of this recent textbook between, on the one hand, two Queen's Counsel both of whom have practised extensively in the Matrimonial Causes Jurisdiction and one of whom played a significant part in the drafting of the Matrimonial Causes Act 1959 and on the other hand, an academic who has been a member of the Law Reform Commission of New South Wales. This substantial volume has already found a place in the libraries of most practitioners who advise or act generally in the field of matrimonial law. It accompanies them upon their incursions into Court of Chambers on matters arising under the Act, and it is probably the most useful textbook in this field to be acquired by any young Australian practitioner. The authors claim in the preface to have essayed an exhaustive statement of the law and practice under the Matrimonial Causes Act. The text consists of an annotation of the sections of the Act and of the rules thereunder, and of the Marriage Act 1961-1966 and Marriage Regulations. It contains a copy of the Maintenance Orders (Commonwealth Officers) Act 1966.

The work is intended, it would seem, rather as a reference book for the busy practitioner, than as a textbook for the student of matrimonial law. It seems to this reviewer that if there is any criticism to be made of this undoubtedly useful volume, it is that there is perhaps too liberal a citation from judgments. It may well have seemed to the authors that at this comparatively early period after the coming into operation of the Matrimonial Causes Act, it was better to refer to all judgments relevant upon each matter under discussion. It may, however, be found advisable in any future editions of the work to prune the extracts from judgments which now constitute a substantial portion of the text. That the authors do hope to keep the work up to date is evidenced by the fact that although in the main text the references to case law were limited to those reported by the 1st October, 1967, with the textbook has been printed a supplement containing references to cases and extracts from cases reported up to 29th February, 1968.

Doubtless the practical experience of at least two of the authors as counsel in matrimonial causes has guided them as to the matters upon which it is of value to discuss principle and in some cases changes in judicial approach to problems. In particular, the section on Custody and Access contains an interesting expression of opinion on these matters.

Some practitioners will find considerable assistance in the chapter relating to Maintenance, in which is included a summary of the provisions contained in the Commonwealth Social Services Act 1947-1967 relating to payment of

pensions to widows, wives deemed to have been deserted, and those women who have received statutory recognition as "deserted de facto wives", and an assessment showing how maintenance orders may be affected by such payments. No statistics are available to your reviewer but it would appear to her that a large proportion of wives, at least in this State, who are litigants in the Matrimonial Causes Jurisdiction are in receipt of some pension under the Commonwealth Social Services Act.

The references to cases are, as has been said, extensive. There are also many references to articles in the Australian Law Journal and to other textbooks.

It may be suggested that the authors have been fully occupied with problems which have already risen under the Act and have been content not to raise possible problems. For example, in the note in section 90 appears the statement, "By implication there can be no application for recision or intervention after decree absolute". But the Court may at some stage have to consider whether sections 75 and 80 inhibit the setting aside of a decree nisi after decree absolute where such decree may properly be described as a nullity[1]. However this volume does not purport to discuss questions in the abstract. It will, as has been indicated, prove an invaluable hand-book to the busy practitioner.

ROMA MITCHELL*

CONFLICT OF LAWS IN AUSTRALIA, *by P. E. Nygh, assisted by E. I. Sykes, and D. J. MacDougall.* Butterworths 1968, pp. 1-42, 1-21, 33-765.

Dr. Nygh's book constitutes a landmark in Australian legal publication, for it is the first work in which an attempt has been made to cover the whole field of the conflict of laws in Australia. Dr. Nygh has been ably assisted in this valuable project by Professor Sykes, who is responsible for the chapters dealing with conflicts relating to property rights, and by Dr. MacDougall, who contributed the first chapter, dealing with the nature of the conflict of laws, and who was joint author, with Dr. Nygh, of Chapter 14, dealing with negotiable instruments.

The stated purposes of the work are twofold: first to provide a general textbook on the conflict of laws for use as a teaching aid in Australian law schools, secondly to encourage Australian lawyers "to try and find their own solutions to conflictual problems at a time when the traditional dependence on all things British is rapidly disappearing". There can be little doubt that the former and less ambitious of these aims has been realised by the learned authors. That a need existed for an Australian textbook on the subject must have been clear to anyone faced with teaching or studying the

1. Cf. *Everitt* v. *Everitt* [1948] 2 All E.R. 545 at 548-49.

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subject in an Australian law school. Student and teacher alike will find in the book much cause for gratitude to Dr. Nygh and his collaborators, particularly in the chapters dealing in a general manner with the conflict of laws in a federation, full faith and credit, service and execution of process and diversity jurisdiction, matters which have, of course, been dealt with before, but not in such readily digestible form.

Some doubt must, however, be expressed concerning the attainment of the second stated aim of the work. The book is laid out upon conservative, traditional lines, such criticism as there is being largely directed towards reinterpretation of the existing "jurisdiction-selecting" rules[1] or their replacement with new ones, never developing, as have recent American writings, into a closely reasoned attack on the bases of the system itself. This fact, which is disappointing in a book which seeks to encourage new thinking in the conflict of laws, is foreshadowed in the early chapters of the book in the treatment there given to modern American theories in this field. Although Chapter 1 does contain brief discussion of some of the most recent writings (pp. 42-47) there could be much more explanation of the basic differences between the views of such writers as Cavers, Currie and Ehrenzweig. Indeed, the consequences of these differences of approach are hardly discussed at all in later chapters of the book where one would have expected much more elaborate treatment. For example, although Cavers' attitude towards the doctrine of renvoi and related matters is mentioned in a footnote on p. 219, nothing is said of the very different views of Ehrenzweig[2], nor is any mention made of the relevance to the Currie approach of choice of law rules other than those of the forum[3].

Again, the book contains no discussion at all of particular choice of law rules or legislatively localizing rules[4], despite the fact that they are of crucial importance in recent American theories, so important, indeed, in Currie's approach that he specifically recommended their general use by legislatures as a means of simplifying the solutions to conflict problems[5]. Nor do these omissions seem merely to be oversights on the part of the authors, for the conclusion to Chapter 4—

> "Most of our predecessors have formulated new basic theories, but have left the existing rules untouched. The time may well have come to query the individual rules rather than formulate an all-embracing theory" (at p. 63)—

implies a rejection, without argument, of the basic views of Currie, Cavers and Ehrenzweig, or else indicates a misunderstanding of the reasons for their

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1. Cavers: *The Choice of Law Process* (1965) 9.
2. *Private International Law* (1967), 95; (1960) 58 Michigan Law Review 637 at 682; (1967) 80 Harvard Law Review 377 at 387.
3. *Selected Essays* (1963), 52, 184-185; (1959) Duke Law Journal 171 at 178-9, and cf. (1968) 15 U.C.L.A. Law Review 578, 589 n. 31.
4. Morris (1946) 62 Law Quarterly Review 170; Cavers: *The Choice of Law Process* (1965), 225-226.
5. *Selected Essays* (1963), 116. See also Von Mehren, "The Renvoi and its Relation to Various Approaches to the Choice of Law Problem", in *20th Century Comparative and Conflicts Law* (1961) 380 at 394.

dissatisfaction with a system composed, as is our own, of the traditional type of "jurisdiction selecting" rules.

Even within the traditional scheme of things there are, inevitably, criticisms which must be made. The most important of these relate to what may be called the general chapters of the work. In the chapter dealing with domicil, *Henderson* v. *Henderson*[6] is not cited in the section concerned with the acquisition of a domicil of choice (pp. 71-72) despite the fact that the court in that case seems to have accepted an interpretation of the requirement of intention which is much less stringent than that adopted, for example, in *Winans* v. *A.G.*[7]. Even more surprising, no reference is made in the same section to *Indyka* v. *Indyka*[8], although at least one of their Lordships in that case indicated[9] that the time might well be approaching when *Winans* v. *A.G.*[10] and *Ramsay* v. *Royal Liverpool Infirmary*[11] would require reconsideration. *Henderson* v. *Henderson*[12] is also not cited for the proposition which it established that one's domicil of origin is dependent upon that of one's parents (or one or other parent) at the time of birth, *not* at the time of becoming sui juris. This omission is perhaps more understandable since few lawyers would have dared, even prior to *Henderson* v. *Henderson*, to propose or argue for the contrary view.

Chapter 4, entitled "The Standing of the Parties", is disappointing in several respects. The sections dealing with wrongful death and survival of causes of action seem far too brief; and Professor Webb's article on the Conflict of Laws and the English Fatal Accidents Act[13] is a surprising omission. The passages dealing with direct recourse by an injured plaintiff against a negligent person's insurance company are confused ones. Section 118, Motor Vehicles Act 1959 (S.A.) is not cited in footnote 53, although section 113 of the same Act is; and *Li Lian Tan* v. *Durham*[14] is discussed as if it were concerned solely with section 113 whereas, in fact, both section 113 *and* section 118 were the relevant provisions in that case. Even the immediately following section (pp. 95-96)—family immunity—contains no discussion of section 118, even though that section was passed in order to provide a remedy for an injured spouse where none existed at common law. Section 118 certainly requires separate treament from section 113, especially if section 113 is treated as being a statutory extension to contractual liability[15], since section 118 cannot be so regarded, its existence being called for precisely because the insurer was under no contrac tual duty to one spouse in respect of injuries suffered by the other.

The problem of Characterisation is dealt with in Chapter 8, entitled "The Selection of the *Lex Causae*". This is one of the less helpful parts of the

6. [1967] P. 77.
7. [1904] A.C. 287.
8. [1967] 3 W.L.R. 510.
9. *Id.*, at 537-538.
10. [1904] A.C. 287.
11. [1930] A.C. 588.
12. [1967] P. 77.
13. (1958) 21 Modern Law Review 467.
14. [1966] S.A.S.R. 143 at 149.
15. *Plozza* v. *S.A. Insurance Co. Ltd.* [1963] S.A.S.R. 122.

work, being marred by a crucial misunderstanding and mis-statement (at p. 201) of Robertson's theory of primary and secondary characterisation, a theory which has received far too little attention in the recent past, often because of just such misunderstandings. In the same chapter is to be found a section entitled "Determination of the Connecting Factor" which also needs rewriting. The fact that it contains a discussion of two quite separate questions is never stated, if realised, by the learned author. First, there is the question of localization of the connecting factor—for example the determination of the domicil at death of a person who dies intestate. The problem here is whether a court should continue to apply the *lex fori* in making this determination even when the law of the country indicated by the rules of the *lex fori* would, on that very issue, reach a different result from that which obtains under the *lex fori*. The answer to this question, on authority, seems to be that a court should apply the *lex fori* and ignore the competing localization of the foreign law[16]. (Authority apart, it is not clear how a court could consistently do otherwise. If the foreign law would disagree upon the place of the deceased's domicil its criteria must differ from those of the *lex fori*, in which case it is employing a different connecting factor even if the word signifying it is the same as that in use in the forum.) The second problem discussed in this section is whether the connecting factors used in our present choice of law rules are adequate and appropriate ones. While reinterpretation or even abandonment of some connecting factors presently in use may be well worth consideration the relationship between this problem and that discussed earlier is never explained by the learned author who seems to regard them as one.

The chapter on renvoi contains a brief discussion of the exclusion of that doctrine from the field of international contracts (p. 228). The famous dictum of Lord Wright, and of the Privy Council, in the *Vita Foods* case[17] is interpreted as supporting the application of renvoi in the forbidden field. However, it is highly unlikely that the Privy Council ever intended to introduce renvoi into the field of the essential validity of contracts. Admittedly, the Board, sitting on appeal from Nova Scotia, after holding that by Nova Scotian choice of law rules English law was the proper law of the contract, continued:

> "Hence English rules relating to the conflict of laws must be applied to determine how the bills of lading are affected by the failure to comply with section 3 of the [Newfoundland] Act"[18].

But, as Falconbridge has correctly pointed out, the reference to English conflict rules was solely for the purpose of determining the effect which would be given in England to a contract which was (by assumption) illegal in the place where it was made. The Privy Council seems not to have been concerned in its dictum with the general choice of law rules of England, but simply with another type of rule, whether conflictual or domestic, which, for certain purposes, acts upon a classification (as legal or illegal) gleaned from

16. *Re Annesley* [1926] 1 Ch. 692 at 705.
17. [1939] A.C. 277.
18. *Id.* at 292.

the foreign systems. The recent dicta of Walsh J. in *Kay's Leasing Corporation* v. *Fletcher*[19] can be similarly interpreted.

Nygh's treatment of specific choice of law rules is much more satisfactory. In the chapter on contract, however, Incorporation by Reference is reduced to one paragraph (p. 295), and no references are given to the important cases, save *Dobell* v. *S.S. Rossmore*[20], or to the textbook or periodical treatment[21] of this by no means straightforward topic. Moreover, to suggest that illegality by the *lex loci contractus* is never, *per se*, a reason for refusing to enforce a contract goes much further than the decided cases[22]. It is also strange that the discussion of the principle of the parties' autonomy in the choice of a proper law contains only a footnote reference (at p. 298) to the important discussion by Walsh J. in *Kay's Leasing Corporation* v. *Fletcher*[23].

A brave attempt is made to grapple with the almost insoluble difficulties which exist in the field of torts, but two minor points deserve mention. First, it is suggested (at p. 356) that the second condition in *Phillips* v. *Eyre*[24] means, for Australia at least, that the act in question must be such as to give rise to a civil liability by the law of the place where it was done[25]. Just what this means is unclear. Is the civil liability referred to one between the actual plaintiff and the actual defendant? Or would the availability in a third person of an action for, say, loss of consortium, be sufficient notwithstanding that the present plaintiff could not establish the defendant's liability in the *lex loci delicti* owing to, say, her contributory negligence? Indeed, is it liability according to the *lex loci delicti* which is a precondition to success by the plaintiff? There are dicta in *Anderson* v. *Eric Anderson*[26] which suggest the same test as for the first rule—actionability by the actual plaintiff against the actual defendant, rather than liability in the defendant. This distinction may be of no importance in the case of the first rule, since the choice of law rule, applicable after the tests in *Phillips* v. *Eyre* have been satisfied, points to the *lex fori* anyway; but it could well be crucial in the case of the second rule[27].

Secondly, it seems to be suggested (at p. 357) that rejection of the obligatio theory, in the field of torts at least[28], leads inexorably to the adoption of a choice of law rule pointing to the application of the *lex fori*[29]. This suggestion seems to involve a *non sequitur*. Rejection of the obligatio theory and approval of a local law theory in *Koop* v. *Bebb* required no decision at all as to the *basis* upon which an Australian court would create the obliga-

19. (1964) 64 S.R. (N.S.W.) 195 at 207.
20. [1895] 2 Q.B. 408.
21. See, *e.g.*, Mann (1937) 18 British Yearbook of International Law, 99-101.
22. See, *e.g.*, *per* Lord Wright in the *Vita Foods* case [1939] A.C. 277 at 297-298.
23. (1964) 64 S.R. (N.S.W.) 195 at 205-206.
24. (1870) L.R. 6 Q.B. 1.
25. *Koop* v. *Bebb* (1951) 84 C.L.R. 629 at 642.
26. (1965) 114 C.L.R. 20 at 23 *per* Barwick C.J., and at 34-35 *per* Taylor J.
27. *Cf.*, *Hartley* v. *Venn* (1967) 10 F.L.R. 151.
28. *Koop* v. *Bebb* (1951) 84 C.L.R. 629; *cf. Hall* v. *National and General Insurance Co.* [1967] V.R. 355.
29. See *per* Windeyer J. in *Anderson* v. *Eric Anderson* (1965) 114 C.L.R. 20 at 45.

tion. The High Court in *Koop* v. *Bebb* could well have decided that the choice of law rule pointed to the *lex loci delicti* and not to the *lex fori* without involving itself in any inconsistency. The author seems to have confused the choice of a governing rule with the theory which lies behind that choice.

Little comment is necessary upon the chapters concerned with status and matrimonial causes. It is, however, somewhat surprising that the question of proof of foreign marriage is dealt with only in the earlier chapter concerned with substance and procedure, and then in only two paragraphs. No mention is there made of such cases as *Axon* v. *Axon*[30]; *Cristofaro* v. *Cristafaro*[31]; *Danyluk* v. *Danyluk*[32]; *Rakauskas* v. *Rakauskas*[33]; or of *Bondarenko* v. *Bondarenko*[34]. In a book which purports to cover the field, this is a serious omission.

The treatment of conflicts concerning property rights contains some of the most interesting writing in the book, particularly for the discussion of problems which could arise as a result of differences between the laws of the Australian States and Territories. There are, however, several puzzling omissions. In dealing with the classification of property as moveable or immoveable, the author makes no mention of an apparent conflict between the judgment of Griffith C.J. in *Potter* v. *B.H.P.*[35], and that of Fullagar J. in *In Re Usines de Melle's Patent*[36]. Again, no reference is made to the latter judgment in the discussion of *In the Estate of Maldonado, dec'd*[37] and *Re Barnett's Trusts*[38]. Neither *Re Cook*[39] nor *Re Anziani*[40] is mentioned at all in relation to the cases of *Re Berchtold*[41] and *Re Cutcliffe's Will Trusts*[42], nor is *A.M.P.* v. *Gregory*[43] discussed in relation to the question of priorities in the assignment of intangible moveables, despite the support there expressed (at p. 628 and 635) for *Kelly* v. *Selwyn*[44]. Even the earlier, and admittedly, not very helpful, Privy Council decision in *Le Feuvre* v. *Sullivan*[45] seems to have escaped the author's attention. While there may be reasons for these omissions, none is given. Neither *Jewish National Fund* v. *Royal Trust Company*[46] nor *Mayor of Canterbury* v. *Wyburn*[47] is discussed in relation to

30. (1967) 59 C.L.R. 395.
31. [1948] V.L.R. 193.
32. (1963) 5 F.L.R. 97.
33. (1961) 2 F.L.R. 381.
34. (1967) 85 W.N. (N.S.W.) 676.
35. (1905) 3 C.L.R. 479 at 494.
36. (1954) 91 C.L.R. 42 at 48.
37. [1954] P. 233.
38. [1902] 1 Ch. 847.
39. (1936) 36 S.R. (N.S.W.) 186.
40. [1930] 1 Ch. 407 at 423.
41. [1923] 1 Ch. 192.
42. [1940] Ch. 565.
43. (1908) 5 C.L.R. 615.
44. [1905] 2 Ch. 117.
45. (1855) 10 Moo. P.C.C. 1.
46. [1966] 53 D.L.R. (2d) 577.
47. [1895] A.C. 89.

the essential validity of wills. *Viditz* v. *O'Hagan*[48] is rejected as an authority on the capacity to make a marriage settlement, yet *Cooper* v. *Cooper*[49] is found acceptable in the same field. This is strange, since the cases raised almost identical points. Finally, the section on the effect of marriage on immoveable property is a disappointing one. It is given only one and a half paragraphs and contains no reference at all to the recent dicta in *Callwood* v. *Callwood*[50].

Despite all of these criticisms, some of which may appear to be carping, and many of which are, as has already been pointed out, of only a minor nature, Dr. Nygh's book is undoubtedly a most valuable contribution to Australian legal writing. Nor should it be assumed that it is of value only in the academic field. Matrimonial causes apart, cases raising conflict problems within Australia have too often not been recognised as such owing to a general lack of acquaintance with the subject. As Dr. Nygh's book provides a readable and readily comprehensible account of the conflict of laws in Australia, it undoubtedly deserves a place in the library of every practitioner.

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THE CONCEPT OF OBSCENITY, *by Richard G. Fox*. The Law Book Company, 1967, pp. 1-193.

What is perhaps the fundamental problem facing a lawyer in the field of obscenity is that much of it is barely, if at all, reducible to legal terms. One result of this is the notorious foolishness of many of the positions which courts are forced to adopt in obscenity cases if they are to avoid the example of Mr. Justice Stewart of the United States Supreme Court. That judge declines to define obscenity but states that "he knows it when he sees it". Mr. Fox's book is a valuable contribution on those aspects of the subject which are capable of legal analysis.

The book begins, appropriately enough, with the standard joke about the delegate to the Geneva Conference on the Suppression of the Circulation and Traffic in Obscene Publications who discovered that they could not define obscenity and who, having triumphantly asserted that they did not know what they were talking about, then settled down to their discussions. Mr. Fox declares that he is in no better position. And the point is pursued a little. For instance he states that obscenity is an "inescapably subjective phenomenon"; is an "expression of opinion rather than fact"; is a "value judgment based upon emotive responses". These conclusions might well be unavoidable.

48. [1900] 2 Ch. 87.

49. (1888) 13 App. Cas. 99.

50. [1960] A.C. 659.

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But it does seem that the tendency of the subsequent development of the book, at least in respect of "pornography", is to contradict them. For Mr. Fox deals extensively with the Kronhausens' valuable treatment of the subject in their book Pornography and the Law (which incidentally was last year found by an Adelaide magistrate to be obscene). The Kronhausens analyse a great deal of alleged pornography and suggest a number of common elements by which the phenomenon can be identified. To accept the Kronhausens' thesis seems to this reviewer to require more critical evaluation than Mr. Fox gives it. It does seem however that he accepts it, for he says:

> "publications which are condemned as pornographic—the worst form of obscenity—can all be shown to exhibit definite similarities in structure and content which are sufficient to distinguish them from other types of obscene writing." (p. 14).

Now this acceptance must surely involve recognition of objective criteria for the identification of pornography; and to that extent it cannot be an "inescapably subjective phenomenon"[1].

The opening definitional treatment concludes with the point that to the lawyer obscenity depends on "the time place and circumstances of dissemination and the audience to whom it is directed". But most censorship in Australia is by Customs, and Mr. Fox's point would seem to have, in that context, very little validity.

The subsequent chapters are much better; they contain a competent and thorough analysis of the various obscenity laws operating in Australia and the disorderly hotch-potch of concepts raised by them. In some places modifications will have to be made in the light of the recent High Court decision in *Crowe* v. *Graham*[2]. The author has elsewhere in this journal noted that decision.

Attention is paid to the arguments raised in justification of obscenity legislation. An apparent omission is a consideration of the alleged tendency of pornography to cause or exacerbate certain psychological disorders. This of course has no necessary connection with overt misbehaviour, and is conceptually quite distinct from a change in moral standards. Further, what seems to this reviewer to be insufficient emphasis is placed, in the consideration of the various arguments, on the different position of children. For instance, the argument that the dissemination of obscenity can be proscribed because it tends to lower moral standards has much more force in the case of dissemination to children.

The author argues strongly for a distinction between public and private media, conceding validity to the argument that people are entitled to protection from obscenity because it is offensive to them, only in the former case. It is difficult to disagree with this. Moreover, the importance of the point has now been underlined by the High Court's holding in *Crowe* v.

1. See e.g. *Jacobellis* v. *Olio* (1964) 378 U.S. 184 at 197.
2. (1968) 41 A.L.J.R. 402.

Graham that the question of obscenity is simply a question of the transgression of bounds of public decency; for this would seem primarily to be based upon the notion of offence.

That our obscenity laws are tuned to such an elusive notion as public decency makes procedural questions all the more important. The author is in places insufficiently concerned with procedure; perhaps because the book is about the *concept* of obscenity. But to divorce substance from procedure can easily produce distortion. An example of this has already been given. It has been suggested that in the context of Customs procedures reference to circumstances of dissemination will usually be pointless; whereas in other contexts Mr. Fox can validly maintain his point that to the lawyer obscenity is ultimately determined by these circumstances. It seems clear enough that the *concept* of obscenity is in these cases inextricably tied up with procedures Furthermore, due regard to the problems of procedures is of particular importance in Australia where a limited indigenous artistic output and consequent dependence upon importation emphasise the significance of censorship by Customs. The procedure here is of course by prior restraint, the dangers of which have long been recognised but still require analysis. We find for instance in Blackstone

> "The liberty of the pen is indeed essential to the nature of a free State; but this consists in laying no *previous* restraints upon publications and not in freedom from censure for criminal matter when published"[3].

The blurb on the back cover of the book states that it "is objective and balanced and is an essential text for anyone seriously interested in the problem of legal control of obscenity". The first part of the claim is by and large true and the second certainly so.

The book is as visually ugly a piece of book production as this reviewer has seen. The Law Book Co. has, of course, never been noted for the visual beauty of its books.

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3. 4 Bl. Comm. 151-152.

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