We would be better off without choice-of-law rules. . . . We have invented an apparatus for the solution of problems of conflicting interests that obscures the real problems, deals with them blindly and badly, and creates problems of its own which, in their way, are as troublesome as the ones we set out to solve. . . . We shall have to go back to the original problems and to the hard task of dealing with them realistically by ordinary judicial methods such as construction and interpretation . . . .

Brainerd Currie¹

I. Dissatisfaction with the Phillips v. Eyre Formula in Canada and Elsewhere.

Every year many thousands of Canadians operate motor vehicles in the United States and many thousands of Americans operate them in Canada. Accidents occur, people are injured or killed, claims are made and some of them lead to litigation on both sides of the border. Usually, though not invariably, the real defendant in interest in such litigation is an insurance company which has agreed to insure the nominal defendant against liability arising out of the operation of a motor vehicle within Canada or the United States. For the plaintiff's counsel the first problem in such cases is to select the most promising place to sue.² Though the rules of territorial jurisdiction vary somewhat from province to province

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²When an action has been commenced against an insured nominal defendant in a state or province which, according to its local law, has jurisdiction to entertain it, his insurer will normally cause an appearance to be entered for him and defend the action. Though it might be legally possible to take no part in the action and resist enforcement of the default judgment at the domicile of the insured there are substantial legal risks involved in such tactics. See Richardson, Problems of Conflict of Laws
and state to state their combined effects in any particular case usually produce a choice among several jurisdictions. The commonest choice is between the place where the accident occurred and the domicile of the nominal defendant. A corporate defendant can usually be sued in any jurisdiction where it regularly carries on its business. A defendant who regularly travels outside his domicile may be subject to suit in other jurisdictions because he can be personally served there.

Before an intelligent choice of forum can be made it is necessary to consider the basic question: what law or laws will the forum in question apply in deciding the case? If the suit were to be brought in a Canadian province the court would turn for guidance to the double-barreled Phillips v. Eyre formula, composed by Mr. Justice Willes in 1870 and reiterated by judges and text writers ever since.

As a general rule, in order to found 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.

The first of these rules epitomized the exaggerated obiter dictum promulgated by the Privy Council in The Halley. The second was derived from a series of earlier cases in which a government official of a foreign country or British colony had been sued in respect of acts committed there in his official capacity.

Relating to Automobiles (1935), 13 Can. Bar. Rev. 209, at pp. 206-209. Moreover, for practical political reasons, the modern insurer prefers to avoid what appears to be an evasion of responsibility.

5 For discussion of American and Canadian legislation and cases with principal emphasis upon the latter see Castel, Private International Law (1960), pp. 233-254. For American legislation and cases only see Leflar, Conflict of Laws (1959), pp. 43-74; Stumberg, Conflict of Laws (3rd ed., 1963), pp. 51-98.

4 These statements regarding the rules of territorial jurisdiction generally followed by Canadian and American courts are intended only as a convenient summary to introduce the choice-of-law problems which are the chief subject of this article. A detailed discussion of modern trends including forum non conveniens and long arm statutes in the United States or the traditional discretion exercised by Canadian courts in cases where the defendant has not been locally served with process, etc., would carry us far beyond the scope of this article.

5 [1870] L.R. 6 Q.B. 1, at pp. 28-29.

6 [1868] L.R. 2 P.C. 193 reversing (1867), 2 Adm. & Ecc. 3. This case was rightly decided on its facts (see footnote 76, infra) but the rule laid down by the court was far more broad and uncompromising than the actual decision.

These antiquated rules have been the subject of much criticism, especially when used as criteria for deciding choice-of-law cases in a Canadian province. The first rule is obviously objectionable because it closes the doors of the court in each province to all foreign suits in which the plaintiff would not have had a cause of action under the domestic law of the forum. For example: suppose that in 1936 H, domiciled in New York, offered a free ride in his automobile to G who was also domiciled in New York. Driving at excessive speed H lost control of the car and G was seriously injured. H, who had considerable moveable property but no insurance removed himself and his property to Ontario to avoid recovery by G.

Had the accident occurred two years earlier H's strategem would not have succeeded since at that time both Ontario and New York imposed liability for negligent driving causing injury to a guest-passenger. But because in 1935 the Ontario legislature had abolished such liability for Ontarians, G would have been

161. 98 Eng. Rep. 1021. The rule that a government official whose conduct was justifiable by the law of the place of wrong would not be held liable in England was applied in Phillips v. Eyre to a case where the official's conduct was rendered non-actionable by a retroactive statute of amnesty and indemnity enacted by the state of wrong. In The M. Moxham (1876), 1 P.D. 107 the Court of Appeal held that an English shipowner who was not vicariously liable for the negligence of his servants navigating his ship under the law of the place of wrong cannot be held liable in an English court even though the English law was otherwise. But the use of the law of the place of wrong as a defence was sharply restricted by the Court of Appeal's decision in Machado v. Fontes, [1897] 2 Q.B. 231 (C.A.). See footnote 12, infra.


Though all of these judges and commentators express dissatisfaction with one aspect or another of the Phillips v. Eyre formula, none of them except Kahn-Freund and Robertson suggest that the entire formula should be completely discarded and replaced by some other rule or rules. This is not surprising because as we shall see, that formula produces functionally sound results in certain cases where the place of injury formula does not.

In Key v. Key (1930), 64 O.L.R. 322, [1930] 3 D.L.R. 327 a guest passenger was injured in New York and since no evidence was offered to prove that New York law differed from that of Ontario which clearly permitted recovery, the plaintiff succeeded.

10 S.O., 1935, c. 26, s. 11. Having eventually become s. 105(2) of R.S.O., 1960, c. 172, it has been amended by s. 20(2), of S.O., 1966, c. 64
unable to show that the wrong was of such a character that it would have been actionable if committed in Ontario. Though the facts had no connexion with Ontario (except that after the event the defendant had taken refuge there) an Ontario court would have dismissed G's suit and effectively deprived him of all remedy against H. It is even more shocking to reflect that the Ontario court would have given the same decision even if G and H had been domiciled in the province of Quebec and G had been injured there.

The operation of the first Phillips v. Eyre rule in this situation is not merely unjust to the injured party; it is needlessly and purposelessly unjust. If the effect of the rule were limited to prohibiting suits not sanctioned by Ontario law against Ontario domiciliaries, it would have an intelligible purpose. But the rule as it stands shelters defendants who have no rational claim to such protection.

There is a second situation in which the entire Phillips v. Eyre formula is capable of working much mischief. Suppose that in 1936 G and H had been domiciled in Ontario and their unfortunate experiences had occurred there. By the law of their common domicile which was also the place of wrong H stood absolved of all civil liability. Suppose, however, that G, knowing that H regularly visited his parents in Quebec, had brought suit against H in that province and had him personally served with process while temporarily present there. Under the prevailing version of the formula (the Machado v. Fontes version) the Quebec courts should have...
applied Quebec law to the decision of the case subject only to a proviso that H had violated an Ontario penal law rendering his conduct "not justifiable" by Ontario law. Since H had violated Ontario's penal law by driving at an excessive speed his conduct was clearly "not justifiable". Thus, although the facts of the case had no connexion with Quebec (except that after the event defendant was served with process there) Quebec law would have been applied to create a new cause of action against him. A more outrageous example of unfairness to a defendant and officious intermeddling with the legal concerns of a sister province would be difficult to conceive.15

In view of the continuous stream of judicial and non-judicial criticism14 directed against the Phillips v. Eyre formula it is not surprising that in 1956 the Conference of Commissioners on Uniformity of Legislation appointed a committee to study these criticisms and suggest improvements.16 Under the chairmanship of Dean Horace E. Read this committee has weighed and considered the views of various practitioners and commentators and has prepared a remarkable series of interim reports16 which deserve the careful attention of everyone interested in the problem. Their latest report contains a suggested tentative draft of a short statute17 which would replace the ancient Phillips v. Eyre formula with a more flexible doctrine modelled on that prevailing in the field of contracts.18 To this tentative draft we shall return at a later point in the discussion.


15 The hypothetical case discussed in the text is the same as the real case of Lief v. Palmer, supra, footnote 8, in which three of the judges rejected and criticized the Machado v. Fontes version of the Phillips v. Eyre formula. See text at footnote 54, infra.

16 See 1957 Proceedings of Conference of Commissioners on Uniformity of Legislation, pp. 20, 62. This action was prompted by a resolution of the Canadian Bar Association Section on the Administration of Civil Justice approving a report from the British Columbia Section recommending that the Phillips v. Eyre formula be amended to require that the alleged tort must be actionable according to the law of the place of wrong. In a preliminary report to the Conference (submitted in 1957) Dean Horace E. Read's committee urged that, in view of the numerous criticisms by commentators, the committee should not confine its study to the proposed amendment alone but should consider the desirability of replacing the entire formula with some new principle. See 1957 Proceedings, p. 122, at p. 125.


18 See 1963 Proceedings, pp. 119-120.
II. The Revival of a Policy-determined Construction Approach in Recent American Cases.

One of the first questions considered by Dean Horace E. Read's committee was whether it would be desirable to recommend adoption of the so-called American formula that tort liability is governed by the law of the place of injury. This formula undoubtedly exudes a certain superficial attractiveness. If one thinks only of admonitory rules regulating the navigation of ships, the operation of motor vehicles or any conduct involving the risk of harm to others, it seems perfectly just and natural that such rules should be obeyed by all persons within the territory of the enacting state. But there are other types of rules the necessity for whose application to controversies between non-citizens or non-domiciliaries is much more questionable. American courts have not actually disposed of all tort cases by mechanically following the place of wrong formula. Dissatisfied with the results it would have produced they have often turned to other broad choice-of-law formulas which overlapped (so to speak) the formula for tort liability. By classifying the issue to be decided as one of remedial law (governed by the law of the forum), or contractual liability (governed by the law of the place of contracting), or matrimonial property (governed by the law of the matrimonial domicile), they have contrived to escape the mandate of the place of wrong formula. They have occasionally declined to enforce the law of the place of wrong on the ground that it was antagonistic to the public policy of the forum. In short, the choice of law for torts has really been determined, in the American cases, by a rather complex technique involving the manipulation of several choice-of-law formulas.\^24

\^20 See 1959 Proceedings, pp. 79-88.
\^23 See Haumschild v. Continental Casualty Co. (1959), 7 Wis. 2d 130, 95 N.W. 2d 814, discussed in Hancock, op. cit., footnote 20; Koplik v. C. P. Trucking Corp. (1958), 27 N. J. 1, 141 A. 2d 34.
\^25 For a more detailed description of this technique see, Hancock, Three Approaches to the Choice-of-Law Problem: The Classificatory, the
During the last decade a number of American courts have expressed strong dissatisfaction with the place-of-wrong formula and the use of ancillary formulas to avoid its application. They have, in effect, cast aside this bewildering array of overlapping inconsistent choice formulas and directly confronted the basic elements of the choice-of-law problem. Those elements are, of course, the facts (including the parties’ domiciles) which are connected with two different political communities, and the relevant domestic laws of these political communities each of which implements a different social policy. Since the litigation normally (though not invariably) occurs in a court of one of these political communities, the problem becomes for that court a problem of construction or interpretation. The court must decide whether, given the policy underlying its local statute or non-statutory rule, that rule or statute should be applied to the facts of the case before it. Since some of these facts are not connected with the forum, the problem is seen to be one of a familiar type: that of applying a statute or other legal rule to a marginal and unforeseen set of facts. Since the facts may or may not also fall within the policy-determined coverage of the other community’s local law, that question must also be resolved. In the light of such an analysis the court should be able to make a rational, purposeful choice between the relevant laws and policies of the two communities.

For example, suppose that in 1965 H, a host driver domiciled in New York State agreed to give G, also domiciled there, a free automobile ride from a place in New York to a place in Ontario and back again. Owing to H’s negligence in driving at an excessive speed an accident occurred in Ontario resulting in serious injury to G. G sued H in New York under whose domestic law host drivers were liable for the negligent injury of their guest passengers. They were not so liable under that of Ontario. A New York judge approaching this case as a problem of legal construction might start with either the New York law or that of Ontario. Taking Ontario law first he might reason that since the obvious

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26 In the usual case. In some cases more than two political communities may be involved.

27 The social background and purposes of the Ontario guest statute are fully explained in Linden, Comment (1962), 40 Can. Bar Rev. 284.
purpose of the Ontario statute was to benefit host drivers by compelling gratuitous passengers to accept the risk of their hosts’ errors in driving it must have been primarily designed to benefit host drivers who were domiciled in Ontario. Why should it be extended to protect a host driver domiciled in New York? No doubt if Ontario law had imposed liability there would have been good reasons for its application; Ontario’s claim to impose liability on drivers who had exceeded her speed limits, Ontario’s humanitarian interest in compensating those who had suffered personal injuries within her borders, Ontario’s concern that her residents who had cared for such injured persons be paid for their services. But in the instant case Ontario law would have denied liability even though its speed regulation had been violated. On the other hand New York’s policy of compensating injured guest passengers would suggest that its law should cover the case of a New York passenger injured by the negligence of a New York driver even though the accident occurred at a time when their journey had taken them beyond the borders of the state. Thus the case would seem to be an easy one in which the policies of the two political communities diverged but did not conflict.\(^{28}\)

The facts of our hypothetical example are the same as those of Babcock v. Jackson\(^ {26}\) in which the New York Court of Appeals, abandoning the place of wrong formula, enforced the New York law. Before proceeding to analyze the policies of the New York and Ontario laws the court announced its adherence to a new and more flexible choice formula:

Justice, fairness and the best practical result may best be achieved by giving controlling effect to the law of the jurisdiction which, because of its relationship or contact with the occurrence or the parties, has the greatest concern with the specific issue raised in the litigation.\(^{30}\)

\(^{28}\) It is generally assumed that one purpose of statutes restricting liability to guest-passengers is the protection of insurers against admissions of carelessness by insured hosts made to facilitate the guests’ recovery. If we assume that the New York driver has been insured by an insurer who has no connection with Ontario, there is no reason why the Ontario statute should protect that insurer. Even if we assume that the New York driver’s insurer carries on business in Ontario, it seems unreasonable to contend that the Ontario statute should be extended to extinguish the liability of the New York driver to a New York passenger in order to relieve the insurer of liability under a contract made with the New York driver. The claim of New York to provide compensation to its injured citizen (the passenger) by its tort feator citizen (the driver) and his insurer is entitled to greater consideration. It should also be noted that the circumstance of the injury having occurred in Ontario furnishes no ground for the application of Ontario law to protect the insurer.

\(^{26}\) Supra, footnote 25.

\(^{30}\) Ibid., at p. 481 (N.Y.), emphasis added.
How was the extent of each jurisdiction's concern with the issue to be determined? The court answered this question with a practical demonstration in which it determined the policy ranges of the New York and Ontario laws as follows:

New York's policy of requiring a tort-feasor to compensate his guest for injuries cannot be doubted—as attested by the fact that the Legislature of this State has repeatedly refused to enact a statute denying or limiting recovery in such cases . . . —and our courts have neither reason nor warrant for departing from that policy simply because the accident, solely affecting New York residents and arising out of the operation of a New York based automobile, happened beyond its borders. *Per contra*, Ontario has no conceivable interest in denying a remedy to a New York guest against his New York host for injuries suffered in Ontario by reason of conduct which was tortious under Ontario law. The object of Ontario's guest statute, it has been said, is to prevent the fraudulent assertion of claims by passengers, in collusion with the drivers, against insurance companies31 . . . and quite obviously the fraudulent claims intended to be prevented by the statute are those asserted against Ontario defendants and their insurance carriers, not New York defendants and their insurance carriers. Whether New York defendants are imposed upon or their insurers defrauded by a New York plaintiff is scarcely a valid legislative concern of Ontario simply because the accident occurred there, any more so than if the accident had happened in some other jurisdiction.32

The court noted that a rule of Ontario law regulating conduct within its borders would, of course, be enforced by a New York court because of Ontario's primary concern in such matters. The purpose of the Ontario guest statute, however, was not to regulate conduct but to confer a special immunity upon host drivers.

Although the New York rule imposing liability for injuries to guest passengers was of a non-statutory character the court applied to it the same technique of statutory construction that it applied to the Ontario statute. Treating the instant case as an unforeseen, borderline problem the court used the policy of the New York non-statutory rule to show that it ought to cover that case. Repeated refusals of the New York legislature to enact a statute resembling that of Ontario were used to justify the court's refusal to apply such a law to a case involving two New York citizens.

Another device for bringing the state's legislative policy to bear upon the solution of a choice-of-law problem was employed by Mr. Justice Keating in the subsequent and similar case of *Macey v. Rozbicki*.33 In the latter case the parties' intended sojourn

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31 See footnote 28, *supra* (Author's footnote).
32 *Supra*, footnote 25, at p. 482 (N.Y.).
33 (1966). 18 N.Y. 2d 289, 221 N.E. 2d 380. This case virtually over-
in Ontario was somewhat longer than in *Babcock v. Jackson* and the unfortunate motor trip began and ended in Ontario. Nevertheless the court reached the same result. In his concurring opinion Mr. Justice Keating quoted a general declaration of New York policy contained in the New York compulsory insurance law:

> The legislature is concerned over the rising toll of motor vehicle accidents and the suffering and loss thereby inflicted. The legislature determines that it is a matter of grave concern that motorists shall be financially able to respond in damages for their negligent acts so that innocent victims of motor accidents may be recompensed for the injury and financial loss inflicted upon them.\(^{34}\)

The compulsory insurance law also required that every automobile liability insurance policy issued under it should provide insurance,

> ... against loss for the liability imposed by law for damages ... arising out of the ownership, maintenance, use or operation of [said] motor vehicle ... within the state of New York or elsewhere in the United States in North America or in the Dominion of Canada.\(^{35}\)

In the light of these enactments Mr. Justice Keating concluded that the legislative concern of the state of New York rather clearly extended to the case of a New York guest passenger injured in the province of Ontario. Moreover, in the instant case there could be no conflict between this policy and the Ontario policy favoring the host driver and his insurer because the latter would naturally extend only to Ontario drivers and their insurers.

If the technique of statutory construction employed by the New York Court of Appeals in these two recent cases appears novel this is only because it has been generally ignored by both British and American commentators of the twentieth century. One who turns to the older cases will find examples of its use for resolving choice of law questions by both British\(^{36}\) and American\(^{37}\) judges. It was, for example, very explicitly used by Lord Haldane when he delivered the judgment of the Privy Council in *Can. Pac. Ry. v. Parent.*\(^{38}\) In that case a stockman taking care of cattle on one of the defendant's trains was killed in a collision in On-

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36 See footnote 43, infra.

37 See footnote 44, infra.

38 *Supra,* footnote 12.
tario resulting from the negligence of the defendant's employees. His widow brought suit on behalf of herself and her children in Quebec, where she and the decedent were domiciled, to recover the damage occasioned by his death under Quebec's Civil Code, article 1056. He had entered into a contract absolving the railway from all liability with respect to his death or injury because he was travelling at a reduced fare; this contract would have been a defence to the widow's suit under Ontario law but was not a defence to a suit under article 1056 of Quebec's Civil Code. Counsel for the widow contended that this article should extend to the facts of the instant case even though the injury causing death had occurred outside Quebec. Lord Haldane (who had already held that the widow could not succeed under the Phillips v. Eyre formula because the defendant's acts were neither actionable nor criminal by Ontario law) disposed of the statutory construction contention as follows:

The other point that remains is whether article 1056 of the Quebec Civil Code ... conferred a statutory right to sue in the events which happened. Their Lordships answer this question in the negative. The offence or quasi-offence took place, not in Quebec but in Ontario. The presumption to be made is that in enacting article 1056 the Quebec Legislature meant, as an Act of the Imperial Parliament would be construed as meaning, to confine the special remedy conferred to cases of offences or quasi-offences committed within its own jurisdiction. There is, in their Lordships' opinion, nothing in the context of the chapter of the Code in which the article occurs which displaces this presumption in its construction. . . . No doubt the Quebec Legislature could impose any obligations in respect of acts done outside the province on persons domiciled within its jurisdiction, as the railway company may have been by reason of having its head office at Montreal. But in the case of article 1056 there does not appear to exist any sufficient reason for holding that it has intended to do so, and by so doing to place claims for torts committed outside Quebec on a footing different from

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39 "In all cases where the person injured by the commission of an offence or a quasi-offence dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right . . . to recover from the person who committed the offence or quasi-offence, or his representatives, all damages occasioned by such death."


41 The Ontario wrongful death statute, like Lord Campbell's Act, required the plaintiffs to show that the decedent, had he lived, could have maintained a suit for damages. In the Parent case the decedent who was travelling on a pass had contracted himself out of all recourse against the defendant railroad and could not have maintained such an action. Moreover, the railroad had not, in its corporate capacity, committed any criminal act. Hence the plaintiff's only chance of recovery was to make out a cause of action under the Quebec Civil Code, art. 1056.
that on which the general rule of private international law already referred to would place them.\(^{42}\)

Lord Haldane's analysis is, if anything, more explicitly couched in terms of statutory construction than that of the New York judges. The New York judges were actually construing a common law rule; they turned to the legislative record for declarations of policy which would indicate to them how far they should extend the common law rule in relation to New York domiciliaries injured outside New York. Lord Haldane's problem was simply to determine how far the Quebec statute should extend in relation to Quebec domiciliaries whose deceased relative had been killed outside Quebec. The principal similarity between the two modes of analysis is that the choice problem is seen to be a problem of construction; a problem of determining whether a rule of domestic law (statutory or non-statutory) should be applied to a marginal and unforeseen case. But the techniques of construction employed were quite different. The New York judges looked to the legislative record and the policy of the New York rule which they found to be the protection of New York guest passengers whether injured in New York or elsewhere. Lord Haldane was content to look no further than "the context of the chapter of the Code" in which article 1056 occurred. Had he been persuaded to consider the policy of article 1056 it seems likely that he would have reached a different conclusion. For the obvious purpose of article 1056 was to compensate the near relatives of the decedent for the economic benefits they would have received from him had he lived. The primary object of the Quebec legislature's concern would naturally be widows and children domiciled in Quebec and their loss would be the same whether their decedent was killed in Quebec or elsewhere. Article 1056 did not prescribe admonitory rules of conduct so Lord Haldane's presumption of a territorial limitation was decidedly inappropriate.

Both Lord Haldane and the New York judges alluded to their respective traditional choice-of-law formulas. Lord Haldane treated the second branch of the Phillips v. Eyre formula as a prima facie rule of statutory construction which might be displaced by a statute of the forum that, expressly or by implication from its context, purported to confer a remedy for acts done outside the forum. The New York judges who were profoundly dissatisfied

\(^{42}\) Supra, footnote 12, at pp. 205-206. The "general rule of private international law already referred to" is, of course, the Phillips v. Eyre doctrine referred to in the preceding paragraph of the opinion.
with their simplistic choice formula for tort liability and its ancillary escape rules decided to seize the opportunity to get rid of it once for all. While their desire to do so is quite understandable, it is submitted that Lord Haldane's position was also perfectly correct; there is no necessary inconsistency between the practice of analyzing choice cases as problems of construction and adherence to a choice-of-law formula as a prima facie rule of construction. Choice-of-law formulas have no special authority which permits them to override a domestic rule of the forum, (statutory or otherwise) whose clearly-evinced policy calls for its application in a particular interstate case. In a novel interstate case involving a domestic rule whose policy scope with respect to such a case has not been previously adjudicated, choice-of-law formulas are nothing more than over-extended, undiscriminating obiter dicta.

To some these conclusions may sound strange because orthodox British and American commentators have in the past placed so much emphasis upon choice-of-law formulas as to suggest that they are the alpha and omega of the science of conflict of laws. The use of the technique of statutory construction to determine the policy range of domestic rules in choice-of-law cases has virtually gone unnoticed until recent years. Yet both Lord Haldane and the New York Court of Appeals could have cited opinions in older cases employing the construction technique had they thought it necessary to do so. It was used in a number of English cases involving international torts prior to Phillips v. Eyre and in a notable series of New York cases involving limitations on testamentary charitable gifts.

In Madraco v. Willes (1820), 3 Barn. & Ald. 352, a Spanish merchant sued a British naval commander for the value of a cargo of 300 slaves taken from him on the high seas while he was transporting them to Cuba. The traffic in slaves was permitted by Spanish law at the time of the seizure. A British statute (1811, 51 Geo. III, c. 23) declared the slave trade to be contrary to the principles of justice, humanity and sound policy. Nevertheless, after considering the provisions of a later British statute (1818, 58 Geo. III, c. 36) the court of King's Bench concluded that because the plaintiff, a Spanish subject, was carrying on the slave trade outside British dominions, he was entitled to recover damages in a British court for the wrongful seizure of his slaves.

For cases in which the scope of statutes limiting the liability of shipowners was determined on principles of statutory construction, see Cope v. Doherty (1858), 4 K. & J. 367, aff'd 2 De Gex & J. 614; The Antilia (1863), 1 Moo. P.C. N.S. 471. See also The Zollverein, [1856] Swab 96 (British statutory rules of navigation not applicable to foreign ships on high seas). The Nostra Signora de los Dolores, [1813] Dodson 290 (statutory defence of English shipowner not available against foreign plaintiff).

These cases are discussed in Hancock, In the Parish of St. Mary le Bow in the Ward of Cheap (1964), 16 Stan. L. Rev. 561.
III. Sound Decisions Based on Unsound Reasoning in the Recent Canadian Cases.

Why have the orthodox commentators constantly emphasized the traditional choice-of-law formulas while neglecting the technique of statutory construction and the policies of domestic laws? Apparently because so far as these commentators have considered policies and values they have concerned themselves almost exclusively with certain abstract policies or values supposed to encourage the application of the established choice formulas, such as the enforcement of rights created by territorial laws, uniformity and predictability of decisions, the fulfillment of the parties' reasonable expectations (if any), the use of simple formulas that can be easily applied, and so on. The commentators' attention has thus been distracted from the particular policies of domestic rules to the more abstract policies supposedly achieved by the traditional system.

Rather different has been the outlook of the advocates and judges who actually litigated and decided the cases. For them the litigation of a choice-of-law case was an out-of-the ordinary experience. In their day-to-day work they were almost exclusively concerned with rules of domestic law and with the policy considerations supporting or limiting those rules. Such specialized knowledge as they possessed was specialized knowledge of domestic law: real property, commercial law, wills, trusts, and so on. Though on the rare occasions when they litigated a choice-of-law case they turned to the commentators for guidance, they were probably much less impressed than the commentators by the futuristic and abstract policies supposedly supporting the traditional formulas. They were inclined to attack the problem as one of choosing between two different domestic rules and to base the choice upon a consideration of the policies of those rules in relation to the parties and the facts. This tendency explains the older cases in which a statutory construction analysis was explicitly adopted. Even in those cases the choice formulas were not completely ignored but were sometimes manipulated to produce the same result as the construction analysis. In many other cases

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46 For a pointed criticism of the traditional system, see Currie, Conflict Crisis and Confusion in New York, [1963] Duke L.J. 1, at pp. 7-22.
47 See footnotes 43, 44, supra.
48 See the American torts cases cited in footnotes 20, 21, and 22, supra. Other cases of this type are discussed in the article cited in footnote 44,
although the opinions contain no explicit construction analysis, the results clearly suggest that such an analysis was in the judges' minds. In these cases also choice formulas often appear to have been manipulated to obtain the desired result.

This phenomenon of an apparent but unspoken judicial construction combined with an obvious manipulation of the traditional formulas can be clearly observed in a series of Canadian torts cases. In these the courts reached the same enlightened results as the Babcock and Macey cases almost twenty years earlier. When, in the Babcock case, the New York Court of Appeals decided to allow recovery by a guest in the teeth of the place of wrong formula, the majority cited McLean v. Pettigrew, the major case of this series, as a decision upon almost identical facts supporting their conclusion. But because of the indiscriminate character of the traditional formula employed, the Canadian courts encountered serious difficulties.

The series began with Howells v. Wilson decided by the Quebec Court of King's Bench in 1936. The parties were domiciled in Quebec whose law has always permitted recovery by guest-passengers against host-drivers for injuries caused by ordinary negligence. The plaintiff guest-passenger was seriously injured when the defendant's car left the road and struck a telegraph pole in Vermont. Vermont law prohibited recovery by a guest-passenger unless the host-driver was guilty of "gross or wilful negligence". The purpose of this law was the same as that of the more stringent Ontario statute considered in Part II, the protection of host-drivers and their insurers from damage claims by gratuitous passengers. Had the judges chosen to analyze the choice-of-law problem as one of statutory construction they would have been clearly justified in holding that the facts were within the policy range of article 1053 of the Quebec Civil Code and that Vermont (like Ontario) had no concern with the application of its guest statute to this particular case. But the Quebec judges did not explicitly articulate such an analysis because the first rule in Phillips v. Eyre obviously enabled them to reach the same result. Only

\[\textit{supra and in Hancock, Equitable Conversion and the Land Taboo in Conflict of Laws (1965), 17 Stan. L. Rev. 1095.}\]

\[\textit{Supra, footnote 12.}\]

\[\textit{(1936), 69 Que. K.B. 32. Though decided in 1936, this case was not reported until 1940.}\]

\[51 \text{"Every person capable of discerning right from wrong is responsible for the damage caused by his fault to another whether by positive act, imprudence, neglect or want of skill."}\]

\[52 \text{Mr. Justice St-Germain did not discuss the Phillips v. Eyre formula}\]
six years before the Supreme Court of Canada had held that Quebec courts (having no specific statutory choice rules for torts) should take the Philips v. Eyre formula as their guide and in this instance the Quebec judges were quite content to do so. It was, of course, necessary under that formula to find that the defendant's conduct was not justifiable by Vermont law. But according to the standard version of the formula his conduct, if punishable by that law, was not justifiable. Since he had pleaded nolle contendere in a Vermont court to a charge of reckless driving and paid his fine the court found his conduct not justifiable by Vermont law and proceeded to hold him civilly liable under the law of Quebec.

It does not seem to have occurred to any of the judges in Howells case that there were extraordinary implications involved in the announcement that Quebec was prepared to enforce its statutory liability to guest passengers in any case where the host driver's negligence had violated a penal law of the place of injury. The judges were confronted by these extraordinary implications only a year later when the preposterous case of Lieff v. Palmer was argued before the same court. It was a guest passenger's suit against her host driver for injuries sustained in Ontario. Both parties were domiciled in Ontario whose stringent guest liability statute of that date would have been an absolute bar to recovery. Nothing daunted, plaintiff's counsel filed suit in Quebec and was fortunate enough to find the defendant in Hull where she was served with the process of the court. (From the fact that the parties were friends it may be inferred that the defendant expected her insurer to pay the damages and that her opportune presence in Hull was not purely fortuitous.) Plaintiff's counsel contended that since the defendant driver had lost control of her car and struck a tree she must have committed some traffic offense which made her conduct non-justifiable under Ontario law. Hence, as in the Howells case, the court should hold her civilly liable to her guest passenger under the law of Quebec.

An analysis emphasizing the policies of the Quebec and Ontario domestic rules would have demonstrated that the Howells

but contented himself with a brief remark to the effect that the Quebec law of torts should be applied to a case in which one Quebec domiciliary had been injured by another. (See supra, footnote 50, at p. 54.) He dissented from the majority judgment for the plaintiff on the ground that procedural errors in the trial court required a new trial.


Supra, footnote 8.
case was as different from *Lieff v. Palmer* as day from night and that the application of Quebec law in the latter case would have constituted a meddlesome interference with the internal legal order of a sister province. In the *Howells* case the government of Quebec had a legitimate claim to apply its law for the protection of a guest passenger domiciled in Quebec who had been injured by another Quebec domiciliary, regardless of where the injury had taken place. Moreover, no countervailing policy of Vermont was involved in a controversy concerning guest-host liability between two Quebec people. Vermont's sole concern in the matter was that the defendant should be punished for driving recklessly on a Vermont highway and this had been done. But in *Lieff v. Palmer*, the parties were not domiciled in Quebec. Had the injury occurred in Quebec, that province would have had a well-recognized claim to compensate the victim of a highway accident occurring within its borders even though she was not domiciled in the province. But since the injury to the plaintiff occurred outside Quebec no rational claim whatever could be made for the application of Quebec law. Ontario, on the other hand, had a very strong claim for the application of its law, designed to protect host-drivers and their insurers, to a controversy between parties who both belonged to the Ontario political community. Why should Quebec, having no concern in the matter, assist Ontario people to evade the law of their province?

The five judges of the Court of King's Bench (and the trial judge) all agreed that it would be wrong to apply the law of Quebec to the instant case but their stated reasons were different. An easy way to avoid the whole problem was to find as a fact that although the defendant had crashed into a tree she had done nothing punishable under the Ontario highway laws; two of the judges rested their decision on this ground alone. But the other judges apparently realized that even if the evidence of criminality had been overwhelming it would still have been wrong to extend the protection of Quebec law to the plaintiff. Hence they all criticized the standard version of the *Phillips v. Eyre* formula, followed in *Howells v. Wilson*, permitting a Quebec court to apply its domestic law if the defendant's conduct was punishable by Ontario law and insisted that plaintiff could not succeed unless the defendant's conduct was actionable by Ontario law. A clear

52 See text at footnote 27, *supra*.
53 Mr. Justice Galipeault and Mr. Justice Walsh.
54 "En somme, un étranger peut sans doute être poursuivi devant les tribunaux de la province de Québec (C.C. art. 27); mais il ne doit pas
The final and most important case in this series was McLean v. Pettigrew, decided by the Supreme Court of Canada in 1945. The action was brought in Quebec; the facts were practically the same as those of Howells v. Wilson except that the accident occurred in Ontario instead of Vermont and that the defendant, though charged in Ontario with "driving without due care and attention," in violation of the Ontario Highway Traffic Act, had been acquitted. But this judgment was not binding upon the parties to the civil action, the trial judge held that the defendant's acts were not justifiable under Ontario law because he had in fact violated the Ontario penal statute. He also found the defendant guilty of negligence causing injury to the plaintiff guest passenger which would have entailed civil liability under article 1053 of the Quebec Civil Code. In view of these findings the Supreme Court of Canada blandly followed the Phillips v. Eyre formula and affirmed a judgment for the plaintiff. In the light of our previous analysis the result was clearly correct but the reasoning was surely open to serious question. Lieff v. Palmer had shown that the standard version of the Phillips v. Eyre formula could lead to absurd results and the Quebec judges had criticized it for this reason. If Canadian courts were nevertheless supposed to follow that treacherous formula, it was incumbent upon the Supreme Court to explain its spectacular breakdown in Lieff v. Palmer and to suggest suitable limitations upon its use. No doubt the Supreme Court judges realized, as the trial judge had realized, that Lieff v. Palmer could be distinguished from McLean v. Pettigrew because the parties in the former case were not domiciled in ...
in Quebec. But this ground of distinction was not sufficient to save the credit of the Phillips v. Eyre formula which took no account whatever of the parties’ domiciles. Any attempt to reconcile Lieff v. Palmer with the formula would have required its drastic reconstruction. Being unwilling to undertake such a reconstruction, the Supreme Court casually cited Lieff v. Palmer without any attempt to distinguish, explain or discuss it.

IV. Conclusion: the Report of the Committee of the Commissioners on Uniformity of Legislation.

We are now in a position to summarize the most obvious defects of the place of wrong formula and the Phillips v. Eyre formula. Their chief vice, common to both, is that they are crude and simplistic, trying to resolve too many problems with a few words. They consequently point to sound results in some cases and unsound results in others. Each one has its own peculiar defects.

When the facts of a given case clearly place it within the policy scope of a statutory or non-statutory rule of the forum (which contravenes a rule of the place of wrong), the place of wrong formula presents a serious obstacle to a correct decision. The formula must be circumvented, as in the American cases by the escape device of classifying the issue as remedial, contractual, quasi-contractual, and so on, or by holding that the foreign law is antagonistic to local public policy. These escape devices, however, often have objectionable implications which lead to difficulties in subsequent cases. From a Canadian point of view, the most serious objection

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62 In view of the clear statements by three of the judges in Lieff v. Palmer that delictual liability should be governed by the law of the place of wrong, Mr. Justice McDougall developed in Assad v. Latendresse (1941), 79 Que. S.C. 286 (a case on all fours with McLean v. Pettigrew) a theory that the host-driver owed a contractual obligation to his guest-passenger to drive carefully, governed by the law of Quebec where their contract was made. For the same reason this alternative classification of the host-driver's duty as contractual was employed by the judges of the Court of King's Bench to justify the plaintiff's recovery in McLean v. Pettigrew. See supra, footnote 12, at p. 67 (S.C.R.). But this alternative classification was strongly disapproved in a learned and elaborate judgment by Taschereau J. speaking for the Supreme Court of Canada. See supra, footnote 8.

63 See supra, footnote 8.

64 In a penetrating analysis written shortly after the decision in McLean v. Pettigrew, Dean Falconbridge remarked upon the Supreme Court's failure to distinguish Lieff v. Palmer and suggested that its silence on the point was "apparently deliberate". See Comment (1945), 23 Can. Bar Rev. 309, at p. 315, footnote 27.

65 See text accompanying footnotes 20, 21 and 22. See also footnote 63, supra.

66 E.g., the statement by a court that a rule of forum law is remedial or procedural clearly implies that the rule should be applied in all cases.
to the place of wrong rule is its utter inconsistency with the sound and sensible results reached by the courts in *Howells v. Wilson* and *McLean v. Pettigrew*.

There is one further objection to the place of wrong formula which appears when, although the place of wrong is also the forum, the law and policy of another state are properly applicable to the case while those of the forum are not. For example, suppose that in *Howells v. Wilson* the Quebec guest passenger had sued her host in Vermont where the injury occurred. Our analysis of the case showed that Quebec alone had any interest in the outcome, yet a Vermont court, following the place of wrong formula, would have had to apply the Vermont rule requiring the plaintiff to prove gross negligence or lose her suit.

The defects of the *Phillips v. Eyre* formula are different and more complex. Since it places so much emphasis upon the law of the forum, the Quebec judges were compelled to reject it in *Lief v. Palmer* to avoid officious intermeddling in a case which had no connection whatever with Quebec. In *McLean v. Pettigrew* and the *Howells* case where the parties were both domiciled in Quebec, the formula fortuitously produced the right result for the wrong reason, that is, because Quebec happened to be the forum. But even in these cases the formula quite unnecessarily required the court to find the defendant guilty of some punishable offence under the law of the place of wrong. Since, as our analysis has demonstrated, the cases fell within the policy range of Quebec's civil statute and the place of wrong had no concern in the outcome of the civil suit, the question whether its law imposed a criminal sanction was totally irrelevant. This pointless requirement could easily become a serious obstacle to a correct decision. For example, if in *McLean v. Pettigrew*, the car had been negligently driven by an employee of the defendant host the plaintiff would have been denied recovery against the host because he could not show that the host was subject to criminal sanctions under Ontario law.

**Litigation at the forum, including those whose facts have no connexion with the forum.** Such a statement can have the same unfortunate effect as the *Phillips v. Eyre* formula had in *Lief v. Palmer*; it can encourage the litigation at the forum of cases with whose outcome the forum has no concern whatever merely because counsel hope to persuade the court to apply its so-called remedial rule. The problem is discussed in Hancock, *op. cit.*, footnote 20, at pp. 260-263.

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*Supra*, footnote 50.

*Supra*, footnote 8.

This situation arose in *Can. Pac. Ry. v. Parent*, *supra*, footnote 12 discussed in the text at footnote 41, *supra*.
The most flagrant defect of the *Phillips v. Eyre* formula, however, is that in its negative aspects it closes the courts of every Canadian province to any cause of action not recognized by local domestic law. There may, of course, be cases in which the facts or the parties are so connected with the forum province that it will quite legitimately insist upon the application of its own law protecting the defendant. Such a case was *O'Connor v. Wray* where the defendant, domiciled in Quebec lent his car in Montreal to a friend named Cochrane for a trip to Arnprior, Ontario. Driving while intoxicated in Ontario, Cochrane negligently killed an Ontario domiciliary. Under the law of Ontario the defendant owner of the car would have been civilly liable for damages for the wrongful death resulting from its operation with his consent. Since the decedent was domiciled in Ontario that province had a real concern for the application of its law. On the other hand, a Quebec statute which at one time had imposed a similar liability upon owner-lenders of automobiles had been expressly amended to abolish that liability. Quebec, since the defendant was domiciled there, had likewise a strong claim that its law and its policy should determine the outcome. Such cases obviously cannot be resolved with complete fairness to both political communities. The action, however, was brought in Quebec and the Quebec court (affirmed by the Supreme Court of Canada), held following

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71 *Supra*, footnote 8.

72 Such was the construction put upon the Ontario Highway Traffic Act, S.O., 1923, c. 48, s. 42(1) by a majority of the judges: Anglin C.J. (dissenting) Smith and Lamont JJ. Since the law of the forum (Quebec) was held to be otherwise, thus preventing any recovery under the first rule of the *Phillips v. Eyre* formula, it was not really necessary to determine the effect of the Ontario law.

73 The Quebec legislative history is detailed by Newcombe J., *supra*, footnote 8, at p. 250 (S.C.R.). All the judges except Anglin C.J. (dissenting) agreed with this view of the Quebec law. Since 1960 the Quebec law has been similar to that of Ontario. See R.S.Q., 1964, c. 232, s. 3.

74 Another example of irreconcilable conflict between the laws of two provinces connected with the case is *Poulin v. Delangis*, [1944] Que. S.C. 5. The plaintiff, a guest-passenger domiciled in Quebec, was injured while riding with the defendant host-driver in Quebec. As an Ontario domiciliary, the defendant was one of the class of persons whom the Ontario statute was meant to protect. On the other hand, Quebec had a strong concern for the compensation of the injured plaintiff, not only because he was a Quebec domiciliary but because he had been injured in Quebec. Disregarding the Ontario law, the judge sustained the plaintiff's suit relying upon the general language of the Quebec Civil Code, art. 6.

76 Obviously the best strategy for plaintiff's counsel would have been to bring the action in Ontario, if possible. But this would have been very difficult if we assume that the defendants could not be served with a writ of summons in Ontario. Although Ontario courts exercised jurisdiction in cases where a tort had been committed in Ontario, this power had been restricted by judicial construction to cases in which the defendant had
the *Phillips v. Eyre* formula that since the plaintiff had no cause of action under Quebec domestic law his suit must fail. In view of Quebec's strong concern for the protection of the defendant, implicit in its legislative record, the result was perfectly acceptable. But the rule laid down by the Supreme Court goes far beyond this case and would compel a Canadian province to reject a cause of action arising under the law of a sister province even though the forum had no concern whatever with the matter except that the defendant had taken refuge there to avoid liability."

_himself done some act in Ontario causing the injury complained of. See Anderson v. Nobels Explosive Co. (1906), 12 O.L.R. 644; Paul v. Chandler & Fisher Ltd. (1924), 54 O.L.R. 410. These cases would have presented a serious obstacle to any attempt to bring the action in an Ontario court._

"This over-extended and indiscriminate principle was derived from the English admiralty case, *The Halley*, supra, footnote 6, in which, as in *O'Connor v. Wray*, the domestic rule of the forum was applied to protect the defendant, a member of the forum political community. The defendant was an English corporation, owner of the steamship Halley which struck and damaged the Norwegian barque, Napoleon in Belgian territorial waters. The collision was due to the improper navigation of the Halley which was under the control of a compulsory pilot. Under Belgian law the owners of the Halley were responsible for the damage. As to Norwegian law no evidence was given. Section 388 of the English Merchant Shipping Act of 1854, 17 & 18 Vict., c. 104, provided that "No owner or master of any ship shall be answerable to any person whatever for any loss or damage whatever occasioned by the fault of any qualified pilot acting in charge of such ship within any district where the employment of such pilot is compulsory by law." By section 330 the fifth part of the Act which included section 388 was made to apply to the United Kingdom only. Similar statutory provisions had been in force since 1812. (See Marsden, *Collisions at Sea* (10th ed., 1953), p. 247). Such statutory provisions had also been held to be declaratory of the common law of master and servant. (See *The Maria* (1839), 1 W. Rob. 95.) The obvious purpose of this law was to exonerate English shipowners from liability for the acts of a pilot whom they had not chosen and over whom they had no control; the loss was thereby thrown upon the owner of the injured vessel or his insurer. No doubt Belgium had a legitimate concern to require compensation for foreign ships damaged in Belgian territorial waters. But England (like Quebec in the *O'Connor* case) had a strong concern to protect English shipowners from this type of vicarious liability wherever the ship might be. The decision was quite acceptable but there was no need to encumber the opinion with such an over-extended obiter dictum.

"The first rule of the *Phillips v. Eyre* formula, would compel undesirable decisions in two situations not previously noted. (1) Suppose in a case like *McLean v. Pettigrew*, one or both of the parties had moved to Ontario so that it was the more convenient forum. This rule seems to imply that an Ontario court must apply Ontario law in all cases where a tort has been committed in Ontario whether Ontario has any interest in the outcome or not. It would therefore be impossible for an Ontario court to reach the functionally sound result reached by the Quebec courts in *McLean v. Pettigrew* and by the New York courts in *Babcock v. Jackson*, supra, footnote 25. (2) Suppose that a gratuitous passenger, domiciled in Ontario, had sustained personal injuries in Quebec while riding with an owner-driver domiciled there and that Ontario was the most convenient forum. The policies of the Quebec law would seem clearly to call for its appli-
It should now be quite clear why Dean Horace E. Read's committee has decided to reject both the Phillips v. Eyre formula and the territorial place of wrong formula. They have decided to recommend that the Phillips v. Eyre formula be replaced by a uniform statute and they have put forward for discussion a tentative draft of such a statute. It reads as follows:

**Foreign Torts Act**

1. When deciding the rights and liabilities of the parties to an action in tort the court shall apply the local law of the state which has the most substantial connection with the occurrence and with the parties regardless of whether or not the wrong is of such a character that it would have been actionable if committed in this Province.

2. When determining whether a particular state has a substantial connection with the occurrence and the parties the court shall consider the following important contacts:
   
   (a) the place where the injury occurred;
   
   (b) the place where the conduct occurred;
   
   (c) the domicile and place of business of the parties; and
   
   (d) the place where the relationship, if any, between the parties is centered.

3. When deciding which state, among the states having any contacts within section 2, has the most substantial connection with the occurrence and the parties, the court shall consider chiefly the purpose and policy of each of the rules of local law that is proposed to be applied.78

What is the source of this statute? Though it resembles in some respects the tentative drafts of the Restatement, Conflict of Laws (Second)79 for this topic, its general conception is of British origin. As long ago as 1949 Professor J. H. C. Morris suggested that English courts could reach more satisfactory results by using a flexible choice rule in the field of torts similar to the well-established rule for determining the proper law of a contract.80 In 1951 he developed this idea more fully in his well-known article,

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79 (Tent. Draft No. 9, 1964), §379.
80 See Morris, Torts in the Conflict of Laws (1949), 12 Mod. L. Rev. 248 at p. 252.
The Proper Law of a Tort.\(^8\) In this article he suggested that American courts would find such a flexible choice rule more helpful and less constricting than the place of wrong formula. This forward-looking and persuasive article doubtless influenced, in part, the tentative formulation of the Restatement, Conflict of Laws (Second)\(^9\) and the reasoning of the New York Court of Appeals in the Babcock case.\(^3\) Apart from its general conception, however, the committee's statute differs markedly from both the Restatement (Second) and Professor Morris' pioneering proposal. It is uniquely the product of the thinking of Dean Horace E. Read and his colleagues.

If this statute were adopted in any particular province what would be its effect? Primarily it would focus the attention of judges and advocates upon the real basic problem of choice cases, the determination of the scope of the divergent domestic rules involved by considering their purpose and effect. According to section 3, in deciding which state's law is to be applied, "the court shall consider chiefly the purpose and policy of each of the rules of local law that is proposed to be applied". The use of this technique has been frequently demonstrated throughout this article. It has occasionally been explicitly adopted by judges in the past and has probably always influenced their thinking. But the clumsy and simplistic Phillips v. Eyre formula has always tended to obscure the real policy issues of the torts cases. This statute would restore those issues to their proper central position and completely eliminate the much criticized and overworked Phillips v. Eyre formula with its incidental absurdities.

On the other hand it should be observed that the statute would not have the effect of overruling any of the cases discussed in this article. Indeed it would be more consistent with one of those cases than the Phillips v. Eyre formula for the formula as applied in McLean v. Pettigrew cannot be reconciled with Lieff v. Palmer. Moreover, the statute would not have the effect of overruling any other decisions of the Supreme Court or the Privy Council.\(^4\) This

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\(^{81}\) (1951), 64 Harv. L. Rev. 881.

\(^{82}\) Professor Morris' article is cited in Restatement (Second), Conflict of Laws (Tent. Draft No. 9, 1964), p. 18.

\(^{83}\) Professor Morris' article was cited in the majority opinion in Babcock v. Jackson, supra, footnote 25, at p. 478 footnote 4 (N.Y.).

\(^{84}\) On the other hand, the rule that tort liability is determined exclusively by the law of the place of injury would, if adopted, have the effect of overruling the perfectly rational decisions of the Supreme Court of Canada in O'Connor v. Wray, supra, footnote 53 and McLean v. Pettigrew, supra, footnote 12, as well as the Privy Council's decision in The Halley, supra, footnote 6.
observation leads to a further question which has already been touched upon at several points: is it not possible for Canadian judges and advocates to avoid the extreme absurdities of the *Phillips v. Eyre* formula and to adopt the approach recommended by Dean Read and his committee without the aid of actual legislation? This suggestion can best be explained by a hypothetical example.

Suppose that in a case similar to *McLean v. Pettigrew* (parties domiciled in Quebec, injury to guest in Ontario) the parties moved to Ontario after the accident so that that province became the most convenient place to try the action. The action was brought in Ontario and the trial judge delivered the following opinion (after stating the facts):

At the time when this accident occurred both parties were domiciled in the province of Quebec which would have been their normal forum. I am satisfied that whether tested by the law of Ontario or that of Quebec the defendant was guilty of actionable negligence causing the plaintiff's injuries. But he was not guilty of "gross negligence" as defined by Ontario law.

Prior to the year 1935 the law of Ontario applied in cases such as this was virtually identical with that of Quebec and the plaintiff would have had a cause of action under the law of either province. In that year, however, the Ontario legislature enacted the "guest statute" which, in effect, prohibited all recovery by the plaintiff in a suit such as this. It is common knowledge that this statute was enacted with a dual purpose. It was intended to protect uninsured or partially insured defendants against claims by persons who were receiving the gift of a free ride and to protect insurers against the possibility that host drivers and guests might work in collusion against them. The statute has recently been amended to permit recovery upon a showing of gross negligence but its purposes remain the same. The ostensible beneficiaries of the statute have always been Ontario residents and their insurers. I cannot believe that our legislature intended to extend this protection to a Quebec host driver and his insurer as against another Quebec resident merely because their accident occurred in Ontario. It seems to me that this case should be decided as if the statute had never been passed.

Defendant's counsel has contended that to apply Quebec law in this case would be inconsistent with the *Phillips v. Eyre* formula which has been reiterated many times by courts of the highest authority. Strictly speaking, that formula purports to deal only with the case of a tort committed outside the forum. But the first branch of the formula clearly implies that the court of the forum will invariably apply its own law to torts committed there. And on this assumption the formula appears to forbid the enforcement of any cause of action not recog-

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65 *Supra*, footnote 10.  
nized by the forum's domestic law. The language of the formula is very broad indeed and as applied to the present case it can only be regarded as the sheerest dictum. The two leading cases in which it has been applied to bar a plaintiff from recovery are clearly distinguishable from this one. In each case the defendant was a domiciliary of the forum whom the law in question was designed to protect. I prefer to rest my judgment upon what I believe to be the proper construction of this statute as applied to the facts of this case.

The case of McLean v. Pettigrew clearly indicates that if this action had been litigated in Quebec the courts there would, in effect, hold that our guest statute ought not to be applied to this case. Though I would not consider myself bound by their opinion in such a matter I may say that their view confirms my own conclusion regarding the proper construction of our statute.

Would this judgment be reversed on appeal by higher Canadian courts? Would it receive the strong commendation of Canadian commentators? The answers to these questions must ultimately come from Canadian judges and commentators. In the meantime let us hope that Dean Horace E. Read's report receives the recognition and support that it deserves.

\footnote{O'Connor v. Wray, supra, footnote 53; The Halley, supra, footnote 6.  
 Supra, footnote 12.}