detail (e.g. in the citation of Stone, *Legal System and Lawyers' Reasonings*) and the system of citation is not uniformly applied.

LYNDEL V. PROTT*

Conflict of Laws in Australia (3rd ed.), by P.E. Nygh, Sydney, Butterworths Pty. Limited, 1976, xlviii + 530 pp. (including index) $20.00 (limp cover), $25.00 (hard cover).

The conflict of laws is a subject students find difficult to grasp, practitioners are quick to ignore and judges too often are halting and confused in expounding. But it is a subject of the greatest importance to any person who claims to think about the law, to educate others in thinking about the law, or to practise it at any level of sophistication. Particularly is this so in a federal system.

The first edition of Professor Nygh's work thus responded to a great need in Australia upon its appearance in 1968. There is now a third edition in less than ten years, evidence enough that the need continues.

Clearly there is much of value in the third edition; the chapters on negotiable instruments (Chapter 16), international monetary obligations (Chapter 17) and exclusion of foreign laws and institutions (Chapter 14) are necessary reading to any lawyer desiring acquaintance with these important topics or an answer to a problem facing him.

However, there are matters of design and size which impose such constraints upon the third edition as seriously to impair its worth as a whole. The first is that of space. It appears from the Preface that the author was obliged to keep the book within "manageable proportions". The result is that the first edition had some 175 more pages of text than the third, and this over a period when the flow of decisions and legislation has greatly increased. This "gain" has been achieved by severe pruning of, for example, the treatment of so important a subject as full faith and credit. It is all too true to observe (at page 8) that the High Court has yet to answer the fundamental question of whether full faith and credit is a doctrine of substantive or evidentiary effect; but it is a question that one day must be answered and in the meantime it is the task of a scholar in the field, such as the author, to seek to point in the right direction those who will argue and settle the issue, by a reasoned statement of his own views on the matter.

Further, the quest for space saving has led in this edition to the virtual elimination of footnotes. This is a retrograde step. Perhaps in no other field is there such an abundance of scholarly (and not so schol-

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arly) writing; it is with just cause that Dr. Morris[1] has written of a vast mass of words issuing from the academic power house in a cloud of escaping steam. It is the task of the author of a leading text on the subject to assist the diligent enquirer after further knowledge on a particular topic to sift this mass of words and indicate what he regards as worthwhile. This is a task difficult to perform without use of footnotes. To take but one example, the rule in *Phillips* v. *Eyre*[2] continues the subject of intensive writing; this varies in quality from the penetrating and incisive[3] to the flat and banal.[4] Yet Professor Nygh cites but seven articles, one written by himself, and tends to note rather than evaluate them.

Again, it is difficult to deal adequately with authorities where references must be put in the text itself. The result of such pressure is the suppression of important citations. Thus, whilst *Safran* v. *Chani*[5] is adequate authority in this State as to the place of occurrence of anticipatory breach of contract, for Victorians the matter is complicated by the seemingly contrary view of McInerney, A.J. (as he then was) in *Weckstrom* v. *Hyson*.[6] But all parties would be the better off for the immediate citation of the Privy Council's views on the subject in *Martin* v. *Stout*.[7]

The foregoing is put not so much as criticism of the learned author but as a protest against the pressures of modern publishing to keep costs down by making books smaller and so of less utility. However, the material placed within these confines is the author's care and his is the responsibility.

Some topics of greatest importance are not dealt with as discrete subject matters. One serious omission is any considered discussion of the role of statutes in conflict of laws. As three recent High Court decisions[8] indicate there is perhaps no subject of more pressing concern to the practitioner in this field, none which indicates more clearly the fragility of what are after all common law rules in an age of an abundance of state legislation enacted in apparent ignorance of its impact on other than exclusively domestic matters and transactions. How do the Courts go about characterizing a right as one created purely by statute with its "foreign element" considered and determined exclusively by the statute, or, on the other hand, as a right "analogous" to existing common law rights and so picked up by the common law rules of private international

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[1] *The Conflict of Laws* (1971) p. 256.
[2] (1870) L.R. 6 Q.B. 1 at 28-29.
[3] E.g., the article by S.D. Robb in (1977) 8 *Syd. L.R.* 146.
[4] E.g., the article by C. Brown, "Jurisdiction and Choice of Law in Tort" (1976) 8 *Victoria Univ. of Wellington L. Rev.* 267.
[5] (1970) 72 S.R. (N.S.W.) 146.
[6] [1966] V.R. 277.
[7] [1925] A.C. 359 at 368-79.
[8] *Kay's Leasing Corporation Pty. Ltd.* v. *Fletcher* (1964) 116 C.L.R. 124, *Freehold Land Investments Ltd.* v. *Queensland Estates Pty. Ltd.* (1970) 123 C.L.R. 418, and *Goodwin* v. *Jorgensen* (1973) 128 C.L.R. 374.

law?[9] By what process of divination do the Courts construe statutes of the forum which regulate or abrogate contractual relationships as fastening upon those contracts connected to the forum other than by their proper law? Where did the Courts reversed by the High Court in *Kay's Leasing Corporation Pty. Limited* v. *Fletcher*[10] and *Freehold Land Investments* v. *Queensland Estates Pty. Limited*[11] go wrong? What meaning (if any) is to be given to the confused discussion of the contracts attracted by the very important Section 88F of the Industrial Arbitration Act 1940 (N.S.W.), in the New South Wales Court of Appeal in *Ex parte Richardson; re Hildred*?[12] Those seeking answers to these pressing questions must seek relief elsewhere than in this work.

Text writers in conflict of laws have in the past largely contented themselves with writing on the conflict of foreign laws with English common law; equity has been ignored. Professor Nygh thus cannot be chided for this neglect; he has but followed in the footsteps of the mighty. Yet to ignore equity is to turn from a vital realm of discourse. It is true that if A wishes in New South Wales to sue B to recover damages at law for a wrong allegedly committed by B in Victoria, A must satisfy the rule in *Phillips* v. *Eyre;* the rule itself was propounded in demurrer proceedings in the old Court of Queen's Bench. But does this mean the same criteria apply if A seeks in New South Wales not common law damages, but an injunction against B (together with damages under Lord Cairns' Act) to restrain, for example, the conscious passing-off by B in Victoria of his goods as the goods of A?

Assume that in the New South Wales proceedings A can establish the existence of the necessary reputation in Victoria and that B is present in New South Wales and so amenable to an injunction. Why should there be any issue whether the wrong is of such a character as to have attracted an injunction if committed purely in the forum? Is it not sufficient for equity's purposes that B is within control of its process and refuses to cease conduct that is fraudulent?

Again, it is to tell but part of the story to say, as does the learned author (at page 87), in dealing with recognition of foreign judgments that

> [I]n case of a judgment based on an action *in personam* the judgment must be for a fixed debt. This is the outcome of the archaic rule that the proper action on a foreign judgment is an action in *indebitatus assumpsit.*

Assume A is a company resident in this State and New Zealand, and B is a New Zealander. Does this extract mean that if A contracts to sell B Blackacre, land in Sydney, but A refuses to complete and B obtains

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[9] See, on the one hand *Plozza* v. *S.A. Insurance Co. Ltd.* [1963] S.A.S.R. 122, *Mynott* v. *Barnard* (1939) 62 C.L.R. 68 and, on the other, *Koop* v. *Bebb* (1951) 84 C.L.R. 629, *Joss* v. *Snowball* [1970] 1 N.S.W.R. 426.

[10] (1964) 116 C.L.R. 124.

[11] (1970) 123 C.L.R. 418.

[12] [1972] 2 N.S.W.L.R. 423.

against A in New Zealand an order for specific performance, B when he comes to New South Wales can enforce his order for costs but must start again with a suit for specific performance? May he not seek here an order that the order of the New Zealand Court be enforced and carried into execution so far as necessary by decree of the New South Wales Supreme Court in its equitable jurisdiction? This is analogous to what was done in *Houlditch* v. *Marquis of Donegal*.[13] Nothing in *Duke* v. *Andler*[14] really meets that case. At all events the issue deserves discussion.[15]

True enough, the work treats trusts, or at least some part of that subject, in Chapters 30 and 33. But the whole treatment of the subject is coloured by the unfortunate observation at page 436,

> Generally speaking, however, the creation of a trust, like any other dealing with property, involved two elements; agreement as to the terms and conditions of the trust and a conveyance of the legal title to the property which is the subject of the trust.

This is the language of express trusts, and, at that, of express trusts created in a particular fashion. It tells nothing of implied resulting or constructive trusts. What follows is a discussion of express trusts as if that exhausted the subject matter. It is true there are few if any decisions in Anglo-Australasian law on resulting implied and constructive trusts in the conflict of laws. But that does not mean there is no need for discussion of them; a brief perusal of Chapter 14 of Professor Scott's work on Trusts (third edition, 1967) indicates the attention the subject has commanded in the United States. What is needed as legal institutions of this country develop in complexity is an authoritative exposition to guide the course of decision when these matters come before our Courts. The besetting vice of academic writing in this country is the assumption that the prime subject matter for analysis is what the Courts decided yesterday in reported decisions; what should be of equal concern are the issues that today vex or should be vexing top practitioners.

Further, in those subjects which the author does essay the field there are some worrying inaccuracies, omissions and obscurities. Is it true to say that there is a "strong analogy" (at page 273) between those cases decided under statutory provisions (expressed in varying terms) permitting service on a defendant outside the forum of process in respect of a cause of action for a tort committed in the forum (a matter of jurisdiction) and those cases deciding whether an action satisfies the second limb of *Phillips* v. *Eyre* i.e. that the act must have been not justifiable by the law of the place where it was done (a matter of choice of law)? To this reviewer there is no necessary connection between these

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[13] (1834) 2 Cl. & Fin. 470, 5 E.R. 955.
[14] [1932] 4 D.L.R. 529.
[15] See also *Burchell* v. *Burchell* (1928) 58 O.L.R. 515, Barbour, "Extra-territorial Effect of the Equitable Decree" (1919) 17 *Mich.L.R.* 527.

concepts; the Canadian Courts are taking the scales from their eyes, and it is a pity that the present author ignores their efforts.[16] Again, it is simply not true to say (at page 257) that the High Court in *Koop* v. *Bebb*[17] correctly paraphrased the rule laid down by Willes, J. in *Phillips* v. *Eyre;* Willes, J. spoke of "the wrong" (first limb) and "the act" (second limb) and it is not to be assumed he meant the terms to be interchangeable; the High Court as to both limbs spoke only of "the wrong". Nor is it satisfying, in this already difficult area, to permit to pass without adverse comment, let alone, as appears from pages 263-265, to accept, the wretched decisions in *Hartley* v. *Venn*[18] and *Schmidt* v. *G.I.O. of N.S.W.;*[19] happily, the task which Professor Nygh has not undertaken has been performed in the pages of this Review.[20]

No discussion of the effect to be given in Australia to English decisions challenging if not overthrowing the rule that at common law damages in tort and contract fall for conversion to the currency of the forum at the date of breach rather than of judgment (see pages 251-254) is complete without a reference to *McDonald & Co. Pty. Ltd.* v. *Wells*[21] where Rich, Starke and Dixon, JJ., a formidable trio on any reckoning, treated the old rule as applicable in Australia. Until the High Court itself or the Privy Council reconsiders the issue, all Courts here are bound by that decision. Again, the discussion (pages 36, 37) of the statutory rule providing for service out of the jurisdiction on a person who is a necessary and proper party to an action begun against a person served within the State would be better for a reference to the decision of the Court of Appeal in *Evans Marshall & Co. Limited* v. *Bertola S.A.;*[22] and that of assimilation of statutory wrongs to actions in tort (pages 274-277) by a reference to the learned judgment of Fullagar, J. in *Norbert Steinhardt & Sons Limited* v. *Meth.*[23]

Then there is that most sensitive and elusive of subjects, style. The more complex the subject matter the greater the need for clarity; Dr. Morris in his work "The Conflict of Laws" meets that challenge with conspicuous success. Moreover, that writer shows that language may be picturesque but exact, colourful but precise. The reader of Professor Nygh's work pines for a shaft of wit, for a light touch and high tone. The reader also hungers for facts, for a context into which to set the principles of law as they are remorselessly unfolded. To give but one example, Dr. Morris tells his reader (at pages 228-229) the tale of the shipment of herrings (and, of course, much less) whereas Professor Nygh

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[16] *Abbott Smith* v. *Governors of University of Toronto* (1964) 45 D.L.R. 2d. 627 at 697, *Moran* v. *Pyle National (Canada) Ltd.* (1973) 30 D.L.R. 3d. 109.
[17] (1951) 84 C.L.R. 629 at 642.
[18] (1967) 10 F.L.R. 151.
[19] [1973] 1 N.S.W. L.R. 59.
[20] In the article cited *supra* n. 3 at 151-160, 175-181.
[21] (1931) 45 C.L.R. 506 at 515.
[22] [1973] 1 All E.R. 992.
[23] (1960) 105 C.L.R. 440 (reversed on other grounds (1962) 107 C.L.R. 187).

gives four gnomic references, nude of fact, to *Vita Food Inc.* v. *Unus Shipping Co.*[24]

In sum, one's disappointment with the book under review is not so much that it is a bad book; it is that it is not better, that it is a tool, a reference point, not a work to engage the mind and stimulate the imagination.

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The Institutes of Justinian. Text, Translation and Commentary, by J.A.C. Thomas, Cape Town, Juta & Co. Ltd., 1975, xviii + 355 pp. (inc. indices). $25.00 (limp).

Text Book of Roman Law, by J.A.C. Thomas, Amsterdam, North Holland Publishing Co., 1976, xix + 562 pp. (inc. index). $17.20 (limp).

There has long been a shortage of good Roman Law text books which give an intelligent person a general, but scholarly, conspectus of the whole of Roman private law. There are — and, oddly enough, increasingly so — any number of advanced works, but on Roman law generally, and on specific topics; but these are of little assistance to a novice. There are also one or two excellent primers (of which Nicholas's *Introduction to Roman Law* is the most outstanding example) which are designed to do no more than whet the appetite of one *cupidus legum.* There is now almost nothing in between. Until recently one had Lee's *Elements of Roman Law,* but — alas — the fourth edition of that work is now out of print.

Professor Thomas's two works on the subject are, therefore, doubly to be welcomed: once, because of what they are; and a second time, because they fill the gap left by Lee's disappearance.

His *Text Book* is, by far, the more successful of the two. It covers the field formerly covered by Lee, and usually in a more satisfactory and thorough manner. For example, his accounts of both the *ius publice respondendi* (pp. 43-45) and of the Sabinian-Proculian Schools (pp. 45-47) give some inkling of the problems which those topics involve, whereas a reader of Lee would be left innocent of complication. Likewise, the theory that in Roman law a statute can fall into desuetude and thereafter cease to have legal effect is treated in a way which suggests the difficulties of too readily embracing it (p. 29). However, in the reviewer's opinion, there are some points where the work falls a little short. There is no really adequate discussion of *infamia* and the manifold difficulties involved in that concept; in the chapter on servitudes, no mention is made of the so-called "abnormal servitudes", i.e. the few praedial servi-

[24] [1939] A.C. 277.

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