DICEY AND THE DEVELOPMENT OF ENGLISH PRIVATE INTERNATIONAL LAW

By G. W. BARTHOLOMEW*

The year 1958 is doubtless memorable for many things but for the private international lawyer it has a rather special significance. It represents the centenary of the publication of the first edition of Westlake's *Private International Law*[1]— the first English text book on the subject.[2] It also represents the eightieth anniversary of the publication of the first edition of Foote's *Private International Jurisprudence*[3]—the second English text book on the subject, and last, but by no means least, it saw the appearance of the seventh edition of Dicey's *Conflict of Laws*.[4]

The various editions of these three works dominated the field of private international law in England until the appearance of Dr. Cheshire's work in 1935.[5] With the subsequent publication of works by Schmitthoff,[6]

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1 Westlake, A Treatise of Private International Law (1858).

2 Certain aspects of private international law had been discussed in English works before Westlake, as, for example, Henry, The Judgment of the Court of Demerara in the Case of Odwin v. Forbes (1823); Dwarris, A General Treatise on Statutes (1830-1831); Hosack, A Treatise on the Conflict of Laws of England and Scotland (1847), of which only one volume was published; Burge, Commentaries on Colonial and Foreign Laws generally, and in their conflict with each other, and with the Law of England (1838); and Reddie, Inquiries in International Law (2nd ed. 1851), but Westlake was the first English writer to attempt a comprehensive treatise on the subject as a separate discipline.

3 Foote, A Concise Treatise on Private International Jurisprudence (1878).

4 Dicey's Conflict of Laws, Seventh Edition, General Editor, J. H. C. Morris. Editors, O. Kahn-Freund, K. Lipstein, M. Mann, C. Parry and G. H. Treitel. London: Stevens & Sons Ltd. 1958, cxxiv and 1180 pages. £8/8/-. The first edition was published in 1896.

5 Cheshire, Private International Law (1935). Other works dealing with private international law published in England during the period 1858-1935 include Phillimore, Commentaries upon International Law, 1st ed. (1861), 2nd ed. (1871), 3rd ed. (1889), the fourth volume of which deals with private international law; Piggott, Foreign Judgments and their effect in the English Courts (1879); Harrison, 'The Historical Side of the Conflict of Laws' (1879) 32 Fortnightly Review 559 and 716, reprinted in Harrison, Jurisprudence and the Conflict of Laws (1919); Nelson, Selected Cases, Statutes and Orders illustrative of the principles of Private International Law (1889); Rattigan, Private International Law (1895); Bate, 'International Law, Private and Public' in Century of Law Reform (1901) pp. 67-80; Bate, The Doctrine of Renvoi in Private International Law (1904); Baty, Polarised Law (1914); Burgin, Administration of Estates (1914); Cheng, The Rules of Private International Law determining Capacity to Contract (1916); and Hibbert, International Private Law, 1st ed. (1918), 2nd ed. (1927). In addition to the above the works of both Savigny and von Bar were published in English translation during this period.

6 Schmitthoff, A Textbook of the English Conflict of Laws (1946).

Wolff[7] and Graveson[8] and the lengthening time since the last editions of Westlake,[9] Foote[10] and Dicey[11] it looked as if all three of the earlier works were to be allowed to pass into the limbo of library basements. In 1949, however, Dicey was resuscitated and a new edition was published under the general editorship of Dr. Morris, and now, nine years later, we have the seventh edition of Dicey which also appears under Dr. Morris's general editorship.

When a book has survived for over sixty years, reached its seventh edition and has been described as possessing 'an authority almost equalling that of a judicial pronouncement'[12] the task of a reviewer becomes rather difficult (especially when the book runs to over 1,000 pages). Since other reviewers will doubtless perform the more orthodox rites which traditionally accompany the appearance of works such as this we may take the opportunity presented by this triple anniversary to consider briefly some of the developments in private international law over the last one hundred years and to attempt to assess Dicey's contribution to this development.

In his first edition Dicey found it necessary to expound, in twenty-two pages, the nature of the subject and the method of treatment he was adopting. The editors of the seventh edition find six pages ample for this purpose. They omit the whole of Dicey's exposition of his method of treatment on the ground that 'his thesis is now universally accepted.'[13] Thus from the very outset we find a striking example of Dicey's contribution to the development of English private international law. Dicey's thesis was that English private international law was as much a part of English law as any other part, but at the time when he wrote this was by no means the generally accepted view. Story, in the United States, had already set the precedent of using Anglo-American court decisions in his exposition,[14] but he nevertheless made extensive use of the earlier continental writers and regarded those cases which were relevant as those in which 'principles of international jurisprudence'[15] were applied. Moreover, although Story cited court decisions he handled them in almost exactly the same way as quotations from Huber or Bartolus. As Frederick Harrison remarked:[16]

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7 Wolff, Private International Law (1945).

8 Graveson, The Conflict of Laws (1948).

9 The last edition of Westlake, the seventh, appeared in 1925 edited by Bentwich.

10 The last edition of Foote, the fifth, also appeared in 1925 edited by Bellot.

11 The last pre-war edition of Dicey, the fifth, appeared in 1932 edited by Berridale Keith.

12 From a review in the New York University Law Review quoted in the publisher's blurb to the seventh edition of Dicey.

13 At p. 9 n. 11.

14 Story, Commentaries on the Conflict of Laws. The first edition was published in 1834. References in this paper are from the third edition (1846), the last that was revised by the author.

15 At p. xiii.

16 Harrison, Jurisprudence and the Conflict of Laws (1919), at p. 120.

> To Story it seems sufficient that a jurist has made a remark; and whether the remark was made under the Feudal system of Europe in the fourteenth century, or by an American judge trained in the Anglo-American common law, it makes no difference. "*Ita scriptum est*," says Story, and he declines to make any attempt to weigh these various dicta.

In Westlake's first edition we find more extensive reliance on decided cases and a reduction in the number of contintental citations. Nevertheless the subject has not yet become firmly established as a branch of English law. Admittedly he stated in the Preface that he was treating the subject 'as a department of English law'[17] and he excused himself from extensive citation from foreign jurists on the grounds that the doctrine of precedent made such reference unnecessary, at least in relation to those matters respecting which there were sufficient decided cases. However, he also said:[18]

> These principles (*i.e.*, those of private international law), too, must necessarily be arrived at by considerations external to all the several municipal laws which in any case may compete; but, since this department of jurisprudence is administered by judges commissioned by human superiors, it follows that if the law of any state has expressly defined the limits of its own applicability, the judges of such state will be bound by such definition, however incorrect in principle it may appear to them to be. It is only where the municipal law is silent as to its own limits, that the jurisprudence which is the subject of this Treatise admits of judicial enforcement.

Foote, in the Preface to his first edition wrote:[19]

> The present work does not purport to be a treatise on Private International Law in the ordinary sense of the phrase. Private International Law is to be collected from the judicial decisions of many nations, and from the writings of many jurists.

He modestly disclaimed any intention to reproduce and analyse the materials to be found in Story and Westlake and relied almost exclusively upon English cases. This growing reliance upon decided cases, which was so marked a feature of English textbooks on the subject, made it inevitable that the development of the subject in England would, sooner or later separate from that on the continent of Europe, but it was left to Dicey to take the final and decisive step.

Even before the appearance of the first edition of his *Conflict of Laws* Dicey had clearly enunciated the thesis that private international law is as much a part of English law as the law of primogeniture. Thus in the

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17 At p. iii.
18 At p. 3.
19 At p. v.

Preface to his *Law of Domicile* (of which the first edition of his *Conflict of Laws* contained a second and carefully corrected edition) he stated:[20]

> The law of domicile is often looked at as a branch of the subject called by an unfortunate misnomer Private International Law. In this treatise, however, it is considered solely as a part of the Law of England. No attempt is made to determine whether the rules which make up the law of domicile, as administered by English courts, are or are not the same as the rules administered by foreign tribunals, and forming, therefore, part of foreign legal systems. The treatment here adopted has two advantages. It is, in the first place, convenient for English practitioners, who are in general only concerned to determine what on a given point is the law of England. In the second place, it is correct in point of theory, for it rests on the broad distinction between rules which are strictly laws, as being part of the municipal law of one particular country (our own), and rules prevailing in other countries, which are not laws to us at all, since they do not rest on the authority of our State: and it completely avoids the errors which have arisen from confusing the rules of so-called Private International Law, which are in strictness "laws" but are not "international," with the principles of international law properly so-called, which are "international" since they regulate the conduct of nations towards each other but are not, in the strict sense of the term "laws."

Thus after a century of relative obscurity the view expressed by Lord Mansfield in *Holman v. Johnson* finally triumphed:[21]

> Every action tried here must be tried by the law of England but the law of England says that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern.

It is therefore rather surprising to find that although both Westlake and Foote referred to *Holman v. Johnson* in their first editions, neither referred to it for the above proposition, whereas Dicey, in his first edition did not refer to *Holman v. Johnson* at all. (It is not referred to in Dicey until we reach the fourth edition).

At all events it was Dicey who firmly established private international law as a branch of municipal law that was to be dealt with in the same way as any other branch, and this was a contribution the magnitude of

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20 At pp. iv-v. Dicey also expounded this view in an article, 'On Private International Law as a Branch of the Law of England' (1890) 6 L.Q.R. 1 and (1891) 7 L.Q.R. 113 which became, in substance, the first part of the Introduction of the first edition of his Conflict of Laws.

21 (1775) 1 Cowp. 341; 98 E.R. 1120. Sir William Scott made the same point in Dalrymple v. Dalrymple (1811) 2 Hag. Con. 54 when he stated: 'The cause . . . being entertained in an English court . . . must be adjudicated according to the principles of English law applicable to such a case. But the only principle applicable to such a case by the law of England is that the validity of Miss Gordon's marriage rights must be tried by reference to the law of the country where, if they exist at all, they had their origin. Having furnished this principle, the law of England withdraws altogether, and leaves the legal question to the exclusive judgment of the laws of Scotland.' The view that private international law was part of English law was challenged by Farrelly, 'The Basis of Private International Law' (1893) 9 L.Q.R. 242.

which can hardly be overestimated. The development of the subject was thenceforth firmly tied to the practical realities which must be considered in curial processes thus clipping the wings of unfettered juristic speculation.

After thus introducing the subject Dicey set himself to establish a number of general principles which he considered to lie at the foundations of the subject. In this field we can see that the last one hundred years have seen many changes. Story, in his first edition, had enunciated a theory of comity as the basis of private international law. Starting from the assumption of the territorial application of law he argued that the application of foreign law by the courts of another state was not a matter of obligation but of comity. Neither Westlake nor Foote attempted any deep analysis of this problem, so that, as far as English private international law was concerned, the theory of comity was the only theory in the field when Dicey prepared the first edition of his *Conflict of Laws*. He had no hesitation in rejecting the theory of comity and replacing it by what has become known as the theory of 'acquired (or vested) rights.'

In attempting to analyse the differences between Dicey and Story on this point it is useful to adopt the distinctions drawn by Cheatham between the questions: Why? How? and Which?, in relation to the application of foreign law.[22] As to the question Why? — why is foreign law applied at all — we find that both Story and Dicey gave what is essentially the same answer. Story phrased his answer to this question as follows:[23]

> The true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconvenience, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return.

Dicey answered the question more shortly:[24]

> The application of foreign law . . . flows from the impossibility of otherwise determining whole classes of cases without gross inconvenience and injustice to litigants, whether natives or foreigners.

Thus although Dicey ostensibly rejected the doctrine of comity, he was, on this point, in agreement with Story.

If we turn to consider the question How? — how is the foreign law applied — we see that differences begin to emerge. Story's answer would seem to be that the foreign law was applied directly by the foreign court. There was admittedly no obligation on the court to apply such law, for law was of territorial application, but by virtue of the principle of comity the foreign law would be applied in certain types of cases. Dicey's answer

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22 Cheatham, 'American Theories of Conflict of Laws' (1945) 58 Harv. L.R. 361.
23 At p. 45.
24 At p. 10.

was rather different. With a much more thorough-going concept of the territoriality of law he denied that the foreign law was in fact applied at all. The problem, as he saw it, was rather one of recognising rights acquired under a foreign law. He thus worded his first general principle as follows:[25]

> Any right which has been duly acquired under the law of any civilised country is recognised, and, in general, enforced by English Courts, and no right which has not been duly acquired is enforced or, in general, recognised by English Courts.

This concept he acquired from the same source as that from which Story acquired his concept of comity, namely Huber,[26] but whereas Story emphasised the concept of comity paying little attention to acquired rights Dicey did precisely the reverse and emphasised the idea of acquired rights while rejecting that of comity.

In rejecting the theory of comity Dicey was undoubtedly influenced by his avowedly positivistic approach to the subject which seems to have led him into a misunderstanding of what Story really meant by 'comity.' Thus in criticising the comity theory Dicey was at pains to emphasise that:[27]

> the application of foreign law is not a matter of caprice or option, it does not arise from the desire of the sovereign of England, or of any other sovereign to show courtesy to other states.

Story, of course, never said that it did. By using the term 'comity' all that Story intended to emphasise was that no nation had any right to require the full recognition and execution of its own laws in the territory of another state. At a time when private international law was thought of as being in some way distinct from municipal law, more international than private, the idea of 'comity' seemed quite acceptable. Once however positivism was firmly established it was a little more difficult to regard a branch of English law as resting on any such concept. Foreign rights were recognised because English law required that they be recognised.

If we now turn to the question Which? — which foreign law is to be applied — we find that Story makes no attempt to elaborate a single principle which will answer this question. This failure is seized upon by Dicey as one of his criticisms of the theory of comity:[28]

> To know, for example, that the Courts are influenced by considerations of comity is no guide to any one who attempts to answer the enquiry whether the tribunals of a given country accept 'domicil' as do English Courts, or 'nationality,' as do Italian Courts, as determining the law which affects the vaidity of a will.

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[25] At p. 22.

[26] Huber, De Conflictu Legum 2.3 'Rectores imperiorum id comiter agunt, ut jura cujusque populi intra terminos ejus exercita, teneant unbique suam vim, quatenus nihil potestati aut juri alterius imperantis ejusque civium praejudicetur.'

[27] At p. 10.

[28] At pp. 10-11.

This is hardly a very valid criticism of the comity theory for it is simply criticising it for not doing what it never set out to do. However, Dicey does attempt to go one stage further and provide an answer to this question, and it is his claim that the vested rights theory provides just such an answer. Even before Dicey had thus written, however, Savigny had pointed out that any such theory as that of acquired rights involved a fatal circularity of reasoning:[29]

> We can only know what are vested rights if we know beforehand by what local law we are able to decide as to their complete acquisition.

The succeeding years have not been kind to the acquired rights theory and it has given rise, by way of reaction, to yet another theory: the local court theory associated particularly with the names of Learned Hand J.[30] and Cook.[31] Dicey's theory, however, whatever its limitations, had a considerable influence on the development of private international law not only in England but also in the United States for it was taken up by Beale[32] and found its way into the American Restatement.[33] Cavers has pointed out that:[34]

> An accepted theory is a social fact; it frequently possesses a significance that is independent of its validity and disproportionate to the intrinsic importance of the problem to which it is addressed.

It cannot be doubted that for many years the theory of acquired rights was a social fact of considerable importance in the field of private international law.

The editors of the last two editions of Dicey, however, have attempted to overcome the inevitable difficulties associated with the acquired rights theory by amending the wording of the first general principle. In the sixth edition this principle was phrased as follows:[35]

> Any right which has been acquired under the law of any civilised country *which is applicable according to the English rules of the conflict of laws* is recognised and, in general, enforced by English courts, and no right which has not been acquired *in virtue of an English rule of conflict of laws* is enforced or, in general, recognised by English courts.

The words in italics in the above quotation represent those which have been added in the sixth edition to the wording of this principle. This attempt to bolster up Dicey's proposition cannot, however, be regarded as very successful.

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29 Savigny, System des heutigen-romischen Rechts (1849). The quotation is from the second edition of Guthrie's translation (1880) at p. 147.

30 See, in particular, his decision in Guiness v. Miller 291 Fed. 769 (S.D.N.Y.) aff'd 299 Fed. 538 (2d. Cir. 1924), aff'd sub nom. Hicks v. Guiness 269 U.S. 71 (1925).

31 Cook, Logical and Legal Bases of the Conflict of Laws (1949). Cavers, 'The Two "Local Law" Theories,' (1950) 63 Harv. L. Rev. 822, has pointed out that Cook's theory is not identical with that formulated by Learned Hand J. and has suggested that the latter be known as the 'homologous right theory.'

32 Beale, Conflict of Laws (1935).

33 Restatement of the Conflict of Laws (1934).

34 Supra at p. 822.

35 At p. 9.

The answer to the question, Which rights are recognised? as given by the revised version of Dicey's principle is, those rights which have been created under a law which is applicable according to English conflict rules. Who decides, however, which law is applicable according to English conflict rules? Presumably the English courts. The revised version of the first general principle therefore becomes simply a statement that the English courts will recognise any right whose creation is sanctioned by the English courts — a proposition which neither dazzles us with its brilliance nor awes us with its profundity. Savigny had pointed out the circularity of Dicey's original formulation. The editors of the sixth and seventh editions have thus avoided this fatal circularity by the brilliant expedient of replacing it with a tautology. From a *circulus in probando* to a tautology in sixty glorious years: this is real progress.

The last hundred years has therefore produced no startling advance towards an acceptable first general principle of private international law. Cheatham's analysis of the problems involved seems to us one of the more notable contributions towards achieving clarity of thought in this field, and it is unfortunate that, although he wrote his paper fourteen years ago, it seems to have produced little effect so far as English text-books are concerned.

The consistent lack of success in achieving an acceptable first general principle, particularly in so far as it relates to the question which foreign law is to be applied, or, in Dicey's terminology, which foreign created rights are to be recognised, should surely by now have raised the question whether there is such a principle—a single principle governing the question which foreign law is to be applied. For all his positivism—and Dicey insisted that his principles were not derived *a priori* but were generalisations representing the actual view followed by the English courts—Dicey, in this section of his work, retained the atmosphere generated by centuries of an *a priori* approach to the subject. At the end of the nineteenth century, when Dicey was helping to lay the foundations of private international law this search for a single fundamental principle was both understandable and even significant. To find mid-twentieth century scholars still fiddling with the wording of such a principle is fantastic. Editorial piety is doubtless laudable, but one wonders, when a book is re-edited to serve as a contemporary law book and not merely as a classic, whether there is much justification for retaining features which, however significant in their own day, are totally out of keeping with contemporary thought on the subject.

The nineteenth century flavour of the first general principle, as it appears in the seventh edition, is heightened by the retention of the phrase 'law of a civilised country'. The nineteenth century was still under the spell of the concept of Christendom and both public and private international law were envisaged as systems of law operating within Christendom. This limitation broke down, so far as public international law was concerned, with the admission of Turkey into the Community

of Nations in 1856, but the implied limitation of private international law survived rather longer. Westlake, in his second edition wrote:[36]

> There are nations like the Turks or the Chinese whose views and ways are so different from ours that we could not establish at all between them a system of private international law by which effect might as a general rule be given in Christian States to their laws and judgments.

Dicey adhered to this limitation in the scope of the application of private international law in his first edition, although he pointed out:[37]

> The reader should, however, note that the proposition on which I am commenting is simply an affirmative and limited statement; it neither affirms nor denies anything as to the recognition of rights acquired under the laws of countries which are not civilised.

Further, he added an Appendix on "Law Governing Acts done in Uncivilised Countries."[38] However, if, as Dicey's editors admit, 'there does not appear to be a reported case in which English courts have refused to apply foreign law merely on the ground that the foreign country was uncivilised,'[39] and if, as they also state, 'the distinction between "civilised" and "uncivilised" countries does not appear to have any practical importance for purposes of English rules of the conflict of laws'[40] one wonders why the phrase was retained in the wording of the principle. Private international law is not a private club with a Christian membership committe from which uncivilised pagans can be blackballed, nor are the editors scribes whose function is the accurate transmission of a Massoretic text. Solemnly to copy such anachronistic relics of mediaevalism from one edition to the next is an inexcusable evasion of editorial responsibility.

In his second general principle Dicey endeavoured to formulate, in terms of a comprehensive proposition, the exceptions to his first general principle. These 'exceptions' had assumed much greater significance since

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[36] At p. 40. This comment, which does not appear in the first edition, is retained in all the subsequent editions.

[37] At p. 29. At page 639 n. 2 Dicey adds by way of explanation that the rule relating to the validity of marriages did not apply to polygamous marriages, 'This is in reality only one instance of the principle that the rules of (so-called) private international law apply only among Christian states.' The first edition of Dicey, at p. 640, there appeared an exception regarding incestuous marriages. This was deleted in the second and all subsequent editions on the strength of Westlake's comment that no exception was necessary 'because no country with which the communion of Private International Law exists has such marriages.' In the seventh edition of Dicey (at p. 253) the editor writes: 'It may be doubted, however, whether there is much reality in the notion of a charmed circle of "civilised" countries within which the "communion" of private international law exists, and outside which it does not.'

[38] This Appendix, which appeared at page 723 of the first edition, was retained in the first five editions, but in the sixth edition all the accumulated appendices were omitted.

[39] At p. 10.

[40] At pp. 10-11.

the adoption of the vested rights theory than they had had before. The existence of such cases was Story's reason for rejecting the idea that there was any obligation on the courts of one state to apply the laws of another:[41]

> There can be no pretence to say, that any foreign nation has a right to require the full recognition and execution of its own laws in other territories, when those laws are deemed oppressive or injurious to the rights or interests of the inhabitants of the latter, or when their moral character is questionable, or their provisions are impolitic or unjust.

For Dicey, however, cases in which a foreign law, which would normally have been applied, was excluded presented a difficulty which he could only resolve by simply regarding them as exceptions to the principle of the recognition of vested rights. For Story, of course, they were not exceptions at all — they were simply illustrations of the application of one side of the doctrine of comity. Dicey worded his exception thus:[42]

> English courts will not enforce a right otherwise duly acquired under the law of a foreign country:
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> (A) Where the enforcement of such right is inconsistent with any statute of the Imperial Parliament intended to have extra-territorial operation;
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> (B) Where the enforcement of such right is inconsistent with the policy of English law, or with the maintenance of English political institutions;
>
> (C) Where the enforcement of such right involves interference with the authority of a foreign sovereign within the country whereof his is sovereign.

Even granting the exceptional nature of these cases there was still grave difficulty in attempting to classify all the cases within neat little verbal formulae. Despite these difficulties Dicey's tripartite classification was

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41 At pp. 43-44.

42 At pp. 32-33. The wording of these exceptions, as they appeared in the first edition, differed from that which Dicey used in his article in (1891) 7 L.Q.R. at pp. 120-124. They were there set out as follows: 'Exception II.—English Courts will not enforce a right otherwise duly acquired under the law of a foreign country, where the enforcement of such right

(1) is inconsistent with the moral rules upheld by English law;

(2) involves the recognition, as regards transactions taking place in England, of any penal status arising under foreign law, or of any institution or status unknown to the law of England;

(3) is inconsistent with the policy of English law, or with the maintenance of English political institutions.

Exception III.—English Courts will not enforce a right otherwise duly acquired under the law of a foreign country, where the enforcement of such right involves interference with the authority of a foreign sovereign within the state whereof he is sovereign.

Exception IV.—English Courts will not enforce a right otherwise duly acquired under the law of a foreign country, where the enforcement of such right is inconsistent with the provisions of any statute of the Imperial Parliament to have extra-territorial operation.

retained without substantial change in the first five editions. In the sixth edition some modification was attempted and the three categories were re-phrased as follows:[43]

(A) Where the enforcement of such right involves the enforcement of foreign penal or confiscatory legislation or a foreign revenue law;

(B) Where the enforcement of such a right is inconsistent with the policy of English law, or with the moral rules upheld by English law, or with the maintenance of English political and judicial institutions;

(C) Where the enforcement of such a right involves interference with the authority of a foreign State within the limits of its territory.

In the seventh edition the attempt to classify these cases is abandoned and they are all put on the simple basis of public policy. This is a long overdue improvement. The treatment of this problem was one of the weaker aspects of Dicey's analysis and it is encouraging and gratifying to see the editor at long last taking a step in the right direction. However, it should be noted that there remain a number of features in the exposition which appears in the seventh edition which leave a good deal to be desired. In footnotes 34 and 36 on page 13 we learn that the editors apparently regard it as possible to draw a distinction between 'an example of public policy' and 'a fixed rule of law.' They do not, unfortunately, indicate just what is the criterion of distinction.

It is not only possible to distinguish between law and public policy but also apparently between policy and convenience. Thus on page 13 we read:

> It should be borne in mind that all questions of procedure are governed by English domestic law as the *lex fori*, though the reason for this is not policy but convenience.

It does not appear very clearly just what are the implications of this subtle distinction. It appears to be little more than the refinement of an illusory distinction.

Furthermore, the implications of the general principle do not appear to have been thought through very thoroughly. Thus on page 13 we read, that 'It is only on the rarest occasions that a foreign law itself can be regarded as contrary to public policy,' and in footnote 37 two examples of this *rara avis* are given, namely foreign laws licensing prostitution or slavery. The first rests on nothing more substantial than the two hundred year old dictum of Wilmot J. in *Robinson v. Bland*:[44]

> In many countries a contract may be maintained by a courtesan for the price of her prostitution; and one may suppose an action to be brought here, on such a contract which arose in such a country; but that would never be allowed in this country.

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[43] At p. 18.

[44] (1760) 2 Burr. 1077; 1 W.B.1 256; 97 E.R. 717.

In relation to slavery the learned editors rely on a dictum of Parker L.J. in *Regazzoni v. K. C. Sethia Ltd.*[45] In point of fact, the statement of Parker L.J. gives no support to the editorial view on this point. All that his Lordship stated was that, for the purposes of the rule that the English courts will not enforce a contract whose performance involves a breach of the law of a foreign state, it is sufficient to enquire whether the law in question is considered to be contrary to public policy, 'such as laws concerning slavery and the like.' Neither do the cases in which the English courts were concerned with the institution of slavery support the editors' views, and a mere 'See however *Santos v. Illidge*'[46] in the footnote hardly does justice to the position. The English cases on slavery, after an admittedly rather shaky start, consistently adhered to the principle that whilst they would not recognise any of the manifestations of slavery *in England* they would nevertheless recognise foreign laws sanctioning slavery in relation to matters happening elsewhere. It is a little difficult to reconcile the editors' view that slavery represents a case in which a foreign law itself will not be recognised with the view expressed by Lord Stowell in *Le Louis* in which his Lordship said:[47]

> There are nations which adhere to the practice (of slavery) under all the encouragement which their own laws can give it. What is the doctrine of the courts of the law of nations relatively to them? Why, that their practice is to be respected, that their slaves if taken are to be restored to them; and if not taken under innocent mistake, to be restored to them with costs and damages.

The slave, known to posterity as Grace, might well have wished that the editorial view expressed in Dicey's seventh edition did in fact represent English law. Unfortunately for her Lord Stowell took a different view,[48] even if Phillimore did regard this decision as one of the most questionable judgments ever pronounced by Lord Stowell. Captain Willes was another who had good reason to wish that the editors were correct, but, as Sir Carleton Allen has commented:[49]

> The attempt to force upon other countries our English detestation of slavery was checked to the tune of very substantial damages in *Madrazo v. Willes*[50] and might have been similarly checked in *Buron v. Denman*[51] but for the convenient doctrine of Act of State.

What consideration of the slavery cases does suggest is not that slavery is an example where the English courts will treat the foreign law itself as contrary to public policy but an illustration of the fact that public policy as an exclusionary principle is limited in its operation to those cases in which a foreign law produces unpalatable manifestations *in*

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45 [1956] 2 Q.B. 490; [1956] 2 All E.R. 487.
46 (1860) 8 C.B. (N.S.) 861; 141 E.R. 1404.
47 (1817) 2 Dods. 210.
48 The Slave Grace (1827) 2 Hag. Ad. 94.
49 Legal Duties (1931) at p. 307.
50 (1820) 3 B & Ald. 353.
51 (1848) 2 Exch. 167; 154 E.R. 450.

England. There are hints, which are gratifying at least to one reader, that this limitation is beginning to be appreciated.[52]

The last one hundred years have therefore seen but little real advance in this field which remains one of the most unsatisfactory in the whole realm of private international law. Dicey's treatment was not up to the standard which he reached in other parts of his work and he has not been well served by subsequent editors. A few shuffling steps have now been taken in what we would submit is the right direction, but much remains to be done.

Dicey's third and fourth principles are retained without substantial modification. Dicey appears to have been the first writer on private international law to attempt to formulate a consistent theory of jurisdiction and his twin principles of effectiveness and submission have passed into the common currency of most textbooks on the subject. The learned editors of the seventh edition 'are convinced that, though they contain a great deal of truth, they do not contain the whole truth.'[53] This, however, does not say very much more than Dicey himself said in his first edition:[54]

> Their truth cannot be dogmatically laid down . . . the doctrine they involve . . . cannot in the exact form in which it is presented here claim the direct sanction of English judges or of English text writers.

The main difficulties associated with any attempt today to construct a consistent theory of jurisdiction are associated with the problems of matrimonial jurisdiction. In this field there has emerged a new principle, a principle which the editors refer to as 'the principle of reciprocity'[55] by virtue of which the English courts are prepared to concede to foreign courts a jurisdiction equivalent to that which they claim themselves. The best known example of this principle being applied is *Travers v. Holley*[56] but it would appear to be too early yet to estimate how far this principle will be carried.

The chaos which has been generated over the years in relation to the problems of jurisdiction in matrimonial causes is not among the more edifying achievements of the English courts. Because in so many cases problems of matrimonial jurisdiction do not involve corresponding problems of enforcement but simply questions of recognition the courts, guided by some sort of woolly humanitarianism, have extended the basis of jurisdiction in a totally haphazard fashion. One is reminded of the

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[52] See p. 15 nn. 45-48. In Mountbatten v. Mountbatten [1959] 2 W.L.R. 128, Davies J. speaking of the position of the English law courts of foreign divorces obtained by collusion said (at p. 137) 'it is important that one should not allow one's instinctive dislike and disapproval of a transaction of this sort to affect the consideration of the point of law which arises in this case.'

[53] At p. 17.

[54] At pp. 42-43.

[55] At p. 28.

[56] [1953] P. 246.

remark of Scrutton L.J. when, in a totally different context, he remarked:[57] 'The whole history of this particular form of action has been what I may call a history of well meaning sloppiness of thought.' There is, in the matrimonial field, no particular objection to a multiplication of jurisdictional bases provided that consideration is given to the relevant choice of law problems. The English courts, however, have extended jurisdiction in this field without paying attention to the choice of law problems and have therefore created a situation in which the decisions can only be described as 'chaotic and inconsistent.'[58]

Dicey made a valiant effort to construct a consistent theory of jurisdiction, but although his attempt has undoubtedly exercised a considerable influence upon the development of English private international law, in the long run it has proved no more successful than his attempt to construct a consistent theory for the choice of law, and for very much the same reason, namely, that in a field in which so many factors are involved no one theory can be constructed which will cover all possibilities. The editors of the seventh edition remark:[59]

> The considerations of policy which determine when jurisdiction should exist are very different in actions *in personam* from those which apply to actions in divorce, and again different in actions relating to succession. Hence a theory of jurisdiction which attempts to account for its exercise in all types of action is unlikely to have much practical value, for it must either admit a great number of exceptions or anomalies, or else be so general as to be virtually meaningless.

But if this is so, and who can doubt that it is, what is the justification for retaining, in the seventh edition, the remains of Dicey's laudable but nevertheless unsuccessful attempt. To state a proposition in large type and then to state in another place, in small type, that it is not really correct does not conduce to clarity of exposition.

It may also be observed that in the first five editions of Dicey six general principles were enunciated as such.[60] In the sixth edition general principles five and six were deleted and the matter distributed to more appropriate parts of the book.

The deletion of two of Dicey's general principles raises the question whether the retention of the other four can really be justified. Dicey insisted that his principles were merely:[61]

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[57] Holt v. Markham [1923] 1 K.B. 504 at p. 513.

[58] Cheshire, Private International Law 3rd ed. (1947) p. 440 uses this phrase in relation to the decisions regarding nullity. In the fourth and fifth editions this is modified and the decisions are simply described as being 'in an unsatisfactory state' (5th ed. p. 338).

[59] At p. 27.

[60] Dicey's fifth general principle dealt very briefly with the subject of characterisation, which in the sixth and seventh editions is removed into new and separate chapters, whilst the sixth general principle dealt with the incorporation of foreign law in wills and contracts, which in the sixth and seventh editions is removed into the appropriate chapters.

[61] At p. 61.

> generalisations suggested by the decisions of the Courts taken in combination with judicial dicta, and with the doctrines in regard to the conflict of laws propounded by writers such as Story, Westlake, or Savigny, of acknowledged weight and authority. These generalisations, though not laid down, in so many words, by English judges, do, it is submitted, express the grounds on which reported decisions may logically be made to rest; they are far less the premisses from which our judges start, when called upon to determine any question of private international law, than the principles towards the establishment of which the decisions of our Courts gradually tend. They mark not so much the *terminus a quo* as the *terminus ad quem* of judicial legislation.

This, however, is no longer true. In the seventh edition of Dicey the generalisations are retained although it is admitted that they can no longer be regarded as even a *terminus ad quem*. Why therefore retain them? There must be very few today who continue to cling to the cherished ideal that the principles of any subject can be confined within the four walls of any verbal formulae. The cast of mind which led Dicey to attempt to formulate such principles was essentially a nineteenth century attitude towards law, but it is hardly a service to the name or reputation of his book to retain such features in 1958; to acknowledge the significance of ideas enunciated sixty years ago is not to justify their retention in a contemporary law book which lays claim to being 'the premier English treatise on conflict of laws'.[62] General principles doubtless have their place in discussions of legal problems, but that place is not to be set out in large type in the introductory chapter. There are many general principles whose application becomes relevant in private international law — their number is certainly not limited to either four or six — and the place to discuss them is in connection with those problems with which they are concerned. To select a limited number of propositions and set them apart in the introductory chapter is to give a wholly false impression. Two of the principles which Dicey dignified by the adjective 'general' have now been omitted from the Introduction and find their place in more appropriate parts of the work. Surely the survival of the other four, in their present form, can only be a matter of time — it is a consummation devoutly to be wished.

Chapters three, four and five of the seventh edition of Dicey illustrate very markedly one of the most characteristic features of the development of private international law over the last one hundred years, for in these chapters are dealt with the problems of characterisation, the renvoi and the incidental question.

Characterisation had been dealt with by Dicey, in his first edition, in his comment to his fifth general principle. This ran as follows:[63]

> The nature of a right acquired under the law of any civilised country must be determined in accordance with the law under which the right is acquired.

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62 From a review in The Solicitor quoted on the publisher's blurb.

63 At p. 56.

This, it will be noted, is essentially an enunciation of the principle of characterisation according to the *lex causae* as later advocated by Wolff.[64]

Characterisation was first 'discovered' shortly before the publication of Dicey's first edition,[65] but it says much for Dicey's acuity of vision that he was able, apparently independently, to refer to the existence of the problem and to suggest an answer which was at least consistent with his own position as an exponent of a theory of acquired rights. It is strange that Dicey's contribution to this problem has been ignored for so long. Again he appears to have been ill-served by his editors. Even after Lorenzen had introduced the subject to Anglo-American readers in 1920[66] Dicey's editor made no attempt to develop Dicey's original discussion of this problem. The fifth edition contained only two additional paragraphs of about half a page with footnote references to Bartin,[67] Arminjon,[68] Raape[69] and Rabel.[70] As a result Dicey's claim to have played an Alfred Wallace to Kahn and Bartin's Darwin has gone unacknowledged, and it cannot therefore be claimed that Dicey played any decisive part in developing this aspect of private international law.

In the seventh edition the learned editors have, probably wisely, abandoned any attempt to state a single point of view, and as mentioned earlier they have omitted Dicey's fifth general principle. They are content to give a thumb-nail sketch of the nature of the problem and some of the solutions that have been proposed. At times, however, in what is doubtless a laudable attempt to be concise, the editors seem only to achieve an unfortunate dogmatism. Thus on pages 44-45 they suggest, in relation to the question as to what it is that is characterised, that, at least in some cases, it is the foreign rule of law which is characterised. Whatever is the subject matter of characterisation, however, it cannot be a foreign rule of law since something has to be characterised before the appropriate conflict rule can be chosen which will indicate which rule of foreign law is to be applied. Thus they cite the case of a domiciled Frenchman, under twenty-one, who marries a domiciled Englishwoman in England without obtaining the consent of his parents. According to the editors it is the French rule requiring parental consent that requires characterisation as to whether it relates to capacity or form. But why the

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64 Private International Law (1945) at p. 155.

65 The first full exposition of the problem of characterisation was that of Kahn, 'Gesetzeskollisionen: Ein Beitrag zur Lehre des Internationalen Privatrechts' (1891) 30 Jherings Jahrbucher 1. It was, subsequent to the publications of Dicey's first edition, again independently discovered by Bartin 'De l'impossibilite d'arriver a la suppression definitive des conflits de lois' (1897) Clunet 225.

66 Lorenzen, 'The Theory of Qualifications and the Conflict of Laws' (1920) 20 Col. L. Rev. 247. Apart from Dicey's contribution the subject was not specifically discussed in the English literature until Sir Eric Beckett's article 'The Question of Classification ("Qualification") in Private International Law' (1934) 15 B.Y.B.I.L. 46.

67 'Regles de qualification' in Etudes de droit international prive pp. 1-82 (1899).

68 Precis de droit international prive (2nd ed. 1927) i, 128-148.

69 Einfuhrungsgesetz (1931) pp. 16-20.

70 (1931) Z. ausl. Int. P.R. 241-288.

French rule? What about the English rule? Until something is characterised it is not possible to determine whether it is the French rule or the English rule that is relevant. The editorial solution would appear to suffer that endemic complaint of private international law arguments, namely, circularity of reasoning.

In this section of the work also the editors seem to adopt a most uncharacteristic and cavalier attitude to difficult decisions. It achieves but little to dismiss *Ogden v. Ogden*[71] as 'grotesque.'[72] Many decisions, particularly in the matrimonial field, would fall fairly easily within this category. If grotesqueness were really accepted as a ground on which decisions could be dismissed the study of law might well be rather more fascinating that it has tended to become, but we have no reason to think that the learned editors would ever really accept this as a generally operative principle of private international law. We are also assured that *Ogden v. Ogden* is 'discredited'.[73] By whom? That the collection of academic opinion that nestles so comfortably in the footnote has authority to 'discredit' a case appears to be a new principle. If in fact *Ogden v. Ogden* is discredited the news does not seem to have percolated through to the Scottish courts, for in *Bliersbach v. McEwan*[74] Lord Clyde took the view that in England lack of parental consent which was required by a foreign domiciliary law did not nullify a marriage which had been celebrated in England, and His Lordship relied upon *Simonin v. Mallac*[75] and *Ogden v. Ogden* for this proposition. One may sympathise with the editors in their view as to what the law ought to be but in this regard they appear to have let their sights wander from their objective of stating the law as it is.

Turning to the problem of the renvoi it must be noted that Dicey appears to have been among the earliest writers to note the existence of this problem, although the actual term does not appear in the English literature until two years after the appearance of Dicey's first edition.[76] Dicey dealt with renvoi in a section entitled 'Interpretation of Terms' in which the meaning of the term 'law of a country' was discussed and in which it was laid down that the term meant, when applied to England 'the local or territorial law of England' but when applied to a foreign country meant:[77]

> Any law, whether it be the local or territorial law of the country or not, which the Courts of that country apply to the decision of the case to which the Rule refers.

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71 [1908] P. 46.

72 At p. 50, citing Falconbridge, Conflict of Laws (1947) p. 49.

73 At p. 43 n. 10.

74 (1958) The Scotsman 28th Nov. See, on this point, 'Conflict of Laws and Scottish Marriages' (1959) Law Times 73.

75 (1860) 29 L.J. (N.S.) p. 97.

76 Griswold, 'Renvoi Revisited' (1938) 47 Harv. L.R. 1165 n. 1 quotes the first reference to the term renvoi in English as being a note in (1898) 14 L.Q.R. 231.

77 At p. 57.

Dicey was thus enunciating what today is known as the 'foreign court theory' of renvoi. Again we must pay a tribute to the extraordinary achievement of Dicey in thus seeing so clearly some of the fundamental problems of private international law. As with characterisation the editors of the seventh edition, although they preserve Dicey's Rule, are primarily concerned with discussing the accumulated literature on the problem and sketching in the various solutions that have been proposed. In an Australian review we may perhaps be allowed to express disappointment that Evatt J.'s views in *Barcelo v. Electrolytic Zinc Co. of Australasia*[78] were not able to achieve greater prominence than a mere '*cf*' in a footnote.

The treatment given to the problems of characterisation and the renvoi, together with that of the 'incidental question', which appears to have been first introduced to the English speaking world by Breslauer in 1937,[79] is very indicative of the development of private international law over the last hundred years, for one of its characteristic features has been the acquisition of a vast and precocious theoretical superstructure. The extensive footnote references to the continental literature in these chapters almost rival Story's references. All this has taken place over the last hundred years, and in particular over the last fifty, but unfortunately this preoccupation with theory has tended to be at the expense of consideration of more mundane points of substance. Taken as a whole, therefore, the development of the subject has been very lopsided.

We may turn from the rarified atmosphere of theory to the more practical domain of the law of domicile and if we compare the chapter on domicile as it appears in Dicey's seventh edition with that which appeared in his first edition the general impression is that, although the chapter has been re-written, the law has undergone no great change over the last sixty years, in other words in deciding where a person is domiciled one still proceeds very much by guess and by God.

If, instead of comparing the current and the first editions of Dicey, we take the last hundred years as a whole then progress in respect to the law of domicile appears to have been not merely nil but negative. Two of the recommendations of the Lord Chancellor's Private International Law Committee in 1954 were:[80]

(a) the abolition of the doctrine of the revival of the domicile of origin, and

(b) the abolition of the doctrine that a separate married woman could not establish a separate domicile.

A hundred years ago, however, if we consult the first edition of Westlake, we see that neither of these doctrines had yet become established in English law. If the recommendations of the Private International Law Committee are accepted it will thus have taken one hundred years to get

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78 (1932) 48 C.L.R. 391.

79 The Private International Law of Succession (1937).

80 Cmd. 9678.

back to the point from which we set out, an achievement which no English lawyer can view with much pride. Thus regarding the doctrine of the revival of the domicile of origin Westlake, in 1858, wrote:[81]

> Everyone receives at birth domicil of origin, which adheres until another is acquired: and so, throughout life, each successive domicil can only be lost by the acquisition of another one.

Admittedly, as a possible exception to the rule that 'the requisite factum is a complete transit to the new locality,' he later added:[82]

> Except, perhaps, that the domicil of origin is regained in transitu, so that in its favour the only requisite factum is a complete abandonment of the late domicil.

With regard to this exception, however, he argued that, at that time, its chief application had been 'in the prize courts' and he added:[83]

> But I do not find English authority for the exception further than for the purposes of the Court of Admiralty; and Sir John Leach in the judgment already cited (*i.e., Munroe v. Douglas*) expressly denies that, when another domicil is quitted, there is any difference between the resumption of that of origin, and the acquisition of a third.

By the first edition of Foote, however, the doctrine of revival is firmly entrenched[84] as a result, it seems, of *Udny v. Udny*[85] and *King v. Foxwell*,[86] and entrenched it remained and remains.

The position with regard to the domicile of a separated wife remained doubtful for much longer. Westlake, in his first edition wrote:[87] 'When a divorce has been decreed, be it even *a mensa et thoro* only . . . the wife regains the power of changing her domicil.' Foote in his first edition stated that the principle 'may now be regarded as settled'.[88] Dicey, in his first edition, was a little more cautious. Relying on the observations of Lord Kingsdown in *Dolphin v. Robins*[89] he regarded the point as open.[90] Westlake and Foote continued, in their successive editions, to be certain. Dicey remained doubtful until the Judicial Committee of His Majesty's Privy Council in *A.G. for Alberta v. Cook*[91] decided that because Bracton,[92] Littleton,[93] Coke[94] and Blackstone[95] had found occasion to 'round a paragraph'[96] with a scriptural

81 At p. 33.
82 At p. 39.
83 At p. 40.
84 At p. 11.
85 (1869) L.R. 1 Sc. & Div. 441.
86 (1876) 3 Ch. D. 518.
87 At p. 42.
88 At p. 18.
89 (1859) 7 H.L. Cas. 390.
90 At p. 127.
91 [1926] A.C. 444.
92 De Legibus lib. v., c 25, s 10.
93 Tenures s. X, 168, 291.
94 Institutes I, 112a.
95 Commentaries I, 442.
96 The phrase is that used by Pollock & Maitland, History of English Law II, p. 405.

quotation that a wife in Alberta could not divorce her husband in the courts of that Province because her husband had been born in Ontario. Although one might have thought that this decision would have been a strong candidate for membership of the editors' 'grotesque' club this question is not canvassed and we must apparently await legislative exorcism of this strange conceptualist offspring of an unholy alliance between law and scripture.

Turning to consider the treatment accorded to jurisdiction we find that the learned editors of the seventh edition have taken their courage in their hands and departed from Dicey's division of his book into two sections: Jurisdiction and Choice of Law.[97] In its place we have an arrangement which is already familiar as being basically that adopted by Dr. Cheshire. The reason given for this change is that although Dicey's arrangement worked well in relation to actions *in personam* and admiralty actions *in rem*:[98]

> it worked badly for matrimonial causes, bankruptcy, winding up of companies and administration of estates, because it meant that the treatment of subjects which possess an intrinsic unity had to be scattered among four or sometimes five widely separated parts of the book.

This, of course, is the perennial problem of arrangement. Unity has been achieved in relation to some matters, but equally it has been lost in relation to others. To obtain a comprehensive view of the jurisdiction of the English court it is necessary to read through four or five widely separated parts of the book. It is doubtless true, nonetheless, that the arrangement adopted in the seventh edition is more convenient for practitioners, and as Dicey is essentially a practitioner's work the abandonment of Dicey's original arrangement is more than justified. Dicey's original arrangement illustrated both the strength and the weakness of his approach to the subject. It was pre-eminently, as Dr. Morris emphasises in his Preface, a logical approach. At the time when Dicey prepared his first edition the authorities, despite the pioneer work of Story, Westlake and Foote, were still in a relatively chaotic condition and to reduce them to order a strong and logical approach was very necessary. In elaborating and following through such an approach Dicey made a contribution of inestimable value to the development of private international law, and it is no wonder that his work soon established itself in a pre-eminent position. Nevertheless, in certain respects Dicey was obliged to force the authorities into the rather rigid mould he had prepared. On the whole that mould was very sound and did much to guide the subsequent development of the subject. It was, however, constructed at a fairly early stage in the history of private international law and whilst adequate for its day and generation it was proving more

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97 Dr. Morris, in his Preface to the seventh edition (at p. vii) speaks of Dicey's 'Tripartite' arrangement, but in fact both Jurisdiction of the High Court and Jurisdiction of Foreign Courts had been but sections of Part II of Dicey's work which was devoted to 'Jurisdiction.'

98 At p. vii.

and more inadequate to cope with the increasingly complex character of the subject and its abandonment was probably inevitable, although not before it had rendered yeoman service to the cause.

It would be an interesting, though a monumental, undertaking to continue through the chapters of the current edition of Dicey and compare them with those of earlier editions and with the work of Westlake and Foote. All that we have space for here is to note a few final points relating to the structure and mechanics of the seventh edition. Many changes have been introduced, most of them effecting very considerable improvements. Notable features are a greatly improved Table of Cases and a considerably expanded Index, and it is presumbaly to make room for these that the Table of Principles and Rules has been deleted — it will never be missed. The structure of the book suffers, nonetheless, from several grave defects. As edition has succeeded edition the footnotes have gradually assumed quite alarming proportions. If we consider chapter 25 we find that in the ninety-six pages of this chapter there are 557 footnotes, many of which are so extensive that, taking the chapter as a whole, the footnotes occupy a little over one quarter of the total type area. A particularly grotesque example of 'cititis' is footnote 46 which appears on page 796 and which cites over fifty cases in support of Rule 154. Doubtless there are considerable advantages in having available an exhaustive list of all the authorities on a given point, but this aim is achieved so much better by publications such as the *English and Empire Digest* that it seems rather unnecessary to repeat the work that has already been done so efficiently. Footnote 40 on page 724, in addition to citing some twenty cases, adds nearly twenty references to the literature on the subject. Again bibliographies are very useful things, but the *Index to Legal Periodicals* is available and is even more exhaustive. With such admirable reference works available it seems a quite unnecessary duplication of labour to produce such ponderous footnotes which merely increase the girth of the book without adding very much to its value — it must have been touch and go whether page 130 would have contained any text at all.

Another unfortunate feature of the post-war editions of Dicey is the retention of the Rule and Commentary method of exposition. In the Preface to the sixth edition the general editor stated that the method 'is not one which all of us would have adopted if we had been writing our own book on the Conflict of Laws'[99] (it is to be hoped that it is a method that none of them would have adopted) but the method was retained on the ground that 'we are satisfied that to have abandoned it would have been to go beyond our province as editors.' This is surely an extraordinary attitude. It is to make the bottle more important than the wine. To change the substance and the arrangement but to retain the method of actual exposition when to retain it means retaining a nineteenth century outlook on the subject seems quite inexplicable. Not only does the method necessitate fiddling with verbal propositions to try

[99] At p. xiv.

and make them harmonise with conflicting decisions but it makes for an incredibly cumbersome text. One must cope with rules, comment and footnotes. The proposition contained in the rule may well be contradicted in small type some pages later. Thus on page 790 we read in a footnote to a comment on an exception to Rule 153, in which certain aspects of the rule are criticised, that 'it has been felt not to be convenient to alter the wording of a Rule which has been judicially approved on so many occasions.' Just what is one to make of this? Does it mean that judicial approval of the rule is to be taken as dismissing the validity of the criticisms (in which case why emphasise the criticisms if they are not valid) or that the criticisms are such that the previous interpretation of the decisions concerned may be erroneous (in which case why not alter the rule) or what? This sort of thing is hardly conducive of clarity.

The utter uselessness of the Rule and Comment method of exposition is well illustrated by the chapter on domicile. Rule 2, as it appears in the seventh edition reads as follows:[1]

(1) A person is, in general, domiciled in the country in which he is considered by English law to have his permanent home.

(2) A person may sometimes be domiciled in a country although he does not have his home in it.

In other words a person may or may not be domiciled in the country in which he has his permanent home, which gets us a long way forward. Some of the alleged rules read more like the instructions of a do-it-yourself-kit than rules of law. Thus Rule 5 reads:[2]

In determining a person's domicile, regard must be had to

(1) rules of law

(2) the facts of the case

(3) the following presumptions . . .

To be solemnly told in a standard textbook that in determining a question one must pay regard to the law and the facts of the case seems to be rather gratuitous. The mere fact that Dicey indulged in such indiscretions is really no justification for retaining them today. Surely twentieth century scholarship can rise to something a little more edifying.

Even if the Rule and Comment method is retained is it really necessary to retain the 'Illustrations'? These potted head-notes contribute absolutely nothing to the value of the book and merely occupy a quite extraordinary amount of space. They presumably stem from Macauley's suggestion that illustrations might be appended to the various Indian Codes that were drawn up in the nineteenth century. This general model was adopted by several writers, who had acted as draftsmen for these Codes,[3]

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[1] At p. 85.

[2] At p. 90.

[3] E.g., Stephen's Digest of the Law of Evidence. His example was followed by Pollock, The Law of Partnership.

in their subsequent publications, but whatever the merits of Macauley's proposal the use of such thumbnail sketches in a modern law book is quite out of place.

In the current edition of Dicey the matter on a single page is distributed over four different sections each using a different fount of type. The result is to make it one of the most cumbersome textbooks in the catalogue. Virginia Woolf once described one of her books as 'that rice-pudding of a book,' and it is a description which fits Dicey admirably. A longer period of gestation in the editorial ovens might produce a more digestible dish — indeed it is perhaps significant that the title page of the last two editions have dropped the term 'Digest' for the one thing Dicey is not, is digestible.

The doctrine of precedent does not yet, I think, apply to editors, and if in the next edition the learned editors take the same liberties with the format as they took with the arrangement in this edition the result would be very much more readable: Dicey would become a twentieth century text book instead of retaining its character as a fugitive from the nineteenth century.

These are matters which will doubtless affect the contribution of Dicey, as a literary institution, to the future development of private international law. It is, however, with the contribution of Dicey the man that we wish to end. Taking the last hundred years as a whole, it would seem no exaggeration to say that Dicey has had a greater influence on the development of English private international law than any other individual. His influence, however, was exercised primarily through the early editions. His reputation has carried subsequent editions, and although, in the current edition there are signs that some concessions are being made to contemporary needs much more will have to be done if Dicey, as an institution, is to take its place again as a truly contemporary work on English private international law — it is in grave danger of becoming a mere repository of other people's ideas and of case citations.

Plucknett has observed that 'the state of our textbooks is . . . an accurate index of the intellectual state of our law'[4] This was certainly true of the first edition of Dicey, but if we consider the state of the law today we must surely admit that a book such as that of Dr. Cheshire is a much more accurate index of its intellectual state than is the current edition of Dicey. Dicey's personal contribution to the development of private international law remains unaffected by the fate of his book in the hands of its subsequent editors, but if the book is to be preserved as a contemporary textbook it is to be hoped that it will be preserved in its original character as a formative influence on the development of English private international law.

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[4] Early English Legal Literature (1958) at p. 20.