

*Private International Law: A Treatise from the Standpoint of Scots Law*, by A. E. Anton, Edinburgh, W. Green & Son Ltd., 1967. lvii and 626 pp. (£10 stlg.).

This book appears to be the first Scottish treatise on private international law as such. There have been earlier treatises dealing with particular aspects of the law of conflicts in Scotland but none so far have sought to treat of the subject as a whole.

The first question that springs to mind is whether there is such a thing as Scottish private international law. Of course, Scots law is quite separate and distinct from English law, much more so than Australian law. In the field of private international law, however, an almost complete assimilation has taken place. A few differences do exist and it is of interest to note them.

The most pronounced difference is found in the law dealing with jurisdiction in personal actions. Such a jurisdiction in Scotland is based upon residence within Scotland for 40 days, the ownership of a beneficial interest in Scottish heritage (a term which corresponds largely, but not entirely, with realty in English law), or the arrestment *ad fundandam jurisdictionem* of movable property within the jurisdiction. In the last two cases it is not necessary for the property to be connected in any way with the action. In contrast to English law the presence of an itinerant in Scotland is not sufficient to found jurisdiction over him except where the defendant has no fixed abode within or without Scotland or, in actions in contract or delict, where the cause of action arose within Scotland.

It is true, of course, that these jurisdictional rules do not necessarily prevent hardship. The property which can be seized to found jurisdiction may be of slight value such as a doorplate or a debt of a few shillings. In such cases, Scottish courts have a safety valve which by and large is denied to English and Australian courts: the doctrine of *forum non conveniens*. This doctrine makes it possible for Scottish courts to decline jurisdiction where fairness and justice demand that it be tried in another forum. An interesting application of the doctrine is seen in *Anderson, Tulloch & Co. v. Field*.<sup>1</sup> In that case the plaintiff brought action in Scotland on an English contract. The contract was one which, under s. 4 of the English Sale of Goods Act, 1893 was required to be evidenced in writing in order to be enforceable. No such requirement existed in Scots law. Following *Leroux v. Brown*,<sup>2</sup> it was argued that the English rule, being one of evidence only, was not applicable in a Scottish court. Lord Mackenzie accepted a plea of *forum non conveniens* in order to avoid a situation in which he had to enforce an English contract in Scotland though it was unenforceable in England. The author considers this a misuse, though a pardonable misuse, of the doctrine. Perhaps the judge could have arrived at a more elegant result by refusing to follow the English case of *Leroux v. Brown*, a prerogative rarely exercised by Scottish judges. Accepting his premise, however, that *Leroux v. Brown* applied, it would seem that he could legitimately hold that the plaintiff's recourse to a Scottish forum was unjustified in the circumstances. This use of the doctrine to ensure the application of the proper law in a proper forum could not occur in Australia.<sup>3</sup>

Another major difference is found in the law relating to delicts. The author sums up the effect of the decision in *McElroy v. McAllister*<sup>4</sup> as follows: "an action for reparation based on a delict committed outside Scotland will fail unless the pursuer can show that the specific *ius actionis* which he invokes is available and available to him both by Scots law and by the *lex loci delicti*" (at p. 243). This, of course, is in direct conflict with *Machado v. Fontes*,<sup>5</sup> an

<sup>1</sup> (1910) 1 S.L.T. 401, discussed by the author at p. 208.

<sup>2</sup> (1852) 12 C.B. 801.

<sup>3</sup> *Pedersen v. Young* (1964) 110 C.L.R. 162.

<sup>4</sup> (1949) S.C. 110.

<sup>5</sup> (1897) 2 Q.B. 231.

English decision which the Court of Session refused to follow in *McElroy v. McAlister*. The latest decision of the English Court of Appeal in *Boys v. Chaplin*<sup>6</sup> makes it clear that this divergence is likely to persist. Despite the apparent approval given to *McElroy v. McAlister* by Chamberlain, J. in *Li Lian Tan v. Durham*,<sup>7</sup> it is unlikely that the Scottish view will be followed in Australia. Though the High Court has expressed doubts about *Machado v. Fontes* in *Koop v. Bebb*,<sup>8</sup> it did not specify what role, if any, the *lex loci delicti* should play. It is not surprising that in the absence of any clear pronouncement by the High Court Kerr, J. preferred to follow *Machado v. Fontes* in the recent case of *Hartley v. Venn*.<sup>9</sup>

Professor Anton is understandably dissatisfied with the Scottish rule which, as he points out, must frequently lead to hardship. Indeed it led to the rejection of justified claims to compensation in *McElroy v. McAlister* and in the even more outrageous decision in *McKinnon v. Iberia Shipping Co.*<sup>10</sup> He would favour a solution along the lines of "the proper law of the tort" which is currently gaining favour in the United States and has recently gained the powerful support of the Master of the Rolls, Lord Denning, in *Boys v. Chaplin*.<sup>11</sup> It is to be hoped that Scottish, English and Australian courts will one day unite in agreement upon this doctrine.

At the time of writing his book another notable divergence lay in the failure of Scottish courts to follow *Travers v. Holley*.<sup>12</sup> Indeed the very argument which succeeded in *Travers v. Holley* had been rejected by Lord Strachan two years previously in *Warden v. Warden*.<sup>13</sup> It is most unlikely, however, that Scottish courts would refuse to follow the recent decision of the House of Lords in *Indyka v. Indyka*.<sup>14</sup>

Professor Anton (at pp. 517-518) makes an interesting comment on the controverted English case of *Re Maldonado*.<sup>15</sup> He points out that in Scotland the Crown claims heirless property as *ultimus haeres*. However, unlike the State of Spain in *Re Maldonado* the Crown in right of Scotland has only laid claim to heirless property situated in Scotland whether its former owner was domiciled in Scotland or not. In *Goold Stuart's Trustees v. McPhail*,<sup>16</sup> a Scottish fund belonging to a deceased dying domiciled in Victoria was claimed by the Crown in right of Scotland. The Victorian authorities though notified of the claim did not appear and the Scottish Crown was preferred to the fund. Of course, the Victorian Crown law officers may have advised that the fund, being situate outside Victoria, could not be claimed as *bona vacantia* by the Crown in right of Victoria. If the Scottish court had anticipated *Re Maldonado* the fund would have been truly ownerless!

The Scottish law in relation to the recognition of foreign judgments is very much like English law. It is very reassuring to learn that *Harris v. Taylor*<sup>17</sup> is not part of the law in Scotland. Professor Anton is too sanguine when he asserts (at p. 579) that *Harris v. Taylor* has now been otherwise explained in England, the implication being that it has been distinguished out of existence. The explanation of *Harris v. Taylor* put forward by Denning, L.J. (as he then was) in *Re Dulles*<sup>18</sup> has not been favourably received. Indeed in

<sup>6</sup> *The Times*, Dec. 6, 1967.

<sup>7</sup> (1966) S.A.S.R. 143.

<sup>8</sup> (1951) 84 C.L.R. 629.

<sup>9</sup> (1967) 10 F.L.R. 151.

<sup>10</sup> (1955) S.C. 20.

<sup>11</sup> *The Times*, Dec. 6, 1967.

<sup>12</sup> (1953) P. 246.

<sup>13</sup> (1951) S.C. 508.

<sup>14</sup> (1966) 3 All E.R. 583.

<sup>15</sup> (1954) P. 223.

<sup>16</sup> (1947) S.L.T. 221.

<sup>17</sup> (1915) 2 K.B. 580.

<sup>18</sup> (1951) Ch. 842.

New South Wales Kinsella, J. in circumstances very similar to *Harris v. Taylor* considered himself bound to follow the original *ratio* of the older case treating Denning, L.J.'s remarks as purely *obiter*.<sup>19</sup>

The rest of the treatise, and this is quite substantial, is devoted to a discussion of the rules which England and Scotland share. In his general discussion of the objects and purposes of private international law, the author points out a factor which many writers have lost sight of in the arid debates over territorialism, local law theories and policy evaluation, namely, that the interests of the forum state lie not so much in the advancement of its own public policy but in the orderly regulation of private rights. This leads to a position in which the attainment of just rules is more important than maintaining the supremacy of the *lex fori* or maintaining respect for the *lex loci actus*.

Professor Anton is satisfied, by and large, with the existing system which, in his opinion, works reasonably well. There are, of course, such exceptions as the law of domicile, which even a Blackstone would find indefensible today. But on the whole his treatment of the law is conservative and he offers no radical panaceas. Certainly his attempt to explain the law as it is succeeds very well. The book is well written and concise. An interesting feature is his restrained use of the opinions of other textwriters, not only Anglo-American, but also continental, both ancient and modern. In this he is seeking to restore the traditional reliance of Scots law in its development as a civil law system on the opinion of writers, a tradition which flourished in the 17th and 18th centuries, but became extinct during the 19th century.

A few relatively minor criticisms must be made. At p. 213 the author relies on the decision of the House of Lords in *Regazzoni v. K. C. Sethia*<sup>20</sup> to support the proposition that "where Scots law is the proper law of the contract, the Scottish courts will not enforce a contract where performance is illegal under the law of the place of performance". This, however, reads too much in the decision. In *Regazzoni's Case* most Law Lords made it clear that they were dealing with a conspiracy to break the law of a friendly foreign country within the territory of that country. The existence of the conspiracy was essential to the decision. Had there been no conspiracy the House might well have followed the example of the Privy Council in the much ignored case of *Trinidad Shipping & Trading Co. Ltd. v. Alston*,<sup>21</sup> and held the contract enforceable.

At p. 272 the author suggests that the character of a marriage as being either polygamous or monogamous should depend on the form of ceremony used, no matter where the marriage takes place. Thus he suggests that a marriage between two domiciled Saudi Arabians celebrated in a mosque in Glasgow should be treated as polygamous. Presumably, though he does not spell this out, both parties must be domiciled in a country permitting polygamy. A marriage between two Scots in a mosque in Glasgow would surely not be regarded as creating a valid polygamous relationship. But I feel that a Scottish court would refuse to regard any ceremony celebrated in Scotland as creating a polygamous marriage. Though Wolff, C.J. in the Western Australian case of *Haque v. Haque (No. 1)*<sup>22</sup> gave support to the idea now put forward by Professor Anton, the present federal Marriage Act 1961 makes it quite clear that a marriage celebrated in Australia otherwise than prescribed by the Act is a nullity except for a limited category of diplomatic marriages.

At p. 275, and again at p. 282, the learned author is too harsh in his

<sup>19</sup> *Re A. Lund & Co. Ltd.*, unreported, May, 1956, discussed in (1958) 2 *Sydney L.R.* 580.

<sup>20</sup> (1958) A.C. 301.

<sup>21</sup> (1920) A.C. 888.

<sup>22</sup> (1963) W.A.R. 15.

criticism of the decision of the Court of Session in *Bliersbach v. McEwan*.<sup>23</sup> In that case two minors both domiciled in Holland sought to marry in Scotland without parental consent as required by Dutch law. Under Dutch law lack of consent rendered the marriage voidable. Under Scots law no parental consent was required. The Court, following the English case of *Ogden v. Ogden*,<sup>24</sup> classified the Dutch requirement as one relating to formalities and hence inapplicable to marriages celebrated in Scotland. At first sight the Court of Session would appear to be open to criticism for blindly following a much criticized English case. But it only did so for considerations of policy. Under Dutch law the marriage would be voidable, not void *ab initio*. If a Scottish court declared such marriages to be void, a limping marriage might result if the parents in Holland accepted a *fait accompli* and did not seek to annul the marriage. On the other hand, if the Scottish courts refused to intervene the matter was left in its proper forum; any annulment pronounced by a Dutch court would be entitled to recognition in Scotland as the decree of the domicile of both parties.<sup>25</sup> The Court of Session left open the question which would arise if under Dutch law the lack of parental consent had rendered the marriage void *ab initio*.

At p. 86, and again at p. 511, the author puts forward the view that Scottish courts should not hesitate to exercise a discretionary power conferred by foreign law upon a foreign court. At p. 511, this suggestion was made specifically in relation to the English Inheritance (Family Provision) Act 1938. It is hard to see that justice would be served by Scottish courts assuming functions with which they are not familiar unless there is no other forum reasonably available. Fortunately in Australia there is good authority against the assumption of the discretionary powers conferred under the Family Provision legislation of other jurisdictions.<sup>26</sup>

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*Principles of Australian Administrative Law* (3d. ed.) by D. G. Benjafield and H. Whitmore, Sydney, The Law Book Co. Ltd., 1966. XXXI and 368 pp. (\$7.50).

This book is a skilful and useful amalgam. It is an excellent presentation of the laws as expounded in the cases. It sets the Australian law against the background of the mother law of England as it has been and is today. It treats well, and I would hazard exhaustively, the Australian law. At the same time, it offers an informed and scholarly presentation of the political and general law background of the subject. Finally it is a critical account of both theory and judicial practice.

If the book has a weakness, it is in its somewhat conventional and derivative treatment of general ideas. The authors are apt to fall back on fashionable critical clichés which have been going the rounds now for sometime. The authors for example protest in a self-satisfied way that "they have no confidence in conceptual classification (indeed they don't understand it)" (p. 110) and "that the courts will never develop a rational approach while they feel obliged to apply conceptual classification". (p. 112). This sort of language is

<sup>23</sup> (1959) S.C. 43.

<sup>24</sup> (1908) P. 46.

<sup>25</sup> *Administrator of Australian Property v. Salvesen* (1927) S.C. (H.L.) 80.

<sup>26</sup> *Re Paulin* (1950) V.L.R. 462).

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