input the less he is liable to be misled by points whether validly or questionably made by his author. The reader who comes light-loaded to Sawer's book should go away from it not only more heavily laden but also stimulated to study some of the federations in full context.

Whether he will go away strengthened in his federalist faith is another matter, but he will at least have had that faith raked over in a very salutary way. Sawer's own conclusion bears thinking about:

> [I]f, however, an attempt is made to evaluate federalism in the range of constitutional systems, I would say that it is a prudential system best suited to the relatively stable, satisfied societies of squares such as abound in Canada, Australia, West Germany and Austria, and probably still constitute the majority in the U.S.A. It is not a swinging system. People are not likely to go to the stake, or the barricades, to defend federalism as such. They may undertake heroic actions for the sake of some value which federalism happens at the minute to favour, and may then even inscribe federalism on their banner—'Liberty and Federalism'—'Equality and Federalism'—but never just 'Federalism'. My own preference would be for a Bill of Rights state,[2] but I would sooner live in a moderately incompetent affluent federalism than in any centralised system with no entrenched Bill of Rights at all (pages 186-187).

Precision in dating is not always important and Sawer is sometimes given to approximation. The buyer of this book may care to note that the Social Security amendment to the Australian Constitution was carried in 1946 (page 43); Western Australians voted for secession in 1933 (page 88); W. M. Hughes' attempt at "court-stacking" surely occurred in 1913 (page 157); the Labour appointment of Labour barristers to the Court occurred in 1930 (page 157); F. D. Roosevelt's "court-stacking" attempt occurred in 1937 (page 157). As Sawer says on page 157, the big change in majority U.S. Supreme Court opinion on federal powers came in 1937, but on page 79 he seems to be settling for 1935 and on page 165 for 1936. Though approximate dating may not be helpful for younger readers, this reviewer would count it venial in anyone as stimulating as Geoffrey Sawer.

L. F. CRISP*

*Conflict of Laws in Australia*, by P. E. NYGH, LL.M. (Syd.), S.J.D. (Mich.), Senior Lecturer in Law,† University of Sydney; assisted by E. I. SYKES, B.A. (Qld.), LL.D. (Melb.), Professor of Public Law, University of Melbourne, and D. J. MACDOUGALL, LL.B. (Melb.), J.D. (Chic.), Professor of Law, University of British Columbia. (Butterworths, 1968), pp. i-xlii, 1-765. $14.50.

---

[2] That is to say an evolving federal state in which . . . geographically guaranteed autonomy [is] replaced, gradually, by guarantees appropriate to a plural society in which the entrenched protection of an area of individual autonomy is the basis for denying omnipotence to a centrally organized Leviathan. (pages 185-186.)

* M.A. (Oxon. and Adel.); Professor of Political Science, School of General Studies, Australian National University.

† Now Associate Professor of Law, University of Sydney.

For a teacher of the conflict of laws it is a pleasure to review this first Australian textbook on the subject. Although the work of Professor Zelman Cowen in particular topics, and of Professor Sykes in the preparation of his casebook, has been of assistance in finding the Australian law on the subject, too often both the teacher and the practitioner, and therefore the courts, must rely on the standard English texts and thus give too little weight to the essentially Australian aspects of the subject. But this work is no mere compilation of the relevant Australian statutory and common law rules of the conflict of laws, as it presents the whole subject in a lucid and easily readable form, and can be warmly recommended to both the academic and practising lawyer, and will no doubt become the standard student textbook.

The diversity of authorship is an advantage in a book of this sort. Professor Sykes has brought his particular skills to bear on one of the most intractable topics in the conflict of laws—that of property rights—and while his chapters require a more careful reading, he has provided a new insight, and suggested new answers, in this area. Professor MacDougall's contribution is much smaller. He prepared Chapter 1, on the nature and scope of the subject, and assisted Professor Nygh with Chapter 14 on Negotiable Instruments. The only detectable difference between Professor MacDougall's and Professor Nygh's work is that the former (page 48) correctly states that *Koop v. Bebb*[1] was an action brought on behalf of two infant children in respect of their father's death, while the latter (page 91 and again page 370) incorrectly states that the action was brought by the deceased's widow.

The book proceeds in logical course through the subject. The first twelve chapters are, broadly speaking, introductory dealing, *inter alia*, with the concept of domicil, the jurisdiction of Australian courts, the recognition of foreign judgments and proof of foreign law. From there the substantive rules of the conflict of laws are dealt with, including contracts and associated topics, torts, family law (marriage, divorce, legitimacy and adoption) and property rights, while the concluding four chapters cover the problems raised by federation, such as full faith and credit and choice of law in federal jurisdiction. However, it would appear that Professor Nygh has had some difficulty in deciding the order in which to deal with some topics—the opening words of Chapter 4 are that "[T]he first question which an Australian court must consider in a case involving foreign elements is whether the parties before the court have the standing to sue or be sued", but Chapter 5 also starts with "[T]he first question which must arise in any case involving foreign elements is whether the court has jurisdiction to hear and determine the matter".

Although the order in which the various parts of the subject are dealt with is to some extent a matter of personal preference, one must question the advisability of trying to fit the rules concerning jurisdiction over foreign land into the chapter on the appropriate forum, which at least

[1] (1951) 84 C.L.R. 629.

starts with an argument for the adoption in Australia of a doctrine of *forum non conveniens.* The speeches of their Lordships in *British South Africa Company v. Companhia De Moçambique,*[2] which laid down the rule concerning the common law courts' jurisdiction over foreign land, are scarcely consistent with such a doctrine, and the exception in equity to the common law rule, stemming from cases such as *Penn v. Lord Baltimore*[3] and *Lord Cranstown v. Johnston*[4] may be regarded as an insular arrogation by English courts of a jurisdiction which they felt foreign courts were unfit to take. In view of *Duke v. Andler,*[5] in which the Supreme Court of Canada refused to give full effect to the order of a Californian court which had taken jurisdiction on the basis of *Penn v. Lord Baltimore,* it would have been preferable to see a stronger criticism of this equitable exception, rather than the attempt to deal with it as part of a doctrine of *forum non conveniens.*

In its attitude the book steers a middle course. It is not the complete compendium of every case touching the subject, which is the hallmark of Dicey and Morris, *The Conflict of Laws,* although it is difficult to find any serious omissions. Nevertheless there are some cases which might have been included, or dealt with more fully. Is not *Haque v. Haque* (*No.* 1)[6] a better illustration, in an Australian textbook, of the retentiveness of the domicil of origin than *Winans v. Attorney-General*[7] and *Ramsay v. Liverpool Royal Infirmary*[8] (page 72) ? *Harrison v. Harrison*[9] is some authority for the proposition put in the first sentences dealing with an infant's domicil (page 76); the domicil of an infant of divorced parents is mentioned in *Hannon v. Eisler,*[10] *Duncan v. Duncan*[11] and *In re B* (*S.*) (*An Infant*)[12] as well as in *Shanks v. Shanks,*[13] which is cited at page 76, note 70. A further example of an expert witness on foreign law (dealt with at page 262) may be found in *Rossano v. Manufacturers' Life Insurance Co.*[14] *In re Emery's Investments Trusts*[15] is surely a better example of the recognition given to foreign revenue laws than *Regazzoni v. K. C. Sethia* (*1944*) *Ltd.*[16] (page 274, note 37); a further example of the refusal to enforce foreign revenue laws (also considered on page 274) is *Metal Industries* (*Salvage*) *Ltd. v. Owners of the S.T.*

---

[2] [1893] A.C. 602.
[3] (1750) 1 Ves. Sen. 444; 27 E.R. 1132.
[4] (1796) 3 Ves. 170; 30 E.R. 952.
[5] [1932] 4 D.L.R. 529.
[6] (1962) 108 C.L.R. 230.
[7] [1904] A.C. 287.
[8] [1930] A.C. 588.
[9] [1953] 1 W.L.R. 865.
[10] [1955] 1 D.L.R. 183.
[11] [1963] N.Z.L.R. 510.
[12] [1968] Ch. 204.
[13] 1965 S.L.T. 330.
[14] [1963] 2 Q.B. 352, 373.
[15] [1959] Ch. 410.
[16] [1958] A.C. 301.

'*Harle*'.[17] *Babcock v. Jackson*,[18] which is discussed on pages 350-352 and 362-363, has received further judicial support in America from *Gore v. Northeast Airlines Inc.*,[19] a decision of the United States Court of Appeals, and *Long v. Pan American World Airways Inc.*[20] The standing of a polygamous marriage in Australia dealt with on pages 384-387, is also adverted to in *Bamgbose v. Daniel*,[21] in relation to succession by the children of such a marriage, and *R. v. Sarwan Singh*[22] in connection with the commission of bigamy by a polygamist. The propositions on page 438 concerning the recognition of foreign divorce decrees despite a failure to serve notice of the proceedings on the respondent is also supported by *Brown v. Brown*,[23] and finally, the discussion of *Re MacDonald*[24] on pages 490-491 dismisses too briefly the difficult question of whether an Australian court should recognize a foreign status of legitimacy or illegitimacy, or whether it need recognize only the incidents of such a status, and if so whether it need confine itself only to the particular incidents in question in the principal issue.

However, it must be stressed that these omissions are of a minor nature only, and that in general, while not emulating Dicey and Morris, every relevant authority is fully discussed. And it must also be stressed that the discussion of authority is complete in every respect, and does not approach any topic with the pungent, and sometimes myopic, criticism found in Cheshire's *Private International Law*. Indeed, symptomatic of the middle course which the book steers is the discussion of the choice of law governing the essential validity of marriage; Professor Nygh concludes by saying that:

> Though it is not claimed that the theory is perfect, the 'dual domicil' theory [of Dicey] is more in accord with present needs than the theory espoused by Dr Cheshire. (page 410).

Rather than side with either protagonist, Professor Nygh suggests yet another solution to this particular problem, for he considers that it is absurd to insist—

> upon a single choice of law rule without inquiring into the policy underlying the substantive rule of law which allegedly should be applied (page 409).

This quest for the policy behind any substantive rule of law is a theme which runs throughout the book. In Chapter 12, dealing with the exclusion of foreign laws, an argument is put forward, at page 272, that the court should first determine the policy objectives of the legislature before deciding whether to apply a statute of the forum. Again,

---

[17] 1962 S.L.T. 114.
[18] (1963) 191 N.E. 2d 279.
[19] (1967) 373 F. 2d 171; [1967] 1 Lloyd's Rep. 433.
[20] (1965) 266 N.Y.S. 2d 513.
[21] [1955] A.C. 107.
[22] [1962] 3 All E.R. 612.
[23] [1963] N.S.W.R. 1371.
[24] (1964) 44 D.L.R. (2d) 208.

in Chapter 16, on torts, Professor Nygh criticizes the traditional approach of *Phillips v. Eyre*[25] and suggests that "The analysis used in *Babcock v. Jackson*[26] suits the spirit of the present age" (page 351). This analysis was of "the policies underlying the conflicting laws [which have been applied]" (page 350). This policy-orientated approach to the conflict of laws is based to a large extent on the modern American view, expounded in Cavers, *The Choice-of-Law Process*, which is cited extensively by Professor Nygh, and in Ehrenzweig, *A Treatise on the Conflict of Laws*. While Professor Nygh performs an invaluable function in bringing the ideas in these works to the attention of Australian lawyers, it is suggested that the policy underlying a substantive legal rule is not always easy to find, and the task may be more difficult in this country than in America. Indeed Professor Nygh himself, in a recent comment on proposed Canadian legislative reform of the rules of tort in the conflict of laws[27], points out that:

> the 'purpose and policy' of a law would vary in the eye of each individual judicial beholder

and that the search for such a policy

> would impose on Australian. . . judges a function for which they have neither aptitude nor inclination.

Admittedly, the comment deals with proposed legislation under which the court would be directed to consider chiefly the purpose and policy of each of the rules of local law that is proposed to be applied, but if such legislation would, as Professor Nygh argues, cause confusion and anarchy, it is difficult to see how any self-imposed judicial quest for legislative policy would be better.

Although Professor Nygh looks forward to suggested reforms of the conflict of laws, a textbook on this subject can still be overtaken by events, and the work under review is no exception. The law is stated as at 1 January 1968, and one might therefore have expected the authors to refer to the eighth edition of Dicey and Morris, *The Conflict of Laws*, which was available to this reviewer in October 1967, and not to the seventh edition; one could not, however, expect anything more than the brief reference which is included to the English Court of Appeal's decision in *Boys v. Chaplin*.[28] It is hoped that the next edition of this work will refer to the apparently complete recantation by Lord Denning M.R. in *Tzortzis v. Monark Line A/B*,[29] of his statement in *Boissevain v. Weil*[30] that parties are not free to choose their own proper law of a contract, and to the decision of Fox J. in *Norman v. Norman (No. 2)*[31] which is contrary to the submission of Professor Nygh on page 442 that

[25] (1870) L.R. 6 Q.B. 1.
[26] *Supra* n. 18.
[27] (1968) 42 Australian Law Journal 313, 314.
[28] [1968] 2 Q.B. 1.
[29] [1968] 1 W.L.R. 406, 411.
[30] [1949] 1 K.B. 482, 491.
[31] (1968) 12 F.L.R. 39.

> in Australia fraud. . . is not a ground upon which recognition [of a foreign divorce decree] can be refused to a decree falling within s. 95 (2) to (4) [of the Matrimonial Causes Act 1959-1966 (Cth)] unless it renders the decree void under the law of the place where it was made.

It is no doubt incumbent on every reviewer to note any misprints, even if only to show that he has read the book. In a work of such high standard, it is surprising to find a relatively large number of such errors; some of those most likely to cause confusion to the reader are on page page 159, line 11, "Court of Appeal" should be "House of Lords"; on page 164, line 19, "international jurisdiction" should be "international recognition"; on page 224, line 24, the neologism "illegitimation" appears; on page 230, lines 3 and 4 should refer to "a woman who died domiciled in California according to New South Wales concepts, but in New South Wales by Californian concepts"; on page 235, line 19, "conception" should be "exception"; page 316, note 124 refers to "Richard Dixon, JJ.", and on page 370, line 2, "*lex loci*" should be "*lex fori*".

Lest it be thought that this review has dwelt only on the errors and omissions of this work, it must be made clear that this is a most valuable book, which gives a clear, concise, accurate and readable statement of the conflict of laws in this country. It is hoped that its publication will assist both the courts and the legislatures to continue to develop particularly Australian conflicts rules and thus break free from the English approach to the subject.

J. L. R. DAVIS*

* B.A., LL.B. (N.Z.) LL.B., Diploma in Comparative Legal Studies (Cantab.), Barrister and Solicitor (N.Z. and Vic.). Senior Lecturer in Law, School of General Studies, Australian National University.