

Conflict of Laws - Survival of Cause of Action Held Matter of Procedure

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relies on the statement in the *Schenck* case to the effect that there is no responsibility if the service was rendered in good faith, without clear evidence of culpable negligence or wilful misconduct. The court then went on to say that it was apparent that reasonable judgment and skill were being exercised since no testimony of any culpability or wilfulness was given. The *Kern* case does not evidence adherence to a gross negligence rule because the explanations of both ordinary negligence and gross negligence were inserted merely for the purpose of showing that neither was present.

In conclusion, it appears that the United States should be held liable for the negligence of the Coast Guard in the course of a sea rescue, and that the standard of care to be imposed should be that of reasonable care. Although this would seem to be placing an undue burden on the government since the duty to rescue is not one imposed by law but assumed voluntarily, the fact remains that there is a federal statute making *all* government vessels liable for negligence. Until this statute is amended or repealed, the court is duty-bound to apply it, and since the statute is unambiguous, it would seem that this court, in saying that the legislature did not intend to include vessels used in rescue operations, has usurped its power. It has created an exception which the legislature did not see fit to make.

CONFLICT OF LAWS—SURVIVAL OF CAUSE OF ACTION HELD MATTER OF PROCEDURE

Plaintiffs and defendant's intestate, all residents of California, were involved in an auto collision in Arizona, the latter dying as a result of injuries thereby sustained. After the appointment of defendant as administrator of decedent's estate, each of the plaintiffs brought damage actions in California, which were rejected. Separate actions were filed against the decedent's estate, to which the defendant demurred and moved for abatement, since the statutes of Arizona made no provision for survival of causes of action after the death of the tortfeasor. By statute in California, causes of action for negligent torts survive the death of the tortfeasor, and can be maintained against the administrator or executor of his estate.¹ The trial court granted motions to abate and the appeals of plaintiffs were consolidated. The Supreme Court of California reversed the lower court's decision, holding survival of a cause of action upon death of the tortfeasor a matter of procedure and, therefore, governed by the law of the forum, in accordance with the rule from conflict of laws. *Grant v. McAuliffe*, 41 Cal. 2d 859, 264 P. 2d 944 (1953).

¹ Cal. Civ. Code (Deering, 1949) § 956.

At common law, personal rights of action abate upon the death of the person. This is the literal meaning of the maxim: *Actio personalis moritur cum persona*.² Due to its stringency, this principle has never been favored by the majority of American courts; exceptions were engrafted upon it even before statutes modifying its effects came to be enacted.³ Due to the variation in the provisions of such statutes, it is not feasible to generalize on the extent of such modification. Under such statutes at the present, most states permit suits by or against the representatives of a deceased plaintiff or tortfeasor.⁴ While the court in the instant case holds to the contrary, the weight of authority in the United States is that the question of survival depends on the law of the situs of the wrong, i.e., the *lex loci delicti*.⁵ Thus, in *Ormsby v. Chase*,⁶ a leading case, the plaintiff sustained injuries resulting from the fall of an elevator caused by the negligence of defendant, occurring in New York. Shortly after, the defendant died, and the plaintiff brought suit in Pennsylvania against the defendant's administrator. New York followed the common law rule on survival. Notwithstanding Pennsylvania's statute abrogating the common law, the United States Supreme Court held the law of the place of the wrong controlled and the plaintiff was denied recovery.⁷

By way of distinction, it is to be noted that the "revival" of an action after the death of a party to a pending action, commenced during the lifetime of the person in whose favor or against whom the cause accrued, is remedial in nature and therefore determined by the law of the forum.⁸ Conversely, if under the law of the forum the pending action in such instance does not abate, but survives, the action will be continued, even though, under the *lex loci*, a like action there pending would have abated by the death of the party and would not have revived.⁹

A deviation from the general rule on survival is found in *Martin v.*

² Clark v. Goodwin, 170 Cal. 527, 150 Pac. 357 (1915); Warner v. Flack, 278 Ill. 303, 116 N.E. 197 (1917).

³ Generally at Common Law, causes of action for injury primarily to property and only incidentally to the person survived, whereas those primarily to the person abated. 1 C.J.S., Abatement and Revival § VI-C (1936).

⁴ Goodrich, Conflict of Laws § 98 (1938).

⁵ Orr v. Ahern, 107 Conn. 174, 139 Atl. 691 (1928); Chubbock v. Holloway, 182 Minn. 225, 234 N.W. 314 (1931); Burg v. Knox, 334 Mo. 329, 67 S.W. 2d 96 (1933); Friedman v. Greenberg, 110 N.J.L. 462, 166 Atl. 119 (1933); Summer v. Brown, 312 Pa. 124, 167 Atl. 315 (1933); Restatement, Conflict of Laws § 390 (1932).

⁶ 290 U.S. 387 (1933).

⁷ See also Stratton's Independence v. Dines, 126 Fed. 968 (C.C. Colo., 1904); Davis v. New York & N.E. R. Co., 143 Mass. 301, 9 N.E. 815 (1887).

⁸ Baltimore & Ohio R. Co. v. Joy, 173 U.S. 226 (1899); Page v. United Fruit Co., 3 F. 2d 747 (C.A. 1st, 1925).

⁹ Gordon v. Chicago R.I. & Pac. R. Co., 154 Iowa 449, 134 N.W. 1057 (1912).

Wabash Railway Company,¹⁰ and its dictum has apparently led courts in other jurisdictions to conclude that survival should be considered a matter of procedure and thus controlled by the law of the forum. The *Martin* case was an action in a federal district court sitting in Illinois. Plaintiff died while his action was pending for injuries he sustained in Indiana. On these facts, it is apparent a question of abatement or revival of a pending action was presented. The court correctly applied Illinois law, but in the course of its opinion stated:

Whether a cause of action *survives*¹¹ by law is not a question of procedure, but of right; and is determinable when the action is one arising at common law, not by the law of the state where the injuries were inflicted, but by the law of the state where the action is brought.¹²

To call either survival or revival a matter of right and then say that it is governed by the law of the forum is a contradiction on its face. The effect of the court's conclusion, however, was that revival was a procedural question to be determined by the *lex fori*. This confusion of the law concerning the distinct concepts of survival and revival has made its impact on the decisions of other courts, and to a degree it would appear to exist in the instant decision.

There exists a legitimate, though uncommon, ground upon which a state may refuse to honor the provisions of a survival statute from a sister state. Such occurs when the enforcement of the foreign cause of action is contrary to the public policy of the forum.¹³ So in *Herzog v. Stern*,¹⁴ the court refused on grounds of public policy, to permit suit against a deceased tortfeasor's executor, even though in Virginia, where the plaintiff sustained the injuries, there was a survival statute.

The majority of the court in the instant case acknowledged that the answer to the question of whether the causes survived depended upon the application of California or Arizona law, the latter jurisdiction having only a revival statute. Resolution of the question whether survival was a matter of substance or procedure was held to be a matter of first impression for the California courts; according to the majority, a review of the cases in other jurisdictions produced "no compelling weight of authority for either alternative."¹⁵ The majority of the court decided in favor of considering survival a matter of procedure and therefore controlled by the *lex fori*. At this point, it is of interest to note that of the

¹⁰ 142 Fed. 650 (C.A. 7th, 1905).

¹¹ Italics added.

¹² *Martin v. Wabash Railway Co.*, 142 Fed. 650, 651 (C.A. 7th, 1905).

¹³ *Mertz v. Mertz*, 271 N.Y. 466, 3 N.E. 2d 597 (1936); *Herzog v. Stern*, 264 N.Y. 379, 191 N.E. 23 (1934); *Texas & Pac. R. Co. v. Richards*, 68 Tex. 375, 4 S.W. 627 (1887).

¹⁴ 264 N.Y. 379, 191 N.E. 23 (1934).

¹⁵ 264 P. 2d 944, 949 (1953).

cases cited by the court in support of its view, four were decided on the question of revival of a pending action,¹⁶ and two held enforcement of a survival statute from a sister state repugnant to the public policy of the forum.¹⁷ This line of cases would not appear to constitute authority for holding contrary to the majority of American jurisdictions on the question of survival, when revival is conceded by the majority to be a matter of procedure, and no question of public policy was presented in the instant case.

In *Cort v. Steen*,¹⁸ an earlier case touching on the same problem, the California Supreme Court held that the effect of a survival statute is to create a right or cause of action, rather than continue an existing right or revive or extend a remedy theretofore accrued. As the minority of the court stated in its dissenting opinion to the instant case, the majority view that survival is not an essential part of the cause of action, but a matter of procedure, is hardly reconcilable with the majority opinion in the *Cort* case. Added to this must be the fact that the court failed to overrule the *Cort* decision in the instant case.

The majority rationalizes support for its view by reasoning from the premise that a statute, or other rule of law, may be characterized "as substantive or procedural according to the nature of the problem for which the characterization must be made."¹⁹ Since California claimants were seeking to enforce their claims against the estate of a California decedent, the majority deemed the proceeding to be a matter of purely local concern, and for this proceeding "characterized" survival as a matter of procedure. The decision of the majority in the instant case is thus open to the criticism of inconsistent application of the conflict of laws rules, which have as their goal uniformity of legal determinations no matter the forum in which recovery is sought. Unquestionably, the plaintiffs in the instant case could not have recovered had they brought their action to the courts of Arizona, where the wrong occurred. The California Supreme Court, it must be remembered, did stress the local nature of the problem due to the fact that all the parties were Californians. Whether or not the court would have held as it did had the plaintiffs been domiciled in Arizona is open to conjecture. Certainly the way to a contrary holding has been left open by the court's reliance on its "characterization" theory.

¹⁶ *Baltimore & Ohio R. Co. v. Joy*, 173 U.S. 226 (1899); *Martin v. Baltimore & Ohio R. Co.*, 151 U.S. 673 (1894); *Gordon v. Chicago, R.I. & P. Ry. Co.*, 154 Iowa 449, 134 N.W. 1057 (1912); *Austin v. Pittsburgh, C.C. & St.L. R. Co.*, 122 Ky. 304, 91 S.W. 742 (1906).

¹⁷ *Herzog v. Stern*, 264 N.Y. 379, 191 N.E. 23 (1934); *Texas & Pac. Ry. Co. v. Richards*, 68 Tex. 375, 4 S.W. 627 (1887).

¹⁸ 36 Cal. 2d 437, 224 P. 2d 723 (1950).

¹⁹ *Grant v. McAuliffe*. 41 Cal. 2d 859, 863, 264 P. 2d 944, 948 (1953).