The idea that men in these barbarous institutions can learn to be good citizens or cope with the outside jungle, by practising democracy in prison, was surely ludicrous even in this period.

Part I

A workmanlike article by Geoffrey Sawer on 'The Judgments of Sir John Barry'; a useful and informative analysis by Sir Richard Eggleston on 'The Assessment of Credibility', which should drastically curtail cross-examination before him, and a contribution by Peter Brett—'Law in a Scientific Age' appear in Part I under the head 'Law and the Legal System'.

Part III

Part III Economic and Socio-Economic Relations is monopolized by the other Co-Editor Mark Perlman. I found the article pointless and very, very dull.

Part IV

A welcome change is contained in Part IV under the title 'Sir John Barry: The Man'. Two biographies, one by Sir Eugene Gorman, the other written by Professor Cowan provide a contrast in style. The concise effectiveness of the former is in contrast to the much harder working Zelman.

To my mind these two articles are the only real justification for the publication and are most readable and full of interest.

What does the book achieve? It is described by Pat Gorman as a *festschrift*. It seems to me to be all that, although I have not yet discovered the meaning of the term.

Some overlapping and repetition (the 'Whose Baby Case'[1] is dealt with at least 3 times) are examples of the problem of this type of publication.

I do not think it a useful substitute for a biography which would surely have been a more fitting and effective testimonial to such a colourful and interesting subject.

JACK M. LAZARUS*

Conflicts of Laws in Australia, by P. E. NYGH, LL.M. (Syd.), S.J.D. (Mich.) 2nd Edition (Butterworths, Australia 1971), pp. 5-808. Australian recommended price $19.50 (hard). SBN 409 43750 6.

This is the second edition of Professor Nygh's comprehensive work on Australian Conflict of Laws. As against the first edition (1968) it has a considerably increased page coverage but proceeds on the same basic plan except for the re-writing of certain chapters on property in the first edition which were contributed by the present reviewer.

The work shows very thorough and painstaking research. It has a very extensive coverage of case material and probably mentions, somewhere or other, every recent case which bears on the subject of Conflict of Laws in Australia, the United Kingdom and Canada—perhaps even some which are scarcely worth recording. It discusses a vast array of possible questions and at least in the fields of contract and property and of jurisdiction and procedure almost every conceivable point is discussed. The discussion of disputed or doubtful points is conducted in an interesting manner and if one cannot agree with all the conclusions they are at least presented with vigour.

Nonetheless it remains a fact that notwithstanding the wide coverage of case material and possible points of doctrine, this just fails to be the sort of book to

[1] *Morrison v. Jenkins* (1949) 80 C.L.R. 626. * Barrister-at-Law.

which one can go with a feeling of confidence that to every question one will be presented with a reasonably clear and satisfying answer. It seems that arguably there may be three reasons for this, firstly, certain nuances in style, secondly, a grave deficiency in the areas of tort and of some aspects of matrimonial law and thirdly, a willingness to tinker with the 'policy' and 'interest' concepts without perhaps fully explaining what is meant by the terms used.

In the first place it seems that the reader in following the chain of reasoning or exposition tends sometimes to be suddenly confronted with a phrase which is either irritatingly vague, is seemingly inconsistent with the context or involves a *nonsequitur*. Thus in the part dealing with international monetary obligations we are told (p. 391) in relation to the distinction between the money of account and the money of payment, that the determination of the money of payment, in so far as it involves the question of the construction of the contract, is a matter for the proper law of the contract. In a context which emphasizes the applicability of the law of the place of performance to this question, this surely needs some explanation. Again, in the discussion of the decision of *Anderson v. Eric Anderson Radio & T.V. Pty Ltd,*[1] he states (p. 410) that if the word 'wrong' referred to legal injury in the abstract, then the plaintiff should have been entitled to relief according to the law of the Capital Territory *(lex loci delicti)* once it was shown that negligence was an actionable tort in New South Wales *(lex fori)*. It seems from the context however that this would be the result on the basis of the *other* theory, viz that the word 'wrong' refers to wrongful act (p. 409). Perhaps one may also criticize the attempted explanation of *Harris v. Taylor*[2] (p. 208) as being charged with obscurity.

More serious however are the deficiencies in the treatment of the subjects of torts and matrimonial law. In fact the treatment of torts is probably the weakest part of the book. This is probably due to the obstinate adherence to the theory that the rules in *Phillips v. Eyre*[3] constitute rules of jurisdiction. Such view derives support from only a minority of judges in *Anderson v. Eric Anderson Radio & T.V. Pty Ltd*[4] and a single judge decision.[5] It does not derive any clear support from *Chaplin v. Boys.*[6] It is also not convincing in principle. It is difficult to see why, when the plaintiff in an ordinary action *in personam*, for example, in contract, is faced with only one jurisdictional requirement, *viz* that of proving presence of the defendant at the time of issue of the writ, he should in a tort case, have to surmount three, *viz* the presence rule and the two prongs of *Phillips v. Eyre.*[3] Moreover, a certain amount of wastage of judicial energy seems to be involved in a process whereby the plaintiff may be let in at the threshold because he proves a *prima facie* actionable tort only to be hurled out of the window because he cannot prove a tort which entitles him to recover notwithstanding possible defences.[7] Professor Nygh, evincing a dogmatic adherence to the 'jurisdictional' character of the rule in *Phillips v. Eyre,*[3] is equally dogmatic that once the jurisdictional test is satisfied, the law applicable on the choice of law level is the *lex fori*. This is certainly supported by the *Anderson*[1] case, but in view of *Chaplin v. Boys*[6] cannot be regarded as in any way settled. At p. 416 of his work, Professor Nygh seems to express surprise that a commentator disputes that the law *lex fori* was 'even before the decision . . . in *Chaplin v. Boys*[6] to be regarded as the general rule'. The present reviewer does not believe that even after *Chaplin v. Boys*[6] any such general rule emerges. Lord Wilberforce regarded the general rule as being that effect must be given to the *lex loci delicti* even as regards heads of damage and applied the *lex fori* only because of what he regarded as exceptional 'policy' considerations.[8] Support for the *lex fori* can be extracted from the judgments of the other Law Lords only by a somewhat tortured interpretation of what they said regarding the rule in *Phillips v. Eyre*[3]—a rule which in any event Professor Nygh regards as relevant to the jurisdiction question and not to that of choice of law. It is also somewhat peculiar that at one part

1 (1965) 114 C.L.R. 20.
2 [1915] 2 K.B. 580.
3 (1870) L.R. 6 Q.B. 1, 28-9.
4 In fact even the support of Barwick C.J. is rather cryptic.
5 *Hartley v. Venn* (1967) 10 F.L.R. 151.
6 [1971] A.C. 356. It is submitted that Professor Nygh (p. 408) cannot deduce from the fact that Lord Wilberforce said the first limb of the *Phillips v. Eyre* formulation was *not* a jurisdictional rule that he regarded the second limb as jurisdictional.
7 This is on Professor Nygh's assumption that on the choice of law plane the *lex fori* governs.
8 [1971] A.C. 356, 389, 391-3.

of his treatment (p. 403) the learned author regards Lord Wilberforce as giving at least partial encouragement to the 'proper law of the tort' theory, which is hardly consistent with a view that the *lex fori* predominates.

There are also some substantial deficiences in the treatment of matrimonial law. One such is the discussion of the rule in relation to polygamous marriages. It is a false alternative to state that the issue as to what law governs the question of the determination of the polygamous or monogamous character of marriage lies between the law of the place of celebration and the domiciliary law. Even where no question of conversion of the character of the marriage by later events arises, it seems that the true character of the marriage is determinable by the *lex fori* with the *lex loci celebrationis* merely supplying evidence of the legal effect of the ceremony under its law.[9] This becomes even clearer when the effect of a possible later conversion of the marriage from a polygamous one to a monogamous one is considered. Clearly in *Ali v. Ali*[10] the verdict of English law that the marriage had been converted to one of a monogamous character was given in its capacity as the *lex fori* and not as the *lex domicilii*. The learned author also seems in this whole area to lose sight of the fact that right from the outset the rule stated in *Hyde v. Hyde and Woodmansee*[11] never purported to do more than deny to the polygamous marriage the application of the English machinery of matrimonial relief. It passed no judgment as to whether the polygamous marriage was void or valid. The Court merely denied itself the luxury of litigating in such a situation. When therefore the question of the conflictual *validity* of a polygamous marriage arises, in for example, in questions of succession, where perhaps the municipal law of one of the applicable countries regards a polygamous marriage as void, the matter is settled by ordinary conflictual principles, *viz* by the application of either the dual domicil theory or the theory of the intended matrimonial home.[12] There is therefore no general question of capacity to enter into a polygamous marriage on the footing that polygamy is some special kind of overriding incapacity. It is therefore thought that Professor Nygh's inquiry as to 'capacity to enter into a polygamous marriage' as a distinct question (p. 439) is misconceived.

Further criticisms must be made of the treatment of matrimonial remedies. In the field of recognition of foreign divorces, it is incorrect to say that the Australian Matrimonial Causes Act in its specific provisions adopted the *principle* of *Travers v. Holley*.[13] The principle of that case when conjoined with the extension made in *Robinson-Scott v. Robinson-Scott*,[14] involves a proposition that a domestic Court of the *forum* will recognize a foreign divorce when the facts are such that it itself would have had jurisdiction to grant a divorce had the same factual situation *mutatis mutandis* come before it. However it is clear that the Australian Act merely makes a piecemeal adoption of the decisional results reached in the two cases mentioned and goes no further. If the Australian Parliament amended the Matrimonial Causes Act to provide that henceforth an Australian Court would have jurisdiction to render a divorce judgment merely because the marriage was celebrated in Australia, an application of the so-called 'reciprocity' principle would require that an Australian Court would recognize a Chilean divorce by reason of the fact that the marriage had occurred in Chile. Yet such a result would in Australia not follow from the specific provisions of the Act but only (and then only possibly) from the effect of section 95 (5) of the Act introducing the common law rules which would include the *Travers v. Holley* principle as distinct from the actual decision in that case.

The nadir of the treatment of matrimonial remedies in the book occurs however in relation to the recognition of foreign nullity decrees. Here a number of vital matters are simply not discussed. In dealing with the jurisdiction of Australian courts to make decrees of nullity, Professor Nygh is of course aware that the basis of jurisdiction depends upon whether the marriage is of the void or voidable type

[9] *Lee v. Lau* [1967] P. 14. Here the final judgment was made by the *lex fori;* the *lex loci celebrationis* furnished only the raw material.
[10] [1968] P. 564.
[11] (1866) L.R. 1 P. & D. 130.
[12] A recent instance is *Radwan v. Radwan (No. 2)* [1972] 3 W.L.R. 939 (Cumming-Bruce J.).
[13] [1953] P. 246.
[14] [1958] P. 71.

and this raises a question of characterisation. In this connection he notices *De Reneville v. De Reneville*[15] as a relevant decision as to what legal system determines the void-voidable issue and is aware that this decision is directed only to the area where the attack on the marriage is on the score of essential validity and not for instance when the attack is on the basis of non-compliance with formal requirements. What he does not spell out is that in *De Reneville v. De Reneville*[15] the marriage was characterised only because of the effect of its character on domicil which was the particular ground of jurisdiction in the main relied on in that case. Under the Australian Act however the characterisation determines what *are* the bases of jurisdiction. If it is a voidable marriage the only available jurisdictional basis is domicil; if the marriage is void then the ground of residence is also available. The particular character of the decisions in *De Reneville v. De Reneville*[15] and its limitations becomes more apparent where the question is as to the recognition of a foreign nullity decree. Here too the basis of recognition depends on whether the marriage is void or voidable, but the decree of the foreign tribunal may cut across the landmarks of *De Reneville.*[15] Thus assume a decree of nullity of a German Court procured at the instance of a petitioner with a residence in Germany; the basis of the allegation of nullity goes to essential validity and yet the law of the matrimonial domicil (Hungary) regards the marriage as *valid.* Unless one is to say that the German decree should be disregarded because it proceeds on a disregard of the appropriate Hungarian law one should perhaps proceed on the basis of merely looking to see how the German decree in fact purports to affect the marriage. The discussion in the book reveals no appreciation of such difficulties.

There are other deficiencies in the treatment. Thus it may be that the difficulties inherent in *Chapelle v. Chapelle*[16] still apply. True it is that the decree of the foreign court need not, in Australia, be that of the common domicil. It still however must be that of the petitioner in the foreign tribunal and it may be that in a *Chapelle*[16] situation the only domicil in the foreign tribunal is that of the respondent. Again, the effect of section 95 (5) may well be indirectly to make English basis of jurisdiction in nullity relevant in Australian recognition of foreign decrees. Thus it seems that English Courts in the case of a void marriage would recognize that the fact of celebration of a marriage in England would give English Courts jurisdiction in nullity[17] and that on a principle of 'reciprocity' English Courts would recognize a foreign decree based on a foreign celebration. If this be so then section 95 (5) would possibly extend the latter principle to Australia. On a similar principle a foreign decree of nullity *even of a voidable marriage* could be based on residence in the foreign country because this is a ground of domestic English jurisdiction under *Ramsay-Fairfax v. Ramsay-Fairfax.*[18]

All the above represent possibilities not explored in the book under review. It is thought that a comprehensive treatment would have involved their exploration.

There are sundry other more minor points of deficiency in treatment. Thus it would seem that vicarious liability (p. 122) is not so much a matter of standing of parties as one of substantive tort liability and that questions of survival of actions on death and of liability for wrongful death are somewhat strangely posed as issues of standing of parties. It is difficult to see why the equitable considerations applicable to an old system mortgage should not apply to a mortgage of land under the Torrens System (p. 193) as the fact that the latter is in form of statutory charge has still permitted most equitable doctrines, for example that of clogging the equity, to be still applicable. It is also somewhat surprising to find the decision in *British South Africa Co. v. De Beers Consolidated Mines Ltd*[19] characterized as an example of English insularity (p. 194). It is well recognized that the proper law of a contract dealing with immovables need not be the *lex situs* and in the case in point which related to a contract the proper law was determined to be English.

[15] [1948] P. 100.
[16] [1950] P. 134.
[17] *Simonin v. Mallac* (1860) 2 Sw. & Tr. 67; 164 E.R. 917. This case just escaped being overruled in *Ross Smith v. Ross Smith* [1963] A.C. 280.
[18] [1956] P. 115.
[19] [1910] 2 Ch. 502.

The rationalization of *Harris v. Taylor*[20] has previously been referred to. If one says that in a situation where there is a conditional appearance and the Court holds in favour of jurisdiction, the defendant, having come to the Court, is bound by a court judgment in favour of jurisdiction, does not this amount to saying that a conditional appearance is a submission to the jurisdiction?

The third and last substantive ground of criticism rests on the basis of the importation of unexplained policy concepts. This reviewer admits that he tends to be suspicious once an author purports to employ a so-called 'functional approach' because such an approach may well represent jumping on a band-wagon which happens to be the poular one at the moment. The approach usually makes great play with notions of 'policy' and 'interest', concepts which represent American approaches of somewhat indeterminate reference. The fact that a particular jurisdiction possesses a particular 'policy' is in itself meaningless. Thus if there is a collision in Ontario where the guest passenger is injured owing to the negligence of the owner-driver but all parties are resident in Ohio and the laws both of Ohio and Ontario recognize that the passenger has a claim against the driver-owner, it is quite irrelevant that the law of Iceland has a policy that guest passengers cannot recover in such a case. The collision did not occur in Iceland and none of the participants had any connection with Iceland. The policy of Iceland (whatever it is) comes into the picture only if there is some connection of the factual picture with Iceland. Then the policy of Iceland becomes more than an irrelevant 'policy', it becomes an 'interest'. But this is merely because of some contact between Icelandic law and the facts in issue or the persons involved. Yet the motion of a connection because of 'significant points of contact' is the very thing that American commentators, such as Ehrenzweig, deny has any significance. Whilst a writer such as Ehrenzweig admits that non-*forum* rules may have application, it is difficult to see why such a non-*forum* rule could even come on the scene as a possible competitor except on the basis of meaningful points of contact between the transaction and its legal system. Even however on the assumption that a particular policy is translated into an 'interest', there are difficulties. There are submissions that the interests need not be 'government interests' but merely interests of the parties. If so, in the previous example the defendant would have a sufficient interest in relying on the law of Iceland merely because that law gives him a defence. One must surely look further than this. Even however if the interest be reducible to that of 'government interest' the conclusions may not be particularly attractive. In the view of some of the commentators, for example, Currie, the mere existence of a *forum* government interest is enough. Thus the traditional rule that the interpretation of wills is governed by the law of the domicil of the deceased would be displaced whenever there was a rule by the *lex fori* that beneficiaries under a will who were resident in the *forum* would be preferred to foreign beneficiaries. Local beneficiaries would be more likely to keep the fund in the country and perhaps produce income liable to taxation. On the same reasoning, the English rule of *bona vacantia* should *always* be applied when English law regarded property as heirless because such an application would help the English Treasury. Perhaps however we should jettison such crude ideas and say that 'interest' means 'community' interest, but this would lead to speculation as to what constitutes 'community' interest.

It is often easy to discern the policy of a statute but how does one discern *forum* policy towards a foreign statute or foreign rule of law?

The somewhat jumbled American notions of 'policy' and 'interest' are applied by Professor Nygh in various parts of his book. Particularly is this so in relation to the topic of 'Characterisation' (Chapter 8). Now it may well be true that English and Australian law need more indicative rules of choice and that frequently the attempt to fit results by a characterization process under some overworked existing indicative rule is unreal. Yet it seems unlikely that any solution may be reached by measuring particular *dispositive* rules against each other according to some undefined measuring rod (Nyah pp. 248-9) or by asking what is the *forum*

[20] [1915] 2 K.B. 580.

policy towards some particular foreign dispositive law (p. 242). The particular result reached in *Apt v. Apt*[21] would seem to be intelligently justified by saying that the question whether actual attendance of the parties at a marriage ceremony is or is not required seems to have more to do with the form of the ceremony than the essence of the marital relationship and so fits into the formal validity indicative rule. There seems to be little point in asking whether the Argentinian municipal rule was a more suitable or a more meritorious one than the English municipal rule.[22] Whilst an inquiry whether it is in accord with English policy that proxy marriages in the Argentine should be governed by Argentinian law just does not seem to make sense.

The criticisms previously made of the deficiencies in the treatment of the subjects of torts and matrimonial law do not apply to other parts of the book. The sections on contract, on service out of the jurisdiction and on full faith and credit are particularly well done.

One notices one or two mechanical deficiencies. A 'not' seems to have been omitted in the tenth line of page 158 and the case in footnote 8 on page 99 is incorrectly cited. The footnotes on the whole show a high degree of relevancy to the text though occasionally this is not so, for example, *Re Cooke's Trusts* (footnote 92 on p. 114) hardly supports the proposition cited and the same may be said of *Merika v. Merika* (p. 110). On page 147 (footnote 29) Queensland should be added as one of the States which still preserve the procedure of foreign attachment.

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The Law and Practice Relating to Torrens Title in Australia Volume 1, by E. A. FRANCIS, B.A., A.A.S.A. (Butterworths, Australia, 1972), pp. i-lxlll, 1-640. Recommended Australian price $22.50. ISBN 0 409 36511 4.

For some time a text book dealing with the operation of the Torrens legislation in Australia has been needed. Apart from books discussing the Acts of the various States, the last major work was Dr Kerr's *Australian Land Titles (Torrens) System*, which was published in 1927. For this reason Mr Francis' enterprise is a welcome one. His book is to appear in two volumes. The first volume covers the following: the scheme and purpose of the system, administration, bringing land under the system, caveats, implied and express convenants, easements and restrictive covenants and indefeasibility of title. The author describes and compares the legislation in all States, in the Australian Capital Territory, and in New Zealand.

Recently there have been several important decisions concerning land under the Torrens system. In 1967 the Privy Council laid the ghost of deferred indefeasibility of title in *Frazer v. Walker*.[1] In 1971 the High Court of Australia grappled with the role of the caveat in a competition between competing equitable interests in *J. H. Just (Holdings) Pty Ltd v. Bank of New South Wales*.[2] In 1967 the New South Wales Court of Appeal dealt with easements omitted from the Register in *James v. Registrar-General*.[3] In 1969 the Supreme Court of New South Wales restricted the concept of indefeasibility of title in *Pratten v. Warringah Shire Council*.[4] Apart from this volume of litigation the New South Wales parliament made several important amendments to the legislation in 1970.

21 [1947] P. 127, [1948] P. 83.
22 Perhaps Argentinians are better authorities on amatory relations than Englishmen!

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1 [1967] 1 A.C. 569.
2 (1971) 45 A.L.J.R. 625.
3 [1968] 1 N.S.W.R. 310.
4 [1969] 2 N.S.W.R. 161.