

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY
relating to
Choice of Law Governing Survival
of Actions

February 1, 1957

LETTER OF TRANSMITTAL

To HIS EXCELLENCY GOODWIN J. KNIGHT
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 207 of the Statutes of 1955 to make a study to determine whether California should continue to follow the rule that survival of actions arising outside California is governed by the law of this State. The commission submits herewith its recommendation relating to this subject and the study prepared by its research consultant, Professor James D. Sumner, Jr., of the School of Law, University of California at Los Angeles.

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to Choice of Law Governing Survival of Actions

The rule that survival of causes of action arising elsewhere is governed by California law when suit is brought in this State was applied in a four-to-three decision of the Supreme Court of California in the recent case of *Grant v. McAuliffe*. In that case suit was brought here by a resident of California against the estate of a California resident on a cause of action for personal injuries arising out of an automobile collision in Arizona. Under California law this type of tort action survives the death of either party; under Arizona law it does not. The Supreme Court held that California law governed. Because every other court which has considered the question presented in *Grant v. McAuliffe* has held that survival is governed by the law of the place where the cause of action arose, the commission requested and was granted authority by the Legislature to make the present study to determine whether the rule of the *Grant* case should be changed by legislation.

The commission has determined that it should not recommend the enactment of a statute specifying what law should govern survival of actions arising elsewhere when suit is brought in this State. As is pointed out in the research consultant's report, this is but a part of the larger problem of differentiating for purposes of choice of law between matters of substance (as to which the "proper law" shall govern) and matters of procedure (as to which the forum applies its own law). The research consultant recommended that any legislation in this area should embrace this entire problem and not merely one facet of it.

Moreover, although much can be said for the view that, generally speaking, survival should be governed by the law of the place where the cause of action arose rather than that of the forum, the application of California law in the *Grant* case to determine that the cause of action survived was not, it is believed, unjustifiable since all of the parties were residents of California and application of the archaic Arizona law of nonsurvivability was avoided.

It is true that the application of California law in all cases to determine whether a cause of action survives could result in hardship to California residents in some instances. For example, a California resident might sue a decedent's estate here for libel committed in a state where such a cause of action survives; application of California law would in this case defeat recovery since a libel action does not survive in this State. Again, suit might be brought in California by the estate of one who had a cause of action for personal injuries arising in another state; in such a case plaintiff's recovery would be diminished by application of California law if the other state did not have the California rule which excludes such elements as pain and suffering,

disfigurement, etc. from the damages recoverable when the injured person dies before suit is brought. However, it is not clear that the California courts will apply California law to determine the issue of survival in such cases. The *Grant* case may be limited by the courts to cases involving either or both of its special facts: (1) all the parties are residents of California and (2) the California law is more favorable on the issue of survival than the law of the other state involved.

Because the result reached in the *Grant* case is not unjustifiable on its special facts and because the application of the rule adopted by the Supreme Court in that case to cases involving different facts is not clear, the commission believes that legislation on the matter of what law shall govern survival of actions would be premature and respectfully recommends that no such action be taken.

A STUDY RELATING TO THE LAW WHICH SHOULD GOVERN SURVIVAL OF ACTIONS ARISING IN ANOTHER STATE WHEN SUIT IS BROUGHT IN CALIFORNIA*

INTRODUCTORY STATEMENT

At common law, tort actions did not survive.¹ Thus, upon the death of either the injured party or the tortfeasor prosecution of a suit for an injury was barred. This was true regardless of whether death occurred before or after suit was commenced. The reason generally assigned for the common law rule was that the cause of action was personal and suit could only be brought by and against the parties to the alleged wrong.² Such was not true with respect to contract claims. They were not abated by death at common law.³ Likewise today the survivability of contract claims is permitted.⁴

The common law rule relating to tort claims has been modified by statute in every jurisdiction in the United States.⁵ There are two types of relevant statutes: those permitting survival and those allowing revival. A survival statute changes the common law rule and permits the commencement of an action after death. A revival statute allows the continuation of pending actions upon death. Such a continuation is usually conditioned on the survival of the action.

In California the survivability of most tort claims is now permitted, but not all are included in the statute.⁶

Within the United States survival has been expanded at different rates and uniformity of legislation is lacking. Thus, only a few states permit the survival of actions involving injury to reputation,⁷ but most allow survival of personal injury actions and actions for injury to property.⁸ This lack of uniformity poses difficult problems in a conflict of laws case when several states whose survival laws are different are involved in the controversy. The problem takes on added significance when consideration is given to the increasing mobility of the American people.

Where there is a difference in the statutes of the states concerned, the forum must decide whether its own law or the law of another place is to govern. If the issue is to be decided by the proper state's concepts, which state is the appropriate one? Even though both the forum and the foreign state allow survival, these questions might still be

* This study was made at the direction of the Law Revision Commission by Professor James D. Sumner, Jr. of the School of Law, University of California at Los Angeles.

¹ ATKINSON, WILLS § 126 (Hornbook Series, 2d ed. 1953).

² See Matter of Killough, 148 Misc. 73, 265 N.Y. Supp. 301 (Sur. Ct. 1933).

³ 3BL. COMM. * 302.

⁴ WILLISTON, CONTRACTS § 1945 (Rev. ed. 1938).

⁵ For a summary of the legislation see Evans, *A Comparative Study of the Statutory Survival of Tort Claims For and Against Executors and Administrators*, 29 MICH. L. REV. 969 (1931).

⁶ CAL. CIV. CODE § 956; CAL. PROB. CODE § 574.

⁷ See note 5 *supra*; PROSSER, TORTS 953 (Hornbook Series 1941).

⁸ *Ibid.*

crucial because of differences on matters such as parties, damages, etc.⁹ For example, many states do not limit the damages recoverable in a tort suit containing a survival element. However, there are limitations under the California statute.¹⁰ Suppose, then, that a tort occurs in state X and one of the parties subsequently dies. Further, assume that state X allows survival. Suit is brought in California. Is the California limitation to be applied?

This general problem was recently before the Supreme Court of California for the first time in *Grant v. McAuliffe*.¹¹ In that case the plaintiffs were injured in Arizona in an automobile collision with the defendant's decedent. All parties were residents of California. The defendant's decedent died as a result of the accident prior to the filing of the suit. The defendant, administrator of the decedent's estate, rejected the plaintiffs' claims for damages and actions were filed in California against the estate. Under the law of Arizona actions for personal injuries abate on the death of the tortfeasor,¹² whereas they survive under the law of California. The defendant demurred generally and moved to abate the actions on the ground that the Arizona law was applicable. The trial court granted defendant's motion and the plaintiffs appealed. The California Supreme Court reversed the lower court decision holding that the California law governed. The majority opinion was written by Traynor, J. and concurred in by Gibson, C. J., Shenk, J. and Carter, J. Justices Schauer, Spence, and Edmonds dissented. The rationale of the majority opinion is unclear. In fact, the decision seems to have been based on several theories. The court first concluded that survival is a matter of procedure and hence governed by the law of the forum. However, it was intimated that this classification is to be made only when both parties are residents of California and that a different result might be reached when the parties are residents of other states:

When, as in the present case, all of the parties were residents of this state * * * plaintiffs' right to prosecute their causes of action is governed by the laws of this state * * *.¹³

In addition it was suggested in the majority opinion that the problem before the court involved the administration of a decedent's estate, which is governed by the place of administration, and not a tort problem:

Basically the problem is one of the administration of decedent's estates, which is a purely local proceeding.¹⁴

The *Grant* case poses several questions that must be considered in order to determine the soundness of the decision: Are there any controlling provisions of the Constitution? Is survival a procedural or substantive issue? Assuming it to be a matter of substance, what type of problem is presented and what choice of law is to be made?

⁹ See *Stoltz v. Burlington Transportation Co.*, 178 F.2d 514 (10th Cir. 1949); *La Prelle v. Cessna Aircraft Co.*, 85 F. Supp. 182 (D. Kan. 1949) (measure of damages); *Howard v. Pulver*, 329 Mich. 415, 45 N.W.2d 530 (1951) (parties).

¹⁰ CAL. CIV. CODE § 956.

¹¹ 41 Cal.2d 859, 264 P.2d 944 (1953).

¹² *McClure v. Johnson*, 50 Ariz. 76, 69 P.2d 573 (1937).

¹³ See *Grant v. McAuliffe*, 41 Cal.2d 859, 867, 264 P.2d 944, 949 (1953).

¹⁴ *Id.* at 866, 264 P.2d at 949.

CONSTITUTIONAL ISSUES

The decision in *Grant v. McAuliffe* suggests several possible constitutional questions. On the survival issue, as well as in most conflict of laws problems, there are provisions of our Federal Constitution which may bear on the manner in which the interstate controversy is to be handled. The clauses of interest are the due process clause of the Fourteenth Amendment, the privileges and immunities clause and the full faith and credit clause.

Due Process Clause

While this provision is a limitation on judicial powers, the state courts have been permitted almost unfettered freedom in conflict of laws cases. Accordingly, the state courts have for the most part been permitted to make classifications of laws and legal issues under their own concepts or under those of a chosen state. Likewise they have been practically free to apply the law of the place that they determine has legislative competence respecting a particular transaction.

However, it should be noted that the Supreme Court has indicated that an outrageous classification by a state court would be a violation of the due process clause.¹⁵ The California court's decision that survival is a procedural issue could conceivably be taken by the Supreme Court to come within this limitation. What of the suggestion in the *Grant* case that tort survival poses an administration of estates problem and not a tort problem? Would this be an outrageous determination? And while the Supreme Court has seldom interfered, it is important to recognize that the application of the substantive law of a state not having legislative jurisdiction would be in conflict with the limitations of the due process clause.¹⁶ Thus, as will be mentioned below, it has been suggested that survival should be decided by the law of the decedent's domicile. Does this State have interests which are sufficient to warrant overlooking the law of the place of the wrong?

While the full implications of the due process clause have not been formulated, they nonetheless should be kept in mind in deciding the survival of tort claims.

On the basis of the Supreme Court cases one cannot definitely say that the decision in *Grant v. McAuliffe* violates the due process clause. However, the writer is of the opinion that it does and that ultimately we can expect a ruling by the Supreme Court to this effect. My opinion can be based on the conclusion that the characterization was erroneous or that the choice of law was improper. The Supreme Court is still taking a cautious approach to conflicts problems. However, when the need for uniformity of result is considered, the undesirability of the *Grant* decision becomes more apparent.

Full Faith and Credit Clause

This clause requires due respect for public acts of sister states and it is settled that a state statute, among other things, is a public act within the provision. The relationship between Article IV, Section 1 and the due process clause is not at all certain. However, it is appar-

¹⁵ *John Hancock Ins. Co. v. Yates*, 299 U.S. 178 (1936).

¹⁶ *Hartford Ind. Co. v. Delta Co.*, 292 U.S. 143 (1934); *Home Ins. Co. v. Dick*, 281 U.S. 397 (1930).

ent that the two are closely related and overlap to some extent. Thus, the application of the statute of a state not having legislative competence would not only be in conflict with our concepts of due process but at the same time might result in the denial of full faith and credit to the statute of a sister state. But the limitations of the clauses are no entirely mutual. Thus, a refusal to allow suit on a sister state statute would not be opposed to the due process clause but would perhaps involve a violation of the comity clause.¹⁷

It is well settled, however, that full faith and credit need not be given to procedural statutes of other states.¹⁸ If survival is classified as procedural and if this determination is not regarded as invalid under the Fourteenth Amendment, the forum could apply its own survival concepts without infringing on the demands of the full faith and credit clause. However, it should be kept in mind that there is apparently a current trend toward requiring greater full faith and credit for sister state statutes.¹⁹

In a subsequent section²⁰ the policies involved in determining whether a survival or revival statute is substantive or procedural are indicated. These goals to be sought in conflict of laws cases cannot be realized under the *Grant* decision. For this reason I think it violates the full faith and credit clause. However, I hasten to add that one cannot with certainty say that the Supreme Court would have reversed the *Grant* decision had it been taken to that tribunal. Here again the reason is the Court's reluctance to make a full-scale entry into the conflict of laws field.

Privileges and Immunities Clause

The decision in the *Grant* case presents a possible violation of the privileges and immunities clause found in Article IV, Section 2 of the United States Constitution. As previously noted, the California Supreme Court intimated that its classification of the survival issue as being procedural might be limited to those instances where all of the parties are residents (domiciliaries) of California. Thus, the inference is that it might be regarded as substantive where one of the parties is domiciled in another state. Would this not be discrimination against noncitizens which is forbidden by the Constitution?²¹ It would appear to be.

GENERAL TREATMENT OF A CONFLICT OF LAWS CASE

When confronted with a controversy involving a foreign element there are several questions, in addition to the constitutional problems, which must be considered. The first of these is whether there is a local law which is applicable. This involves the distinction between substantive and remedial laws. Secondly, the court must decide the legal category into which the facts fit. Thirdly, the choice of law rule to be used must be selected. In order to understand the ways in which the sur-

¹⁷ *First Nat. Bank v. United Air Lines*, 342 U.S. 396 (1952); *Hughes v. Fetter*, 341 U.S. 609 (1951).

¹⁸ *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953).

¹⁹ Note the recent change in the federal statute, 28 U.S.C. § 1738 (1948). Also consider the *United Air Lines* and *Hughes* cases cited in note 17 *supra*.

²⁰ See p. J-11 *infra*.

²¹ A similar discrimination is found in the California "borrowing" statute. CAL. CODE CIV. PROC. § 361.

vival issue has been treated in the United States, it is necessary to consider each of these processes.

Substance-Procedure

It is settled beyond dispute that the forum applies its own rules of procedure, or remedy, and the substantive law of the proper place in a conflict of laws case.²² The principal reason for making this distinction is to avoid inconveniences and hardships that might be imposed on a court in trying to apply all of the law of the proper state. Thus, if courts were required to apply all of the foreign law, a reorganization of judicial machinery would often be necessary in conflict of laws cases. Moreover, local concepts of the administration of justice might be frustrated. At the same time the courts usually apply the substantive law of the proper state in order to achieve uniformity of result, a principal policy in the conflict of laws area. Generally, the classification of the local and the foreign laws is made by the forum's concepts.²³ While, as previously suggested, an outrageous determination might violate the due process and full faith and credit clauses, the state courts have been granted an almost unlimited latitude in this area. Legislative classification is nonexistent. Therefore the question as to whether a law is substantive or procedural must be determined by the judiciary. However, a court should be hesitant about classifying its laws as procedural. A too-liberal application of the forum's laws under the substantive-procedural distinction would make for great uncertainty of result and would increase forum shopping. Moreover, in many instances the expectations of the parties would be frustrated. Unfortunately, the courts do not consider the above factors in classifying laws, nor do they often consider the purpose for which the classification is being made.²⁴ The distinctions that are made are usually the results of arbitrary and illogical determinations and more often than not are based on unsound precedent.

Perhaps the best test that has been suggested for determining whether a particular matter is one of substance or one of procedure was formulated by the late Walter Wheeler Cook:

How far can the court of the forum go in applying the rules taken from the foreign system of law without unduly hindering or inconveniencing itself? ²⁵

One would expect uniform treatment of the survival issue in light of the previous discussion. But this has not been true. As a generalization it should be noted at the outset that a preponderance of the courts regard survival as a matter of substantive law, but the revival issue is treated with unanimity as being procedural.²⁶ Thus it is generally recognized that survival is governed by the law of the proper state—which in most instances is taken to be the place of the wrong—but that

²² GOODRICH, *CONFLICT OF LAWS* § 80 (Hornbook Series, 3d ed. 1949).

²³ *Ibid.*

²⁴ The writer agrees with Justice Traynor's statement in *Grant v. McAuliffe* that the characterization of the survival issue is dependent on the purpose for which it is made. The writer also agrees that the decision in *Cort v. Steen*, 36 Cal.2d 437, 224 P.2d 723 (1950) was not relevant to the issue in the *Grant* case. In the *Steen* case survival was classified as substantive in determining whether the survival statute was to be given retroactive effect.

²⁵ COOK, *THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS* 166 (1942).

²⁶ STUMBERG, *CONFLICT OF LAWS* 189-90 (2d ed. 1951).

revival is controlled by the forum's laws. Moreover, this is the view supported by the *Restatement of Conflict of Laws*²⁷ and by the text writers.²⁸ Therefore the California court's statement that a majority treat survival as a procedural point is erroneous. Moreover, the cases cited by the court do not sustain the proposition, as will be noted below. But despite that widespread agreement on the proper rule we find various results being reached in the cases. In order to understand these divergent results it is better to consider the different factual situations presented. Throughout the remaining portion of this study "X" will be used to refer to the place of the tort and "F" will be used to designate the forum.

Survival Statute in X But Not in F. Although this was not the factual pattern of the *Grant* case, discussion of it is necessary for an understanding of the survival problem and the *Grant* decision. In the early cases involving these facts recovery was generally denied for a variety of reasons. Some courts stated that a tort survival statute was in derogation of the common law and thus not enforceable elsewhere.²⁹ They stated that to apply the foreign statute when no similar one existed in the forum was giving extraterritorial effect to the laws of X. One of the cases cited by the California court as holding that survival is procedural involved this principle.³⁰ While this reason is seldom given today as a ground for dismissal, others that are equally absurd are stated. Thus, in the modern cases it is not unusual to find the courts saying that the enforcement of the X statute would violate the public policy of the forum.³¹ Several of the cases cited in the *Grant* case were decided under this principle and did not hold that survival is procedural.³² Most authorities today conclude that the application of a foreign survival statute does not violate any fundamental concept of justice existing in the forum. A broad application of the public policy refusal in such an instance as this would almost abolish the chance of recovery in a conflict of laws case where the X and F laws are different. Moreover, there appears to be a possible violation of the full faith and credit clause by such a dismissal in view of two recent cases decided by the United States Supreme Court.³³ Another reason given for denying recovery where X permits survival but the forum does not is that there is a lack of judicial machinery available in the forum.³⁴ Thus it is stated that the absence of a survival statute in F means that the legislature has not invested the courts with jurisdiction to determine such causes. The New York cases cited in the *Grant* case were based

²⁷ RESTATEMENT, CONFLICT OF LAWS § 390 (1934).

²⁸ 2 BEALE, CONFLICT OF LAWS § 390.1 (1935); GOODRICH, *op. cit. supra* note 22, § 101; STUMBERG, *op. cit. supra* note 26, at 189-90.

²⁹ Texas & Pac. Ry. Co. v. Richards, 68 Tex. 375, 4 S.W. 627 (1887); O'Reilly v. N.Y. & N.E.R.R. Co., 16 R.I. 388, 19 Atl. 244 (1889).

³⁰ Texas & Pac. Ry. Co. v. Richards, 68 Tex. 375, 4 S.W. 627 (1887).

³¹ Gray v. Blight, 112 F.2d 696 (10th Cir. 1940); Herzog v. Stern, 264 N.Y. 379, 191 N.E. 23 (1934); Matter of Killough, 148 Misc. 73, 265 N.Y. Supp. 301 (Sur. Ct. 1933); Clough v. Gardner, 111 Misc. 244, 182 N.Y. Supp. 803 (Sup. Ct. 1920).

³² Among them were the New York cases cited in note 31 *supra*.

³³ First Nat. Bank v. United Air Lines, 342 U.S. 396 (1952); Hughes v. Fetter, 341 U.S. 609 (1951).

³⁴ Gray v. Blight, 112 F.2d 696 (10th Cir. 1940); Woollen v. Lorenz, 98 F.2d 261 (D.C. Cir. 1938); Muir v. Kessinger, 35 F. Supp. 116 (E.D. Wash. 1940); Dougherty v. Gutenstein, 10 F. Supp. 782 (S.D.N.Y. 1935); Herzog v. Stern, 264 N.Y. 379, 191 N.E. 23 (1934); Demuth v. Griffin, 253 App. Div. 399, 2 N.Y.S.2d 2 (1938); Taynton v. Vollmer, 242 App. Div. 854, 275 N.Y. Supp. 284 (1934); Silverman v. Rappaport, 165 Misc. 543, 300 N.Y. Supp. 76 (Sup. Ct. 1937); *In re Vilas' Estate*, 166 Ore. 115, 110 P.2d 940 (1941).

on this theory.³⁵ While there is no disagreement about the power of a legislature to increase or decrease the power or jurisdiction of the courts, it is doubted whether the failure to enact survival legislation indicates an intention to limit the powers of the courts. The state courts are given general jurisdiction and this type of suit involves no unique procedure or remedy.

Lastly, note might be made of an early New York case in which X allowed survival but the F statute abated a cause of action upon death. The court denied recovery on the unique ground that the New York statute was, in effect, a statute of limitations providing that tort actions had to be brought before death; and since action was not commenced within that time it was barred.³⁶ However, this view was not followed in subsequent New York cases nor has it been adopted elsewhere.

It should be recognized that while there are many cases denying recovery where F has no survival statute for one or more of the above reasons, there are numerous cases in which recovery has been allowed.³⁷ Moreover, it should be especially noted that in most of the cases in which recovery was disallowed, the forums did not classify survival as procedural. Denial of recovery was based on other grounds.

Survival Statute in F But Not in X and Suit Before Death. The facts assumed here likewise differ from those in *Grant v. McAuliffe*. In such a factual situation as this most of the courts have, surprisingly, granted recovery though recognizing that survival is substantive. These decisions have mostly turned on the distinction between survival statutes and revival statutes. The latter are unanimously considered to be remedial.³⁸ The writer agrees that revival should be classified as procedural. A number of the cases cited by the California court in *Grant v. McAuliffe* involved revival. The substitution of a party and continuation of a suit after death under a revival statute is usually conditioned on the survival of the cause of action.³⁹ Most of the courts have determined the answer to the condition by looking to the law of the forum.⁴⁰ Therefore, since we are assuming that survival is allowed at the forum, recovery is granted even though the action abates under the law of X, the place of the wrong.

³⁵ These are the cases cited in note 34 *supra*.

³⁶ *Matter of Killough*, 148 Misc. 73, 265 N.Y. Supp. 301 (Sur. Ct. 1933).

³⁷ *Wallan v. Rankin*, 173 F.2d 488 (9th Cir. 1949); *McIntosh v. General Chemical Defense Corp.*, 67 F. Supp. 63 (S.D.W.Va. 1946); *Kertson v. Johnson*, 185 Minn. 591, 242 N.W. 329 (1932); *Chubbuck v. Holloway*, 182 Minn. 225, 234 N.W. 314 (1931); *Burg v. Knox*, 334 Mo. 329, 67 S.W.2d 96 (1933); *Domres v. Storms*, 236 App. Div. 630, 260 N.Y. Supp. 335 (1932) overruled by *Herzog v. Stern*, 264 N.Y. 379, 191 N.E. 23 (1934); *Parsons v. American Tr. & Banking Co.*, 168 Tenn. 49, 73 S.W.2d 698 (1934).

³⁸ STUMBERG, *CONFLICT OF LAWS* 190, n. 30 (2d ed. 1951); also see *Orr v. Ahern*, 107 Conn. 174, 139 Atl. 691 (1928).

³⁹ Note that such a condition appears in the California revival statute. CAL. CODE CIV. PROC. § 385.

⁴⁰ *Baltimore & Ohio R.R. Co. v. Joy*, 173 U.S. 226 (1899); *Martin v. Baltimore & Ohio R.R. Co.*, 151 U.S. 673 (1894); *Luster v. Martin*, 58 F.2d 537 (7th Cir. 1932), *cert. denied*, 287 U.S. 637 (1932); *Page v. United Fruit Co.*, 3 F.2d 747 (1st Cir. 1925), *rev'd on other grounds*, *Northern Ry. Co. v. Page*, 274 U.S. 65 (1927); *Martin v. Wabash R.R. Co.*, 142 Fed. 650 (7th Cir. 1905); *Winslow v. Domestic Engineering Co.*, 20 F. Supp. 578 (S.D.N.Y. 1937); *Gaskins v. Bonfils*, 4 F. Supp. 547 (D. Colo. 1933), *aff'd*, 79 F.2d 352 (10th Cir. 1935); *Portland Gold Min. Co. v. Stratton's Independence*, 196 Fed. 714 (D. Colo. 1912); *Ekstrom v. United States*, 21 F. Supp. 338 (Ct. Cl. 1937); *Gordon v. Chicago, R.I. & Pac. Ry. Co.*, 154 Iowa 449, 134 N.W. 1057 (1912); *Austin's Admr. v. Pittsburg, C.C. & St. L. Ry. Co.*, 122 Ky. 304, 91 S.W. 742 (1906). *Contra*: *Allen v. Whitehall Pharmaceutical Co.*, 115 F. Supp. 7 (S.D.N.Y. 1953); *Rathgeber v. Sommerhalder*, 112 N.J.L. 546, 171 Atl. 835 (Ct. Err. & App. 1934).

In another group of cases recovery has been permitted where the forum has survival and revival statutes although the action is abated under the foreign law. However, the recovery in these cases has been placed on a basis different from that described in the preceding paragraph. The theory upon which recovery has been granted is that once suit is brought the cause of action becomes a local one and the law of the other state cannot deprive the forum of its jurisdiction.⁴¹

Survival Statute in F But Not in X and Suit After Death. *Grant v. McAuliffe* is apparently the only case in which recovery has been allowed where the action was commenced after death and where survival was not permitted at the place of the wrong. In fact there are many cases involving this situation in which recovery has been disallowed.⁴² The decision in the California case was based on survival being classified as a matter of procedure—which is definitely against the overwhelming weight of authority in the United States.

It is difficult to reconcile the decision with previous rulings by the California court. In past cases the prevailing classifications have been followed in California.⁴³ Therefore, the only conclusion to be reached respecting the *Grant* case is that an erroneous determination was made or that the court was greatly influenced by the "sympathy" factors in the case. Moreover, as has been demonstrated, the decision in *Grant v. McAuliffe* was the result of the court's failure to analyze properly the cases upon which it relied.

Classification of Survival and Revival Statutes. One of the principal goals in setting up conflict of laws rules is to provide for uniformity and certainty of result. In order to achieve this purpose the role of the forum should be minimized as much as possible. Hence, absent other factors, the mere fact that suit is brought in a state should not warrant an overzealous application of the forum's laws. Otherwise, forum shopping is encouraged and the result in a given case becomes dependent on the place where suit is brought. However, because of the possible inconveniences, it is established that the forum utilizes its own rules of remedy. But as noted above the distinction between substantive and remedial laws should be determined by the factor of inconvenience. No more hardship is placed on a court by requiring it to apply the survival rule of another state than is encountered with the application of any other foreign law. Moreover, survival is in effect an incident of the cause of action. Since it is established that the existence

⁴¹ See *Orr v. Ahern*, 107 Conn. 174, 139 Atl. 691 (1928).

⁴² *E.g.*, *Ormsby v. Chase*, 290 U.S. 387 (1933); *Stratton's Independence, Ltd. v. Dines*, 126 Fed. 968 (C.C.D. Colo. 1904), *aff'd on other grounds*, 135 Fed. 449 (8th Cir. 1905); *Orr v. Ahern*, 107 Conn. 174, 139 Atl. 691 (1928); *Hyde v. Wabash, St. L. & Pac. Ry. Co.*, 61 Iowa 441, 16 N.W. 351 (1883); *Dalton v. McLean*, 137 Me. 4, 14 A.2d 13 (1940); *Trudel v. Gagne*, 328 Mass. 464, 104 N.E.2d 489 (1952); *Yount v. National Bank*, 327 Mich. 342, 42 N.W.2d 110 (1950); *Friedman v. Greenberg*, 110 N.J.L. 462, 166 Atl. 119 (Ct. Err. & App. 1933); *Sumner v. Brown*, 312 Pa. 124, 167 Atl. 315 (1933); *O'Reilly v. New York & N.E.R.R. Co.*, 16 R.I. 388, 19 Atl. 244 (1889); *Mexican Central Ry. Co. v. Goodman*, 20 Tex. Civ. App. 109, 48 S.W. 778 (1898); *Needham v. Grand Trunk Ry. Co.*, 38 Vt. 294 (1865); *accord*, *Allen v. Whitehall Pharmaceutical Co.*, 155 F. Supp. 7 (S.D.N.Y. 1953) and *Rathgeber v. Sommerhalder*, 112 N.J.L. 546, 171 Atl. 835 (Ct. Err. & App. 1934).

⁴³ *E.g.*, *Biewend v. Biewend*, 17 Cal.2d 108, 109 P.2d 701 (1941) (statute of limitations is procedural); *O'Brien v. O'Brien*, 197 Cal. 577, 241 Pac. 861 (1925) (California type of statute of frauds held procedural); *Loranger v. Nadeau*, 215 Cal. 362, 10 P.2d 63 (1932) (standard of care is substantive); *Intagliata v. Shipowners & Mer. etc. Co.*, 26 Cal.2d 365, 159 P.2d 1 (1945) (whether contributory negligence precludes recovery is a substantive issue); *Spreckels v. Hawaiian Com. etc. Co.*, 117 Cal. 377, 49 Pac. 353 (1897) (damages treated as substantive).

of a cause of action is determined by the law of the proper state, that law should likewise govern survival. Therefore survival should be treated as substantive. This suggestion is strengthened by the realization that it is so classified in all other states. Moreover, by giving a procedural classification to survival, forum shopping is encouraged. No doubt this argument is weakened to some extent by the limitation on the powers of foreign administrators to sue and be sued outside the state of appointment.⁴⁴ However, this obstacle has been eliminated by statutes in some states and can frequently be overcome in the others by the appointment of an ancillary administrator or by a showing of unusual circumstances.⁴⁵ It is true that there are many cases in which the forum has applied its own survival concepts. But as discussed above these cases involved the application of outdated or illogical concepts. The decisions in those cases were not based on survival being classified as substantive.

On the other hand revival involves only a substitution of parties. In view of the fact that the question of proper parties has always been determined by the law of the forum there is no sound reason to change this rule. However, revival should not be permitted, even though provided for at the forum, unless the cause of action survives by the law of the proper state.

Characterization of the Problem

If survival of a tort action is to be treated as remedial, the forum applies its own rules and that concludes the matter. However, if it is regarded as substantive, further issues must be resolved. Assuming it to be substantive, the next step is to determine the type of problem presented by the facts—commonly described as characterization of the facts. This is a determination that is made by the forum under its own concepts. No doubt the due process clause limits a court's power in making the classification, but as a practical matter the courts have had almost unlimited discretion.⁴⁶ Ordinarily no particular difficulty is encountered because agreement on the type of problem would be reached by all courts. However, a set of facts often presents a choice. Such a choice is presented where tort survival is involved. For example, suppose that A of state F is injured by B of state F in state X and B dies before suit is brought. Further assume that there is survival in F but not in X. If suit is brought in F by A against B's personal representative, the forum could characterize this as a tort problem or as a problem involving the administration of a decedent's estate. Facts such as these have been characterized by most of the courts in the United States as giving rise to a tort question. Supporting this solution is the idea that in a suit for personal injuries there is a tort claim rather than a problem of administering a decedent's estate. Moreover, it should be noted that if there were no death the law of state X would be used. Why should a subsequent event, death in this instance, change the nature of the issue? The characterization of the problem is determinative of the choice of law that is made. Under the general practice the

⁴⁴ CAL. CODE CIV. PROC. § 1913.

⁴⁵ In exceptional cases the California Supreme Court has departed from the usual rule. See *Estate of Rawitzer*, 175 Cal. 585, 166 Pac. 581 (1917) and *Fox v. Tay*, 89 Cal. 339, 24 Pac. 855, 26 Pac. 897 (1891).

⁴⁶ See note 15 *supra*.

above example would be classified as a tort problem and it is axiomatic that the law of the place of the wrong governs. Thus probably all courts would look to the place of the tort and thereby uniformity of result would be assured.

It is arguable, however, that the tort survival issue should be viewed as presenting the problem of administering a decedent's estate. Most suits dealing with survival are brought at the place of administration, irrespective of whether the decedent was the injured party or the wrongdoer. This is necessary because of the difficulties of obtaining jurisdiction and because of procedural bars to a suit by a foreign personal representative.⁴⁷ Moreover, in a survival suit there is an issue of whether a claim may be made by or against a decedent's estate. Therefore, survival cannot be completely divorced from the administration of the decedent's estate. Such a characterization was deemed relevant by the California Supreme Court in *Grant v. McAuliffe*. Justice Traynor stated in the majority opinion:

Basically the problem is one of the administration of decedents' estates * * *⁴⁸

However, there is but slight authority to support this intimation.⁴⁹ Moreover, the cases cited by the California court do not support the proposition. It is inescapable that the basic problem is one of tort recovery. The court is not asked to distribute a decedent's estate nor is the issue one involving administration. Had death not occurred, the law of the place of the tort would have been used. Had wrongful death recovery been sought, the law of the place of the wrong would have been applied. Why should death affect this usual approach? In addition, it should be noted that uniformity will not be achieved under this alternative. If it is classified as an administration problem, the law of the place of administration will be used. It would be impossible to achieve uniformity of result under this approach. The result to be reached would vary from forum to forum, depending on where administration is had.

Choice of Law

After having characterized the problem in a conflict of laws case, the court must next select a choice of law rule. This rule points to the state whose substantive law will be applied. The rule to be used is principally governed by the characterization of the facts. The selection is made by the forum and the states have had almost complete freedom in this area. However, the attempted use of a rule involving the application of the law of a state not having a substantial connection with a transaction would no doubt be in violation of the due process clause or the full faith and credit clause, or both.

If survival is deemed to present an administration problem, the local law will be used because the local law of the place of administration

⁴⁷ See note 44 *supra*.

⁴⁸ 41 Cal.2d 859, 866, 264 P.2d 944, 949 (1953).

⁴⁹ See *Whitten v. Bennett*, 77 Fed. 271 (C.C.D. Conn. 1896), *aff'd*, 86 Fed. 405 (2d Cir. 1898); *Dougherty v. Gutenstein*, 10 F. Supp. 782 (S.D.N.Y. 1935); *Herzog v. Stern*, 264 N.Y. 379, 191 N.E. 23 (1934), *cert. denied*, 203 U.S. 597 (1934); *Matter of Killough*, 148 Misc. 73, 265 N.Y. Supp. 301 (Sur. Ct. 1933); *cf. Domrowski v. Dunn*, 69 F. Supp. 42 (D. Vt. 1946). For cases rejecting this novel argument see *Yount v. National Bank*, 327 Mich. 342, 42 N.W.2d 110 (1950); *Needham v. Grand Trunk Ry. Co.*, 38 Vt. 294 (1865). A criticism of this suggestion is also found in HANCOCK, *TORTS IN THE CONFLICT OF LAWS* § 53 (1942).

determines the assets of a decedent's estate as well as the claims that can be charged against it. Such a choice of law is uniformly reached where it is decided that tort survival presents an administration type of problem.⁵⁰ However, it should be noted that such matters as damages, defenses, etc. are generally regarded as substantive and therefore governed by the law of the place of the wrong. Hence if we treat survival as an administration problem, the question of whether the action abated would be controlled by the place of administration, the existence of a cause of action, damages, defenses, etc. would be determined by the place of the wrong, and matters of remedy would be controlled by the law of the forum. What particular purpose is served by the almost endless confusion resulting from this application of different state laws under different concepts?

On the other hand, if the survival issue is classified as a tort problem there are several choice of law rules that might be used. One of these is that survival should be governed by the law of the decedent's domicile. While there is some authority to support this possibility⁵¹ it is open to numerous criticisms. The most obvious one is that through its use liability would be dependent on one state's laws and survival on another. Moreover, the domicile suggestion would lead to difficult questions as to where was the decedent domiciled and what the result would be if both parties die having different domiciles.

The rule having the strongest support is the one that makes survival dependent on the law of the place of the tort. Had there been no death this law would have been used. Why should death diminish the importance of the place of the wrong? Moreover, under all existing theories liability is determined or modeled after the place of the injury. Should not the effect of death on liability be determined by this law as are damages, etc.? If this law is used, the same result can be expected irrespective of where suit is brought or where the parties happened to be fortuitously domiciled. Further support for the use of this choice of law rule is to be found in the fact that this is the law applied by most of the states.⁵² Moreover, it has the recommendation of many of our current writers.⁵³ Thus, the current authority favors the use of the law of the place of the tort. If uniformity is to be achieved, California should follow the generally accepted rule. Its application has too much support to expect a reversal in another direction within the near future.

CONCLUSIONS

It was previously stated that the tort survival issue should be deemed a substantive issue. Moreover, it was suggested that a case involving this question be classified as a tort problem to be answered by the law of the place of the wrong. And lastly it was mentioned that revival be treated as a procedural matter to be governed by the law of the forum. However, revival should not be allowed unless the cause of action survives by the law of the proper state. Obviously some of these conclu-

⁵⁰ *E.g.*, Whitten v. Bennett, 77 Fed. 271 (C.C.D. Conn. 1896), *aff'd*, 86 Fed. 405 (2d Cir. 1898); Matter of Killough, 148 Misc. 73, 265 N.Y. Supp. 301 (Sur. Ct. 1933).

⁵¹ See Whitten v. Bennett, note 50 *supra*; HANCOCK, TORTS IN THE CONFLICT OF LAWS § 53 (1942).

⁵² See STUMBERG, CONFLICT OF LAWS 189 (2d ed. 1951); GOODRICH, CONFLICT OF LAWS § 101 (Hornbook Series, 3d ed. 1949).

⁵³ *Ibid.*; RESTATEMENT, CONFLICT OF LAWS § 390 (1934).

sions are opposed to the decision in *Grant v. McAuliffe*. This raises the question of whether that ruling should be changed by statute. While one's initial reaction favors such action, further reflection suggests caution. The survival problem is only one of many issues encountered in a conflict of laws case. The instances in which the substance or procedure question arises are numerous. It is pertinent respecting parties, damages, the statute of limitations, admissibility of evidence, presumptions, etc. Might not legislation on survival be cause for subsequent legislation on all these matters in the event of subsequent California cases? Thus the question is whether legislation should be enacted which might lead to codification of many, if not all, of the conflict of laws principles to be used in California.

Moreover, conflicts cases involve very flexible facts. Alternative courses are presented in every step. It is for this reason that there is almost a dearth of legislation in the field.⁵⁴ If legislation were enacted providing that the survival of a tort action is to be controlled by the place of the wrong, this would still leave considerable discretion in the court. Where is the place of the wrong? If A is negligent in state X and this negligence leads to injury in state Y might not state X or state Y be chosen? Further assume that the parties were residents of the same state, as was true in *Grant v. McAuliffe*. Could not the state of residence be reasonably considered the state with the primary interests and hence the place of the wrong?⁵⁵ There is yet another situation in which this discretion would be present. Suppose that the wrongdoer is a railroad company on which the injured party, now deceased, was a passenger. Instead of characterizing the problem as one of torts invoking a possible statute, it could be classified as a contract problem which would call for different principles.⁵⁶

In addition, the writer does not think that the decision in *Grant v. McAuliffe*, which is generally believed to be unsound, is a sufficient basis for legislative reform. It should be especially noted that all of the parties in *Grant v. McAuliffe* were California residents. Moreover, Arizona's survival law is outdated and not in accord with either California's or those found in most of the other states. Because of these special facts *Grant v. McAuliffe* might not be followed in a case presenting other facts. And lastly, as previously noted, the rationale of the *Grant* decision is not clear. For these reasons legislation on survival might be premature. While it is certainly proper for the Legislature to modify judicial rules of great import, it is doubtful whether the *Grant* case is an instance which would warrant a statute specifically directed to it.

These objections to survival legislation cannot be avoided. However, a statute would no doubt cure some of the existing injustices. Moreover, the existence of survival legislation would at least indicate a legislative policy to guide the courts in subsequent cases. While the

⁵⁴ There are only a few statutes in California that deal with conflicts cases: e.g., CAL. CIV. CODE § 3451 (foreign assignment for creditors); CAL. CIV. CODE § 1646 and CAL. CODE CIV. PROC. § 1857 (law governing interpretation of contracts); CAL. CIV. CODE § 63 (foreign marriages); CAL. CIV. CODE § 946 (law governing personal property); CAL. CODE CIV. PROC. § 361 (borrowing statute).

⁵⁵ See COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 311 *et seq.* (1942).

⁵⁶ See *Dyke v. Erie Ry.*, 45 N.Y. 113 (1871).

writer does not recommend its adoption the following type of proposed statute could be considered to modify the *Grant* decision:

Survivorship of a tort action shall be determined by the law of the place of the wrong, but revival shall be governed by local law. However, revival shall not be permitted unless the cause of action survives at the place of the wrong.

It was mentioned above that the enactment of a survival statute might lead to, or suggest, similar legislation covering parties, damages, presumptions, etc. Since all of these involve the same basic distinction—substance or procedure—the advisability of a statute prescribing a standard to be used in making the distinction in all cases is raised. Would not such a statute be more desirable than one dealing with only the survival point? This question quite obviously calls for an affirmative answer. However, the writer finds it impossible to draft such a statute that would be meaningful. The basic test suggested by Cook⁵⁷ is undoubtedly the soundest and most easily applied formula that can be reasonably used. But just how would you draft a statute containing his suggestion that would be meaningful? It will be recalled that the inconvenience placed on a court by the application of a foreign rather than a local law should govern the distinction between matters of substance and those of remedy. Thus, under his test no particular hardship would be imposed on a court by applying the survival law of the place of the wrong. However, a judge who was inclined to apply local law, as no doubt most are, could well conclude that the application of any foreign law would result in inconvenience. Aside from this inclination how would questions of proper parties, right to jury trial, forum of action, etc. be classified under Cook's test? Surely there would be agreement that these matters should be treated as procedural. However, they could well be classified as substantive under Cook's test. And yet this has never been suggested or contemplated. The reason is that Cook's formula is generally brought up in a broad treatment of the conflict of laws rules. Thus, the test derives its meaning from the context in which it is used. However, a statute does not, and should not, take the form of an exposition on the topic it covers. The statute should be self-explanatory and should cover most of the possibilities that will arise on the subject. The writer does not feel that a worthwhile statute covering the distinction between substantive and remedial laws can be written.

There is yet another type of general statute that should be considered. In view of the disadvantages of a general statute defining substance and procedure, perhaps a statute setting forth those matters which are to be treated as substantive and those to be regarded as remedial should be deliberated. A statute worded as follows is suggested for consideration:

In conflict of laws cases the following matters shall be treated as remedial: pleadings, right to jury trial, parties, whether equitable relief is available, joinder of causes of action, counterclaim and setoff, burden of proof, presumptions, statute of limitations, admissibility of evidence, revival (if the action survives by the law

⁵⁷ *Op. cit. supra* note 55, at 166.

of the proper state), and competency of witnesses. However the following shall be deemed substantive: existence of a cause of action, defenses to a cause of action, damages, survival (contract survival by the place of execution and tort survival by the place of the tort), and the effect of contributory negligence.

The writer has not attempted to exhaust the matters presenting the substance or procedure issue in the above suggested statute. However, the most commonly encountered matters are enumerated. Moreover, with the classification above a court would no doubt treat other analogous issues accordingly. Therefore a statute classifying the various issues would not be subject to the criticisms of a general statute which defines substance and procedure. By suggesting these classifications the writer does not intend to convey the idea that there is unanimity of opinion among the courts on these issues. However, the classifications mentioned are given by a preponderance of the courts. Hence further uniformity of result can be expected if California follows these prevailing rules. In addition, most of the matters mentioned in the proposed statute have already been dealt with in California. The suggested and prevailing classifications are in accord with the California decisions,⁵⁸ except as to survival.

In summary, the writer does not recommend a specific statute directed at the decision in *Grant v. McAuliffe*. However, he does recommend that a general statute be adopted, changing the rule of the *Grant* case and classifying other matters which present the substance-procedure issue. The adoption of these classifications would make for certainty of result in California and would be an advance toward the accomplishment of uniformity of result—a principal goal in conflict of laws cases. Moreover, the suggested classifications would serve as a useful guide when similar questions that are too numerous to detail are presented.

⁵⁸ See note 43 *supra*.

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