

In fine, short of resuscitating Pollock on Torts along the lines of Salmond, no useful purpose can be seen in continuing the present editorial policy of periodically launching further editions of this work. Nor is it believed that the legal profession would suffer any irreparable loss by an abandonment of these reprints which are offered at a price that is no longer commensurate with their intrinsic usefulness.

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Cases on Private International Law: by J. H. C. Morris, D.C.L., Fellow and Tutor of Magdalen College, Oxford, All Souls Lecturer in Private International Law, etc.; pp. i-xxviii, 1-417. Oxford University Press, 2 ed. 1951. (Price in Australia £2/16/0.)

Dr. Morris' second edition has appeared at a time when quickening interest is being shown in Australia in the subject of case books in general. In part this is due to the growth of the numbers of students attending law schools, with resulting strain on library facilities. But signs are not wanting that a more fundamental reason is the existence of a questioning attitude to traditional methods of legal instruction. Nor is this attitude unconnected with the development of closer intellectual contacts between Australian and American legal scholars in the past few years. The visits to Australia of Dean Griswold of the Harvard Law School and Professor Gregory of the University of Virginia, both leading exponents of the case method of instruction, have emphasised the Australian interest in the subject.

There is, of course, nothing novel and nothing distinctly American in the notion of a case book. Old established English case books such as *Kenny on Crimes* have passed through many editions. But the character of a case book depends very largely on the author's view of the ends which it should serve. One hears from time to time of the "all purpose case book", but an examination of existing case books suggests that it is practically impossible for a case book to be produced which can be utilised equally well for all methods of instruction. Insofar as it is possible to generalise, the typical English development has been the production of case books which will serve as companions to particular text books. Well known examples are *Kenny's Cases on Crimes*, *Winfield's Cases on Torts*, and Professor Graveson's *Cases on the Conflict of Laws*.¹ C. H. S. Fifoot's *History and Sources of the Common Law*² follows the general pattern except that the text is shortened and made somewhat more tentative, while the cases are incorporated with the text in the one volume. By contrast the typical American case book of the present century is designed largely to replace the text book. The author's exposition is confined to introductions with interstitial comments usually in the shape of footnotes. The physical volume of case material is much greater than in English case books, since the function of the cases is to enable the student to spell out the legal principles rather than merely to illustrate propositions which he has studied from other sources.

Dr. Morris' book is in the English tradition. "This book", we are told in the Preface³, "is intended primarily as a companion volume to Dr. Cheshire's *Private International Law*".⁴ The student is not, therefore, intended to approach each case as a mystery to be investigated and solved. He will have studied the

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¹ (1949).

² (1949).

³ At vii.

⁴ Now in its fourth edition (1952).

principles which it is thought to illustrate already in Dr. Cheshire's book. And if he has not followed this order of procedure, any mystery which might then arise is dissipated in advance by Dr. Morris' succinct statement of the principle in the case at its commencement. Further, should the student become confused in the course of reading a number of cases on a particular topic, Dr. Morris again comes to his assistance with a lucid summarising note at the end of the chapter.

It will be gathered that there is nothing of the Socratic in Dr. Morris' approach to the instruction of students by means of his case book. Hence some opportunities to use case study as a method for inducing judgments and assessments are lost. On the other hand, Dr. Morris takes the opportunity of forcing the student to exercise his power of independent judgment in other ways. Students who use the book as a companion to Cheshire will find that there is fundamental disagreement between Dr. Cheshire and Dr. Morris on fundamental points. For instance, Cheshire's view that capacity to marry is governed by the law of the intended matrimonial home, is castigated in no measured terms⁵, and sufficient critical material is compressed into Dr. Morris' note on this subject to force the reader to do some hard thinking. The same may be said of the dispute between Cheshire and Morris as to the law governing legitimacy.⁶ Dr. Morris is here a supporter of the traditional view that birth in lawful wedlock according to English conflicts rules relating to marriage is the test, Dr. Cheshire a supporter of the view that legitimacy depends on the domicile of origin of the child. This, according to Dr. Morris, involves a "particularly vicious form of circular argument".⁷ To this charge Cheshire answers, rather quaintly, that it is the father's domicile at the time of birth which is important, for a child's legitimacy is a matter between him and his father.⁸ The reviewer admits that he is not impressed with this answer and feels that Dr. Morris has the weight of authority on his side. But the important point for the present purpose is that in these and other instances Dr. Morris' treatment is calculated to stimulate the reader's critical interest in divergent views as to results of the cases.

Within the limits imposed by the purpose for which it was written, Dr. Morris' case book is therefore a good book. The cases are well selected and the expansion of the number of cases included as compared with the first edition is welcome. It is felt, however, that more cases might have been included on the general subject of classification, having regard to the manner in which this problem permeates the field of Private International Law. The extent of this permeation is demonstrated by the frequency with which such problems are thrown up by Dr. Morris' discussion of particular topics, and while elaboration of this theme would unduly prolong this review, the following example is selected as of particular interest.

In rejecting Dr. Cheshire's view that the law governing capacity to marry is the law of the intended matrimonial home, Dr. Morris adduces the following argument⁹: "If bigamy cases fall under the head of capacity to marry (and there is high authority that they do, see *Shaw v. Gould*¹⁰ and *De Reneville v. De Reneville*)¹¹, then we have a decision of the House of Lords which rejects" (Cheshire's view) "in the clearest terms. In *Shaw v. Gould* the husband and wife were domiciled in England; the wife obtained a divorce in Scotland and went through a marriage with a domiciled Scotsman; it was held that the second marriage was void because the divorce was void in England. Yet (on Cheshire's view) the marriage should have been valid because Scotland was the intended matrimonial home."

This argument is not altogether novel. It was also put forward by Mr.

⁵ At 80-81.

⁶ At 171-74.

⁷ At 172.

⁸ 4 ed. at 386.

⁹ At 80-81.

¹⁰ (1868) L.R. 3 H.L. 55.

¹¹ (1948) P. 100.

Rupert Cross in Dicey's *Conflict of Laws*.¹² But neither Mr. Cross nor Dr. Morris appears to have explored the large implications of the argument for the relations of the various branches of Private International Law to one another. Yet, if it is correct, it raises some startling issues as to the delineation of the appropriate sphere for the rules relating to recognition of divorces in relation to the rules governing capacity to marry. The following example may serve to illustrate these implications: H (1) marries W in New South Wales. W later goes to Nevada purely for the purpose of obtaining a decree of dissolution, obtains the decree and returns to New South Wales. Much later H (1) goes to New York and becomes domiciled there. W then marries H (2) in New South Wales.

If one classifies the problem of W's marital status after the second marriage as depending on the validity of the Nevada divorce, it is clearly void in the eyes of our Courts, because Nevada was never the domicile of the parties and at the time that it was pronounced the decree was not recognised by the courts of the domicile. On the other hand, if one accepts Dr. Morris' view, and asks whether W had capacity to marry by the law of her domicile, the marriage is valid. For her domicile immediately prior to the second marriage was New York and the New York courts would recognise the Nevada decree and hold that her status was that of a single woman immediately prior to the second marriage. H (1), in the eye of the New South Wales Courts, would now no longer be married to W, having in effect been divorced by his wife's re-marriage.

While the second conclusion, particularly in regard to the husband, seems sufficiently startling, the reasoning by which it is reached is equally as cogent as the reasoning by which the first conclusion is reached. The question is which premises are correct, and this depends on what is the proper classification of the problem, a question to which the authorities give no decided answer.¹³ This difficulty is just as fundamental, and of the same character, as the problem concerning legitimacy dealt with by Dr. Morris — the problem whether legitimacy is a question of the status of the child or the marriage of the parents.¹⁴ The only difference is that the latter is widely recognised as a fundamental problem while the former has been raised only by way of an incidental argument in favour of a point of view on another question — whether the intended matrimonial domicile or the domicile of each party governs capacity to marry. Its use in this context may well be regarded as an attempt to explain the obscure by reference to the more obscure.

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BOOKS RECEIVED

Legal Controls of International Conflict, A Treatise on the Dynamics of Disputes and War-Law, by Julius Stone, LL.M. (Leeds), S.J.D. (Harvard), D.C.L. (Oxford), Sydney, Maitland Publications Pty. Ltd., 149 Castlereagh St., Sydney, Ivi + 851 pp., £A5/5/0. (Simultaneous American and English editions by Messrs. Rinehart & Co., Inc., New York, and Stevens & Sons, Ltd., London, respectively, are announced on the title page.)

This important new work by the Challis Professor of International Law and Jurisprudence appeared early in January, 1954, too late for review in the present number. Pending review the Editorial Committee is indebted to the Publisher for permission to extract from the Preface (pp. vii-xi) the Author's account of the scope and purpose of the volume.

... It is its main purpose to integrate with the literary systematics and social statics of international law, a coherent examination of the unstable dynamics of its operation in a world in travail. To this end, I have sought to display the movements of growth, change, and disruption arising in the actual economic, political, and technological

¹² 6 ed. (1948) at 263.

¹³ This type of situation is not, of course, confined to Private International Law (see J. Stone, *The Province and Function of Law* (1946) at 176-78).

¹⁴ At 171-74.

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contexts; and to display these as they bear down even on the details of each main branch of the traditional law. In this aspiration many have, of course, gone before me. If they have failed, as I believe they have, to narrow the chasm between the law on paper and the conduct of States, it is not for lack of skills and learning greater than any that I myself can claim. It is rather, I believe, that their channels of approach proved incapable of sustaining the influence they sought to bring. These channels were mainly two: first, the infiltration of the inert system of traditional exposition with a mere leavening of dynamic elements; second, the monographic attack on its main dogmas and postulates. . . .

The main plan of the present work is built upon awareness of these frustrations. It seeks to approach the full range of the traditional materials in a manner which surveys concurrently both the materials *of the system*, and the materials *which challenge the system*. Most of the twenty-six Chapters of systematic exposition are accompanied by critical Discourses (thirty-four in all) examining the forces which threaten the system with change and breakdown. While Chapters and Discourses stand on their own respective feet, their expository and critical materials are inter-related and cross-referenced.

. . . In general, the Chapters and Discourses, taken together and as a whole, may present for all who are concerned with the practice or teaching of international law, a comprehensive treatise on the law of disputes, war, and neutrality, in its present phase of dynamic movement. Further, in relation to college and law school teaching of international law and relations, the work may prove useful at each of three levels. First, on the more elementary level, the Chapters alone may be treated as a text book; so treated they provide a survey of this part of international law *as a system*, with adequate inter-cellular references to its contemporary and changing aspects; and they can be used along with any of the standard text books on the international law of peace. Second, for more advanced courses, the Chapters may be treated as a general framework against which the problems raised in the Discourses may be projected for special class-room attention. Third, though this is only for the most advanced seminar groups, the Discourses themselves may be taken as a main teaching instrument, since the problems there examined are, it is believed, very central to the present crisis of international law. Important new insights may be obtained by working thus inwards from the Discourses to the Chapters, from the dynamic contemporary problems (as it were) to the static system of traditional law.

It would be misleading to imply, however, that this work is designed only for University courses. On the contrary, care has been taken to equip it with footnote documentation of cases, treaties, statutes, practice, and doctrinal writing, so that it may serve as a useful starting-point for research in practical problems which arise in the offices of legal advisers, government departments, civil and military and consular and diplomatic missions. Inevitably, also, the attempt to write a contemporary treatise has involved discussion, often very extended, of matters of interest to the general reader, for example, the Great Power veto, the nature of the hostilities in Korea, the standing of the North Atlantic Treaty Organisation, the prospects of the United Nations Security system, the "cold war" and ideological warfare, war crimes and the problem of international aggression, the human rights movement, and many other current topics. Although I have rarely hastened to a final judgment on such matters, I have always tried to present the final issues as I see them. . . .

SOME OTHER RECENT BOOKS

Now available in Australia

- Allen, *The Queen's Peace* (The Hamlyn Lectures. Fifth Series.) (17/9).
 Amery, *Thoughts on the Constitution*, 2 ed. (17/6).
 Boulton, *Conduct and Etiquette at the Bar*, 1953 (15/6)*.
 Cheng, *General Principles of Law as applied by International Courts and Tribunals* (Library of World Affairs) (£5/17/6).
 Cross and Jones, *Cases on Criminal Law*, 2 ed., 1953 (£1/18/0).
 Cross and Jones, *Introduction to Criminal Law*, 3 ed., 1953 (£2/1/0)*.
 Friedman, *Expropriation in International Law* (Library of World Affairs) (£2/9/6).
 Goodhart, *English Law and the Moral Law* (The Hamlyn Lectures. Fourth Series.) (17/9).
 Hammond and Davidson, *Landlord and Tenant in N.S.W.*, 4 ed., 1953 (£6/11/0). (Supplements for Victoria, Queensland, South Australia, and Tasmania will be supplied at no extra cost.)*
 Hayward and Wright, *Office of Magistrate*, 9 ed., 1953 (£1/9/0)*.
 Holland, *Frederic William Maitland, 1850-1906: A Memorial Address* (Selden Society Annual Lecture) (6/9).
 Jackson, *The Machinery of Justice in England*, 2 ed. (£2/9/9)*.
Manual of Military Law, Part 2, 8 ed., 1951, Loose-leaf (including Binder) (6/9).
 Ratanlal Ranchhoddass and Thakore, *The English and Indian Law of Torts*, 16 ed. (£1/3/3).
 Rayden, *Practice and Law in the Divorce Division*, 6 ed., 1953 (£6/1/6)*.
 Stephen, *Commentaries on the Laws of England*, 21 ed. with 1953 Supplement (£9/17/6)*.
 Toose and Helsham, *Company Meetings in Australia*, 1953 (£1/10/0)*.
 Underhill, *Law of Trusts and Trustees*, 10 ed. with 1953 Supplement (£5/12/6)*.
 Williams, *Title*, with 1953 Supplement (£5/12/6)*.

* The prices marked with an asterisk are subject to certain discounts for cash.