

1937

Joseph Henry Beale: Pioneer

Arthur Leon Harding

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Arthur Leon Harding, *Joseph Henry Beale: Pioneer*, 2 MO. L. REV. (1937)

Available at: <https://scholarship.law.missouri.edu/mlr/vol2/iss2/5>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Missouri Law Review

 Volume II

APRIL, 1937

Number 2

JOSEPH HENRY BEALE: PIONEER

ARTHUR LEON HARDING*

Joseph Henry Beale's *Treatise on the Conflict of Laws*¹ occupies an enviable position among current books. Some great books have been perceived to be books of real authority almost immediately upon publication; others have achieved positions of authority only after a process of slow recognition; still others have lived and died unnoticed. Professor Beale's book was recognized as authoritative and epoch-making even before its publication. This is perhaps the greatest tribute which the profession can pay one of its members. It would be presumptuous for me, distinctly a lesser member, to offer words of praise. It would be pointless for me to go through the book with a spy-glass looking for minor inaccuracies and quibbles. It does seem fitting, however, to examine both the Book and the Man to discover the secret of their greatness.

A few years ago, in the throes of getting out an argumentative sort of book dealing with state jurisdiction to tax, I desired to dedicate the book to Mr. Beale, as a minor recognition of his acknowledged leadership in giving form to the cases in that field. Numerous dedicatory passages were composed, all of them highly rhetorical and lush with adjectives. All were discarded as inadequate. Finally, the most fitting form emerged: "To Joseph Henry Beale: Pioneer." Every man who has studied in this field of tax law has followed the trails blazed by this master, however much he

*Professor of Law, College of Law, University of Idaho; author of *DOUBLE TAXATION OF PROPERTY AND INCOME* and numerous articles in legal periodicals.

1. *A TREATISE ON THE CONFLICT OF LAWS*. By Joseph H. Beale. New York: Baker, Voorhis & Co., 1935. Pp. cxii, 2127. Book Reviews: (1936) 24 CALIF. L. REV. 354; (1935) 9 SO. CALIF. L. REV. 82; (1935) 21 CORN. L. Q. 210; (1935) 35 COL. L. REV. 1154; (1935) 49 HARV. L. REV. 346; (1935) 13 CAN. BAR REV. 531; (1935) 21 A. B. A. J. 603; (1936) 52 L. Q. REV. 590. See, also, deSloovere, *On Looking into Mr. Beale's Conflict of Laws* (1936) 13 N. Y. U. L. Q. REV. 333; McClintock, *Beale on the Conflict of Laws* (1936) 84 U. PA. L. REV. 309.

may have prized his own by-paths and detours. This same word, "Pioneer," seems to afford the best motif about which to organize a study of Mr. Beale's lifetime of study, as represented in the Treatise herein discussed.

Few people realize the extent to which trail-blazing has dominated this man's life. Just fifty years ago he joined with other unknown young men in creating the Harvard Law Review. Joined with his name in this project we find those of John Jay McKelvey, Judge Julian Mack, and John Henry Wigmore. A few months later is noted the addition of Samuel Williston. Patterned upon the English giant then in its infancy, the Law Quarterly Review, the Harvard Law Review was destined to mark the end of the then-popular semi- or pseudo-learned professional journals, and to serve as the model for the numerous law school reviews now being published. Foreign lawyers express surprise at the volume and high quality of this material thus made available to the American lawyer. This year the Harvard Law Review celebrates its fiftieth anniversary, still the leader of journals devoted to Anglo-American common law.

Most university law schools of today admit that their instructional methods are based largely upon those of the Harvard Law School. This is sometimes called the Langdellian method. It is not. The present greatness of the Harvard Law School, true enough, dates from the period of Langdell and Ames; but the methods of Langdell and Ames were a bit too academic to fit the law student for American practice. It fell to the lot of Professors Beale and Williston to reconcile the theoretical niceties of Langdell with the illogic of life. That the task was well done would be suggested by the fact that this Beale-Williston technique has survived until today, although of late we have been forced to make modifications to accommodate ourselves to the growing illogic and expediency and short-sightedness prevailing in our daily affairs. Even in spite of these concessions to contemporary bustle, however, legal education remains in what Dean Pound has called the Bwealston period.²

The debt of American legal education to Mr. Beale is obvious. In addition, he has left his imprint upon the body of the law. A recently compiled bibliography³ shows that his name appears upon treatises on Criminal Practice, Foreign Corporations, Innkeepers, Railroad Rate Regulation. He has edited authoritative revisions of leading treatises in the

2. (1934) *HARVARD LEGAL ESSAYS*, vii.

3. *Ibid.*, 537-546.

fields of Damages, Criminal Law, Partnership. He has compiled casebooks in numerous editions in Criminal Law, Damages, Carriers, Conflict of Laws, Public Service Companies, Municipal Corporations, Taxation, Federal Taxation, Torts. In between times he translated the fragmentary Bartolus on Conflict of Laws, and compiled the standard bibliography of early English law books. His articles in legal periodicals are almost countless. These articles were not a rehash of what had gone before. Almost without exception each offers a definitely new idea or new approach to the question under discussion. They are to be found in the Harvard Law Review from volumes first to last and in numerous other places. Their subject matters represent a scope of interest and activity embracing virtually all the law.

One whose study embraces all phases of the law would naturally be attracted to the Conflict of Laws, a subject which itself pervades all phases. Mr. Beale's mastery of the history, rationale, and operation of the substantive law in all its aspects is naturally reflected in his writings on Conflicts. One can hardly be a master of Conflict of Laws without this mastery of Law. We have men who would give us systems of Conflict of Laws without stopping to think how the rules and principles developed in their systems would mesh with the rules and principles of substantive law in connection with which they have to be applied. Such systems seem perfect but somehow they fall down in operation. Perhaps this is but another way of saying that a young man really cannot be expert in this field. Mr. Beale's fault in this connection, if he has a fault, is in the other direction. Sometimes it appears that he is prone to carry into the Conflict of Laws outmoded distinctions of substantive law which have ceased to be useful. In other places however the reader will be struck by the vigor with which he discards common law tweedledum-tweedledee and solves his Conflicts problems afresh.

LEGAL METHOD

Most of the criticism which has centered about Mr. Beale has been an attack phrased in terms of legal method.⁴ "Unscientific" and "*a priori*" have been the epithets most commonly used. It is here that any evaluation of the Treatise must begin. A book so abounding in the personality of the author as this must be read in light of that personality.

4. See *inter alia*, Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 457; Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE L. J. 736.

Mr. Beale's method is disclosed in the various prefaces to the Treatise. He says: "First, many decisions are examined, before a provisional opinion is formed."⁵ All writers do this, but Mr. Beale's technique is a bit out of the ordinary. He wastes little time on elaborate card-index classifications of decided cases. Rather he appears to employ the method so successfully employed by the late Dean Ames. The many opinions on a particular point are gathered together, and are read and studied *in solido*, with great emphasis upon the reported facts and the final dispositions of the causes. An effort is made to state the law on the point as the present stage of a moving process. The transitory nature of the minutae of legal rules is understood. These rules are viewed as imperfect expressions of more fundamental principles to which the judges adhere. Once these principles are understood in their proper setting, one may safely talk about what these same judges will do next.

Mr. Beale denies that he is a legal philosopher.⁶ This, of course, is absurd. He is a philosopher and is a good one. What he intends no doubt is that he is not given to Kantianism; that he is impatient of the abstruse maunderings so often passed off in the name of Philosophy. Like any other philosopher, from medieval scholasticist to the modern realist of the ultra-ultra type, he must make certain assumptions. The first of these assumptions is that men organize their knowledge into principles and concepts, and interpret facts in light of them. This cannot be demonstrated, but one feels that there is much truth in it. But men are not entirely rational. As men strive for knowledge, they are unwittingly endowed with prejudices. What we fondly believe is a reasoning process is but a passing compromise between reason and prejudice, between reflection and passion. It is not enough to understand the principles to which a man subscribes, the concepts which he has erected, but one must study how closely he has adhered to these in practice.

Even in so speculative a field as the relationship between principle and prejudice, it is possible to draw tentative conclusions upon the basis of continued courses of conduct. Extensive study of past behavior may justify tentative conclusions as to how judges as a class will react to extralegal pressure of a particular variety. A group of decided cases may indicate clearly the existence and pressure of some social purpose in the minds of the

5. P. xiii.

6. *Ibid.*

judges, not mentioned in any way in the opinions themselves. The discovery and definition of this purpose is as important to the study of the law as is the analysis of the outward manifestations (rules and principles) themselves.

Mr. Beale has no patent on this process. All legal writers worthy of the name employ it. True, they differ radically among themselves as to ultimate results, but this is as it should be. It is only from ceaseless ferment of ideas and endless wrangle of argument that the transitory truths of our day can emerge. Even Mr. Beale's most ruthless opponents concede his mastery of this technique. Wherein do they differ?

Here we encounter Mr. Beale's second assumption: That American judges as a class make an honest and sincere effort to decide their cases by the application of the principles which they have gathered from their own study and practice, and then make an honest effort to reproduce in their written opinions the particular reasoning employed. In other words he appears willing to accept a reported opinion on its face, until convinced by his own study that some other reasoning or motive underlies the decision. This does not mean that he constructs a jurisprudence of dicta. He is fully conscious of these hidden factors and strives to bring them to light. When brought forth they are likely to be phrased in terms of some fundamental social policy changing the nature of legalistic concepts and principles. While he is conscious of the influence of purely personal factors in shaping decisions he prefers to minimize them. Mr. Beale's more extreme critics appear to take a different view. There appears to be a tendency to interpret all opinions in the light of the personality of the particular judge. There appears to be almost a presumption that no opinion is honest and straightforward, but is a plausible cloak given non-rational process. Here again there is some truth; even the most honest and sincere judge cannot be entirely objective in his disposition of causes. No man can divorce himself from his own conditioning and environment. And some judges give evidence of being vindictive, arbitrary, and even corrupt.

Perhaps the most that can be said is that the difference is one of degree. While Mr. Beale attaches less weight to judicial language than does the typical practitioner, he gives it more credence than do his younger critics. While many of the critics focus their attention upon individual decisions marking specific isolated failures of what we hope is a legal order, Mr. Beale minimizes these as temporary excrescences on the body of the law. The rash may be quite severe at times, but never sufficient to indicate

any serious organic breakdown, infirmity or debility. Or, if I may press the figure further, they appear to him as the adolescent pimples marking an approach to maturity, or as the warning to a mature body against a too sudden change of habits. In short, while many of us devote our effort to the law as it is, Mr. Beale insists upon maintaining perspective. While all that matters to a particular litigant is the manner of disposition of his cause, society itself is fully as interested in the next cause, and in the next. "One believes that legal history means not only a study of the trends and changes of legal thought in the past, but also, a more subtle task, a study of the trends and the likelihood of changes of legal thought in the present."⁷

So much then for the manner in which Mr. Beale formulates his tentative conclusions. The next task is to try them out. The physical scientist tries his in the laboratory and, if they stand this test, then in the field. Mr. Beale's laboratory consists of a steady procession of quite capable law students. His testing process is one of the unforgettable sights of the Harvard Law School. A plausible sort of hypothesis is formulated and carefully explained. It is then tossed out for discussion. With smiles of pure joy these students proceed to do their part. It seems that every possible argument and objection is brought forth and pressed to the end. No quarter is asked and none is given. It appears to be the greatest ambition of the senior law student to "hang one on Joey." On the other hand, Mr. Beale has been known to toss out an obvious fallacy just to give the lads a chance to sharpen their teeth. Few of the propositions emerge from this welter in their original form. Time and again, Mr. Beale must admit that he is beaten, and retire to make modifications to eliminate the fatal weakness brought to light. The new proposition is then subjected to the same fire of criticism, more deadly than most lawyers are likely to encounter in a lifetime of court appearances. Finally, there emerges a principle or theory which gives promise of being sound. Next the hypothesis is tried out on the profession, by means of publication in a law journal. Here again valuable criticism is forthcoming and an occasional weakness discovered. Shortly thereafter we find the idea being tried in the field; that is, it will be incorporated in the argument in a pending case. The results here have been rather good. With an almost uncanny frequency the courts themselves accept Mr. Beale's notions; or,

7. Beale, *Social Justice and Business Costs—A Study in the Legal History of Today* (1936) 49 HARV. L. REV. 593, 609. This article embodies a typical example of Mr. Beale's method of analysis.

perhaps more accurately, confirm his statements as a correct analysis of the judicial process in the particular field.

Forty years of this testing lie behind this Treatise. It is believed to be the nearest thing to the application of a scientific method to the writing of a substantive law text. It embodies the formulation of hypotheses on the basis of observed fact (decided cases); and the revision and correction of these hypotheses on the basis of continued testing. However, it must be remembered that it is an exposition of legal theory; not a trial manual. It purports to give to the practitioner the means with which to appeal to the reason of the judge. It does not offer any means of guarding the case against the unreasoning judge. It must be appraised with a view to this purpose.

LAW

We start then with Mr. Beale's notion of law. As he himself puts it:

"It is not a mere collection of arbitrary rules, but is a body of scientific principle. . . . Purity of doctrine may be lost through wrong decisions of courts, thus warping legal principle by bad precedent; but wrong decisions are after all uncommon, and the law is not seriously affected by them. The application of general principles may be inhibited by legislation; but the amount of legislation which affects ordinary private law is relatively small, and doctrine is not greatly changed by statute. . . . The changes in principle made by legislation and by wrong decisions constitute the greater part of the peculiar local law of any jurisdiction, as distinguished from the general doctrine of the prevailing legal system. Law, therefore, is made in part by the legislature; in part it rests upon precedent; and in great part it consists in a homogeneous, scientific, and all-embracing body of principle; and a correct definition of law in general must apply to all these varieties of law."⁸

Before we condemn this as an untenable sort of legal fundamentalism, we must remember how Mr. Beale visualizes this body of principle. It is not immutable. Instead it is steadily forging ahead, incorporating in a more or less logical but unhurried manner changing concepts in ethics, economics and politics. So understood it presents little more than the slightly idealized picture of Common Law as understood by common lawyers. His tendency to minimize single precedents is perhaps overdone, but appears to be generally in line with the current practice of appellate courts.⁹

8. Sec. 3.4.

9. Goodhart, *ESSAYS IN JURISPRUDENCE AND THE COMMON LAW* (1931) 50; *Case Law in England and America* (1930) 15 CORN. L. Q. 173.

VESTED RIGHTS

Mr. Beale's general understanding of the nature of the Conflict of Laws is well known. It has been debated pro and con for years and need not be debated here. It starts with the proposition:

"That the law is territorial, that there can be no law in a particular state except the law of that state, and therefore that a foreigner coming into that state can by no means bring with him his personal law even for his own protection; the foreigner coming in is subject to the law of the state as much as the nationals of the state. The conception of the common law has always been the conception of a territorial law. No law is administered as such by the courts except the territorial law."¹⁰

Included in this territorial law are the principles of the Conflict of Laws. These direct that when an action is brought involving some conduct or happening abroad, this foreign element be viewed in its proper setting in the law of the place of occurrence. If by the law of that place the complaining party is not recognized as having any sort of a legally protected interest (Mr. Beale's Primary Right),¹¹ he has no basis for a complaint to the courts of that or any other place. If, on the other hand, the law of the place of the operative facts recognizes and protects the legal interest involved as against the particular conduct complained of, it is said to confer upon the injured party a Remedial Right,¹² as a substitute for and in vindication of the violated Primary Right. This Remedial Right will normally be in the form of a claim to compensation or some other satisfaction by the wrongdoer.

Having determined by the inspection of the law of the proper place whether the claimant's claim of right is well founded, the court must again turn to its own Conflict of Laws rules to determine upon what terms and conditions the right may be enforced or vindicated in its own law. Local enforcement does not follow automatically from the fact that a remedial right is created by the law of another place. However, the local Conflict of Laws rules will indicate that it be enforced locally, unless it comes within certain exceptions. These are: (1) the foreign created right may be denied enforcement because it is deemed entirely opposed to fundamental notions

10. Sec. 5.2.

11. Sec. 8A.10 *et seq.*

12. Sec. 8A.27.

of justice accepted at the forum;¹³ (2) the local court may refuse enforcement because of a belief that a contrary course would be seriously prejudicial to the public policy of the forum;¹⁴ or (3) the remedial right asserted may be of such a nature that it is impossible of enforcement under the judicial machinery existing at the forum.¹⁵ The point is further stressed that these exceptions are of diminishing importance. The law of our several states, and for that matter of all civilized nations, is sufficiently similar that it is hard to imagine a case of a remedy granted in one state which another could label as entirely opposed to basic ideas of right and wrong.¹⁶ So, too, the recent cases insist that one relying upon an asserted public policy opposing the enforcement of the right show that some really prejudicial consequences would result.¹⁷ Courts recognize that no real public policy is involved merely because the law of the two places differ in substantial degree. Also there is a well defined tendency on the part of courts trying such cases to adapt local procedural machinery to the enforcement of novel rights. In short we are coming more and more to realize with Judge Cardozo that, "The fundamental public policy is perceived to be that rights lawfully vested shall be everywhere maintained."¹⁸

13. Very few of the authorities treat of this limitation as a separate item. It is normally included as a part of a broad notion of public policy. It has been noted separately in cases involving attempted enforcement of foreign judgments. *De Brimont v. Penniman*, 10 Blatchf. 436, Fed. Cas. No. 3,715 (1873). Other cases have used the term in connection with judgments attacked as based upon intrinsically unfair proceedings. *Robinson v. Fenner* [1913] 3 K. B. 835.

14. Sec. 612.1.

15. Sec. 608.1. *Slater v. Mexican National Ry.*, 194 U. S. 120 (1904); *Weidman v. Weidman*, 274 Mass. 118, 174 N. E. 206 (1931).

16. *Cf.*, *Hudson v. von Hamm*, 85 Cal. App. 323, 259 Pac. 374 (1927), refusing to enforce in California a claim in tort predicated upon an Hawaiian statute making a parent liable for the torts of his minor child. The opinion is filled with loose language relating to comity. (1928) 26 MICH. L. REV. 439; (1928) 13 CORN. L. Q. 266.

17. See, Nutting, *Suggested Limitations on the Public Policy Doctrine* (1935) 19 MINN. L. REV. 196. The classic statement is to be found in Beach, *Uniform Interstate Enforcement of Vested Rights* (1918) 27 YALE L. J. 656. A current controversy of some difficulty centers about whether a married woman given a cause of action against her husband by the law of the place of wrong, will be permitted to sue thereon in a state declaring a rule of public policy against such actions. Two recent cases deny the claim. *Poling v. Poling* (1935) 116 W. Va. 187, 179 S. E. 604 (action by injured husband against wife); (1935) 41 W. VA. L. Q. 429; *Mertz v. Mertz*, 271 N. Y. 466, 3 N. E. (2d) 597 (1936); (1936) 36 COL. L. REV. 1158; (1936) 50 HARV. L. REV. 351; (1936) 1 MO. L. REV. 348. The latter opinion contains language of a definitely retrogressive nature as compared with the opinion in *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198 (1918).

18. *Loucks v. Standard Oil Co.*, 224 N. Y. 99, 120 N. E. 198 (1918). This opinion may be cited as the outstanding statement of the prevailing American doc-

There is some seeming artificiality in this vested-rights theory. It has been attacked and every weakness brought out. We cannot decide the controversy here. Mr. Beal himself is a bit disdainful of it, and appears content to reply that his critics have yet to produce a better explanation. Instead he poses two tests: (1) Does the theory actually represent the basic assumption of the courts in deciding Conflict of Laws cases? and (2) Does it aid in the analysis, understanding and solution of novel points?

As to the first query, it appears that we must concede that almost every American opinion containing any particular discussion of the theoretical problem espouses in form at least the vested-rights theory.¹⁹ It is with

trine of the Conflict of Laws. Cf., Cook, *Recognition of "Massachusetts Rights" by New York Courts* (1918) 28 YALE L. J. 67.

The development of the Conflict of Laws in the United States was held back for many years by a sort of rule of thumb invented in certain early opinions to the effect that a cause of action predicated upon a statute at the place of wrong would not be accorded local enforcement unless the state of the forum had a statute of substantially similar import. Two well-known Texas cases indicate the absurdities of this doctrine in action. *Texas & Pac. R. R. v. Richards*, 68 Tex. 375, 4 S. W. 627 (1887); *St. Louis, I. M. & S. Ry. v. McCormick*, 71 Tex. 660, 9 S. W. 540 (1888). Numerous later cases correctly refuse to be limited by any such doctrine. Interesting opinions may be found in *Brown v. Perry*, 104 Vt. 66, 156 Atl. 910 (1931); *Powell v. Gt. No. Ry.*, 102 Minn. 448, 113 N. W. 1017 (1907); *Curtis v. Campbell*, 76 F. (2d) 84 (C. C. A. 3d, 1935); *Reilly v. Antonio Pepe Co.*, 108 Conn. 436, 143 Atl. 568 (1928). Cf., *London Guarantee & Acc. Co. v. Balgowan S. S. Co.*, 161 Md. 145, 155 Atl. 334 (1931).

19. One of the most thorough opinions among the recent cases is to be found in *Gray v. Gray*, 174 Atl. 508, 94 A. L. R. 1404 (N. H. 1934), where the court says: "It is contended that there is unpardonable inconsistency in enforcing foreign rights, whether of prosecution or defense, and at the same time declaring that the foreign law is not in force here. The ground has been gone over many times. The local law is that the foreign rights will be enforced. What those rights are depends upon the facts, and a part of the facts consists in the law under which the transactions took place. But if it is still insisted that a proper designation of the process is that we thus enforce foreign law (*Saloshin v. Houle*, 85 N. H. 126, 155 A. 47), it does not affect the soundness of the procedure. We enforce the foreign law because it is our law that the foreign law shall govern the transactions in question. 'For the purposes of the case the foreign law becomes the local law.' (*Saloshin v. Houle, supra*). It has been concluded that it shall so govern for the reasons before stated. This is not importing foreign law. It is only giving to it the legitimate effect upon transactions occurring where it is in force. The logical alternative is not found in the application of local law to a foreign transaction, but in a refusal to deal with that transaction at all. If it is to be justiciable here, it should be upon the basis of what it is there. The other view, that to some indefinite degree our law should govern the foreign transaction, would export our law into foreign territory. The reasonable conclusion which has been reached is that there should be neither export nor import; that generally speaking, the law is territorial, conceived of spatially as governing within the jurisdiction, and creating there rights and obligations which will be respected and enforced elsewhere."

considerable reason that Mr. Beale can contend that his theory is the law, quite regardless of whether it ought to be. It is true that most of the decisions can be explained on the basis of one of the competing theories.²⁰ It is also true that some of the cases are somewhat difficult of reconciliation with this theory. Nevertheless, this virtual unanimity of judicial expression is impressive, and indicates the extreme magnitude of the task of those who would establish the Conflict of Laws upon an entirely different theoretical basis.

As to whether the theory offers the most workable method of understanding and applying the cases, each reader will have to draw his own conclusions.²¹

20. The reader must always have in mind that the quarrel as to terminology and theory is largely one as to words and not as to result. Mr. Beale's critics usually end up in substantial agreement with his ultimate conclusions as to the law on a certain point. However, the competing theories have in some instances led to differences in conclusion. See, *Guinness v. Miller*, 291 Fed. 769 (S. D. N. Y. 1923).

21. Mention should be made of the most recent doctrine advanced. This would discard the accepted vested-rights doctrine, as well as the European private international law theories, and would make the solution turn upon the social and economic "desirability" of the result in the particular case. The governing law would be selected not by reference to the relationship between the place and the operative facts, but by reference to the internal laws of various places concerned, and the law giving a more just result would be selected. Cavers, *A Critique of the Choice-of-Law Problem* (1933) 47 HARV. L. REV. 173. See also Stumberg, *PRINCIPLES OF THE CONFLICT OF LAWS* (1937) 12-15. Mr. Beale's reaction to this proposition is not made clear, but one can imagine it. The idea, of course, is opposed to his whole idea of logical development. Further he would ask: By whom and by what standard is the just result to be determined? Can the court under modern conditions make a detailed study of the social desirability of the result in each individual case? Must not the courts think in terms of principles which may normally be relied upon to achieve just results and apply such principles to all cases except where it is quite apparent that the end result will be bad? What proof is there that the results of the vested-rights doctrine are less just than might be had under other systems? And, finally, while certainty and uniformity are not the sole ends of the Conflict of Laws, are they not of sufficient importance to throw great doubt upon any such plan as that proposed? Mr. Beale appears conscious of these factors. As pointed out above, his inductive process in formulating his general principles appears to take social interests into account. Once his principles are formulated, his desire for uniformity and predictability leads him to apply them deductively. However, it is grossly unfair to label his entire process as deductive. As a learned observer has pointed out: "But a comparison of what Professor Beale and his critics have respectively done, as distinguished from what they have professed they were going to do, creates at least a suspicion, if it does not demonstrate, that Professor Beale has more consistently followed the approved inductive method than have his critics. Certainly he has given much more evidence of having made an extensive observation of the decided cases than have those who accuse him of mere deductive reasoning, and in many cases he has radically departed from the language used by the court to base a generalization upon the results of the cases." McClintock, *supra* Note 1, at 310.

DOMICIL

In entering upon the discussion of the specific problems in the field, Mr. Beale follows the arrangement of subjects employed in the American Law Institute Restatement. While this means to some degree a sacrifice of orderly presentation, it is more than offset by the ease of reference between the two works.

The first topic is Domicil. To Mr. Beale this is a unitary concept,²² that is, the purpose for which the issue of domicil is to be determined, whether for voting, taxation, divorce, inheritance, attendance in public schools, poor settlement, or other, has little effect upon the ultimate determination of this forum.²³ In support he can point to the fact that standard definitions appear in all manner of cases, and to the fact that cases involving an adjudication of domicil for one purpose are freely cited in cases involving adjudications for quite different purposes. One wonders. Examine the opinions finding the millionaire Dr. Dorrance domiciled in both Pennsylvania and New Jersey for purposes of inheritance taxation.²⁴ Suppose the question had been whether Dr. Dorrance was entitled to a poor settlement or could qualify for an old-age pension? It's not impossible that instead of having two domicils, the doctor might have found that he had none. Mr. Beale's critics on this point can point to many cases where the nature of the controversy has affected the finding of domicil. Are these cases sufficiently few in number that Mr. Beale can dismiss them as mere wrong applications of a general principle; or are there enough of them to deny the existence of such a principle?²⁵ No

22. Sec. 9.4 *Cf.*, Cook, Book Review (1935) 35 COL. L. REV. 1154; 3 PROCEED. AM. LAW INST. (1925) 226 *et seq.*

23. That the forum will determine the issues both of law and fact in a question of domicil appears clear. Sec. 10.1.

24. *In re Dorrance's Estate*, 309 Pa. 151, 163 Atl. 303 (1932), *cert. denied*, Dorrance v. Pennsylvania, 288 U. S. 617 (1933); *In re Dorrance's Estate*, 115 N. J. 268, 170 Atl. 601 (1934) *aff'd*, Dorrance v. Martin, 13 N. J. Misc. 168, 176 Atl. 902 (1935), 116 N. J. L. 362, 184 Atl. 743 (1936), *cert. denied*, 298 U. S. 678, 692. See also Hill v. Martin, 296 U. S. 393 (1935).

25. Mr. Beale properly makes the point that since domicil is in every case a matter of local law, and since the laws of the states differ on several points, the fact that the courts of two states reach conflicting adjudications does not mean that domicil is not a unitary concept within the borders of each state. "There is no super-law which can prevent such a result. In the law of a single state it is submitted that the courts deal with all questions of domicil on the principle that a man can have but one domicil, no matter for how many purposes his domicil may become legally important." Sec. 9.4. Where domicil forms the basis of constitutional jurisdiction of a state, as in taxation, we are not entirely at the mercy of conflicting adjudications in two or more states. That there is judicial relief would appear to be indicated by the fact that the appeal to the United States Supreme Court from

definite answer is possible. It is another case in which Mr. Beale can rely upon a virtual unanimity of judicial statement, while his opponents point to numerous cases to argue that the courts' decisions belie their words.

In discussing particular problems of domicile, Mr. Beale is conscious of the change now going forward in this country because of the increased migration of both families and individuals, as well as the increasing ease with which family ties are broken.²⁶ From the older definition of the place where a man expected to spend the rest of his mortal days, we have passed to the present definition of the place where a man resides for the time being without any definitely formed present intent to remove therefrom.²⁷ Perhaps even this definition should have been qualified to include the case where there is a present intent to remove, but not in the immediate future.

Beginning with the proposition that every person must have a domicile,²⁸ the domicile acquired at birth is first discussed. This is determined with reference to the domicile of a parent,²⁹ if this is possible of ascertainment, otherwise with reference to the place of birth. This domicile may be changed by the voluntary act of the person concerned as soon as he acquires the requisite capacity,³⁰ and whether he has the capacity is determined by the law of the forum.³¹ The new domicile is acquired as soon as the person is present in

Pennsylvania's "muscling in" on the Dorrance estate was dismissed on the express ground that the Federal question was not properly presented and preserved in the lower courts. *Dorrance v. Pennsylvania*, 287 U. S. 660 (1932). See (1932) 81 U. PA. L. REV. 177; (1934) 9 IND. L. J. 586. In an interesting recent case, the new Federal interpleader statute (49 Stat. 1096, 28 U. S. C. A. 41 (26) as amended) was used to obtain an adjudication of domicile binding upon the two state tax commissions seeking to levy estate taxes. *Worcester County Trust Co. v. Long*, 14 F. Supp. 754 (D. Mass. 1936), *cert. denied*, 57 S. Ct. 29 (1936); (1936) 49 HARV. L. REV. 1378.

26. "It is, of course, true that in every generation juridical questions arise upon which the experience of the past is no complete guide. In the law of domicile several such questions have arisen within the past generation, owing to an entirely novel experience in such matters as the vast increase of travel, both for business and pleasure, and the new position of the married woman. When such questions arise, judges, teachers, and legal authors must revise their past ideas in the light of the new experiences. This fact keeps the law fluid. It is for this reason that the common law retains its flexibility and will not harden into the rigid outline of a code. The law of domicile as developed in this chapter is the law of today and, it is hoped, the law of tomorrow; but it must develop as new situations arise just as any portion of the law may develop." Sec. 9.4.

27. Secs. 9.5, 19.1. *Stevens v. Larwill*, 110 Mo. App. 140, 84 S. W. 113 (1904).

28. Sec. 11.1.

29. Secs. 14.1, 30.1.

30. Sec. 15.2.

31. Sec. 10.2. *Torlonia v. Torlonia*, 108 Conn. 292, 142 Atl. 843 (1928).

that place³² with the necessary intent to make it his home. Numerous cases are collected showing when the requisite intent may be found.

In treating domicile by operation of law, Mr. Beale takes a distinctly sound position. It has been customary for years to explain the power of the husband and father to fix the domicile of the wife and minor children in terms of the legal unity of husband and wife or parent and child, or in terms of legal incapacity of married women and infants. Mr. Beale starts with the proposition that the members of a family normally take the same domicile because they are living together in a single place.³³ So long as the family continues as a unit this single domicile continues, although individual members may be absent from time to time. Nor may a member of the family acquire a new domicile by wrongfully departing from the home.³⁴ However, as soon as the family unit is broken for a cause permitted by law, the various members are free to acquire domiciles apart from that of the husband and father.³⁵ Thus the American cases recognize the power in a married woman who has been turned out of her home or deserted by her husband, or who has left the husband for cause justifying divorce or separate maintenance.³⁶ What is cause would be determined by the law of the matrimonial domicile.³⁷ It is also noted that in time this requirement of fault may be eliminated, and the wife permitted to acquire a separate domicile whenever she is actually living apart from her husband.³⁸ If the mother is living apart from the

32. Sec. 16.2. It is clear, of course, that one must be physically within the area before he acquires a domicile of choice therein. Mr. Beale takes the further position that he must have settled in a particular place within the area. Not all the cases cited by the author for this point appear sufficient to carry the doctrine to the limits suggested.

33. Sec. 26.1.

34. Secs. 27.2, 28.5, 30.1. *Martin v. Gardner*, 240 Mass. 350, 134 N. E. 380 (1922); *Floyd v. Floyd*, 95 N. J. Eq. 661, 124 Atl. 525 (1924); *New Domain Oil & Gas Co. v. McKinney*, 188 Ky. 183, 221 S. W. 245 (1920).

35. Thus an emancipated minor living apart from the father with the father's consent may acquire a new domicile. *Bjornquist v. Boston & Albany R. R.*, 250 Fed. 929 (C. C. A. 1st, 1918); *Thomaston v. Greenbush*, 106 Me. 242, 76 Atl. 690 (1909). Some cases would require that this emancipation be accomplished in some formal manner. *Delaware, L. & W. R. R. v. Petrowsky*, 250 Fed. 554 (C. C. A. 2d, 1918); *Gulf, C. & S. F. Ry. v. Lemons*, 109 Tex. 244, 206 S. W. 75 (1918).

36. Sec. 28.3. *Walton v. Walton*, 6 S. W. (2d) 1025 (Mo. App. 1928); *Wear v. Wear*, 130 Kan. 205, 285 Pac. 606 (1930); *Williamson v. Osenton*, 232 U. S. 619 (1914). The English cases reject this doctrine.

37. Sec. 28.4.

38. Sec. 28.5. There is reason to believe that the consent of the husband to the separation will enable the wife to acquire a new domicile. *In re Crosby's Estate*, 85 Misc. 679, 148 N. Y. S. 1045 (1914); (1914) 28 HARV. L. REV. 196; *McCormack v. McCormack*, 3 N. J. Misc. 624, 129 Atl. 212 (1925). While the majority appear

father under circumstances enabling her to acquire a separate domicil, this domicil will also attach to such minor children of the marriage as actually reside with her.³⁹

JURISDICTION

Jurisdiction is a word of many meanings. In dealing with a fully independent sovereign state, it may be said that it has jurisdiction to do anything that it has the physical power to make effective. Jurisdiction is sometimes defined in terms of such power. Few nations claim such a jurisdiction, but limit themselves to those things not vigorously condemned by international usage. A subordinate state within a federated nation, as one of the states of the United States, may find that its claims to jurisdiction are further limited by the organic law of the federation. These situations suggest varying definitions of jurisdiction, but Mr. Beale will have none of them. In his view, the principles of the Conflict of Laws are not concerned with what powers our own state may exercise, but with what powers we will recognize when claimed by another.⁴⁰ In this way he comes to the Restatement definition as "the power of a state to create interests which . . . will be recognized as valid in other states."⁴¹ Thus one state may refuse to recognize the power of another to do a certain thing, although claiming a similar power in itself. In such a setting, Mr. Beale's definition is acceptable.

opposed, there is some authority to the effect that even a deserting wife may acquire a new domicil. *Saperstone v. Saperstone*, 73 Misc. 631, 131 N. Y. S. 241 (1911). An occasional case appears to place the wife on exactly the same plane as the husband so far as concerns an ability to acquire a domicil of choice. *Com. v. Rutherford*, 160 Va. 524, 169 S. E. 909 (1933).

39. Sec. 32.1. The first cases went no further than to hold that on the death of the father, the domicil of the minor child would thereafter be that of the mother if the child in fact lived with her. *Lamar v. Micou*, 112 U. S. 452 (1884); *Sudler v. Sudler*, 121 Md. 46, 88 Atl. 26 (1913); *DeJarnett v. Harper*, 45 Mo. App. 415 (1891). It was held that upon the separation of the parents, the child would continue to have the domicil of the father although it in fact lived with the mother. *Lanning v. Gregory*, 100 Tex. 310, 99 S. W. 542 (1907); *In re Means*, 176 N. C. 307, 97 S. E. 39 (1918); *Glass v. Glass*, 260 Mass. 562, 157 N. E. 621 (1927). Other cases hold that where the wife is given custody of the minor by judicial decree, the child thereafter takes her domicil. *Glass v. Glass*, *supra*; *Ex parte Erving*, 109 N. J. Eq. 294, 157 Atl. 161 (1931). The modern view appears to be that where the parents are living apart under circumstances enabling the wife to acquire a separate domicil, that domicil attaches to the minor children actually living with her. *Stephens v. Stephens*, 53 Idaho 427, 24 P. (2d) 52 (1933); *People v. Dewey*, 23 Misc. 267, 50 N. Y. S. 1013 (1898). On the death of the mother with custody, the domicil of the minor reverts to that of his father. *Bradford v. Lincoln Bank & Trust Co.*, 96 S. W. (2d) 821 (Tex. 1936); (1937) 85 U. PA. L. REV. 320; *Chumos v. Chumos*, 105 Kan. 374, 184 Pac. 736 (1919). *Cf.*, *In re Thorne* 240 N. Y. 444, 148 N. E. 630 (1925).

40. Sec. 42.1.

41. RESTATEMENT, CONFLICT OF LAWS, §42.

In some of Mr. Beale's earlier writings he leaned more toward the broader definition of jurisdiction prevailing in public international law. Of course, he still concedes a general power in a state to act pretty much as it pleases within its own territory, except so far as restrained by its own constitutional limitations.⁴²

A state has a general jurisdiction over all persons within its borders.⁴³ It may also claim jurisdiction over all persons owing it political allegiance, although absent from its borders.⁴⁴ This latter claim of jurisdiction over absent nationals may be asserted only by states enjoying full external sovereignty in international law, and not by subordinate units of a federated state, as by one of the states of the United States. In stating that this jurisdiction cannot be recognized in such British Dominions as Canada, Australia, and the Union of South Africa, Mr. Beale underestimates the degree of independence which these states now enjoy.⁴⁵

A state has jurisdiction over all interests in land within its borders.⁴⁶ It would seem that it has a similar jurisdiction over all chattels and all interests in chattels found within its borders. Mr. Beale denies this jurisdiction when the chattel is brought into the state without the knowledge or consent of the owner, and remains there without his having an opportunity to remove it.⁴⁷ This contention was debated at the Law Institute and was finally rejected. *Edgerly v. Bush*,⁴⁸ on which Mr. Beale relies seems more properly to be considered a remnant of the maxim *mobilia sequuntur*

42. Sec. 42.2.

43. It is sometimes considered appropriate to note as an exception to this broad statement the diplomatic immunity enjoyed by foreign rulers, ambassadors, etc. Mr. Beale's definition would require that the exception be made.

44. Sec. 47.2.

45. Recent constitutional developments in these parts of the British empire would indicate that these are no longer subordinate states, but have full standing as nations.

46. Sec. 48.1.

47. Secs. 50.1-50.3. Mr. Beale distinguishes between jurisdiction over the chattel, and jurisdiction over the owner and his interest therein, and argues that to acquire jurisdiction over the personal interest the state will have to show jurisdiction over the person of the owner, or some consent or acquiescence on the part of the owner to the exercise of the jurisdiction claimed.

48. 81 N. Y. 199 (1880). In this case plaintiff in New York was mortgagee of certain horses in that state. By the terms of the mortgage the mortgagee was entitled to possession if the mortgagor should remove the horses from the state. The mortgagor carried the horses into Canada and there sold them to a stranger and they finally reached the defendant under circumstances which under a rule similar to that of market overt were sufficient to pass title to the defendant by the Canadian law. Defendant, refusing to return the horses when demanded in New York, was held liable in damages to the plaintiff although the horses remained in Canada.

personam. The conditional sale and chattel mortgage cases cited appear more likely to rest upon statutory construction than upon a finding of no jurisdiction.

In treating of the jurisdiction of courts, Mr. Beale continues to apply his special Conflict of Laws definition of Jurisdiction. He is concerned not with what the courts of the forum may be required or permitted to do under the local law, but with what powers the forum will recognize in the courts of another state. The judgment of a foreign court based upon a claim of jurisdiction not recognized at the forum, will be considered by the forum as a nullity.⁴⁹ Furthermore, we have erected in our own common law a requirement that the foreign court must have taken some reasonable steps to give to the person sought to be affected by the judgment, notice of the pendency of the controversy and an opportunity to defend.⁵⁰

Generally, the courts of a state may claim jurisdiction over any person actually within the territorial limits and subjected to something in the nature of process sufficient to satisfy the notice requirement.⁵¹ Mr. Beale makes a somewhat questionable exception to this when he says that there is no jurisdiction in civil suits over persons brought into the state by force without their consent.⁵² It is open to some doubt whether the privilege or immunity from service, recognized in most common law jurisdictions, is properly classed as a jurisdictional limitation.⁵³ Fraud in inveigling the defendant into the state constitutes no bar to jurisdiction.⁵⁴

A person may consent to be bound by the adjudications of a court of a state in which he is not personally served with process.⁵⁵ This may be

49. Sec. 74.3. *Sallee v. Hays*, 3 Mo. 116 (1832); *State v. Blair*, 238 Mo. 132, 142 S. W. 326 (1911); *Palmer v. Bank of Sturgeon*, 281 Mo. 72, 218 S. W. 873 (1920); *Dewey v. Des Moines*, 173 U. S. 193 (1899); *Baker v. Baker, Eccles & Co.*, 242 U. S. 394 (1917).

50. In the United States this is subsumed under the requirement of due process of law. *McDonald v. Mabee*, 243 U. S. 90 (1917); *Bardwell v. Collins*, 44 Minn. 97, 46 N. W. 315 (1890). This requirement, however, is a part of the doctrine of Conflict of Laws independently of constitutional provision. See, *Overstreet & Overstreet v. Shannon*, 1 Mo. 529 (1825); *Ray County v. Barr*, 57 Mo. 290 (1874).

51. Sec. 78.1. *Baisley v. Baisley*, 113 Mo. 544, 21 S. W. 29 (1893); *Moss v. Fitch*, 212 Mo. 484, 111 S. W. 475 (1908); *Severson v. Dickinson*, 216 Mo. App. 572, 259 S. W. 518 (1924).

52. Sec. 78.3.

53. RESTATEMENT, CONFLICT OF LAWS, § 78, *caveat*.

54. Sec. 78.4. Many states, of course, recognize a common law privilege in such a case. *Abercrombie v. Abercrombie*, 64 Kan. 29, 67 Pac. 539 (1902); *Vastine v. Bast*, 41 Mo. 493 (1867); *Holker v. Hennessey*, 141 Mo. 527, 42 S. W. 1090 (1897).

55. Sec. 81.1. Thus a power of attorney to confess judgment will support the claim of jurisdiction. *Hazel v. Jacobs*, 78 N. J. L. 459, 75 Atl. 903 (1910); *Ritter v.*

shown by a consent expressed prior to the controversy, by the waiver of service in the controversy, by an express acquiescence in accepting service outside the state,⁵⁶ or by actually appearing in the proceedings.⁵⁷ The common law privilege of the defendant to make a special appearance to deny jurisdiction without being held to have consented to jurisdiction, is seemingly endowed with jurisdictional aspects. In one place,⁵⁸ the author states that such an appearance does not confer jurisdiction over the person, and later discusses *York v. Texas*,⁵⁹ which is sought to be distinguished on the ground that there was an express statute making the special appearance a consent to jurisdiction, and the defendant voluntarily appeared under this statute.⁶⁰ It would seem more accurate to class the special appearance rule as a privilege which may or may not be given in a particular state, and having nothing to do with jurisdiction.⁶¹

A debated issue at the present time is whether a state without other claim may assert judicial jurisdiction over a person who has done within the state an act on which it is sought to base the liability. The American Law Institute treats the doing of the act as akin to a consent to the jurisdic-

Hoffman, 35 Kan. 215, 10 Pac. 576 (1886); *Crim v. Crim*, 162 Mo. 544, 63 S. W. 489 (1901). As a matter of local law, however, many states refuse to enter judgments upon the ordinary warrant of attorney found in a promissory note. *Siskiyou County Bank v. Hoyt*, 132 Cal. 81, 64 Pac. 118 (1901); *First Nat. Bank v. White*, 220 Mo. 717, 120 S. W. 36 (1909). *Cf.*, MO. REV. STAT. (1929) §§ 1093-1096.

56. Sec. 81.2. This acquiescence would appear to require more than a silent acceptance of the summons. See, generally, *Jones v. Merrill*, 113 Mich. 433, 71 N. W. 838 (1897); *White v. White*, 66 W. Va. 79, 66 S. E. 2 (1909). Cook, *Acceptance of Service Outside the State as Affecting Jurisdiction* (1926) 11 IOWA L. REV. 131.

57. Sec. 82.1.

58. Sec. 82.2. Broad language to this effect appears in *Huff v. Shepard*, 58 Mo. 242 (1874); *State ex rel. Bulger v. Southern*, 278 Mo. 610, 214 S. W. 100 (1919).

59. 137 U. S. 15 (1890). In this case a Missouri resident served at his home with the process of a Texas court, entered his special appearance in Texas, and under the rule in Texas was held to have consented to the jurisdiction. This was affirmed by the United States Supreme Court as being not in violation of the due process clause. The case, therefore, stands for the proposition that it is within the legally recognized power of the state to abolish the special appearance practice, and thus would seem to establish jurisdiction in the sense defined by Mr. Beale.

60. Sec. 82.7. *Harris v. Taylor*, [1915] 2 K. B. 580, 84 L. J. K. B. 1839, would indicate that this statutory angle is not decisive.

61. It would seem to be clear that there is no jurisdictional issue involved in the disputed matter of whether one who defends on the merits without asking affirmative relief after having been overruled on the special appearance, is deemed to be generally subject to the jurisdiction of the court. *Mertens v. McMahon*, 334 Mo. 175, 66 S. W. (2d) 127 (1933); *Harkness v. Hyde*, 98 U. S. 476 (1878) (holding that the privilege is not lost). *Contra*: *Jardine v. Superior Court*, 213 Cal. 301, 2 P. (2d) 756 (1931); BEALE, sec. 82.5.

ion.⁶² In the states of the United States this consent theory would be restricted by the limitations on the states under the privileges and immunities clause to attach such conditions to the doing of ordinary local business by individuals resident in other states.⁶³ Adopting *Hess v. Pawloski*,⁶⁴ an exception is made permitting the states to assert this jurisdiction where the act done is of a sort to endanger the public safety, etc., and so properly classed under conduct subject to the police power of the state. On the other hand, Mr. Beale rejects the general idea of judicial jurisdiction based upon the doing of an act within the state.⁶⁵ He would admit the jurisdiction in two cases. The first would be the public safety exception indicated in *Hess v. Pawloski*.⁶⁶ The second, by analogy to the foreign corporation cases, would be where the nonresident individual has an established course of business within the state, and the cause arises therefrom.⁶⁷

DIVORCE

One draws a deep breath on approaching the problem of jurisdiction for divorce. Not only is the subject one of great contemporary confusion, but

62. RESTATEMENT, § 84: "A state can exercise through its courts jurisdiction over an individual who has done an act within the state, as to a cause of action arising out of such act, if, by the law of the state at the time when the act was done, a person by doing the act subjected himself to the jurisdiction of the state as to such cause of action."

63. RESTATEMENT, § 85. The comment to this and to the preceding section would indicate that the RESTATEMENT correctly forecast the recent decision in *Henry L. Doherty & Co. v. Goodman*, 294 U. S. 623 (1935); (1935) 48 HARV. L. REV. 1433; (1935) 20 IOWA L. REV. 853; (1935) 33 MICH. L. REV. 963; (1935) 19 MINN. L. REV. 805. Goodrich, *Conflict of Laws Since the Restatement* (1937) 23 A. B. A. J. 119.

64. *Hess v. Pawloski*, 274 U. S. 352 (1927) (upholding the common nonresident motorist statute). Scott, *Jurisdiction over Nonresident Motorists* (1926) 39 HARV. L. REV. 563.

65. Sec. 84.1.

66. Sec. 84.2. It is, of course, arguable that the Doherty case, 294 U. S. 623, *supra* note 63, is nothing but a police power case, using the analogy of the wide regulatory power sustained in the Blue Sky cases. *Hall v. Geiger-Jones Co.*, 242 U. S. 539 (1917). But see, *McBaine, Service upon a Non-resident by Service upon his Agent* (1935) 23 CALIF. L. REV. 482.

67. Sec. 84.3. In this section the author correctly criticizes the reasoning of *Flexner v. Farson*, 248 U. S. 289 (1919), and advances an argument which would also support the conclusion of the Doherty case. It appears that Mr. Beale is unwilling to concede the existence of any claim of jurisdiction in the Conflict of Laws in this connection, which would not also be sanctioned by the Constitution of the United States. See Culp, *Process in Actions Against Nonresidents Doing Business Within a State* (1934) 32 MICH. L. REV. 909; Daum, *Transaction of Business within State by Nonresident as a Foundation for Jurisdiction* (1934) 19 IOWA L. REV. 421.

Mr. Beale's personal theories⁶⁸ in the field drew criticism on his head some eleven years ago,⁶⁹ and this criticism has continued unabated.⁷⁰ He starts with the obvious fact that a valid divorce may be granted at the domicil of both parties,⁷¹ and that this domicil has a pretty complete control over the terms and conditions of such divorces,⁷² and the manner in which they are to be procured.⁷³ The next proposition is also undisputed in common law countries; that a divorce, valid in that it is recognized elsewhere, cannot be given in a state not the domicil of either party,⁷⁴ with the possible exception of the case where both spouses may be estopped by their conduct to deny the validity of the decree.⁷⁵ With the topic of divorce at the domicil of one spouse, the fun starts. Where the divorce is obtained by the wife, the first thing to be examined is her capacity to acquire a domicil at the place of the divorce.⁷⁶ Under the prevailing rules of domicil, a deserting wife continues to have the husband's domicil, and cannot acquire a new one.⁷⁷ To determine whether the state granting the divorce was even the domicil of the plaintiff, another court would have to examine into the circumstances of the separation, in a sense retry the issues in the original divorce proceed-

68. Mr. Beale announced his findings in *Haddock Revisited* (1926) 39 HARV. L. REV. 417.

69. An excellent analysis was contained in McClintock, *Fault as an Element of Divorce Jurisdiction* (1928) 37 YALE L. J. 564.

70. Leflar, *Jurisdiction to Grant Divorces* (1935) 7 MISS. L. J. 445; Bingham, *American Law Institute vs. The Supreme Court: In the Matter of Haddock v. Haddock* (1936) 21 CORN. L. Q. 393; Vreeland, *The Validity of Foreign Divorces* (1936) 10 TULANE L. REV. 416.

71. Sec. 110.4.

72. Sec. 110.5.

73. Secs. 110.2, 110.3.

74. Sec. 111.1. *Andrews v. Andrews*, 188 U. S. 14 (1903); *Kruse v. Kruse*, 25 Mo. 68 (1857); *Wagoner v. Wagoner*, 287 Mo. 567, 229 S. W. 1064 (1921). The Arkansas court appears to be getting off the reservation in this matter. *Squire v. Squire*, 186 Ark. 511, 54 S. W. (2d) 281 (1932); see, *Miller v. Miller*, 173 Miss. 44, 159 So. 112 (1935); (1936) 8 MISS. L. J. 397.

75. Sec. 111.3. Principles of estoppel have saved many Reno and similar divorces which might otherwise have failed for want of domicil of a party. *Parmalee v. Hutchins*, 238 Mass. 561, 131 N. E. 443 (1921); *Bruguiere v. Bruguiere*, 172 Cal. 199, 155 Pac. 988 (1916); *Drummond v. Lynch*, 82 F. (2d) 806 (C. C. A. 5th, 1936). Harper, *The Validity of Void Divorces* (1930) 79 U. PA. L. REV. 158. There are, however, striking cases where the estoppel argument has been rejected and the divorce declared invalid. *Lefferts v. Lefferts*, 263 N. Y. 131, 188 N. E. 279 (1933); (1934) 82 U. PA. L. REV. 546; *Holt v. Holt*, 77 F. (2d) 538 (D. C. App. 1935); *Kegley v. Kegley*, 60 P. (2d) 482 (Cal. App. 1936). Normally, of course, the party procuring the divorce is estopped to attack it. *McGraw v. McGraw*, 48 R. I. 426, 138 Atl. 188 (1927); *Curry v. Curry*, 79 F. (2d) 172 (D. C. App. 1935).

76. *Cheever v. Wilson*, 9 Wall. 108 (1869).

77. *Supra*, note 38.

ing. If when the husband's divorce was brought into question in another state, he could prove not only that the divorce was granted at his domicil, but that his wife was living apart without cause, he established that the original divorce was at the domicil of both husband and wife, so that the decree was entitled to recognition without question. These issues of fault purported to have been decided in the original proceeding, but where the defendant spouse had in no way subjected himself or herself to the divorce court, he or she was not precluded by the findings thereon. In *Atherton v. Atherton*,⁷⁸ the Supreme Court disposed of one common situation on what appears to be an obvious rule of fairness, and held that a divorce obtained at the domicil of one spouse would be binding everywhere, if that domicil was also the place in which the parties lived together last as husband and wife prior to the separation. This left only the case where the divorce was procured at the domicil of one spouse, which domicil was acquired after the separation. In *Haddock v. Haddock*,⁷⁹ it was held that such a divorce might be granted at the new domicil, and might be recognized as valid in other states, but that the state of domicil of the absent spouse would be under no obligation to recognize it. In that case the contested divorce had been obtained by the husband, so that there was no real question as to his domicil. Also in the principal litigation between the parties it had been found that the husband had wrongfully deserted the wife. This finding was required to establish that she too was not domiciled in the state granting the divorce. The decision, therefore, was that a deserting husband could not get an uncontested divorce at his new domicil which would be entitled to recognition at the former matrimonial domicil, still the domicil of the deserted wife. Under the prevailing views such a divorce obtained by a deserting wife at a new residence, would fail entirely for lack of a power to acquire a new domicil.⁸⁰ Nothing was said in this case about the result where the separation was by mutual consent.

Mr. Beale's analysis of this situation is unique. First it must be established that the court granting the divorce is the domicil of one spouse.⁸¹ This establishes its jurisdiction over the public interest in the marital relationship involved. However, the court must also acquire a jurisdiction sufficient to

L. J. 49. 78. 181 U. S. 155 (1901). Goodrich, *Matrimonial Domicile* (1917) 27 YALE
 79. 201 U. S. 562 (1906).
 80. Beale, sec. 113.10.
 81. *Supra*, note 74.

give it a power over the interests in the relation vested in the two spouses respectively. The plaintiff spouse submits his or her interest in the relation by filing the original divorce bill. To acquire jurisdiction over the interest of the other spouse, the court will have to find the same jurisdictional facts as for any other personal action; that is, either that the defendant is personally subject to the court, or that he has consented to the court's jurisdiction.⁸² To show that he is personally subject, the court would have to find that he has been served within the state, or is domiciled in the state, or perhaps that he is a national of the state and the state is qualified to claim jurisdiction over absent nationals. To show consent to the jurisdiction, there might be an appearance by the defendant spouse, or perhaps an effective waiver of service. In the absence of some such express consent, it is clear that the innocent spouse does not consent to have his interest in the marital status adjudicated at the new domicile of the deserting spouse. So far Mr. Beale has not gone beyond the decision in the *Haddock* case. The next step does. He argues, with some support from the reasoning of the *Atherton* case, that a deserting spouse cannot be heard to object to the divorce jurisdiction of the domicile of the innocent spouse, whether this be the matrimonial domicile or one subsequently acquired. This is phrased in terms of consent; that the deserting or wrongdoing spouse must be held to have consented to the adjudication at the domicile of the innocent spouse. The final step is that whenever the parties are living apart by mutual consent, so that each has acquired a separate domicile with the assent of the other, this should be construed as an assent to a divorce adjudication at the domicile of either.

Thus we arrive at the final position taken in the Treatise and also in the Restatement⁸³ that there is a complete divorce jurisdiction, entitling the decrees to recognition elsewhere, where the decree is granted at the domicile of both spouses, or at the domicile of one spouse which was also the place in which the parties last lived together as husband and wife, or at the domicile of one spouse where it appears that the other spouse personally subjected himself to the court, or at the domicile of one spouse where it appears that this domicile was acquired with the consent of, or because of the wrongdoing of the absent spouse. Conversely, there is no divorce jurisdiction, and decrees are void, where granted in a state which is the domicile of neither spouse, or where granted at the domicile of one spouse who is shown to have deserted the other or to have been the wrongdoer in the prior separation.

82. Sec. 113.11.

83. RESTATEMENT, § 113.

The criticism of this view has been voluminous.⁸⁴ First it is argued that the *Haddock* case does not involve such a theory. This is true. It is doubtful whether it ever entered the mind of any judge in that case. This does not prove that it is a bad theory. The second objection is based upon the uncertainty of the doctrine. Fault in divorce is a complex issue about which courts differ. If possible, issues of jurisdiction should be simple ones. However, jurisdiction often depends on disputed issues of fact. Even such a thing as service of process may be open to considerable doubt. Under any prevalent theory of divorce jurisdiction domicil must be determined, and this is often vague and uncertain. It is argued that fault should not be an element of jurisdiction, but it may be answered that in divorce cases it always has been. Freedom from fault is a necessary issue wherever the wife is claiming a separate domicil for divorce purposes, or a husband suing an absent wife relies upon freedom from fault to show that his domicil is also hers. Finally, it may also be argued that it is no worse to run the risk of divergent findings of fault in two courts on the same facts, than it is to proceed under the *Haddock* case with the result that the two courts, in perfect agreement as to the fault, may diverge in holding, with the result that the divorce is good in one state and is bad in the other.

Whether justified in entirety by the *Haddock* case or not, Mr. Beale's hypothesis offers a means to avoid the amazing spectacle of a man married in one state and not married in another. His argument that the theory involves no more uncertainty of fact than is already present in the issue of disputed domicil, seems to have considerable merit. In last analysis one's reaction to this problem will likely be influenced greatly by his attitude toward the social problem of casual divorce. Except perhaps in New York, the *Haddock* case appears to have presented little impediment to migratory divorce. In a number of cases recognizing a divorce obtained by a deserting spouse, the recognition appears to have been grudgingly given, and as the distasteful alternative to the even worse situation which would apply in event of a refusal of recognition under the *Haddock* case. In making such a divorce void in both states, Mr. Beale's theory would offer some encouragement to the domicil of the offended spouse in refusing recognition. It appears to have had this effect in a recent California case.⁸⁵ In short, those of us

84. *Supra*, note 70.

85. *Delanoy v. Delanoy*, 216 Cal. 27, 13 P. (2d) 719 (1932); (1933) 21 CALIF. L. REV. 504. The facts in this case were similar to those in *Haddock v. Haddock*. The court apparently overruling prior decisions, held that the wife attacking the *ex*

who deplore the present migratory and transient divorce situation may well feel that Mr. Beale's doctrine could not make matters any worse, and that it is plausible enough to merit a trial. Those contrary minded on the social problem would naturally be content with a continuation of the present situation, or even of a doctrine making a divorce at the domicile of one spouse binding everywhere.

CONTRACTS

The problems in the Conflict of Laws with respect to contracts are perhaps the most controverted of the entire field. The philosophical notion of the autonomy of the human will has left its mark most indelibly on all phases of contract law. One hundred years ago contracts cases were decided in terms of "meeting of the minds" in an almost entirely subjective sense of simultaneous concurrence of actual positive intent. Problems of interpretation and construction were debated almost exclusively in terms of giving effect to the intent of the parties. It was exceedingly easy in the Conflict of Laws cases to say that the validity and effect of the contract would be determined by the law "intended" by the parties. Most courts did just this.⁸⁶ In the meanwhile, mutual assent problems were decided more and more on an objective standard of apparent mutual assent, on the basis of injurious misreliance on the part of one party or the other. Rules of construction and interpretation have crystallized in terms not entirely related to the intent of the parties. Numerous Conflict of Laws cases continue to speak in terms of the intention of the parties as all-conclusive. Some cases have qualified this doctrine to the extent of limiting the choice of the parties to the law of some place having a substantial connection with the contract, or perhaps merely to a choice between the place of making and the place of performance.⁸⁷ In many cases the intent is obscure if it existed at all, and the court is required to attach a presumption in favor of the law of the one place or the other.⁸⁸ In more recent years some courts have drifted from an intention rule to the proposition that the law of the place of performance is to be

parte divorce procured by the husband at his new domicile might show that the husband was guilty of desertion at the time the new domicile was acquired.

86. *In re Missouri S. S. Co.*, 42 Ch. D. 321, 58 L. J. Ch. 721 (1889); *Pritchard v. Norton*, 106 U. S. 124 (1882).

87. *Bundy v. Commercial Credit Co.*, 200 N. C. 511, 157 S. E. 860 (1931); *Crawford v. Seattle R. & S. Ry.*, 86 Wash. 628, 150 Pac. 1155 (1915).

88. STORY, *CONFLICT OF LAWS* (1834) § 280, raised the presumption that the place of performance was intended, and this presumption was commonly quoted. *Hall v. Cordell*, 142 U. S. 116 (1891).

applied in all cases. Others have discarded reference to intention and have applied to contracts cases the same principles prevailing with respect to most other jural acts, and have applied to the solution of the case the rules of the place where occurred the act bringing the contract into existence.⁸⁹

Mr. Beale's attack on this program is characteristic. Following the plan of organization of the Restatement, he opens with a discussion of determining the place of making.⁹⁰ This, of course, involves little other than the substantive law of contracts. Then follows an extended attack upon the intention rule in all its forms.⁹¹ The criticisms are: (1) that the rule permits the parties to usurp lawmaking functions of a nature inherently prerogative to the state in which the parties act; that the parties are purporting to bind themselves by a contract selecting a foreign law, when the agreement to be bound by the foreign law may itself be invalid by the law of the place where it is made; and (2) that the rule defies any effort to predict the outcome of litigation, and makes it impossible for the attorney to advise his client prior to the conclusion of litigation, thus denying to this field the quantum of certainty and uniformity desirable in the field. The court-made presumptions and limitations attached to the intention rule are cited as evidence of judicial recognition of the validity of these objections. Mr. Beale then takes up the place of performance doctrine,⁹² and finds it subject to the same theoretical objections, as evidenced by the qualification of the rule which would attach considerable weight to an express statutory prohibition existing at the place of making. The place of performance rule offers few practical objections, and that it supplies almost the same degree of certainty as does the place of making test.⁹³ Next, the place of making rule is discussed.⁹⁴ This is found to be unobjectionable on theoretical grounds, as evidenced by the fact that it is unnecessary to qualify it to meet special situations. It is perhaps the most certain solution possible.

Two other possibilities have been advanced. It is urged that the governing law should be the "proper" law of the contract, the law of the place with

89. *Scudder v. Union Nat'l Bank*, 91 U. S. 406 (1875); *Carnegie v. Morrison*, 2 Metc. 381 (1841); *Mut. L. Ins. Co. v. Johnson*, 293 U. S. 335 (1934); GOODRICH, *CONFLICT OF LAWS* (1927) 228; MINOR, *CONFLICT OF LAWS* (1901) 401.

90. Secs. 311.1-331.1.

91. Sec. 332.2.

92. Sec. 332.3.

93. Except, of course, where the contract contemplates partial performances in each of several places. *Morgan v. New Orleans, M. & T. R. R.*, Fed. Cas. No. 9,804 (C. C. La. 1876).

94. Sec. 332.4.

which the contract has its most substantial connection.⁹⁵ Mr. Beale finds this open to the same practical objection as is the intention rule; namely, uncertainty. The objection is not so serious in degree. Theoretically, it is subject to the same objection as is the place of performance rule, in that "the contract cannot be assigned to a state until it has come into existence; and it is still necessary to meet the theoretical objection that the law of the place where the parties act must attach legal obligation to their action."⁹⁶ It has also been suggested, but without direct judicial support,⁹⁷ that the governing law should be that which will make the contract valid.⁹⁸ This proposition is not discussed in detail.

The most common objection to Mr. Beale's place of making rule, that the place of making is often an accident without connection with the parties or with the contract itself, would seem to be answered by the proposition that the jurisdiction of the state over acts done therein is not limited by considerations of how or why the acts came to be done.

Passing from theory to cases, the author takes up each common law jurisdiction in turn, seeking to formulate the rule of decision in each. Confusion is found in almost every instance, with one court espousing different doctrines at different times. The English cases are found to incline to some form of the intention rule.⁹⁹ As might be expected from the fact that the problem is essentially state rather than Federal, the Federal courts are found to apply all the doctrines.¹⁰⁰ The preponderance of the state courts appear to lean toward some form of intention rule.

95. DICEY, *CONFLICT OF LAWS* (5th ed. 1932), Rules 155, 160; CHESHIRE, *PRIVATE INTERNATIONAL LAW* (1935) 181-197.

96. P. 1082.

97. Except in the usury cases, which do not fit into any accepted doctrine. See: *Miller v. Tiffany*, 1 Wall. 298 (1863); *Continental Adj. Corp. v. Klause*, 174 Atl. 246 (N. J. 1934); *Lubbock Hotel Co. v. Guaranty Bank & Trust Co.*, 77 F. (2d) 152 (C. C. A. 5th, 1935); *Dugan v. Lewis*, 79 Tex. 246, 14 S. W. 1024 (1891).

98. Lorenzen, *Validity and Effect of Contracts in the Conflict of Laws* (1921) 30 YALE L. J. 565, 655. See also, Cook, *'Contracts' and the Conflict of Laws* (1936) 31 ILL. L. REV. 143; Stumberg, *Conflict of Laws—Validity of Contracts—Texas Cases* (1932) 10 TEX. L. REV. 163.

99. Sec. 332.7. Mr. Cheshire denies this and asserts that England is now committed to the idea that the contract will be governed by the law of the place having the most substantial connection with it. Cheshire, *supra* note 95; *Book Review* (1936) 52 L. Q. REV. 590. See also Falconbridge, *Contract and Conveyance in The Conflict of Laws* (1933) 81 U. PA. L. REV. 661, 817.

100. Sec. 332.9.

The Missouri cases, many in number, are examined¹⁰¹ and found to support the place of making rule,¹⁰² although containing some dicta supporting other doctrines. The Missouri courts have adopted the common hostility toward usury statutes and follow the general rule in upholding contracts as against this defense if the interest rate be lawful in either the place of making or the place of performance.¹⁰³

The author's discussion of detailed problems of contract law consists of the application of these disputed doctrines to particular fact situations. The intricate problems of assignability, assignment, and priorities of assignees are discussed in some detail.¹⁰⁴ Also set out is the corollary to the place of making rule, to the effect that matters relating solely to the manner of performance,¹⁰⁵ breach,¹⁰⁶ and discharge¹⁰⁷ of a valid contract are to be determined with reference to the law of the agreed place of performance. On this matter almost all the authorities agree.

TORTS

In the field of torts, the author states the familiar American rule which defines as the place of wrong the place where the act or omission of the defendant first took harmful effect upon the interests of the plaintiff.¹⁰⁸ The law of this place determines the existence of a cause of action based upon the alleged wrong,¹⁰⁹ and the extent of the recovery permitted.¹¹⁰ No other state will allow an action not permitted by the law of the place of wrong.¹¹¹ Other states will normally permit an action to be maintained in its courts identical to the one created at the place of wrong, except where the action is impossible

101. Sec. 332.33.

102. Citing numerous cases, including *Otis Co. v. Missouri Pac. Ry.*, 112 Mo. 622, 20 S. W. 676 (1892); *Reed v. Western Union T. Co.*, 135 Mo. 661, 37 S. W. 904 (1896); *Illinois Fuel Co. v. Mobile & O. R. R.*, 319 Mo. 899, 8 S. W. (2d) 834 (1928); *Roselle v. Farmers' Bank*, 141 Mo. 36, 39 S. W. 274 (1897). *Fidelity L. S. Co. v. Moore*, 280 Mo. 315, 217 S. W. 286 (1919), is noted as a recent intention case.

103. *Davis v. Tandy*, 107 Mo. App. 437, 81 S. W. 457 (1904).

104. Secs. 348.2, 350.1-352.1, 354.1.

105. Secs. 355.1-370.1. *Martin v. Mutual L. Ins. Co.*, 190 Mo. App. 703, 176 S. W. 266 (1915).

106. Sec. 370.1.

107. Secs. 373.1-375.3.

108. Sec. 377.2.

109. Sec. 378.1.

110. Sec. 412.2. *Roseberry v. Scott*, 120 Kan. 576, 244 Pac. 1063 (1926).

111. Sec. 378.4. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347 (1909); *Kansas City So. Ry. v. Phillips*, 174 Ark. 1019, 298 S. W. 325 (1927).

or exceedingly difficult under the procedural forms of the forum, or where its maintenance would be opposed to some serious consideration of public policy at the forum.¹¹² About the ultimate result of these cases there is little disagreement, although some courts are a bit sensitive in defining public policy. The arguments have centered about the theoretical basis of the proceeding, and it is here that the vested-rights doctrine has been most bitterly argued.

JUDGMENTS

The material on foreign judgments presents nothing startling. The due process requirements of a competent court,¹¹³ affording notice and an opportunity to defend,¹¹⁴ are stated as principles of the Conflict of Laws. So, too, with the requirement that the court rendering the judgment shall have had jurisdiction over the parties or subject matter as the case may be.¹¹⁵ Ordinary judgments for money are to be enforced by a new action thereon.¹¹⁶ The doctrine of *Hilton v. Guyot*,¹¹⁷ introducing the element of reciprocity into the enforcement of judgments from foreign nations, is repudiated on both theoretical and practical grounds.¹¹⁸ Considerations of public policy of the forum, virtually eliminated under the full faith and credit clause in action on judgments of sister states,¹¹⁹ may still be applied to actions on judgments from foreign nations.¹²⁰

112. *Supra*, notes 13-18.

113. Sec. 429.2. *Sawyer v. Maine F. & M. I. Co.*, 12 Mass. 291 (1815).

114. Sec. 429.4. *Supra*, note 50. *Banco Minero v. Ross*, 106 Tex. 522, 172 S. W. 711 (1915).

115. Sec. 429.5. *Stuart v. Dickinson*, 290 Mo. 516, 235 S. W. 446 (1921); *Dorey v. Dorey*, 248 Mass. 359, 142 N. E. 774 (1924).

116. Sec. 434.1. *Brisbane v. Dobson*, 50 Mo. App. 170 (1892).

117. 159 U. S. 113 (1895), holding a French judgment to be merely prima facie evidence on the issues, on the somewhat questionable ground that French courts attached no greater weight to judgments from the United States.

118. Secs. 434.2, 434.3. *Accord: Johnston v. Compagnie Generale Transatlantique*, 242 N. Y. 381, 152 N. E. 121 (1926); (1926) 25 MICH. L. REV. 70; (1926) 26 COL. L. REV. 892.

119. Sec. 446.1. *Roche v. McDonald*, 275 U. S. 449 (1928); *Fauntleroy v. Lum*, 210 U. S. 230 (1908); *Randolph v. Keiler*, 21 Mo. 557 (1855). It appears that a state cannot escape its constitutional obligation with respect to foreign judgments by the device of divesting its courts of jurisdiction in all such cases. *Kenny v. Supreme Lodge*, 252 U. S. 411 (1920); *Broderick v. Rosner*, 294 U. S. 629 (1935). *Cf. Weidman v. Weidman*, 274 Mass. 118, 174 N. E. 206 (1931); (1931) 31 COL. L. REV. 702; (1931) 29 MICH. L. REV. 1071. *Cook, The Powers of Congress Under the Full Faith and Credit Clause* (1919) 28 YALE L. J. 421; *Langmaid, The Full Faith and Credit Required for Public Acts* (1929) 24 ILL. L. REV. 383.

120. Sec. 445.1. *DeBrimont v. Penniman*, 10 Blatchf. 436 (1873).

Mr. Beale persists in his denial of any direct action in one state on the judgment of another state ordering something other than the payment of money.¹²¹ He concedes the capacity of the foreign court to create an obligation of this sort, but makes the point that the common law had no action for the enforcement of a foreign judgment other than debt or *indebitatus assumpsit*, and that those actions would not lie on judgments not involving money. The leading cases cited to the contrary are explained as involving nothing more than the principles of *res judicata*,¹²² or as based upon facts enabling the plaintiff to get into court upon a bill to cancel a fraudulent conveyance.¹²³ In this position Mr. Beale may fall into error.¹²⁴ While our modern procedure cases still speak in terms of the theory of the pleading, the fact that an alleged cause of action does not fit precisely some common law writ is not considered an insuperable objection under the modern codes. Furthermore, recent cases would indicate a growing movement toward the enforcement of decrees other than final and unconditional decrees for the payment of money,¹²⁵ and toward enforcement of decrees by other than actions of debt.¹²⁶

THE TRAIL

Mechanically, the book is all that can be desired. It contains the only collection of American Conflict of Laws cases remotely approaching completeness. It features a world-wide bibliography of discussions of the general nature of the subject. In each chapter is found a bibliography of the subject of that chapter. These special bibliographies are excellent, having been com-

121. Sec. 449.1, relying upon *Fall v. Eastin*, 215 U. S. 1 (1909). Gordon, *The Converse of Penn v. Lord Baltimore* (1933) 49 L. Q. REV. 547.

122. Thus a plaintiff suing in specific performance at the situs of land could prove the contract and the defendant's breach thereof by introducing a decree obtained in a foreign court on the same state of facts. See, *Burnley v. Stevenson*, 24 Ohio St. 474 (1873). Cf., *Bushman v. Bushman*, 311 Mo. 551, 279 S. W. 122 (1925).

123. *Matson v. Matson*, 186 Iowa 607, 173 N. W. 127 (1919); *Mallette v. Scheerer*, 164 Wis. 415, 160 N. W. 182 (1916); *Dunlap v. Byers*, 110 Mich. 109, 67 N. W. 1067 (1896).

124. See, *Barbour, The Extra-territorial Effect of the Equitable Decree* (1919) 17 MICH. L. REV. 527; *Goodrich, Enforcement of a Foreign Equitable Decree* (1920) 5 IOWA L. BULL. 230; *Lorenzen, Application of Full Faith and Credit Clause to Equitable Decrees for the Conveyance of Foreign Land* (1925) 34 YALE L. J. 591; *Bentley, Equity Decrees in Sister States* (1934) 8 SO. CALIF. L. REV. 1.

125. *Palen v. Palen*, 12 Cal. App. (2d) 357, 55 P. (2d) 228 (1936); *Cousineau v. Cousineau*, 63 P. (2d) 897 (Ore. 1936).

126. *Shibley v. Shibley*, 181 Wash. 166, 42 P. (2d) 446 (1935); *Ostrander v. Ostrander*, 190 Minn. 547, 252 N. W. 449 (1934); *Fanchier v. Gammill*, 148 Miss. 723, 114 So. 813 (1927). *Contra*: *Grant v. Grant*, 64 App. D. C. 146, 75 F. (2d) 665 (1935).

piled with discrimination so as to exclude the sloppy and the inconsequential. The reader dissatisfied with Mr. Beale's analysis must almost inevitably find an analysis to his liking in the cited material.

In style the book is pleasing. Sentences are terse and to the point. Language is simple, almost unbelievably simple. One is led through a chain of reasoning to a conclusion. The conclusion is stated dogmatically. "Dogmatic" is a prime epithet of our day, deserved to be attached to those who assert facts not supported by reason or by observed experience. But Mr. Beale is not this. His reasoning is set forth in detail and supported by fact: judicial decision. It is only when he comes to his conclusions that he assumes a magisterial tone. This is not *a priori* deduction, nor an assertion that a thing is true because 'tis true. Conclusions are stated unequivocally, for Mr. Beale asks, Does not the Bar desire it this way?¹²⁷ It seems that the Bar does so desire; and this book is written for the Bar.

We have then a treatise destined to a permanent place in the history of our law. But it is more. It embraces the life of a great man and scholar, and that man brings into his book a tradition. We find the tradition of the common lawyer; feeling his way by trial and error, making distinctions as they become necessary, yielding to new considerations when facing new problems, to the end that there may be Law, a partially systematized body of principle on which we may draw to meet our current little problems. We find the tradition of a teacher; analyzing, reasoning, persuading, to the end that others may aid in giving us Law. Strikingly, we find the tradition of New England; of a people orienting their lives upon a few simple yet basic principles of right and wrong, cautious to depart from the faith of their fathers until new principles are convincingly established, yet when new principles are accepted fighting for them with the same conviction as moved their fathers in defense of the principles of former years.

And so the trails blazed through widespread thickets over a period of fifty years are joined together into a road. Here and there mistakes have been made; here a hill is too steep; and there a curve is too sharp. But others will make the corrections, lessen the grade, broaden the curve. Yet it will be years before an entirely new road is surveyed and constructed. Truly, we may say: JOSEPH HENRY BEALE: PIONEER.

127. P. xiii.