BOOK REVIEWS

Federal Conflict of Laws, by M. PRYLES and P. HANKS, (Butterworths Pty. Ltd., Australia, 1974), pp. i-xxviii, 1-212, Recommended Australian Price, Hard cover $16.00, Soft cover $10.00, ISBN 0409 437848, 0409 437956.

If it is one of the valid criticisms of American contemporary decision-making and academic commentary in the field of conflict of laws that it is almost totally preoccupied with considerations of interstate conflicts, depending largely on constitutional considerations peculiar to the United States, and has concerned itself little with conflicts considerations on the international level, the opposite criticism might be levelled at Australian decision-making. Until a comparatively late date we have been substantially unaware of the important considerations involved in the 'full faith and credit' provision of our Constitution. When the awakening came it came with a bang but was succeeded by silence. The bang consisted in the decision of Fullagar J. in *Harris v. Harris*[1] when he went even further than the American decisions in applying full faith and credit to a matrimonial judgment, i.e. he decided that even a jurisdictional inquiry was prohibited by the 'full faith and credit' requirement.[2] The silence consisted in the absence of any attempt to develop a positive doctrine in relation to the question of the full faith and credit to be accorded to laws as distinct from judgments. Whilst certain characteristics of the Australian scene and later developments understandably render the topic of judgments—both of the *in personam* and matrimonial types—less important in this connection, the same could not be said of choice of law matters. It is true that there are other Federal phenomena than full faith and credit but all in all there has been a lack of concentration on Federal elements. This may be thought to be somewhat remarkable in view of the fact that one of our Federal statutes, the Service and Execution of Process Act 1904, instituted a system of interstate enforcement of *in personam* judgments which was revolutionary at the time of its passing and even now is subject to less inhibitions than are involved in more modern enactments dealing with this topic.

It is therefore very timely that the Federal aspects of our conflicts system of rules should be explored by a work of the type here being reviewed. This work conducts a meaningful exploration of the relevant areas. It of course does not limit itself to 'full faith and credit' elements but in addition considers the topics of interstate service of process, interstate execution of judgments, federal diversity jurisdiction, choice of law in federal diversity jurisdiction and the question of the Commonwealth Government as a litigant. The discussion in each instance is full and critical as well as being expository. The Australian constitutional considerations are fully discussed; moreover in connection with each topic there is a full and reasoned preliminary analysis of the American position. The major cases, both Australian and American, receive a full exposition.

There seem to be three major criticisms which can be made of the substantive treatment.

One relates to 'full faith and credit'. It does not seem that the authors set out

[1] [1947] V.L.R. 44.

[2] In the United States this is not so unless the defendant in the sister-State has actually appeared or otherwise participated in the proceedings; *William v. North Carolina* (No. 2) (1945) 325 U.S. 226; 89 L.Ed. 1577; *Sherrer v. Sherrer* (1948) 334 U.S. 343; 92 L.Ed. 1429.

all the alternatives arguably available to Australian courts in the area of full faith and credit as applicable to choice of law. There is the balancing of interests approach, once pursued in the United States, which contains the vices of the possibility of subjective analyses and of uncertainty in the law and which now seems to have been abandoned, perhaps under the influence of the late Professor Brainerd Currie, in favour of an attitude that the *lex fori* will receive untrammelled operation provided that the *forum* has *some* detectable interest in the matter of the suit. Then there is the other very different viewpoint that the full faith and credit provision has merely evidentiary import. In between these two frequently articulated views—articulated in the United States and Australia—the authors[3] discern two other possibilities, *viz.* (a) a 'literal application' i.e. a principle that the constitutional command should be read in such a way that all State statutes are considered as operative throughout Australia but the scope of their application is limited by a technique of construction and interpretation, and (b) a federal body of choice of laws rules. With respect, however, another view is possible, *viz.* that the full faith and credit command is directed to preserving the application of the 'proper law' or *lex causae* of the particular transaction or act, such 'proper law' to depend on the State common law rules of conflicts, which happen to be uniform in Australia. Such common law rules would be shorn of local disqualifications directed against penal or revenue laws or based on local public policy and would also exclude extra-territorial legislation of an uncontrolled variety on the part of a State whose law was not the *lex causae*.

The second criticism arises out of the topic of execution of judgments. Is there any method by which under the Service and Execution of Process Act machinery a ground of objection could be raised in the registering State that the sister-State judgment, execution of which was being enforced, should be disqualified as being based on a penal or a revenue law, and, if so, would such objection be adequately answered by the argument based on full faith and credit? In the United States there have been decisions in a context of judgment enforcement and a distinction has been drawn between a cause of action based directly on a tax law and a cause of action based on a judgment for taxes.[4] It might have been interesting to investigate how this kind of disqualification fares under the very different system of *in personam* judgment enforcement operative in Australia.

The last criticism relates to the question of choice of law in Federal jurisdiction. There is a chapter in the book (Chapter 5) dealing with choice of law in Federal diversity cases but two of the decisions which are obviously of prime importance in the whole area of federal choice of law, *viz. Musgrave v. The Commonwealth*[5] and *Parker v. The Commonwealth*[6] (and the same might be said of *Suehle v. The Commonwealth*[7]) are not diversity cases but cases involving the Commonwealth as a defendant and yet clearly have to be dealt with in this connection. In the following chapter (Chapter 6) the topic of the Commonwealth as litigant is dealt with separately and perforce these cases have to be dealt with again. It is not clear whether the suggestion is that choice of law considerations are to be dealt with differently in diversity cases from the treatment in the other type of case (a view held by the late Sir Philip Phillips).[8] This indeed may be no more than a criticism going to arrangement. More pertinent perhaps however is the question of the relationship between *Parker v. The Commonwealth* and *Suehle v. The Commonwealth* and the possible inconsistency between the two decisions. Whilst the authors criticize the view of Windeyer J. in the latter case that section 56 of the Judiciary Act constitutes inferentially a Federal choice of law rule and indicates the applicability of the law of the State where the wrongful act occurred, they do not consider

[3] At pp. 90-2.
[4] *e.g. Milwaukee County v. M. E. White Co.* (1935), 296 U.S. 268; 80 L.Ed. 220.
[5] (1937), 57 C.L.R. 514.
[6] (1965), 112 C.L.R. 295.
[7] [1967] A.L.R. 572.
[8] (1961), 3 M.U.L.R. 170.

the difficulties inherent in the *Parker* case itself. The reason why section 56 of the Judiciary Act did not apply to the *Parker* situation was presumably because, as the collision occurred on the high seas, there was no *locus delicti* in an Australian State; however there are still difficulties in that case touching the application of section 79 of the same Act. The difficulty lies not, it would seem, in regarding Victorian law as the *lex fori*, but rather in the fact that the *Phillips v. Eyre*[9] tort rule requires 'non-justifiability' by the *lex delicti*—a difficulty which is not solved by the case referred to by Windeyer J. *viz. Davidsson v. Hill.*[10] Something may rest on the fact that apparently the applicability of Victorian law was conceded by the parties.

Subject to the above three basic criticisms, it can be said that the book contains an excellent review of all the authorities and notices just about every question relevant to Australian Federal conflicts law. This reviewer confesses however that he did not find it an easy book to read and had to puzzle over some of the conclusions reached. Perhaps this was due to some of the peculiarities of style. Thus 'on point' used where the meaning is either 'on the point' or 'in point', though involving only a difference of one word, can really either distract or irritate the reader when he is trying to follow a line of intricate reasoning. Moreover do the authors really mean to say that the 'High Court's original jurisdiction . . . as a matter of law . . . is open to doubt'?[11] In short an excellently conceived and executed book but one which could have been improved and made more interesting by a little more clarity in expression.

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[9] (1960), L.R. 6 Q.B. 1.
[10] [1901] 2 K.B. 606.
[11] At the foot of p. 146.
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Statutory Interpretation in Australia by D. C. PEARCE, LL.M (Butterworths Pty. Ltd., Australia, 1974), pp. i-xviii, 1-165. Recommended Australian Price $12.00. ISBN 0 409 41820x.

This is the first comprehensive work on judicial interpretation of statutes in Australia, and should prove extremely useful.

It might seem at first that there are no distinctive features of the Australian legal system which would justify a book devoted to this subject, but the author draws attention to several. Some arise from the federal system itself (*e.g.* the reluctance of State courts to attempt fine analysis in areas of federal law that have been considered by the High Court, and the special deference shown by the courts of one State to the courts of another in the case of uniform law). Others are special Australian developments (*e.g.* a noticeable weakening in the tendency to construe a penal statute strictly in favour of the defendant without regard to its objects).

The book is, in any event, no mere Australian variation on the theme of well-known works like *Craies*[1] and *Maxwell*[2]. The author has chosen to explain the familiar avenues of approach by reference to modern Australian authorities rather than the classic English decisions wherever possible. Many readers will be surprised by the wealth and sophistication of the Australian material, and particularly of the earlier decisions of the State Supreme Courts and the High Court; the prophets have indeed gone unrecognized in their own country. As it happens, the traditional arrangement of the subject-matter of digests and noters-up leads to the great bulk of material dealing with statutory interpretation being buried under special headings, and this book would have justified itself if it had done no more than gather together what it has.

It does, however, do much more. The author has considered the whole subject afresh, and has divided the subject in a way that is original and pleasing. Moreover, he has not contented himself with simply describing judicial techniques, but has attempted to trace their development and examine them critically. He has tried to assess the relative importance of the various principles, and in many cases has forecast their waxing or waning in importance in Australian courts.

The author's general thesis is that modern courts approach the interpretation of statutes in much the same way as anybody sets about the interpretation of a complex document, that they do not accord the established 'rules' any undue respect, and that they often fall back on them to confirm an intuitive feeling stemming from a sense of justice rather than use them to reach a conclusion.

He discusses the case law and the Australian Interpretation Acts and Ordinances in considerable depth. The general content is undoubtedly sound, although there are some comments of speculative nature that might be thought unconvincing, and a few that might be thought incorrect. There is, however, one particular topic which is treated in a slightly confusing manner, namely the vexed matter of mandatory and directory provisions. The author attempts, rather unwisely, to deal at one blow with two quite separate questions. The first is whether a provision imposes a duty or merely confers a power; the second is whether, if it imposes a duty, any breach will be visited with fatal consequences. These have always been murky waters, and the older texts have navigated them more smoothly.

The treatment of the Interpretation Acts and Ordinances reveals the fascinating permutations and combinations of common provisions to be found in them. The purposes of all of them must surely be the same, yet nobody uses the same recipe to make the same pudding.

[1] *Craies on Statute Law*, (7th ed. 1971).
[2] *Maxwell on the Interpretation of Statutes*, (12th ed. 1969).