RAND ON CONFLICT OF LAWS:

AN INDEPENDENT VOICE

John P. McEvoy*

INTRODUCTION

In 1909, at twenty-five years of age, Ivan Rand commenced studies at Harvard Law School, perhaps then the only place for the study of Conflict of Laws (also known as Private International Law). This commitment is easily traced[1] to the influence of its Dane Professor of Law, Joseph Story, who published the first edition of his famous treatise on the subject in 1834.[2] Through various editions, Story's *Commentaries on the Conflict of Laws* served as primary course text until 1870 when Harvard Law dropped the course from the curriculum.[3] In 1886, it reappeared as a course "offered, at most, twice", and limited to the study of domicile, capacity and property.[4] In 1894, Conflict of Laws became a permanent course and enjoyed an annual place in the curriculum.[5] This commitment at Harvard and a few other law faculties was not necessarily shared by all law teachers. Upon the occasion of his address as the new president of the Association of American Law Schools in 1904, the then dean of law at Cornell University identified Conflict of Laws as "an excellent subject for broadening the mind... [but] might well be omitted" from a more streamlined curriculum that stressed the value of more fundamental courses.[6] Ivan Rand did not go to Cornell; he went to Harvard.

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* Professor, Faculty of Law, University of New Brunswick

1 J. H. Beale, "The Conflict of Laws, 1886-1936" (1937) 50 *Harvard Law Review* 887, at 888.

2 J. Story, *Commentaries on the Conflict of Laws* (Boston: Charles C. Little and James Brown, 1834). Its final edition is dated 1891.

3 *Supra* note 1, at 887. By then, Conflicts had been offered only "at short intervals" rather than annually.

4 *Ibid.*

5 *Ibid.* For an overview of the development of legal education at Harvard Law School, see R. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Chapel Hill: The University of North Carolina Press, 1983) at chapters 3 and 4. I am grateful to my colleague Edward Veitch for bringing this to my attention.

6 *Ibid.*, citing E. W. Huffcut, "The Elective System in Law Schools", [1904] *Proceedings of the*

Born in Moncton, New Brunswick, on 27 August 1884 to Nelson and Minnie Rand, he worked in the audit office of the Inter-Colonial Railway for five years before commencing studies at Mount Allison University in Sackville, New Brunswick, from which he graduated in 1909. The entering class of 1909[7] at Harvard Law consisted of 311 individuals, of whom 74 were Harvard graduates (23.8%), 38 graduated from other Massachusetts colleges (12.2%), 33 graduated from colleges elsewhere in New England (10.6%), 150 graduated from colleges outside of New England (48.2%), and 16 held no prior degree (5.1 %). Eighty colleges and universities were represented in this class but only one person came from Mount Allison. In its second year, the class of 311 reduced to 238 students[8] and in its third year to 219 students.[9] Even if the first year students of 1909-1910 had no basic comprehension of Conflict of Laws as an area of study, the *Harvard Law Review* of that year made sure that the subject was "in their face". At page one of issue number 1 of the 1909-1910 *Review*, dated November 1909, there appeared an article by Joseph H. Beale entitled "What Law Governs the Validity of a Contract" and the editors followed this with a second article at page 37 by Edwin H. Abbot, Jr. entitled "Conflict of Laws and the Enforcement of the Statutory Liability of Stockholders in a Foreign Corporation". The Beale article continued as the lead article in issue Number 2 of the *Review*, dated December 1909, commencing at page 79; as an article in issue Number 3, dated January 1910, at page 194; and concluded in issue Number 4, dated February 1910, commencing at page 260. In their second year, these same students were treated to a lead article (actually a letter) in issue Number 1 of the *Review*, dated November 1910, by A. V. Dicey in which he commented:

> All Souls [Oxford] has also created a Lectureship in Private International Law (Conflict of Laws). My studies have interested me much in the subject, and it is impossible I should not feel every wish that this branch of law should receive more attention than has hitherto been devoted to it in Oxford. The reason why it has been but slightly studied by undergraduates is that it is only in the B.C.L. examination that the subject of Conflict of Laws may be taken up by the candidate for a degree. *No man can for the moment expect that a very large class can be collected together for the study of a subject which, to those acquainted with it, presents special fascinations. Yet I am inclined to think that it ought to, and when its nature is well understood will draw to it a definite body of American students.*[10]

Association of American Law Schools 18, at 22.

[7] "The Law School" (1909-1910) 23 *Harv. L. R.* 132-33. The first year class averaged 252 persons during the ten preceding academic years (1899-1900 to 1908-1909). The first year curriculum consisted of Contracts, Criminal Law, Property Law, Torts and Civil Procedure.

[8] "The Law School" (1910-1911) 24 *Harv. L. R.* 137. The 1910 first year class of 296 students included two Canadians, one each from the University of New Brunswick and the University of Toronto.

[9] "The Law School" (1911-1912) 25 *Harv. L. R.* 169-70.

[10] A.V. Dicey, "The Extension of Law Teaching at Oxford" (1910-1911) 24 *Harv. L. R.* 1 at 4 [emphasis added].

In addition, Conflict of Laws subjects appeared repeatedly in "Notes" and summaries of "Recent Cases" in the three volumes of the *Harvard Law Review* published during Ivan Rand's period of study: 3 "Notes" and 11 "Recent Cases" in Volume 23; 6 "Notes" and 12 "Recent Cases" in Volume 24; and 4 "Notes" and 11 "Recent Cases" in Volume 25.[11]

Even if Ivan Rand somehow missed the message from the *Harvard Law Review*, Conflict of Laws would seem to have been a logical choice of study for him. From a bilingual city in a bilingual, bi-juridical country of then nine provinces and two territories with a sense of its place in the British Empire, he studied law in a country of then 46 states, a national capital district and additional territories.[12] Both were countries largely populated by immigrants from around the world. His father was a master mechanic with the railway; Ivan Rand himself had worked for the railway, and his uncle Dr. Silas Rand was known as a linguist and "missionary" to the Mi'kmaq peoples. One can easily speculate that he was imbued with a sense of connection with other peoples, places and communities. The call of Conflict of Laws would seem irresistible to a person like Ivan Rand, particularly at a place like Harvard Law School.

But Ivan Rand, law student, did not heed the call; he did not study Conflict of Laws with Professor Beale at Harvard.[13]

Had he done so, Ivan Rand would have become familiar with Ulric Huber's *De Conflictu Legum* (1689), often quoted by Story and in later editions of his 1834 treatise; Huber declared three fundamental principles for the area of law he called Conflict of Laws:

> 1st. The laws of every empire have force within the limits of that government, and are obligatory upon all who are within its bounds.
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> 2d. All persons within the limits of a government are considered as subjects, whether their residence is permanent or temporary.

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[11] Statistics based on the "Index-Digest" heading "Conflict of Laws" at (1909-1910) 23 *Harv. L. R.* vii-viii; (1910-1911) 24 *Harv. L. R.* v-vi; and (1911-1912) 25 *Harv. L. R.* vi.

[12] New Mexico became the 47th state of the United States on 6 January 1912; Oklahoma had become the 46th state on 16 November 1907.

[13] Course transcript information provided by Registrar's Office, Harvard Law School by telephone on 12 March 2003 and confirmed on 8 July 2003. The Registrar's Office indicated that each transcript was a pre-printed form listing available courses with a grade recorded beside courses taken by a student. The transcript of Ivan Rand recorded no grade beside "Con of Laws".

> 3d. By the courtesy of nations, whatever laws are carried into execution, within the limits of any government, are considered as having the same effect every where, so far as they do not occasion a prejudice to the rights of the other governments, or their citizens.[14]

If, instead of Story, the course text had been that other readily available text, Francis Wharton's *A Treatise on the Conflict of Laws or Private International Law*,[15] Ivan Rand would have been introduced to the views of Friedrich Carl von Savigny,[16] who in turn often quoted Huber. But, for whatever reason, Ivan Rand was not academically exposed to these giants of Conflicts scholarship.

ONE LAWYER'S EXPERIENCE WITH CONFLICTS

When legal counsel to Canadian National Railways, Ivan Rand represented the interests of that company and its subsidiaries before tribunals and courts. He had one experience with Conflict of Laws in the Supreme Court of Canada before his appointment to that Court; the appeal succeeded but not on Conflicts grounds.

The case was *Canadian National Steamships Company Ltd. v. Watson*.[17] Though Rand, K.C., appeared alone before the Court, other counsel had represented C.N. Steamships at trial and before the Quebec Court of Appeal.[18] Watson, a carpenter, had been hired in Montreal to serve on the *S.S. Cornwallis*, a British ship registered in Vancouver. While off Bermuda, en route from the West Indies to Charlottetown, Watson suffered serious head injuries on 6 November 1935 when swept by a wave twenty-five feet onto the bulkhead of the ship; at the time, Watson and other crew members were applying locking bars on the hatches ("batten down the hatches"). Back in his home jurisdiction of Quebec, Watson brought suit against his employer, C.N. Steamships, for damages claimed at $30,000. A jury found the employer at fault (quasi-delict) because of the failure of the chief officer to order the use of life lines but awarded Watson only $4000 in damages. Following this jury award, counsel for C.N. Steamships made a motion for judgment notwithstanding the verdict.

Specifically, counsel for C.N. Steamships argued application of the *Merchant Shipping Act, 1894*,[19] an imperial statute which permitted application of local law

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[14] As translated in *Emory v. Greenough*, 3 U.S. 640, 3 Dallas 369 (1797).

[15] 2nd ed. (Philadelphia: Kay and Brother, 1881).

[16] F. C. von Savigny, *A Treatise on the Conflict of Law,* translated with notes by W. Guthrie, 2nd ed. (Edinburgh: Clark, 1880).

[17] [1939] S.C.R. 11.

[18] C. A. Harwood, K.C., and W. A. Merrill, K.C., represented C.N. Steamships at trial reported at (1937) 75 Que. S.C. 124 and on appeal, reported at (1938) 64 Que. K.B. 11.

[19] 1894, c. 60 (U.K.).

to British ships registered in colonies, provided the relevant colonial law received imperial approval. In this era before the *Statute of Westminster, 1931*, the imperial statute governed Canadian registered ships, notwithstanding enactment by Parliament of the *Canada Shipping Act, 1927*, because the federal statute had not been approved pursuant to the imperial Act.[20] Exercising its post-*Statute of Westminster* authority, Parliament had enacted the *Canada Shipping Act, 1934*,[21] but that Act came into effect on 1 August 1936,[22] eight months after the date of the accident. Thus, by virtue of the imperial Act, counsel for C.N. Steamship argued application of the law of England as the *lex loci delicti* of a British ship on the high seas.[23] Specifically, counsel argued the common law doctrine of common employment, by which an injured employee could not sue an employer for injuries suffered due to the negligence of another employee (co-worker) – a doctrine which led to enactment of workers' compensation legislation to avoid the obvious inequities. Counsel proved the common law of England on this point. On the motion for judgment, the trial judge, Chief Justice Greenshields, rejected this argument and applied instead section 265 of the imperial Act (identical to section 281 of the Canadian Act):

> 265. Where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then, if there is in this Part of this Act any provision on the subject which is hereby expressly made to extend to that ship, the case shall be governed by that provision; but if there is no such provision, the case shall be governed by the law of the port at which the ship is registered.

Finding no relevant express provision in the legislation, the trial judge applied the law of British Columbia, being the law of the port. But, as counsel for the employer had proven the law of England (by the testimony of two expert witnesses) and not that of British Columbia, and had not alleged that the law of British Columbia was either the same as or different from the law of England, the trial judge invoked the rule that, in the absence of proof of foreign law, "it must be presumed to be the same as the law of the forum".[24] The law of Quebec did not recognize the doctrine of common employment, or any equivalent doctrine, so the trial judge ruled in favour of the plaintiff Watson and rejected the defence motion with the comment:

> A somewhat curious condition arises; an anomaly it may be called. This Court is bound by the law proved as a fact in the case, and failing proof by the Quebec law, this Court cannot take judicial cognizance of the law

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[20] *Canada Steamship Lines, Limited. v. Charland Limited.*, [1933] Ex. C.R. 147.

[21] S.C. 1934, c. 44.

[22] *Canada Gazette,* 2 May 1936, at 2607.

[23] The then choice of law rule reflected the double civil actionability rule of *Phillips v. Eyre* (1870) L.R. 6 Q.B. 1, as expressed by the Judicial Committee of the Privy Council in *C.P.R. v. Parent*, [1917] A.C. 195 and applied to Quebec in *O'Connor v. Wray*, [1930] S.C.R. 231.

[24] *Supra* note 18, at 75 Que. S.C. 126.

> of the Province of British Columbia, but... the Supreme Court of Canada, might do so, and might do what this Court cannot do, viz.: apply the law of British Columbia, and if that law recognizes the defence of "common employment", might give the relief the defendant seeks.[25]

The Quebec Court of King's Bench dismissed the defendant's appeal for substantially the same reasons.

Before the Supreme Court of Canada, Rand, K.C., presented essentially the same arguments as in the courts below. It may well be that C.N. Steamships merely relied upon the 'anomaly' noted by the trial judge and hoped the evidentiary gap would be filled by the Court. Instead, Chief Justice Duff (with the concurrence of Justices Crocket, Kerwin and Hudson) similarly interpreted section 265 of the imperial Act as declaring the *locus delicti* to be the port of registration in the absence of any express provision in the Act governing the matters at issue. But the Court did not address the 'anomaly" and take judicial notice of the law of British Columbia. Instead, Chief Justice Duff declared:

> Nor do I think any ground of appeal based upon the law of British Columbia is admissible in this Court. In the first place, the law of British Columbia was not pleaded. Then there was no suggestion at the trial that the law of that province would be relied upon. The Court has power to amend... but I think we ought not to exercise it in this case.[26]

In the absence of proof of foreign law, the Court stated the governing rule as "a presumption which is a presumption of law, *viz.*, that the general law of the place where the alleged wrongful act occurred is the same as the law of Quebec."[27] In concurring reasons, Justice Cannon distinguished *Logan v. Lee*,[28] a critical case not discussed by Chief Justice Duff, in which the Court had declared its authority to take judicial notice of the laws of each province because of its position as a general court of appeal for Canada. Justice Cannon noted that in *Logan v. Lee* the law of the other province had been alleged but not proven; here, C.N. Steamships had not even alleged application of British Columbia law:

> This Court, in cases from the province of Quebec, must follow the rule that all facts in support of the action, e.g. the law of another province, must be alleged and proved; otherwise it would be unfair for this Court to take *suo motu* judiciary notice of the statutory or other laws of another province, ignored in the pleadings, when the Quebec courts did not consider them,

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[25] *Ibid.*, at 127.
[26] *Supra* note 17, at 16.
[27] *Ibid.*, at 14.
[28] (1907) 39 S.C.R. 311.

> and, forsooth were prohibited from considering them as applying to the case.[29]

Accordingly, the law of British Columbia must be "presumed to be the same as law of Quebec"[30] Justice Cannon further noted that the defence based on the doctrine of common employment had not been put to the jury but had only been argued before the trial judge on the motion for judgment notwithstanding the verdict.

Notwithstanding this lack of success on Conflict of Laws principles, C.N. Steamships won its appeal because of the wording of the jury's verdict. Asked if the defendant employer had committed a fault to cause the accident which injured Watson and to identify that fault, the jury responded:

> Yes (unanimous). If the Chief Officer [name deleted] had ordered life lines erected earlier the accident might have been avoided.[31]

This answer, held the Court, "is not sufficiently free from obscurity"[32] to conclude that the jury found a connection between the fault and the accident. In other words, the answer that the "accident might have been prevented" appeared too speculative to characterize it as a finding of actual fault. The Court unanimously ordered a new trial.

Thus, in his Conflicts debut before the Supreme Court of Canada – though certainly not his first appearance before that Court – Rand, K.C., found success in the interpretation of language rather than with principles of Conflict of Laws.

THE RAND APPROACH

Ivan Rand's appointment to the Court occurred on 22 April 1943, five days before his fifty-ninth birthday. A common law jurist in the true sense, Justice Rand looked for the underlying purpose of a rule and considered that rule in the context of the system of legal rules and its role and function in society. Unlike many judicial colleagues who were satisfied to summarize and then apply the relevant decision from the English courts, Justice Rand was not a formalist in his approach to judging.

Though not a Conflicts case, his general approach was clearly articulated in his reasons for decision in *Reference re Exemption of United States Forces from*

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[29] *Supra* note 17, at 18.
[30] *Ibid.*
[31] *Ibid.*, at 16.
[32] *Ibid.*, at 17.

Proceedings in Canadian Criminal Courts,[33] argued before the Court on 14 to 18 June 1943, the fourth heard by Justice Rand. This reference by the Governor General in Council posed the basic question of whether United States military and naval forces stationed in Canada with the consent of the Canadian government were exempt from the ordinary processes of Canadian criminal courts and subject only to the military justice of the United States forces. Justices Kerwin and Taschereau would have recognized a general immunity from criminal prosecution for such forces; however, Chief Justice Duff, with whom Justice Hudson concurred, and Justice Rand, in separate reasons for decision, recognized a limited exemption in practice. For the majority, foreign military and naval forces in Canada pursuing a state of war against a common enemy were not in law immune from the jurisdiction of Canadian civilian courts. This rule was subject to a practical exemption for offences committed by a member of the foreign force against another member and for general disciplinary offences committed by one member against another. In other words, there existed an expectation that visiting forces would internally regulate offences committed by one member against another. Offences committed against Canadians were not exempt from prosecution before Canadian courts. In his reasons for decision, Justice Rand asserted the basic constitutional principle that civil law prevailed over military law and summarized his analytical approach:

> I have come to the conclusion that that principle stands in the way of implied exemption when the act complained of clashes with civilian life. *The question is what is the workable rule implied from the invitation, that fits into the fundamental legal and constitutional system which it is offered. It is from the background of that system that the invitation and its acceptance must be interpreted.*[34]

This contextual analysis (or purposive approach) is characteristic of the common law method. On the constitutional plane, it fully articulated Justice Rand's approach to a common citizenship in cases such as *Winner v. S.M.T. (Eastern) Limited*.[35] It was an approach one would expect to find mirrored in Rand's Conflicts Jurisprudence. But, in general, it is not there — perhaps because he had not taken the Conflict of Laws course when at law school! But there were snippets of it just the same.

The Rand Conflicts Jurisprudence consisted of ten cases. In some of these cases, Conflict of Laws served as a mere backdrop or context in which a rule must be interpreted and applied, rather than offering an opportunity for direct consideration of the appropriate rule itself. In seven of the cases, Justice Rand wrote separate reasons

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[33] [1943] S.C.R. 483.

[34] *Ibid.*, at 525 [emphasis added]. He added: "The citizen taking on the special duties of a soldier abates no jot of that accountability."

[35] [1951] S.C.R. 887.

for decision concurring in the result; in two cases he silently concurred with the unanimous reasons of another justice. Only once did his reasons for decision attract the substantial support of the Court. In this jurisprudence, Justice Rand was never in dissent.

JURISDICTIONAL ISSUES

Local or direct jurisdiction refers to the jurisdiction of a court to adjudicate matters involving a legally relevant foreign element. In *Muzak Corporation v. Composers, Authors and Publishers Association of Canada Ltd*,[36] the plaintiff/ respondent CAPAC in Ontario sought leave from the Exchequer Court to serve notice of its statement of claim on the second defendant, Muzak in the State of New York. The plaintiff alleged that it had an exclusive copyright to the public performance of various musical works in Ontario; that the first defendant, Associated Broadcasting Company Ltd., had breached its copyright by performing these works in Ontario without a license; and that defendant Muzak had infringed its copyright by renting recordings of the musical works to the first defendant. The plaintiff served the first defendant in Canada and served notice of motion on Muzak of its application for leave to serve notice of the statement of claim *ex juris*. The Exchequer Court granted leave to serve Muzak in New York and the general issue before the Supreme Court of Canada was whether leave had been properly granted.

At that time, the procedural rules of the Exchequer Court (a predecessor to the Federal Court of Canada) were rather skeletal in relation to certain matters. Rule 42 provided:

> In any proceeding in the Exchequer Court respecting any patent of invention, copyright, trade mark or industrial design, the practice and procedure shall, in any matter not provided by any Act of the Parliament of Canada or by the Rules of Court... conform to, and be regulated by, as near as may be, the practice and procedure for the time being in force in similar proceedings in His Majesty's Supreme Court of Judicature in England.[37]

A majority of the Court, Justices Kerwin, Kellock and Cartwright, interpreted Rule 42 as incorporating by reference the English rules of court governing service *ex juris* applicable to a tort committed within the jurisdiction (Rule XI). Justice Taschereau expressed no opinion on this point but implicitly accepted the majority opinion. Only Justice Rand took the position that it was not necessary to decide whether or not the Rule incorporated the English Rule by reference — which, given the wording of the Rule, seemed to reflect an obvious reluctance to accept legislative adoption

[36] [1953] S.C.R. 182.
[37] *Ibid.*, at 186.

of English, *i.e.*, foreign, law. Thus, with the exception of Justice Rand, the Court accepted the relevant English jurisprudence as establishing the appropriate standard or test against which to assess the decision of the Exchequer Court; that is, the plaintiff had established "a good arguable case" *per* Lord Simonds in *Vitkovice Horni A Hutni Tezirstvo v. Korner*.[38] Justices Kerwin and Taschereau, in separate dissenting reasons for decision, favoured a broad approach to service *ex juris*, with the standard of "a good arguable case" not applied too stringently at the jurisdictional stage of proceedings. Justice Kerwin considered that the statement of claim and accompanying affidavits "suggested" a "good arguable case" and that "difficult questions of law [should be left] to the trial".[39] Justice Taschereau stressed the discretionary nature of the order granting leave to serve the defendant *ex juris*, and observed:

> It is not the function of a court or judge who considers an application... to go into all the merits of the litigation, and to dispose of the ultimate merits of the parties.[40]

The majority, however, disagreed. Justice Kellock examined English case law not only to identify and explain the standard of a "good arguable case" but also to interpret the word "franchise", because the defendant Muzak granted a franchise to persons who rented the musical recordings. According to that case law, such a "franchise" conferred a right to the use of the recordings *vis à vis* Muzak but did not confer any right to perform the music in Ontario without a license from the copyright holder, CAPAC. Justice Cartwright adopted the reasons for decision of Justice Kellock on this point and devoted the major portion of his own reasons examining English case law on the preliminary point: whether the order in issue constituted a 'judgment' for the purposes of an appeal to the Supreme Court of Canada (it did).

Justice Rand's reasons for decision were unique. Not a single case precedent was discussed or even mentioned. He detailed the relevant territorial points of contact in the fact pattern regarding Muzak acting in the course of its business in New York, when it shipped the recordings to the first defendant in Ontario; it received payment for those recordings in New York; it acted in contravention of no New York law; and it was not in a business partnership with the first defendant, in the sense that it received no percentage or other interest in any revenues or profits derived from public performances of its recordings in Ontario by the first defendant. In other words, Muzak's relationship with the first defendant began and ended in New York; and it had no interest in what the first defendant did with the recordings in Ontario or elsewhere in Canada. Thus, the plaintiff failed to establish a "*prima facie* case" for service *ex juris*. Significantly, only Justice Rand commented on inherent limitations on the exercise of the power of a court to authorize service *ex juris*:

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[38] [1951] A.C. 869, at 880.
[39] *Ibid.*, at 188.
[40] *Ibid.*

> ...an order for such service is the exercise of an unusual power by the domestic forum, and it has at all times been limited to such situations as are consistent with a proper appreciation of the limitations to be placed on exercising jurisdiction beyond a country's boundaries.[41]

He did not elaborate on these limitations. Justice Rand's approach in this case was reminiscent of the famous case of *Holman v. Johnson*,[42] in which Lord Mansfield held enforceable in England a contract made in France for the purchase of goods intended by the purchaser to be smuggled into England. The contract was completed by the sale and purchase in France; and the subsequent smuggling operation did not taint the contract itself – though the contract would not have been enforceable if the vendor had been a party to the illegal activity. In both *Holman* (re: contract) and *Muzak* (re: tort), the localizing of factual connections led to an appreciation of the validity of the conduct of the challenged party.

CHARACTERIZATION

Characterization is often not an issue in Conflict of Laws. At its first step, it involves assigning the legal issue in dispute to an appropriate legal category; for example, is the issue one of contract, marriage, transfer of property *inter vivos*, etc.? This is rarely in dispute between the parties. More frequently, the true nature of specific rules is the pivotal point of dispute. Is a specific rule properly characterized as substantive or procedural in nature? This can be decisive when there are differences in the law of the countries connected to the legal dispute because, while procedural law is that of the forum (the place where the litigation is adjudicated), the substantive law is that of the country identified by application of the appropriate choice of law rule (connecting factor).

Characterization of a foreign law was the critical issue in the estate dispute presented in *Pouliot v. Cloutier*.[43] Mme. Cloutier's late husband was born in Quebec but moved to New Hampshire in 1926, where he established his domicile. In 1937, Mme. Cloutier and her husband married in New Hampshire. By the law of that state, spouses remained separate as to property. Two years later in early 1939, the Cloutiers returned to Quebec and re-acquired domicile there. In other words, Mr. Cloutier abandoned his New Hampshire domicile of choice and reverted to his domicile of

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[41] *Ibid.*, at 190.

[42] (1775) Cowp. R. 341, 98 E.R. 1120 referring to Huber, *supra* note 14, at para. 5: "In a certain place particular kinds of merchandise are prohibited, if sold there the contract is void - but if the same merchandise were sold elsewhere, in a place where there was not any prohibition, and a suit is brought in a place where they were prohibited, the purchaser will be condemned and the suit maintained, because the contract was good in its origin, where made."

[43] [1944] S.C.R. 284.

origin, Quebec, where he re-established permanent residence. In a by-gone era of formal gender inequality, Mme. Cloutier had a domicile of dependency on her husband and re-acquired her Quebec domicile when he did.

Mr. Cloutier made his will in June 1939 and died in April 1940. By the terms of this will, Mme. Cloutier received a bequest of $1000 from an estate with an estimated value of $15,000. Her late husband's estate included immovable property in Quebec valued at $2500 and movable property in both Quebec and New Hampshire. In an attempt to gain a greater share of her late husband's estate, Mme. Cloutier renounced any interest under his will and brought an action in Quebec against Pouliot and the other residuary legatees under the will. She argued application of a New Hampshire law which entitled a surviving spouse to $5000 plus one-half of the remaining value of the movable estate and to the value of $5000 of the real estate or immovable property. Thus, rather than the paltry $1000 bequest, Mme. Cloutier's claim amounted to $11,250 from her late husband's estate ($5000 base entitlement + $3750 being one half the value of the remaining movable estate + $2500 being the value of the real estate). Her success or failure depended on the characterization of the New Hampshire statute as a law governing marital property. In Quebec, the trial and appeal courts held in her favour. The Supreme Court of Canada did not.

Justice Kerwin, Chief Justice Rinfret and Justice Taschereau concurring, accepted the proposition that, in Quebec law, the matrimonial domicile fixed the rights of spouses *inter se* to marital property. Justice Kerwin found the argument based on the famous case of *De Nicols v. Curlier*[44] misplaced and distinguished that case because of the difference between a community of property regime and a separate property regime. In *De Nicols*, a husband and wife married in France under a community of property regime and then moved to England. Later, the husband died domiciled in England and the House of Lords applied French law (community property regime), with the result that the widow took a half interest in her late husband's movable estate. A similar result did not apply in the present matter because the Cloutiers had married in New Hampshire, where the late husband had been domiciled and where the couple had established their marital home.

Under the law of New Hampshire, the couple were separate as to property and the wife enjoyed only a mere hope to share in her husband's estate rather than a proprietary interest. Nor was Mme. Cloutier's cause furthered by the argument based on the New Hampshire law entitled "The Rights of Surviving Husband or Wife".[45] Professor John D. Falconbridge characterized such laws as testamentary rather than as concerned with marital property regimes and Justice Kerwin accepted this characterization. Specifically, Falconbridge characterized legislation like the New

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[44] [1900] A.C. 21.

[45] 1933 Pub. L. New Hampshire c. 118, ss. 10 and 11.

Hampshire statute as dependents' relief legislation which limited a testator's power of disposing of his or her estate (applicable to immovables within the territory and to movables wherever situate).[46] But, Mme. Cloutier's late husband had died domiciled in Quebec, not New Hampshire, so the New Hampshire law had no application under the choice of law rule that declared the law of domicile at the time of death governed limitations on a testator's disposing power in relation to his or her estate. As a result, Mme. Cloutier took nothing from her late husband's estate (having renounced her interest under his will in order to pursue her claim under New Hampshire law).

Justice Rand wrote separate reasons for decision which attracted the concurrence of Justice Hudson. Rather than adopting the majority characterization from Falconbridge, Justice Rand preferred to examine the New Hampshire legislation itself. Accepting the choice of law rule, that property between spouses as such was governed by the law of the matrimonial domicile, Justice Rand concluded that the subject of the legislation was not marriage but married persons:

> The condition of its application seems to be that the deceased person should have been domiciled in New Hampshire at the time of his death, but even if that is not so, it is clearly of no significance where or when he was married. It does not restrict alienation inter vivos just at succession.[47]

Citing but not discussing *De Nicols*, Justice Rand then identified "the essential nature of matrimonial [property] law" as "defining and declaring property rights conceived as terms of the marriage itself, following it through all changes of domicile... in short, it must be a statutory equivalent to a marriage contract."[48] Thus, while Justice Rand reached the same result as the majority, his analysis of the argued legislative provisions marked him as a judge willing to walk a different analytical path than his colleagues.

Another 1944 case presented an issue of characterization, in terms of a choice between status and capacity to sue, as opposed to mere heads of damage. By the former characterization, the plaintiff would lose the appeal; by the latter, the plaintiff would win.

It may be helpful to set the context in terms of previous case law. In *Lucas v. Coupal* (1930),[49] four children and their mother sued for injuries sustained in a motor vehicle accident in Quebec. The plaintiffs were all domiciled and resident in Quebec

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[46] J. D. Falconbridge, "Administration and Succession in the Conflict of Laws" (1934) 12 *Canadian Bar Review* 125, at 133

[47] *Supra* note 43, at 290.

[48] *Ibid.*, at 290-91.

[49] [1931] 1 D.L.R. 391.

and the defendant driver was domiciled and resident in Ontario. The plaintiffs sued in Ontario; the mother in her own name and the children through their "next friend" (now litigation guardian). Counsel for the defendant seized upon the Conflict of Laws aspect of the case and challenged the children's standing to sue by means of a litigation guardian. By the law of Quebec, where the accident occurred (*lex loci delicti*), the right of action vested not in the injured children but in their tutor. The trial judge gave effect to this argument, non-suited the children and pronounced judgment in favour of the mother only. The case supported the general proposition that in whom a right of action is vested is a question of substantive law governed by the appropriate choice of law rule; and the question of how such a right is vindicated is a question of procedure governed by the *lex fori*. However, that is a modern interpretation of the case; it was argued here as a case of status and capacity governed by the law of the domicile.

Lister v. McAnulty[50] presented a similar opportunity for defendant's counsel. This appeal arose as a result of a motor vehicle accident in Quebec in which a Massachusetts woman suffered injuries through the fault of a Quebec driver. Thus, the forum was Quebec; the *lex loci delicti* was Quebec law; and the defendant was from Quebec. Except for the foreign plaintiff, it would have been a purely domestic action. More importantly, the named plaintiff in the action was not the injured woman but her husband, a person not personally involved in the accident. Mr. Lister and his wife had married in Quebec without a marriage contract but were accepted for purposes of the trial as domiciled in Massachusetts where they had lived for over forty years under a marital regime of separate property (following their marriage in Montreal, the plaintiff/ appellant and his wife had immediately returned to Massachusetts, their matrimonial domicile). Their Quebec lawyer, relying upon the rights of husbands and wives *inter se* under Quebec law, by which a husband had a right to his wife's *consortium* and *servitium*, commenced an action with Mr. Lister as the plaintiff. The suit claimed $18,250.40 in damages arising from the permanent disability of his wife, including a claim of $15,000 as compensation for the future cost of a maid or housekeeper to replace his wife's duties. Admitting liability, the defendant paid only $1250 plus costs into court and then challenged the standing of the plaintiff to bring the action. Defendant's counsel argued that, being domiciliaries of Massachusetts and therefore under a separate property regime, the right of action vested in Mrs. Lister personally and not in her husband. Expert evidence at trial established that Massachusetts law would only permit the plaintiff to recover for his out of pocket expenses ($750.34) and that he could not recover for the losses of *consortium* and *servitium*, nor for future expenses related to the care of his now invalid wife. Both the trial and appeal courts in Quebec accepted the defence argument and held that the plaintiff could not recover in excess of the amount deposited with the court. The Supreme Court of Canada allowed the appeal.

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[50] [1944] S.C.R. 317.

Justice Taschereau, Chief Justice Rinfret and Justice Thorson (*ad hoc*) concurring, held in favour of the plaintiff and granted the appeal in part. Justice Taschereau noted that article 6 of the *Civil Code of Lower Canada* provided that "persons domiciled out of Lower Canada... as to their status and capacity, remain subject to the laws of their country." Thus, though matters of status and capacity were governed by Massachusetts law as the law of the domicile, rights arising from the motor vehicle accident in Quebec were subject to Quebec law. Was the Massachusetts limitation on the right of the plaintiff to recover for the injuries suffered by his wife a matter of matrimonial law? Did the Massachusetts law apply to prevent recovery for losses of *consortium* and *servitium*? In other words, was the Massachusetts law properly characterized as pertaining to "status and capacity" and, therefore, applicable as the law of the domicile? Applying the decision in *De Nicols v. Curlier*, Justice Taschereau held that the Massachusetts law, as the law of the matrimonial domicile, governed the marital regime between the plaintiff and his injured wife. Considered as a question of marital status governed by Massachusetts law, the expert evidence clearly established that the plaintiff had no right to claim for losses of *consortium* and *servitium*. But, Justice Taschereau distinguished between a claim for losses of *consortium* or *servitium* in relation to an injured spouse and a claim for future care expenses of that spouse. The latter, expenses borne by the plaintiff husband, were properly characterized as relating to the right to recovery (head of damage) under the law of Quebec as the *lex loci delicti*:

> To hold otherwise would be a violation of article 6 C.C. for it would mean that a foreigner suing in Quebec, for damages that occurred in Quebec, is governed by the laws of his domicile, not only as to his status and capacity, but also as to the law of torts and damages.[51]

The majority awarded the plaintiff $3000 for future expenses for the care of his injured wife and, of course, nothing in relation to losses of *consortium* and *servitium*. In separate reasons for decision, both Justices Hudson and Rand would have awarded a further amount of $1000 for loss of *consortium*.

A point of departure between the majority and minority of the Court lay in their respective treatment of the expert evidence presented at trial. Justice Taschereau described the expert witness who proved the law of Massachusetts as a lawyer with "some fifty years of practice" and a lecturer on the law of damages, contracts and torts at Boston University Law School:

> In view of the legal rights and obligations of husband and wife, towards each other, he says that plaintiff could not claim for loss of *consortium* or

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[51] *Ibid.*, at 326.

> *servitium*, nor for future expenses to be incurred by him for the care of his invalid wife.[52]

Though they came to a different conclusion under Quebec law, Justice Taschereau and the concurring justices accepted the expert evidence uncritically. Not so Justices Hudson and Rand.

Justice Hudson went behind the opinion of the defendant's expert witness on the law of Massachusetts to examine the basis for that opinion.[53] He noted that the witness had testified that a right to *consortium* existed in Massachusetts law until 1909[54] and that after that date the courts of that state consistently refused compensation. Though Justice Hudson did not identify any of the cases examined, his review disclosed that Massachusetts courts dismissed *consortium* and *servitium* claims by husbands as too remote in situations in which injured wives had already recovered damages for their injuries. Significantly, the Massachusetts courts did not deny the existence of a right to recover for loss of *consortium*. In the present matter, because Mrs. Lister had not already been compensated for her injuries, Justice Hudson would have awarded the plaintiff a further sum of $1000 for loss of *consortium*:

> ...what the plaintiff claims is damages for the loss he has sustained through the defendant's negligence which deprives him of the services and companionship of his wife.[55]

Justice Rand did not mention the expert witness on Massachusetts law in his reasons for decision. He ignored that element of the evidentiary record. Instead, he referred to a pre-1909 Massachusetts case precedent in which the court had recognized a right of recovery for loss of *consortium* and the 1909 case principally relied on by the expert witness, and discussed by Justice Hudson, to ground his own conclusions. In his view, that case, *Feneff v. New York Central & Hudson River Railroad Co.*,[56] stood for the principle that Massachusetts law permitted only "one complete recovery" for the injuries to a married woman:

> The limitation of recovery... shows beyond doubt that it results from the conflict between rights of action given to the wife under various married women's property acts and the common law rights of the husband: but it is in fact a limiting rule of damages. As the wife under those statutes has the

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[52] *Ibid.*, at 322-23.

[53] Citing, but not discussing, the 1922 decision in *Allen v. Hay* (1922) 64 S.C.R. 76, at 81, Justice Hudson at 331 stated: "We are justified in examining the precedents cited in support of his evidence."

[54] *Feneff v. New York Central & Hudson River Railroad Co.* (1909) 203 Mass. 278.

[55] *Supra* note 50, at 330-31.

[56] *Supra* note 53.

> right to recover in one sum for the total effect upon her of the injury, there is in the view adopted nothing left for any claim of the husband. One complete recovery is permitted and on ground of policy that recovery has been attributed to the wife. Otherwise the equivalent of her physical and mental impairment would become the property of her husband in contradiction to the provisions that she shall be entitled as if she were femme sole.... The recovery of the wife, therefore, exhausts the total liability of the wrongdoer.[57]

Justice Rand concluded that the trial and appeal courts had erred in treating the plaintiff's claim as depending on the law of his domicile. The wrong had occurred in Quebec, the *locus delicti*, so the legal effect of that wrong depended on application of Quebec law: "Whatever consequences are to be attached to those acts must arise by force of that territorial law."[58] Accordingly, a limitation on damages by the law of Massachusetts was irrelevant to determination of the substantive right to recover for a wrong committed in Quebec:

> For the purposes of the law of Quebec, then, we have a claim on the part of a husband who possesses the right of consortium and who is under a legal duty to care for and support his wife while the marriage continues. These are the rights which in Quebec the husband complains have been violated by the wrongful act of the respondent. It is the law of Quebec and that only to which we must look for the legal consequences from those facts. It will arise from the law of personal wrongs in that province and part of that law is the delimitation of the damages attributed to the impairment of right suffered. It was, therefore, in my opinion, a misconception of the law to be applied to import from Massachusetts the law of tort including the rule of damages to determine the rights of the appellant in Quebec.[59]

By inference, Justice Rand rejected the trial and appeal courts' characterization of the Massachusetts law as a law of "status and capacity" and favoured its characterization as a substantive law pertaining to the heads of recoverable damages in tort. Justice Rand would have awarded the sum of $1000 as compensation for loss of *consortium*, a category of damages under Quebec substantive law.

Lister v. McAnulty and *Pouliot v. Cloutier*, released on the same day (22 June 1944) and only one year after Justice Rand joined the Court, set him apart from his colleagues on Conflict of Laws issues. He, more than they, used the language of Conflict of Laws and his analysis was grounded in Conflicts principles. In *Lister*, he used the common law method to attempt to do justice between the parties. Unfortunately, the majority of the Court did not agree with him. He properly characterized the issue as

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[57] *Supra* note 50, at 336.
[58] *Ibid.*, at 334.
[59] *Ibid.*, at 337.

one of heads of damage governed by the *lex loci delicti*; the majority followed the lead of the defendant's counsel and the expert witness and characterized it as a question of marital status governed by the *lex domicili*.

PUBLIC POLICY

In Conflict of Laws analysis, the substantive law of the country identified by application of the appropriate connecting factor (choice of law rule) determines the rights and liabilities of the parties to a legal dispute. As with any general rule, there are exceptions. For example, foreign penal and revenue laws are not enforced; the law of the forum may provide a mandatory rule which the court must apply; or the foreign law may be held unenforceable as contrary to the public policy of the forum. Public policy reflects fundamental values in the state, such as liberty and morality, and includes protection of the international relations of the state. Thus, for example, a foreign contract concerning slavery or prostitution will not be enforced if the local law prohibits it.

Laane and Balster v. The Estonian State Cargo & Passenger Steamship Line[60] presented the Court and Justice Rand with an opportunity to consider application of the public policy exception in the context of property issues arising in the colourful and tragic circumstances of state succession. Again, Justice Rand took a decidedly different analytical path than his colleagues.

In August 1940, crew members of the *S.S. Elise* had the vessel arrested in Saint John, New Brunswick, in the course of its regular voyages between the United Kingdom and Canada. The crew members were owed wages which presumably were paid after the court ordered sale in January 1941. After all claims had been paid, the sum of $44,177 remained under the control of the court. The *Elise* had been co-owned by two partners, Ado Laane and Frederick Balster, both Estonian citizens, and had been registered in Estonia where Laane and Balster had their office. One might have thought it a simple matter to pay the remainder of the sale proceeds to the owners; but who were the lawful owners? This complication arose from the tragic events of June 1940 when the former Soviet Union occupied Estonia and established a soviet-style government. The new government then nationalized the shipping industry (and many other privately-held means of production) by issuing two decrees. The first decree created the respondent company, the Estonian State Cargo & Passenger Steamship Line; the second purported to transfer ownership of all Estonian vessels to the company and fixed the rate of compensation at 25%. This new Estonian company brought an action *in rem* in the Admiralty Court, New Brunswick District, for payment of the proceeds of sale of the ship. Laane and Balster also claimed the proceeds.

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[60] [1948] S.C.R. 530.

For purposes of trial, counsel obtained the following response from Hon. Louis St. Laurent, then Secretary of State for External Affairs:

> Re: Estonian State Cargo and Passenger Steamship Line v. Proceeds of the Steamship ELISE.
>
> Your letter of December 23 encloses four questions put jointly by you and Mr. C. F. Inches, representing all the parties to this action. You desire my answers to these questions for production to the court in this case.
>
> Question 1. Does the Government of Canada recognize the right of the Council of Peoples' Commissars of U.S.S.R. or any other authority of the U.S.S.R., to make decrees purporting to be effectual in Estonia?
>
> Answer: The Government of Canada recognizes that Estonia has *de facto* entered the Union of Soviet Socialist Republics, but does not recognize this *de jure*. The question of the effect of a Soviet decree is for the Court to decide.
>
> Question 2. Does the Government of Canada recognize the existence of the Republic of Estonia as constituted prior to June 1940, and if not when did such recognition cease?
>
> Answer: The Government of Canada does not recognize *de facto* the Republic of Estonia as constituted prior to June 1940. The Republic of Estonia as constituted prior to June 1940, has ceased *de facto* to have any effective existence.
>
> Question 3. Does the Government of Canada recognize that the Republic of Estonia has entered the Union of Soviet Socialist Republics, and if so, as from what date, and is such entry recognized as being *de facto* or *de jure*?
>
> Answer: The Government of Canada recognizes that Estonia has *de facto* entered the Union of Soviet Socialist Republics but has not recognized this *de jure*. It is not possible for the Government of Canada to attach a date to this recognition.
>
> Question 4. Does the Government of Canada recognize the Government of the Estonian Soviet Socialist Republic, and if so, from what date?
>
> Answer: The Government of Canada recognizes the Government of the Estonian Soviet Socialist Republic to be the *de facto* government of Estonia but does not recognize it as the *de jure* government of Estonia.

> It is not possible for the Government of Canada to attach a date to this recognition.
>
> Sincerely Yours
> LOUIS S. ST. LAURENT Secretary of State for External Affairs.[61]

Thus, the Estonia and its government that had existed prior to 17 June 1940 no longer received *de facto* recognition by Canada and the Soviet Socialist Republic of Estonia, a constituent member of the U.S.S.R., received *de facto* but not *de jure* recognition.

Chief Justice Rinfret reviewed the facts and noted that English courts had already addressed the same issues, *i.e.*, the effect of the Soviet Estonian nationalization decree; particularly, the English Court of Appeal in *A/S Talinna Laevachisus and others v. Talinna S.S. Line and another*.[62] That court had characterized the decree as penal and confiscatory in nature and, therefore, unenforceable. Chief Justice Rinfret quoted with approval the following passage from *A/S Talinna*:

> If the decree did apply, the legislation involved taking 75 per cent of the moneys without compensation, and English law treats as penal foreign legislation providing for compulsory acquisition of assets situate in this country... and 25 per cent cannot be just compensation.[63]

Noting that the vessel had not at any material time been physically within Soviet Estonian territory, the Chief Justice reviewed other English (and even a Scots case) to the same effect and concluded, somewhat remarkably for a civil law trained Canadian judge, with respect to the nationalization decree:

> Quite independent of their illegality and unconstitutionality, they are not of such a character that they could be recognized in *a British Court of Law*.[64]

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[61] *Ibid.*, at 539-40 (reproduced in the reasons for decision of Kerwin J.). The letter was addressed to counsel for Laane and Balster, J. Paul Barry of Saint John, N.B., later Justice Barry of the New Brunswick Court of Queen's Bench.

[62] (1947) 80 Ll. L. Rep. 99 (C.A.) dismissing an appeal from (1946) 79 Ll L. Rep. 245 (K.B.).

[63] *Supra* note 60, at 536, quoting Scott L.J. at 111.

[64] *Ibid.*, at 538 [emphasis added]. The appointment of Chief Justice Rinfret as a Commonwealth judge entitled to hear appeals to the Judicial Committee of the Privy Council and his efforts to actually sit on the Board, even when not wanted, are recounted in R. Stevens, *The Independence of the Judiciary: The View from the Lord Chancellor's Office* (Oxford: Clarendon Press, 1993) at 140-41. I am grateful to my colleague Edward Veitch for reminding me of this work.

Justice Kerwin, Justice Estey concurring, also discussed various English case precedents before also characterizing the decree as penal, with the statement that the decree had a "confiscatory nature as much as if the compensation had been fixed as one per centum."[65] Justice Kellock similarly applied the *A/S Talinna* to achieve the same result.

Justice Rand took a different approach.

The trial judge had held the *Elise* to have been *in transitu* and, therefore, governed by the law of its registry. Justice Rand rejected that conclusion:

> Whatever may be the significance or legal consequences of a vessel being *in transitu* there can be no doubt that once a private ship is voluntarily brought within a country's territory it is submitted to the laws of that country. The jurisdiction arising is primary and fundamental; but the particular law to be applied to determine legal relations in respect of the vessel is quite another matter... [and] the act and authority of the territorial state follows from the language of Chief Justice Marshall in *Schooner Exchange v. M'Fadden*: [(1812) 7 Cranch 116 at 136]
>
> All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced to the consent of the nation itself. They can flow from no other legitimate source.[66]

Thus, consistent with Huber's first principle, the local law governed. Justice Rand recognized the port of registry as a choice of law rule in relation to vessels but described it as a "rule of practical convenience" and stated that "convenience and expediency are merely relevant factors in reaching the judicial determination...."[67] Some foreign laws, such as foreign penal or revenue laws and laws contrary to the forum's sense of morality or public policy, were not enforced. Justice Rand considered the nationalization decree as analogous to a foreign revenue law by which the foreign state, through coercion and for a public purpose, took a percentage of the property of a taxpayer. So characterized as a revenue law, the nationalization decree was unenforceable. But, Justice Rand did not stop there; nor did he follow his judicial colleagues by characterizing the decree as confiscatory and penal in nature. He chose to explore a different analytical path. Justice Rand alone reasoned that the taking of property

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[65] *Ibid.*, at 542.
[66] *Ibid.*, at 544.
[67] *Ibid.*, at 545.

> ...is not to be disassociated from the larger political policy of which it is in reality an incident.... What has been set up is a social organization in which the dominant position of the individual, as recognized in our polity, has been repudiated and in which the institution of private property, so far as that has to do with producing goods and services, has been abolished; and those functions... taken over by the state....
>
> What is asked... is... to aid in the execution of a fundamental political law of Estonia....[68]

In sum, the Estonian nationalization decree was not enforceable because of its political character – a character fundamentally inconsistent with the forum's protection of private property in the context of a capitalist economic system. Justice Rand recognized that property within the territory of the foreign state would be subject to its law but declared there is "no warrant in international accommodation to call upon another state to exercise its sovereign power to supply the jurisdictional deficiency in completing such a political program."[69]

Justice Rand could have concurred with the reasons of Justice Kerwin or of Justice Kellock and still have avoided the Anglo-philism of Chief Justice Rinfret. Yet, he chose to present an analysis which attracted the concurrence of no other member of the Court. His political or public law rationale mirrored later jurisprudence; for example, the reasons for decision by Lord Denning, M. R. in *New Zealand v. Ortiz*[70] in which the English Court of Appeal held unenforceable New Zealand legislation which protected the culture and history of that country by declaring forfeit any illegally exported (or attempted export of) protected articles of historical significance. More recently, the Ontario Court of Appeal "left the door open" to possible recognition of a public law exception in *United States of America v. Ivey*,[71] though it described the argued exception as "on a shaky doctrinal foundation". It did not find it necessary to address the exception because the foreign law in issue merely sought to recover from the polluter the actual environmental clean-up costs of a polluted site. The Court did not consider the foreign judgment recovered under that law to be an attempt to assert extra-territorial sovereignty but simply a cost recovery action for property damage sustained in the United States.

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[68] *Ibid.*, at 546.

[69] *Ibid.*, at 547.

[70] [1984] 1 A.C. 1.

[71] (1996) 30 O.R. (3d) 370 (C.A.) adopting the thorough analysis of Sharpe J. (as he then was) at trial in (1995) 26 O.R. (3d) 533.

CHOICE OF LAW

Choice of law rules identify the substantive law governing the rights and liabilities of the parties. Traditionally, such rules were expressed in territorial terms such as *lex domicili* (law of the domicile), *lex loci delicti* (law of the place of the tort) and *lex situs* (law of the place, *e.g.*, where the property is located). It was common to think of every legal transaction as centred in one country or law district ("its seat", *per* von Savigny) and therefore governed by that law. Such territorialism was certainly reflected in the principles of Huber but, in the era of Justice Rand, choice of law rules were changing. Instead of referring to the *lex loci contractus* and *lex loci solutionis* as choice of law rules in contract, there developed the more flexible concept of the proper law of the contract.[72] Later, the proper law concept spread (though not necessarily in Canadian law) to other areas of choice of law; for example, the proper law of the tort and the proper law of the transaction. Unfortunately, the so-called American revolution in choice of law, with such significant contributions as Brainerd Currie's governmental interest analysis,[73] pretty much stopped at the Canadian border and need not be further reviewed for the purposes of this essay.

The Rand choice of law jurisprudence was generally unremarkable. The usual rules were accepted and applied — though the factual contexts were often colourful and the most interesting element of this jurisprudence. Unfortunately, Justice Rand did not hear the appeal in *McLean v. Pettigrew*.[74] Doubtless his absence from that appeal is explained by the simple matter of the duty roster or rotation of the justices.[75] The decision in *McLean* was *the* Canadian choice of law precedent for forty-nine years, until 1994 when, in *Tolofson v. Jensen*[76] the Supreme Court of Canada abandoned the double civil actionability rule of *Phillips v. Eyre*[77] in favour of the *lex loci delicti* (with an exception when warranted for truly international torts). Justice Rand's observations on choice of law in tort might have stirred an earlier revision of the choice of law

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[72] G. C. Cheshire, *International Contracts* (Glasgow: Jackson, 1948); and see F. A. Mann, "The Proper Law of the Contract" (1950) 3 *International Law Quarterly* 60 and J. H. C. Morris, "The Proper Law of the Contract: A Reply" (1950) 3 *International Law Quarterly* 197.

[73] Brainerd Currie, "Comment on *Babcock v. Jackson*" (1963) 63 *Columbia Law Review* 1233.

[74] [1945] S.C.R. 62.

[75] The hearing of the appeal in *McLean v. Pettigrew* occurred on Monday, 6 November 1944. The previous week, Justice Rand had heard argument in *City of Saskatoon v. Shaw*, [1945] S.C.R. 82, on Tuesday, Wednesday and Thursday being 31 October, 1 and 2 November 1944; *Consumers Cordage Co. Ltd. v. St. Gabriel Land & Hydraulic Co. Ltd.*, [1945] S.C.R. 158 on Friday, 3 November 1944; and *Breault v. Tremblay*, [1945] S.C.R. 217 on Thursday and Friday, 2 and 3 November 1944. A factor which may have led to Justice Rand not sitting on appeals the week of 6 November was the scheduling of the appeal in *Canadian National (West Indies) Steamships Ltd. v. Canada and Dominion Sugar Co. Ltd.*, [1945] S.C.R. 249 for Tuesday and Wednesday, 7 and 8 November. Canadian National Steamships Co. Ltd. was Justice Rand's former employer.

[76] [1994] 3 S.C.R. 1022.

[77] *Supra* note 23.

rule; but it is doubtful if he would himself have gone as far as to adopt a different rule. His contribution to choice of law in tort remained as counsel in *Canadian National Steamships Company Ltd. v. Watson*.[78]

In *Lunn v. Barber*,[79] the Court gave counsel an expensive lesson in legal practice but fortunately not at the expense of the client, a widow. In 1931, George W. Lunn, a resident of New York state, commenced an action in Ontario against Samuel W. Barber on two promissory notes. Though the statement of claim and statement of defence were delivered in May and June 1931, nothing further developed before Lunn died in 1934. Four years later, the Surrogate Court in New York granted his widow, Williamina D. Lunn, letters of administration with will annexed. Rather remarkably, the action on the promissory notes appeared to have been dormant until 1946 when Mrs. Lunn's Ontario solicitor successfully applied to have her named as a party to the original Ontario action on the promissory notes. Later, a master granted an application to vary that order by identifying her as plaintiff "and administratrix with the will annexed of the said George Wellington Lunn"; the master also dismissed an application by Barber to rescind the order naming Mrs. Lunn as plaintiff.

At trial, Mrs. Lunn responded to a challenge to her standing by putting in evidence her New York letters of administration with will annexed. The trial judge then asked defendant's counsel "Am I not bound by that?" to which counsel replied "Well I am afraid so. There is a judgment of the Supreme Court of Canada", an allusion to *Crosby v. Prescott*[80] which recognized an exception to the general rule that the *situs* of a simple contract debt was the place of the debtor, by declaring the *situs* of a negotiable instrument at the time of the death of a payee to be the place of residence of the payee, if the negotiable instrument was also in that place. Applying that exception, the trial judge held in favour of the plaintiff, Mrs. Lunn. The Court of Appeal allowed the appeal and dismissed the action because, in argument and not in response to any question, the plaintiff's counsel informed the Court that the promissory notes had been in his possession in Ontario at the time of the payee's death and that he (the counsel) had subsequently sent them to Mrs. Lunn in New York. Accordingly, the facts did not support application of the exception from the general rule and the Surrogate Court in New York did not have jurisdiction to grant letters of administration in relation to property within the territorial jurisdiction of Ontario courts.

In three separate sets of reasons for decision, the justices of the Court unanimously allowed the appeal. Justice Kerwin, with Justices Taschereau and Locke concurring, Justice Rand and Justice Kellock all agreed that the defendant was bound by his acquiescence to the master's order and by the admission at trial. Accordingly, it

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[78] *Supra* note 17 and accompanying text.
[79] [1949] S.C.R. 108.
[80] [1923] S.C.R. 446.

was not necessary to decide whether the general rule as to *situs* or the *Crosby* exception applied. The Court granted judgment in favour of the plaintiff on condition that she file Ontario letters of administration with will annexed of her husband's estate. The Court accepted as unchallenged that the cause of action survived Mr. Lunn's death, so a grant of letters of administration with will annexed in Ontario would be permitted. As stated by Justice Kerwin, "Even at this late date an opportunity should be given the plaintiff to take such steps."[81] To re-enforce the practice point, the Court ordered costs to the plaintiff in the Court of Appeal but granted only one-third of the costs of the Supreme Court of Canada appeal.

Justice Rand's special contribution to this analysis focused on a "public policy" aspect to the matter — a point also mentioned in the separate reasons for decision of Justice Kellock. The provincial *Succession Duty Act* prohibited the transfer or delivery *inter alia* of promissory notes belonging to a deceased person which might be liable to duty in Ontario.[82] Therefore, though the defendant's acquiescence settled the issue of *situs* between the litigants, Justice Rand recognized a broader interest:

> ...if from the facts disclosed an overriding law or consideration of public policy is brought to the notice of the Court, then the matter is no longer between the parties only.[83]

The plaintiff's solicitor had "unwittingly violated" Ontario law by sending the promissory notes to the plaintiff in New York, thereby avoiding the necessity of seeking ancillary letters of administration of the estate in Ontario. This invalidity had to be corrected by a grant of ancillary letters either to the plaintiff or to some other person. Justice Rand concluded the action should be stayed until such letters were filed with the Court, at which event the appeal would be allowed.

The Court did justice between the parties.

The remaining four cases of the Rand choice of law jurisprudence presented different Conflicts issues in the context of, at times troubling and complicated, family disputes.

Canada v. Chai[84] presented the Court with an opportunity to apply domicile rules to reunite a father and his son in Canada. Leong Hung Hing was born in China in 1884 and came to Canada in 1911. He and his first wife, Fong Shee, were married in 1911 in China but had no children. While on a visit to China in 1926, Leong Hung Hing

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[81] *Supra* note 79, at 111.
[82] *The Succession Duty Act*, R.S.O. 1937, c. 26, s. 18(3).
[83] *Supra* note 79, at 112.
[84] [1954] S.C.R. 10.

married, in accordance with local custom, a second wife with whom he subsequently had a son, Leong Ba Chai, born in 1933. Except for that 1926 visit and a lengthy stay in China during the years 1932 to 1934, Leong Hung Hing lived and worked in Vancouver. He annually sent money to support his two wives and his son in China. In 1951, Leong Hung Hing became a Canadian citizen and applied for his son to be admitted to Canada under terms of an Order in Council issued under authority of the *Immigration Act*.[85] That Order stated:

> From and after the 16th August, 1930, and until other wise ordered, the landing in Canada of any immigrant of any Asiatic race is hereby prohibited, except as hereinafter provided:
>
> ...if it is shown to [the immigration officer's] satisfaction that such immigrant is,
>
> The wife, the husband, or the unmarried child under twenty-one years of age, of any Canadian citizen legally admitted to and resident in Canada, who is in a position to receive and care for his dependents.[86]

An immigration officer interviewed Leong Ba Chai in Hong Kong, where he resided, and refused him admission to Canada because the officer considered Leong to be an illegitimate son and, therefore, not within the scope of the Order. In making this determination, the officer applied Department policy which considered a second wife or concubine not a lawful wife under Chinese law and children born to such a wife or concubine as illegitimate.

In proceedings before the British Columbia Supreme Court, an expert witness proved Chinese law at the time of Leong Ba Chai's birth. The expert, a graduate of Chutow University Law School qualified to practice law in China and residing in Vancouver, testified that a child born out of wedlock was considered illegitimate in Chinese law but that such a child would gain legitimacy by (i) the subsequent marriage of the parents and (ii) by acknowledgment. Of the lawful means of acknowledging a child, the most relevant identified by the expert was that provided by article 1065 of the then *Civil Code of China*:

> A child born out of wedlock who has been acknowledged by the natural father is deemed to be legitimate; where he has been *maintained* by the natural father, acknowledgment is deemed to have been established. [emphasis added]

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[85] R.S.C. 1927, c. 93, s. 38.

[86] SOR/50-583 dated 28 December 1950 (P.C. 6229) amending Order in Council P.C. 2115 dated 16 September 1930.

The judge held Leong Hung Hing to have been domiciled in China at the time of his marriages and at the time of the birth of his son and that, under Chinese law, he had *maintained* his son and thereby conferred the status of legitimacy. He also held that, in any event, the word "child" in the Order in Council should not be interpreted as referring only to a "legitimate" child but should be given its natural meaning as referring to the child of a citizen.[87] The judge based the finding on domicile by reference both to the testimony of Leong Hung Hing as to his intention at the relevant times and to the then practice of Chinese workers in Canada to make regular visits to China and to maintain the settled intention to return eventually to China. It may be recalled that this was not exactly the most welcoming era for Chinese immigrants to Canada. The Court of Appeal dismissed the Minister's appeal.[88] The Minister appealed to the Supreme Court of Canada.

Justice Taschereau delivered reasons for the Court. He accepted the legal proposition that issues of legitimacy were governed by the law of the domicile of the father and the finding of fact that Leong Hung Hing had not abandoned his Chinese domicile at the time of his son's birth in 1933, a time when he was residing in China. On the expert evidence presented at trial, Chinese law, as the law of the domicile, provided that the son had achieved legitimacy by being "maintained" by his father. Thus, the validity of the second marriage, which had so vexed the Minister's officials, became irrelevant. As had the courts below, the Supreme Court of Canada issued a writ of *mandamus* directing the Minister to reconsider the immigration application consistent with the judgment of the Court. Remarkably the Court decision was grounded in Conflict of Laws analysis, rather than the more direct route of interpreting the word "child" for purposes of the Order in Council. Given an analytical choice, the Court did not always elect to resolve a matter by application of Conflicts principles.

Gray v. Kerslake[89] illustrated a non-Conflicts resolution of an interesting Conflicts fact pattern. It was not even argued as a Conflicts case at trial or on appeal. In 1934, Everett George Kerslake, a resident of Ontario, entered into an annuity contract with the Teachers Insurance and Annuity Association located in New York, New York[90] and not licensed to carry on business in Ontario. The contract, to pay a monthly benefit upon attaining sixty years of age, provided for payment of premiums and benefits at the head office of the Association in New York and expressed the contract to be "made and to be performed in the State of New York". If the annuitant died before the age of

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[87] *Re Leong Ba Chai*, [1952] 4 D.L.R. 715.

[88] [1953] 2 D.L.R. 766.

[89] [1958] S.C.R. 3.

[90] The successor to TIAA is the Teachers Insurance and Annuity Association College Retirement Equities Fund (TIAA-CREF New York, NY). Founded by philanthropist Andrew Carnegie to provide pensions for poorly paid college professors, TIAA-CREF and its subsidiaries manage approximately billions in assets and are one of the largest financial services providers in the world.

60, the contract provided for monthly payments to be made to an identified beneficiary selected by the annuitant. Kerslake duly designated his wife, Mildred Louise Kerslake, as his beneficiary.

In the period 1949 to 1953, Kerslake took four significant steps which resulted in this litigation. First, he changed the beneficiary under the annuity contract from his then wife to Alison B. Gray, described as "friend". Second, that same year he went to Idaho (of all places!) and obtained a decree of divorce. Third, he married his "friend", Ms. Gray, in Connecticut in 1950 and re-designated her as his beneficiary under the annuity contract, identifying her as "wife". Fourth, he died in 1953. Two other factors need to be noted. At all material times, Kerslake was domiciled in Ontario and Ms. Gray conceded that her marriage to Kerslake was not valid by the law of Ontario because Ontario, as the domicile, would not recognize the Idaho divorce. Accordingly, Kerslake had no capacity to marry Ms. Gray when he purported to do so in Connecticut. By his will, Kerslake bequeathed his estate to Ms. Gray and named her as the executrix. In her claim for the annuity proceeds, Mildred Kerslake relied on the insurance legislation of Ontario, which conferred a preferred beneficiary status upon a spouse and provided that the designation of such a beneficiary could not be changed without consent of the original beneficiary. That legislation "deemed" a contract of life insurance to be made in the Province if the insured resided in the Province.[91] The trial judge held the annuity contract not to be a contract of insurance and dismissed the action.[92] The Court of Appeal reversed.[93]

In the Supreme Court of Canada, Justice Cartwright, Justice Kerwin concurring, interpreted the deeming provision in the insurance statute to mean "deemed until the contrary is proved" rather than 'deemed conclusively", as argued by counsel for Mrs. Kerslake:

> ...to construe the word "deemed" in s. 134(1) as "held conclusively" would be to impute to the Legislature the intention (i) of requiring the Court to hold to be the fact something directly contrary to the true fact and (ii) of asserting the power to alter the terms of a contract made and to be wholly performed and in fact wholly performed in a foreign state. This result can, and in my opinion should, be avoided by construing the word to mean "deemed until the contrary is proved". In the case at bar the contrary has been proved and indeed admitted.[94]

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[91] *The Insurance Act*, R.S.O. 1950, c. 183, s. 134(1).

[92] [1956] O.W.N. 594.

[93] [1956] O.R. 899. The plaintiff relied upon the insurance legislation of Ontario to support her claim and left proof of the law of New York to the defendant, who did not offer such proof. The plaintiff therefore argued the laws of Ontario and of New York were the same.

[94] *Supra* note 89, at 10.

Accordingly, the Ontario legislation did not apply to the New York annuity contract because to decide otherwise, reasoned Justice Cartwright, would have violated the "in the Province" limitation on legislative jurisdiction in relation to "Property and Civil Rights" conferred by the *Constitution Act, 1867*, section 92(13).[95] Justice Locke, Justice Taschereau concurring, expressed the same reasoning and read down the scope of the legislation to respect the constitutional limitation. Justice Locke also held the annuity contract in issue (entitled 'Deferred Annuity Policy, Teachers Retirement Plan, Non-Participating') not to be a contract of life insurance, a conclusion reflected in the analysis of Justice Rand.

Justice Rand, Justice Abbott concurring, approached the matter purely as presenting an issue of statutory interpretation. The insurance legislation defined "life insurance" as "insurance whereby the insurer undertakes to pay insurance money on death, or on the happening of any contingency dependent on human life...."[96] Developing the concepts of this definition, Justice Rand stated:

> Life insurance in its characteristic forms involves, as its essence, a risk in a specified payment of money absolute from the moment the contract takes effect. That constitutes the security sought by the insured, the premiums for which in turn furnish the consideration to the insurer. There is nothing of that in this case. The repayment when death is before the age of 60 years is simply the return of the premiums to the moment paid. The only risk assumed by the [insurer] in relation to death lies in the preservation or investment of the premiums. But that is not a life insurance risk....[97]

This then disposed of the appeal.[98] The annuity contract was not a contract of life insurance and the preferred beneficiary restrictions did not limit Kerslake's freedom to designate Ms. Gray as his beneficiary.

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[95] The Supreme Court of Canada recently confirmed this constitutional point in *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, [2003] 2 S.C.R. 63.

[96] *Supra* note 91, subsection 1(36).

[97] *Supra* note 89, at 12.

[98] Mrs. Mildred Kerslake also unsuccessfully attempted to gain an interest in her husband's group life insurance policies issued in Ontario and governed by Ontario law. She cited the protection of the *Dependents' Relief Act*, R.S.O. 1950, c. 101. Like the annuity contract considered in *Gray v. Kerslake*, Mrs. Kerslake had been the designated beneficiary under these policies until her husband changed the beneficiary to Ms. Gray. As had the courts below, the Supreme Court of Canada held that policies payable to a third party beneficiary were not part of an "estate" within the meaning of the dependents' relief legislation. See *Kerslake v. Gray*, [1957] S.C.R. 516. Though these two appeals did not overlap, their timing was close. The Court (Kerwin C.J. and Rand, Kellock, Locke, and Cartwright JJ.) heard argument in *Kerslake v. Gray* on 19 February 1957 and delivered judgment on 6 June 1957; the Court (Kerwin C.J. and Taschereau, Rand, Locke, Cartwright, Abbott and Nolan JJ.) heard argument in *Gray v. Kerslake* on 11 and 12 June 1957 and delivered judgment on 18 November 1957 (though Nolan J. died before judgment).

From a Conflicts perspective, it is unfortunate that the Court, and Justice Rand in particular, did not find it necessary to analyze the law governing the foreign insurance contract. Other than accepting that the contract meant exactly what it expressed, *i.e.,* that it was governed by the law of New York, there was scant mention of Conflicts principles in the Court's analysis. One exception was the brief comment by Justice Cartwright of an issue of proof of foreign law. The Court of Appeal had presumed the law of New York to be the same as that of Ontario in protecting preferred beneficiaries in policies of life insurance. Justice Cartwright declared that presumption to be in error because "the presumption relates to the general law and does not extend to the special provisions of particular statutes altering the common law."[99] One can only speculate whether, for Justice Rand, this brought back memories of his own argument on proof of foreign law as counsel in *Canadian National Steamships Company Ltd. v. Watson.*[100]

Counsel's interesting litigation strategy in *Gray v. Kerslake* was doubtless developed with full knowledge of the substantive law of New York. Counsel for Mrs. Kerslake must have determined that reliance on the substantive law of New York to govern her rights under the annuity contract — in other words, as a matter of Conflict of Laws alone — would not have strengthened her claim. Hence, counsel argued application of Ontario insurance law with its privileged protection of preferred beneficiaries under policies of life insurance. Two legal issues were then joined with counsel for Ms. Gray: (i) the constitutionality of the application of the Ontario insurance provisions to a contract made in, and expressed to be governed by, the law of New York and (ii) the characterization of the subject contract as a policy of life insurance. It is somewhat surprising that counsel for Ms. Gray decided not to prove the law of New York and to leave proof of foreign law to the principle of similarity which, unless restricted to general principles, would not be favourable to Ms. Gray. Applying that principle, the Ontario trial and appeal courts presumed the law of New York to be the same as that of Ontario. Significantly, Justice Cartwright would have applied a more restricted principle of similarity and would have reversed the finding of the courts below on this point.

The question remains unanswered: what would have been the result if the case had been resolved by Conflicts analysis including proof of New York law? The short answer would be that the result would have been the same and Mrs. Kerslake would have been unsuccessful in her claim against Ms. Gray under the annuity contract. First, New York law would not have characterized the annuity contract as a policy of life insurance. Case law in New York clearly distinguished between the two types of contracts:

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[99] *Ibid.*, at 10.
[100] *Supra* note 17.

> ...an annuity as a provision or life with no indemnity feature, and a contract of insurance as a provision against death... insurance involved risk shifting and risk distributing; that annuities insurance were opposites; that from the company's view insurance looked to longevity, annuities to transiency.[101]

Secondly, New York insurance law protected a beneficiary designated under a policy of life insurance. The beneficiary gained a vested property interest upon issuance of the policy, a designation that could not be modified without the beneficiary's consent,[102] because of an implied trust for the benefit of the beneficiary, a rule described by Vance as "peculiar to the United States" but which had been adopted by legislation in Ontario.[103] An important qualification to this implied vested right was that New York law also recognized a right in the insured to change the designated beneficiary if the insured reserved such a right in the contract. The Kerslake annuity contract did just that:

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[101] *In Re Rhodes' Estate* 94 N.Y.S. 2d 406 (1949) (Surr. Ct.) at 408, Griffiths, Surr. Ct. J. referring to *People ex rel. Metropolitan Life Insurance Company v. Knapp* 184 N.Y.S. 345, affirmed at 231 N.Y. 630 and *Helvering v. Le Gierse* 312 U.S. 531, 61 S.Ct. 646.

[102] See W. R. Vance, *Handbook on the Law of Insurance*, 3rd ed. (St. Paul: West Publishing Co., 1951) at 661; also an earlier summary of the law in *Davis v. Modern Industrial Bank* 279 N.Y. 405 (1939) at 409-10:

> Concededly an assignment of a policy by the insured will not convey any interest as against the beneficiary named in the policy unless the right to change the beneficiary is reserved therein. It makes no difference what the interest of the beneficiary is denominated, as a vested interest or by some other name. In any event it is such an interest that the beneficiary cannot be deprived of it without consent unless such right is reserved in the policy. (14 R. C. L. p. 1387; *Shipman v. Protected Home Circle*, 174 N. Y. 398, 407.) That is the law in every jurisdiction in this country except Wisconsin. (*Boehmer v. Kalk*, 155 Wis. 156; *Richards on The Law of Insurance* [4th ed.], p. 557.) That rule is known as the vested interest rule. It was because the law had become settled to the effect that an insured could not change the beneficiary or assign a policy that the insurance companies, in answer to an extensive demand therefor, provided in some policies that the insured reserved the right to change the beneficiary and to assign the policy. (31 *Yale Law Journal*, p. 358.) The very purpose of reserving the right to change the beneficiary and to assign the policy was to overcome the old rule that the beneficiary had a valuable interest which could not be encumbered or changed by the insured without the consent of the beneficiary.

The 1954 New York case of *McNerney v. Aetna Life Ins. Co.* 130 N.Y.S.2d 152 (N.Y.A.D.) (1954) was to the same effect. I am indebted to my colleague Richard Bird for bringing the Vance text to my attention and kindly permitting me to borrow his copy.

[103] Vance, *ibid.*, at 667 and at 668, note 5.

> In the event of the death of the Annuitant before payment of the annuity has begun as provided on the first page hereof, the Association will pay 120 equal monthly instalments of $9.83 per $1000.00 of Accumulated Premiums to MILDRED LOUISE KERSLAKE, WIFE of the annuitant, if living, as Beneficiary.
>
> The right to change the Beneficiary is ----- reserved by the Annuitant.[104]

Both the form completed by Dr. Kerslake in 1949 to change the designated beneficiary to "Alison B. Gray, Friend" and the 1950 form used to designate the beneficiary as "Alison B. Kerslake, Wife" included the following reservation:

> The right is hereby reserved to the Annuitant, without the consent of any beneficiary to change and revoke this Mode of Settlement and to receive, exercise, and enjoy every benefit, option, right and privilege conferred by the contract or allowed by the Association.[105]

Accordingly, Dr. Kerslake not only reserved the right to change the beneficiary and thereby avoided the vested right rule but, properly characterized, the contract was not a policy of life insurance under New York law. Just as Mrs. Kerslake was ultimately unsuccessful in her litigation invoking constitutional law principles, she would have been equally unsuccessful if her claim had been resolved using Conflict of Laws principles.

Like *Gray v. Kerslake*, two family law appeals presented interesting fact patterns inviting Conflicts analysis but were resolved without resort to Conflicts principles.

Bickley v. Bickley and Blatchley[106] presented choice of law issues in the context of a child custody dispute between divorced parents. The Bickleys married in New Jersey in 1944. After his discharge from military service in 1946, the couple resided in several locations in the eastern United States and were residing in Pennsylvania when Mrs. Bickley informed her husband of her desire for a divorce and of her intention to marry a family friend who would also be seeking a divorce. The Bickleys assumed that they were domiciled in the state of Pennsylvania and Mr. Bickley reluctantly

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[104] The spacing in the last line obviously permitted the insured to opt to insert the word "not" so the phrase would read "is not reserved". See appeal file in *Gray v. Kerslake* in the custody of the Court Records Office, Supreme Court of Canada. I appreciate the assistance of Mario Laurier, Supervisor, Court Records Office and of the staff of the Supreme Court of Canada Registry Office in facilitating access to this file.

[105] *Ibid.*, annuity contract documentation in appeal file.

[106] [1957] S.C.R. 329.

"acquiesced" in a divorce plan by which Mrs. Bickley would take custody of their two children and establish residency in Nevada and Mr. Bickley would attorn to the jurisdiction of the Nevada courts. In 1954, after Mrs. Bickley and the children had gone to Nevada, Mr. Bickley learned that his wife had engaged in an act of adultery previously unknown to him and he decided, contrary to the divorce plan, not to retain a Nevada lawyer to appear on his behalf in the divorce proceedings. After six weeks residence in Nevada, Mrs. Bickley commenced her action for divorce and had Mr. Bickley served in Pennsylvania. The Nevada court granted an uncontested divorce decree and custody of the children to Mrs. Bickley. The now former Mrs. Bickley's lover then obtained his Nevada divorce and the happy couple married in February 1955. In May 1955, the new couple moved to British Columbia with the children.

In December 1955, Mr. Bickley commenced an application in British Columbia for custody of the children. Following a lengthy hearing, the judge awarded custody to Mr. Bickley. The Court of Appeal allowed the appeal by the former Mrs. Bickley partly because the Court regarded Mr. Bickley's failure to appear in the Nevada proceedings as a strategic decision to make "no effort to disturb the existing arrangement, but merely... to preserve his freedom of action should he consider later that it was better to remove them from the mother's custody."[107]

The Supreme Court of Canada allowed the appeal by Mr. Bickley and restored the trial judge's award of custody to him. For the Court, Justice Cartwright, Chief Justice Kerwin and Justices Rand, Locke and Fauteux concurring, deferred to the decision of the trial judge who had heard the witnesses and had properly applied the 'best interests of the children' principle. The Court ordered custody to Mr. Bickley in Pennsylvania and left issues of access by the former Mrs. Bickley to the courts of that jurisdiction. Commenting on the Court of Appeal's interpretation of Mr. Bickley's decision not to retain counsel to appear in the Nevada divorce proceedings, Justice Cartwright wrote:

> This passage appears to overlook the fact that as the children were then in Nevada, the only effective action which the father could have taken would have been in the Court of that State where the mother's action was pending, and by applying to that Court he would have attorned to its jurisdiction which was the very thing which he had determined not to do.[108]

He concluded that the former Mrs. Bickley had not been "lulled" into inaction in the Nevada proceedings because she had submitted an affidavit to the Nevada court, in which she expressed her fear that her husband would come to Nevada and take the children.

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[107] Reported as *Bickley v. Blatchley* (1956) 6 D.L.R. (2d) 199 at 204 (B.C.C.A.).
[108] *Supra* note 106, at 334.

It is surprising that Justice Rand chose not to write separate reasons for decision in this appeal. The case cried out as an instance of forum shopping. Surely, it was in the best interests of the children to have custody issues determined at the same time as the divorce. That was exactly what the Nevada court did in the uncontested proceeding. Mr. Bickley decided not to appear in the Nevada proceedings only after learning of his wife's earlier adultery. He considered his wife an unfit mother but did not raise that issue in the Nevada proceedings. Was there something about the Nevada courts or Nevada law that he considered unfavourable? With respect, it seemed the British Columbia Court of Appeal gave the appropriate interpretation to his actions; the Supreme Court of Canada gave a more innocent interpretation.

In *Hellens v. Densmore*,[109] the Conflicts issues appeared less muted than in the two cases just discussed and became overwhelmed by the issue of reception of English law. In 1943, Amy Gundron Hellens married her first husband in Alberta. He subsequently moved to British Columbia where he established his domicile. Mrs. Hellens obtained a divorce in British Columbia in November 1948 and in January 1949 married her second husband, Andrew William Densmore, an Alberta domiciliary, in Alberta. In 1953, the Densmores and their child moved to British Columbia where they established their domicile. Two years later, Mrs. Hellens Densmore commenced an action for a declaration that her "purported" second marriage was invalid and for custody of their child. The argued invalidity arose because the couple had married contrary to the condition expressed in the divorce decree, that the parties thereto could not re-marry within the appeal period – a condition reflecting a provision of the provincial *Divorce and Matrimonial Causes Act* of the 1936 British Columbia *Revised Statutes*.[110]

The British Columbia courts reasoned that, at the time of her divorce, Mrs. Hellens had a domicile of dependency in British Columbia and that, upon her marriage in Alberta to Mr. Densmore, she either reverted to her domicile of origin or had acquired a domicile of choice in Alberta. With capacity to marry governed by the law of the domicile at the time of this marriage, Ms. Hellens capacity to marry was governed by the law of Alberta. But, Mrs. Hellens-Densmore did not plead the law of Alberta nor did she provide evidence that the laws of Alberta and British Columbia were materially different. Further complicating the matter were the inter-twined problems of reception of English law and the constitutional jurisdiction in relation to marriage and divorce. An English statute of 1857, *An Act to amend the law relating to Divorce and Matrimonial Causes in England*,[111] established the prohibition on re-marriage during the relevant appeal period following a divorce. This statute, which was considered to have been received law in British Columbia (the date of reception

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[109] [1957] S.C.R. 768.
[110] R.S.B.C. 1936, c. 76, s. 38.
[111] 1857, c. 85 (U.K.) as amended by 1858, c. 108 (U.K.).

being 18 November 1858),[112] was later re-enacted by the Legislature in 1897 and then repeated in the 1936 *Revised Statutes*.[113] Therein lay the constitutional issue because British Columbia became a province in 1871 and the *Constitution Act, 1867*, s. 91(26) assigned the class of subject "Marriage and Divorce" to the exclusive jurisdiction of Parliament. Logically, the received law would have continued as a valid law by virtue of the *Constitution Act, 1867*, s. 129, which continued colonial laws within federal legislative jurisdiction until altered by Parliament. But, even before considering the constitutional question, was the law received law if no court existed in British Columbia to hear divorce and matrimonial appeals until 1885? The trial and appeal courts in British Columbia answered this question in the negative and dismissed the petition for a declaration of invalidity of the marriage.

Justice Cartwright, Justices Taschereau and Fauteux concurring, allowed the appeal and held the Densmore marriage invalid. On the Conflicts issue, Justice Cartwright accepted as an unchallenged assumption that, at the time of her marriage to Densmore, Mrs. Hellens was domiciled in Alberta but concluded that the Court of Appeal had erred in dismissing the petition because of a lack of evidence as to the law of Alberta. Instead, the Court should have presumed Alberta law to be the same as the general law of the forum, British Columbia:

> In the absence of such evidence the British Columbia Court should proceed on the basis that in Alberta the general law, as distinguished from special statutory provisions, is the same as that of British Columbia. It is the general law which determines whether the Courts of one jurisdiction will recognize an incapacity to remarry until the lapse of a specified time forming an integral part of the proceedings of the Courts of another jurisdiction....[114]

Justice Cartwright agreed with Sidney Smith J.A. dissenting in the court below that the limitation on re-marriage was indeed received substantive law in British Columbia and had merely lain dormant while no right of appeal existed. The limitation "became effective immediately upon that right coming into existence",[115] which occurred at least upon enactment by Parliament of the *British Columbia Divorce Appeals Act* in 1937.[116] Referring to English and Australian jurisprudence,[117] Justice Cartwright held that the limitation on re-marriage during the appeal period created an incapacity to marry during that period. Justice Locke, Justice Abbott concurring,

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[112] *English Law Ordinance*, Ordinances of B.C., 30 Vict. no. 7 (6 March 1867): "so far as the same are not from local circumstances inapplicable".

[113] For clarity, 1857, c. 85, s. 57 (U.K) is the same as R.S.B.C. 1897, c. 62, s. 62, which is the same as R.S.B.C. 1936, c. 76, s. 38, which is the section to which the decree made reference.

[114] *Supra* note 109, at 780.

[115] *Ibid.*, at 779.

[116] S.C. 1937, c. 4.

[117] Primarily, *Watts and Attorney General for British Columbia v. Watts*, [1908] A.C. 573 (P.C.); and *Miller v. Teale* (1954), 29 A.L.J. 91 (H.C.).

and Justice Kerwin (in separate reasons for decision) dissented principally because they concluded that the English statute was not appropriate to local circumstances and therefore was not received law in British Columbia. As expressed by Justice Locke, "the language of the section by its very terms refers to a right of appeal which never existed in British Columbia".[118]

In separate reasons for decision concurring in the result, Justice Rand held that the 1857 English statute was received law, even though it provided for an appeal from and to courts which did not exist in British Columbia, *i.e.*, a special tribunal and the House of Lords. Justice Rand considered the progressive and forward-thinking intention of the British Columbia Legislature when establishing the date for reception of English law in the then colony:

> The Province was in its infancy: divorce was unknown to its judicature.... That with the increase of population and the general development of its political, social and economic life, the apparatus of justice would undergo major modifications must be attributed to the understanding of the legislators; and that... such a provision originally inoperative because of the absence of an appeal Court within the Province would then become efficacious through the furnishing of procedure is, in my opinion, the sound view of what was intended to be done... [and] what was intended was to infuse the life of the Province with the matured rules of conduct of an older society to which resort, present or future, could be made....[119]

The limitation was only ineffective until provision had been made for an appeal mechanism and that had been done. Justice Rand arrived at his conclusion without any acknowledgment of the Conflicts dimension to the case and without mention of any principles of Conflict of Laws.

RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

Recognition and enforcement of foreign judgments is the third branch of Conflict of Laws. In general, recognition of a foreign judgment at common law requires that the foreign court have had international or direct jurisdiction according to the rules of the recognizing forum. Personal service within the territory and consent and submission to the jurisdiction are the traditional bases of international sense jurisdiction.[120] Recently the concept has been expanded to include a "real and substantial connection" between the parties, the cause of action and the adjudicating forum.[121] In

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[118] *Supra* note 109, at 793.
[119] *Ibid.*, at 782-83.
[120] *Emanuel v. Symon*, [1908] 1 K.B. 302.
[121] *Morguard Investments v. De Savoye*, [1990] 3 S.C.R. 1077.

addition, the foreign judgment must be a final judgment, for a sum certain in money and not tainted by a limited number of defences, such as having been obtained by fraud or being contrary to the public policy of the recognizing country. A foreign judgment which satisfies all these conditions is conclusive on the merits of the legal dispute; and the foreign successful plaintiff may elect either to sue on the foreign judgment or, assuming some defect in the foreign judgment, recommence litigation. In other words, there is no merger of a foreign judgment with its underlying cause of action. A foreign judgment may also be registered in the recognizing forum if there exists, for example, an agreement between the two countries for the reciprocal enforcement of judgments. This is a procedural advantage that permits the foreign successful plaintiff to avoid the necessity of an action on the foreign judgment by the expediency of simply registering the foreign judgment, subject of course to jurisdictional and other recognition rules. A judgment which satisfies the recognition rules will be enforced.

Maintenance orders do not satisfy recognition rules at common law. Orders for the financial support of a spouse and/or children are not "final" because the very court which issued the order can modify it upon application. To overcome this impediment, reciprocal enforcement of maintenance orders legislation (REMO) has become commonplace. In *Attorney General for Ontario v. Scott*,[122] the Supreme Court of Canada rejected a constitutional challenge to REMO legislation. Justice Rand's reasons for decision attracted the concurrence of three justices and represented the views of four of the eight justices who participated in the decision (Justice Estey participated in the hearing but did not participate in the decision due to illness). *Scott* is the only case considered in this essay in which the reasons for decision of Justice Rand attracted substantial support among his judicial colleagues.

Elizabeth Scott and John Lewis Scott were married in Scotland but resided with their two children in Ontario, where Mr. Scott served in the Canadian Army. In December 1949, Mrs. Scott and the children went to England, leaving Mr. Scott in Ontario. In England, Mrs. Scott applied to the appropriate court for a maintenance order against her husband and the court granted that order. When Mrs. Scott sought to have the English order recognized and enforced under the Ontario REMO legislation,[123] Mr. Scott applied for an order of prohibition. The High Court of Ontario dismissed the application, but the Court of Appeal allowed the appeal and granted the order.[124] The Court of Appeal accepted Mr. Scott's arguments that, by permitting only the defences allowed in the original English proceedings pursuant to English law, the REMO statute constituted (i) an unconstitutional delegation of the exclusive legislative jurisdiction of the Province under the *Constitution Act, 1867*, s. 92(13) "Property and Civil Rights in the Province" and (ii) an impermissible conferral of superior court jurisdiction upon an inferior court contrary to section 96 of the *Constitution Act, 1867,* which reserved to

[122] [1955] S.C.R. 137.
[123] *Reciprocal Enforcement of Maintenance Orders Act*, R.S.O. 1950, c. 334.
[124] [1954] O.R. 676.

the Governor in Council the appointment of judges of the superior, district and county courts in the Provinces.

In the Supreme Court, Justice Rand, with Chief Justice Kerwin and Justices Kellock and Cartwright concurring, responded to these constitutional issues but grounded his analysis squarely in the Conflict of Laws context of the matter. He commenced by defining the "comity of nations", Huber's informing principle of Conflict of Laws, as

> ...the respect paid by one state to the laws and to civil rights established by them of another relating to personal or property interests which touch both states.[125]

The civil right sought to be enforced was the maintenance order granted by the English court. If accepted as valid, the maintenance order created a judgment creditor in England and a judgment debtor in Ontario. The maintenance order gave effect to a legal obligation duty recognized by the laws of both countries as inherent in the relationship of the judgment creditor and judgment debtor as married persons, which Justice Rand considered analogous to enforcement of a foreign contractual right.[126] It was at this point that Conflicts principles inter-mingled with constitutional limitations on provincial legislative jurisdiction. While the Ontario courts exercised jurisdiction over Mr. Scott, because of his presence within the territory (Huber's first principle), what jurisdiction existed in relation to the rights of Mrs. Scott, resident in England? Did this constitute an attempt to exercise jurisdiction in relation to civil rights outside the Province and thus contrary to the "within the Province" limitation in section 92(13) of the *Constitution Act, 1867*? Justice Rand clearly thought not. In his opinion, the principle of comity justified recognition of the foreign right within the Province and did not require *in personam* jurisdiction over the foreign resident to be effective within the territory of the recognizing court; though it must be noted that by making her application for enforcement, Mrs. Scott submitted to the jurisdiction of the Ontario courts. Justice Rand distinguished between jurisdiction necessary to vest a right and jurisdiction necessary to extinguish a right:

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[125] *Supra* note 122, at 140. In *Morguard Investments v. De Savoye*, *supra* note 121, at para. 31, La Forest J. chose to define "comity" by quoting the United States Supreme Court in *Hilton v. Guyot*, 159 U.S. 113, at 163-64 (1895):

> "Comity"... is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

[126] *Ibid.*, at 140: "I see no jural distinction between the creation and enforcement of a contract and the recognition and enforcement of a marital duty...."

> A distinction may properly be made between vesting a right and extinguishing it. The former is, in fact, a declaration that within the jurisdiction making it the attributes of ownership of property or of a claim against a person within the jurisdiction, are available to the non-resident. Generally, the right so declared would be recognized and enforced under the principle of comity by other jurisdictions. But a like declaration purporting to extinguish a right based on jurisdiction over a debtor only could not bind the non-resident debtor... outside that jurisdiction unless otherwise supported by recognized elements furnishing jurisdiction over him or the right. In short, a state, including a province, does not require jurisdiction over a person to enable it to give him a right *in personam*; but ordinarily, and to be recognized generally, such a jurisdiction is necessary to divest such a right.[127]

Just as Ontario and Canadian courts daily enforced foreign contractual rights, so too could foreign matrimonial rights be enforced. In any event, Justice Rand considered that, by invoking the Ontario REMO legislation, Mrs. Scott exercised a right "within the Province" conferred upon her by the Ontario Legislature; and, though physically in England, it was the same as if she had come to Ontario in person to enforce that right.[128] The English order was but "the preliminary ground and condition"[129] for creation of the order of the Ontario court under the REMO legislation. He rejected the argument that "civil rights within the Province" in section 92(13) was limited to pre-existing rights localized within the Province and noted that such an interpretation was inconsistent with the head of jurisdiction as interpreted by the courts since 1867; and, if accepted, this would have the practical effect of permitting a debtor to avoid financial responsibilities by the simple expediency of keeping property in another province safe from seizure by creditors.[130]

Justice Rand saw no merit in the delegation argument. Both the Ontario Legislature and the British Parliament acted independently, the former merely adopting in Ontario the defences permitted by the latter. He also rejected the section 96 argument, holding that the judicial duties involved were those regularly performed by inferior courts in Ontario. In particular, he considered that the conversion of foreign currency orders into Canadian dollars by an inferior court did not offend the exclusive jurisdiction of a superior court.

Justice Abbott, Justices Taschereau and Fauteux concurring, delved more fully into the constitutional analysis and concluded that limiting available defences to those permitted in the foreign proceedings:

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[127] *Ibid.*, at 141.
[128] *Ibid.*, at 140.
[129] *Ibid.*, at 144.
[130] *Ibid.*, at 140.

> ...is not in my opinion a delegation of legislative power to another province or state. It is merely a recognition by the law of the province of rights existing from time to time under the laws of another province or state, in accordance with the well recognized principles of private international law.[131]

Justice Locke, for himself, gave a detailed review of the facts before presenting analysis of the constitutional issues raised and made no mention of the application of Conflicts principles.

CONCLUSION

The Rand jurisprudence discussed in this essay received scant attention in the legal community of the 1940s and 1950s, at least in terms of published commentary. *Lister v. McAnulty*, concerning the rights of recovery in tort of a foreign husband for injuries suffered by his wife, became the subject of a comment by Moffat Hancock in the 1944 *Canadian Bar Review*[132] and merited a "Recent Case" note in the *Harvard Law Review*.[133] As a constitutional law case, *Attorney General for Ontario v. Scott*, about the recognition and enforcement of foreign maintenance orders, was the subject of a comment by then Professor Bora Laskin in the 1956 *Canadian Bar Review*.[134] The litigation surrounding Dr. Kerslake's estate attracted the most interest. *Kerslake v. Gray*, the 1957 Supreme Court decision on Mrs. Kerslake's dependant's relief claim, was summarized as a recent case in *Chitty's Law Journal*[135] and *Gray v. Kerslake*, the Court's decision on her claim to the New York annuity contract, was also summarized in *Chitty's*[136] and received a passing mention in the "1962 Special Lectures of the Law Society of Upper Canada".[137]

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[131] *Ibid.* at 148.

[132] (1944) 22 *Can. Bar Rev.* 843. The author stated that the Court "opinions... exemplify... an admirable approach to a rather difficult conflict of laws" (*ibid.*, at 849). The reasons for decision of Rand J. were not discussed in detail.

[133] (1945) 58 H. L.R. 878-80. The unidentified editor placed the significance of the case in "an observable trend in common law jurisdictions away from a mechanical application of the dogma that everything connected with a tort is governed by the law of the place of wrong" (*ibid.*, at 878) . The editor suggested that *renvoi* had a role in such analysis.

[134] B. Laskin , "Case and Comment" (1956) 34 *Can. Bar Rev.* 215.

[135] "Insurance – Status of ordinary beneficiaries of a life policy" (1957) 7 *Chitty's Law Journal* 219, at 220.

[136] "Annuity – Application of Ontario statute to contract made ex juris" (1958) 8 *Chitty's L. J.* 28-29. The note presented the reasons for decision of Rand J. in one sentence: "Rand J. (Abbott J. concurring), disposed of the case on the ground that the contract was not a contract of life insurance and the Ontario statute did not apply."

[137] E. H. McVitty, "Interpretation of Life Policies", [1962] *Special Lectures, Law Society of Upper Canada* 101, at 102: "An interesting decision on this is found in *Kerslake v. Gray* [citing (1958) 2 D.L.R. (2d) 225] which concerned a policy issued by a New York insurance company not licensed in Ontario and it infers that the presumption under Ontario law that a

Yet, the Rand Conflict of Laws Jurisprudence, while not overtly significant in advancing the development of Canadian Conflict of Laws, was characteristic of Justice Rand's general approach to the law and judging. Rather than uncritically applying existing English precedent, as many of his judicial colleagues were content to do, Justice Rand repeatedly wrote separate reasons for decision in which he considered underlying reasons for a rule or an alternative mode of analysis which might develop the law. His was often an independent voice – a voice compelled to expression in almost every appeal he considered. On a Court where concurrence promoted both efficiency and collegiality, Justice Rand's independence might not have been as appreciated in practice as it has become through the lens of history.

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contract is made in the province can be rebutted." That author identified the case using the style used for the earlier dependant's relief claim and that the citation was in error – it should be to 11 *Dominion Law Reports* (2d). The Court of Appeal's decision was cited in a footnote in J. W. Graham, "Life Insurance", [1957] *Special Lectures L.S.U.C.* 61, at 72.