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Survival and Revival of Personal Injury Actions in the Conflict of Laws.

to be limited to its facts,[102] and those which find the broad principles of the decision suggestive enough to warrant a wider use of the reserved power of the state.[103] If one trend is to be noted which stands out in this clash of the decisions of the state courts, it is that the *Blaisdell Case* is being seized upon to justify emergency legislation not alone in the field of mortgages but in other branches of the law as well.

SURVIVAL AND REVIVAL OF PERSONAL INJURY ACTIONS IN THE CONFLICT OF LAWS.—Modern opinion having rejected the ancient notion of tort liability as a punitive rather than a compensatory measure,[1] the outworn rule of the common law that personal actions[2] die with the person[3] has gradually yielded to the attacks of a more realistic jurisprudence.[4] While the category of sur-

102. Des Moines Joint Stock Land Bank v. Nordholm, 253 N. W. 701 (Iowa 1934). The attempt by this court to construe the Iowa statute so that it satisfied the requirements set out in the Blaisdell decision is indicative of the belief of this court that the criteria of reasonableness must be satisfied before the statute can be upheld. While the Wisconsin court in Hanauer v. Republic Bldg. Co., 255 N. W. 136 (Wis. 1934) used some very broad language in interpreting the Blaisdell decision, the court held the statute unconstitutional since it did not satisfy the criteria of reasonableness established by the decision. See note 19, *supra*.

103. Sewer Improvement Dist. v. Delinquent Lands, 188 Ark. 738, 68 S. W. (2d) 80 (1934) (Blaisdell decision used to sustain a general change of remedies); Town of Cheney's Grove v. VanScoyoc, 357 Ill. 52, 191 N. E. 289 (1934) (constitutionally bound to follow Blaisdell decision although statute not of usual mortgage moratoria); Dunn v. Love, 155 So. 331 (Miss. 1934) (Blaisdell decision used to uphold release of part of the liability of bank stockholders); Matter of People (Title & Mortgage Guaranty Company of Buffalo), 264 N. Y. 69, 190 N. E. 153 (1934) (Blaisdell decision relied on to sustain the power of superintendent to administer affairs of mortgage company).

1. POLLOCK, LAW OF TORTS (12th ed. 1923) 578.

2. A right of action is of a personal nature if it is based upon an injury done to either person or property for which the remedy is in damages. 3 BL. COMM. *117.

3. 3 BL. COMM. *302; Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787 (1885); United States Casualty Co. v. Rice, 18 S. W. (2d) 760 (Tex. 1929). Under this doctrine the personal representatives of a deceased tort-feasor could not, as a general rule, be held responsible for torts of the decedent. Matter of Killough's Estate, 148 Misc. 73, 265 N. Y. Supp. 301 (Surr. Ct. 1933). Pain and bodily injuries were not regarded as possessed of such transmissible qualities as to fix upon the living liability to atone for injuries inflicted or suffered by the dead. Best v. Vedder, 58 How. Pr. 187 (N. Y. 1879). Where, however, a direct result of the tortious conduct was the enrichment of the estate of the wrong-doer, a recovery could be had. Osborn v. Bell, 5 Denio 370 (N. Y. 1848); Hambly v. Trott, 1 Cowp. 371, 98 Eng. Reprints 1136 (1776).

4. See Winfield, *Death as Affecting Liability in Tort* (1929) 29 COL. L. REV. 239. The explanation for the persistent denial of redress in tort at common law against the rep-

viving claims has been steadily enlarged by remedial legislation,[5] the statutory abrogation of the common law rule with respect to actions for personal injuries in a number of the states,[6] and its retention in the remaining jurisdictions, have given rise to problems which furnish adequate justification for the lament that the field of conflict of laws "is one of the most thorny and difficult fields to traverse."[7]

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resentative of the deceased tort-feasor is probably to be found in the criminal taint with which trespass was originally colored. POLLOCK, *op. cit. supra* note 1. Since all criminal amenability must be buried with the offender, the received maxim of the common law was: *actio personalis moritur cum persona.* Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. 787 (1885). In the more advanced view, however, liability for tort is regarded as dependent upon the requirements of punishment only with respect to its origin, while its continuance is ascertained by resort to the principles of compensation. SALMOND, JURISPRUDENCE (8th ed. 1930) § 149. The continued adherence to the common law rule, long after the last vestige of criminality had been removed from trespass, was defended with the argument that neither the executors of the injured party had received, nor those of the wrong-doer had committed, in their own personal capacity, any species of wrong or injury. 3 BL. COMM *302; Best v. Vedder, 58 How. Pr. 187 (N. Y. 1879). But as far as the liability of the representatives of the wrong-doer to afford redress is concerned, it is difficult to support a distinction between the right of a creditor to recover his debt and the right of one who has suffered an assault to be compensated for his injuries. As to the rights of the representatives of the person wronged, the sounder view would appear to favor the descent of his right to redress to his representatives, as is the case with any other proprietary interest. SALMOND, *op. cit. supra.* But see Winfield, *supra* at 249, where it is argued that "the representatives of the injured party ought not to profit by a wrong which did not harm them."

5. See Comment (1932) Q. N. Y. U. L. 9 REV. 344; Notes (1929) 61 A. L. R. 830; (1932) 78 A. L. R. 600.

6. ALA. CODE ANN. (Michie, 1923) §§ 5712, 5713 (except injuries to reputation); ARIZ. REV. CODE ANN. (Struckmeyer, 1928) § 3774; ARK. DIG. STAT. (Crawford & Moses, 1921) § 1070 (except injuries to reputation); CONN. GEN. STAT. (1930) § 6177; ILL. REV. STAT. (Cahill, 1929) c. 3, § 125 (except injuries to reputation); IOWA CODE (1931) § 10957; KAN. REV. STAT. ANN. (1923) §§ 60-3201, 60-3203; ME. REV. STAT. (1930) c. 101, § 8; MD. ANN. CODE (Bagby, Supp. 1929) c. 93, § 106 (except actions for slander); MO. REV. STAT. (1929) § 3282; NEV. COMP. LAWS (Hillyer, 1930) § 9196; N. H. PUB. LAWS (1926) c. 302, § 9; N. C. CODE ANN. (Michie, Supp. 1933) § 162 (except injuries to reputation and actions for false imprisonment and assault and battery); N. D. COMP. LAWS ANN. (1913) § 8798; OHIO CODE ANN. (Throckmorton, 1934) § 11235; OKLA. STAT. ANN. (Harlow, 1931) §§ 568, 569 (except injuries to reputation and actions for malicious prosecution); PA. STAT. ANN. (Purdon, 1930) vol. 20, § 772 (except injuries to reputation); R. I. GEN. LAWS (1923) § 4855; S. C. CODE (Michie, 1932) § 419; S. D. COMP. LAWS (1929) §§ 2267, 2317; TEX. ANN. CIV. STAT. (Vernon, 1925) art. 5525; VT. GEN. LAWS (1917) § 3310; VA. CODE (Michie, 1930) §§ 5786, 5790; WASH. COMP. STAT. (1922) § 967; W. VA. SESS. LAWS 1931, c. 20; WISC. STAT. (1933) c. 287, § 1 (except injuries to reputation); WYO. REV. STAT. ANN. (Courtright, 1931) § 1227 (except injuries to reputation and actions for malicious prosecution, assault, and assault and battery). In Nebraska, personal injury actions survive at common law. Murray v. Omaha, 98 Neb. 482, 153 N. W. 488 (1915); Levin v. Muser, 107 Neb. 230, 185 N. W. 431 (1921).

7. Northwestern Mutual Life Ins. Co. v. Adams, 155 Wis. 335, 337, 144 N. W. 1108, 1109 (1914).

The Survival Cases

The cases raising the perplexing issues fall roughly into two groups. In the first are cases wherein, subsequent to the death of one or both of the parties, suit is brought in a state other than that in which the cause of action arose. These cases will be hereinafter referred to as the "survival cases." In the second group, the action is commenced in the lifetime of both parties, but one dies during the pendency of the suit. These cases will be referred to as the "revival cases." Since it may happen that personal injury actions survive or may be revived by the *lex loci*[8] but abate under the *lex fori*,[9] or *vice versa*, it frequently becomes important to determine which law will control.

It is established beyond dispute that in the determination of a case involving a conflict of laws, the *lex loci* will govern substantive rights, while the *lex fori* will control matters of procedure.[10] But while the rule as stated is universally conceded, its application to concrete cases often becomes a matter of considerable difficulty.[11] It has indeed been demonstrated that laws are often both substantive and procedural,[12] and that what is deemed substantive for one purpose may well be regarded as procedural for another.[13] Owing

8. The law of the place where the cause of action arose.

9. The law of the place where the action is brought.

10. Orr v. Ahern, 107 Conn. 174, 139 Atl. 691 (1928); DICEY, CONFLICT OF LAWS (2d ed. 1908) 708; WHARTON, CONFLICT OF LAWS (3d ed. 1905) § 478b; Cook, *"Substance" or "Procedure" in the Conflict of Laws*, (1933) 42 YALE L. J. 333.

11. The distinction between substantive and procedural law has been characterized as artificial and illusory, having no real existence. CHAMBERLAYNE, EVIDENCE § 171; see also Cook, *loc. cit. supra* note 10. But, as the latest text-writer on the subject has observed, "the distinction is made by courts and the lawyer must figure it out as best he can." GOODRICH, CONFLICT OF LAWS (1927) 159, n. 2. The explanation for the complexity of the subject is historical. Like most legal systems, the English was in origin largely procedural. Thus it has been observed that "whenever we trace a leading doctrine of substantive law far enough back, we are likely to find some forgotten circumstance of procedure at its source." HOLMES, COMMON LAW 253. With the growth of the English legal system, however, many rules of procedure acquired a substantive character, leaving the line of demarcation distinct in some cases, but barely preceptible in others. RESTATEMENT, CONFLICT OF LAWS (Prop. Final Draft, 1931) c. 12, introductory note.

12. Comment (1918) 8 COL. L. REV. 354. "Very many rules are only in appearance rules of procedure and really concern the legal relation itself." VON SAVIGNY, PRIVATE INTERNATIONAL LAW (Guthrie trans. 2d ed.) 146-147. "Many laws are only apparently rules of procedure, but in truth are material laws." VON BAR, PRIVATE INTERNATIONAL LAW (Gillespie trans. 1892) 497.

13. Barnet v. New York C. & H. R. R. Co., 222 N. Y. 195, 199, 118 N. E. 625, 626 (1918); Cook, *supra* note 10, at 337, 344. The development of the concepts of substance and procedure in the field of conflicts, has, owing to historical reasons, been given an unfortunate turn. England's geographical isolation from the continent when her courts were deciding the first cases in the field of private international law, produced a distortion of the concepts to conform with a policy that was adverse to the recognition of principles of foreign law. Accordingly the concept of substance was subjected to a process of strict delimitation accompanied by a corresponding enlargement of the concept of procedure. Comment (1933) 47 HARV. L. REV. 315.

to the manifold intricacies of this problem, a liberal view of interstate comity would support enforcement of a foreign-created cause of action in every case of doubt, unless such enforcement could not be effected without a disturbance of the proper functioning of the machinery of litigation in the forum.[14] This suggestion, of course, applies only to decisional doctrine and concedes the right of one state to declare its own policy through its legislature. Whether the view taken be liberal or conservative, however, the survival of a cause of action would seem to fall clearly within the category of substantive matters.[15] Accordingly, the question of whether a claim for personal injuries survives the death of either party ought to be governed by the *lex loci* and not the *lex fori*.[16] Nor is any sound reason perceived for placing upon a different ground the question of whether such claims may be revived in the event of the death of one party during the trial of the action.[17]

Though the foregoing would appear to be a correct exposition of the principles applicable to survival and revival cases generally, the reported decisions sometimes manifest a failure to give those principles proper application. Both

14. Comment (1933) 47 HARV. L. REV. 315.

15. Martin's Adm'r v. Railroad, 151 U. S. 673 (1894); Hyde v. Wabash, St. L. & P. R. Co., 61 Iowa 441, 16 N. W. 351 (1883); Kertson v. Johnson, 185 Minn. 591, 242 N. W. 329 (1932); Burgess v. Gates, 20 Vt. 326 (1848); Herzog v. Stern, 264 N. Y. 379, 191 N. E. 23 (1934); Needham v. Grand Trunk Ry. Co., 38 Vt. 294 (1865); *cf.* Chase v. Ormsby, 65 F. (2d) 521 (C. C. A. 3d, 1933). *Contra:* Matter of Killough's Estate, 148 Misc. 73, 265 N. Y. Supp. 301 (Surr. Ct. 1933). In Hyde v. Wabash, St. L. & P. R. Co., *supra*, the contention that the question of survival relates to the remedy, and should therefore be controlled by the *lex fori*, was rejected. "But in our opinion," wrote the court, "there is a question involved deeper than one pertaining merely to remedy." Wrongful-death statutes are generally regarded as affecting substantive rights. Texas & Pac. Ry. v. Cox, 145 U. S. 593 (1892); Davis v. New York & N. E. R. R., 143 Mass. 301, 9 N. E. 815 (1887); Whitlow v. Nashville C. & St. L. Ry., 114 Tenn. 344, 84 S. W. 618 (1904). *Contra*: Texas & Pac. Ry. v. Richards, 68 Tex. 375, 4 S. W. 627 (1887).

16. See RESTATEMENT, CONFLICT OF LAWS (Prop. Final Draft, 1932) § 426, where the general rule is stated to be that "whether a claim for damages for a wrong survives the death of the wrongdoer or of the injured person is determined by the law of the place of wrong." See also Rathgeber v. Sommerholder, 112 N. J. L. 546, 171 Atl. 835 (1934); Burgess v. Gates, 20 Vt. 326 (1848); Note (1933) 87 A. L. R. 856. A rather anomalous view of the question has been taken by a federal court, which has held that whether a cause of action for tort survives against the estate of the tort-feasor depends upon the law of the latter's domicil, and not upon the *lex loci*. Whitten v. Bennett, 77 Fed. 271 (1896). In Matter of Killough's Estate, 148 Misc. 73, 265 N. Y. Supp. 301 (Surr. Ct. 1933), the entirely novel argument was advanced that the New York statute abating personal injury actions upon the death of either party is, in effect, a statute of limitations limiting the time for bringing suit to the lifetime of the parties, and that since the statute of limitations is generally regarded as a matter affecting remedy and, accordingly, to be governed by the *lex fori*, no action could be maintained against the estate of the tort-feasor. It is submitted that this argument necessitates a perversion of the commonly accepted understanding of statutes of limitation.

17. See (1928) 28 COL. L. REV. 498.

Minnesota[18] and Missouri[19] have correctly held that where a cause of action for personal injuries survives by the *lex loci*, it will be enforced notwithstanding that such an action would terminate under the *lex fori*.[20] But, following closely upon a series of conflicting decisions in the lower courts,[21] the recent case of *Herzog v. Stern*,[22] decided by a divided bench in the New York Court of Appeals, held that such an action is not maintainable in the courts of New York. The prevailing opinion, while conceding the soundness of the doctrine that the survival of a cause of action is determinable by the law of the place of the wrong,[23] adopted a qualification suggested by the Restatement of the Conflict of Laws:

"If a claim for damages for injury survives by the law of the place of wrong, recovery may be had upon it by or against the representative of the deceased party, provided the law of the state of suit *permits* the representative of the deceased party to sue or be sued on such a claim. Without such power created by the law of the state of suit, no recovery can be had."[24]

It is submitted that this restriction is without sound logical basis and, if rigidly enforced, would frequently strip the general rule of its operative force. In view of the universal acceptance of the doctrine that the *lex loci* governs all matters of substantive law while the *lex fori* controls only procedural matters,[25] it must be assumed that the draftsmen of the Restatement viewed the question of whether the forum permits such an action to be brought by or against the executors of the decedent as a mere question of procedure. But conceding the line of demarcation between substantive and procedural mat-

18. Chubbuck v. Holloway, 182 Minn. 225, 234 N. W. 314 (1931), *rev'd on other grounds*, 182 Minn. 231, 234 N. W. 868 (1931); Kertson v. Johnson, 185 Minn. 591, 242 N. W. 329 (1932).

19. Burg v. Knox, 67 S. W. (2d) 96 (Mo. 1933).

20. While in the Burg Case, the Missouri court based its decision upon a statute which provides that where a cause of action has accrued under the laws of another state, an action can be maintained thereupon in the courts of Missouri, the spirit of the decision supports the view taken by the courts of Minnesota.

21. That the action is maintainable: Domres v. Storms, 236 App. Div. 630, 260 N. Y. Supp. 355 (4th Dep't 1932); Taynton v. Vollner, 271 N. Y. Supp. 128 (Sup. Ct. 1934); that the action is not maintainable: Matter of Killough's Estate, 148 Misc. 73, 265 N. Y. Supp. 301 (Surr. Ct. 1933); *cf.* Clough v. Gardiner, 111 Misc. 244, 182 N. Y. Supp. 803 (Sup. Ct. 1920), *aff'd* 194 App. Div. 923, 184 N. Y. Supp. 914 (2d Dep't 1920) (involving the question of revival).

22. 264 N. Y. 379, 191 N. E. 23 (1934), *cert. denied*, U. S. L. Week, Oct. 9, 1934, at 103, col. 3. The plaintiff, having sustained personal injuries in an automobile accident occurring in Virginia, brought an action against the executor of the alleged wrong-doer. Under a Virginia statute, such claims are enforceable against the estate of the tort-feasor, but by § 120 of the New York Decedent Estate Law, the death of either party abates the action. The court held, Pound, C. J., and Hubbs, J., dissenting, that the courts of New York had no jurisdiction over the action.

23. *Supra* note 16.

24. RESTATEMENT, CONFLICT OF LAWS (Prop. Final Draft, 1932) § 426, comment (b). Italics not in original.

25. See *supra* note 10.

ters to be narrowly drawn, consistency demands that if the survival question be deemed substantive, the question of whether suit may be brought against the representative of the deceased tort-feasor should be placed in the same category. Extraordinary perceptive powers would be required to discover a substantial distinction between the principle that a cause of action survives the death of a party and the statement that upon the death of such party an action may be prosecuted against his estate.[26] Mere changes in phraseology do not alter the intrinsic identity. From the premise that the action does not abate upon the death of the wrong-doer, it follows irresistibly that the action may be maintained against his representative.[27] "It is not possible for one at the same time to have a cause of action and not to have the right to sue."[28]

Moreover, the restriction suggested by the Restatement and adopted by the New York Court of Appeals, contains the implication that where, under the *lex fori,* personal injury claims are not enforceable against the representatives of the wrong-doer, the case falls within the class of claims unenforceable because of the lack of adequate machinery of enforcement at the forum.[29] But this objection to affording redress on foreign-created rights is manifestly inapplicable to tort-survival cases.[30] Where no express statute *forbids* the enforcement by the courts of the forum of claims arising in other jurisdictions, sound principle points the way to judicial recognition of such claims. No novel procedural rules need be devised for the adjudication of such suits. Jurisdiction over the estate having been acquired by the service of process upon the personal representative of the deceased tort-feasor, the suit can be carried to completion in accordance with the ordinary machinery of procedure.[31]

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26. When, in Kertson v. Johnson, 185 Minn. 591, 242 N. W. 329 (1932), it was objected by the defendant administratrix that under Minnesota practice there was no method of enforcing liability against the estate of the deceased wrong-doer, the court replied: "We do not so regard the law. In our opinion jurisdiction of the estate for the purpose of establishing liability against it in this kind of a suit is acquired by service upon the personal representative. . . . We apprehend that if a trespass had been committed in Wisconsin by Johnson there would be no question but that suit against the personal representative could be maintained here. . . . That being the case, we see no reason why our judicial machinery cannot determine and enforce liability against the estate by suit against the personal representative on a tort which survives by the substantive law of that state . . ."

27. "By this phrase [cause of action] is understood the right to bring an action, which implies that there is some person in existence who can assert, and also a person who can lawfully be sued." BOUVIER, LAW DICTIONARY tit., "Cause of Action." See also Parker v. Enslow, 102 Ill. 272 (1882).

28. Walters v. City of Ottawa, 240 Ill. 259, 263, 88 N. E. 651, 653 (1909); Jacobus v. Colgate, 217 N. Y. 235, 111 N. E. 837 (1916). "A right without a remedy is a right only in name." Kuhn, *Doctrines of Private International Law in England and America Contrasted with those of Continental Europe* (1912) 12 COL. L. REV. 44, 54.

29. Slater v. Mexican Nat. R. Co., 194 U. S. 120 (1904); 2 WHARTON, *op. cit. supra* note 10, at 1123; GOODRICH, *op. cit. supra* note 11, at 196.

30. Kertson v. Johnson, 185 Minn. 591, 242 N. W. 329 (1932).

31. *Ibid.*

In cases like *Orr v. Ahern*,[32] the converse of the *Herzog v. Stern* set-up is presented. In the *Orr Case* suit was brought in a Connecticut court for personal injuries occasioned by the negligent conduct of the defendant's intestate in New York. Under a Connecticut statute a claim for personal injuries continues against the executor, while in New York the death of the wrong-doer abates the action.[33] The Connecticut court properly refused to take jurisdiction on the ground that the cause of action, having arisen in New York, was governed by the law of that state and, having abated under New York law, the right to redress no longer existed anywhere. The same view has generally been entertained in other jurisdictions,[34] but a federal court has taken a diametrically opposite stand.[35]

The Revival Cases

Nowhere is the confusion on this subject better illustrated than in the revival cases. In cases of this type one of the parties dies pending an action commenced during his lifetime. The complications are caused by the question of what law is to govern the revival of such an action. In most cases it has been held that the revival of the action is governed by the law of the forum, so that if by that law pending actions abate, the action will not be continued against the personal representative, even though under the *lex loci* a like action then pending would be revived;[36] and conversely, if the law of the forum revives such claims, the action will be continued even though such cause of action would abate under the law of the situs.[37] It is difficult to discover a defensible ground for such decisions.[38] The cause of action when

32. 107 Conn. 174, 139 Atl. 691 (1928).

33. DECEDENT ESTATE LAW (1909) § 120.

34. Davis v. New York & N. E. R. Co., 143 Mass. 301, 9 N. E. 815 (1887); Friedman v. Greenberg, 110 N. J. L. 462, 166 Atl. 119, 87 A. L. R. 849 (1933); Mexican C. R. Co. v. Goodman, 20 Tex. Civ. App. 109, 48 S. W. 778 (1898). In Davis v. New York & N. E. R. Co., *supra*, the court clearly indicated the ground of its decision: "What the new liability shall be, by what conditions it shall be controlled, and whether the original liability shall be destroyed, must be determined by the law of the state where the injury occurs, unless the legislation of other states is to have extraterritorial force, and govern transactions beyond their limits. . . ."

35. Chase v. Ormsby, 65 F. (2d) 521 (C. C. A. 3d, 1933).

36. Clough v. Gardiner, 111 Misc. 244, 182 N. Y. Supp. 803 (Sup. Ct. 1920), *aff'd* 194 App. Div. 923, 184 N. Y. Supp. 914 (2d Dep't 1920). The decision was based upon the theory that to permit revival of the action would be to transcend the declared limits of the public policy of the forum. For an analysis of the concept of public policy in the field of conflicts, see *infra* pp. 96-100.

37. Baltimore & O. R. R. Co. v. Joy, 173 U. S. 226 (1889); Page v. United Fruit Co., 3 F. (2d) 747 (C. C. A. 1st, 1925), *cert. granted*, 269 U. S. 542 (1925), *rev'd on other grounds*, 274 U. S. 65 (1927); Luster v. Martin, 58 F. (2d) 537 (C. C. A. 7th, 1933); Gordon v. Chicago, R. I. & P. R. Co., 151 Iowa 449, 134 N. W. 1057 (1912); see Orr v. Ahern, 107 Conn. 174, 178, 139 Atl. 691, 693 (1928).

38. See Note (1933) 87 A. L. R. 852. The Connecticut court, in a *dictum* in the case of Orr v. Ahern, 107 Conn. 174, 178, 139 Atl. 691, 693 (1928), cited note 37, *supra*,

created by the *lex loci,* carries with it as a substantive matter any limitations placed upon it by that law.[39] If revival of such claims is not permitted by the *lex loci,* the cause of action should terminate upon the death of either party regardless of where the action is prosecuted.[40] Similarly, if the law of the place of the injury revives such actions, there should be no abatement of the suit even though under the *lex fori* such claims are not revived.

The Public Policy Argument

Having reached the conclusion that the question of the survival of a claim for personal injuries is fundamentally one of substantive law and, accordingly, governed by the *lex loci,*[41] it becomes necessary to consider some additional problems. It is elementary that the laws of one state have, *proprio vigore,* no extra-territorial force,[42] and, with one or two important exceptions,[43] it is the sovereign right of each state to refuse recognition to foreign-created rights.[44]

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has suggested what may be the correct rationale of the revival cases. The argument is that where an action is brought to secure a claim which arose in a foreign jurisdiction, the right which the action thus seeks to enforce becomes a right in the jurisdiction of the forum as soon as its courts have assumed jurisdiction. Since the right then exists by force of the law of the forum, that law will determine the revival of the action, should one of the parties die during its pendency. But it is submitted that this argument assumes too much. The right primarily recognized is the right acquired under the foreign law, and, even though it be conceded that the forum does not directly enforce that right, but substitutes a corresponding right therefore [see note 44, *infra*], the new right ought to be equal to but no greater than the original one.

39. Thus it is clear that the law of the place of the act determines not merely the existence of the obligation, but determines its extent as well. Slater v. Mexican National R. Co., 194 U. S. 120 (1904). The Restatement furnishes direct support for the text statement: "When a certain law is said to 'govern' a right of action it is meant that that law applies to the right in all particulars: It creates the right, determines its nature (for instance, whether it is a cause of action for tort, whether it survives the death of a party, *etc.*) fixes the measure of damages, determines the person who is entitled to its benefit and person against whom it exists, and all other qualities of the right." RESTATEMENT, CONFLICT OF LAWS (Tent. Draft, 1928) § 427, comment (a). See also Davis v. New York & N. E. R. Co., 143 Mass. 301, 9 N. E. 815 (1887); Comment (1930) 47 Harv. L. Rev. 129.

40. See (1928) 28 COL. L. REV. 498.

41. See note 16, *supra.*

42. Lauria v. Du Pont de Nemours & Co., 241 Fed. 687 (E. D. N. Y. 1917); Union Securities Co. v. Adams, 33 Wyo. 45, 236 Pac. 513 (1925); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws* (1924) 33 YALE L. J. 736.

43. See pp. 100-101 *infra.*

44. Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918); Lorenzen, *Story's Commentaries on the Conflict of Laws—One Hundred Years After* (1934) 48 Harv. L. Rev. 15, 35-36. The recognition of a foreign created right, whether it be based upon a statute or upon the common law, stands, in this respect, upon the same ground. The forum is not, properly speaking, enforcing a foreign right. It is applying its own law to the case, but in the process, adopts as its own law a rule substantially identical with the law of the foreign state. The forum thus gives effect, not to a foreign right, but to a right created by its own law. See Cook, *The Logical and Legal Bases of the Conflict of Laws* (1924) 33 YALE L. J. 453.

However, the real question is not whether the power to refuse such aid exists, but whether it ought, in accordance with the principles of interstate comity, to be exercised.[45] To make the rights of the injured party dependent upon the mere fortuity of the place where the defendant is apprehended, may often work a substantial failure of justice.[46] The unmistakable tendency of modern decisions has been in the direction of a uniform interstate enforcement of vested rights,[47] and the conviction has taken hold that only extraordinary circumstances will justify one state in refusing to entertain suits on rights acquired in another.[48] Notwithstanding the force of this tendency, however, if the

45. (1934) 83 U. OF PA. L. REV. 84.

46. Thus in Chubbuck v. Holloway, 182 Minn. 225, 234 N. W. 314 (1931), *rev'd on other grounds;* 182 Minn 231, 234 N. W. 868 (1931), the court, in assuming jurisdiction, wrote: "Our public policy is not such as to prompt us in turning him [the plaintiff] from our door and relegating him to a foreign state where the defendant, perchance, having no property could not be reached. . . . We should not make things better by sending him to Wisconsin where suit may be impossible. We have no desire to establish a policy that would turn the citizens of this state from our courts, which have jurisdiction, into a foreign state wherein their otherwise valuable cause of action might be worthless for want of jurisdiction."

47. "The fundamental policy is perceived to be that rights lawfully vested shall be everywhere maintained." Cardozo, J., in Loucks v. Standard Oil Co., 224 N. Y. 99, 113, 120 N. E. 198, 202 (1918). See also Rick v. Saginaw Bay Towing Co., 132 Mich. 237, 93 N. W. 632 (1903); Chubbuck v. Holloway, 182 Minn. 225, 234 N. W. 314 (1931); *rev'd on other grounds,* 182 Minn. 231,334 N. W. 868 (1931); Brown v. Perry 104 Vt. 66, 156 Atl. 910 (1931); Beach, *Uniform Interstate Enforcement of Vested Rights* (1918) 27 Yale L. J. 656; Dodd, *The Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws* (1926) 39 Harv. L. Rev. 533; Langmaid, *The Full Faith and Credit Required for Public Acts* (1929) 24 Ill. L. Rev. 383. The application of the *a posteriori* as distinguished from the *a priori* method to decisions in the law of conflicts has resulted in the rejection of the vested rights theory by the advocates of the new approach. In its place they substitute an appraisal of the actual basis of decisions in this field as gleaned from a study of the reported cases. See Cook, *loc. cit. supra* note 44; Lorenzen, *loc. cit. supra* note 42. The conclusion reached by this method is that "the general problem is . . . always the same: What are the demands of justice in the particular situation; what is the controlling policy?" Lorenzen, *supra* note 42, at 748. See also Cavers, *The Choice of Law Problem* (1933) 47 HARV. L. REV. 173, at 178; Cook, *loc. cit. supra* note 44. If this conclusion is to be accepted, there would seem to be no place for the doctrine of *stare decisis* in the field of conflicts, since "it is the demands of justice in the particular situation" that control the decision. But the correctness of the conclusion is open to question. The binding force of precedent is forcefully indicated in the oft-quoted statement of Mr. Justice Cardozo: "Nine-tenths, perhaps more, of the cases that come before a court are predetermined—predetermined in the sense that they are predestined—their fate pre-established by inevitable laws that follow them from birth to death. The range of free activity is relatively small. We may easily seem to exaggerate it through emphasis." CARDOZO, GROWTH OF THE LAW 60. It is difficult to believe that the law of conflicts should be anomalous in this respect. For a vigorous attack upon the profitless efforts of the "realists" to discover uncertainty where only certainty exists, see Kennedy, *Men or Laws* (1932) 2 BROOKLYN L. REV. 11.

48. Loucks v. Standard Oil Co., 224 N. Y. 99, 120 N. E. 198 (1918). In the field of penal claims, however, the tendency has rather been to rigidly enforce the rule with

recognition of the foreign rights would be subversive to the public policy[49] of the forum, redress will be denied.[50] Unfortunately the ascertainment of the precise meaning of the term "public policy" is no less difficult in the field of conflicts than in other fields.[51] It connotes something that is "uncertain, fluctuating, varying with changing economic needs, social customs and moral aspirations of the people."[52] It is generally agreed, however, that before the courts of one state will close their doors to rights acquired in another, it must appear that the recognition of the foreign rights would be repugnant to good morals and abstract justice, and would produce a serious disruption of the local municipal law.[53]

While the ground of the decision in *Herzog v. Stern*[54] was lack of jurisdiction in the court of the forum because of the absence of any provision in the law of New York for the maintenance of personal injury actions against personal representatives, the court intimated, by way of *dictum*, that the result would have been the same had the question really been one of public policy. The legislature, it reasoned, had declared the public policy of New York when it provided that no action for personal injuries could be maintained against the executor or administrator of a decedent residing in that state.[55] But the very statement of the proposition carries with it a sufficient refutation, and

precludes the extra-territorial enforcement of causes of action based upon penal laws. But the wisdom of this policy has been seriously questioned. See Leflar, *Extrastate Enforcement of Penal and Governmental Claims* (1932) 46 HARV. L. REV. 193.

49. The question of public policy is not peculiar to the enforcement of tort claims arising in foreign jurisdictions, but is present potentially in nearly all cases involving the recognition and application of foreign law. WHARTON, *op. cit. supra* note 10, § 4a; GOODRICH, *op. cit. supra* note 11, at 197.

50. Bond v. Hume, 243 U. S. 15 (1916); RESTATEMENT, CONFLICT OF LAWS (Prop. Final Draft, 1931) § 478a.

51. For a discussion of the general question of public policy, see Winfield, *Public Policy in the English Common Law* (1928) 42 HARV. L. REV. 76; Comment (1933) 33 COL. L. REV. 508.

52. Weeks v. New York Life Ins. Co., 128 S. C. 223, 122 S. E. 586, 587 (1924).

53. Bond v. Hume, 243 U. S. 15, 21 (1916); Reilly v. Antonio Pepe Co., 108 Conn. 436, 143 Atl. 568 (1928). The English courts have been exceedingly conservative in this respect. Under the English rule, unless the act would have been a tort if committed in England, there can be no enforcement of a cause of action predicated thereupon. The Halley, L. R. 2 P. C. 193 (1868); DICEY, CONFLICT OF LAWS (3d ed. 1922); 6 HALISBURY LAWS OF ENGLAND 248. This rule would seem to be based upon the abandoned concept of tort liability as penal. See note 4, *supra*; GOODRICH, *op. cit. supra* note 11, at 198. The better view would seem to be that adopted by the American courts: that recovery for a foreign tort will not be refused even though no liability would have been imposed by the *lex fori* had the operative facts occurred there. Walsh v. New York & N. E. R. Co., 160 Mass. 571, 36 N. E. 584 (1894); Eingartner v. Illinois Steel Co., 94 Wis. 70, 68 N. W. 664 (1896).

54. 264 N. Y. 379, 191 N. E. 23 (1934), cited note 22, *supra*.

55. *Id.* at 384, 191 N. E. at 25. The same view had been previously taken in two cases in the lower courts. Clough v. Gardiner, 111 Misc. 244, 182 N. Y. Supp. 803 (Sup. Ct. 1920), *aff'd* 194 App. Div. 923, 184 N. Y. Supp. 914 (2d Dep't 1920); Matter of Killough's Estate, 148 Misc. 73, 265 N. Y. Supp. 301 (Surr. Ct. 1933).

when it is considered that claims for personal injuries now survive in more than half the states,[56] it is difficult to perceive how the enforcement of a right acquired under the survival statute of another state can seriously disturb the moral security[57] of a community in which no survival statute exists.[58] Thus the dissenting judges in the *Herzog Case* insisted that refusal to enforce the foreign cause of action on the ground that it was repugnant to the public policy of New York "would constitute an assumed virtue and superiority which cannot be justified and which we should at least hesitate to announce."[59] The public policy of a state, moreover, is said to be found in its constitution and laws and judicial decisions.[60] But it is clear that public policy is broader than the mere terms of a statute; it embraces its general purpose and spirit.[61] It may be questioned whether the statutes enacted by some states codifying the common law rule of *actio personalis moritur cum persona* were calculated to extend to actions arising under the laws of other states.[62] The rule formerly obtained quite generally that recovery on a cause of action arising on the statute of another state could not be had unless there was a statute in

56. See note 6, *supra.*

57. It has been suggested that there can never arise among the several states any cases so extreme that the enforcement of a foreign right would be an offense against the morals of the forum. The differences among the states are said to relate merely to minor matters of expediency. Beach, *loc. cit. supra* note 47. See also RESTATEMENT, CONFLICT OF LAWS (Prop. Final Draft, 1931) § 620, comment (b). But this view has not always been accepted. "There may be, and we cannot ascertain until inquiry, situations in which the foreign law may be so obsolete or inimical to the social interests of the forum that to apply the doctrine of the uniform of vested rights would defy justice." Yntema, *The Hornbook Method and the Conflicts of Laws* (1928) 37 YALE L. J. 468, 479.

58. Chubbuck v. Holloway, 182 Minn. 225, 234 N. W. 314 (1931), *rev'd on other grounds*, 182 Minn. 231, 234 N. W. 868 (1931); Kertson v. Johnson, 185 Minn. 591, 242 N. W. 329 (1932); Burg v. Knox, 67 S. W. (2d) 96 (Mo. 1933); Domres v. Storms, 236 App. Div. 630, 260 N. Y. Supp. 335 (4th Dep't 1932); Taynton v. Vollner, 271 N. Y. Supp. 128 (Sup. Ct. 1934). The argument has been advanced that where under the *lex loci* someone other than the tort-feasor is held responsible for the tort, and no similar recovery is permitted under the law of the forum, public policy may prevent the forum from entertaining the action. (1931) 15 MINN. L. REV. 705. This argument might be properly applied to cases like Hudson v. Von Hamm, 85 Cal. App. 323, 259 Pac. 374 (1927) (statute at locus imposed upon parent liability for torts of child), where the person substituted for the tort-feasor is not legally identifiable with him. But it has no force when applied to survival cases, for the individual substituted here is a personal representative of the deceased wrong-doer administering the latter's estate.

59. 264 N. Y. 379, 387, 191 N. E. 23, 26 (1934). "It would be an intolerable affectation of superior virtue," writes Judge Beach, "for the courts of one state to pretend that a mere enforcement of a right validly created by the law of a sister state would be repugnant to good morals." Beach, *loc. cit. supra* note 47.

60. Vidal, Girard v. Mayor, 43 U. S. 126 (1844); People v. Martin, 175 N. Y. 315, 67 N. E. 589 (1903).

61. Georgia Fruit Exchange v. Turnip-Seed, 9 Ala. App. 123, 62 So. 542 (1913); Johnston v. Chicago Great Western R. Co., 164 S. W. 260 (Mo. 1914).

62. It is at least clear that survivorship statutes are designed to cover only situations arising within the enacting states. Orr v. Ahern, 109 Conn. 174, 139 Atl. 691 (1928).

force at the forum substantially similar to that of the situs.[63] But the clear course of decision in recent years has been in the direction of giving the same recognition to a foreign claim whether it arose under the common law or was given by statute.[64]

Constitutional Problems

The refusal of New York to entertain suit on a personal injury action subsequent to the death of the wrong-doer, raises the interesting question of whether the full faith and credit clause of the Federal Constitution[65] is not thereby violated.[66] The inclusion of the clause in the Constitution was prompted in part by the realization of the necessity of placing the observance of some principles of private international law upon a basis more substantial than a tenuous interstate comity.[67] But while the broad terms of the mandate offered an opportunity to establish standards securing a virtual uniformity of state legislation in the field of conflict of laws,[68] the Supreme Court has to date shown no particular desire to avail itself of the opportunity.[69] Though able arguments have been advanced to show that there ought to be no distinction between a case in which reliance is placed on the full faith and credit clause as requiring recognition of the validity of a cause of action arising under a statute of another state, and a case in which enforcement of a judg-

63. Leonard v. Columbia Steam Nav. Co., 84 N. Y. 48 (1881); Morris v. Chicago, R. I. & P. R. Co., 65 Iowa 727, 23 N. W. 143 (1885); Burns v. Grand Rapids & I. R. Co., 113 Ind. 169, 15 N. E. 230 (1888) Texas & P. R. Co. v. Richards, 68 Tex. 375, 4 S. W. 627 (1887). The requirement that there be a similar statute at the forum has a tendency to unduly hamper the operation of the principles of comity by assuming that the only means of negativing the objection based upon the public policy of the forum is to show the existence of a similar statute. WHARTON, *op. cit. supra* note 10, § 480b.

64. Huntington v. Atrill, 146 U. S. 657 (1892); Northern Pacific R. R. Co. v. Babcock, 154 U. S. 190 (1894); Herrick v. Hill, 80 Ind. App. 363, 141 N. E. 66 (1923); Herrick v. Minneapolis & St. L. Ry. Co., 31 Minn. 11, 16 N. E. 413 (1883); Powell v. Great Northern R. Co., 102 Minn. 448, 113 N. W. 1017 (1907); Thompson v. Taylor, 66 N. J. L. 253, 49 Atl. 544 (1901); Loucks v. Standard Oil Co. of N. Y., 224 N. Y. 99, 120 N. E. 198 (1918).

65. U. S. CONST. Art. IV, § 1: "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings in every other State."

66. The conflict of laws is, of course, a part of the common law and is binding upon state courts as are other parts of the law of the state. It is not a body of law forced on a state by any external power. RESTATEMENT, CONFLICT OF LAWS (Prop. Final Draft, 1930) § 5. The freedom of each state to adopt its own rules of conflict of laws, however, is not as great as it is with respect to other rules of law, for the full faith and credit clause prescribes certain limitations the bounds of which may not be transcended with impunity. *Ibid.* See also Lorenzen, *supra* note 42 at 750.

67. See Corwin, *The Full Faith and Credit Clause* (1933) 81 U. OF PA. L. REV. 371.

68. *Ibid.* Dodd, *Power of the Supreme Court to Review State Decisions in the Field of Conflict of Laws* (1926) 39 HARV. L. REV. 532; Lorenzen, *supra* note 42, at 750.

69. The potential developments based upon this clause are fully treated in Dodd, *loc. cit. supra* note 68; Langmaid, *loc. cit. supra* note 47; Ross, *Has the Conflict of Laws Become a Branch of Constitutional Law?* (1931) 15 MINN. L. REV. 161.

ment granted in another state is sought,[70] it is unlikely, in the light of the strict interpretation of the clause in past decisions, that the distinction will be easily obliterated.[71] But even supposing that the Supreme Court should assume the status of a tribunal for effecting uniformity in the field of conflicts,[72] it is highly improbable that it would interfere with decisions of state courts which refuse to allow the statutes of sister states to govern in cases involving the survival of personal injury claims, for the substantial interest of the forum in the administration of decedents' estates might well be deemed an adequate justification for such refusal.

Another constitutional problem presented by these cases concerns the possible violation of the due process clause. Conceding the paucity of authority on this subject, it is submitted that if the vested rights theory be accepted the refusal of the forum to recognize the existence of the cause of action—a property right—because of some local statute, as in the *Herzog Case,* might be interpreted as putting upon the local statute a construction which would render it unconstitutional as effecting a deprivation of property without due process of law.[73] The force of this argument is emphasized in cases in which the only property of the decedent is located in the forum. To refuse to recognize the plaintiff's right in such a case is, in effect, to completely deprive him of that right.[74]

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70. Dodd, *supra* note 68, at 540 *et seq.*

71. See Comment (1930) 40 YALE L. J. 291, 295. In one line of cases the clause has been construed to embrace causes of action arising under statutes of sister states. Royal Arcanum v. Green, 237 U. S. 531 (1915); Aetna Life Ins. Co. v. Dunken, 266 U. S. 389 (1924); Modern Woodman of America v. Mixer, 267 U. S. 544 (1925). But these cases involve insurance contracts and appear to occupy a unique position.

72. The argument of those who would have the Supreme Court assume such position is clearly put by Professor Lorenzen: "The rules are imposed upon them [the states], and in the nature of things the rules are dictated by what the Supreme Court conceives to be the general interest. The particular interests and policies of the different states are submerged in these cases in the general interest of the nation." Lorenzen, *supra* note 42, at 750.

73. See Dodd, *supra* note 68, at 548.

74. It has been urged that the due process clause ought to be construed to protect against all error in state decisions regardless of the question involved. Schofield, *The Supreme Court of the United States and the Enforcement of State Law by the Courts* (1908) 3 ILL. L. REV. 195. But whatever the merit of the suggestion, a constitutional amendment would probably be necessary to effect the desired result. See Ross, *loc. cit. supra* note 69.