Conflict of Laws in Australia, by P. E. NYGH, LL.M. (Syd.), S.J.D. (Mich.). (Butterworths Pty Ltd, Sydney, 1976, 3rd ed.), pp. i-xlviii, 1-530. Cloth recommended retail price $25.00, P/B recommended retail price $20.00. (ISBN 0 409 43752 2, ISBN 0 409 43753 0 P/B).

The third edition of Professor Nygh's book makes a welcome appearance in view of the far-reaching changes in the law—particularly as a result of the Family Law Act 1975—since the second edition in 1971. Apart from changes necessitated by new legislation and case law, the book contains some new material; in particular, New Zealand statutory and case materials have been included so as to make the book of greater value in New Zealand. In addition, new chapters have been added on arbitration and corporations, both topics of increasing importance and interest in the conflict of laws.

The result in the reviewer's opinion, is that *Nygh* remains the best introductory text to the study of the conflict of laws in Australia (and, now, in New Zealand too). As an introductory text aimed at expounding the Australasian law it seems unimpeachable, for despite a few minor stylistic or printing errors,[1] the book is not only well-written, but also concise.

The concision of the book is, however, both its strength and its weakness —its weakness because it means that the work must remain no more than an introductory text. There are many passages in the book which one feels could have been expanded. For example, Nygh suggests that "a man who acquires a domicile in Australia according to the common law rules, acquires at the same time a domicile in the state or territory which he has made his immediate headquarters, even if he has not decided to remain there permanently or for an indefinite period" (page 131); although this

[1] *E.g.*, the second sentence of Ch. 3, p. 24: should "a citizen" read "citizens"? See 1st edition p. 107 and 2nd edition p. 141. Page 139, third line from the bottom: should not "domicile of choice" read "domicile of dependence"? There are other obvious printing errors. The use of "Dicey-Morris" for "Dicey and Morris" is simply annoying!

suggestion is no doubt sustainable, it gives rise to difficulties. A discussion of the relationship, at common law, between a state and a federal domicile would not have been out of place. Again, the bland statement, "*Semble* an agreement to submit to the jurisdiction must be express" (page 26), would seem to require elaboration.

A more fundamental criticism is the failure to evaluate the law in the light of the relevant policy considerations, and, thereafter, to point out to the student the path of development and reform. It is true that criticisms are made of individual cases, but not of the general approach of the courts to specific areas of the law. It is felt that this defect, in general, permeates the whole of the work, but a few random examples will suffice as an illustration of it. First, the old chapter[2] on full faith and credit has gone, and has been replaced by a section (pages 6-9) which is a mere shadow of its former self. As the effect of section 118 of the Constitution on interstate conflicts has yet to be authoritatively determined, as Nygh points out (page 8), surely it is too early to dismiss American interpretations, and not too late to discuss the possibilities inherent in section 118 for the solution of interstate conflicts?[3] Secondly, Chapter 2 could be improved by a more incisive evaluation of the theories which are discussed. Anton's evaluation of the more modern theories was:

> A discretionary system of equity takes the place of a system of rules: we are back to the medieval beginnings of private international law.[4]

Professor Nygh seems to be in favour of the traditional connecting-factor approach, but he does not seem to go as far as Anton in his condemnation of the theories. Why? Thirdly, it is felt that the confusion in the chapter on torts (Ch. 18), which has plagued all three editions of the book,[5] could perhaps be avoided if attention were given in the chapter to underlying policy considerations, without being mesmerized by the equally confusing, and, with respect, clearly wrong, *dicta* interpreting *Phillips* v. *Eyre*[6] in *Anderson* v. *Eric Anderson Radio and TV Pty Ltd.*[7] Although the rule in *Phillips* v. *Eyre*[8] is now no longer treated under the heading of "jurisdiction", presumably because this is, as the New South Wales Court of Appeal suggested,[9] misleading, the rule is still treated as a "threshold" rule. What the difference is between a "threshold" and a "jurisdictional" requirement is not explained, and if, in truth, there is no difference, or at least only a semantic one, then, how does this requirement relate to the accepted jurisdictional rules relating to actions *in personam*? So the matter is not one of "little practical significance" (page 258), even if one accepts that "the authorities in Australia clearly establish that the *lex fori* is the law applicable to the question of substance" (*ibid.*) a proposition which, of course, begs the whole question.

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[2] Ch. 32 of 1st and 2nd editions.

[3] See *e.g.*, J.-G. Castel, "Constitutional Aspects of Private International Law in Australia and Canada" (1966) *Hague Recueil* 1.

[4] A. E. Anton, *Private International Law* (1967) 40.

[5] And, indeed, Nygh's article "*Boys* v. *Chaplin* or the Maze of Malta" (1970) 44 A.L.J. 160, written in answer to J. D. McClean, "Torts in the Conflict of Laws" (1969) 43 A.L.J. 183.

[6] (1870) 6 L.R.Q.B. 1.

[7] (1965) 114 C.L.R. 20.

[8] Note 6 *supra.*

[9] *Kolsky* v. *Mayne Nickless Ltd* (1970) 72 S.R. (N.S.W.) 437, 444, where it is said that not only is the rule not jurisdictional, but substantive, though apparently not choice of law. *Sed quaere*?

There are, inevitably, passages in the book with which it is difficult to agree, because of one's own interpretation of the authorities. For example, the statement that, in a court's determination of the domicile of a *propositus*, "the standards are so vague that it would be open to a court to give full rein to its sympathies for a particular litigant" (page 139), is clearly too wide. Surely the court's sympathies were, at least on this occasion, with the tax-man in *Winans* v. *Attorney-General*?[10] Again, in attempting to explain Lord Wright's qualifications[11] to the autonomy of the will of contracting parties to choose their own law, namely, that such choice must be "*bona fide* and legal", Professor Nygh says that "[a] selection is not legal when the parties are faced with a provision such as that contained in section 9(1) of the Sea-Carriage of Goods Act 1924 (Cth)" (page 217). This is, surely, not what Lord Wright had in mind? Was he not, rather, speaking of legality in a wider sense, and, therefore, merely begging the question?

Something must be said of the arrangement of the chapters. In particular, there seems no apparent order in the arrangement of Chapters 8 to 14.

In the end, Professor Nygh's work on conflicts takes its place amongst the standard conflicts textbooks, like *Morris*[12] and *Graveson*,[13] though, like those works, it somehow lacks the added dimension—the "sparkle"—of a *Cheshire*[14] or an *Anton*.[15]

Michael Tilbury*

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[10] [1904] A.C. 287.
[11] In *Vita Food Products Inc.* v. *Unus Shipping Co. Ltd* [1939] A.C. 277.
[12] J. H. C. Morris, *Conflict of Laws* (1971).
[13] R. H. Graveson, *The Conflict of Laws* (1974 7th ed.).
[14] P. M. North, *Cheshire's Private International Law* (1970 8th ed.).
[15] Note 4 *supra*.
* Lecturer in Law, University of New South Wales.