Dicey's Conflict of Laws, Seventh edition by J. H. C. Morris and specialist editors. London, Stevens & Sons, Ltd., 1958. cxxiv and 1180 pp. (£8/8/0 in Australia.)

The craft of editing well-known text-books is an ancient one with a guild history lost in the remote corners of time. Ulpian on Sabinus, Tribonian on Ulpian and so through Accursius, Bartolus, Huber and Savigny to our own day. All around us we see works trickling down through a series of editions, some even being lucky enough to receive a controversial burst of new life such as Turner and Guest have recently given to *Kenny*[1] and *Anson*.[2] Still others carry on bravely when little more than the name, rank and number of the original author is remembered.[3] The whole process reminds one of a biological life-cycle in which some microscopic animals are swallowed by another animal which, *mutatis multum mutandis*, becomes a whale; and for this last diner his fate is to die and disintegrate and to provide a food for the process to be renewed. The reviewer of a well-established text-book, therefore, may find himself at a snack, a banquet, an amputation, or a palingenesia but never at a funeral, the borderline between the last two ceremonies being but sketchily defined.

Now there must have been many who have wondered in the last two or three years whether they would see another *Dicey*. Was the sixth edition to be looked back on as a despairing fling or as the forerunner of a new era both of editions and of editors, of men who could take up the double challenge of an *opus* and a name? This question has been long in the answering for, as modern text-books go, nine years is a Trojan time of waiting and the editors, like Penelope, must have made and unmade their web with some care during the interval. But, to leave Ithaca for the sea, what a whale has come upon the scene and what a prodigious store of baleen is here to stay and corset even the most waspish argument or theory! For although the editors have dropped (as they had in the sixth edition) the whole section on Nationality and now, in this edition, the Table of Principles and Rules, which formerly occupied sixty-four pages, yet the new work has still made a gain of a quarter in actual content by rising from 1041 to 1304 pages. It is submitted, therefore, that, although the editors have saved the day and *Dicey* is entitled to expect a further lease of years, future editions should be prepared to go even further in cutting down the mass of the work lest it overload itself with the soporific fare of too many cases and too much large type.

There are two main questions that need to be tackled in such an approach to this book. First, is Dicey's method of Rule, Comment and Illustration a satisfactory one and, as a special question, do the Illustrations themselves serve a useful purpose? Second—flowing on from the first, for both involve question of space—is it not possible to adjust the ratio of "prose" text to other matter which at present stands at about 1100 to 200 pages?

As to the first question, the retention of Dicey's method, here it must be said immediately that the editors came to a firm decision in 1949, namely that to abandon the method would be to go beyond their province,[4] and in the present edition no further heartsearchings seem to have been found necessary. For the student and indeed for the practitioner, there is much to be said for having a clear rule to begin with and, since in a subject in which there are many areas of uncertainty a text-book writer will be bound to express a

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[1] Kenny's *Outlines of Criminal Law* (16 ed. 1952, by J. Turner).

[2] Anson's *Law of Contract* (21 ed. 1959, by A. Guest).

[3] In the preface to *Gale on Easements* (13 ed. 1959) viii, it will be seen how near the edge of oblivion are the names of Gale and Whatley, the original authors.

[4] However, since they have substantially re-altered the order of the whole subject-matter and have re-numbered the Rules in consequence, and since they have (originally as a result of the blessed post-war paper shortage) reduced the Illustrations to small point, their loyalty must not be thought unwavering!

sententia, the boldest thing to do is to make a Rule and thus open the way to inspection and criticism. The usual objection to Dicey's Rules has been that judges have been tempted to treat them as final and therefore as Rules in the full sense, the innuendo being that a group of words if found in a statute or in the mouth of a judge can be relied upon, whereas if a similar group of words is created by a text-book writer as a *bona fide* attempt to expound the result of earlier fragments of judge and statute-made law, then it must never be allowed any formal recognition. Now, since it is notorious that this is in fact the theory[5] upon which English law proceeds, any text-book writer who creates Rules can hardly himself be blamed if, whether for convenience or for any other reason, his Rules are in fact adopted and relied upon by those whose task it is to make such Rules.

However, although one may approve of the continuance of Dicey's method in the present edition, this does not debar one from making suggestions as to its improvement. Thus there are occasions in which the Comment to the Rule covers so many pages that the reader, especially if he has been plunged *in medias res* as a result of a case or index reference, is quite at a loss to know what the rule is. Rule 148 for example is used as a heading for 30 pages but, in the course of these pages, the Rule develops three sub-rules, one of which is split into two "presumptions".[6] A similar problem arises in the excellent chapter on torts which is a superb addition to the work and effectively replaces the very insignificant treatment given in the sixth edition. The present chapter is composed of some forty pages, all of which shelter under a pair of Rules (180 and 181), made up of a general and a particular statement of the effect of the two well-known cases, *The Halley*[7] and *Phillips* v. *Eyre*.[8] "Rule 181" is used as the heading for 38 of the 40 pages of the chapter yet, although pages 941-949 are specifically written as a comment upon the two parts of Rule 181 all the subsequent pages of the chapter refer regularly to the First and Second Rule in *Phillips* v. *Eyre* sometimes with and sometimes without quotation marks. Now, since it is common knowledge that this is equivalent to saying "the two parts of Rule 181", then it would seem that the Rule method is retained only *pro forma*. Furthermore, since the discussion ranges over so many important topics, one would have thought that the editor would have taken the step—in dealing, for instance, with maritime torts or the *locus delicti*—of creating new Rules or sub-rules; if the Rule method is to be retained, in short, let it be pursued effectively and with the boldness which the author must have needed sixty years ago.

Another way in which the Rule method could, it is submitted, be used with greater force would be by drawing a distinction between those Rules which are certain and those which are not. One would prefer a difference of type size to indicate this distinction but it would be hazardous to suggest which group of Rules would be entitled to type of the larger size. In the present writer's opinion there seems little justification for devoting the whole of one page of large type to s.1 of the Bankruptcy Act!

A count reveals that about a quarter of all the Rules (including "Exceptions") are of statutory origin in that the actual words of the Act are reproduced as the substance of a Rule or of an individual part of a Rule.[9] It would therefore seem convenient to establish to the reader at the outset that such Rules

[5] Although there are, of course, many more textbooks references made today than formerly, the unspoken objection seems to remain, namely that whereas a judge hears both sides before making a rule-like decision, the writer has only his own point of view. Thus a judge's text-book is not higher in degree and, by contrast, the Judges' Rules are not "law".

[6] See also 182-212 where although the page heading is given as Rule 26, the subject-matter is, all but a few lines, concerned with thirteen exceptions to the rule.

[7] (1868) L.R. 2 P.C. 193.

[8] (1870) L.R. 6 Q.B. 1.

[9] Rules 20, 27, 41, 45, 46, 55, 57, 58, 61, 64, 67, 69, 71, 72, 79, 80, 94, 98-100, 106-108,

or their parts were in fact not exactly the author's sole creation and, to make only one further point, that the subsequent comment must be read as subject to the Rule rather than *vice versa*.[10]

A last criticism, and one of a more general character, is that the Rule method, unless carefully watched can cause a particular subject to get overblown as though, having stated a Rule, it therefore became necessary to put some sort of comment in. We have seen how the chapter on torts seems to need more than two rules. By contrast the law relating to domicile is, it is submitted, made to seem unnecessarily involved by having fifteen Rules, and it goes without saying that where a Rule is exactly based on the words of an Act, the Comment may be purely periphrastic.[11]

On turning next to the Illustrations one is more concerned with questions of space than of method. The practice of giving references to both hypothetical and decided cases is certainly a useful one for the student as well as for those whose task it is to be setting perennial examination papers. But a far greater moderation should, it is felt, be exercised and, a point of much greater significance, the Illustrations should not be tied to a case reference in a footnote unless that case is accurately reproduced in the Illustration.[12] At some points the Illustrations serve no purpose; thus if a Rule of Court states that the court has jurisdiction whenever a contract affecting land in England is sought to be rectified, can it be said that one is further advanced by the Illustration (not based as a decided case) "A brings an action against X for the rectification of a contract for the sale by A to X of land in Middlesex. The court has jurisdiction".[13] Again there are places where the Illustrations are used to do the work of the Comment. Thus Rule 132 is followed by a Comment of five elementary lines (including the words "This Rule is most important") and this is followed by eleven Illustrations which, with their copious footnotes, occupy two whole pages.[14] Yet another example of the way in which the Illustration can be criticised is to be found in the chapter on torts. Although in several other places headings are given to show how the individual Illustrations within a group are connected with different parts of the preceding Comment, in this chapter the 35 pages of Comment on Rule 181 are subdivided into 14 parts and are followed by 16 Illustrations, but no attempt is made to show how these Illustrations fit in with the Comment. In a word, if the reader wished to know at a glance whether there were any Illustrations to "(13) Maritime Torts", of the Comment, he would be quite unable to tell whether any of the 16 suited his purpose.[15]

In dealing with the second main question, the reduction of the ratio of the apparatus to the text, it is very satisfying to begin by placing on record the editors' very comprehensive coverage of cases decided outside the United Kingdom. A rough estimate shows that 2,800 United Kingdom, 120 United

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121, 124, 131, 133-135, 137, 138, 141, 178, 185-189, 193-195, 199, 200, 202; 13 Exceptions to Rule 26, 2 to Rule 40, 1 to Rule 43, 1 to Rule 60, 1 to Rule 85, 2 to Rule 116.

[10] See, for example, Rule 126 which, though given in positive terms, has, as part of its comment, "the second part of the Rule is as yet unsupported by authority".

[11] See Rules 57-61.

[12] E.g. of *White* v. *White* (1937) P. 111 it is said (at 361) that the husband was domiciled either in Western Australia or in Malta whereas later (at 376) the domicile is given as Western Australia only; *Macmillian* v. *C.N.R.* (1923) A.C. 120 was not a case of wrongful death (as stated at 977); the decision in *McLean* v. *Pettigrew* (1945) 2 D.L.R. 65 did not *depend* upon showing a wrongful acquittal (as at 978) but merely treated an actual acquittal as not *res judicata*.

[13] This example is one of many of a similar kind in Chapter 8.

[14] It may be that this is a special case, as nearly all the Illustrations are hypothetical. On the other hand it is submitted that the whole of this section on bankruptcy, covering pages 670-681, is very laboured and repetitive, and could easily be reduced in length.

[15] For "(12) The Place of Wrong", by contrast, he would be royally, though secretly, served. Not only are the leading cases on this point given in detail in the text; they are also given as Illustrations, but 700 pages away under Order XI r. 1 (ee)!

States and 500 Empire cases are referred to, including over 100 from Australian courts.[16] There are also separate indexes for the American and the Empire cases. However, it is necessary to ask whether non-textual material, particularly the tables of cases, ought not to be asked to suffer some condensation in the interests of the whole work. It is submitted, for example, that the sixth edition's arrangement of the cases in double columns without any citations was just as effective as the present arrangement in single columns with full citation—some cases bearing references to as many as eight sets of reports. The result of the present arrangement is that whereas the table of all cases in the sixth edition covered 31 pages, the three tables in the seventh, with an estimated increase of 300 cases,[17] cover a total of 84 pages. By contrast the table of statutes has been reduced from 17 pages of single column in the sixth edition to 11 pages of double column. A second suggestion would be that, where a case has a large number of page references, the use of bold faced type would assist the reader to find the chief of such references.

If we turn to the text itself in a search for ways to save space, Chapter 2, "Interpretation of Terms", must surely come under fire. Here there are 10 pages explaining the way in which terms such as "Court", "Foreign", "*lex situs*", etc. are used in the work as a whole. Yet when many of these terms are met again they are all explained again. A classic example is "The proper law of a contract" which is itself the subject of a Rule and most of a Chapter; and when all the Latin phrases occur in the text they are explained (i.e. translated) again.[18] Nor is this all; for it is not until Chapter 20, or nearly the middle of the work, that we come across another little heap of terms with their interpretations, all of which are said to be effective throughout the whole work "unless the context or subject-matter otherwise require".[19]

However, apart from these somewhat mathematical criticisms, one cannot have anything but praise for this new edition. The standard of editing is very high and there can be no doubt that whereas future editors will look back on the sixth edition as a pilot or interim edition, the seventh will be regarded as the beginning of a new era. Only a few minor suggestions can be made. Thus, there seems to be a better chance of saving *Sottomayor* v. *De Barros (No. 2)*[20] if attention is paid to the very end of the judgment where the similarity between paternal and papal consent is pointed out; this of course, would mean that the rule of the foreign law would be classified as one of formality only. Again, in dealing with the question of whether the so-called "common law" marriage is or is not confined to British subjects, it would seem more historically accurate to state that a marriage free from formalities is a "common canon law" arrangement, i.e. one which until altered by statutes, was part of the common ecclesiastical law of Europe and therefore not dependent on "common law" in the ordinary sense at all. Again a both good and possible example of a case in which the *locus delicti* may be meaningless, would occur if one channel swimmer assaulted another.

Turning lastly to errors and misprints, the present writer found only a few,[21] though two pages of the table of cases taken at random produced a

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[16] This means that there are very few Australian cases omitted. Only *Havens* v. *Havens* (1943) Q.W.N. 2 and *Manicaros* v. *Manicaros* (1944) 61 W.N. (N.S.W.) 94, both concerned with domicile, were noticed by the present writer. Among periodical references one notices with regret the omission of Dr. Morison's article "The Proleptic Domicile Puzzle" (1954) 6 *Res Judicatae* 505.

[17] Including, in spite of a note of caution sounded in introduction to the sixth edition, a 100% increase in American cases.

[18] In Rule 180 (Torts), however, the term *lex fori* has, for obvious reasons, to be given the specific meaning "law of England".

[19] One of these terms, "succession", has already been used earlier in the work in a wider sense (in Rules 66, 70, 71, and 74).

[20] (1879) 5 P.D. 94, 106.

[21] These were as follows: *White* v. *Tennant* (1888) 31 W. Va. 790 should not be in

number of errors.[22] One matter arising out of these details is that the "table of foreign case references" should include the *A.L.J.* and care should be taken to see that the Argus Law Reports are not abbreviated A.L.R. (as has been regularly done) as this tends to confusion with the American Law Reports.

In conclusion, therefore, congratulations are due to *Dicey's* new editors. Let us only hope that, while his authority continues to grow more weighty, his shadow may not grow too much longer.

J. A. ILIFFE.*

Cases on Trusts, by H. A. J. Ford, S.J.D. (Harvard), LL.M. (Melb.), Reader in Law in the University of Melbourne. Sydney, The Law Book Co. of Australasia Pty. Ltd. 1959, xvi and 794 pp. with Index. (£4/15/- in Australia.)

Dr. Ford's *Cases on Trusts* is a most valuable contribution to the study of equity in Australia, and, indeed, in the British Commonwealth, including as it does cases, statutes and other materials drawn from English, Australian (both Commonwealth and State), as well as New Zealand sources.

The author has two chief aims, firstly to provide information about the law of trusts, and secondly to include materials of sufficient difficulty (perhaps not too arduous a task in the law of trusts) to cause students to develop a lawyer-like capacity for ordered thought and analysis. As Dr. Ford points out in his preface these two aims are not mutually exclusive.[1] In his view it is possible to include many leading cases which are at the same time "problem" cases, and hence attain both ends at once. His book is striking evidence of the correctness of his view, and of its value as a guide to the nature of a casebook and of the case method of teaching. It will be useful not merely for law students and teachers, but also, to the practising profession.[1a]

The book has real merit too as a teaching instrument to be used in the case method of instruction. There are probably as many views of the true nature of this teaching method as there are law teachers[2]—"*quot homines, tot sententiae*". But whether it be seen as a modern revival of the ancient moot problem approach used so much in the 15th and 16th century Inns of Court, or as a quite distinct, modern (and essentially American) contribution to the teaching of law, whether it be desirable to use it on its own or in conjunction with the so-called "formal" lecture, it is based upon making the student grapple with actual or hypothetical fact situations and apply legal principles to them.

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the Empire table; *Robertson* v. *Robertson* (1905) 30 V. (not Vict.) L. R. 546 (118); Ashanti is now a little out-moded as a description of a place to which an English Act applies (1043); Cabassi (1955) Q.W.N. 71 should be corrected in the Empire table to *Re Cabassi* and the second page reference altered to 391; *R.* v. *Langdon* (1953) 23 *A.L.J.* 484 is more fully reported in (1953) 88 C.L.R. 158; *The Six Widows* have lost their page reference (12 Straits Settlements L.R. 120) in the Empire table and *The Rita Garcia* (1937) 59 LL.L.R. 140 has been unkindly aged three years.

[22] Pages cxxx and cxxxi, covering parts of M and N in the United Kingdom table of cases. Here *Moncrieff* v. *Moncrieff* (1934) C.P.D. 208 is an interloper; the reference 9 R. 519 for *Musurus Bey* v. *Gadban* (1894) 2 Q.B. 352 proved to belong to *Stavert* v. *Stavert*—a case from the sixth edition not reproduced in the seventh; *Moore* v. *Darrell* (1832) 4 Hagg. Ecc. 346 is unusual in not being given an English Report reference; *National Bank of Australia* v. *Scottish Union Insurance Co.* is given only *A.L.J.* and C.L.C. reference (this latter term standing for Current Law Consolidation) when (1952) 86 C.L.R. 110 and (1951) 84 C.L.R. 177 would have been better. With *National Bank of Greece and Athens* v. *Metliss* (1957) 3 W.L.R. 1056, the editors bravely prophesied (1958) A.C. in the text (475-482 and elsewhere) but had to go to press without ever getting a page number.

* M.A., B.C.L. (Oxon.). Senior Lecturer in Law, University of Sydney.

[1] At iii.

[1a] But for the practitioner a fuller subject index is necessary.

[2] See e.g., J. Hall, *Teaching by Case Method and Lecture* (1955) 3 *Jo.S.P.T.L.* 99. H. A. L. Ford, *The Evolution of the American Casebook* (1953) 7 *Res. Jud.* 253. W. Pedrick, *A Case Study in Case Method Teaching* (1959) 4 *Univ. W.A. Ann. L Rev.* 74.