CONFLICT OF LAWS — TORT — RULE IN *PHILLIPS* v. *EYRE* — CHOICE OF LAW OR JURISDICTION

The famous two-fold rule in *Phillips* v. *Eyre*,[1] as extended in *Machado* v. *Fontes*,[2] has been applied by the British Columbia Supreme Court in *Morrie & Stulback v. Angel*.[3] The headnote in the cited report states the case fairly:

> Plaintiffs, gratuitous passengers in the defendant's car, were injured in an accident in the State of Washington. The accident was due to gross negligence on the part of the defendant. In an action brought in British Columbia (where all the parties were domiciled) *held*, that as the act or default would have been actionable if committed in British Columbia and as it was not justified by the law of Washington where it was committed the conditions to establish tort liability in a conflict of laws case had been fulfilled and the plaintiffs were entitled to recover. Although the default of the defendant was not actionable by Washington law it nevertheless was punishable there as an offence against Washington law and hence was not legally justified within the meaning of the second condition.

Inasmuch as some $14,000 was awarded in damages, it is perhaps of more than academic interest to examine the necessity and desirability of a Canadian court applying the "English Rule" in tort cases involving a conflict of laws.

I

Without actually referring to the original statement of the rule by Willes J. in *Phillips* v. *Eyre*, Whittaker J. adopts the quotation by Duff C.J.C.[4] of Lord Macnaghten in *Carr* v. *Fracis Times & Co.*[5]

> In the first place, the wrong must be of such a character that it would have been actionable if committed in England; and, secondly, the act must not have been justified by the law of the place where it was committed.

Whittaker J. found that while the defendant's unsafe entry into a through street constituted gross negligence, the standard of actionability in British Columbia, it was not accompanied by the intention to cause injury without which "a gratuitous passenger is not entitled to recover" in Washington. However, the court did not have to discuss whether this was a substantive or merely procedural requirement of civil liability in Washington, because it found that "to operate a motor vehicle in such a manner is an offence and punishable under the law of the State of Washington" and "was therefore not legally justifiable in that State." The defendant had cited two Privy Council cases from Saskatchewan and two Scottish cases[6] in support of his argument that non-actionability under the *lex loci delicti* (Washington) would be a good defence in British Columbia. To this the court answered, "I have read those cases carefully. Without analysing them here to see whether they are applicable to the case at bar, I think that I am bound by the decision of the Supreme Court of Canada in *McLean* v. *Pettigrew* [1945] S.C.R. 62."

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[1] (1870), L.R. 6 Q.B. 1 (Ex. Ch.)

[2] [1897] 2 Q.B. 231 (C.A.).

[3] (1956), 5 D.L.R. (2d) 30.

[4] Canadian National S.S. Co. v. Watson, [1939] S.C.R.11, at 13.

[5] [1902] A.C. 176, at 182.

[6] Walpole v. Canadian Northern Rlwy Co., [1923] A.C. 113.
McMillan v. Canadian Northern Rlwy Co., [1923] A.C. 120.
Naftalin v. L.M. & S.R. Co. [1933] S.C. 259
M'Elroy v. M'Allister [1949] S.C. 110

The *McLean* case, arising in Quebec out of an accident in Ontario, required an even more strained interpretation of the meaning of "not justifiable": not only was the defendant not civilly liable in Ontario, he had been found not guilty there on a charge laid under the Ontario Highway Traffic Act. Despite the acquittal, Taschereau J. had no difficulty in finding the defendant guilty for the purpose of rendering his act "not justifiable" within the meaning of the second branch of the Rule.

Without discussing the merits of the decision in the *McLean* case, which has been widely denounced,[7] it would appear that it turns on the extended meaning given to the second test of Willes J., "the act must not have been justifiable by the law of the place where it was done," by the Court of Appeal in *Machado* v. *Fontes*.[8] In that case, a libel committed in Brazil, where it was not actionable, was considered not to be "justifiable"[8a] because there was a possibility of a criminal prosecution in Brazil. To achieve this position, the Court of Appeal had to invert the emphasis of the two cases it relied on, *Phillips* v. *Eyre*[9] and *The Mary Moxham*.[10] In the Exchequer Chamber, Willes J. had held that what was prima facie a false imprisonment in Jamaica would not "found a suit in England" because it had been "justified" by an Act of the Jamaican Legislature. The Court of Appeal in the *Moxham* case had decided that the owners of a ship were not liable for damage done by the ship to a dock in Spain, because, by Spanish law, only the master was liable.

Willes J. had said, " . . . the civil liability arising out of a wrong derives its birth from the law of the place, and its character is determined by that law. Therefore, an act committed abroad, if valid and unquestionable by the law of the place, cannot, so far as civil liability is concerned, be drawn in question elsewhere . . . "[11] Read in its context, this statement would indicate that an act, though characterized as tortious, will not create liability in England if the defendant, by the *lex loci delicti*, has a good defence. Willes J. used "wrong" to mean tort, and assimilated the results to those flowing from a breach of a foreign contract. Criminal consequences at the *locus delicti*, if contemplated at all, were dismissed by this reference to "civil liability" — as would be expected from the general rule that the forum will not have regard to foreign penal laws.[12] However, the Court of Appeal in *Machado* v. *Fontes*, in purporting to

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[7]P. B. Carter (1953), 3 W. Australia Law Rev., 67 at p. 82, "Comment is scarcely called for"; Hancock (1945), 23 Can. Bar Rev. 348; Cheshire, Private International Law (4th ed.), at p. 264: "Such a surprising decision . . . at least illustrates what inelegant results may be reached unless 'justifiable' is treated as *synonymous* with 'not actionable'"; Rabel, 2 Conflict of Laws, p. 243, footnote 59, "It is a curious case . . . " He goes on to show that the case could hae been decided on grounds of quasi-contract; Falconbridge (1945), 23 Can. Bar. Rev. 309. The authority given for disregarding the Ontario acquittal was *La Fonciere Co.* v. *Perras*, [1943] S.C.R. 165, involving a conviction under the Criminal Code. *Quaere* whether a Quebec court can so easily disregard the evidence of an Ontario Court's interpretation of *Ontario* law.

[8]*Supra*, footnote 2.

[9]*Supra*, footnote 1.

[10](1876), 1 P.D. 107 (C.A.).

[11]*Supra*, footnote 1, at p. 28.

[12]Lord Loughborough, in *Folliot* v. *Ogden*, (1789), 3 T.R. 726, "It is a general principle that the penal laws of one country cannot be taken notice of in another."

follow the *Phillips* and *Moxham* cases, disregarded the exculpatory effect of the second branch of the classic test, and said:

> Both those cases seem to me to go to this length: that, in order to constitute a good defence to an action brought in this country in respect of an act done in a foreign country, the act relied on must be one which is innocent in the country where it was committed.[13]

In effect, Willes J. had said, "No action at the forum if there is a defence where committed," which Lopes and Rigby LLJ. took to mean, "Action at the forum unless innocent in all respects where committed." Even conceding that "justifiable" is equivalent to "innocent", the Court of Appeal made an unwarranted shift in emphasis in favor of the plaintiff.[14] Until *Machado* v. *Fontes,* the English rule was in step with the law prevailing in the United States and most other jurisdictions[15] in that a substantive defence available by the *lex loci* would be given effect to; since then the plaintiff is permitted to found his action on considerations irrelevant to his injury (penalty at the suit of the foreign state), but the defendant cannot invoke his foreign defences because English law "then becomes the source and measure of the resulting cause of action."[16]

There is nothing novel about the above criticism of *Machado* v. *Fontes* — the decision has been criticized in stronger terms elsewhere.[17] One writer has made what I submit is an especially incisive attack on the English position as exemplified by the *Machado* case and its progeny.[18] Spence sees the classic Rule as a test of jurisdiction, rather than one for determining which law is to be applied. That is, both branches must be satisfied before an English court will be called upon to make a choice of law. This approach would leave it open to the court, once the jurisdictional test is satisfied, to apply the *lex locus delicti. Machado* v. *Fontes,* of course, is directly contrary,[19] but it is submitted that that was a case of first impression, wrongly decided. Prior to 1897, the test had never been fulfilled in a leading case, and though the Court of Appeal in *Machado* found the Rule to be satisfied by warping it to the facts, there was no precedent for deviating from what Rabel called "the world-

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[13] *Supra,* footnote 2, at p. 233, per Lopes L.J.

[14] Robertson, 4 Mod. L. Rev. 27, at p. 35; points out that *The Mary Moxham* was direct authority contrary to *Machado,* and at p. 35 remarks that the authority of *Machado* is dismissed by the two Privy Council cases cited by the defendant in the instant case, *supra* footnote 6, "if the normal meaning of the words counts for anything,"—because the acts in those cases, while not actionable, were certainly not innocent.
Willes J. in the *Phillips* case, to refute charges that English courts are too willing to admit foreign causes of action, cites many exceptions, none of which are innocent *per se.*

[15] Including Scotland: F. E. O'Riordan, 4 Mod. L. Rev. 214. Excepting: China, Japan, and to a limited extent, Germany: See Rabel, *op. cit.,* pp. 243, 247.

[16] Cardozo J., citing *Machado* v. *Fontes* in *Loucks* v. *Standard Oil,* 244 N.Y. 99 (1918).

[17] Hancock, (1945), 22 Can. Bar Rev. 843, at 853; Robertson, *op. cit.* in footnote 14, *supra,* who shows the decision is wrong on principle and theory, at p. 41 reconciles his view with Lorensen's acceptance of the case's theory Rabel, *op. cit.,* at 241, notes that compensation *was* available in Brazil on two grounds. If the Court of Appeal had permitted a commission to investigate Brazilian law it would not have found it necessary to distort the second branch of the Rule to do justice to the plaintiff; in *Koop* v. *Bebb,* (1951), 84 C.L.R. 629, McTiernan J. of the High Court of Australia disapproves *Machado* relying on on *Phillips* v. *Eyre;* see also note 38 *infra.*

[18] Spence (1950), 27 Can. Bar. Rev. 661; see also Ynetma (1950), 27 Can. Bar Rev. 116, 121.

[19] *Supra,* footnote 16.

rule."[20] Hitherto, plaintiffs had always failed because the jurisdictional test had not been met: the facts of *The Halley*[21] did not meet the requirement of the first branch, while those of *Phillips* v. *Eyre* and *The Mary Moxham* fell short of the second branch: the question of choice of law was therefore still open until answered incorrectly, contrary to principle and authority, by *Machado* v. *Fontes*. This rationale[22] is also adequate to determine the cases subsequent to 1897 cited in the instant decision: in *C.P.R.* v. *Parent*[23] neither branch was satisfied; *O'Connor* v. *Wray*[24] turned on the first branch; *Carr* v. *Fracis Times & Co.*[25] and *Young* v. *Industrial Chemicals Co.*[26] were decided on the second branch of the Rule. *C.N.S.S.* v. *Watson*[27] did not really raise the question, since it was[28] determined by statute. *Brown* v. *Poland*[29] applied the *lex fori*, but this case cited and followed the reasoning of *McLean* v. *Pettigrew* as it was no doubt bound to do. A true *Machado* v. *Fontes* situation raising the choice of law question did not recur until the Supreme Court of Canada in the *McLean* case found facts leading to the acquittal in Ontario to be "wrongful" within the meaning of "not justifiable"; — the dual test being thus strangely satisfied, it required only a mechanical application of the *Machado* decision to hold that the law of the forum governed. In effect, the plaintiff was given the advantage of a reference to the penal law of the *locus delicti*, but the defendant could not plead his defence under the civil *lex loci*. Spence feels that this latent inequity[30] given effect to by the *Machado* and *McLean* cases (and now by the instant decision) could be abolished by adopting the *lex loci delicti* as the proper law to be applied once jurisdiction under the dual Rule is established. Certainly his approach isolates the source of the evil in the improper choice of law made in the *Machado* case. In his view, the involved semantic discussion of the Rule, especially the second branch, as found in the majority of the cases, becomes unnecessary. He would therefore approve the classic test, though only in its jurisdictional aspect. However, at the risk of appearing ungrateful for his gratuitous carriage to what we agree is the fundamental question, we must part company with him on the wisdom of retaining the dual test for any purpose.

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[20] Rabel, *op. cit.*, p. 240.

[21] (1868), L. R. 2 P.C. 193; see footnote 33, *infra*.

[22] This analysis will also explain why the Defendant in the instant case and Taschereau J. in *McLean v. Pettigrew*, would both cite the *Walpole* and *McMillen* cases in the Privy Council; one to show "if neither actionable no punishable, then innocent"—the other to show "if either actionable or punishable, then justifiable"; see also Cheshire, *op cit.*, p. 266.

[23] [1917] A.C. 195.

[24] [1930] S.C.R. 231.

[25] *Supra*, footnote 4.

[26] [1939] 4 D.L.R., 392.

[27] [1939] S.C.R. 11.

[28] Falconbridge (1946), 23 Can. Bar Rev., at 310. This is the case which says *O'Connor* v. *Wray* is authority for the dual rule in Quebec, thus ending the effect of the enlightened decision in *Lieff* v. *Palmer* (1937), 63 Que. K. B. 278.

[29] (1952), 6 W.W.R. (N.S.) 368.

[30] Holmes J. in *Slater* v. *Mexican Natl. R.R. Co.* 194 U.S. 120 (1904), " It seems unjust to allow a Plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose. . . . We are aware that expressions of a different tendency may be found in some English cases."

II

Even as a test of jurisdiction, the semantics of the second branch are not so easily dismissed: the limits of "not justifiable" must be determined before the choice of the *lex loci* can be made. If it means "not innocent" or "wrongful" in any and all senses, then on facts similar to those raised by the trilogy of the instant case, the *McLean* case, and *Machado* v. *Fontes*, to choose the *lex loci* would be to invoke a nullity.[31] On the other hand, if it is equated to "actionable" it is a premature consideration, raising questions of substance and procedure best answered after the governing law has been selected. Up to this point we have seen that the language of the second branch, appropriate to the facts of *Phillips* v. *Eyre*, has lent itself to the unwarranted and unfair extension in *Machado* v. *Fontes* by which a person may be liable in damages for an act not considered to have violated an interest worthy of protection where it was committed. Apparently, a man must not only abide by the law of the sovereign to whom he owes allegiance at the moment of his acting, he must also guard against his person or property becoming amenable to the jurisdiction of a court employing the English rule.

But the first branch of the Rule is also open to objection, this time because of an unfair advantage given to the defendant.[32] The requirement that the act must have been actionable had it been committed in England originated with *The Halley*,[33] which, though it has been cited often, has seldom been applied since. If it can be explained as a stringent application of public policy,[34] which all systems reserve to the forum, it is an extreme example of the "provincialism" rejected by Cardozo J.[35] More likely, the Privy Council in *The Halley* meant only to make a primary characterization of the facts — and found them not to be tortious.[36] It has been said that in stating this part of the rule in *Phillips* v. *Eyre*, Willes J. was addressing his mind to purely local actions, and to causes

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[31]This has been noted as a factor that led the Court of Appeal in *Machado's* case to choose the *lex fori*: Hancock (1945), 22 Can. Bar Rev. 843, 854.

[32]Smith, International and Comparative L.Q., July 1956, 466. In a footnote, at p. 469, he says, in defending *Machado* against Cheshire's criticism, "Evidently the English Courts have succeeded in being unfair to both sides." Though no doubt intended to be facetious, the remark is accurate. See also, Lorenzen, 47 L.Q.R. 483, at 501.

[33](1868), L. R. 2. P.C. 193. The facts as stated by Willes in *Phillips* v. *Eyre*: " . . . therefore, in *The Halley*, the Judicial Committee pronounced against a suit in Admiralty founded upon a liability by the law of Belgium for collision caused by the act of a whom the shipowner was compelled by that law to employ, and for whom therefore, as not being his agent, he was not responsible by English Law". It was essentially an inverted *Mary Moxham*.

[34]Lorenzen, (1931), 4 L.Q.R. 483, 498; Robertson (1940) 4 Mod. L. Rev. 27, 33, Hancock, 3 U.T.L. 400, 402. The English position was changed by the Pilotage Act, 1913.

[35]*Supra*, footnote 16, " . . . Our own scheme of legislation may be different. We may even have no legislation on the subject. That is not enough to show that public policy forbids us to enforce the foreign right . . . We are not so provincial as to say that every solution of a problem is wrong because we deal with it otherwise at home."

[36]Rabel, *op. cit.*, at pp. 232, 233, say that by British, Japanese, and Chinese law the *lex fori* governs characterization, but because of the impossible consequences of this theory it is not generally so. Cheshire, *op. cit.*, at p. 50 notes that the *lex fori*, for this purpose, includes its conflict rules since to confine it to municipal law would be "*parochial*" On this view, though, the Privy Council should have characterized the collision as tortious.

really offensive to English public policy.[37] So confined, the first branch is not at variance with the "world-rule"; it is merely declaratory of reservations common to all courts. Indeed, the judgment of Willes J. read as a whole is in marked conformity with those exemplifying the American position.[38] So far, this part of the Rule is, at worst, redundant. But if it is extended to mean that

> similarity of legislation . . . be exalted into an indispensible condition, then . . . "that, of course, is a false view. The courts are not free to refuse to enforce a foreign right at the pleasure of the judges, to suit the individual notion of expediency or fairness. They do not close their doors unless help would violate some fundamental principle of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal . . . We shall not make things better by sending them to another state, where the defendant may not be found . . . [39]

III

Of course, the foregoing objections become material only where the *lex fori* and the *lex loci delicti* are substantially and substantively different, as in the trilogy including the instant case. Here, the defendant's plea of non-actionability by the *lex loci* was inadequate. Because, so to speak, he was found guilty *in absentia* under a penal law having no relevance to the plaintiff's injury, he was not "innocent." His defences to that penal law, if any, could not avail him because of *McLean's* case, and since the *lex fori* was chosen to govern, his defence under the civil *lex loci* was not relevant. He became subject to all the duties imposed by Washington law as soon as he crossed the line,[40] but, in effect, the plaintiffs retained the benefits of a sort of status as British Columbians. No doubt the court had no alternative in view of the decision in *McLean* v. *Pettigrew*, and perhaps could not be expected even to have discussed the merits of the theory on which it is based. Nevertheless, the case stands as another example of a "fortunate choice of a forum."[41] If the plaintiffs had had to seek the defendant in Idaho or Oregon, they would not have succeeded, because the American theory would have confined them to their rights under Washington law. Had it been worthwhile to sue in Alberta, they probably

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[37]Cheshire, *op. cit.*, at p. 267; Ynetma (1950), 27 Can. Bar Rev. 116, at 118-119. It is true that Willes J. did cite *Doulson* v. *Matthews* (1792) 4 T.R. 503, a land trespass case, but the exclusions of the dual Rule appear, at least *prima facie*, to be in addition to this restriction. *The Halley* is cited as authority for the first branch but quaere whether it turned on public policy; Willes J. did not specify public policy in his list of exceptions—perhaps this was implied by his mention of *The Halley* because such a "careful judge" would not likely overlook this.

[38]e.g., at p. 28 "A right of action, whether it arises from contract governed by the law of the place or wrong, is equally the creature of the place and subordinate thereto . . . Its character is determined by that law . . . If the foreign law extinguishes the right, it is a bar in this country."

Cf. Cardozo J. in *Loucks* v. *Standard Oil Co.*, *supra*, footnote 16: "A foreign statute is not the law in this state, but it gives rise to an obligation, which, if transitory, 'follows the person and may be enforced wherever the person may be found', citing Holmes J. in *Slater* v. *Mexican Natl.* RR. Co., 194 U.S. 120. See also *Cuba R.R. Co.* v. *Crosby*, 222 U.S. 473, at p. 478, "The law of the forum is material only as setting a limit of policy beyond which such obligations will not be enforced there."

[39]*Supra*, footnote 16. Falconbridge (1946), 23 Can. Bar Rev. 309, at 312, "My own view of the effect of the first condition is that the cause of action is wholly governed by the domestic rules of the law of the forum applied to a hypothetical domestic situation, subject only to the proviso expressed in the second condition . . . "

[40]Harper, (1956), 33 Can. Bar Rev. 1155, 1157.

[41]Hancock (1945), 22 Can. Bar Rev. 843, 853.

... have succeeded, again by virtue of the second branch of the English Rule.[42] ... if the action had been brought in Ontario, the claim would have been defeated under the first branch.[43] This catch-as-catch-can style of litigating is particularly undesirable in North America where the highways are frequented by vehicles from so many different legal "countries". Surely the possibility of a driver being resident in an "English Rule" jurisdiction is a hazard that a person about to be injured by him should not have to consider; by the same token, the visiting driver should not be impressed with or permitted a standard of care differing from that of the others on the same highway.

The logical permutations of the instant case may be illustrative if not confusing. For example: If the *facts* were changed so that the accident occurred in British Columbia, these results would probably follow in the various courts: Washington (and other United States) would allow B.C. law to govern, and find liability since lack of similar legislation would not offend its public policy,[44] Alberta would grant recovery, but Ontario would not. On the other hand, if the *law* were changed for purposes of the example, (i.e., an action permitted by the domestic law of Washington, but not of B.C.), then on the facts of an accident in Washington, the courts in British Columbia and Ontario would find no liability, but those in Idaho and Alberta would; on an accident in British Columbia, all the courts would be against liability, except Alberta.

Another example raises the possibility of collusion: The defendant, through ordinary negligence, injures his passenger, the plaintiff, in Alberta. No action is maintainable here against the defendant, or, therefore, against his insurer, but the defendant submits to the jurisdiction of a Quebec court when action is brought there. The Quebec court can have no regard to the *lex loci delicti*,[45] and will find for the plaintiff on principles of quasi-delict. Even if the plaintiff is unable to register this judgment in Alberta, he may well be able to enforce it in Quebec.

If the American rule were a North American Rule, then liability would vary only with the *lex loci delicti*. It is no wonder that the English Rule is described as:

> inherently imprecise, and incompatible with the liberal principles at the same time in England applied to other types of obligation.[46]

It has been suggested that the domicile of both parties at the place of the forum justifies the total application of the *lex fori*,[47] but this would have the

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[42]*Supra*, footnote 29.

[43]Ontario Highway Traffic Act, R.S.O., 1950, c. 167, s. 50 (2).

[44]*Supra*, footnote 35.

[45]Supra, footnote 28.

[46]Ynetma, *op. cit.*, p. 121.

[47]A minority in *Scott* v. *Seymour* (1862) 1 H. & C. 219 said that a British plaintiff could succeed against a British defendant in an English court even where the *lex loci* contemplated no action. Falconbridge suggests this as a possible basis for *Machado* in (1946), 23 Can. Bar Rev. 309, at 315; Morris (1951), 64 Harv. L. R. 881, at 885 commends the theory in an example; Carter, *op. cit.*, p. 81, says, in a note, it is "just possible" to defend *McLean* v. *Pettigrew* on this basis; Lorenzen (1931), 4 L.Q.R. 483, at 489, notes that this theory would justify *Machado* v. *Fontes*, but would not free the decision from criticism; cf. Dicey's Conflict of Laws (6th ed., 1949), at p. 804: "The civil rights and liabilities of the parties before an English Court, are, subject to the rarest exceptions, not affected by nationality."

absurd effect of making domicile a "connecting factor" in torts conflicts. Happily, neither was this theory discussed by Whittaker J.

In summary then, it is submitted that the two-fold Rule should be abandoned, whether as a test for jurisdiction or choice of law, because it is provincial in extreme, differing from every other western system;[48] it is not followed in other categories of conflict law; it admits foreign penal law;[49] it makes compensation turn on the chance of finding the defendant within the jurisdiction of a congenial forum; it has the effect of making tort liability a creature of status. Adoption of the American or "world-rule" technique would still reserve to the forum the limitations in regard to local actions,[50] public policy, foreign penal law, and matters of procedure, but would yield uniform results (which is the rationale of conflicts law generally)[51] based on the behavior of the defendant and the ordinary tests of jurisdiction, rather than the luck of the plaintiff. It would also bring into harmony the notions of abstract justice held by the Supreme Courts of Canada and the United States.[52] The House of Lords may someday have an opportunity to overrule *Machado* v. *Fontes,* but if the Supreme Court of Canada is bound by its decision in *McLean* v. *Pettigrew,* then the Legislatures should act. As long as these cases stand, they should be required reading for all users of the highway, and tourist drivers should be forced to display prominently a resumé of the law of their home jurisdiction.

—W. Philip
Third Year Law

[48]Even Scotland, see footnote 15, *supra.*

[49]But see: *Huntington* v. *Attrill,* [1893] A.C. 150, at 156.

[50]Although Rabel, *op. cit.,* p. 247, says this doctrine "has shocking results" which he notes Goodrich ascribes to "an archaic survival of outworn rules of venue."

[51]Robertson, *op. cit.,* pp. 28-9; Harper, *op. cit.,* p. 1156.

[52]C.f., footnote 30, *supra* with *McLean* v. *Pettigrew.*