MAR 5 1956

Memorandum No. 7

Subject: Study No. 4: What law should govern survival of actions

This study will be on the agenda of the meeting of March 12. Enclosed herewith are the following items relevant to it:

1. The research consultant's report; See Study file
2. A proposed Report and Recommendation of the commission to the Legislature; and See Study file
3. The minutes of the meeting of the Southern Committee on February 10, which report the discussions and the recommendations of the committee concerning this study.

As is apparent, both the research consultant and the Southern Committee are of the view that the commission should not recommend legislation on this subject. The purpose of this memorandum is to suggest reasons for which the commission may wish to take a different view of the matter.

The research consultant concluded, on the basis of his careful and detailed analysis and discussion of survival of actions that the rule applied in Grant v. McAuliffe is in conflict with generally accepted principles of conflict of laws and that it may, in addition, violate the Due Process and Full Faith and Credit Clauses of the United States Constitution. He nevertheless concluded that the commission should not recommend to the Legislature the enactment of a statute requiring California courts to apply the law of the place of wrong to determine whether a cause of action survives the death of any person involved. Two reasons were given for this conclusion: (1) that such legislation might not effectively control the courts because, depending on the facts in any individual case, a survival problem might be characterized as a tort problem, a contract problem, or an administration of estates problem, and

also because even though it were characterized as a tort problem the concept "place of wrong" is sufficiently flexible to permit a court to apply any law which it might wish to apply in a particular case; and (2) that survival is but one aspect of the larger problem of differentiating matters of substance from matters of procedure for purposes of conflict of laws and that legislative action, if any, should be taken with respect to the larger problem rather than merely one facet of it.

With regard to the research consultant's first point, it seems doubtful that insuperable difficulty would be encountered in drafting a statute which would effectively control the courts in their choice of law as to survival of actions. Any statute drafted might, of course, fall somewhat short of perfection in this regard but it seems likely that a reasonably tight statute could be drawn. For example, a statute along the following lines might be considered:

> Whether an action survives the death of any person is determined by the law of the place where the cause of action arose. Whether an action brought in this State revives after the death of any party is governed by the law of this State but no action revives unless the action survives by the law of the place where the cause of action arose. For purposes of this section the place where a cause of action arose is the State or country whose law would have been applied to determine the substantive rights and liabilities of the persons involved had all of them survived.

With regard to the second point made by the research consultant, it is questionable whether the whole difficult area of substance and procedure in conflict of laws ought to be covered in a single statute, or even a single study. Each facet of the problem -- e.g., statute of limitations, burden of proof, etc. -- has its special aspects and ramifications. It would seem, therefore, that each of them should be made the subject of the kind of detailed study which the research consultant has made of the problem of survival before

a recommendation is made to the Legislature. Such a study is, of course, beyond the scope of our authority under Resolution Chapter 207. Moreover, there is reason to believe that legislation is unnecessary as to many of these matters because the California courts are now following accepted principles. Finally, at this stage in the development of our commission, such a study or group of studies may be a larger undertaking than the commission would be justified in requesting authority to make, particularly in what might seem to be a rather esoteric field to many members of the Legislature.

The Southern Committee is of the view that Grant v. McAuliffe was correctly decided because it avoided the application of the archaic Arizona law of nonsurvival of tort actions. Discussion at the committee meeting indicated that this opinion is based, at least in part, on the view that it is proper for a court in deciding a conflict of laws case to decide what result it wants to achieve as between the parties and then apply whichever law will get that result. But this view is contrary to the basic and generally accepted principle upon which choice of law rules are founded. That principle is that there should be a rational body of rules to determine what law is to govern various types of controversies, without regard to the intrinsic merit of the law which the rules will indicate should be applied. The rule with respect to what law is to govern cases involving a particular type of controversy is determined by deciding which jurisdiction has the most important connection with that type of controversy, because it is the domicile of the parties, the place of wrong, the place of contracting, or the situs of property, or because it has some other controlling connection or "contact" with the underlying transaction. The jurisdiction whose law is to govern is not chosen because in the particular case before the court its law is more modern or just than the

law of other jurisdictions which may be involved. Moreover, once the jurisdiction whose law is to be applied has been selected, its substantive law should be applied regardless of whether it is modern or archaic, "right" or "wrong". Unless these principles are followed, the rights of the parties are likely to be determined by the fortuity of where suit is brought, thus encouraging forum shopping by the plaintiff for the "brand" of law favorable to his cause.

The research consultant made a careful analysis of the problem of what law should govern survival of actions and concluded, on the basis of both principle and authority, that it should be the law of the place of wrong and not of the forum. If that view is well taken, it ought to be followed even though in particular cases a rule of survival less enlightened than that of California is thus applied.

Moreover, as is acknowledged in the committee report, the application of the Grant rule in certain other cases could result in hardship to California plaintiffs. While, as the committee points out, the courts may not follow the Grant rule in such cases, there is also a very substantial possibility that they will. Should this risk be deliberately taken?

There is, no doubt, some justification for the position taken in the committee's report that legislative action on this matter may be premature inasmuch as future decisions may modify the apparent scope of the Grant rule. Indeed, this consideration might have persuaded the commission not to put this matter on its agenda. But the commission did request authority for and undertake this study and it has hired a research consultant and expended not a little of its own energy on it. These considerations would seem to weigh heavily in favor of deciding the question presented by Grant v. McAuliffe now.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

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Mr. Ball was absent during the part of the meeting in which this study was considered. However, he had conveyed his views to Mr. Shaw and had authorized Mr. Shaw to express them for him.

The committee decided to recommend to the commission that Mr. Sumner's report be accepted for publication.

The committee discussed at length what recommendation the commission should make to the Legislature regarding this study. Mr. Shaw stated that both he and Mr. Ball were of the view that the result in Grant v. McAuliffe was good because the Arizona rule which does not allow a personal injury action to survive is, they feel, archaic and unjust. Mr. Shaw expressed the view that it is proper for the California courts to seize upon any available theory to justify refusing to apply such an archaic rule, particularly in a case involving California residents. For this reason both Mr. Ball and Mr. Shaw felt that the choice of law rule applied in Grant v. McAuliffe should not be changed by legislation.

The Executive Secretary expressed disagreement with this view, taking the position that the courts of this State should not choose the applicable law on the basis of which law, of the two or more involved, appears to be the more enlightened but rather by the application of accepted principles of conflict of laws under which this factor is irrelevant. Mr. Sumner expressed agreement with this view.

Mr. Sumner also pointed out that the theory adopted in the Grant case is a two-edged sword which, if applied in all cases, could operate as much to the detriment of California residents as to their benefit. For example,

in a case in which the place of wrong allows survival of a personal injury action, the damages would, under the Grant rule, be limited pursuant to California law (Civil Code § 956) even though not so limited under the law of the place of wrong. Moreover, under the Grant rule, a libel action for an injury to the reputation of a California resident occurring in a state which allowed the cause of action to survive would be abated by the application of California law. Mr. Shaw expressed the view, however, that the California courts might well limit the Grant rule to the special facts of that case and not apply it when the interests of California residents would be adversely affected by doing so.

Mr. Babbage agreed with Mr. Ball, Mr. Shaw and Mr. Sumner that the commission should not recommend any legislation on this matter at the present time. He thought, however, the suggestion of the research consultant that the Legislature might undertake to deal with the entire problem of substance and procedure for purposes of conflict of laws was well taken and suggested that the commission request permission from the Legislature to study this broader question. He stated that if such a study were undertaken it should, in his opinion, include the question of what law should govern survival and revival of actions.

The committee ultimately decided to recommend to the commission (1) that no legislation be recommended to the Legislature at this time, and (2) that authorization be requested to study the broader question of differentiating matters of substance from matters of procedure for purposes of conflict of laws (the committee did not determine whether survival and revival of actions should be included in this study).

Grant v. McAuliffe
41 C.2d 859, 264 P.2d 944 (1953)

TRAYNOR, J. - On December 17, 1949, plaintiffs W. R. Grant and R. M. Manchester were riding west on United States Highway 66 in an automobile owned and driven by plaintiff D. O. Jensen. Defendant's decedent, W. W. Pullen, was driving his automobile east on the same highway. The two automobiles collided at a point approximately 15 miles east of Flagstaff, Arizona. Jensen's automobile was badly damaged, and Jensen, Grant and Manchester suffered personal injuries. Nineteen days later, on January 5, 1950, Pullen died as a result of injuries received in the collision. Defendant McAuliff was appointed administrator of his estate and letters testamentary were issued by the Superior Court of Plumas County. All three plaintiffs, as well as Pullen, were residents of California at the time of the collision. After the appointment of defendant, each plaintiff presented his claim for damages. Defendant rejected all three claims, and on December 14, 1950, each plaintiff filed an action against the estate of Pullen to recover damages for the injuries caused by the alleged negligence of the decedent. Defendant filed a general demurrer and a motion to abate each of the complaints. The trial court entered an order granting the motion in each case. Each plaintiff has appealed. The appeals are based on the same ground and have therefore been consolidated.

The basic question is whether plaintiffs' causes of action against Pullen survived his death and are maintainable against his estate. The statutes of this state provide that causes of action for negligent torts survive the death of the tort feasor and can be maintained against the administrator or executor of his estate.

(Civ. Code, § 956; Code Civ. Proc., § 385; Prob. Code, §§ 573, 574.) Defendant contends, however, that the survival of a cause of action is a matter of substantive law, and that the courts of this state must apply the law of Arizona governing survival of causes of action. There is no provision for survival of causes of action in the statutes of Arizona, although there is a provision that in the event of the death of a party to a pending proceeding his personal representative can be substituted as a party to the action (Arizona Code, 1939, § 21-534), if the cause of action survives. (Arizona Code, 1939, § 21-530.) The Supreme Court of Arizona has held that if a tort action has not been commenced before the death of the tort feasor a plea in abatement must be sustained. (McClure v. Johnson, 50 Ariz. 76, 82 [69 P.2d 573]. See, also McLellan v. Automobile Ins. Co. of Hartford, Conn., 80 F.2d 344.)

Thus, the answer to the question whether the causes of action against Pullen survived and are maintainable against his estate depends on whether Arizona or California law applies. In actions on torts occurring abroad, the courts of this state determine the substantive matters inherent in the cause of action by adopting as their own the law of the place where the tortious acts occurred, unless it is contrary to the public policy of this state. (Loranger v. Nadeau, 215 Cal. 362 [10 P.2d 63, 84 A.L.R. 1264].) "[N]o court can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can enforce any law but that of its own sovereign, and, when a suitor comes to a jurisdiction foreign to the place of the tort, he can only invoke an obligation recognized by that sovereign. A

foreign sovereign under civilized law imposes an obligation of its own as nearly homologous as possible to that arising in the place where the tort occurs." (Learned Hand, J., in Guiness v. Miller, 291 F. 769, 770.) But the forum does not adopt as its own the procedural law of the place where the tortious acts occur. It must, therefore, be determined whether survival of causes of action is procedural or substantive for conflict of laws purposes.

This question is one of first impression in this state. The precedents in other jurisdictions are conflicting. In many cases it has been held that the survival of a cause of action is a matter of substance and that the law of the place where the tortious acts occurred must be applied to determine the question. . . . The Restatement of the Conflict of Laws, section 390, is in accord. It should be noted, however, that the majority of the foregoing cases were decided after drafts of the Restatement were first circulated in 1929. Before that time, it appears that the weight of authority was that survival of causes of action is procedural and governed by the domestic law of the forum. . . . The survival statutes do not create a new cause of action, as do the wrongful death statutes. . . . They merely prevent the abatement of the cause of action of the injured person, and provide for its enforcement by or against the personal representative of the deceased. They are analogous to statutes of limitation, which are procedural for conflict of laws purposes and are governed by the domestic law of the forum. (Biewend v. Biewend, 17 Cal.2d 108, 114 [109 P.2d 701, 132 A.L.R. 1264].) Thus, a cause of action arising in another state, by the laws of which an action cannot be maintained thereon because of lapse of time, can be enforced in California by a citizen of this state, if

he has held the cause of action from the time it accrued. (Code Civ. Proc., § 361; Stewart v. Spaulding, 72 Cal. 264, 266 [13 P.661]. See, also, Biewend v. Biewend, supra; and Western Coal & Mining Co. v. Jones, 27 Cal.2d 819, 828 [167 P. 719, 164 A.L.R. 685].)

Defendant contends, however, that the characterization of survival of causes of action as substantive or procedural is foreclosed by Cort v. Steen, 36 Cal.2d 437, 442 [224 P.2d 723], where it was held that the California survival statutes were substantive and therefore did not apply retroactively. The problem in the present proceeding, however, is not whether the survival statutes apply retroactively, but whether they are substantive or procedural for purposes of conflict of laws. "'Substance' and 'procedure'...are not legal concepts of invariable content" . . . and a statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made.

Defendant also contends that a distinction must be drawn between survival of causes of action and revival of actions, and that the former are substantive but the latter procedural. On the basis of this distinction, defendant concludes that many of the cases cited above as holding that survival is procedural and is governed by the domestic law of the forum do not support this position, since they involved problems of "revival" rather than "survival." The distinction urged by defendant is not a valid one. Most of the statutes involved in the cases cited provided for the "revival" of a pending proceeding by or against the personal representative of a party thereto should he die while the action is still

pending. But in most "revival" statutes, substitution of a personal representative in place of a deceased party is expressly conditioned on the survival of the cause of action itself.[1] If the cause of action dies with the tort feasor, a pending proceeding must be abated. A personal representative cannot be substituted in the place of a deceased party unless the cause of action is still subsisting. In cases where this substitution has occurred, the courts have looked to the domestic law of the forum to determine whether the cause of action survives as well as to determine whether the personal representative can be substituted as a party to the action. . . . Defendant's contention would require the courts to look to their local statutes to determine "revival" and to the law of the place where the tort occurred to determine "survival," but we have found no case in which this procedure was followed.

Since we find no compelling weight of authority for either alternative, we are free to make a choice on the merits. We have concluded that survival of causes of action should be governed by the law of the forum. Survival is not an essential part of the cause of action itself but relates to the procedures available for the enforcement of the legal claim for damages. Basically the question is one of the administration of decedents' estates, which

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[1] For example, Code. Civ. Proc., § 385: "An action or proceeding does not abate by the death, or any disability of a party if the cause of action survive or continue." (Emphasis added.) See also 28 U.S.C.A., Rule 25(a)(1) [leg. hist., U.S.Rev.Stat., § 955 (1874); Judiciary Act of 1789, § 31]:"If a party dies and the claim is not thereby extinguished, the court. . . may order substitution . . ." of the personal representative. (Emphasis added.) The exact language of Rule 25(a)(1) is repeated in Arizona Code, 1939, § 21-530.

is a purely local proceeding. The problem here is whether the causes of action that these plaintiffs had against Pullen before his death survive as liabilities of his estate. Section 573 of the Probate Code provides that "all actions founded . . . upon any liability for physical injury, death or injury to property, may be maintained by or against executors and administrators in all cases in which the cause of action . . . is one which would not abate upon the death of their respective testators of intestates. . . ." Civil Code, section 956, provides that "A thing in action arising out of a wrong which results in physical injury to the person . . . shall not abate by reason of the death of the wrongdoer. . . ," and causes of action for damage to property are maintainable against executors and administrators under section 574 of the Probate Code. . . . Decedent's estate is located in this state, and letters of administration were issued to defendant by the courts of this state. The responsibilities of defendant, as administrator of Pullen's estate, for injuries inflicted by Pullen before his death are governed by the laws of this state. This approach has been followed in a number of well-reasoned cases. . . . It retains control of the administration of estates by the local Legislature, and avoids the problems involved in determining the administrator's amenability to suit under the laws of other states. The common law doctrine actio personalis moritur cum persona had its origin in a penal concept of tort liability. (See Prosser, Law of Torts 950-951; Pollock, The Law of Torts (10th ed.) 64, 68.) Today, tort liabilities of the sort involved in these actions are regarded as compensatory. When, as in the present case, all of the parties were residents of this state, and the estate of the deceased tort feasor

is being administered in this state, plaintiffs' right to prosecute their causes of action is governed by the laws of this state relating to administration of estates.

The orders granting defendant's motions to abate are reversed, and the causes remanded for further proceedings.

Gibson, C. J., Shenk, J., and Carter, J., concurred.

SCHAUER, J. - I dissent. In Cort v. Steen (1950), 36 Cal. 2d 437, 442 [224 P.2d 723], this court held that under the doctrine of nonsurvivability the abatement of an action by the death of the injured person through the tort feasor's act or otherwise, or by the death of the tort feasor, abates the wrong as well; that the effect of a survival statute is to create a right or cause of action rather than to either continue an existing right or revive or extend a remedy theretofore accrued for the redress of an existing wrong; and that consequently a survival statute enacted after death of the tort feasor did not apply to the tort or cause of action involved. And more recently, in Estate of Arbulich (1953), ante, pp. 86, 88-89 [257 P.2d 433], we recognized the rule that the burden of proof provisions of the Probate Code sections (259 et seq.) dealing with reciprocal inheritance rights are not merely procedural in nature, but rather, are substantive statutes regulating succession, and that consequently such rights are to be determined by the law as it existed on the date of decedent's death. (See, also, Estate of Giordano (1948), 85 Cal.App.2d 588, 592, 594 [193 P.2d 771].)

Irreconcilably inconsistent with the cases cited in the preceding paragraph, the majority now hold that "Survival is not an

essential part of the cause of action itself but relates to the procedures available for the enforcement of the legal claim for damages. Basically the question is one of the administration of decedents' estates, which is a purely local proceeding." If the above stated holding is to prevail, then for the sake of the law's integrity and clarity, and in fairness to lower courts and to counsel, the cited cases should be expressly overruled. But even more regrettable than the failure to either follow or unequivocally overrule the cited cases is the character of the "rule" which is now promulgated: the majority assert that henceforth "a statute or other rule of law will be characterized as substantive or procedural according to the nature of the problem for which a characterization must be made," thus suggesting that the court will no longer be bound to consistent enforcement or uniform application of "a statute or other rule of law" but will instead apply one "rule" or another as the untrammeled whimsy of the majority may from time to time dictate, "according to the nature of the problem" as they view it in a given case. This concept of the majority strikes deeply at what has been our proud boast that ours was a government of laws rather than of men.

Although any administration of an estate in the courts of this state is local in a procedural sense, the rights and claims both in favor of and against such an estate are substantive in nature, and vest irrevocably at the date of death. . . . Since this court has clearly held that a right or cause of action created by a survival statute is likewise substantive, rather than procedural, we should hold, if we would follow the law, that the trial court properly granted defendant's motions to abate.

Spence, J., concurred.

EDMONDS, J. - I concur in the conclusion that the order granting the defendant's motion to abate should be affirmed.