AMERICAN-AUSTRALIAN PRIVATE INTERNATIONAL LAW. By Zelman Cowen. BILATERAL STUDIES IN PRIVATE INTERNATIONAL LAW, No. 8. New York: Oceana Publications, Inc., 1957. Pp. 108. $3.50.

THE Dean of the Faculty of Law at the University of Melbourne returns in this book to a theme familiar to Australians acquainted with his other works. This theme is epitomized by section XIII of the present volume:

> "American experience and doctrines of private international law have a very real importance for Australia in the interstate field. There is the clearest evidence of direct copying of the American full faith and credit provisions, although the two sets of provisions are not identical. Yet very often Australian courts have followed English authority in interstate private international law cases, sometimes ignoring what may be thought to be obvious questions of full faith and credit. Sometimes, as in the law of domicile, English rules have been followed in interstate cases, where it might be thought that the American solutions and doctrines were more appropriate . . . . For the future, it will be interesting to see whether the full faith and credit clause continues to be the 'orphan clause' of the Australian Constitution and, if not, how far American experience will guide its interpretation. So, too, it will be interesting to see whether Australian courts will pay increased attention to American authorities in seeking solutions to interstate questions of private international law."[1]

As a natural implication of this approach, the weight of material in this work involves problems arising among Australian states, with comparative references to American authorities functioning to provide a reservoir of ideas, many of which Cowen recommends for adoption in Australia. He is inclined to disagree with the Victorian case of *Harris v. Harris*,[2] which ruled that the faith and credit due to an interstate judgment requires it to be recognized in all other forums if it is final and conclusive in the state where it was pronounced.[3] He would evidently prefer the American rule that the obligation to accord full faith and credit to judgments from other states does not preclude jurisdictional inquiry, at least if the proceedings were *ex parte*.[4] Likewise, believing that in interstate torts cases Australian courts have incorrectly imposed a requirement of actionability by the law of the forum as well as by the law of the place of commission, he adopts the American view that actionability under the law of the place of commission is sufficient.[5] Again, he recommends that Australia reject, both in the interstate and international spheres, the English revival of domicile of origin doctrine, and adopt the American theory that an existing domicile, whether of choice or origin, persists until a new domicile of choice is acquired.[6] And he feels that Australia should follow the United States in recognizing a separate domicile for married women.[7]

1. P. 84.
2. [1947] Vict. L.R. 44 (Austr. 1946).
3. P. 24.
4. Coe v. Coe, 334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343 (1948); Williams v. North Carolina, 325 U.S. 226 (1945).
5. Pp. 26-29.
6. Pp. 30-31.
7. Pp. 32-34.

Perhaps this extended discussion of Australian interstate problems will not greatly interest the American practitioner. The remainder of the book, however, is oriented in his direction, for it consists of brief summaries of those doctrines of Australian private international law and related subjects which might have to be considered by an American lawyer dealing with cases having Australian contacts. The author obviously has not found space to include a similar survey of American doctrines for use by the Australian practitioner, though some appear incidentally.

At first sight, Professor Cowen's format seems odd, for half of this short monograph appears to be directed at the Australian reader, who is advised to profit by the American experience, and the other half at the American reader, who needs to know something of what Australian courts do. As already mentioned, however, Professor Cowen has dealt at some length in his Australian publications with the central problems discussed in the first part of this book.[8] And American experience with these problems is so economically treated throughout the present work that one may safely infer that the part devoted to internal Australian problems, as well as the part which follows, has been consciously addressed to an American audience presumably already familiar with American law. In this aspect, then, the entire book constitutes a report on Australian developments to readers whose theoretical as well as professional interest in them has been variously evidenced.

The report is not encouraging from this standpoint. Cowen's objective is that Australian courts become increasingly aware that international and interstate problems should not be solved in the same way;[9] yet there has been negligible development in this direction since he last surveyed the field in 1952.[10] An obiter remark in the 1954 case of *Miller v. Teale* [11] suggests that the full faith and credit clause of the Australian Constitution might have to be considered in determining the validity in one Australian state of a divorce decree issued in another.[12] Professor Cowen is unable to point to any further cases during this period in which the clause has been discussed. *Harris v. Harris* remains practically unannotated.

Professor Cowen possibly overemphasizes the extent to which the Australian courts are responding to local conditions in diverging from doctrines of English private international law. The examples he gives in this connection are confined to obiter remarks paralleling criticisms by orthodox English text writers of English decisions long regarded as unsatisfactory in that country. He says, for instance, that *Miller v. Teale* implies clearly enough that the anomalous rule of *Sottomayor v. DeBarros* [13] and *Ogden v. Ogden* [14] will not

8. Cowen, *Full Faith and Credit—The Australian Experience*, 6 RES JUDICATAE 27 (1952).

9. See text accompanying note 1 *supra*.

10. Cowen, *supra* note 8.

11. [1954] Argus L.R. 1109 (Austr.).

12. *Id.* at 1113.

13. 5 P.D. 94 (1879).

14. [1908] P. 46 (C.A. 1907).

be followed in Australia, and that *Miller* illustrates again the High Court's willingness to depart on occasion from English authority.[15] *Ogden v. Ogden* has already been overruled in England,[16] although on a point separate from the principle which was discussed in *Miller v. Teale*; and both Cheshire [17] and Dicey,[18] the standard English texts, condemn the principle in question. All that was said in *Miller v. Teale* was that the principle was "dubious,"[19] under these circumstances surely not a convincing expression of Australian independence. Cowen takes *Machado v. Fontes* [20] as another example of English authority on which there has been Australian dissent.[21] But once again the criticism, made obiter in two or three judgments, has been in line with English text writing.[22] One cannot support inferences about the relation between the judicial doctrines of the two countries by referring to Australian criticisms of English authority which might equally well come, and in fact have come, from judges sitting in England.[23] A sociological comparison of Australian and English decisions, taking account of differing national conditions, is a project much to be admired; but one cannot create the materials for such an examination by attributing a special local significance to passages in Australian judgments of the sort to which Professor Cowen here refers.

In the field of full faith and credit, with which Professor Cowen is primarily concerned, studies of American material have had a marked impact on the Australian academic fraternity as distinguished from the profession generally. Professor Cowen states that the literature in Australia on private international law is meager.[24] This is undoubtedly true, and the present work will constitute a welcome addition to it. But, comparatively, problems of full faith and credit have received much attention, particularly since Professor Cowen's 1952 article.[25] When *Harris* was decided in 1947, it received a somewhat uncritical acceptance. I myself welcomed its implications for interstate judgments,[26] and Professor Cowen at first took the same view.[27] We were moreover encouraged in whatever complacency we felt by favorable American reaction. In 1949 Brunson MacChesney told the Committee on Comparative Interna-

15. P. 51.
16. De Reneville v. De Reneville, [1948] P. 100 (C.A. 1947).
17. CHESHIRE, PRIVATE INTERNATIONAL LAW 317 (5th ed. 1957).
18. DICEY, THE CONFLICT OF LAWS 761, 785-86 (6th ed. 1949).
19. [1954] Argus L.R. at 1113.
20. [1897] 2 Q.B. 231 (C.A.).
21. Pp. 61-62.
22. See the summary of criticisms in CHESHIRE, *op. cit. supra* note 17, at 274-76; DICEY, *op. cit. supra* note 18, at 802 n.22.
23. See the reference in Koop v. Bebb, 84 Commw. L.R. 629, 643 (Austr. 1951), to Canadian Pac. Ry. v. Parent, [1917] A.C. 195, 205 (P.C.).
24. P. 10.
25. Cowen, *supra* note 8.
26. Morison, *Extraterritorial Enforcement of Judgments Within the Commonwealth of Australia*, 21 AUSTR. L.J. 298 (1947).
27. Cowen, *The Recognition of Foreign Judgments Under a Full Faith and Credit Clause*, 2 INT'L L.Q. 21, 21-25, 621-34 (1948).

tional Law that the Australian development had "resulted in a more uniform and predictable system, and one that offers promise of achieving the underlying purposes of a full faith and credit clause."[28] But in 1951 Dean Griswold of Harvard visited Australia and engaged in a counteroffensive. He defended American policy regarding interstate recognition of divorce decrees and suggested reasons why the decision in *Harris v. Harris* should be reconciled with it.[29] Professor Cowen, unable to accept the suggested reconciliation, then departed from his earlier view and urged that *Harris* was wrong and that the American position—that the full faith and credit clause does not preclude jurisdictional inquiry—was correct. He presented an extensive survey embodying these conclusions at the annual conference of the Australian Universities Law Schools Association in 1952.[30]

Reaction was varied and somewhat startling. J. G. Fleming of Canberra, who had previously disapproved *Harris v. Harris*, announced to the Conference that he proposed to exercise the same privilege taken by Professor Cowen and now wished to approve automatic recognition by all Australian states of a divorce conclusive in the state where given. R. P. Roulston of Tasmania, who had gone on record as favoring a limitation of *Harris* to situations in which the original decree was based on an explicit finding of domicile,[31] now announced his intention to accept the broad proposition that divorces be recognized whenever conclusive in the state where given.[32] Mr. Sykes of Queensland subsequently expressed a preference for Mr. Roulston's original position, arguing that full faith and credit requires effect to be given to judgments and laws of other states only if common law rules of private international law so require; however, he would not incorporate within the clause those common law qualifications on recognition based on the recognizing forum's public policy or on re-examination of jurisdictional facts.[33]

Sykes's position, while harmonizing with the American notion that legislative and other jurisdictional qualifications are to be given full faith and credit, ignores Professor Cowen's suggestion as to what constitutes the chief lesson of American experience. According to Cowen, this experience shows that international conflicts rules are not necessarily suitable for dealing with problems arising among the states of a federation, and that courts therefore should

28. MacChesney, *Full Faith and Credit—A Comparative Study*, 44 ILL. L. REV. 298, 310 (1949).

29. Griswold, *Divorce Jurisdiction and Recognition of Divorce Decrees—A Comparative Study*, 25 AUSTR. L.J. 248, 261-62 (1951), also published in 65 HARV. L. REV. 193, 221 (1951).

30. Cowen, *supra* note 8.

31. Roulston, *Some Aspects of the Plea Lis Alibi Pendens*, 1 U. WESTERN AUSTR. ANN. L. REV. 289, 292 (1949).

32. He took the earliest opportunity to elaborate this thesis in an extensive review of the subject of divorce decrees. Roulston, *Inter-state and International Divorce Recognition, The Full Faith and Credit Clause and the Common Law*, 26 AUSTR. L.J. 400, 405-06 (1952).

33. Sykes, *Full Faith and Credit—Further Reflections*, 6 RES JUDICATAE 353 (1954).

develop jurisdictional limitations implied in the full faith and credit clause free from any suggestion that they must coincide with international conflicts rules. On this question, Professor Cowen's approach appears to be preferable. Under conditions presently obtaining in Australia, however, the broad principle stated in *Harris v. Harris* probably should be accepted and both Mr. Sykes's and Professor Cowen's views rejected. There is no real likelihood that interstate recognition of judgments conclusive in the state where given would lead to attempts by any state to legislate for the whole of Australia. The usual practice of state legislatures is to avoid questions of private international law by the simple expedient of neglecting to give state statutes any territorial dimension at all. The state courts are therefore left to determine the scope of local laws; and these bodies have tended to give such a narrow territorial application to state statutes as to have excited the concern of the High Court of Australia.[34]

The Roulston and Sykes articles have escaped notice in the documentation of Professor Cowen's work. These commentaries together with those cited by Cowen indicate a not inconsiderable Australian academic interest in the subject of full faith and credit. But the lack of professional exploitation of the provision stands in such contrast to the academic interest as to give to Professor Cowen's progress account to Americans somewhat the aspect of a report from an outlying monastery to the central institutions of the order.[35]

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34. See Koop v. Bebb, 84 Commw. L.R. 629 (Austr. 1951).

35. A review of the present work by Mr. Alan W. Mewett appears in 36 CAN. B. REV. 118 (1958). One of the specific charges made by Mr. Mewett in a generally critical review is that Professor Cowen "elevates the strong dicta in *Travers v. Holley* [[1953] P. 246] as to reciprocal recognition of divorce decrees by courts not of the domicile to the status of *ratio decidendi*." 36 CAN. B. REV. at 119. The suggestion that the remarks in that case were obiter was originally made by Davies, J., in his opinion in Dunne v. Saban, [1955] P. 178, 186 (1954), an opinion which his lordship prefaced with the remark that he would have preferred to reserve judgment had he not been leaving on circuit the following day. *Id.* at 183. Davies, J.'s proposition has been dismissed in a sentence by one commentator as based on a misunderstanding of the facts in *Travers v. Holley*. Kennedy, *Recognition of Foreign Divorces: The Effect of Travers v. Holley*, 4 INT'L & COMP. L.Q. 389, 392 (1955). The seeming rashness of an undefended repetition of Davies, J.'s proposition at this stage by Mr. Mewett may induce the reader to accept his more sweeping criticisms of Professor Cowen's work with some caution.

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