

EDWARD JOHN EYRE AND THE CONFLICT OF LAWS

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[In 1865 Edward John Eyre, the Governor of Jamaica, in the course of suppressing a revolt, caused a leading activist to be tried and executed under martial law. Over the next three years, a group of leading politicians and thinkers in England attempted to have Eyre prosecuted for murder. When the criminal process failed, they attempted to have him sued for trespass and false imprisonment. Though this case, *Phillips v Eyre*, was mainly concerned with constitutional issues, Willes J laid down a rule for choice of law in tort which endured for nearly a century before it was finally superseded. In this article, the author illuminates the case by reference to its background. The author speculates on why the decision, which initially occasioned little notice, became the subject of academic and judicial controversy many years afterwards.]

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I INTRODUCTION

As a general rule, in order to found a suit in England for a wrong alleged to have been committed abroad, two conditions must be fulfilled. First, the wrong must be of such a character that it would have been actionable if committed in England ... Secondly, the act must not have been justifiable by the law of the place where it was done.¹

For over a century this classic formula uttered by Willes J in delivering the judgment of the Court of Exchequer Chamber in *Phillips v Eyre*² was the starting point for any inquiry into the rules that govern choice of law in tort. But over

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¹ *Phillips v Eyre* (1870) LR 6 QB 1, 28–9 (Willes J).

² *Ibid.* The other judges were Kelly CB, Martin, Channell, Pigott and Cleasby BB and Brett J. The matter was in the Chamber on a writ of error from the Court of Queen's Bench where it was heard by Cockburn CJ, Lush and Hayes JJ: see *Phillips v Eyre* (1869) LR 4 QB 225.

time, the difficulties associated with the application of this principle became apparent. One problem was that it compelled the plaintiff to satisfy the requirements of two systems of law. As such, the plaintiff gained no advantage by pleading foreign law; only the defendant stood to gain from such a manoeuvre.³ Further, the words 'not justifiable' in the second part of the formula caused difficulties for courts which had to decide whether this meant something different from 'actionable' in the first branch of the rule. Early authority suggested that 'not justifiable' simply required that the wrong be civilly actionable in the *lex loci delicti*.⁴ However, the issue was compounded when the English and Wales Court of Appeal, on an interlocutory application in *Machado v Fontes*, held that if libel was criminally punishable but not civilly actionable in Brazil then it was 'not justifiable' as this expression simply meant 'not innocent'.⁵ Though later cases expressed considerable doubt as to the correctness of this decision,⁶ it was not until *Boys v Chaplin* in 1970 that the Court of Appeal disposed of *Machado v Fontes* and reinstated the civil actionability requirement in the second branch of the rule in *Phillips v Eyre*.⁷

In Australia and Canada, the possible interpretations of the rule in *Phillips v Eyre* produced even more permutations. One theory postulated that either the first⁸ or both⁹ rules were concerned with jurisdiction rather than choice of

³ See *Kemp v Piper* [1971] SASR 25, 27–8 (Bray CJ).

⁴ See *The M Moxham* (1876) 1 PD 107, 115 (Baggallay JA).

⁵ [1897] 2 QB 231, 233 (Lopes LJ), 235 (Rigby LJ). The defendant took out a summons for leave to amend his defence by pleading that by Brazilian law libel could not be a ground of legal proceedings in which damages were claimed. A two-judge Court of Appeal refused to allow the amendment on the ground that the plea did not state that publication was not a criminal offence under Brazilian law. It was assumed for the purpose of the case that libel was not tortious in Brazil — an artificial and highly unlikely assumption: at 233 (Lopes LJ), 234 (Rigby LJ). *Machado v Fontes* was followed by the Supreme Court of Canada in *McLean v Pettigrew* [1945] 2 DLR 65.

⁶ In Australia, the decision was criticised by the Victorian Court of Appeal and by the High Court of Australia: see *Varawa v Howard Smith Co Ltd [No 2]* [1910] VLR 509, 528–31 (Cussen J); *Koop v Bebb* (1951) 84 CLR 629, 642–4 (Dixon, Williams, Fullagar and Kitto JJ); *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20, 40 (Windeyer J). *Machado v Fontes* was also distinguished by the Privy Council on appeal from the Supreme Court of Canada in *Canadian Pacific Railway Co v Parent* [1917] AC 195, 205 (Viscount Haldane); was not followed in Scotland in *M'Elroy v M'Allister* 1949 SC 110; and is inconsistent with several Privy Council decisions: see *Walpole v Canadian Northern Railway Co* [1923] AC 113; *McMillan v Canadian Northern Railway Co* [1923] AC 120.

⁷ *Boys v Chaplin* [1971] AC 356, 377 (Lord Hodson), 381 (Lord Guest), 388 (Lord Wilberforce), *contra* 383 (Lord Donovan), 400 (Lord Pearson). Lord Wilberforce's judgment was followed in subsequent cases: see, eg, *Church of Scientology of California v Commissioner of Metropolitan Police* (1976) 120 SJ 690; *Coupland v Arabian Gulf Petroleum Co* [1983] 2 All ER 434, 443–6 (Hodgson J); *Armagas Ltd v Mundogas SA* [1986] 1 AC 717, 740–1 (Goff LJ); *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, 198 (Lord Slynn).

⁸ See *Boys v Chaplin* [1968] 2 QB 1, 38–9 (Diplock LJ); Hessel E Yntema, 'Essays on the Conflict of Laws' (1949) 27 *Canadian Bar Review* 116.

⁹ See Donald B Spence, 'Conflict of Laws in Automobile Negligence Cases' (1949) 27 *Canadian Bar Review* 661; P Gerber, 'Tort Liability in the Conflict of Laws' (Pt 1) (1966) 40 *Australian Law Journal* 44; P E Nygh, 'Boys v Chaplin or The Maze of Malta' (1970) 44 *Australian Law Journal* 160; P E Nygh, *Conflict of Laws in Australia* (2nd ed, 1971) 407–9. In Australia, the idea that both rules were jurisdictional questions was judicially accepted in *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20, 41 (Windeyer J); *Kolsky v Mayne Nickless Ltd* (1970) 72 SR (NSW) 437. For a similar view in Canada, see *Gagnon v Lecavalier* (1967) 63 DLR (2d) 12. *Contra Boys v Chaplin* [1971] AC 356, 385–7, where Lord Wilberforce argues that the first rule is a choice of law rule but the second rule is concerned with jurisdiction. The

law and that, once the jurisdictional issue was satisfied, the court was free to apply the law of the forum as the true choice of law rule. An alternative suggestion was that Willes J's two conditions simply required that the wrong be generally actionable in each of the two jurisdictions, rather than that the action on its facts be successful as between the particular parties.¹⁰ A third possible way of escaping the rigours of the *Phillips v Eyre* rule was the suggestion that it should be read subject to a 'flexibility exception'. This concept stemmed from the fact that Willes J had prefaced his statement by the words 'as a general rule'.¹¹ It was not until *Boys v Chaplin* that English law recognised such an exception,¹² an approach since followed in several Australian cases.¹³

A final theory canvassed in Australia was that the constitutional '[f]ull faith and credit' provisions might apply in cases of interstate torts,¹⁴ thereby requiring the forum court to apply the law of the place of the wrong.¹⁵ In 1988, this was the approach chosen by Wilson and Gaudron JJ when, along with the majority of the High Court of Australia, their Honours decided that the *lex loci delicti* should be applied in interstate tort cases.¹⁶ In later cases, however, the Court returned to the traditional rule.¹⁷ Other cases simply avoided the rule by classifying the issue as something other than tortious. For example, questions of interspousal tort

other judges in *Boys v Chaplin* do not deal specifically with the point: Lord Donovan implies that the rule is jurisdictional (at 383), Lord Pearson implies that it is a choice of law rule (at 398), and the judgments of Lord Hodson (at 374) and Lord Guest (at 381) are ambiguous. For other cases that do not consider both rules in *Phillips v Eyre* to be concerned with jurisdiction, see *Kemp v Piper* [1971] SASR 25; *Warren v Warren* [1972] Qd R 386; *Corcoran v Corcoran* [1974] VR 164; *Interprovincial Co-Operatives Ltd v The Queen* [1976] 1 SCR 477, 501 (Laskin CJ); *Red Sea Insurance Co Ltd v Bouygues SA* [1995] 1 AC 190, 198 (Lord Slynn).

¹⁰ See *Potter v Broken Hill Pty Co Ltd* [1905] VLR 612, 633–5 (A'Beckett J) (dissenting); *Koop v Bebb* (1951) 84 CLR 629, 644 (Dixon, Williams, Fullagar and Kitto JJ); *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20, 41 (Windeyer J). *Contra M'Elroy v M'Allister* 1949 SC 110; *Boys v Chaplin* [1971] AC 356, 389 (Lord Wilberforce).

¹¹ *Phillips v Eyre* (1870) LR 6 QB 1, 28.

¹² [1971] AC 356, 379–80 (Lord Hodson), 389–92 (Lord Wilberforce), *contra* 381 (Lord Guest), 383 (Lord Donovan). The position of Lord Pearson is less clear: at 405. See also J H C Morris, *The Conflict of Laws* (1st ed, 1971) 269–70. Cf G C Cheshire and P M North, *Cheshire's Private International Law* (8th ed, 1970) 263. For a discussion of *Boys v Chaplin*, see P M North and P R H Webb, 'Foreign Torts and English Courts: I. The Effect of *Chaplin v Boys*' (1970) 19 *International and Comparative Law Quarterly* 24. *M'Elroy v M'Allister* 1949 SC 110 (see below n 210 and accompanying text) is a good example of a case where the flexibility exception would have provided a more just result: see J H C Morris, 'Torts in the Conflict of Laws' (1949) 12 *Modern Law Review* 248. See also *Szalatnay-Stacho v Fink* [1947] KB 1.

¹³ See *Warren v Warren* [1972] Qd R 386; *Corcoran v Corcoran* [1974] VR 164; *Borg Warner (Australia) Ltd v Zupan* [1982] VR 437, 453 (Marks J). *Contra Kolsky v Mayne Nickless Ltd* (1970) 72 SR (NSW) 437.

¹⁴ See *Australian Constitution* s 118.

¹⁵ This theory was rejected by *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20, 24–5 (Barwick CJ), 31 (Kitto J), 37 (Taylor J), 39–40 (Menzies J), 45–6 (Windeyer J).

¹⁶ See, eg, *Breavington v Godleman* (1988) 169 CLR 41, 77 (Mason CJ), 99 (Wilson and Gaudron JJ), 127–8 (Deane J). The minority adopted the orthodox double actionability approach, but only Toohey J was prepared to follow Lord Wilberforce in *Boys v Chaplin* in recognising a flexibility exception: at 163.

¹⁷ See *McKain v R W Miller & Co (SA) Pty Ltd* (1991) 174 CLR 1; *Stevens v Head* (1992) 176 CLR 433.

immunity were regarded as matrimonial, and statutory rights against insurers as *sui generis*.¹⁸

In these circumstances, it is not surprising that the leading common law jurisdictions eventually decided to abolish the rule entirely. In the last decade of the 20th century, the High Court of Australia¹⁹ and the Supreme Court of Canada²⁰ repudiated the rule in favour of reference to the *lex loci delicti*. Following influential investigations by law reform bodies, the United Kingdom Parliament replaced *Phillips v Eyre* with a statutory formula.²¹ Since then, pressure for harmonisation within the European Union has caused the UK to move even further away from the traditional common law position.²²

Consequently, *Phillips v Eyre* is now largely a piece of legal history.²³ But because of the central part it played in the development of the choice of law rule in tort for over a century, the case does not deserve to be forgotten. The basic facts are well-known. Edward John Eyre, then Governor of Jamaica, suppressed a rebellion in Morant Bay in October 1865. His acts were declared lawful by an Act of Indemnity with the consequence that, applying Willes J's formula, trespass and false imprisonment committed during the course of these events could not be termed 'not justifiable'. But behind these bare facts lies one of the leading intellectual controversies of the 19th century, one which occasioned intense debate both at a public level and amongst the leading figures of the day.

For his role in putting down the rebellion, Governor Eyre was at risk of much more than being mulcted in damages. The civil action which has aroused so much interest among conflicts lawyers was a mere appendage to a much wider controversy that gripped England during the late 1860s. The main issue in the so-called 'Jamaica Question' was whether Eyre was a hero who had fulfilled his duty as Governor in suppressing the rebellion (and consequently saving the white population of Jamaica from massacre), or a murderer who had to be

¹⁸ See Edward I Sykes and Michael C Pryles, *Australian Private International Law* (3rd ed, 1991) 573–9; P E Nygh and Martin Davies, *Conflict of Laws in Australia* (7th ed, 2002) 430–8; Lawrence Collins (ed), *Dicey and Morris on the Conflict of Laws* (12th ed, 1993) vol 2, 1523–7.

¹⁹ See, eg, *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, which dealt with the choice of law rule for interstate torts. In *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, the High Court extended the application of the *lex loci delicti* to international torts. For a discussion of the development of the choice of law rules in Australia, see Australian Law Reform Commission, *Choice of Law*, Report No 58 (1992) ch 6.

²⁰ See *Tolofson v Jensen* [1994] 3 SCR 1022. The rule was rejected in relation to both inter-provincial and international torts.

²¹ See *Private International Law (Miscellaneous Provisions) Act 1995* (UK) c 42, pt III. This reform was based on Law Commission and Scottish Law Commission, *Private International Law: Choice of Law in Tort and Delict*, Law Com No 193, Scot Law Com No 129 (1990). Part III does not completely displace the rule in *Phillips v Eyre*. First, s 13 provides that defamation claims are excluded from the abolition of the common law rule effected by s 10, and so remain governed by the common law. Secondly, because s 14(2) provides that '[n]othing in [pt III] affects any rules of law ... except those abolished by section 10', there is a preliminary question whether the claim would have been regarded as one subject to *Phillips v Eyre* at common law: see Adrian Briggs, 'Choice of Law in Tort and Delict' [1995] *Lloyd's Maritime and Commercial Law Quarterly* 519, 521–2.

²² See below n 236 and accompanying text.

²³ *Phillips v Eyre* remains authoritative in the United Kingdom with respect to defamation actions: see above n 21.

prosecuted, punished and perhaps executed for his crimes.²⁴ Even when the attempt to bring criminal proceedings failed, and the verdict in *Phillips v Eyre* could have resulted in a damages award at the most, the outcome was still of great importance. A decision for the plaintiff would have suggested that a wrong had been committed in transporting a prisoner into an area subject to martial law where he was cruelly punished.

The fascinating duality in Eyre's character adds to the high profile nature of the issues involved in the case. His early career as an explorer in Australia has made him a leading figure in Australian history, alongside other pioneers such as Thomas Mitchell, Robert O'Hara Burke and John Wills, Ludwig Leichhardt, Charles Sturt, Augustus Gregory and the Forrest brothers (John, Alexander and David).²⁵ Yet his later actions as a colonial Governor have made him a villain in the eyes of many.²⁶

The decision in *Phillips v Eyre* can be better understood if something is known about the controversial background to the case. Brian Simpson, in his groundbreaking study of the historical background to a number of landmark decisions,²⁷ commented on the shortcomings of law reports as historical sources and how his curiosity about certain issues involved in cases such as *R v Dudley*²⁸ motivated him to want to know more. Simpson said:

There is indeed something at first very peculiar about the tradition, in legal academia, of suppressing curiosity about cases. Both modern and ancient cases are, at least as a general rule, studied without anyone knowing or indeed caring who the litigants were, why they litigated, what they were trying to achieve, what they did achieve, except in so far as this happens to be public knowledge, as it often will be with very modern cases. Much less is it the general practice to relate cases to their general historical context, which is often quite unknown to those who read older decisions.²⁹

Simpson suggests that this is due to the fact that most lawyers have adopted a theory about the decision-making process which suggests that most contextual information about cases is irrelevant.³⁰ Noting that '[y]ou cannot understand litigation simply by reading law reports', Simpson says that

²⁴ For references to the term 'Jamaica Question', see, eg, 'The Jamaica Question', *Punch, or the London Charivari* (London), 23 December 1865, 249; 'The Jamaica Question' (1866) 10 *Solicitors' Journal and Reporter* 265–6 (20 January 1866).

²⁵ See generally Ernest Favenc, *The Explorers of Australia and Their Life-Work* (1908); Tim Flannery (ed), *The Explorers* (1998); Department of the Environment, Water, Heritage and the Arts, *Early Explorers* (18 June 2007) Australian Government: Culture and Recreation Portal <<http://www.cultureandrecreation.gov.au/articles/explorers>>.

²⁶ See below Part II(C).

²⁷ A W Brian Simpson, *Leading Cases in the Common Law* (1995).

²⁸ (1884) 14 QBD 273. This is a well-known decision in which two shipwrecked sailors were sentenced to death for killing and eating their young shipmate, and it was held that necessity was not a defence to murder: see A W Brian Simpson, *Cannibalism and the Common Law: The Story of the Tragic Last Voyage of the Mignonette and the Strange Legal Proceedings to Which It Gave Rise* (1984). For an analysis of *Liversidge v Anderson* [1942] AC 206, another leading case, see A W Brian Simpson, *In the Highest Degree Odious: Detention without Trial in Wartime Britain* (1992).

²⁹ Simpson, *Leading Cases in the Common Law*, above n 27, 10.

³⁰ *Ibid.*

it is no more than common sense to appreciate that it is misguided, if other relevant materials exist, to rely upon law reports alone to tell us what happened in the case, how the dispute arose, what the persons involved conceived the dispute to be about, how it came to be litigated, how it came to be decided the way it was, much less what the consequences of the decision were to the people involved, or to others indirectly affected by the decision.³¹

In the spirit of Simpson's studies, it is suggested that *Phillips v Eyre* is worthy of the same analysis: the civil action, in which Willes J enunciated the authoritative double choice of law rule, is illuminated by the criminal prosecutions and general surrounding controversy that preceded it. It should be noted that the significance of the civil action is by no means limited to conflict of laws in torts matters: Willes J's ruling was given in the course of discussing the important constitutional issue of the effectiveness of colonial legislation, an aspect of the case directly related to major developments of significance to the entire British Empire.³² But it is the conflict of laws aspects of the judgment that give rise to questions similar to those that fascinated Simpson. What appears to be a major doctrinal development seems to have happened quietly and without much notice in the law journals of the time³³ — the controversy came later.

Part II of this article provides a summary of and explains the historical setting that gave rise to the proceedings in *Phillips v Eyre*. An analysis of the decision in *Phillips v Eyre* follows in Part III, while Part IV discusses the pertinent law prior to and following Willes J's judgment — in particular, it considers when and why the controversy surrounding the double choice of law rule emerged. The fact that *Phillips v Eyre* has now largely passed into history does not lessen the interest of these questions.

³¹ Ibid 11–12.

³² See below nn 141, 147–50 and accompanying text.

³³ See below nn 202–3 and accompanying text.

II BACKGROUND: THE PROSECUTION (OR PERSECUTION) OF EDWARD JOHN EYRE³⁴A *Eyre's Early Career in Australia, New Zealand and the West Indies*³⁵

Eyre arrived at Sydney Cove in March 1833, aged 17. His father had suggested to him that Australia might be a preferable option to the army for a young man seeking his way in the world. Eyre gained some experience on a sheep station and began to earn a living trading sheep. It was not long, however, before he developed a desire to explore the unknown regions of what, to Europeans, was a new continent. In 1837 he overlanded stock to the new settlement at Port Phillip, a journey of some 400 miles from Sydney. For his next project, Eyre bought cattle and drove them across to the new colony of South Australia (established the previous year). Despite encountering problems that caused him to retrace his steps in search of a better route, Eyre reached Adelaide in July 1838 — the first European to make the journey from Sydney by the overland route.

Following further exploration of the unknown country to the north and west of Adelaide, and a sea voyage to Albany on the southern tip of Western Australia, Eyre conceived an even grander project: the opening up of an overland stock route between Adelaide and Perth, through 2000 miles of unknown territory. Having gained the support of the Governor of South Australia, George Gawler, (and having invested a good deal of his own money in the project) Eyre's expedition left Adelaide in July 1840. Finding the route to the north barred by great salt lakes (one of which is now named Lake Eyre), Eyre was forced to travel west in an attempt to find the head of the Great Australian Bight. The expeditioners endured many privations, often unable to find water for several days at a stretch. Eyre survived the desertion of some of his Aboriginal trackers, who shot his assistant Baxter and plundered the guns and stores, and later on,

³⁴ The *Law Times* noted that the 'long-threatened persecution of Governor Eyre has commenced': 'Governor Eyre' (1867) 42 *Law Times: The Journal and Record of the Law and the Lawyers* 181 (5 January 1867). *Palmer's Index to the Times* several times refers to leading articles 'On the Eyre Persecution', although the heading is not used in the newspaper itself.

³⁵ This discussion is drawn primarily from Geoffrey Dutton, *In Search of Edward John Eyre* (1982) chs 1–6. For a longer biography by the same author, see Geoffrey Dutton, *The Hero as Murderer: The Life of Edward John Eyre — Australian Explorer and Governor of Jamaica 1815–1901* (1967). For other biographies, see further Hamilton Hume, *The Life of Edward John Eyre, Late Governor of Jamaica* (1867); Malcolm Uren and Robert Stephens, *Waterless Horizons: The First Full-Length Study of the Extraordinary Life-Story of Edward John Eyre — Explorer, Overlander and Pastoralist in Australia* (1945). Eyre published the journals of his Australian explorations: see Edward John Eyre, *Journals of Expeditions of Discovery into Central Australia, and Overland from Adelaide to King George's Sound, in the Years 1840–1; Sent by the Colonists of South Australia, with the Sanction and Support of the Government: Including an Account of the Manners and Customs of the Aborigines and the State of Their Relations with Europeans* (1845). See also Jill Waterhouse (ed), *Autobiographical Narrative of Residence and Exploration in Australia: 1832–1839 by Edward John Eyre* (1859). On Eyre's career as a colonial administrator, see Julie Evans, *Edward Eyre, Race and Colonial Governance* (2005). Eyre's Australian explorations have inspired two musical compositions: *Aria for Edward John Eyre* (Composed by David Lumsdaine, 1972); *Edward John Eyre* (Composed by Barry Conyngham, 1973). It has also inspired several poetical works: see, eg, Miriel Lenore, *Travelling Alone Together: In the Footsteps of Edward John Eyre* (1997, published with Louise Crisp, *Ruby Camp: A Snowy River Series*); Francis Webb, 'Eyre All Alone' in *Socrates and Other Poems* (1961) 61. Francis Berry, 'Morant Bay' in *Morant Bay and Other Poems* (1961) 1 is another poem dealing with the later episode in Eyre's life that is the subject of this article.

when in desperate straits, was fortunate to encounter a French whaling ship. With his Aboriginal companion, Wylie, Eyre reached Albany one year and 26 days after leaving Adelaide.³⁶

Eyre then began to make the transition from pioneering explorer to colonial servant.³⁷ Ironically, in view of later events, it was Sir George Grey, the new Governor of South Australia, who gave him his first position as Resident Magistrate and Protector of the Aborigines on the Murray River. Eyre occupied this post from 1841 to 1844, by which point relations with Grey had cooled. After more than a year in England waiting for a summons from the Colonial Secretary, Eyre accepted the post of Lieutenant-Governor of southern New Zealand, arriving in Wellington in July 1847. However, the new Governor of New Zealand — Eyre's immediate superior — was none other than Sir George Grey. Grey was an able administrator who believed in running a tight budget, but who did not show much regard for representative democracy. His increasing dislike of Eyre was manifested in his conduct towards him over the next seven years.³⁸ Everything Eyre did earned a reprimand from the Governor and, in the end, he was not even permitted to travel outside Wellington without the Governor's consent. Matters were made worse when Adelaide Fanny Ormond, Eyre's fiancée, came to New Zealand to marry him in 1850: Lady Grey, the Governor's wife, nearly succeeded in persuading Ada to abandon thoughts of matrimony and return to England. When he opposed Grey's constitutional Bill,³⁹ Eyre was effectively removed from his post. However, Eyre had to remain in New Zealand under the Governor's control for another two years before finally being released. Even then, Grey saw to it that the Eyres, with Ada in the late stages of pregnancy, missed their ship to England.

In spite of these experiences, Eyre continued to seek government positions, serving five years (1854–59) as Lieutenant-Governor of St Vincent followed by a year (1859–60) in Antigua as temporary Governor-in-Chief of the Leeward Islands. Then, in January 1862, Eyre became the temporary Lieutenant-Governor of Jamaica.

There is a telling contrast between Eyre the explorer — master of his own destiny — and Eyre the public servant who was constrained by authority. In the words of Geoffrey Dutton, '[t]he tragedy of Eyre was that his heroic qualities were of a solitary, not a public kind.'⁴⁰ As a young man in Australia, Eyre was independent and made his mark as an explorer relying on his own initiative. On various expeditions, Eyre was prepared to make difficult decisions when faced

³⁶ Today, the Eyre Highway, which runs between Port Augusta in South Australia and Norseman in Western Australia, commemorates the journey of the first European to find an overland route across Australia's 'western third'. This phrase is inspired by F K Crowley, *Australia's Western Third: A History of Western Australia from the First Settlements to Modern Times* (1960).

³⁷ See generally Dutton, *In Search of Edward John Eyre*, above n 35, ch 5.

³⁸ Grey's hostile manner was evident from the outset. In fact, Grey only came to Wellington to swear Eyre in five months after Eyre arrived in New Zealand. Even then, Eyre was given very little real power: see *ibid* 58–9.

³⁹ This was an attempt by Grey to delay proper representative government, with Grey having the final right of approval of all laws and ordinances: see *ibid* 63–4. Eyre labelled the Bill '[u]tterly repugnant': at 64.

⁴⁰ *Ibid* viii.

with a crisis, perhaps because his obstinacy made him committed to achieving the goals that he had set himself.⁴¹ Later in life, during the 20 year period he served as a colonial Governor, Eyre had to accept the restraints of authority, something which did not always come easily. Whether this affected his decision-making ability during the crucial stages of the Morant Bay rebellion is a matter for debate. It may simply be that advancing age and the burdens of responsibility rendered the decision-making process rather more complex; or, as Dutton suggests, it is possible that the ‘traumatic’ experiences that he suffered at the hands of ‘that sadistic pair’, Sir George and Lady Grey, had an ongoing effect on him.⁴² So long after the events in question, one can merely speculate.⁴³

Eyre had a much greater understanding of the Aboriginal peoples than most early European colonists. He took the time to try to learn their languages and understand their culture. On his early expedition from Sydney to Adelaide, Eyre chose not to give his men guns to protect themselves from the Aborigines, as he believed that understanding was greatly preferable to conflict. He also took care of Aboriginal companions such as Wylie who stood by him, and he paid for two boys to return to England with him to be educated. Later, as Protector of the Aborigines on the Murray River, he restored good relations with the native peoples. The same characteristics are manifested by Eyre’s attempts to understand the New Zealand Maoris, whose language he attempted to learn whilst travelling to Wellington. His experience with the Australian Aborigines bore fruit in his work *Manners and Customs of the Aborigines of Australia*, written in 1845.⁴⁴ As Dutton says:

It is ... clear from the whole history of his relations with the Aborigines, that his bravery and presence of mind did not just extend to the field of his explorations. In all his dealings with the Aborigines he consistently displays a courage which would have been quite alien to the caricature, drawn twenty years later by the Jamaica Committee, of a man frightened by an alien race.⁴⁵

However, there is some evidence that Eyre felt less sure of himself in the West Indies where Europeans were greatly outnumbered by the black and coloured population, who had by then experienced 200 years of contact with Europeans. During Eyre’s time in St Vincent, there were a number of riots and his dispatches suggest that he was feeling nervous. He may have been a little too ready to ask for troops to assist in quelling such disturbances: in 1857, his request for the assistance of the military was rejected by his superior, Governor Francis Hincks.⁴⁶ All of this may suggest a change in Eyre’s character as he grew older

⁴¹ For example, on the 1840–41 expedition, when failing to find a passage to the north because of the salt lakes, Eyre persisted in travelling west rather than returning to Adelaide. Later in the same expedition, Eyre adhered to his decision to keep going west in spite of a plea from Governor Gawler to turn back: see *ibid* 29–32.

⁴² *Ibid* viii.

⁴³ Curiously, Bernard Semmel makes no reference to Grey’s conduct towards Eyre, albeit in a brief discussion of Eyre’s period in New Zealand: Bernard Semmel, *The Governor Eyre Controversy* (1962) 31.

⁴⁴ See Eyre, *Journals of Expeditions of Discovery into Central Australia*, above n 35, vol 2, 147–507.

⁴⁵ Dutton, *In Search of Edward John Eyre*, above n 35, 51.

⁴⁶ *Ibid* 68.

and became weighed down by the burdens of public office. However, there was nothing to suggest that when Eyre went to Jamaica he would become the callous murderer that he was portrayed to be by many sectors of English society as a result of the October 1865 uprising at Morant Bay.

B *Eyre as Governor of Jamaica and the Rebellion at Morant Bay*⁴⁷

The key event that made Eyre the subject of controversy in England over the ensuing years — and that provided the immediate backdrop to the litigation in *Phillips v Eyre* — was the arrest, trial by court martial and execution in October 1865 of George William Gordon. Gordon was the illegitimate son of a white landowner and a black slave. Freed by his father, he had risen to a position of affluence and social respectability. He was a magistrate, subsequently a member of the House of Assembly and also a lay preacher in the Native Baptist Church. Gordon was a constant thorn in the side of the authorities through his agitation for social reforms. Even before Eyre's arrival, he had incurred the displeasure of Governor Ralph Darling because of his complaints about the state of the prison at Morant Bay, a settlement in the Parish of St Thomas in eastern Jamaica. Clashes between Eyre and Gordon began soon after Eyre's arrival in Jamaica in early 1862.

Jamaica faced many problems during this period. Unlike Trinidad and British Guiana (now Guyana), which were Crown colonies, in 1662 King Charles II of England had given Jamaica a form of self-government similar to that conferred on the original 13 American colonies in the same period.⁴⁸ However, the House of Assembly, elected by the European planter class who alone had the right to

⁴⁷ This account is drawn from a number of sources: see, eg, *ibid* chs 7–9; Semmel, above n 43, ch 2; R W Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (2005) ch 1; 'The Case of Mr George William Gordon' (1866) 22 *Law Magazine and Law Review*; or, *Quarterly Journal of Jurisprudence* 28. Newspaper coverage in Jamaica commences in *The Morning Journal* (Kingston) from 13 October 1865 and in *The Colonial Standard, and Jamaica Despatch* (Kingston) from 12 October 1865. The latter was congratulated for 'the correctness and completeness of [their] Bulletin': *The Colonial Standard, and Jamaica Despatch* (Kingston), 17 October 1865. All the daily reports concerning the rebellion at Morant Bay are reprinted in logical order in the *Extra to The Colonial Standard* (Kingston), 24 October 1865.

⁴⁸ The early constitutional history of Jamaica following the British acquisition of the island in 1655 is complex. It appears that, although initially regarded as a conquered colony, Jamaica was treated as a settled colony from 1728 following the settlement of a dispute with the English authorities about the powers of the Jamaican legislature. Its status as a settled colony was confirmed in *Campbell v Hall* (1774) 1 Cowp 204; 98 ER 1045, where Mansfield CJ held that Jamaica's English inhabitants were entitled to be regarded as British subjects. However, Willes J expresses some doubt on the point in *Phillips v Eyre* (1870) LR 6 QB 1, 18. For a discussion of the legal status of Jamaica and its early constitutional development, see generally Lloyd G Barnett, *The Constitutional Law of Jamaica* (1977) 1–10; Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966) 851–4; B H McPherson, *The Reception of English Law Abroad* (2007) 109–10, 148, 245–6, 264–5, 268, 351–2. McPherson emphasises the leading role played by Jamaica in providing a model for conferring the jurisdiction of the English courts on a single Supreme Court of Judicature (at 424) and the notion that English settlers took the common law with them as their birthright (at 31, 245–6, 257–8, 352). The idea of the law as the birthright of an English subject was central to the case of *Anonymous* (1722) 2 P Wms 75; 24 ER 646. For a discussion of this case, see Justice B H McPherson, 'The Mystery of *Anonymous* (1722)' (2001) 75 *Australian Law Journal* 169.

vote,⁴⁹ was corrupt and resisted reforms, and threats of a repeat of the insurrection of 1831 were never far away.⁵⁰ The abolition of slavery in 1833 had led to a labour shortage, as the black and coloured population chose to cultivate their own smallholdings rather than work for others. The planter class, who supported the established church, were uneasy about the Native Baptist 'sect' whose faith was a mixture of Christianity and pagan practices such as obeahism.

The initial clash between Eyre and Gordon resulted from an open letter from Gordon about conditions in Morant Bay in June 1862. After taking the advice of Baron Maximilian von Ketelholdt, the Custos of the Parish of St Thomas,⁵¹ Eyre dismissed Gordon from the magistracy. Von Ketelholdt and Gordon were already enemies.⁵² Controversy continued over the next three years,⁵³ during which time Eyre made some unfortunate decisions. In early 1865, for example, Edward Cardwell, the Secretary of State for the Colonies in England, sent Eyre a letter from Dr Edward Underhill, the Secretary of the Baptist Society, about social conditions in Jamaica. Eyre distributed copies seeking evidence of the truth or otherwise of Underhill's assertions, which simply stirred up further controversy. As a result of an 'Underhill Meeting' in the Parish of St Ann's,⁵⁴ the locals sent a petition to the Queen asking for more land, which in July 1865 elicited the unhelpful response from Cardwell that if the people worked harder they would become more prosperous. Eyre again distributed copies of this throughout the island. Gordon denounced Cardwell's response and maintained a constant attack on Eyre. Reports of secret drillings and rumours of the possibility of an insurrection began to emerge.

The touchpaper was lit when there was a disturbance at Morant Bay on 7 October 1865. Two hundred men led by Paul Bogle, a black preacher, marched on the courthouse and a riot ensued. Warrants were issued for the arrest of Bogle and 28 others, but the half-dozen police sent to execute the warrant were hopelessly outnumbered. In response to reports that Bogle's men would return in force the following day, von Ketelholdt prepared to defend the town with a small volunteer force, which was all he had. He also sent a message to Eyre in Kingston asking for troops to assist him, but the troops did not arrive in time. On 11 October the courthouse and other buildings were burnt down and 18 people

⁴⁹ In 1863, only 1799 white males from a total population of around 450 000 were registered to vote: A C Burns, *History of the British West Indies* (1954) 653.

⁵⁰ The slaves in western Jamaica rose in revolt in 1832 in the belief that their freedom was being withheld despite the abolition of slavery in Britain: see J H Parry and P M Sherlock, *A Short History of the West Indies* (3rd ed, 1971) 185–6.

⁵¹ The ancient English title 'Custos Rotulorum', which means keeper of the rolls, was given to the Governor's representative in each region of Jamaica (known as a Parish): Dutton, *In Search of Edward John Eyre*, above n 35, 77.

⁵² For example, a dispute between them as to what constituted membership of the Church of England was twice litigated in the Circuit Court. On both occasions, the Court found for von Ketelholdt only for Gordon to obtain a rule nisi for a new trial: *The Morning Journal* (Kingston), 12 October 1865.

⁵³ For example, a letter from Gordon to his agent Henry Lawrence notes that 'the man, Mr Eyre, is an arch liar, and he supports all his emissaries ... *the wicked shall be destroyed*. This is decreed. God is our refuge and strength, a very pleasant [sic] help in trouble': Dutton, *In Search of Edward John Eyre*, above n 35, 87 (emphasis in original).

⁵⁴ See *ibid* 83.

including von Ketelholdt were killed, with many others wounded. Over the next few days, Bogle's forces tried to spark a more general rebellion.

Having received news of the massacre and other communications seeking assistance, Eyre formally proclaimed martial law on 13 October. The proclamation covered the whole of the County of Surrey, which included the Parish of St Thomas, but not Kingston.⁵⁵ Eyre travelled by sea to Morant Bay that day, and was able to observe that the measures he had taken appeared to have been successful in containing the rebellion. However, he had also come to a conclusion about who was ultimately responsible:

I found everywhere the most unmistakeable evidence that Mr Geo Wm Gordon, a coloured member of the House of Assembly, had not only been mixed up in the matter, but was himself, through his own misrepresentation and seditious language addressed to the ignorant black people, the chief cause and origin of the whole rebellion.⁵⁶

On his return to Kingston on 17 October, Eyre ordered Gordon's arrest.

Eyre now had to make a fateful decision: he could either have Gordon tried by a civil court in Kingston, or bring Kingston within the area covered by martial law and have Gordon tried by a military court, or have Gordon transported to Morant Bay and tried there. Eyre chose the third option and Gordon was taken to Morant Bay aboard the *HMS Wolverine*, where Eyre left him in the care of the military authorities under Colonel Abercrombie Nelson. This same ship was to take the plaintiff in *Phillips v Eyre* to Morant Bay one week later.⁵⁷ On 21 October, Gordon was tried for high treason by a court martial presided over by Lieutenant Herbert Brand. Brand was a relatively junior officer for such a responsibility and the trial appears to have been very unsatisfactory with much of the evidence heard being inadmissible.⁵⁸ However, Gordon was found guilty and sentenced to hang the next morning.

Over the following weeks, the rebellion was quashed. It is clear that those in charge allowed this process to get out of control: 439 were killed, some 600 flogged and about 1000 houses burnt down.⁵⁹ There is evidence that some of the officers involved treated the task as 'hunting sport'.⁶⁰ Eyre was not directly

⁵⁵ The text of the proclamation is set out in 'The Insurrection in Jamaica', *The Times* (London), 17 November 1865, 9; 'The Proclamation', *The Morning Journal* (Kingston), 14 October 1865.

⁵⁶ Eyre's dispatch of 17 October 1865, quoted in Dutton, *In Search of Edward John Eyre*, above n 35, 97. The newspapers shared Eyre's view: *The Colonial Standard* (as cited in *The Morning Journal* (Kingston), 20 October 1865) noted that Gordon incited the rebellion through rash speeches, in order to rectify what he saw as a wrong against the people. *The Colonial Standard* also seemed certain by this stage that Gordon had incited the rebellion, despite expressing incredulity at the fact that a man of such intelligence and standing in the country would have sanctioned such violence.

⁵⁷ For a discussion of the civil action, see below Part III.

⁵⁸ See Dutton, *In Search of Edward John Eyre*, above n 35, 98–9.

⁵⁹ *Ibid* 96.

⁶⁰ *Ibid* 101. Lieutenant Adcock, for example, reported that 'I visited several estates and villages. I burnt seven houses in all, but did not even see a rebel. On returning to Golden Grove in the evening, sixty-seven prisoners had been sent in. ... I disposed of as many as possible, but was too tired to continue after dark': Semmel, above n 43, 17. Prominent among the reports of the suppression were those of Colonel Francis Hobbs: see, eg, the letters quoted in *ibid* 101–2; Semmel, above n 43, 16. In May 1866, Hobbs, who had served with distinction at the siege of Sebastopol during the Crimean War, was put on a boat for England under escort and committed

responsible for any of this. However, the controlling European element of the Jamaican populace — those who had most to lose — regarded him as the hero who had saved Jamaica from disaster. His influence at this point was so strong that he was able to convince the House of Assembly to pass constitutional reforms that brought the old form of government to an end and allowed Jamaica to become a Crown Colony, with an appointed (rather than an elected) legislature,⁶¹ on the basis that stronger legislative control would ward off another act of rebellion.⁶² Before dissolving itself, the legislature passed legislation to deal with the recent emergency, including an Act that sanctioned martial law and — all-importantly for the litigation in *Phillips v Eyre* — an Act of Indemnity covering all acts done in good faith to suppress the rebellion after the proclamation of martial law.⁶³

C The ‘Jamaica Question’

Though the Jamaican people saw Eyre as the hero of the hour,⁶⁴ the mood changed rapidly when news of the suppression of the rebellion reached England in November 1865. The situation was not helped by the lurid nature of some reports that had come out of the island — headlines such as ‘Eight Miles of Dead Bodies’⁶⁵ seem to bespeak a style of reporting more prevalent in the 21st than the

suicide by jumping over the side: see Semmel, above n 43, 85–6. Gordon Ramsay, the Provost Marshal who was also involved in the excesses that followed the insurrection, also committed suicide: see *ibid* 96. Some of the others involved, notably Ensigns Cullen and Morris, were later court-martialled in Jamaica: *ibid* 133.

⁶¹ This system of government was ‘no more than a form of benevolent despotism’: Barnett, above n 48, 10. See also Raphael Codlin, *Historical Foundations of Jamaican Law* (2003) 46. In reviewing the events of 1866, the *Daily Gleaner* (Kingston), 8 January 1867 noted: ‘Our old Constitution passed away in 1866; but whether the change which we have been called upon to make, will conduce to the welfare of our people, Time alone will tell.’ See also *The Morning Journal* (Kingston), 27 November 1865. Legislation by the Westminster Parliament was required to bring these changes into operation: see *Jamaica Act 1866* (Imp) 29 & 30 Vict, c 12. Section 1 provided that the two Acts passed in Jamaica were to be brought into operation when the Royal Assent was proclaimed in Jamaica. For comment, see (1866) 1 *Law Journal* 214 (20 April 1866).

⁶² The *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63, which determined when colonial legislation would be considered repugnant to English law, had come into operation on 29 June 1865. The *Jamaica Morning Journal* commented that, although this Act provided that no colonial Act can be ‘repugnant to the laws of the Mother-country’, the Jamaican legislature had passed several Acts that it ought to have foreseen would be held invalid when submitted for the consideration of the English law officers: *The Morning Journal* (Kingston), 26 December 1865; *The Morning Journal* (Kingston), 27 December 1865.

⁶³ Notice of the indemnity Bill was given when the parliamentary session opened on 7 November 1865. The Bill passed during the next three days and was assented to by the Governor on 10 November 1865: *The Morning Journal* (Kingston), 8 November 1865; *The Morning Journal* (Kingston), 9 November 1865; *The Morning Journal* (Kingston), 10 November 1865; *The Morning Journal* (Kingston), 11 November 1865. The Act — set out in full in *Phillips v Eyre* (1870) LR 6 QB 1, 3–5 — had to be affirmed by the Westminster Parliament. There was speculation that it might be disallowed: see *The Morning Journal* (Kingston), 21 June 1866, which refers to a parliamentary question on this issue. However, ultimately the Act was affirmed. The Act sanctioning martial law was, however, disallowed by the UK Parliament — see Dispatch from the Earl of Carnarvon read in the Legislative Council on 12 March 1867: *Daily Gleaner* (Kingston), 13 March 1867.

⁶⁴ Dutton, *In Search of Edward John Eyre*, above n 35, 113.

⁶⁵ This headline first appeared in *The New York Herald*: Semmel, above n 43, 22–3. It was later used by several English newspapers: see *ibid* 105.

19th century. Meetings to protest against the events in Jamaica were organised within days. In Manchester, Eyre was denounced by ‘Exeter Hall’, the nonconformist groups who had a special interest in Jamaican Christians,⁶⁶ and Gordon’s execution was compared to the martyrdom of Saint Stephen.⁶⁷ In response to deputations from the British and Foreign Anti-Slavery Society and the London Missionary Society,⁶⁸ Cardwell wrote to Eyre on 16 December 1865 informing him that a Royal Commission would be appointed to inquire into the circumstances of the rebellion.⁶⁹ The three members of the Commission arrived in Jamaica on 23 January 1866, and completed their task in April following 51 days of hearings.⁷⁰ The Commission’s report was published in England on 18 June and received in Jamaica on 5 July.⁷¹ The verdict was that praise was due to Eyre for the speedy termination of the insurrection, but that the punishments inflicted were excessive.⁷² However, the issue of whether Gordon’s execution was legal was not addressed.

Though there was no direct criticism of Eyre in the report — it was the senior army officer, General Luke O’Connor, who was directly responsible for those who inflicted excessive punishment — Cardwell decided that in view of the controversy surrounding Eyre’s actions he had to be dismissed.⁷³ But this was not enough to satisfy those who were outraged by what had happened. As early as December 1865, activists had formed the ‘Jamaica Committee’ and were moving to have Eyre prosecuted for murder.⁷⁴ Among the leading members of

⁶⁶ These groups were so named because they had their headquarters at Exeter Hall, located off the Strand in London.

⁶⁷ Semmel, above n 43, 22. According to *Punch*, ‘Exeter-hall says the case against Governor Eyre is plain. In their hands, we say, it is coloured’: ‘Two Ways of Looking at It’, *The Times* (London), 23 December 1865, 8 (emphasis in original).

⁶⁸ Semmel, above n 43, 23.

⁶⁹ For comment on the decision to set up a Royal Commission, see ‘Legal Topics of the Week’ (1866) 41 *Law Times: The Journal and Record of the Law and the Lawyers* 125 (6 January 1866).

⁷⁰ Semmel, above n 43, 66. *The Morning Journal* (Kingston), 11 April 1866 gave the figure as 46 days.

⁷¹ *Daily Gleaner* (Kingston), 8 January 1867. The *Jamaica Morning Journal* had copies of the Royal Commission Report for sale to the public, with its advertisement reading: ‘WHAT A SHILLING CAN GET! THE BLUE BOOK with The Report of the Royal Commissioners. The Despatch of the Secretary of State. A Coloured Map of Jamaica’: *The Morning Journal* (Kingston), 16 July 1866.

⁷² For the Royal Commission’s conclusions, see Dutton, *In Search of Edward John Eyre*, above n 35, 111–12. See also ‘The Bench and the Bar’ (1866) 41 *Law Times: The Journal and Record of the Law and the Lawyers* 580 (23 June 1866); (1866) 10 *Solicitors’ Journal and Reporter* 801 (23 June 1866). *The Times* regretted that the Royal Commission did not go further in drawing inferences of responsibility, particularly with regard to the trial and execution of Gordon: *The Times* (London), 19 June 1866, 11.

⁷³ See Dutton, *In Search of Edward John Eyre*, above n 35, 112.

⁷⁴ Soon after its formation, the Jamaica Committee sought an opinion from Edward James QC and Fitzjames Stephen on the legality of the measures taken to put down the insurrection. For the text of the opinion, dated 13 January 1866, see ‘The Jamaica Question’ (1866) 10 *Solicitors’ Journal and Reporter* 265–6 (20 January 1866); ‘The Jamaica Rebellion: Opinion’ (1866) 41 *Law Times: The Journal and Record of the Law and the Lawyers* 179 (27 January 1866); ‘The Jamaica Rebellion: Opinion’ (1866) 41 *Law Times: The Journal and Record of the Law and the Lawyers* 201–2 (3 February 1866); ‘The Jamaica Inquiry’ (1866) 20 *Law Magazine and Law Review; or, Quarterly Journal of Jurisprudence* 326, 329–42. For commentary on the opinion, see ‘Legal Topics of the Week’ (1866) 41 *Law Times: The Journal and Record of the Law and the Lawyers* 163–4 (20 January 1866). Counsel appointed by the Jamaica Committee were

this Committee were Liberal Members of Parliament including John Bright, Charles Buxton, Peter Taylor and authors John Stuart Mill and Thomas Hughes; scientists Charles Darwin and Thomas Huxley; and scholars such as Goldwin Smith, Regius Professor of Modern History at the University of Oxford. Subscribers to the Jamaica Committee included Henry Fawcett, Professor of Political Economy at the University of Cambridge; Albert Venn Dicey, Fellow of Trinity College, Cambridge, who later wrote the classic text on conflict of laws;⁷⁵ and the philosopher T H Green, Fellow of Balliol College, Oxford.

Others continued to support the former Governor of Jamaica and, in August 1866, when it became clear that there would be an attempt to launch a prosecution, the Eyre Defence Committee was formed. The leading figures in this group were the authors Thomas Carlyle and John Ruskin, Member of Parliament Lord John Manners, the Earl of Cardigan (who had led the Charge of the Light Brigade at Balaclava in the Crimean War) and the scientist John Tyndall. Two prominent literary figures, the novelist Charles Dickens and the poet Lord Alfred Tennyson, also lent support, as did the well-known writer Charles Kingsley, Regius Professor of Modern History at the University of Cambridge.⁷⁶ Over the next couple of years, during which the Jamaica Committee made determined attempts to bring Eyre to justice,⁷⁷ the controversy continued — in Parliament, in public meetings, and in the leaders and correspondence columns of the newspapers.

Contemporary press reports and leading articles evidence the divergence of opinion on the ‘Jamaica Question’. *The Times*, for example, gradually modified its views as more information came to hand. Its earliest reports and comments expressed incredulity that the authorities could have overstepped the mark in the measures used to suppress the rebellion, or that the black population could have any reason for rising up against British rule. On 16 December 1865, *The Times* commented:

The more we consider the events of the 11th of October, the more we are irresistibly led to the conclusion that the attack on the Court-house was premeditated, and that probably for some time Baron Ketelholdt and his colleagues had been doomed men. The alacrity with which other districts rose as soon as the news of the first massacre reached them shows the spirit of the population, and gives reason to believe that if the insurrection had not been stopped it would have traversed the entire island.⁷⁸

permitted to appear before the Royal Commission. The Committee’s solicitors, Messrs Shaen and Roscoe, briefed Mr T Horne Payne, Mr Gorrie and Mr Phillippo — the latter a member of the English Bar practising in Jamaica: (1866) 41 *Law Times: The Journal and Record of the Law and the Lawyers* 125 (6 January 1866); Kostal, above n 47, 77–8.

⁷⁵ A V Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws* (1st ed, 1896). Dicey also authored *Introduction to the Study of the Law of the Constitution* (1st ed, 1885).

⁷⁶ For a detailed discussion of the part played by the members of the two groups, see Dutton, *In Search of Edward John Eyre*, above n 35, chs 11–12; Semmel, above n 43, ch 5; Kostal, above n 47, ch 3.

⁷⁷ See below Part II(D).

⁷⁸ *The Times* (London), 16 December 1865, 9. See also *The Times* (London), 30 November 1865, 8; *The Times* (London), 2 December 1865, 8; *The Times* (London), 4 January 1866, 8. See *The Times* (London), 29 November 1865, 8, where it was noted that Eyre was ‘eminently kind, generous and just’ towards the Australian Aborigines.

But a month later, as more information about the trial of Gordon became available, *The Times* began to express doubts about the outcome:

no one will deny that there were grounds for arresting Gordon. The fatal mistake was in sending him to a spot where he could not communicate with the persons who might have given evidence in his favour, and then bringing him suddenly before a Court-Martial to answer for a capital crime. A man whom everybody in a moment pointed to as a traitor and murderer must have given ground for suspicion, but unless there be further evidence of Gordon's wilful connexion with the outbreak we must hold that he ought not to have suffered death.⁷⁹

By 19 March 1866, in light of evidence accumulating before the Royal Commission, these doubts were fully confirmed:

There is no longer any reasonable doubt that cruelties of which it is impossible to think without shuddering were perpetrated in the suppression of the Jamaica insurrection. ... [A]n abuse of power, beyond all excuse or palliation either in nature or degree, will probably be brought home to several British officers ... It is a conclusion from which our readers will bear us witness that we long shrank, and which to have accepted hastily would have been almost as dishonourable as to shut our eyes to it now that it is forced upon us.⁸⁰

Despite this gradual change in attitude, *The Times* consistently expressed the view that attempts to prosecute Eyre and others for murder were misguided.⁸¹

More polarised opinions can be found in the Jamaican press. *The Colonial Standard*, consistently pro-Eyre, commented shortly after the rebellion that the 'master spirit of this hellish combination' was Gordon, who exercised 'uncommon intelligence and ability' and the 'peculiar tact required to give unbounded influence upon the Negro'. It stated that, if it were not for Eyre's decisiveness in the state of emergency, many other parishes would have joined the rebellion.⁸²

⁷⁹ *The Times* (London), 27 January 1866, 8. Similarly, when reporting the proceedings at Gordon's trial, it was noted that 'there was no sufficient proof of Gordon's guilt': *The Times* (London), 25 January 1866, 8.

⁸⁰ *The Times* (London), 19 March 1866, 8. For commentary on the Report of the Royal Commission, see *The Times* (London), 13 April 1866, 9; *The Times* (London), 1 May 1866, 11; *The Times* (London), 19 June 1866, 11. For commentary on the decision of the Bow Street magistrate to indict Eyre under the *Criminal Jurisdiction Act 1802*, 42 Geo 3, c 85, see *The Times* (London), 30 June 1866, 8; *The Times* (London), 13 October 1866, 6; *The Times* (London), 16 May 1868, 9. See also below n 121 and accompanying text. As reported in *The Times* (London), 4 June 1868, 8, after the Grand Jury finally acquitted him, the newspaper speculated on Eyre's real punishment:

In fact, the trial has only begun, and will never end. Governor Eyre will always be in court, for not even the stern functionary who relieves the worst criminals from their penalties and pains will stay the interminable pleadings for and against him. In our humble opinion, he is not to be envied even for his present and, as we sincerely hope, final escape from his legal persecutors. Two years in a healthy gaol, or the payment of a thousand pounds, are a trifle compared with a position by the side of Nero, Colonel Kirk, Judge Jeffreys, Claverhouse, the Duke of Cumberland, and similar notoriety, in books for the young and religious periodicals.

⁸¹ See *The Times* (London), 20 June 1866, 9; *The Times* (London), 30 June 1866, 8; *The Times* (London), 20 July 1866, 9; *The Times* (London), 13 October 1866, 6; *The Times* (London), 16 May 1868, 9. See also a comment on the prosecution of Nelson and Brand: *The Times* (London), 8 February 1867, 8.

⁸² *The Colonial Standard, and Jamaica Despatch* (Kingston), 24 October 1865.

By 1867, when it was clear that Eyre would be prosecuted in England, it had not changed its opinion, referring to

the duty which the Press is under to urge the public of Jamaica to assist the ex-Governor in the expensive task which, it is now certain to all appearances, will be imposed on him of defending himself against the desperate attempts of the negro-philists to bring him to the scaffold.⁸³

The Jamaica *Morning Journal* originally adopted the same stance — for example, it suggested that, in the immediate aftermath of the rebellion, the gentry could no longer afford to place confidence in the goodwill of the ‘masses’, and that it was now crucial to unite for mutual protection and no longer ‘regard it as beneath their dignity to shoulder the rifle’.⁸⁴

A few days later it commented that the white community in Jamaica had become complacent in the security of the Empire, and suggested that the aim of the uprising was to eliminate the white and coloured population with ‘a second massacre of St Bartholomew’.⁸⁵ However, in the light of anti-Eyre comments reprinted from the English papers, the Jamaica *Morning Journal* began to alter its opinion.⁸⁶ By the time the Royal Commission Report was published six months later, its opinion had hardened against Eyre to the point that it now supported his condemnation and dismissal. The Jamaica *Morning Journal* criticised *The Colonial Standard*, which it said was writing for the ‘upper classes’, for holding different views: ‘Our contemporary surely could not have read the report, or, if he did read it, he must have done so by the light of the stars, and thus have failed to perceive that which strikes all who read the document by the light of day.’⁸⁷ Similar comments flowed from the editor’s pen over the ensuing years.⁸⁸

The law journals of the time provide a more balanced source of contemporary opinion. The *Law Times* was consistently supportive of Eyre and his cause. On 5 January 1867, for example, it said of the use of martial law:

Governor Eyre undoubtedly saved Jamaica and the lives of all its white inhabitants by the instant and vigorous employment of this weapon. If the Fenians were to rise in rebellion in Ireland our governor there would, with the approval of England, use it too. Were he to refuse to do so, and a massacre were to result, we should certainly hang or shoot him. So, if Governor Eyre had not done in Jamaica as we should do in Ireland, and stamped out the first sparks of the rebellion by martial law, and our countrymen in Jamaica had been massacred, the whole country would have called for his trial and execution. Because he did so, and succeeded, a party among us indict him for murder. What is a governor to

⁸³ *The Colonial Standard, and Jamaica Despatch* (Kingston), 19 January 1867. See also the editorial in *The Colonial Standard, and Jamaica Despatch* (Kingston), 26 June 1868.

⁸⁴ *The Morning Journal* (Kingston), 16 October 1865.

⁸⁵ *The Morning Journal* (Kingston), 25 October 1865.

⁸⁶ See, eg, *The Morning Journal* (Kingston), 26 December 1865; *The Morning Journal* (Kingston), 27 December 1865.

⁸⁷ *The Morning Journal* (Kingston), 16 July 1866.

⁸⁸ See, eg, *The Morning Journal* (Kingston), 14 February 1867; *The Morning Journal* (Kingston), 30 April 1867; *The Morning Journal* (Kingston), 29 June 1868.

do? How, with the fate of Governor Eyre before his eyes, can any future governor discharge his duty with confidence?⁸⁹

By contrast, the *Solicitors' Journal and Reporter* was much more hostile to Eyre and supportive of his prosecution. It suggested that the trial of political prisoners by a military court was illegal under the Bill of Rights, and that

even Strafford himself ... never ventured to propose that a prisoner against whom no act of violence was ever alleged, and who was duly made amenable to justice in a peaceable manner, should be taken out of the district wherein he was properly triable, and transferred to a disturbed district, for the mere purpose of subjecting him to a trial by military law. ... [Brigadier-General] Nelson, and the officers who sat on that court martial, and the soldiers who carried their sentence into effect, have one and all been guilty of wilful murder.⁹⁰

In a later issue, the *Solicitors' Journal and Reporter* drew another historical analogy, noting that not since the case of Lord William Russell had there been 'a British subject more foully "done to death" without evidence by a British Court.'⁹¹ More than once, the journal congratulated itself that it was 'among the first to call public attention to that hideous violation of law and justice which brought a man, now authoritatively declared innocent of all crime, to a felon's death at the hands of an illegal tribunal'⁹² and that it had played an important part 'in procuring the inquiry into that melancholy tragedy'.⁹³ However, by the time the criminal prosecutions had run their course, there was a noticeable softening of view: 'vindication', the *Solicitors' Journal and Reporter* said, 'has gone far enough'.⁹⁴

It is important to appreciate that this debate was not taking place in a vacuum. Our understanding of the controversy is enhanced if consideration is given to the other important issues of the day. The primary debate concerned electoral reform, culminating in the passing of the second Reform Act in August 1867, which extended suffrage to the working classes.⁹⁵ Many of those who supported the Jamaica Committee were also in favour of electoral reform.⁹⁶ Debates over

⁸⁹ 'Governor Eyre' (1867) 42 *Law Times: The Journal and Record of the Law and the Lawyers* 181–2 (5 January 1867). See also 'Legal Topics of the Week' (1866) 41 *Law Times: The Journal and Record of the Law and the Lawyers* 113 (30 December 1865); 'Legal Topics of the Week' (1866) 41 *Law Times: The Journal and Record of the Law and the Lawyers* 125 (6 January 1866); 'Mr Eyre and Trial by Jury' (1867) 42 *Law Times: The Journal and Record of the Law and the Lawyers* 321–2 (23 February 1867); (1868) 44 *Law Times: The Journal and Record of the Law and the Lawyers* 343 (7 March 1868).

⁹⁰ (1865) 10 *Solicitors' Journal and Reporter* 70 (25 November 1865). The Earl of Strafford was Charles I's Chief Minister during the period when he governed without Parliament (1629–40): see C P Hill, *Who's Who in Stuart Britain* (revised ed, 1988) 68–74.

⁹¹ (1866) 10 *Solicitors' Journal and Reporter* 286 (27 January 1866). Lord William Russell was murdered in his sleep in 1840 and his valet, François Courvoisier, confessed and was tried and executed for the crime, although the evidence against him was purely circumstantial: see David Mellinkoff, *The Conscience of a Lawyer* (1973).

⁹² (1866) 10 *Solicitors' Journal and Reporter* 849 (7 July 1866).

⁹³ (1868) 12 *Solicitors' Journal and Reporter* 373 (7 March 1868). The *Law Magazine and Law Review* reflected on its role in a similar vein: see 'The Jamaica Inquiry' (1866) 20 *Law Magazine and Law Review*; or, *Quarterly Journal of Jurisprudence* 326.

⁹⁴ (1868) 12 *Solicitors' Journal and Reporter* 373 (7 March 1868).

⁹⁵ *The Representation of the People Act 1867*, 30 & 31 Vict, c 102.

⁹⁶ See Semmel, above n 43, 57–9, 71–2.

electoral reform had been revived following the death of Prime Minister Lord Palmerston a week after the commencement of the Morant Bay insurrection. A public demonstration in Trafalgar Square in June 1866 caused the authorities to ban a further meeting planned for Hyde Park, a decision which resulted in outbreaks of violence and fears of a repeat of the Jamaican uprising much closer to home.⁹⁷

The other key contemporary issue concerned unrest in Ireland — the papers that questioned whether Eyre was a hero or a murderer were also reporting the Fenian disturbances, notably an audacious attempt to release prisoners by blowing up the wall of Clerkenwell House of Detention.⁹⁸ Some commentators noted that Fenians were being taken back to Ireland to be tried, and questioned whether there was any difference between this and Eyre's decision to send Gordon to Morant Bay.⁹⁹ Indeed, 'it might be said that for much of English public opinion what was at issue in the controversy was not Eyre but Eire.'¹⁰⁰

International events also had a role in forming English public opinion. One reason why Exeter Hall reacted so promptly to the news from Jamaica was its failure to protest against the bloody suppression of the Indian Mutiny of 1857.¹⁰¹ There was also the American Civil War of 1861–65: similarities could be drawn between the interests of the slavery-supporting South and the white planter class in Jamaica. The English middle class was generally supportive of the South, whereas the radicals and the working class were more sympathetic to the North.¹⁰² Another influence on those in the radical camp, including the members of the Jamaica Committee, was the assassination of President Abraham Lincoln on 14 April 1865. The new President, Andrew Johnson, ordered the execution of Mary Surratt for her part in the murder — one of many events which led to two attempts to impeach him.¹⁰³ The analogy between the roles of Eyre and Johnson

⁹⁷ Ibid 81–5; Dutton, *In Search of Edward John Eyre*, above n 35, 120–1, 133. The mobilisation of the working class continued in the lead up to and following electoral reform: see *ibid* 96–8, 132–3, 136–9. The editorial in *The Colonial Standard, and Jamaica Despatch* (Kingston), 27 May 1867 — written after the Grand Jury had dismissed the indictment against Nelson and Brand (see below nn 108–12 and accompanying text) — questioned whether 'the late meetings in the London Parks, would have been held in spite of the Government proclamation' without Cockburn CJ's ruling on the nature and scope of martial law as delivered to the Grand Jury.

⁹⁸ See Semmel, above n 43, 133–4; 'The Two Rebellions', *The Times* (London), 1 February 1866, 7, reprinted from *Blackwood's Magazine*. For a report of the Clerkenwell explosion, see *The Times* (London), 14 December 1867, 6.

⁹⁹ See, eg, 'Reg v Eyre' (1870) 49 *Law Times: The Journal and Record of the Law and the Lawyers* 160 (2 July 1870), where it was noted:

Everyone knows the uproar that was made in the case of Gordon, on account of his having been taken out of the district, although at the very time we were taking Fenians here, and sending them over to be tried in Ireland, for acts done there, and punishable by a more severe law than exists here.

¹⁰⁰ Semmel, above n 43, 133.

¹⁰¹ Ibid 20–2. Eyre himself drew parallels with the Indian Mutiny in his speech opening the session of the Jamaica Legislative Assembly on 7 November 1865: 'The Insurrection in Jamaica', *The Times* (London), 29 November 1865, 9, reporting material from *The Jamaica Guardian* (Kingston), 8 November 1865. See also *The Times* (London), 18 November 1865, 8, where it was suggested that the mutiny in Jamaica had a greater impact on public opinion than the Indian Mutiny.

¹⁰² Semmel, above n 43, 59–60. In discussing the situation in Jamaica, *The Times* referred to '[t]he late convulsions in America': *The Times* (London), 30 November 1865, 8.

¹⁰³ See Albert Castel, *The Presidency of Andrew Johnson* (1979) 24–5, 34–5, 167–95.

was uncomfortably close — it was very difficult to defend one while excoriating the other.¹⁰⁴

Finally, it should be appreciated that unrest in Haiti was foremost in the minds of many in Jamaica in the 1860s. In Haiti, the former slaves had won independence from the French authorities in 1804 but had not been able to maintain a stable regime.¹⁰⁵ On 16 October 1865, the Jamaica *Morning Journal* suggested that the design of the rebels was to emulate the killing of the white and coloured inhabitants in Haiti, and to claim all property in the country for themselves.¹⁰⁶ Unbeknown to the journal and other commentators, in May 1865 Gordon had attempted to purchase an ex-Confederate schooner with a view to ferrying arms and ammunition from the United States of America.¹⁰⁷ His companion on this occasion was a Haitian general. Had Eyre been aware of this occurrence, his actions may have had additional justification as a measure of national security.

D The Criminal Proceedings

The first shots in the Jamaica Committee's campaign to bring the 'villains' of Morant Bay to justice were fired on 6 February 1867 when warrants for the wilful murder of Gordon were filed against Brigadier-General Nelson and Lieutenant Brand at Bow Street Police Court.¹⁰⁸ Eyre was absent from these proceedings as he was temporarily living at Adderley Hall near Market Drayton in Shropshire, and so was not within the jurisdiction of the Court.¹⁰⁹ The Chief Magistrate, Sir Thomas Henry, committed Nelson and Brand for trial before the Central Criminal Court. In those days the next stage of a criminal prosecution was the charge to the Grand Jury.¹¹⁰ On 10 April, Cockburn CJ delivered his

¹⁰⁴ See (1866) 10 *Solicitors' Journal and Reporter* 250 (20 January 1866), criticising a leading article in *The Times* (London), 8 January 1866, 8, which said that the executive had the right to provide for the safety of society by dispensing with the ordinary processes of law and illustrated this by reference to the activities of President Johnson. The *Solicitors' Journal and Reporter* opined that '[i]t was no part of the duty of President Johnson to punish one murder by another.'

¹⁰⁵ Haiti was mentioned by Eyre in his speech to the Legislative Assembly on 7 November 1865: see above n 101. See also *The Times* (London), 3 November 1865, 7; *The Times* (London), 4 November 1865, 9; *The Times* (London), 20 November 1865, 8.

¹⁰⁶ *The Morning Journal* (Kingston), 16 October 1865. See also Semmel, above n 43, 50.

¹⁰⁷ See *The Times* (London), 3 March 1866, 9; Dutton, *In Search of Edward John Eyre*, above n 35, 84.

¹⁰⁸ By October 1866, the Jamaica Committee had issued an address saying that it had resolved to submit Eyre's conduct to judicial investigation and appealing to the public for funds to support them: see 'The Jamaica Committee and Governor Eyre' (1866) 41 *Law Times: The Journal and Record of the Law and the Lawyers* 866–7 (20 October 1866). The prosecution was brought in the names of John Stuart Mill and Peter Taylor. The *Law Times* regretted the shortcomings in the criminal prosecution system that made it necessary for the proceedings to take the form of a private prosecution, commenting that '[i]t is a disgrace to our jurisprudence that public servants should be prosecuted by private individuals for official misdeeds': 'Legal Topics of the Week' (1866) 42 *Law Times: The Journal and Record of the Law and the Lawyers* 21 (10 November 1866). Note that Nelson is sometimes referred to as Colonel Nelson in contemporary reports despite being promoted to the position of Brigadier-General: see Dutton, *In Search of Edward John Eyre*, above n 35, 93–4.

¹⁰⁹ It seems that Nelson was within the jurisdiction of the Bow Street court only because he had taken his son to London to put him into college and had visited the United Services Club: *Daily Gleaner* (Kingston), 13 March 1867.

¹¹⁰ See Dutton, *In Search of Edward John Eyre*, above n 35, 135, in which it is explained that: 'The "charge" is a statement of the law in the case, usually accompanied by a recommendation to the

charge, but the Grand Jury declined to certify a true Bill, thus bringing the attempt to prosecute Nelson and Brand to a close.¹¹¹ Cockburn CJ took the unusual step of publishing his charge.¹¹²

Undoubtedly, Eyre was the primary target. On 25 March 1867, barrister Fitzjames Stephen appeared before the Justices of the Peace at Market Drayton¹¹³ to seek a warrant against Eyre for wilful murder.¹¹⁴ There was considerable comment in legal journals and the press about the anomaly that a prosecution of national importance could not be launched without first obtaining the endorsement of the Justices of Market Drayton.¹¹⁵ The Justices refused to issue the warrant, a decision greeted by cheering in the crowded courtroom and the ringing of bells in the local church.¹¹⁶ The Jamaica Committee's request to the Attorney-General to file a criminal information against Eyre was also unsuccessful.¹¹⁷

jury to bring in "a true Bill", that will send the case for trial, or a "no true Bill", in which event the case is discharged.'

¹¹¹ See 'The Jamaica Prosecutions' (1867) 42 *Law Times: The Journal and Record of the Law and the Lawyers* 455 (13 April 1867). For comment on Cockburn CJ's charge, see 'Martial Law: Charge of the Lord Chief Justice of England to the Grand Jury, in the Case of *The Queen v Nelson and Brand*' (1867) 23 *Law Magazine and Law Review; or, Quarterly Journal of Jurisprudence* 222; 'The Jamaica Prosecutions' (1867) 11 *Solicitors' Journal and Reporter* 567-8 (20 April 1867); *The Times* (London), 11 April 1867, 8.

¹¹² (1867) 11 *Solicitors' Journal and Reporter* 563 (20 April 1867). In the words of W F Finlason, a barrister who wrote four books on the Jamaica case,

not content with having *delivered* such a charge, he *published* it! *Published* it with all its cruel and extra-judicial imputations, and uncharitable suggestions, published it to the world, although it was known that criminal proceedings were in contemplation against the Governor; and the whole tone and tendency of the charge were so exceedingly calculated to prejudice him.

W F Finlason, *The History of the Jamaica Case: Being an Account, Founded upon Official Documents, of the Rebellion of the Negroes in Jamaica: The Causes Which Led to It, and the Measures Taken for Its Suppression; The Agitation Excited on the Subject, Its Causes and Its Character; and the Debates in Parliament, and the Criminal Prosecutions, Arising out of It* (2nd ed, 1869) 499 (emphasis in original).

¹¹³ *The Morning Star* (London), 1 April 1867, 4, which was clearly anti-Eyre, suggested that Eyre had taken measures to evade justice by taking refuge in Shropshire: '[Eyre] took shelter under the protecting wing of the game-preserving squires of Shropshire, being perfectly assured that, with their ignorance and prejudices, he was safe.' See also *The Colonial Standard, and Jamaica Despatch* (Kingston), 22 April 1867. However, Eyre's solicitor had 'given an assurance that [Eyre would] appear upon due notice' at the Bow Street Police Court: *The Times* (London), 7 February 1867, 6.

¹¹⁴ Stephen's arguments are reviewed in some detail in *The Times* (London), 30 March 1867, 9. There were some lively exchanges between Stephen and the bench: see 'Courts: Market Drayton Sessions' (1867) 11 *Solicitors' Journal and Reporter* 502 (30 March 1867). For instance, the Chairman, Sir Baldwin Leighton, told him to get on with the facts of the case instead of telling them what was their duty, and later complained of his abuse of Eyre by his 'tone of voice': at 502. Peter Taylor, one of the prosecutors of Eyre and a member of the Jamaica Committee, wanted to sit on the justices' bench but was quite rightly prevented from doing so: 'The Prosecution of Governor Eyre' (1867) 42 *Law Times: The Journal and Record of the Law and the Lawyers* 438 (6 April 1867).

¹¹⁵ See, eg, *The Times* (London), 18 April 1867, 6, defending the option of private prosecution but suggesting that there was a need for a public prosecuting authority. This need was not met in England until the creation of the Crown Prosecution Service by the *Prosecution of Offences Act 1985* (UK) c 23.

¹¹⁶ Dutton, *In Search of Edward John Eyre*, above n 35, 135; Semmel, above n 43, 149-50.

¹¹⁷ Messrs Shaen and Roscoe furnished the Attorney-General with a copy of Cockburn CJ's charge 'as being the latest and most complete authority upon the law involved in these proceedings', a communication the *Law Journal* suggested was in very bad taste: (1867) 2 *Law Journal* 351 (2

Following the end of the proceedings against Nelson and Brand, Eyre, seemingly in an attempt to force the matter to a conclusion, moved to London, so bringing himself within the jurisdiction of the Bow Street Police Court. On 27 February 1868, the Jamaica Committee made a final attempt to prosecute Eyre for murder by seeking a warrant at Bow Street but Sir Thomas Henry ruled that, in view of the decision in the cases of Nelson and Brand, he was precluded from issuing a warrant.¹¹⁸ The Committee then sought prosecution of Eyre under the *Criminal Jurisdiction Act 1802*, 42 Geo 3, c 85, which provided for those in the service of the Crown abroad to be tried in England for ‘any Crime, Misdemeanor, or Offence’ committed in the exercise of their official capacity.¹¹⁹ Magistrate Vaughan initially declined to hear the case but, after a successful application to the Court of Queen’s Bench for a writ of mandamus,¹²⁰ the Bow Street Police Court on 20 May 1868 committed Eyre for trial in the Court of Queen’s Bench.¹²¹ Eyre made a dignified speech to the Court justifying his actions.¹²² The task of charging the Grand Jury was entrusted to Blackburn J and he read his charge on 2 June 1868.¹²³ When the Grand Jury returned no Bill, the final attempt to prosecute Eyre for his alleged crimes had failed.

This was not the last act in this particular drama, however. On 8 June 1868 the Court of Queen’s Bench convened in banco and Cockburn CJ expressed his disagreement with certain statements made by Blackburn J.¹²⁴ His most significant complaint was that Blackburn J had twice claimed that he had the concurrence of the other members of the Court on various issues relating to martial law, including the legality of Gordon’s removal into a proclaimed district for the purpose of subjecting him to martial law. Cockburn CJ noted that he had not been present when these matters had been discussed with the other judges and had only been given an inadequate summary. He made it clear that, contrary to

August 1867). The Attorney in reply said that he was familiar with the charge. The *Law Journal* also commented that the Jamaica Committee had not tried the alternative of bringing an indictment before the Middlesex Grand Jury.

¹¹⁸ See *The Times* (London), 28 February 1868, 6. For an account of the proceedings, see ‘Courts: Police Courts’ (1868) 12 *Solicitors’ Journal and Reporter* 363–4 (29 February 1868).

¹¹⁹ *Criminal Jurisdiction Act 1802*, 42 Geo 3, c 85, preamble. Prosecution under this Act was foreshadowed by the *Law Times* in 1867: ‘The Legal Position of Mr Eyre’ (1867) 42 *Law Times: The Journal and Record of the Law and the Lawyers* 280 (9 February 1867).

¹²⁰ ‘Law Report’, *The Times* (London), 9 May 1868, 11.

¹²¹ For comment as to whether a police-magistrate could commit for trial before the Court of Queen’s Bench, see (1868) 12 *Solicitors’ Journal and Reporter* 514 (25 April 1868).

¹²² See *The Times* (London), 21 May 1868, 12; Dutton, *In Search of Edward John Eyre*, above n 35, 137–9.

¹²³ Blackburn J’s charge is reproduced in full in W F Finlason (ed), *Report of the Case of The Queen v Edward John Eyre on His Prosecution in the Court of Queen’s Bench, for High Crimes and Misdemeanours Alleged to Have Been Committed by Him in His Office as Governor of Jamaica; Containing the Evidence, (Taken from the Depositions), the Indictment, and the Charge of Mr Justice Blackburn, with the Subsequent Observations of the Lord Chief Justice* (1868) 53–102. This text also contains a summary of the evidence and the indictment. For comment, see ‘Mr Justice Blackburn on Martial Law’ (1868) 3 *Law Journal* 384–5 (5 June 1868).

¹²⁴ See Finlason, *Report of the Case of The Queen v Edward John Eyre*, above n 123, 103; ‘Courts: Court of Queen’s Bench’ (1868) 12 *Solicitors’ Journal and Reporter* 673 (13 June 1868). Cockburn CJ also took the highly unusual step of asking *The Times* to publish an exchange of letters between Lush J and himself setting out what had happened: ‘The Case of Ex-Governor Eyre’, *The Times* (London), 10 June 1868, 12.

the suggestion in Blackburn J's charge, he had not modified his views.¹²⁵ Whether Blackburn J's accidental misrepresentation would have made any difference to the result will never be known. However, this unusual spectacle of a public disagreement between judges is one of the many fascinating aspects of the Eyre saga.

III THE CIVIL PROCEEDINGS: *PHILLIPS V EYRE*

The Jamaica Committee had one last weapon at its disposal: a civil action.¹²⁶ The plaintiff was someone who played only a minor part in this whole saga. The Law Reports refer to him simply as Phillips, but he was in fact Alexander Phillips, a black 'gentleman' resident of St Thomas¹²⁷ who like Gordon had been arrested and taken to Morant Bay, but a few days later, on 24 October 1865.¹²⁸ Phillips came to England in August 1867 so that a civil action could be launched in his name.¹²⁹ It would seem that Phillips did so at the behest of the Jamaica

¹²⁵ Finlason, *Report of the Case of The Queen v Edward John Eyre*, above n 123, 103–7. For a comment on the incident, see 'The Lord Chief Justice of England and Mr Justice Blackburn' (1868) 25 *Law Magazine and Law Review*; or, *Quarterly Journal of Jurisprudence* 256. The writer suggests that Blackburn J's conduct was 'a temporary aberration' (at 264) and, rather condescendingly, suggests that it is explicable by reference to his Scottish origins (at 264):

Mr Justice Blackburn is no doubt an excellent lawyer and an able judge, but he possesses perhaps too much of the *perfervidum ingenium* of his countrymen, and there are times when, even with the wisest of our northern friends, this quality escapes for a short season from the prudence which in general directs its action.

For other comments, see (1868) 12 *Solicitors' Journal and Reporter* 669 (13 June 1868); GH, Correspondence of the Profession, 'The Jamaica Case' (1868) 45 *Law Times: The Journal and Record of the Law and the Lawyers* 134 (13 June 1868); WOC, Correspondence, 'Martial Law' (1868) 3 *Law Journal* 481–4 (17 July 1868). *The Times* suggested that if Cockburn CJ had charged the jury, 'a true bill must have been found against Mr Eyre in respect of the transfer of Gordon, and the question of his further responsibility must have come before a common jury': *The Times* (London), 9 June 1868, 9.

¹²⁶ There are references to a civil action having been commenced before Phillips's arrival in England, by Phillips and one Dr Robert G Bruce against Eyre and Nelson in the Court of Exchequer: see 'Governor Eyre' (1867) 42 *Law Times: The Journal and Record of the Law and the Lawyers* 181 (5 January 1867); Kostal, above n 47, 434. An application was made to Bramwell B for the action to be stayed until the plaintiffs had given security for costs because they were out of the jurisdiction. The *Law Times* reported that Bramwell B had ruled that the application was irregular and ordered it to be adjourned *sine die*: 'Judge's Chambers' (1867) 42 *Law Times: The Journal and Record of the Law and the Lawyers* 243 (26 January 1867). However, the *Law Times* reported in its next issue that these proceedings had never taken place, basing their report on material that apparently emanated from the office of Messrs Shaen and Roscoe, solicitors to the Jamaica Committee: 'Ex-Governor Eyre' (1867) 42 *Law Times: The Journal and Record of the Law and the Lawyers* 261 (2 February 1867). The action was ultimately abandoned so that a new lawsuit could be commenced in the Court of Queen's Bench: Kostal, above n 47, 436.

¹²⁷ Phillips' evidence to the Royal Commission was that he was 'in the position of a gentleman' and was 'living off his own means': Kostal, above n 47, 434 fn 10.

¹²⁸ Phillips had apparently commenced a civil action in Jamaica in 1866, but abandoned it: Dutton, *In Search of Edward John Eyre*, above n 35, 140.

¹²⁹ Phillips was one of those who gave evidence before the Bow Street Police Court in the prosecution of Eyre for high crimes and misdemeanours: see Finlason, *Report of the Case of The Queen v Edward John Eyre*, above n 123, 9–12. In late 1868, Charles Buxton, who had parted company with the Jamaica Committee over his refusal to take part in the further prosecution of Eyre, offered Phillips money if he would agree to abandon his lawsuit. However, Phillips refused: see Kostal, above n 47, 437, citing *Pall Mall Gazette* (London), 4 November 1868, 5. Kostal comments:

Although it was far from certain that he would ultimately prevail in his case, Phillips refused. The tempting inference here is that for this plaintiff the lawsuit had exceptional or symbolic

Committee, who also paid for his living and legal expenses between the issue of the writ on 7 November 1867 and the final decision of the Court of Exchequer Chamber on 23 June 1870.¹³⁰

According to the declaration set out in the Law Reports,¹³¹ Phillips had been arrested at his house in Kingston, taken to the courthouse, forcibly conveyed in handcuffs to a place called Uppuck Camp,¹³² moved to the Ordnance Wharf, and then put on board the *HMS Wolverine*, which took him to Morant Bay where he was beaten and flogged.¹³³ The declaration charged six counts of assault and false imprisonment, in addition to conversion of Phillips's 'goods and chattels'.¹³⁴ Following the reformed, but still rather formal, pleading rules of the *Common Law Procedure Act 1852*, 15 & 16 Vict, c 76, the defendant in response made a general plea of not guilty as well as a specific plea based on the Act of Indemnity. By his replications, the plaintiff joined issue on the first plea, and demurred to the second plea, arguing that: (1) some of the trespasses committed were not covered by the Act; (2) some trespasses were 'committed on the high seas', beyond the territorial limits of the Jamaican legislature's jurisdiction;¹³⁵ and (3) the defendant, as Governor, was a necessary party to the passing of the

importance. More than money, this obviously proud black gentleman craved public vindication of his rights and privileges as a British subject.

¹³⁰ Chamerovzow was the treasurer of the fund, which was supported by Mill and Taylor on an unofficial basis: Dutton, *In Search of Edward John Eyre*, above n 35, 140. 'The Persecution of Governor Eyre' (1867) 42 *Law Times: The Journal and Record of the Law and the Lawyers* 240-1 (26 January 1867) commented:

The only rational conclusion is, that they have some instigators and backers, and seeing that the solicitors are the solicitors to the Jamaica Committee, it was a reasonable conclusion that the actions were a part of the same system of persecution which tries to take Governor Eyre's life with one hand, and, if it fails in that, resolves to ruin him with the other.

In giving evidence, Phillips confirmed this, noting that 'I have brought an action against Mr Eyre. There is a fund formed to enable me to bring the action': see Finlason, *Report of the Case of The Queen v Edward John Eyre*, above n 123, 11. However, in Letter to the Editor, *The Times* (London), 21 January 1867, 10, Messrs Shaen and Roscoe, the solicitors of the Jamaica Committee, stressed that the Jamaica Committee had no official connection with Phillips or his action:

Two private gentlemen, who were illegally arrested, and one of whom was flogged, but against whom no shadow of evidence has ever been produced, have, without any connexion with or assistance from the Jamaica Committee, commenced actions for damages against Mr Eyre and Colonel Nelson, and have intrusted their cases to the solicitors who are also instructed by the Jamaica Committee. ... The only proceeding with which the Jamaica Committee has anything whatever to do is the intended indictment ...

¹³¹ See *Phillips v Eyre* (1869) LR 4 QB 225.

¹³² According to the evidence of Alexander Phillips, this in fact seems to have been Up Park Camp: Finlason, *Report of the Case of The Queen v Edward John Eyre*, above n 123, 10.

¹³³ It seems that Phillips was in danger of his life: see 'An Episode of the Morant Bay Tragedy', *The Morning Journal* (Kingston), 4 April 1868, which quotes an article in the *Anti-Slavery Reporter* noting that Phillips was conveyed to the 'Golgotha' at Morant Bay. It also quotes a letter from Colonel Fyfe, one of the army officers, saying that the local people had been prepared for his execution (even though he had not been tried at this point) and that they asked prospectively for his sentence to be commuted. Phillips was ultimately released without trial. As reported in *The Colonial Standard, and Jamaica Despatch* (Kingston), 20 June 1868, when committing Eyre for trial before the Court of Queen's Bench on 20 May 1868, Magistrate Vaughan said that he could not refrain from observing that Phillips was taken to Morant Bay without charge, detained there for a considerable time, and then released without any sort of trial.

¹³⁴ *Phillips v Eyre* (1869) LR 4 QB 225, 225-6.

¹³⁵ *Ibid* 228. It was this argument that provided the basis for the discussion of the choice of law issue.

Act which ‘discharged and made void’ his own conduct.¹³⁶ Cockburn CJ, Lush and Hayes JJ in the Court of Queen’s Bench heard argument on 17 November 1868¹³⁷ and the Chief Justice delivered the Court’s judgment in Eyre’s favour on 29 January 1869.¹³⁸ Phillips then proceeded by writ of error to the Court of Exchequer Chamber, where the appeal was argued before seven judges over three days in early February 1870. Nearly five months later, Willes J handed down the Court’s reserved judgment affirming the first instance decision.

The essential issue was the same at each stage of the proceedings: was the effectiveness of the Act of Indemnity limited to the island of Jamaica and within the limits of the Jamaican legislature’s authority, or did it also operate to exclude the plaintiff’s right to sue in an English court? In essence, Cockburn CJ’s reasoning was that the Jamaican legislature could pass a statute authorising something for the future, in which case there would be no right of action in England, and the position was no different if immunity had been granted by legislation operating *ex post facto*.¹³⁹

This argument formed an important part of the more elaborate reasoning of Willes J in the Exchequer Chamber. Willes J commenced by discussing the duties imposed on individuals by the common law in the case of riots and other disturbances. In such circumstances, Willes J acknowledged that Governors may have to take actions for which they might be called to account, and that it thus

seems to be plainly within the competence of the legislature, which could have authorized by antecedent legislation the acts done as necessary or proper for preserving the public peace, upon a due consideration of the circumstances to adopt and ratify like acts when done ...¹⁴⁰

The plaintiff argued that the Act of Indemnity passed by the Jamaican legislature was effective only within the limits of Jamaica and could not take away a right of action in an English court. Willes J disposed of this argument by making a series of points. First, there was no doubt that the Crown could create a legislature in a settled colony (Jamaica, though originally conquered from the Spaniards, was conceded to be a settled colony). Secondly, there was no question of the Act being void as contrary to the principles of English law. Willes J noted that repugnancy under the *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63 was limited to ‘repugnancy to an imperial statute ... applicable to the

¹³⁶ Ibid 228–9.

¹³⁷ The Court was sitting in banco to consider the issues of law raised by the demurrer. Such proceedings would normally have been heard by the full court of four judges but Hannen J, having given advice at an earlier stage of the case when at the bar, took no part in the proceedings: ‘Sayings and Doings of the Courts: Court of Queen’s Bench’ (1868) 46 *Law Times: The Journal and Record of the Law and the Lawyers* 47 (21 November 1868). Montague Smith J had earlier refused an application for leave to examine Eyre on interrogatories: ‘Judges’ Chambers’, *The Times* (London), 26 June 1868, 10. Blackburn J had ruled that the case was too important to be tried before two judges: ‘Law Report’, *The Times* (London), 29 June 1868, 11.

¹³⁸ Cockburn CJ’s decision was conveyed to the Jamaican public by *The Colonial Standard, and Jamaica Despatch* (Kingston), 22–23 February 1869, which expressed a hope, now that the Court of Queen’s Bench had decided in Eyre’s favour, that he would be allowed to be left in peace, given that the many ‘prosecutions and persecutions’ of his ‘enemies’ had been thwarted.

¹³⁹ See *Phillips v Eyre* (1869) LR 4 QB 225, 239.

¹⁴⁰ *Phillips v Eyre* (1870) LR 6 QB 1, 17. In support, Willes J cited numerous Acts of Indemnity passed by the English Parliament.

colony by express words or necessary intendment'.¹⁴¹ On the particular point in contention, the Act of Indemnity was not repugnant to legislation dealing with colonial Governors passed in 1698 and 1802,¹⁴² or to any other legislation. Thirdly, to suggest that Eyre could take no benefit under the Act because he was a necessary party to its passing in his capacity as Governor was to confuse legislative and judicial proceedings: the rule against bias was confined to the latter.¹⁴³ Moreover, if the Governor was prevented from taking the benefit of a legislative provision because he was a party to it, this would also apply to members of the legislature and, through them, the people they represented.¹⁴⁴ Fourthly, it could not be argued that the Act 'was contrary to natural justice, as being retrospective in its character'¹⁴⁵ — the doctrine of ratification, well known in other areas of the law, was equally applicable to the exercise of sovereign authority and, moreover, often had beneficial results.¹⁴⁶

From these points, it can be seen that, first and foremost, *Phillips v Eyre* is an authority on an important question of Commonwealth constitutional law: the powers of colonial legislatures.¹⁴⁷ Though stemming from a localised controversy in South Australia,¹⁴⁸ the *Colonial Laws Validity Act 1865* (Imp) affected every corner of the British Empire. Willes J confirmed that, providing they did not transgress the limits established by the *Colonial Laws Validity Act 1865* (Imp), a colonial legislature's power to legislate was as wide as the power of the UK Parliament. This issue, 'drawn into doubt for the first time' in *Phillips v Eyre*,¹⁴⁹ was thus conclusively settled. It was inconceivable that the legislation of the most powerful colonies — such as the Australian colonies,

¹⁴¹ Ibid 20–1. Willes J's ruling may only have effect in relation to civil proceedings: Roberts-Wray, above n 48, 398. On the criterion of repugnancy, see generally McPherson, *The Reception of English Law Abroad*, above n 48, 16–17, 160–9.

¹⁴² The 1698 Act is the *Governors of Plantations Act 1698*, 11 Wm 3, c 12 — which Willes J refers to as the *Governors Act*, 11 & 12 Wm 3, c 12: see *Phillips v Eyre* (1870) LR 6 QB 1, 21. The 1802 Act is the *Criminal Jurisdiction Act 1802*, 42 Geo 3, c 85: see above n 119 and accompanying text.

¹⁴³ *Phillips v Eyre* (1870) LR 6 QB 1, 22 (Willes J). In support, Willes J cites *Dimes v Proprietors of the Grand Junction Canal* (1852) 3 HL Cas 759; 10 ER 301.

¹⁴⁴ *Phillips v Eyre* (1870) LR 6 QB 1, 22 (Willes J).

¹⁴⁵ Ibid 23.

¹⁴⁶ The same point had been made by Cockburn CJ at first instance: see *Phillips v Eyre* (1869) LR 4 QB 225, 242–4. On appeal, Willes J cited two prominent examples in support: see ibid 23–5. The first was the case of Captain Denman, who had liberated slaves in Sierra Leone and whose acts were subsequently ratified by the government: see *Buron v Denman* (1848) 2 Ex 167; 154 ER 450. The second was the legislation validating marriages celebrated in Ireland by Presbyterian ministers and others who had not had an episcopal ordination: see *Marriages (Ireland) Act 1844* (Imp) 7 & 8 Vict, c 81, s 83. Such marriages had been ruled void by the decision of the House of Lords in *R v Millis* (1844) 10 Cl & F 534; 8 ER 844.

¹⁴⁷ See, eg, 'Power of Colonial Legislatures' (1869) 46 *Law Times: The Journal and Record of the Law and the Lawyers* 303 (20 February 1869). See also *The M Moxham* (1875) 1 PD 43, 50 (Phillimore J) noted at below n 205 and accompanying text. The comment on the appeal, '*Reg v Eyre*' (1870) 49 *Law Times: The Journal and Record of the Law and the Lawyers* 160 (2 July 1870), is devoted to martial law.

¹⁴⁸ The controversy related to the activities of Boothby J of the Supreme Court of South Australia, who struck down many South Australian statutes on the ground of alleged repugnancy to English statutes or the common law: see Alex C Castles, *An Australian Legal History* (1982) 405–10.

¹⁴⁹ (1870) LR 6 QB 1, 20 (Willes J).

Canada or New Zealand — should be limited so as to have merely local effect.¹⁵⁰ Willes J's decision indicated that the same applied to legislatures in smaller outposts of the British Empire.

Willes J had a fifth point to make: it was wrong to suggest that the Act could not have the extraterritorial effect of removing the right of action in an English court. It was in relation to this last objection, which 'was of a more technical character',¹⁵¹ that Willes J reached the issue of conflict of laws and made the ruling on choice of law in matters of tort that stood as authority for over a century.

IV PHILLIPS V EYRE AND THE CONFLICT OF LAWS

From the account of Willes J's judgment in *Phillips v Eyre* in Part III, it might seem that the question of choice of law in tort was an almost incidental aside in a judgment concerned with more weighty matters. Nonetheless, this is the issue which has given the case its most enduring claim to fame. It is therefore useful to consider the legal position on choice of law that prevailed before *Phillips v Eyre* and, in light of that analysis, to consider the impact of Willes J's judgment.

A Choice of Law in Tort Prior to *Phillips v Eyre*

By the 19th century, conflict of laws in common law jurisdictions had received little consideration. However, as regards torts cases containing a foreign element, two schools of thought can be identified. One favoured the application of the *lex loci delicti commissi* (that is, the law of the place where the tort was committed). John Westlake, for example, suggested that the solution should be found by reference to the local law under which the tort was committed and cited a dictum repudiating the *lex fori* (the law of the jurisdiction where the action was brought) as inapplicable.¹⁵² Writers from the more highly developed private international law systems of civil law countries also provided support for the *lex loci delicti* view.¹⁵³ Particularly influential was Carl Ludwig von Bar, who adopted

the doctrine which, amid some conflict of authority, seems to prevail in England, America, and Scotland — viz that the law of the place where the wrong is committed has authority, so far as regards the substance of the matter on which an action of damages is brought.¹⁵⁴

¹⁵⁰ See *The Times* (London), 24 June 1870, 9.

¹⁵¹ *Phillips v Eyre* (1870) LR 6 QB 1, 28.

¹⁵² John Westlake, *A Treatise on Private International Law, or the Conflict of Laws, with Principal Reference to Its Practice in the English and Other Cognate Systems of Jurisprudence* (1st ed, 1858) 222, 223 fn 1. Westlake cites *Cope v Doherty* (1858) 4 K & J 367, 384; 70 ER 154, 161 (Wood V-C). In fact, this dictum is concerned with the distinction between matters of substance and matters of procedure.

¹⁵³ See, eg, Charles Brocher, *Nouveau traité de droit international privé au double point de vue de la théorie et de la pratique* (1876) 315, cited by John Westlake, *A Treatise on Private International Law, with Principal Reference to Its Practice in England* (3rd ed, 1890) 237.

¹⁵⁴ Friedrich Carl von Savigny, *Private International Law: A Treatise on the Conflict of Laws, and the Limits of Their Operation in Respect of Place and Time* (William Guthrie trans, 1869 ed) 205 fn z² [trans of: *Systems des heutigen römischen Rechts* (1840–49) vol 8], citing Carl Ludwig von Bar, *Das internationale Privat- und Strafrecht* (1862) 243, 317.

The other school of thought, which favoured the application of the *lex fori*, also had its supporters, notably the German jurist Carl von Savigny. Von Savigny held that in the case of an obligation arising from delict, it was appropriate to 'have regard to the law of the place of the action, not to that under which the delict was committed'.¹⁵⁵ Von Savigny justified this view by reference to the close relationship between civil and criminal wrongs.¹⁵⁶

There were few authorities prior to 1869 dealing with tort cases involving an international dimension. Those that had been decided did not provide any conclusive ruling. In fact, it was not until *Mostyn v Fabrigas*¹⁵⁷ in 1775 that it was clearly established that it was possible to sue in England in respect of a tort committed abroad.¹⁵⁸ Both before and after *Mostyn v Fabrigas*, defendants who were sued in tort in England raised defences based on the law of the country where the tort was committed. Specifically, defendants argued that governmental authority justified their actions. In the earliest case, *Blad v Bamfield*,¹⁵⁹ concerning a dispute between a Dane and English subjects over fishing rights in Iceland, Blad pleaded what in modern eyes would be a defence of act of state (that he had been granted letters patent by the King of Denmark). This case is, however, at best an indirect authority because Blad was suing in Chancery for an injunction to restrain common law proceedings.

The leading case of *Mostyn v Fabrigas* is interesting in that, unlike most of the other cases of this period, the Court of Common Pleas contemplated the possible application of foreign law as an alternative to English law.¹⁶⁰ *Mostyn v Fabrigas* resembles the facts in *Phillips v Eyre* as it was an action for trespass and false imprisonment brought against the Governor of Minorca for actions involved in suppressing a riot. Mansfield CJ recognised that the Governor could have a good defence in certain circumstances, stating that: 'I can conceive cases in time of war in which a governor would be justified, though he acted very arbitrarily, in which he could not be justified in time of peace.'¹⁶¹ With no Act of Indemnity applicable, Mansfield CJ upheld the jury verdict in the plaintiff's favour.¹⁶²

In other cases decided before *Phillips v Eyre*, the defence was successful. In *Rafael v Verelst*, an Armenian merchant sued for trespass and assault committed

¹⁵⁵ Von Savigny, above n 154, 205 (citations omitted).

¹⁵⁶ *Ibid* 206–7.

¹⁵⁷ (1775) 1 Cowp 161; 98 ER 1021.

¹⁵⁸ See also *Rafael v Verelst* (1775) 2 Wm Bl 983, 998; 96 ER 579, 581 (De Grey CJ). Mansfield CJ refers to this case (though not by name) in *Mostyn v Fabrigas* (1775) 1 Cowp 161, 180–1; 98 ER 1021, 1031–2.

¹⁵⁹ (1674) 3 Swans 604; 36 ER 992. See also the earlier proceedings in the Privy Council: *Blad's Case* (1673) 3 Swans 603; 36 ER 991.

¹⁶⁰ Alexander N Sack, 'Conflicts of Laws in the History of the English Law' in *Law: A Century of Progress 1835–1935* (1937) vol 3, 342, 391.

¹⁶¹ *Mostyn v Fabrigas* (1775) 1 Cowp 161, 173; 98 ER 1021, 1028.

¹⁶² See also *Wey v Rally* (1704) 6 Mod 195; 87 ER 948. In a striking preview of *Phillips v Eyre*, Powell J refers to an action for false imprisonment in Jamaica being brought in England against the Governor of Jamaica, where the Jamaican laws had been 'given in evidence': at 195; 948. This case (albeit referred to as *Way v Yally*) was cited in support of the proposition that the best way to establish a foreign law was to prove it as fact: *Mostyn v Fabrigas* (1775) 1 Cowp 161, 175; 98 ER 1021, 1029 (Mansfield CJ).

at Owd in the East Indies.¹⁶³ A jury verdict in his favour was overturned on a motion for a new trial, the court ruling that the acts were done under the authority of an Indian prince who was independent of the officers of the East India Company. In *Dobree v Napier*,¹⁶⁴ a British subject serving as an admiral in the Portuguese navy seized a ship that broke a blockade and took it as prize. A Portuguese court ruled that the vessel had been lawfully taken. When sued for trespass in England, the admiral successfully pleaded that his actions had been justified by 'a foreign court of competent jurisdiction'.¹⁶⁵ In contrast, in *R v Lesley*, a case of a criminal prosecution for trespass and false imprisonment, it was held that imprisonment of political prisoners under the authority of the government of Chile could not justify their continued detention once the ship was outside Chilean territorial waters.¹⁶⁶

Two other cases turned on what would now be analysed as involving issues of localisation of statutory rules. In *The Nostra Signora de Los Dolores*, the Court of Admiralty held that a statutory provision requiring a shipowner's name to be inserted on the bill of sale and the ship's register did not apply to persons who were not British subjects.¹⁶⁷ Similarly, in *Cope v Doherty*,¹⁶⁸ provisions in the *Merchant Shipping Act 1854*, 17 & 18 Vict, c 104 limiting the liability of shipowners were held not to apply to foreigners.

Finally, and perhaps most interestingly, *Scott v Lord Seymour* concerned an action for assault and false imprisonment committed in Naples.¹⁶⁹ Both parties were British subjects. The defendant pleaded various defences to the effect that, according to the law of Naples, he could not be sued while proceedings in Naples were pending. All of the judges agreed that these pleas failed because matters of procedure were referable to English law as the *lex fori*.¹⁷⁰ However, some of the judges considered what the position would be if the defendant's plea were to be interpreted as an argument that no cause of action was available to him in Naples. Wightman J, in what has been called a 'prophetic anticipation of the modern doctrine of the proper law of the tort',¹⁷¹ suggested that the plaintiff could still sue for trespass in England because the parties were British subjects.¹⁷² Blackburn J denied that the nationality of the parties was relevant, but otherwise expressed some support for Wightman J's comments.¹⁷³ The other

¹⁶³ (1775) 2 Wm BI 983; 96 ER 579.

¹⁶⁴ (1836) 2 Bing NC 781; 132 ER 301.

¹⁶⁵ *Ibid* 795; 306 (Tindal CJ).

¹⁶⁶ (1860) Bell CC 220; 169 ER 1236.

¹⁶⁷ (1813) 1 Dods 290; 165 ER 1315.

¹⁶⁸ (1858) 1 K & J 367; 70 ER 154.

¹⁶⁹ (1862) 1 Hurl & C 219; 158 ER 865.

¹⁷⁰ *Ibid* 233–4 (Wightman J), 235 (Williams J), 236 (Crompton J), 236 (Willes J), 237 (Blackburn J); 872 (Wightman J), 872 (Williams J), 873 (Crompton J), 873 (Willes J), 873 (Blackburn J).

¹⁷¹ Kurt Lipstein, 'Phillips v Eyre, A Re-Interpretation' in Ernst von Caemmerer, Soia Mentschikoff and Konrad Zweigert (eds), *Ius Privatum Gentium* (1969) vol 1, 411, 415 fn 25.

¹⁷² *Scott v Lord Seymour* (1862) 1 Hurl & C 219, 234; 158 ER 865, 872.

¹⁷³ *Ibid* 237; 873.

judges were not prepared to commit themselves to Wightman J's proposition;¹⁷⁴ interestingly, one of the judges was Willes J.

In this uncertain context, a well-known case decided just before *Phillips v Eyre* raised the issue of choice of law in tort more directly than any previous decision, producing diametrically opposed judgments from Phillimore J in the Court of Admiralty¹⁷⁵ and the Privy Council, which overturned his decision on appeal.¹⁷⁶ This case involved a collision between the Norwegian barque *Napoleon* and the British steamship *Halley* in the River Scheldt in Belgian territorial waters. At the time of the collision, which caused considerable damage to the *Napoleon*, the *Halley* was under the control of a pilot who had to be on board to fulfil the requirements of Belgian law (a 'compulsory pilot'). The plaintiffs argued that the shipowner was responsible for the pilot's negligence. In response, the defendants argued that English law alone ought to govern the case and, by English law, there was no vicarious liability in such a case because the employer had no choice in the selection of the employee.¹⁷⁷

At first instance, Phillimore J, in a learned judgment containing much Latin, rejected the defendants' arguments, noting that there was no direct authority or principled basis in favour of applying the *lex fori*.¹⁷⁸ Relying on civil law authorities and the principles of general maritime law, Phillimore J held that Belgian law as the *lex loci delicti* ought to govern the case. This, he said, was more consonant with the principles of natural justice; the English rule of non-liability for the acts of a compulsory pilot was founded on considerations of domestic policy applicable only in British waters.¹⁷⁹ Phillimore J noted the 'remarkable' fact that the defendants had invoked Belgian law in their own favour to make the point that it was compulsory to have a pilot, but did not wish to accept the further principle that by Belgian law the shipowner was vicariously liable in such circumstances.¹⁸⁰

On appeal, the Privy Council accepted the defendants' argument that English law as the *lex fori* should apply.¹⁸¹ Selwyn LJ, delivering the judgment of the Judicial Committee, was not prepared to apply a principle of Belgian law which had no English equivalent:

it is ... alike contrary to principle and to authority to hold, that an English Court of Justice will enforce a Foreign Municipal law, and will give a remedy in the

¹⁷⁴ Ibid 235 (Williams J), 235 (Crompton J), 236 (Willes J); 872 (Williams J), 872 (Crompton J), 873 (Willes J).

¹⁷⁵ *The Halley* (1867) LR 2 Adm & Eccl 3.

¹⁷⁶ *Liverpool, Brazil, and River Plate Steam Navigation Co Ltd v Benham; The Halley* (1868) LR 2 PC 193 ('*The Halley*').

¹⁷⁷ *The Halley* (1867) LR 2 Adm & Eccl 3, 3–4.

¹⁷⁸ Ibid 10.

¹⁷⁹ Ibid 13–14.

¹⁸⁰ Ibid 22–3.

¹⁸¹ This reading of the case was recognised by Guthrie in his 1869 edition of von Savigny's text: von Savigny, above n 154, 205 fn z².

shape of damages in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed.¹⁸²

The Privy Council's decision was given on 2 July 1868. When the Court of Queen's Bench in *Phillips v Eyre* heard argument on 17 November of that same year, counsel for the plaintiff cited the Privy Council's decision in *The Halley* for the proposition that the *lex loci delicti* would not be enforced in an English court if it was inconsistent with or contrary to English law. However, Cockburn CJ made no reference to *The Halley* and ruled in favour of the application of the *lex loci delicti*, saying:

It appears to us clear that where by the law of another country an act complained of is lawful, such act, though it would have been wrongful by our law if committed here, cannot be made the ground of an action in an English court. The rule, which obtains in respect of property and civil contracts — namely, that an act, unless intended to take effect elsewhere, shall as regards its effect and incidents, if a conflict of law arises between the *lex loci* and the *lex fori*, be governed by the former — appears to us to be applicable to the case of an act occasioning personal injury. To hold the contrary would be attended with the most inconvenient and startling consequences, and would be altogether contrary to that comity of nations in matters of law to which effect should, if possible, be given.¹⁸³

Decisions of the Judicial Committee of the Privy Council were binding on English courts where an appeal lay from such a court to the Privy Council, as in ecclesiastical and prize matters.¹⁸⁴ It is therefore unusual that Cockburn CJ ignored an important Privy Council authority which had been brought to his notice, even if it was technically distinguishable as being concerned with damage to property or with a situation where it was the *lex loci delicti* rather than the *lex fori* that gave a right to damages.

Ultimately, when *Phillips v Eyre* went to the Court of Exchequer Chamber on a writ of error, and Willes J ruled that in order to found a suit in England for a wrong committed abroad it had to be of such a character that it would have been actionable if committed in England and not justifiable by the law of the place where it was done, the Privy Council decision in *The Halley* provided the foundation for the first condition. The second condition was supported by the line of authorities on defences commencing with *Blad's Case*.¹⁸⁵

B *The Impact of Phillips v Eyre: A New Rule for Choice of Law in Tort?*

The importance of Willes J's consideration of conflict of laws in *Phillips v Eyre* is evident from the fact that it became the foundation of the rule for choice of law in tort for over a century. However, many regarded it as an

¹⁸² *Liverpool, Brazil, and River Plate Steam Navigation Co Ltd v Benham; The Halley* (1868) LR 2 PC 193, 204. Selwyn LJ was, however, prepared to concede that it might be necessary to refer to foreign law to determine such matters as 'the rule of the road': at 203. This process is now known as relying on foreign law as a datum: see Lipstein, 'Phillips v Eyre, A Re-Interpretation', above n 171, 420–1; Sykes and Pryles, above n 18, 234.

¹⁸³ *Phillips v Eyre* (1869) LR 4 QB 225, 239.

¹⁸⁴ See, eg, *Combe v Edwards* (1877) 2 PD 354.

¹⁸⁵ (1673) 3 Swans 603; 36 ER 991. See above nn 159–66 and accompanying text.

undesirable development. For example, successive editions of the two classic English texts authored by Dicey and Geoffrey Cheshire appeared to prefer the approach taken by Cockburn CJ in the first instance decision — and the approach applicable in modern times¹⁸⁶ — that tort issues should be referable to the *lex loci delicti*. Dicey pointed out that this was the normal choice of law rule in most countries including France and Germany, whereas this principle only had full application in England where the tort ‘was also actionable according to English law.’¹⁸⁷ Cheshire went further in saying that the dual choice of law test was applied in no country outside the Commonwealth except China and Japan.¹⁸⁸ Each of these works suggested that the authorities favouring reference to the *lex fori*, even as part of a dual test, were rather limited.¹⁸⁹ Further criticism was levelled at the difference between the requirements that the wrong be ‘actionable’ in the forum and ‘not justifiable’ by the *lex loci delicti*.¹⁹⁰ The primary basis for this criticism was the decision in *Machado v Fontes*¹⁹¹ that a wrong could be ‘not justifiable’ even if it was not civilly actionable, so seemingly giving the *lex loci delicti* an inferior role to the *lex fori*.¹⁹²

There is, however, another view, which has history on its side. In 1969, Kurt Lipstein reached the conclusion that the cases decided before *Phillips v Eyre* supported the predominant application of the *lex fori*.¹⁹³ He referred to Alexander Sack’s scholarly study of the history of conflict of laws in England,¹⁹⁴ which showed that conflicts of laws were unknown in English courts prior to the 18th century. Sack suggested that this was because English law had been centralised under the Norman kings and so created principles of common law for the whole country, unlike European countries such as France, Germany and Italy where legal disunity compelled the early development of conflicts principles.¹⁹⁵ For centuries the rule was that English courts had no jurisdiction to redress torts committed abroad,¹⁹⁶ with the exception of the special courts that dealt with the law merchant.

When, due to the growth of trade and other changing circumstances, it became necessary for English courts to take jurisdiction over cases involving a foreign element, it was done by developing the distinction between local and transitory actions. The latter category of action was capable of being tried in any location and, if the facts had taken place abroad, the courts would solve the jurisdictional

¹⁸⁶ See above nn 19–22 and accompanying text.

¹⁸⁷ Collins, *Dicey and Morris on the Conflict of Laws*, above n 18, vol 2, 1480–1.

¹⁸⁸ Cheshire and North, above n 12, 262 fn 1.

¹⁸⁹ See *ibid* 264–6; Collins, *Dicey and Morris on the Conflict of Laws*, above n 18, vol 2, 1489–91.

¹⁹⁰ See Cheshire and North, above n 12, 272–3; Collins, *Dicey and Morris on the Conflict of Laws*, above n 18, vol 2, 1492–4.

¹⁹¹ [1897] 2 QB 231.

¹⁹² See above n 5 and accompanying text.

¹⁹³ See Lipstein, ‘*Phillips v Eyre*, A Re-Interpretation’, above n 171, especially at 421–2.

¹⁹⁴ Sack, above n 160.

¹⁹⁵ *Ibid* 343–4.

¹⁹⁶ See, eg, *Hugh le Pape v Merchants of Florence in London* (1280–81), reported in *Selden Society: Select Cases concerning the Law Merchant* (1930) vol 2, 34–9.

problem by laying a fictitious venue in England.¹⁹⁷ This process of development was acknowledged in *Mostyn v Fabrigas*.¹⁹⁸ A similar process of evolution took place in other areas of private law over a period of about 100 years commencing in the late 17th century. However, once a court took jurisdiction, it invariably applied the *lex fori*: it was not until later that principles were developed under which, in appropriate cases, particular questions might be decided by reference to a foreign law. In this context, it was only to be expected that the courts would apply the law of the forum in tort cases.¹⁹⁹

Additionally, there was an accumulating line of authority that recognised particular defences, usually of a public law nature, based on foreign law.²⁰⁰ Willes J's judgment in *Phillips v Eyre* is important because he crystallised this line of authority in the second condition. In this context, the change of terminology from 'actionable' to 'not justifiable' seems entirely appropriate, and *Machado v Fontes* may not be as poor a decision as later writers suggest.²⁰¹

Given the influence of the decision, it is perhaps surprising that Willes J's pronouncement on the approach to conflict of laws in matters of tort received little attention from the legal journals of the time. For example, the *Law Journal* of 5 February 1869 made no mention of Cockburn CJ's decision, and the note on *Phillips v Eyre* in the accompanying *Notes of Cases* dealt only with the effectiveness of the Act of Indemnity.²⁰² Similarly, the issue published on 24 June 1870 said little about the decision of the Court of Exchequer Chamber — the *Law Journal* grossly oversimplified what happened by commenting that the Court 'affirmed the judgment of the Court below for the reasons contained in that judgment'.²⁰³ The *Law Times* and the *Solicitors' Journal and Reporter* did not note the decision at either level. The lack of commentary on the decision in *Phillips v Eyre* is perhaps explicable by reference to the fact that these finer

¹⁹⁷ See, eg, *Mostyn v Fabrigas* (1775) 1 Cowp 161, 161; 98 ER 1021, 1022, where it was pleaded that John Mostyn made an assault on Anthony Fabrigas 'at Minorca, (to wit) at London aforesaid, in the parish of St Mary le Bow, in the ward of Cheap'.

¹⁹⁸ *Ibid* 176–81; 1029–32 (Mansfield CJ).

¹⁹⁹ Sack, writing in 1935, pointed out that in a few areas, such as divorces, the courts were still applying English law exclusively: Sack, above n 160, 398, citing *Le Mesurier v Le Mesurier* [1895] AC 517. This, of course, was written prior to later developments such as *Travers v Holley* [1953] P 246 and *Indyka v Indyka* [1969] 1 AC 33.

²⁰⁰ See above nn 159–66 and accompanying text.

²⁰¹ Lipstein, 'Phillips v Eyre, A Re-Interpretation', above n 171, 426, also makes the point that Willes J's reliance on the subsequent Act of Indemnity emphasises the particular function of the *lex loci delicti*, which is to provide a source of possible justification. Reference to the *lex loci* as a choice of law rule must necessarily be to the law as it stood at the time the wrong was committed, which would make reliance on subsequent indemnity legislation difficult. On conflict of laws in time, see Sir Lawrence Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* (14th ed, 2006) vol 1, ch 3 and works there cited.

²⁰² (1869) 4 *Law Journal (Notes of Cases)* 31–2 (5 February 1869). Instead the notes in this issue deal with the Overend-Gurney case (the latest company scandal), languor in the common law courts, actions for seduction and a petition in favour of building the new Law Courts on the Thames Embankment site. (They were ultimately built on the alternative Carey Street site fronting on Fleet Street.)

²⁰³ (1870) 5 *Law Journal (Notes of Cases)* 178 (1 July 1870). The topics of discussion instead concentrated on the debates on the Married Women's Property Bill, and the liability of husbands for the spending habits of their wives, a topic provoked by the case of Major Mercer, whose wife, left in England while her husband was serving in India, had spent far beyond her allowance, resulting in the Major being sued by her creditors.

points of law were buried amongst the considerable public and intellectual debate on surrounding events.

Phillips v Eyre was also not mentioned in the seventh edition of the classic work by Joseph Story, published in 1872 under the editorship of Edmund Bennett. Rather, Bennett affirmed that tort issues had to be determined according to the law of the place where the wrong was committed.²⁰⁴ Similarly, the decision in *The M Moxham* five years after Willes J's judgment failed to recognise the existence of the double choice of law rule. In this case — where an English ship had damaged a Spanish pier — Phillimore J said that the only question he had to determine was 'whether the law of Spain or the law of England is to be applied to the circumstances of the case',²⁰⁵ and that *Phillips v Eyre* was confined to particular circumstances and dependent on the power of colonial legislatures.²⁰⁶ It was therefore considered unnecessary to enter into an examination of *The Halley*,²⁰⁷ 'the decision [being] of more indirect application'.²⁰⁸ Phillimore J decided that Spanish law was not applicable.

For the most part, however, Willes J's rule was accepted without controversy as the governing rule in matters of tort,²⁰⁹ and remained so for many years.

C Controversy over Choice of Law

Although there was isolated criticism of the second rule in *Phillips v Eyre* as interpreted in *Machado v Fontes*, it was not until the 1940s that the rule itself was seriously challenged. One key decision was *M'Elroy v M'Allister* in 1949, a case concerning a Scottish lorry driver who negligently caused the death of his passenger while travelling a few miles south of the English border.²¹⁰ Under English law, the deceased's cause of action was not extinguished by his death. Under Scottish law, however, negligence was not actionable at the suit of the widow. The Scottish court dismissed the claim on the basis that the first rule in *Phillips v Eyre* was not satisfied. John Morris drew attention to the shortcomings

²⁰⁴ Edmund H Bennett (ed), *Commentaries on the Conflict of Laws, Foreign and Domestic, in Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (7th ed, 1872) 24–5. This remained the rule in the United States until the advent of the proper law doctrine in the 1960s: see below nn 212–13 and accompanying text.

²⁰⁵ (1875) 1 PD 43, 50.

²⁰⁶ *Ibid.*

²⁰⁷ (1868) LR 2 PC 193.

²⁰⁸ *The M Moxham* (1875) 1 PD 43, 51 (Phillimore J).

²⁰⁹ See, eg, *The M Moxham* (1876) 1 PD 107, 111 (Mellish LJ), 115 (Baggallay JA); *Carr v Francis Times & Co* [1902] AC 176. For late 19th and early 20th century treatises, see John Alderson Foote, *Foreign and Domestic Law: A Concise Treatise on Private International Jurisprudence, Based on the Decisions in the English Courts* (2nd ed, 1890) 476–7; Dicey, *A Digest of the Law of England with Reference to the Conflict of Laws*, above n 75, 659–61; T Baty, *Polarized Law* (1914) 50–1; G C Cheshire, *Private International Law* (1935) 215–18. Compare the slightly less forthcoming accounts in Friedrich Carl von Savigny, *Private International Law, and the Retrospective Operation of Statutes: A Treatise on the Conflict of Laws, and the Limits of Their Operation in Respect of Place and Time* (William Guthrie trans, 1880 ed) 253–4 fn z² [trans of: *Systems des heutigen römischen Rechts* (1840–49) vol 8]; Westlake, *A Treatise on Private International Law*, above n 153, 237–8.

²¹⁰ 1949 SC 110.

of this decision in an important case note,²¹¹ and his subsequent article in the *Harvard Law Review*²¹² was instrumental in the adoption of ‘the proper law of the tort’ by many US jurisdictions.²¹³ From this point onwards, courts and writers began to question not only particular elements of the double choice of law rule, but the very existence of the rule itself.

In England, all of this led inexorably to *Boys v Chaplin* where the issue was which law governed a motorcycle accident in Malta involving two British servicemen.²¹⁴ In the Court of Appeal, Lord Denning MR sought to apply the proper law of the tort while Diplock LJ applied the *lex loci delicti*.²¹⁵ The House of Lords settled on recasting Willes J’s rule as requiring civil actionability by both jurisdiction’s laws, together with a flexible exception.²¹⁶

Morris, in his text on conflict of laws first published in 1971, noted the dramatic explosion in scholarship on choice of law in tort from round about this time onwards:

For centuries the law of torts was a neglected topic in the conflict of laws. ... All this is now changed. The literature on torts in the conflict of laws has now become almost unmanageable. Almost as many articles and notes are written each year on torts as on all the rest of the conflict of laws put together. Not only are centuries of neglect suddenly being made good, but also (especially in the United States) the problem of torts has moved into the centre of the discussion of methodological issues in the conflict of laws, or (in simpler language) the discussion of why courts apply foreign law, and on what basis do they choose it.²¹⁷

The beginning of this process can be traced through indexes to journal articles. Virtually nothing on the topic of conflict of laws in tort was written before Ernest Lorenzen’s article in the *Law Quarterly Review* in 1931.²¹⁸ Then, from about 1940 onwards, influential articles by Moffatt Hancock,²¹⁹ A H Robert-

²¹¹ Morris, ‘Torts in the Conflict of Laws’, above n 12.

²¹² J H C Morris, ‘The Proper Law of a Tort’ (1951) 64 *Harvard Law Review* 881.

²¹³ This process was commenced by *Babcock v Jackson*, 12 NY 2d 473 (1963). The ‘proper law of the tort’ was described by Lord Denning MR in *Boys v Chaplin* [1968] 2 QB 1, 20 as ‘the law of the place which has the most significant contacts with the matter in dispute’.

²¹⁴ [1971] AC 356.

²¹⁵ *Boys v Chaplin* [1968] 2 QB 1, 20 (Lord Denning MR), 34–5 (Diplock LJ).

²¹⁶ This was the approach of Lord Wilberforce in *Boys v Chaplin* [1971] AC 356, 388–9, which has since found general acceptance: see above n 7.

²¹⁷ Morris, *The Conflict of Laws*, above n 12, 256.

²¹⁸ Ernest G Lorenzen, ‘Tort Liability and the Conflict of Laws’ (1931) 47 *Law Quarterly Review* 483.

²¹⁹ See Moffatt Hancock, ‘Torts in the Conflict of Laws: The First Rule in *Phillips v Eyre*’ (1940) 3 *University of Toronto Law Journal* 400; Moffatt Hancock, ‘A Problem in Damages for Tort in the Conflict of Laws’ (1944) 22 *Canadian Bar Review* 843.

son,²²⁰ John Falconbridge²²¹ and Morris²²² himself were published, since followed by many others.²²³

As Morris noted, the reasons for this awakening of interest are not hard to identify.²²⁴ In the 19th century, aside from those involving misdeeds of colonial Governors and other persons in high authority, most cases concerned ship collisions. Ships were the only means of overseas transportation at that time. This situation was changed by the technological revolution of the 20th century. Trains, cars and aeroplanes have made international travel more accessible. Products are distributed worldwide. Newspapers, radio, television and the internet have created a revolution in communications²²⁵ — a far cry from Eyre's time when it was necessary to await the arrival of the next mail packet.²²⁶ This problem is even more acute in federal jurisdictions. Whereas in Great Britain there is only one jurisdictional border that can be driven across,²²⁷ the US, Australia and Canada have multiple states or provinces. Indeed, automobile accidents caused by drivers from other jurisdictions within the country form the bulk of modern conflict cases in torts.

There is at least one additional factor contributing to the increased interest in conflict of laws — the civil law contribution. Lipstein's study of *Phillips v Eyre* appeared in a festschrift of essays marking the 70th birthday of Max Rheinstein of the University of Chicago. Lipstein begins by noting that

Max Rheinstein was one of the first when, in 1944, he sought to employ the modern techniques of the conflict of laws in order to refine the rigid notions which at that time determined the rules of the conflict of laws in matters of tort. Within a decade a rich and stimulating body of writings had appeared, and not

²²⁰ See A H Robertson, 'The Choice of Law for Tort Liability in the Conflict of Laws' (1940) 4 *Modern Law Review* 27.

²²¹ See John D Falconbridge, 'Torts in the Conflict of Laws' (1945) 23 *Canadian Bar Review* 309.

²²² See Morris, 'Torts in the Conflict of Laws', above n 12; Morris, 'The Proper Law of a Tort', above n 212.

²²³ For articles published between 1950 and 1970, see further Fowler Harper, 'Tort Cases in the Conflict of Laws' (1955) 33 *Canadian Bar Review* 1155; J A Clarence Smith, 'Torts and the Conflict of Laws' (1957) 20 *Modern Law Review* 447; J G Castel, 'Canadian Private International Law Rules in the Field of Civil Responsibility' (1958) 18 *Revue de Barreau* 465; S Strömholm, 'A Recent Contribution to the Problem of Torts in the Conflict of Laws' (1964) 13 *International and Comparative Law Quarterly* 691; Gerber, 'Tort Liability in the Conflict of Laws' (Pt I), above n 9; P Gerber, 'Tort Liability in the Conflict of Laws' (Pt II) (1966) 40 *Australian Law Journal* 73; J L R Davis, 'Conflict of Laws — Torts — An Unjustifiable Extension of the Rule in *Phillips v Eyre*' (1967) 41 *Australian Law Journal* 213; P R H Webb, 'Tort in the Conflict of Laws (Based on *Boys v Chaplin*)' (1967) 16 *International and Comparative Law Quarterly* 1145; Albert A Ehrenzweig, 'The Not So "Proper" Law of a Tort: Pandora's Box' (1968) 17 *International and Comparative Law Quarterly* 1; R H Graveson, 'Towards a Modern Applicable Law in Tort' (1969) 85 *Law Quarterly Review* 505; J D McClean, 'Torts in the Conflict of Laws' (1969) 43 *Australian Law Journal* 183.

²²⁴ Morris, *The Conflict of Laws*, above n 12, 256.

²²⁵ For a discussion of the difficulties that arise from the use of such technology across jurisdictional borders with different defamation laws, see Peter Handford, 'Defamation and the Conflict of Laws in Australia' (1983) 32 *International and Comparative Law Quarterly* 452.

²²⁶ News of the Morant Bay insurrection took about a month to reach England.

²²⁷ It is, of course, possible to drive from Northern Ireland into the Republic of Ireland.

long afterwards the practice, especially in the United States, began to put to use the new insights so gained.²²⁸

Lipstein and Rheinstein were two among many distinguished lawyers who, after their early training in Germany, migrated to England or America in the 1930s to escape the Nazi regime and then proceeded to have long and distinguished careers in the common law, specialising in conflict of laws.²²⁹ Another was Otto Kahn-Freund,²³⁰ who became the editor of the tort chapter of *Dicey's Conflict of Laws* for the seventh edition published in 1958. The treatment of torts in the sixth edition, a mere nine pages, had altered little from the original edition in 1896.²³¹ Kahn-Freund revolutionised the chapter, increasing it to 46 pages in 1958 and 58 pages for the eighth edition in 1967.²³² In the preface to the sixth edition in 1949, Morris listed several factors that had influenced the enormous

²²⁸ Lipstein, 'Phillips v Eyre, A Re-Interpretation', above n 171, 411 (citations omitted). See further Max Rheinstein, 'The Place of Wrong: A Study in the Method of Case Law' (1944) 19 *Tulane Law Review* 165.

²²⁹ On Lipstein, see Christopher Forsyth, 'Kurt Lipstein (1909–)' in Jack Beatson and Reinhard Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (2004) 463; Christian von Bar, 'Kurt Lipstein — The Scholar and the Man' in Jack Beatson and Reinhard Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (2004) 749; K Lipstein, 'Acta et Agenda' [1977] *Cambridge Law Journal* 47. Lipstein authored many works on conflict of laws: see especially K Lipstein, 'The General Principles of Private International Law' (1973) 135 *Recueil des Cours: Collected Courses of the Hague Academy of International Law* 97. On Rheinstein, see Konrad Duden, 'Max Rheinstein — Leben und Werk' in Ernst von Caemmerer, Soia Mentschikoff and Konrad Zweigert (eds), *Ius Privatum Gentium: Festschrift für Max Rheinstein zum 70 Geburtstag am 5 Juli 1969* (1969) vol 1, 1; Mary Ann Glendon, 'The Influence of Max Rheinstein on American Law' in Marcus Lutter, Ernst C Stiefel and Michael H Hoeflich (eds), *Der Einfluß deutscher Emigranten auf die Rechtsentwicklung in den USA und in Deutschland* (1993) 171; Kyle Graham, 'The Refugee Jurist and American Law Schools, 1933–1941' (2002) 50 *American Journal of Comparative Law* 777. (My thanks to Professor John Langbein for assistance with references on Rheinstein.) Other émigré German scholars who made a distinctive contribution to conflict of laws in the common law included Clive M Schmitthoff, F A Mann and Martin Wolff: see John N Adams, 'Clive M Schmitthoff (1903–1990)' in Jack Beatson and Reinhard Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (2004) 367; Lawrence Collins, 'F A Mann (1907–1991)' in Jack Beatson and Reinhard Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (2004) 381; Gerhard Dannemann, 'Martin Wolff (1872–1953)' in Jack Beatson and Reinhard Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (2004) 441.

²³⁰ See Mark Freedland, 'Otto Kahn-Freund (1900–1979)' in Jack Beatson and Reinhard Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (2004) 299. For an important contribution on the conflict of laws with regard to tort, see O Kahn-Freund, 'Delictual Liability and the Conflict of Laws' (1969) 124 *Recueil des Cours* 1.

²³¹ Arthur Berriedale Keith joined Dicey as the editor for the 3rd edition in 1922, and was sole editor of the 4th edition of 1927 and the 5th edition of 1932. The 6th edition of the work, published in 1949 after a 17-year gap, was edited by a team headed by John Morris, with Zelman Cowen editing the torts chapter. The 6th edition was also the first time the work was entitled *Dicey's Conflict of Laws*, having previously been *A Digest of the Law of England with Reference to the Conflict of Laws*.

²³² Kahn-Freund continued as an editor of the 8th and 9th editions in which the authors of chapters were not specifically identified. From the 8th edition, the work was entitled *Dicey and Morris on the Conflict of Laws*. The 14th edition published in 2006 was marked by the addition of Sir Lawrence Collins as a co-author: Collins, *Dicey, Morris and Collins on the Conflict of Laws*, above n 201.

development of the conflict of laws since the previous edition: the contribution of '[r]efugee scholars' was particularly noted.²³³

V THE PRESENT AND THE FUTURE

Though conflict of law issues in tort matters were not the focus of the civil action in *Phillips v Eyre*, the test endorsed by Willes J has left its mark. For the best part of a century, scholars and practitioners have been trying to accommodate or find an alternative to the double choice of law rule in *Phillips v Eyre*. Although common law jurisdictions have now uniformly rejected Willes J's formulation, it is by no means certain that these measures have resulted in a simpler or more rational alternative.

In England, the rule enacted by the *Private International Law (Miscellaneous Provisions) Act 1995* (UK) c 42 has been much criticised,²³⁴ and the amount of space devoted to it in post-1995 editions of *Dicey and Morris on the Conflict of Laws* suggests that the complications are still considerable.²³⁵ A further layer of complexity has now been added by the introduction of uniform choice of law rules for non-contractual obligations arising out of a tort or delict applicable throughout the European Union.²³⁶ In Canada, it has been suggested that the attempt to provide certainty by establishing a firm rule based on the *lex loci delicti* has failed.²³⁷ In Australia, it is not yet clear whether reference to the *lex loci delicti* without some flexible exception will result in an entirely satisfactory solution,²³⁸ a problem highlighted by the High Court's reliance on *renvoi* as a means of avoiding the application of Chinese law.²³⁹

²³³ J H C Morris (ed), *Dicey's Conflict of Laws* (6th ed, 1949) xiii. See also Peter North, 'Private International Law in Twentieth-Century England' in Jack Beatson and Reinhard Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (2004) 483, 514–15.

²³⁴ See, eg, Briggs, above n 21; P B Carter, 'The *Private International Law (Miscellaneous Provisions) Act 1995*' (1996) 112 *Law Quarterly Review* 190; Alan Reed, 'The *Private International Law (Miscellaneous Provisions) Act 1995* and the Need for Escape Devices' (1996) 15 *Civil Justice Quarterly* 305; C G J Morse, 'Torts in Private International Law: A New Statutory Framework' (1996) 45 *International and Comparative Law Quarterly* 888.

²³⁵ The 2006 edition is entitled *Dicey, Morris and Collins on the Conflict of Laws*: see above n 232. For a recent example of the potential problems to which the Act gives rise, see *Harding v Wealands* [2007] 2 AC 1.

²³⁶ *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)* [2007] OJ L 199/40. For commentary on this regulation, see Sir Lawrence Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws: First Supplement to the Fourteenth Edition* (14th ed, 2006) 183–224.

²³⁷ See Janet Walker, "'Are We There Yet?'" Towards a New Rule for Choice of Law in Tort' (2000) 38 *Osgoode Hall Law Journal* 331.

²³⁸ See, eg, J L R Davis, 'Is There Still Scope for Forum Shopping after *John Pfeiffer v Rogerson?*' (2000) 20 *Australian Bar Review* 107; Anthony Gray, 'Flexibility in Conflict of Laws Multistate Tort Cases: The Way Forward in Australia' (2004) 23 *University of Queensland Law Journal* 435.

²³⁹ See *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331. For a discussion of this decision, see Elsabe Schoeman, 'Renvoi: Throwing (and Catching) the Boomerang — *Neilson v Overseas Projects Corporation of Victoria Ltd*' (2006) 25 *University of Queensland Law Journal* 203; Mary Keyes, 'Foreign Law in Australian Courts: *Neilson v Overseas Projects Corporation of Victoria Ltd*' (2007) 15 *Tort Law Journal* 9. For a discussion of the decision in the context of broader consideration of the approach to choice of law in cross-border torts, see Reid Mortensen, 'Homing Devices in Choice of Tort Law: Australian,

It is not always easy to escape one's history. Even though Edward John Eyre was eventually acquitted of every charge, the experience cost him a large amount of money,²⁴⁰ ended his career as a servant of the British Empire and undoubtedly affected him for the remaining 31 years of his life, spent in seclusion in a 16th century house near Tavistock in Devon. It was Eyre's actions as Governor of Jamaica that provided the basis for Willes J's pronouncement of the double choice of law rule. The *Phillips v Eyre* test may now have been officially replaced and the case may no longer be central to textbook treatments on conflict of laws in tort. However, so long as the complexity in deciding matters of conflict of law remains, the ghosts of Edward John Eyre the explorer and colonial Governor, and Alexander Phillips, the humble Jamaican, will continue to haunt the question of choice of law in tort for many years to come.

British, and Canadian Approaches' (2006) 55 *International and Comparative Law Quarterly* 839.

²⁴⁰ Despite the financial assistance provided by the Eyre Defence Committee, Eyre's 'financial straits now were [very] desperate' by the end of the civil proceedings: Kostal, above n 47, 451, quoting Eyre in a letter to Sir Roderick Murchison, a member of the Committee. In 1872, Parliament finally authorised payment of Eyre's legal expenses: Dutton, *In Search of Edward John Eyre*, above n 35, 140–2; Semmel, above n 43, 174–7.