

Survival of Tort Actions in the Conflict of Laws: A New Direction?

Law and Reason vs. The Restatement

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The common law rule that tort actions do not survive the death of either party has been modified by statute in every American jurisdiction. The most significant and widespread modification has been the passage of wrongful death statutes. The universality of these statutes has reduced the scope and importance of conflicts questions in that area.¹ But there is far less uniformity among the states on the question of survival of tort actions. This question arises where the plaintiff seeks to institute or continue an action against the estate of a deceased tortfeasor; and where the representative of a deceased party wishes to institute or continue an action which accrued to the decedent during his life. While nearly all states allow survival of actions for injury to property and a growing majority allows survival of personal injury actions, most states deny survival of actions involving injury to reputation.² This lack of uniformity, coupled with the increasing mobility of society, means that the question of choice of law in this area is of considerable practical importance.³

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¹ Choice of law problems in this area have arisen in recent years as to measure of damages [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)]; the person entitled to bring suit [see *Howard v. Pulver*, 329 Mich. 415, 45 N.W.2d 530 (1951)]; and the applicable statute of limitations [see *Janes v. Sackman Bros. Co.*, 177 F.2d 928 (2d Cir. 1949)]. The United States Supreme Court has indicated that the *lex loci* rule has constitutional sanction under the full faith and credit clause. *First National Bank of Chicago v. United Air Lines*, 342 U.S. 396 (1952); *Hughes v. Fetter*, 341 U.S. 609 (1951). *But cf.* *Wells v. Simonds Abrasive Co.*, 345 U.S. 514 (1953).

Theoretically a wrongful death statute creates a new cause of action which did not exist at common law, while a survival statute merely prevents the abatement of an existing cause of action upon the death of either party. See Schumacher, *Rights of Action Under Death and Survival Statutes*, 23 MICH. L. REV. 114 (1924).

² PROSSER, TORTS 953 (1941); Evans, *A Comparative Study of the Statutory Survival of Tort Claims For and Against Executors and Administrators*, 29 MICH. L. REV. 969 (1931).

³ Statutes permitting institution of actions after death are commonly referred to as "survival" statutes; while those permitting continuation of pending actions upon death are referred to as "revival" statutes. Since it is believed that both types of statutes involve essentially the same principles, the term "survival" will be used to refer to both unless the distinction is being specifically discussed.

A

THE "GENERAL RULE": *LEX LOCI*

Most writers have assumed the general rule to be that set forth in the Restatement, Conflict of Laws, Section 390 (1934) which reads as follows:

Whether a claim for damages for a tort survives the death of the tortfeasor or of the injured person is determined by the law of the place of wrong.⁴

The Restatement view also seems correct from the standpoint of the conventional analysis of conflicts questions in the field of tort. Under the "territorial" theory, propounded by such respected authorities as Holmes, Cardozo, Beale and Goodrich,⁵ a defendant is regarded as having incurred an obligation upon committing an act which creates a right to sue under the law of the place of wrong. This obligation is enforceable against him wherever he goes, provided that such enforcement does not violate the forum's public policy or involve giving effect to another jurisdiction's "penal" laws, and provided that the forum has the necessary machinery for enforcement. If an act does not give rise to a cause of action under the law of the place of wrong, no obligation accrues under this theory, and it follows that the forum will not grant relief even though a right to sue would have arisen under the law of the forum. To apply the *lex fori* would, it is argued, give that law "extraterritorial" effect by making it applicable to events occurring outside the jurisdiction of the sovereignty which enacted it. Moreover, application of the *lex loci* is deemed fair to the defendant in that he incurs an obligation no greater than that which he could have anticipated; and the outcome of litigation is not affected by a fortuitous or intentional choice of forum.

One would expect that a view advocated by nearly all leading writers and conforming to traditional conceptions would correctly state the weight of authority; however, that is not the case. American courts have applied the *lex loci* consistently in only one class of cases: those in which survival was not permitted under the *lex loci* and action had not been instituted before death. In other situations, the great majority of decisions have in effect applied the *lex fori*, both in granting and denying recovery. In this article, we shall try to ascertain whether these decisions may be explained as exceptions to the supposed "rule" of the *lex loci*, or whether accurate reflection of judicial phenomena requires the formulation of a new rule.

⁴ This view finds support in 2 BEALE, CONFLICT OF LAWS § 390.1 (1935); GOODRICH, CONFLICT OF LAWS § 101 (3d ed. 1949); STUMBERG, CONFLICT OF LAWS 189-190 (2d ed. 1951).

⁵ Holmes, J., *Western Union Telegraph Co. v. Brown*, 234 U.S. 542 (1914) and *Slater v. Mexican National Railway Co.*, 194 U.S. 120 (1904); Cardozo, J., *Loucks v. Standard Oil Co. of New York*, 224 N.Y. 99, 120 N.E. 198 (1918); 2 BEALE § 378.1 (1935); GOODRICH § 92 (3d ed. 1949).

B

THE "EXCEPTION": LEX FORI

Decisions justifying "exceptional" application of the *lex fori* can be divided into two categories: those denying recovery although survival is permitted under the *lex loci* and those permitting recovery although survival is not allowed under the *lex loci*. In the following discussion, the state of forum will sometimes be referred to as *F*, and the jurisdiction in which the wrong occurred will sometimes be referred to as *L*.

1.

Denial of Recovery

Early decisions stated that a foreign survival statute, being in derogation of the common law, would not be enforced unless the state of the forum had a similar statute.⁶ They asserted that giving redress to a foreign wrong actionable under the *lex loci*, but not under the *lex fori*, would constitute vesting the foreign law with "extraterritorial" operation. This reasoning was generally abandoned in later cases and is inconsistent with the modern view that the forum is not in fact applying the foreign law as such, but is applying as its own rule of decision a law as similar as possible to that of the place of wrong.⁷ Since *F*'s courts are not actually applying the foreign statute, there is no problem as to the "extraterritoriality" of that statute.

Since later courts have generally given lip-service to that theoretical analysis which postulates the ubiquity of rights once "created" under the *lex loci*, they no longer deny that a right exists in the state of forum. However, they have reached identical results by finding reasons why the right cannot be enforced.

A number of cases have disallowed recovery against a deceased tortfeasor's estate on the ground that enforcement of the obligation would violate the public policy of the state of forum.⁸ This "policy" has been inferred merely from the failure of *F*'s legislature to modify the common law rule of non-survival of tort actions, or from the express exclusion of personal injury claims from those which survive. This line of reasoning

⁶ *Texas & Pac. Ry. Co. v. Richards*, 68 Tex. 375, 4 S.W. 627 (1887); see *Mexican Central Ry. v. Goodman*, 20 Tex. Civ. App. 109, 48 S.W. 778 (1898); *O'Reilly v. N.Y. & N.E. R.R.*, 16 R.I. 388, 396, 19 A. 244, 245 (1889). See STORY, *CONFLICT OF LAWS* 844 n.a (8th ed., Bigelow, 1883).

⁷ 1 BEALE, *CONFLICT OF LAWS* § 5.2, 5.3 (1935); GOODRICH, *CONFLICT OF LAWS* § 8 (3d ed. 1949); RESTATEMENT, *CONFLICT OF LAWS* § 5 (1934); STUMBERG, *CONFLICT OF LAWS* 8 (2d ed. 1951).

⁸ *Gray v. Blight*, 112 F.2d 696 (10th Cir. 1940); *Herzog v. Stern*, 264 N.Y. 379, 191 N.E. 23 (1934); *In re Killough's Estate*, 148 Misc. 73, 265 N.Y.S. 301 (1933); *Clough v. Gardiner*, 111 Misc. 244, 182 N.Y.S. 803 (1920).

has met with disapproval on the part of modern courts and writers, who generally agree that enforcement of a cause of action founded upon foreign operative facts does not violate public policy unless such enforcement is against "good morals" or "natural justice."⁹

Since it was difficult to assert that the modification of a common law rule which has been almost universally criticized as baseless and unwise¹⁰ offended the moral sensibilities of any American court, the "public policy" argument has been bolstered or superseded in the last two decades by another line of reasoning: where *F*'s statutes fail to provide for recovery against a decedent's estate upon a particular type of action, *F*'s courts have no "power" to allow such claims.¹¹ These cases seem to base their denial of recovery upon two grounds: (1) that although the question of survival is one of substance governed by the *lex loci*, the right to sue is a matter of procedure governed by the *lex fori*, and (2) that the absence of a statute in the state of forum means that there is no judicial machinery for the enforcement of this type of claim.¹²

These arguments merely seem to reflect a reluctance on the part of common law judges to enforce foreign statutes which encroach upon the unwritten law. Although this appears most clearly in the earliest cases which candidly distinguish between common law and statutory rights, the

⁹ *Ellison v. Hunsinger*, 75 S.E.2d 884 (1953); *Loucks v. Standard Oil*, 224 N.Y. 99, 120 N.E. 198 (1918); *GOODRICH, CONFLICT OF LAWS* § 11 (3d ed. 1949); *RESTATEMENT, CONFLICT OF LAWS* § 612, comment c (1934); *Beach, Uniform Interstate Enforcement of Vested Rights*, 27 *YALE L.J.* 656 (1918).

¹⁰ 2 *COOLEY, TORTS* §§ 210-211 (4th ed. 1932); *HARPER, LAW OF TORTS* § 301 (1933); *POLLOCK, LAW OF TORTS*, 60-72 (12th ed. 1923); *PROSSER, TORTS* 953 (1941).

¹¹ *Gray v. Blight*, 112 F.2d 696 (10th Cir. 1940); *Woollen v. Lorena*, 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. Supp. 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 (1937); *In re Villas' Estate*, 166 Ore. 115, 110 P.2d 940 (1941).

¹² Many of these cases rely upon the *RESTATEMENT, CONFLICT OF LAWS* § 390, comment b (1934), which provides in effect that although survival is determined by the *lex loci*, no action can be brought by or against a decedent's estate unless the forum permits the personal representative to sue or be sued upon such a claim. If this language is taken literally, legal actions can never be enforced after the death of either party unless both states *F* and *L* have survival statutes. However, an examination of comment b itself and Professor Beale's later treatise (2 *BEALE, CONFLICT OF LAWS* § 390.1 (1935), which expands the principle stated in comment b) indicates that the Restaters intended no such strangulation of their general principle that the *lex loci* governs. Comment b seems merely to refer to the following accepted principles: A foreign administrator cannot sue to recover a claim belonging to the decedent absent special statutory permission [3 *BEALE, CONFLICT OF LAWS* § 507.1 (1935); *RESTATEMENT, CONFLICT OF LAWS* § 507 (1934)]; and no action can be maintained against an administrator upon a claim against the decedent's estate outside the state of administration [(3 *BEALE, CONFLICT OF LAWS* § 512.1 (1935); *RESTATEMENT, CONFLICT OF LAWS* § 512 (1934)]. Neither of these problems was involved in any of the cases using this argument and relying upon comment b.

later decisions are no more convincing in their attempts to reconcile with prevailing theory the results actually reached. The argument that absence of a survival statute as to this type of action deprives the court of "jurisdiction" or "power" is not tenable. These courts were vested with general jurisdiction to adjudicate all claims, and enforcement of this type of claim would involve no special procedures or continued supervision by the court.¹³ Furthermore, since the arguments in these later decisions are predicated solely upon the non-survival of such an action under the *lex fori*, courts are in substance applying the *lex fori* and denying relief regardless of the right "created" under the *lex loci*. However, a satisfactory rationale for this application is yet to be developed.

2.

Grant of Recovery

The principal justification for allowing recovery where survival is permitted under the *lex fori*, but not under the *lex loci*, is based upon a supposed distinction between the "survival" of causes of action where litigation had not commenced before death and the "revival" of actions pending at time of death. It is stated that although survival is governed by the *lex loci*, revival is determined under the *lex fori*.¹⁴

This distinction has its source in two early United States Supreme Court decisions¹⁵ in which the question of choice of law was very inade-

¹³ Compare the cases cited in note 12 *supra* with Slater v. Mexican National R.R. Co., 194 U.S. 120 (1904), where continued judicial supervision of the award, not provided for under the *lex fori*, was required under the *lex loci*; and Chambers v. Baltimore & Ohio R.R. Co., 207 U.S. 142 (1907), where the *lex fori* specifically deprived local courts of jurisdiction.

¹⁴ 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 R.R. 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 Mining Co. v. Stratton's Independence, 196 Fed. 714 (D. Colo. 1912); Ekstrom v. U.S., 21 F. Supp. 338 (Ct. Cl. 1937); Gordon v. Chicago, Rock Island & Pacific R.R. Co., 154 Ia. 449, 134 N.W. 1057 (1912); Austin's Adm'r v. Pittsburgh, C.C. & St.L. R.R. Co., 122 Ky. 304, 91 S.W. 742 (1906). See Orr v. Ahern, 107 Conn. 174, 176, 139 A. 691, 692 (1928). *Contra*: Allen v. Whitehall Pharmacal Co., 115 F. Supp. 7 (S.D.N.Y. 1953); Rathgeber v. Sommerhalder, 112 N.J.L. 546, 171 A. 835 (1934).

¹⁵ Baltimore & Ohio R.R. Co. v. Joy, 173 U.S. 226 (1899); Martin's Adm'r v. Baltimore & Ohio R.R. Co., 151 U.S. 673 (1894).

Both of these decisions were primarily concerned with interpretation of a federal statute [REV. STAT. § 955 (1875), 28 U.S.C. 778 (1946)] which provided for the continuation of pending actions upon the death of either party where such actions "survived at law." The Supreme Court held that the question of survival was to be determined by the law of the state in which the action had commenced. The main issue was whether federal or state law should be applied on the issue of survival, and neither decision adequately discussed the possibility of applying the law of the state in which the wrong occurred. Every decision applying the distinction between survival and revival has relied heavily upon these Supreme Court decisions.

quately discussed. Most courts have merely cited earlier cases and have not attempted to rationalize the distinction. In some decisions, it is said that the question of revival, unlike the question of survival, is one of procedure and thus governed by the *lex fori*.¹⁶ This statement has a superficial plausibility in that most revival statutes merely provide for the substitution of a deceased party's personal representative where his death occurs pending the action. This substitution is generally conditioned upon survival of the cause of action itself. If the distinction between procedure and substance is ever justified in conflicts questions, such a revival statute is quite clearly "procedural" since it provides only for the implementation of substantive rights granted elsewhere. However, decisions involving this type of revival statute have looked at the forum's own statutes to determine whether the condition of survival has been met. Since these decisions were therefore actually applying *F*'s survival statutes,¹⁷ they are authority for a view directly opposed to that of the Restatement.

On the other hand, the leading case in this area¹⁸ involved what one might call a "substantive" revival statute, i.e., a statute allowing revival of pending actions even though such actions could not have been instituted after a party's death. It is submitted that there is no valid distinction between such statutes and survival statutes and that an application of different rules is unwarranted. Both create a right of action which was not available at common law and the characterization of one as "substantive" and the other as "procedural" illustrates the general invalidity of such a classification.

The distinction between survival and revival has also been justified by the assertion that once *F*'s court acquires jurisdiction of the action, *L*'s law cannot "deprive it of jurisdiction" because that would give the place of wrong an extraterritorial power to control litigation in *F*.¹⁹ This reasoning fails to state why *L*'s law is not given extraterritorial effect when it operates to prevent institution of an action after a party's death.

The recent California case of *Grant v. McAuliffe*²⁰ stands virtually

The recent decision in *Allen v. Whitehall Pharmacal Co.*, 115 F. Supp. 7, 8 (S.D.N.Y. 1953) suggests that the *Joy* case must be deemed overruled *sub silentio* by *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 312 U.S. 674 (1941) and *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), which held that federal courts must follow the substantive law of the state in which they sit, including its conflicts rules.

¹⁶ *Austin's Adm'r v. Pittsburgh, C.C. & St.L. R.R.*, 122 Ky. 304, 91 S.W. 742 (1906); see *McIntosh v. General Chemical Defense Corp.*, 67 F. Supp. 63, 64-65 (S.D. W.Va. 1946).

¹⁷ The recent case of *Allen v. Whitehall Pharmacal Co.*, 115 F. Supp. 7 (S.D.N.Y. 1953) deviated from prior federal decisions and looked to the *lex loci* to determine whether the condition of survival had been fulfilled.

¹⁸ *Baltimore & Ohio R.R. v. Joy*, 173 U.S. 226 (1899).

¹⁹ See *Orr v. Ahern*, 107 Conn. 174, 176, 139 Atl. 691, 692 (1928).

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

alone²¹ in characterizing the issue of survivorship itself as one of procedure governed by the *lex fori*. This characterization, in the face of almost universal statements to the contrary on the part of courts and writers, was apparently the only available method of justifying the desired result without expressly discarding existing theory. The court recognized the variable content of the concepts of "substance" and "procedure" and therefore did not feel prevented by contrary authority from characterizing this issue as procedural.²²

C

THE "TRUE RULE"²³

1.

The Present State of the Law

Since the results in these cases applying the *lex fori* are irreconcilable with generally accepted theory and since the *lex fori* cases seem to represent a majority of the reported decisions, we must conclude that this theory fails properly to state the law in the survival field. How then can we state a rule more accurate than that embodied in Section 390 of the Restatement? The results actually reached in judicial decisions may be summarized as follows:

a. Where there is a statute permitting survival in *L* and none in *F*, the cases are about evenly divided as to the allowability of recovery.²⁴

²¹ But cf. *Whitten v. Bennett*, 77 Fed. 271, 273 (C.C.D. Conn. 1896).

²² *Grant v. McAuliffe*, 41 Cal.2d 859, 865, 264 P.2d 944, 948 (1953). It is becoming increasingly widely recognized that the process of characterization as procedural or substantive is frequently merely a rationalization of a pre-conceived result. *Rubin v. Irving Trust Co., et al.*, 305 N.Y. 288, 113 N.E.2d 424 (1953); see COOK, *THE LOGICAL AND LEGAL BASES OF CONFLICT OF LAWS* 154 *et seq.* (1949); Morse, *Characterization: Shadow or Substance?*, 49 COL. L. REV. 1027 (1949).

²³ I.e., the rule as indicated by the results reached in actual decisions rather than the language used. See Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173 (1933); Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 COL. L. REV. 1072 (1953); *Interstate Recognition of Custody Decrees*, 51 MICH. L. REV. 345 (1953); *The Place of Acting in Intentional Multistate Torts: Law and Reason Versus The Restatement*, 36 MINN. L. REV. 1 (1951); Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COL. L. REV. 581 (1940).

²⁴ See notes 8 and 11 *supra* for cases denying recovery in this situation.

The following decisions are authority for granting recovery in this situation: *Stockwell v. Boston & M.R. Co.*, 131 Fed. 153 (C.C.D. Vt. 1904); *Higgins v. Central New England & W. R. Co.*, 155 Mass. 176, 29 N.E. 534 (1892); *In re Daniel's Estate*, 208 Minn. 420, 294 N.W. 465 (1940); *Kertson v. Johnson*, 185 Minn. 591, 242 N.W. 329 (1932); *Chubbuck v. Holloway*, 182 Minn. 225, 234 N.W. 314 (1931), *rev'd on other grounds*, *Chubbuck v. Minneapolis St.P., S.S.M. R.R. Co., et al.*, 182 Minn. 225, 234 N.W. 868 (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), *impliedly overruled*, *Herzog v. Stern*, 264 N.Y. 379, 191 N.E. 23 (1934); *Davis v. Gant*, 247 S.W. 576 (Tex. Civ. App. 1923); *accord: O'Reilly v. New York & N.E. R.R. Co.*, 16 R.I. 388, 19 Atl. 244 (1889); cf. *McIntosh v. General Chemical Defense Corp.*, 67 F. Supp. 63 (S.D.W.Va. 1946); *Anderson v. Miller Scrap Iron Co.*, 176 Wis. 521, 187 N.W. 746 (1922); see *Dombrowski v. Dunn*, 69 F. Supp. 42, 44 (D.Vt. 1946).

b. Where *F* allows survival and *L* does not, and where action has been instituted before death, nearly all modern courts have allowed recovery.²⁵

c. Where *F* allows survival and *L* does not, and where action has not been instituted before death, modern courts have generally denied recovery.²⁶

The Restatement then clearly reflects existing decisions only in this last category. Ignoring the desirability of the results reached, it would be easy to prove fallacious much of the reasoning in the cases deviating from the *lex loci* and to urge the "wandering sheep" to return to the fold. Cases denying recovery under the *lex fori* seem to reflect an unwholesome repugnance against statutory reform, while those allowing recovery are based largely upon an indefensible distinction between survival and revival. However, conceding these weaknesses in the *lex fori* cases, they do establish the fact that the Restatement view is not firmly entrenched in American law. The question remains whether the Restatement, though failing to "restate" existing law, at least advocates the best possible rule.

2.

Grant v. McAuliffe: A New Direction?

The recent California decision in *Grant v. McAuliffe*²⁷ may indicate a negative answer to this question. The facts were as follows: plaintiffs and tortfeasor, all California residents, were involved in an automobile accident in Arizona. After the tortfeasor's death, action was begun against his estate which was being administered in California. Under Arizona law, actions for personal injury not instituted before death abate upon the demise of either party. California statutes allow continuation as well as institution of such actions after death. The California Supreme Court, in a four to three decision, held the California law applicable and granted recovery. The principal justification for applying the *lex fori* was a characterization of the issue of survival as one of procedure, rather than substance. It was asserted that survival statutes, unlike wrongful death stat-

²⁵ See note 14 *supra*.

²⁶ *Ormsby v. Chase*, 290 U.S. 387 (1933); *Stratton's Independence v. Dines*, 126 Fed. 968 (C.C.D. Colo. 1904), *aff'd*, 135 Fed. 449 (8th Cir. 1905); *Orr v. Ahern*, 107 Conn. 174, 139 Atl. 691 (1928); *Hyde v. Wabash, St.L. & P. R.R. Co.*, 61 Ia. 441, 16 N.W. 351 (1883); *Davis v. New York & N.E. R.R. Co.*, 143 Mass. 301, 9 N.E. 815 (1887); *Yount v. National Bank of Jackson*, 327 Mich. 342, 42 N.W.2d 110 (1950); *Dalton v. McLean*, 137 Me. 4, 14 A.2d 13 (1940); *Friedman v. Greenberg*, 110 N.J.L. 462, 166 Atl. 119 (1933); *Potter v. First National Bank*, 107 N.J.Eq. 72, 151 Atl. 546 (1930); *Sumner v. Brown*, 312 Pa. 124, 167 Atl. 315 (1933); *Mexican Central R.R. Co. v. Goodman*, 20 Tex. Civ. App. 109, 48 S.W. 778 (1898); *Needham v. Grand Trunk R.R. Co.*, 38 Vt. 294 (1865); *Burgess v. Gates*, 20 Vt. 326 (1848); see *Trudel v. Gagne*, 328 Mass. 464, 466, 104 N.E.2d 489 (1952). *Contra: Grant v. McAuliffe*, 41 Cal.2d 859, 264 P.2d 944 (1953).

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

utes, merely prevent the abatement of existing causes of action and do not create new substantive rights. Although the court had ample authority for applying the *lex fori*,²⁸ this decision seemingly stands alone in *granting* recovery under the *lex fori* where litigation had not commenced before the death of a party.²⁹

The injustice that would have resulted from following the Restatement rule and denying recovery under the *lex loci* seems manifest. The principal contacts were all within the state of forum, and the fact that the accident occurred in another state was hardly more than a fortuitous circumstance. To allow this fact to vitiate the effect of an important legislative reform in the state of the forum would be both unfair and unnecessary. The tortfeasor's conduct in Arizona was surely not influenced by an expectation that his estate would be immune from suit.³⁰ The plaintiffs were unable to choose their law by choosing the jurisdiction in which to sue, because the estate was being administered in California and all the decedent's assets were apparently within this state.

While the result in the *Grant* case thus seems eminently desirable, the question remains whether the *lex fori* should always be applied in survival cases. Although this decision may be interpreted as authority for such a view due to its characterization of the issue as procedural, this interpretation would ignore two significant elements in the case, both of which were stressed by the court: (1) The state of the forum was the state of administration of the decedent's estate, and such administration was considered to be a matter of local concern;³¹ and (2) the decision gave preference to a progressive statute over what is considered an obsolete common law rule.³² It might be improper, therefore, to regard the case as authority for applying the *lex fori* in cases where the state of forum is not the state of administration or where the *lex fori* does not abrogate the common law rule. Indeed, perhaps we should cease to strive for a general rule requiring universal application of either the *lex loci* or the *lex fori*. Instead we should realize that concern with specific situations requires the formulation of a whole new set of rules, based upon a realistic appraisal of practical problems rather than upon an artificial conceptualism. This, it is submitted, is the proper direction for future decisions, to which the highest court of this state has pointed the way.

²⁸ Notes 8, 11 and 14 *supra*.

²⁹ Except for *Chase v. Ormsby*, 65 F.2d 521 (3d Cir. 1933), *rev'd*, *Ormsby v. Chase*, 290 U.S. 387 (1933).

³⁰ See *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909); *Slater v. Mexican National R.R. Co.*, 194 U.S. 120 (1904).

³¹ *Grant v. McAuliffe*, 41 Cal.2d 859, 866, 264 P.2d 944, 949 (1953).

³² *Id.* at 867, 264 P.2d at 949.