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Survival of Actions:  
Adjudication versus Automation  
In the Conflict of Laws

BRAINERD CURRIE*

I

In December, 1949, a collision occurred between two automobiles on U.S. Highway 66 near Flagstaff, Arizona. Jensen, the driver of the westbound car, was injured, as were his two passengers, Grant and Manchester. Pullen, the driver of the eastbound car, received injuries from which he died nineteen days later. All four men were residents of California. An administrator, McAuliffe, was appointed for Pullen's estate by a California court. Grant, Manchester, and Jensen presented claims for damages to the administrator, who rejected them. The three survivors of the accident thereupon filed actions against the administrator, which were dismissed by the California court on the ground that under the law of Arizona a plea in abatement must be sustained if a tort action is not commenced before the death of the tort-feasor. These dismissals were affirmed by the district court of appeal. The Supreme Court of California reversed by a vote of four to three, Mr. Justice Traynor writing the opinion. The court said:

When, as in the present case, all the parties were residents of this state, and the estate of the deceased tort feasor is being administered in this state, plaintiffs' right to prosecute their causes of action is governed by the laws of this state relating to administration of estates.

As a matter of first impression, uncontaminated by conflict-of-laws theory, the decision seems hardly controversial. The practical effect was to allow the injured plaintiffs to proceed with their cases, and to prove, if they could, that the collision was the fault of Mr. Pullen. Under California law it was not necessary for their

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3. Id. at 867, 264 P.2d at 949.

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lawyers to hurry to the hospital in order to serve process upon the unfortunate Mr. Pullen before death came. The case was in a California court; the parties were all residents of California; the estate of the deceased was being administered in California; the court applied California law. Why should the law of Arizona be consulted as to this point? The plaintiffs were given their day in court, as they would have been if the collision had occurred farther to the west, inside the California border. There seems nothing very remarkable in that.

Yet there were three dissenting votes, Mr. Justice Schauer writing a strongly phrased dissenting opinion. Four law reviews published comments, all to some extent critical. And there was an even more interesting reaction.

The note in the U.C.L.A. Law Review came to the attention of a staff worker for the California Law Revision Commission in the course of a routine check for developments in California law. Reporting the critical tenor of the note, the staff worker suggested that the Commission might adopt as a topic for study the question whether the rule of the Grant case should be changed or codified by statute. In due course, the topic became the fifth of twenty-three in the first calendar of topics selected by the Commission for study. It was one of the studies in that calendar which the Legislature, by concurrent resolution, authorized the Commission to pursue. A research consultant to the Commission, Professor James D. Sumner, Jr., of the School of Law of the University of California at Los Angeles, prepared a study and report which was extremely critical of the decision. Although he reported that the decision was "generally believed to be unsound," he felt that the problem of survival of causes of action was only one instance of the general

4. Id. at 867, 264 P.2d at 949.
6. This information is on file with the California Law Revision Commission, School of Law, Stanford University, and has been made available through the courtesy of Professor John R. McDonough, Jr., of Stanford University, the Commission's Executive Secretary.
10. Id. at 18.
problem of substance and procedure in the conflict of laws, and that, instead of a statute aimed narrowly at changing the result of the Grant case, there should be a general statute, "changing the rule of the Grant case and classifying other matters which present the substance-procedure issue." He provided a draft of a general statute for this purpose.

The Commission recommended no legislative action. "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." In general, the Commission's recommendation follows the research consultant's report. It differs chiefly in that (1) it omits most of the critical flavor of the report, and (2) sub silentio, it omits the recommendation that a general statute be enacted, classifying as procedural those things that are procedural, and as substantive those things that are substantive.

There the matter rests. There it might be allowed to rest, but for certain troublesome thoughts that linger in its aftermath. To begin with, the whole episode raises again some fundamental worries about that branch of the law known as conflict of laws, which can provide the wherewithal to create quite a tempest in a teapot although, to the uninitiated observer, there appears to be no problem at all. The question in the Grant case can hardly be described as one of major practical importance. Mr. Justice Traynor said that the question was "one of first impression in this state." Having failed to reach a California appellate court in the first century of the state's membership in the Union, the question is not likely to arise with great frequency in the future, since only a diminishing company stands with Arizona in her position that a cause of action for personal injuries dies with the tort-feasor. An interesting fact is that none of the published comments criticizes the result in

11. Ibid.
12. Id. at 20.
13. Id. at 19–20.
14. Id. at 6.
Grant v. McAuliffe; even the severest critic, Mr. Sumner, hints a somewhat grudging willingness to accept that result on the facts of the case.\textsuperscript{17} The commentators were worried, not because they felt that justice was not done as between the plaintiffs and the defendant, but because of the "rule" of the case, and of the methods employed by the court in reaching its decision. They were worried, in short, because the decision is unorthodox in terms of current conflict-of-laws doctrine. A system of law which nurtures such reactions, inciting the desire to change a just result because of the apprehended effects of the decision as a precedent and because unorthodoxy is hateful, must be re-examined as often as the occasion arises.

The Commission is to be congratulated on its decision not to recommend legislation on the question of what law shall govern survival of actions.\textsuperscript{18} The California Supreme Court is one of several courts in this country which are making serious efforts to break away from sterile formalism and to develop a rational approach to conflict-of-laws problems.\textsuperscript{19} The task is a difficult and

\textsuperscript{17} 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?" \textbf{Recommendation and Study} 18.

\textsuperscript{18} It is doubly to be congratulated on its decision not to recommend enactment of the general statute proposed by the research consultant with the aim of taking away from the courts the function of characterization. The draft suggested was as follows:

"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 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."

\textbf{Recommendation and Study} 19–20. A more mischievous piece of legislation in the field of conflict of laws would be difficult to imagine.

\textsuperscript{19} "In certain fields, as currently in Conflict of Laws, the wilderness grows wilder, faster than the axes of discriminating men can keep it under control. The concepts in the \textit{Restatement} have been shattered by the devastating attacks of Cook and Lorenzen, and the compelling logic of the proposition that in the area between the prohibition of the due process clause and the mandate of the full faith and credit clause, local law is supreme, has made it necessary to search for acceptable doctrines to govern the making of exceptions to the local law, and serve as the basis of a new and realistic system of conflict of laws. The demolition of obsolete theories makes the judge's task harder, as he works his way out of the wreckage; but it leaves him free to weigh competing policies without preconceptions that purport to compel the decision, but in fact do not. He has a better chance to arrive at the least erroneous answer if the scholars have labored in advance to break ground for new paths. If they have not, he must chop his own way through, however asymmetrically, and hope that scholars will speed their reinforcements to the job in hand."

complex one; it is not one to be accomplished by easy generalization.

The Commission was wise to recognize that the actual result in the Grant case was justifiable on the facts before the court, that the decision did not necessarily portend the possibly undesirable results in other cases apprehended by the critics, and that legislative intervention would be premature.

I believe not only that the actual result in the Grant case was "justifiable" on the facts, but also that the approach to conflict-of-laws problems which the California Supreme Court adopted in that case is sound, constructive, and likely to prove fruitful in the search for more intelligent ways of handling such problems. Legislation which would have placed this vigorous court in the metaphysical irons forged by Professor Beale and the American Law Institute would have been reactionary in the extreme. At the same time, it must be conceded that the opinion in the Grant case is not one which gives clear guidance as to the future course of development of conflict of laws in California concerning survival of actions. The reason for that is understandable. Confronted with a situation in which the result dictated by the orthodox system of conflict of laws was manifestly absurd, and in which the just and rational result was clear, the court availed itself of one of the several escape devices which are built into the system itself. It characterized the problem differently, and the different characterization produced the result which had previously been recognized as the sound one. This is a device which has long been used by the courts. It is far from an ideal way of dealing with such situations. Certainly it would be better if the courts could state explicitly the considerations which led them in the first place to determine what the result should be, and indicate clearly how those considerations will be appraised in other cases. Legal scholars, however, have not provided the courts with a systematic method of analysis whereby the sound instincts employed by a sensitive court in the adjudication of conflict-of-laws cases can be fitted into the conventions and the terminology of the legal order. They have provided only a mechanism for dealing with such cases which leaves no room for

23. See Traynor, supra note 19.
such an adjudicative function, and which is continually confront-
ing the courts with the choice between a mechanistic result which is repugnant and an acceptable result which can be reached only by a none-too-candid resort to one or another of the loopholes in the system. Scholars have talked of a better approach, whereby the courts would seek to apply "the more effective and more useful law," or the law that fulfills "the demands of justice in the particular situation," or the law which produces results which are acceptable "from the standpoint of justice between the litigating individuals or of those broader considerations of social policy which conflicting laws may evoke . . . ." They have not, however, suggested any method whereby the courts could select the appropriate law objectively; and, in the present state of development of this approach, an attempt by the court to explain its decision in such terms would doubtless create more uncertainty and arouse more criticism than did the California Supreme Court's employment of the traditional escape device of novel characterization.

The decision in the Grant case is consistent with a method of analysis which I think holds promise of considerable utility in the intelligent and objective adjudication of conflict-of-laws cases. I do not suggest that the California court consciously employed any such analysis. I suggest that the result which that court recognized on common-sense grounds as the sound one, and then justified by a traditionally authorized manipulation of the concepts of the system, can be explained and justified by objective analysis.

II

The art of reading cases and of evaluating them as precedents remains an art, no matter how hard we law teachers try to make a science of it. After all, the purpose of the process is to provide a


27. On the other hand, the critical reaction might have been less severe than it was if the court had used an even more respectable escape device and refused to apply the "applicable" foreign law on the ground that it was contrary to the public policy of the forum. See Union Trust Co. v. Grosman, 245 U.S. 412 (1918); Paulsen & Sovern, "Public Policy in the Conflict of Laws, 56 COLUM. L. REV. 969 (1956).
basis for predicting future decisions, and for that practical purpose it is often necessary to read between the lines of the opinion as well as to apply the canons formulated by Goodhart and others 28 for the guidance of law students. A case may mean more than it seems to hold, or it may mean less. 29 For the purposes of our discussion, it is important to know just what the court held in the Grant case. That question had an important bearing on the reaction of the critics, and is central to our analysis.

To me it seems clear enough that one, and only one, prediction can be made with certainty on the basis of the Grant decision: the California law providing for survival, and not the law of the place of injury providing for abatement, will be applied when the following conditions are satisfied:

1. The injured person was a resident of California at the time of the injury;
2. The tort-feasor was a resident of California at the time of the injury;
3. The estate of the deceased tort-feasor is being administered in California; and
4. The action is brought in California.

Such an evaluation of the decision as a precedent accords with a strict and salutary conception of the doctrine of stare decisis. 30 It accords with the restrained interpretation placed on the decision by the Law Revision Commission, which recognized that the implications for cases in which the facts are different are by no means obvious. 31 The critics of the decision, however, are not content with such a restrained interpretation. They must stretch the actual decision into a rule which will cover more cases than the one before the court, say more than the court decided. The passion for such rules is particularly strong in the field of conflict of laws. Nothing narrower in scope than a typical rule of the Restatement will satisfy the critics. The court has rejected section 390 of the Restatement: "Whether a claim for damages for a tort survives the death of the

31. RECOMMENDATION AND STUDY 6.
tort-feasor or of the injured person is determined by the law of the place of wrong." Well, then, say the critics, let the court substitute another rule, of equal generality, in place of the rejected rule. The court may not have wished to commit itself to generalities beyond the necessities of the case to be decided. No matter; the critics must, by main force if necessary, interpret the decision as establishing a rule of traditional generality, and attribute that rule to the court.

Force was not necessary in the Grant case. The opinion of the court undeniably lent encouragement to the scramble to find the premises from which the conclusion followed. The court provided alternative premises, both leading to the same result: (1) the question of survival is a question of procedure, and (2) the question is one concerning the administration of decedents' estates. On either premise, the law of the forum controls. Only after suggesting that the result might be justified by one or both of these premises did the court limit the holding to the facts of the case in hand, thus serving notice, I think, that neither premise was to be employed to produce absurd results in other cases.

The critics were little deterred by this notice. From the beginning, they presumed to extract and state the "rule." The staff worker who brought the question to the attention of the Commission said in his report that the holding was that the question "is a matter of procedure and therefore governed by the law of California." In submitting the proposed study for approval as a Commission project, the Commission referred to "the rule that survival of causes of action arising elsewhere is governed by California law when suit is brought in this state . . . ." According to one law review comment, the holding was "that survival of actions is a matter of procedural law and governed by the lex fori." Another was less specific: "The survival of a tort action for personal injuries is determined by the law of the forum." A third criticized the procedural classification but approved the alternative relating to administration of estates. Mr. Sumner noted carefully the three

32. Restatement, Conflict of Laws § 390 (1934).
33. See note 6 supra.
34. Recommendation and Study 5.
35. 1 U.C.L.A.L. Rev. 380, 381 (1954). The Comment does not refer to the alternative characterization of the problem as one relating to administration of estates. It does mention the court's suggestion that the decision was limited to the facts of the case.
possible delimitations of the scope of the decision. Most of his discussion, however, was devoted to the classification of the question as procedural. He thought the proposition that the question should be characterized as one concerning administration of estates was "arguable," but dismissed it rather summarily: "However, there is but slight authority to support this intimation. . . . It is inescapable that the basic problem is one of tort recovery." At one point he says flatly: "The decision in the [Grant] . . . 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." In a section on "Constitutional Issues," which will warrant some consideration at a later point, he says in effect that the court's classification of the problem is "outrageous."

His opinion that the decision is unconstitutional as a violation of the due process clause "can be based on the conclusion that the characterization was erroneous or that the choice of law was improper. . . . However, when the need for uniformity of result is considered, the undesirability of the Grant decision becomes more apparent." The indictment concludes: "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."

It is by thought processes such as these that a decision which seemed at first noncontroversial, natural, justifiable, and even desirable in result comes to be spoken of as undesirable, erroneous,

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38. Recommendation and Study 8.
39. Id. at 16.
40. Id. at 14. In connection with this matter of the weight of authority, Mr. Sumner says: "Therefore the California court's statement that a majority treat survival as a procedural point is erroneous." Id. at 12. He does not append a citation, and I do not find such a statement in the opinion of the court. On the contrary, I find these statements:

"The precedents in other jurisdictions are conflicting. In many cases it has been held that the survival of a cause of action is a matter of substance and that the law of the place where the tortious acts occurred must be applied to determine the question. . . . Before that time [1929], it appears that the weight of authority was that survival of causes of action is procedural and governed by the domestic law of the forum."

Grant v. McAuliffe, 41 Cal.2d 859, 863, 264 P.2d 944, 946-47 (1953). "Since we find no compelling weight of authority for either alternative, we are free to make a choice on the merits." Id. at 866, 264 P.2d at 949.
41. Recommendation and Study 9.
42. Ibid.
43. Id. at 14.
and even outrageous and unconstitutional. It is worth remembering that no one has criticized the justice of the result in the case which the court decided. Nor do I find any solid indications that Mr. Sumner is particularly concerned because of the possibility that one or the other of the alternative premises for the decision might work an undesirable result if applied to other fact situations—a concern provisionally expressed by the Commission in its recommendation. Nevertheless, the decision, according to Mr. Sumner, is wrong, and the court ought to be prevented from reaching such satisfactory results in future cases—by legislation which will, at the same time, deny the court any such freedom in a wide variety of other cases.

If I were called upon to explain such vagaries of the legal mind to a layman, I think I would try to do so in this way: Conflict-of-laws cases—i.e., cases in which two or more states are involved in potentially significant ways—confront the courts with a uniquely difficult set of problems. The problems are complex and sensitive. Frequently, nothing less is involved than a determination that the legitimate law and policy of one sovereign state must yield to that of another. Some of our greatest judges have recoiled from conflict of laws as "one of the most baffling subjects of legal science." The problems are at least as difficult as those in any other branch of the law, since almost any problem, from almost any branch of the law, may be presented—with an additional dimension because of the involvement of more than one state. Once we move outside the range of a single legal system, it is difficult for us to find any ultimate goal to pursue in the adjudication of controversies, such as we have under a single system in the ideal of justice under law; for with two or more systems of law involved, an ambiguity is introduced: Justice under what law? The nearest thing to an ultimate goal that we have been able to agree upon is the ideal of uniformity—in general, at least, it will be desirable if the outcome of a case does not depend on where the action is brought.

But questions of such intricacy and difficulty and delicacy must

44. I have not, of course, outlined Mr. Sumner's argument in detail. In the main, it is devoted to showing that the decision is contrary to the Restatement of Conflict of Laws, and to what most of the courts have said. So much may be conceded. The decision is certainly an unorthodox one. For an analysis of the precedents, see Appendix, p. 249 infra.

45. RECOMMENDATION AND STUDY 5-6.

46. The figure is doubtless overdrawn. I have long believed, however, that anamorphosis is as legitimate a technique in argumentation as it is in the graphic arts.

47. E.g., CARDozo, THE PARADOXES OF LEGAL SCIENCE 67 (1928).
not be left to be determined by the judges. We must have a government of laws (don't ask what laws) and not of men. We must not place it within the power of judges to determine that the law and policy of a sovereign state shall yield to that of another. Therefore, we have constructed a machine for the solution of such problems. No other goal being apparent, we have, in the construction of the machine, given uniformity of result primacy over all other considerations. To this end, we have adjusted the machine so that, for any imaginable case, one and only one state can be identified whose law should be applied by all states. When a conflict-of-laws case comes before a court, the court is not supposed to adjudicate it—that is, to bring its intelligence to bear upon the reason and policy and history of the laws in question, and their application to the facts at hand so as to do justice to the parties under law. He is supposed to feed the data into the machine, using certain standard procedures, and to write down as his decision the result that comes out of the machine. He is not supposed to question the wisdom, or soundness, or justice of the result, nor to think, or even talk, in terms of competing policies.

Now, what happened in the Grant case is pretty clear. The judges fed the data into the machine in the usual way, but, when the machine's answer came out, they couldn't swallow it. They rebelled against the machine. They adjudicated the case. Using discretion and intelligence, and having regard to the fact that it was a lawsuit they were trying, they looked for a result they could live with. They saw no purpose, in reason or policy, to be served by applying Arizona law to cut off the rights of the plaintiffs when the tort-feasor died—at least, no purpose which seemed important in comparison with their obligation to decide the controversy between the parties properly. So they decided the case their way. This was a kind of insubordination on their part, of course; acting that way, they might open a whole Pandora's box of troublesome problems which the law has stowed safely away, out of sight where they will not cause us any trouble. Doubtless they felt a bit uncomfortable, as anyone might who has departed from the ordained path. So they went back to the machine and fed the same data into it again, this time using a somewhat different procedure. After pressing the button marked "Procedure is governed by the law of the forum, substance by the law of the place of the wrong," they pressed the button marked "Procedural" instead of the one marked
“Substantive.” This time the machine came up with the answer that the court had arrived at independently. Again the court fed the data into the machine, this time pressing instead a button referring to administration of decedents’ estates. Again the machine came forth with the judges’ own answer. They were able, then, to hand down their own decision, and to show that the same result would be yielded by the machine, given two procedures different from the one which first suggested itself.

Mr. Sumner is dismayed by this exposure of the fallibility of the machine. Quite accurately, he has placed his finger on the trouble: there is too little control of the operating procedures. Judges have too much freedom to decide what the problem is. Consequently, the machine can be made to give not just one result but different results. This will never do. The machine must be tightened up; the process must be made fully automatic. The judges must not only be required to accept the machine’s solution of the problem; they must be told how to state the problem to the machine as well. Only in this way can judicial discretion and intelligence be excluded. Otherwise the single goal of uniformity is jeopardized; otherwise we are threatened with adjudication instead of automation in conflicts cases.

Mr. Sumner has nothing against intelligence, of course. He simply believes that the final contribution of human intelligence to the solution of conflict-of-laws problems was made when the machine was built. A result which differs from that which the machine will produce under conventional operating procedures must be the product of either error or prejudice. “[T]he 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.”

Since Mr. Sumner makes it pretty clear that he thinks the court knew the proper operating procedures, and manipulated the machine deliberately to produce the desired result, one may fairly gather that he believes the decision was based on purely subjective grounds: sentimental

48. “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. If legislation were enacted providing that 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?”

49. Recommendation and Study 18.

RecommEndation and Study 14.
bias in favor of the plaintiffs and unbecoming hostility to the archaism of the Arizona law.

In all this I think Mr. Sumner is quite wrong. 50

III

A California statute, enacted in 1949, provides: "A thing in action arising out of a wrong which results in physical injury to the person . . . shall not abate by reason of the death of the wrong-doer . . . ." 51 This statutory provision was designed to change the common-law rule of abatement, which had prevailed in California for a century. 52 Presumably the change was made for a reason. The California Legislature adopted a new policy, and gave expression to it in this form. What was that policy, and how should the statute be applied to cases involving foreign factors so as to effectuate it?

50. The objection made in the dissenting opinion was on a much narrower ground. Mr. Justice Schauer was troubled only by the fact that the characterization of survival as a procedural matter seemed inconsistent with the court's previous decision in Cort v. Sten, 36 Cal.2d 437, 224 P.2d 723 (1950), holding the survival statute "substantive" for the purpose of determining whether it should be given retrospective effect. That there was no such inconsistency is made clear by Walter Wheeler Cook's brilliant essay on "Substance" and "Procedure." Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 Yale L.J. 333 (1933), A.A.L.S. Readings 499, relied on by the majority. The minority made no reference to Cook's analysis. Only one of the law review comments supported the majority in its position on the alleged inconsistency, 27 So. Calif. L. Rev. 468, 469 (1954), though Mr. Sumner did. Recommendation and Study 11 n.24. It is a matter for profound regret when one of the finer products of legal scholarship is neither refuted nor accepted, but ignored. See also Currie, Full Faith and Credit to Foreign Land Decrees, 21 U.C. L. Rev. 620, 621 (1954). If Professor Cook's argument does not produce conviction, no additional argument is likely to do so. It may, however, be worthwhile to add that counsel once attempted to trap Mr. Justice Holmes in the false dilemma which troubled the dissenting justices, and ran into a stone wall of common sense. Holmes held that a foreign statute of limitations was to be treated as substantive and applied by the forum because it was directed to the statutory liability so specifically that it qualified the right. Counsel submitted that from this it followed that the limitation could not be applied in the case at bar, since the cause of action had arisen prior to the amendment changing the limitation period, and substantive laws could not be retrospectively applied. Holmes was merely impatient. He avoided the trap by not using the terms "substance" and "procedure" in discussing the constitutional point. As to that he said, shortly and appositely: "[The operation of the statute in this instance] did not shorten liability unreasonably." Davis v. Mills, 194 U.S. 451, 456 (1904).

51. Cal. Civ. Code § 956 (1954). Similar provisions are contained in Cal. Code Civ. Proc. § 385 (1954), and Cal. Prob. Code §§ 573, 574 (1956). Thus, for purposes of codification, the problem has been "characterized" as substantive, as procedural, and as a matter pertaining to the administration of decedents' estates.

52. See Livingston, Survival of Tort Actions: A Proposal for California Legislation, 37 Cal. L. Rev. 63 (1949). Actually, the first breach in the common-law rule had been made by the California Supreme Court in Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379 (1946); the legislation was designed to confirm and systematize the change. Because of Mr. Livingston's article, we have available, as we do not often have in connection with state legislation, what amounts to a comprehensive legislative history of the statutes.
There are at least 174 different fact situations which might raise the question of the applicability of the statute in the conflict-of-laws sense. Four factors have been recognized as potentially significant for conflict-of-laws purposes in cases of this type:

1. The domicile (or residence) of the injured plaintiff; 53
2. The domicile (or residence) of the tort-feasor; 63
3. The place of the wrong; 65 and
4. The place where the action is brought. 66

Each of the four factors may be domestic or foreign, and each may be associated with a different state. There are, therefore, 256 possible combinations. Of these, however, 81 will have no factor connected with California; they are wholly foreign cases, and no one would contend that the California statute should have any application. One case will be that in which all factors are associated with California; it is purely domestic, and there is no question at all about the applicability of the statute. There remain 174 cases 57 with which California is connected in a potentially significant way—i.e., in which the application of the statute might be consistent with, or essential to, effectuation of the California policy. 68

53. See Grant v. McAuliffe, 41 Cal.2d 859, 867, 264 P.2d 944, 949 (1953), 1 U.C.L.A. Rev. 380 (1954). Domicile is a troublesome concept to work with, though it is not so objectionable here as in commercial cases. Perhaps "residence," carefully defined, would be better, although it has been suggested that domicile is preferable. Reese & Greene, That Elusive Word, "Residence," 6 Vand. L. Rev. 561 (1953), A.A.L.S. Readings 483. In this Article the terms will be used interchangeably.

54. Note, Survival Statutes in the Conflict of Laws, 68 Harv. L. Rev. 1260, 1263 (1955); see also Hancock, Torts in the Conflict of Laws 244 (1942).

55. See RESTATEMENT and STUDY 12.

56. Grant v. McAuliffe, 41 Cal.2d 859, 264 P.2d 944 (1953). This list of factors contains no express mention of the place where the estate of the deceased tort-feasor is being administered, but covers that factor by implication. Under the prevailing view, at least, such an action can be brought only in a state where an administrator or executor for the decedent has been appointed or qualified. Restatement, Conflict of Laws § 512, comment a (1934); see Cheatham, Goodrich, Griswold & Reese, Conflict of Laws 893–94 (4th ed. 1957). Hence it is assumed in this Article that the forum is always a state in which the estate is being administered. If the forum is also the domicile of the deceased tort-feasor, it is the state of domiciliary administration; otherwise (though more than one state may claim domiciliary administration, Riley v. New York Trust Co., 315 U.S. 343 (1942); In re Fischer's Estate, 118 N.J. Eq. 599, 180 Atl. 633 (1935)) the administration at the forum is assumed to be ancillary.

57. There are four factors, each of which may be connected with a different state. Assuming that each of the four states may have a different law as to survival of a personal injury action upon death of the tort-feasor (see Wallan v. Rankin, 173 F.2d 488 [9th Cir. 1949], discussed in the Appendix p. 249 infra), the formula for the possible combinations where California has a potentially significant connection is 44–34–1. 4–34–1.

58. This is a conservative figure which might easily be increased if certain assumptions were abandoned. Thus if there is ambiguity in any one of the factors—e.g., if it be suggested that the "place of the wrong" may reasonably be taken to mean either the place of acting or the place where the force takes effect to cause harm—an additional factor is introduced and an additional state may be involved. This would increase the number of possible conflict-of-laws cases to 2100.
One might suppose that a recommendation of legislation to guide the courts in the application of the California statute to cases involving foreign factors would give some consideration to how the proposed legislation would affect the result in those 174 cases, and how the results would comport with the policy underlying the survival statute. Mr. Sumner did not perform such an analysis for the Legislature. In all fairness, he could hardly have been expected to do so. Merely to enumerate the possible cases is a laborious task; to visualize them all and to evaluate the play of varying policies in each is an undertaking of considerable magnitude, which the science of conflict of laws does not require of its votaries. The system assures us all that our task is far simpler, and Mr. Sumner proceeded faithfully in the belief that it is only necessary to determine which one of the four contacts is the significant one, whereupon all possible cases—all 174 of them—will be properly disposed of, sight unseen. A court skeptical of the system, confronted with one of the conflicts cases, might understandably prefer to know what the rest of the cases look like before committing itself on faith to a blanket disposition of them.

In general terms, at least, the policy embodied in the California statute is not difficult to formulate. Damages for personal injuries are regarded as compensation to the injured party. The award of damages in private litigation is one of several alternative ways of dealing with the economic and social problem of personal injuries. One of the possible alternatives is for the state to provide for compensation.59 Underlying our free-enterprise choice is the possibility that the state—the state concerned with the injured party—may have a residual responsibility: if the system of free enterprise does not provide compensation, the injured person may become a public charge. It seemed illogical to the California Legislature that death of the tort-feasor should put an end to the right to compensation. Death of the tort-feasor seemed irrelevant both in terms of the rights of the litigants and of the public interests involved. Whatever local interests might benefit from the common-law rule insulating the estate of the tort-feasor from liability were therefore subordinated to the interest of the injured person, and to the public interest, in compensation.

To formulate the policy of Arizona as expressed in its law on the survival of tort actions is more difficult. Arizona has simply retained the maxim, actio personalis moritur cum persona. If the truth were known, it would probably be that Arizona has retained that rule simply because of the proverbial inertia of legal institutions, and that no real policy is involved.\textsuperscript{60} If an effort were made to change the Arizona law, it may be speculated that the chief opposition would come from the insurance lobby, and would have no higher motivation than to minimize the amount paid in claims.\textsuperscript{61} The Arizona law is no doubt archaic and out of harmony with prevailing legal thought. That is not our affair here. The business of courts in conflict-of-laws cases is not to judge the policies of the states, but to ascertain them and give them effect, so far as possible, when there is a legitimate basis for effectuating them. We must therefore do the best we can to formulate Arizona policy.

The statement that a cause of action for personal injuries is "personal" is a bit of mysticism which tells us nothing about why the injured party cannot sue the tort-feasor's estate; it tells us (if anything) no more than that he cannot do so. The rule that the cause of action abates apparently goes back to the time when the penal conception of tort law prevailed; judgment in damages was punishment visited upon the wrongdoer, not compensation for the victim.\textsuperscript{62} An attempt to utilize the penal concept in formulating Arizona policy will not get us very far, since the rule we are concerned with is purely negative. We cannot say, for example, that since the Arizona law of torts is based on penal concepts, its bearing is on activity within the state, and conclude that Arizona law should be applied when the conduct in question occurs there. For Arizona does impose liability for injuries negligently inflicted in the state, so long as the tort-feasor lives to be punished and does not otherwise escape the jurisdiction. The law of survival of actions simply says that punishment will be withheld in cases where the tort-feasor has died. That law cannot conceivably influence any conduct on Arizona highways—except the conduct of the

\textsuperscript{60} This observation becomes particularly pointed when we note that Arizona has a "revival" rule, preventing abatement when the tort-feasor dies after the action has been commenced but before judgment. \textit{Ariz. Rev. Stat.}, R. Civ. P. 25(a) (1956). See also Burg \textit{v. Knox}, 334 Mo. 329, 67 S.W.2d 96 (1933); Parsons \textit{v. American Trust & Banking Co.}, 168 Tenn. 49, 73 S.W.2d 698 (1934), discussed in the Appendix p. 249 infra.

\textsuperscript{61} To take into account, throughout, the realistic fact that liability insurance is involved in many of the survival cases in conflict of laws would unduly complicate the analysis. The fact should nevertheless be borne in mind.

\textsuperscript{62} See note 16 \textit{supra}. 
Kamikaze driver, and we can hardly suppose it is intended to encourage that. The most rational policy that can apparently be attributed to Arizona is that the living should not be mulcted for the wrongs of the dead63 that the interests represented in the estate of the tort-feasor—his heirs, next of kin, devisees, legatees, creditors—should not suffer because of what he did.

The focal point of California policy is the injured person; the imposition of liability on the local estate seems but a corollary of the purpose to provide compensation. California has an interest in the application of its law and policy whenever the injured person is one toward whom California has a governmental responsibility. California may legitimately assert such an interest when the injured person is domiciled in (or a resident of) California, and also where he is present in the state at the time of injury.64

The focal point of Arizona policy is the people who are interested in the estate of the deceased tort-feasor. Our analysis will become excessively complex, however, if we attempt to treat Arizona policy as directed specifically to those persons; they may be numerous and scattered. It seems necessary, therefore, in order to avoid excessive particularism, to resort to fiction: to treat some factor, other than the actual connection between the state and the protected persons, as a symbol, providing sufficient basis for the state's asserted interest in applying its policy although the persons protected may not in fact be within the state's sphere of governmental concern. The administration of property within the state might be an appropriate factor for this purpose.65 The domicile of

64. Carroll v. Lanza, 349 U.S. 408 (1955); Watson v. Employers Liability Assurance Corp., 348 U.S. 66 (1954); Pacific Employers Ins. Co. v. Industrial Accident Comm'n, 306 U.S. 493 (1939); In re Vilas' Estate, 166 Ore. 115, 110 P.2d 940 (1941). The Supreme Court has declined to be so particularistic as to inquire whether the injured person actually became a burden to the state where the injury occurred. See Carroll v. Lanza, supra, at 413; see also Frankfurter, J., dissenting, id. at 414, 420–21. See also Comment, Conflict-of-Laws Problems in Workmen's Compensation: Carroll v. Lanza, 23 U. Chi. L. Rev. 515 (1956).
65. Suppose the following case: All factors are associated with California alone except that the deceased tort-feasor left property in Arizona. An administrator is appointed in Arizona and an action is brought there. There are no Arizona creditors and the sole heir is a resident of California. Is there any basis for the application of Arizona law? (The
the deceased tort-feasor within the state might be an appropriate alternative. It seems inconsistent to seize upon both as appropriate. If Arizona is to assert an interest in the application of its policy when the tort-feasor was domiciled there, she should logically, perhaps, confess the absence of an interest when that connecting factor is absent. A state seeking to maximize its interests, however, may indulge such an inconsistency if it chooses. The Constitution will present an obstacle only when it can be said that the state has no interest in the application of its policy. In view of the fact that both domicile and situs have long been recognized as relevant factors in determining the disposition of decedents' property, it is unlikely that a state connected with the case by either factor would be held without interest in the application of its law of abatement. Accordingly, for the purposes of this Article Arizona is treated as having an interest in the application of its law and policy whenever the deceased tort-feasor was domiciled there, and also whenever the action is brought in Arizona against an ancillary representative.

We are now in position to inquire how the statute proposed by Mr. Sumner would affect the result in the possible conflicts cases, and how those results would effectuate the policies of the states involved. The proposed statute was: "In conflict of laws cases the following matters shall . . . be deemed substantive: . . . survival (. . . tort survival by the place of the tort) . . . ." In other words, in all 174 cases the law to be applied is that of the place of injury. This, of course, is not Mr. Sumner's proposal alone; it is the rule of the Restatement and of the standard texts.

The problem may not be a serious one. Even if Arizona applies its law to defeat recovery, the tort-feasor's property will become available to satisfy a California judgment if the ancillary administrator delivers it to the domiciliary administrator. See Restatement, Conflict of Laws § 522 [1934]). See note 64 supra. See pp. 237–39 infra.

66. The analysis which follows has also been applied on the basis of the alternative hypotheses: i.e., that Arizona's interest is limited to the case where the deceased tort-feasor was domiciled there, and that the interest is limited to the case in which action is brought against an Arizona representative. Limitations of space preclude a detailed statement of the result. It can be stated, however, that the results are so similar that the thesis of this Article would not be affected, regardless of the basis employed. The hypothesis used in the text makes the strongest possible case for application of Arizona law. Furthermore, the analysis of the type case which corresponds to Grant v. McAuliffe is exactly the same on each of the three hypotheses.

68. Recommendation and Study 19–20. The number of conflicts cases disposed of sight unseen by omitted portions of the proposed statute stagger the imagination. Even the quoted portion goes far beyond the topic under consideration here, since the statute is not limited to personal injuries nor to survival on death of the tort-feasor. See New York Law Revision Commission Report 171, 187 (1935).

69. Restatement, Conflict of Laws § 390 (1934).

An array composed of 174 cases is an unwieldy subject for analysis. For the sake of simplicity, let us assume that only two states are involved, Arizona and California. On this basis, there are only sixteen possible combinations of the four factors, one of which is entirely domestic to California and one entirely foreign. This leaves fourteen possible conflict-of-laws cases, as shown in Table 1.  

<table>
<thead>
<tr>
<th>Case</th>
<th>Domicile of Plaintiff</th>
<th>Place of Injury</th>
<th>Forum</th>
<th>Factors</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>C C C C</td>
<td></td>
<td></td>
<td>All factors domestic (1)</td>
</tr>
<tr>
<td>2</td>
<td>A C C C</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>3</td>
<td>C A C C</td>
<td></td>
<td></td>
<td>One foreign factor (4)</td>
</tr>
<tr>
<td>4</td>
<td>C C A C</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>C C C A</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>A A C C</td>
<td></td>
<td></td>
<td>Two foreign factors (6)</td>
</tr>
<tr>
<td>7</td>
<td>C A A C</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>C C A A</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>A C C A</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>A C A C</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>C A A C</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>A A A C</td>
<td></td>
<td></td>
<td>Three foreign factors (4)</td>
</tr>
<tr>
<td>13</td>
<td>A A C A</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>14</td>
<td>A C A A</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>C A A A</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>16</td>
<td>A A A A</td>
<td></td>
<td></td>
<td>All factors foreign (1)</td>
</tr>
</tbody>
</table>

*Forum, by definition, will be a place where the estate is being administered.
C—California
A—Arizona

If California adopts the rule that survival is determined by the law of the place of injury, by legislation or by court decision, she immediately renounces any interest in having the California law and policy applied in half of the possible cases. Of the remaining 71. Actually, this array includes all of the possible conflicts cases, under our assumptions, if we assume that only two types of laws are involved: those providing absolutely for survival and those providing absolutely for abatement.
seven, in which an interest in the application of California law is asserted, California can be sure of the application of her law in only three, because only three are in California courts. Such a rule, then, would assure the application of California law and policy in only three of the fourteen possible conflict-of-laws situations, and then only if such application were not unconstitutional; it would result in the application of California law and policy in four additional cases if Arizona were to follow faithfully the same rule; it would assure the application of Arizona law and policy in four cases in which the place of injury is Arizona and the forum is California; and it would result in the application of Arizona law and policy in three additional cases if Arizona follows the same rule.

As I have remarked in connection with another conflict-of-laws problem, this seems on the face of it an extraordinarily diffident position for a “sovereign” state to take concerning a policy which it holds with some conviction. The policy is to control in only half of the possible cases, and in a majority of those only by sufferance of a foreign state. Let us examine the cases which, under such a rule, California would (1) determine to control, (2) express the hope of controlling, and (3) renounce any interest in controlling.

The three cases in which the rule asserts applicability of the California law and in which California courts have power to effect that result are shown in Table 2.

<table>
<thead>
<tr>
<th>Case</th>
<th>Factors</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Domicile of Plaintiff</td>
</tr>
<tr>
<td>2</td>
<td>A</td>
</tr>
<tr>
<td>3</td>
<td>C</td>
</tr>
<tr>
<td>6</td>
<td>A</td>
</tr>
</tbody>
</table>

In Case 2 the application of California law makes excellent sense. California interests are advanced without impairment of

any interest of Arizona. Arizona's policy relates only to the estates of its domiciliaries and to property being administered in that state. California has no similar policy protecting the estates of decedents. California has an interest in applying its policy since it may incur responsibility to the person injured in the state. Of course, the injured person is a foreigner, and if California were utterly and shortsightedly selfish she might wish to discriminate against him in favor of those interested in the local estate. There would be no defensible basis for doing so, however. California has retained no subsidiary policy of protecting estates against "punitive" liability, but has discarded the whole punitive concept as applied to this problem. Both the privileges and immunities clause\textsuperscript{73} and the equal protection clause\textsuperscript{74} would present obstacles to such discrimination.

In Case 3, application of California law furthers California interests. California is doubly interested in the victim, a resident injured in the state. This result is achieved, however, at the expense of Arizona's interest, as we have defined it, since the deceased tort-feasor was domiciled in Arizona. The California judgment will indirectly reduce the amount ultimately to be distributed in accordance with Arizona law (at least to the extent that the California estate consists of movables).\textsuperscript{75}

In Case 6, application of California law still makes sense. California's interest in the injured plaintiff is based solely on the fact that he was injured here, but that has been regarded as a substantial basis.\textsuperscript{76} But Arizona policy is involved to the same extent as in Case 3, since the tort-feasor was domiciled there. It is not involved to a greater degree by virtue of the victim's residence in Arizona, since that state has no policy calling for compensation to injured plaintiffs where the tort-feasor has died.


\textsuperscript{74} U.S. CONST. amend. XIV, § 1. See Takahashi v. Fish and Game Comm'n, 334 U.S. 410 (1948); Truax v. Raich, 239 U.S. 33 (1915).

\textsuperscript{75} Under the law as it stands, a judgment against the California administrator would not be entitled to full faith and credit in an action in Arizona against the domiciliary administrator. Brown v. Fletcher's Estate, 210 U.S. 82 (1908); Johnson v. Powers, 139 U.S. 156, 159 (1891); Nash v. Benari, 117 Me. 491, 105 Atl. 107 (1918). But see Carpenter v. Strange, 141 U.S. 87 (1891). See RESTATEMENT, CONFLICT OF LAWS § 510 (1934); Freund, Chief Justice Stone and the Conflict of Laws, 59 Harv. L. Rev. 1210, 1226 (1946).

\textsuperscript{76} See note 64 supra.
The four cases in which adoption of the rule indicates a desire on the part of California that California law be applied by other courts are shown in Table 3.

**Table 3**

<table>
<thead>
<tr>
<th>Factors</th>
<th>Domicile of Plaintiff</th>
<th>Domicile of Tortfeasor</th>
<th>Place of Injury</th>
<th>Forum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case 5</td>
<td>C</td>
<td>C</td>
<td>C</td>
<td>A</td>
</tr>
<tr>
<td>Case 9</td>
<td>A</td>
<td>C</td>
<td>C</td>
<td>A</td>
</tr>
<tr>
<td>Case 11</td>
<td>C</td>
<td>A</td>
<td>C</td>
<td>A</td>
</tr>
<tr>
<td>Case 13</td>
<td>A</td>
<td>A</td>
<td>C</td>
<td>A</td>
</tr>
</tbody>
</table>

In Case 5, California has every reason to wish its law applied. That would be the result in a California court (Case 1). That result cannot be reached, however, without impairment of Arizona interests. These interests may seem attenuated; we have noted that they are to some extent supported by fiction. It is even conceivable that Arizona might defer to the law of California, at least if movables are involved, since California is the state of domiciliary administration. We have leaned over backward, however, to give Arizona policy its most intelligible content and its maximum scope; and the policy we have recognized is involved here. Hence the result would be to advance California interests at the expense of those of Arizona.

In Case 9, California again would desire application of its law. That would be the result in a California court (Case 2). Here California's interest in the injured plaintiff is less strong, since he is a nonresident; Arizona's interest remains what it was in Case 5. That interest does not gather strength from the fact that the injured person is a local resident, since Arizona has no relevant compensatory policy, and an attempt to favor the local resident at the expense of the nonresident's estate would probably run afoul of the privileges and immunities clause.77 But such as it is, the interest re-

77. *I.e.*, if the resident plaintiff in Case 9 were allowed to maintain the action, the nonresident plaintiff in Case 5 could complain that the denial of his right to maintain the action constitutes a withholding from a citizen of another state of a privilege given citizens of Arizona. See note 73 *supra*.
mains, and the result of applying California law would advance California interests at the expense of those of Arizona.

In Case 12, California’s interest in having its law applied is twofold, and so, in a sense, is Arizona’s. We need not stop to inquire whether Arizona’s interest is fortified by the concurrence of domicile and suit in that state, for we do not assume to “weigh” the respective interests. It is not significant that one state is connected with the case by interest-supporting factors in more ways than is the other. What is significant is that the respective interests are in conflict. Here, California interests would be advanced at the expense of Arizona interests.

In Case 13, California retains a substantial, though diminished, interest. Although three of the four factors are associated with Arizona, the fact that the injury occurred in California suggests—that California may become very deeply concerned. The injured person may be indigent; California residents, even the state itself, may be called upon in simple humanity to make substantial expenditures for his care after the injury. The deceased tort-feasor may have left no property outside Arizona. If the injured person is not allowed to maintain an action against the tort-feasor’s solvent estate in the only place where action can be brought, California interests will suffer. The case for application of California law is so strong as to make the supposed Arizona interest seem almost frivolous by comparison; but we must remind ourselves that it is not the business of courts in conflict-of-laws cases to appraise the relative merits of the laws and policies of the respective states where a legitimate basis exists for the application of the law that is applied. The result in Case 13 will advance California interests, but at the expense of Arizona interests.

Under the rule that the law of the place of injury governs survival, California would renounce any interest in having its law applied in seven cases. In four of these, shown in Table 4, California can effect the application of foreign law, since the action is in a California court.

In Case 4 the application of Arizona law would make no sense whatever. An injured California resident is involved, and Cali-

78. Nor do the concurrent interests of two or more states outweigh the interest of one. Suppose that in a case of the general type represented by Case 5 (C C C A) the victim is a resident of California but was injured in a third state whose law, like California’s, provides for survival. The problem for the Arizona court would remain the same; whether to subordinate the interests of the forum to those of other states.
Table 4

<table>
<thead>
<tr>
<th>Case</th>
<th>Domicile of Plaintiff</th>
<th>Domicile of Tort-Encoder</th>
<th>Place of Injury</th>
<th>Remoteness</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>C</td>
<td>C</td>
<td>A</td>
<td>C</td>
</tr>
<tr>
<td>7</td>
<td>C</td>
<td>A</td>
<td>A</td>
<td>C</td>
</tr>
<tr>
<td>10</td>
<td>A</td>
<td>C</td>
<td>A</td>
<td>C</td>
</tr>
<tr>
<td>12</td>
<td>A</td>
<td>A</td>
<td>A</td>
<td>C</td>
</tr>
</tbody>
</table>

California policy requires compensation for him. California is the state of domiciliary administration. Arizona has not the slightest interest in the matter's being decided according to Arizona law. So far as appears, no property of the decedent is being administered in Arizona. Even if there were ancillary administration there, Arizona's presumed interest would be confined to that administration, and is not affected by the proceeding at the domicile. As a matter of fact, policy or no policy, Arizona's true interest here would seem to cry aloud for the application of the California law of survival. If the person injured in Arizona is indigent, the Good Samaritans of that state who spend their energies and substance in ministering to him will go uncompensated if he is denied the right to maintain his action. This interest, however, has not been recognized by the Arizona legislature. The same injustice would result in a domestic case in Arizona. In the realm of conflict of laws it is not our business to remake misguided state policy. Let us therefore not overstate the case by suggesting that Arizona policy is subverted also. The rule that the law of the place of injury governs here subverts California policy with no advancement of any policy of Arizona.

Case 4, by the way, is precisely the case of Grant v. McAuliffe. The California court, by applying California law, advanced California interests with no expense to any interest of any foreign state. This, the critics say, must not be allowed to happen again; the California court must be required by the Legislature to subvert the interests of California with no advantage to the interests of any state.
In Case 7, application of Arizona law advances Arizona's interests at the expense of those of California. The injured person is a California resident. Property which belonged to the decedent is being administered in California. The fact that the injury occurred in Arizona provides no basis for the application of that state's law, since Arizona has no relevant policy. Arizona's interest in the application of its policy of insulating the living from liability for wrongs of the dead is predicated solely on the Arizona domicile of the deceased wrongdoer; yet the conventional rule for choice of law would require the California court to frustrate California's interest in favor of Arizona's.

Case 10 presents an interesting phenomenon. Application of Arizona law impairs no interest of California. The injured person was not a resident and was not injured there. On the other hand, that result advances no interest of Arizona. Though the injured person is both a resident of Arizona and is injured there, Arizona has no policy of compensation for him. If California law were applied instead, California interests would be neither advanced nor impaired; nor would those of Arizona.

This is the "unprovided case" in a very special sense. Neither state cares what happens. Traditionalists may stand aghast at this anomaly, and take it as proof of the unsoundness of the analysis. If so, they may be reminded that the same kind of lacuna can occur under the traditional system. The phenomenon is not, in fact, a surprising one. While the laws of California and Arizona on the subject of survival of personal injury actions are different, the policies expressed in those laws are not in conflict here. It may be that the laws of neither state, nor of both states together, purport to dispose of the entire universe of possible cases. Identical laws do not necessarily mean identical policies, and different laws do not necessarily mean conflicting policy, when it is remembered that the scope of policy is limited by the legitimate interests of the respective states.

79. This analysis holds true under the alternative assumptions, that the interest of Arizona is limited to its domiciliaries or to property administered in the state.

80. See Marie v. Garrison, 13 Abb. N. Cas. 210 (N.Y. 1883). There the two states involved had almost identical statutes of frauds, and the contract in suit satisfied the requirements of neither. The court held that neither statute was applicable. The statute of New York, where the action was brought, was held to be applicable only to contracts made within the state; the statute of Missouri, where the contract was made, was held to apply only to actions brought in that state. This construction was formalistic and literal, to be sure (though it seems to be approved by the Restatement, Conflict of Laws §§ 334, 598, 602 [1934]) but similar results can be reached by defensible analysis. See also Yntema, The Objectives of Private International Law, 35 Can. B. Rev. 721, 739 (1957).
Cases such as this do arise, and when they do they must be disposed of. Traditional choice-of-law rules provide a means of disposing of them without concerning ourselves about the result. Apart from such mechanistic devices, there are perhaps four ways in which such a case might be decided by a California court:

1. Since no California policy would be infringed by holding the California estate liable, and since the Arizona law is offensive to the modern and humane legal mind, the court might apply California law because it is the more enlightened and humane law, and because it provides a better solution to the underlying social and economic problem. In this specific context such a rationale has strong appeal, since neither state's interests can be impaired by the result. If there is any place for cadis justice, it is in the areas where there is no relevant law. Even in such a harmless context, however, this does not seem a sound approach. Conflict-of-laws cases do not provide courts with a license which they do not otherwise have to condemn the law and policy of a state on the ground that it is archaic, or misguided, or socially and economically unwise. If we condone such an approach here, we shall have difficulty in resisting it when the respective policies are in conflict, and even when the archaic and misguided law is that of the forum—and when enlightened opinions may differ on the question of which is the better law and policy.

81. See Ormsby v. Chase, 290 U.S. 387, 92 A.L.R. 1499 (1933); Dalton v. McLean, 137 Me. 4, 14 A.2d 13 (1940), discussed in Appendix p. 252 infra.

82. Since this is a major point in my argument, and since it constitutes a departure from the counsels of several writers from whom I have drawn inspiration, an explanation is advisable here though it would constitute a digression in the text.

It has several times been suggested, more or less explicitly, that courts in conflict-of-laws cases should choose the law which appeals to the sense of justice, Lorenzen, *Tort Liability and the Conflict of Laws*, 47 L.Q. Rev. 483, 490 (1931), especially where one of the laws is plainly archaic and out of harmony with prevailing legal thought. Cavers, *A Critique of the Choice of Law Problem*, 47 Harvard L. Rev. 173 (1933), A.A.L.S. Readings 101, 105, 114; Freund, *supra* note 75, at 1216; Yntema, *supra* note 80, at 738; Cook, "Contracts" and the Conflict of Laws: "Intention" of the Parties, 32 Ill. L. Rev. 899 (1932), A.A.L.S. Readings 639. The law rejected as archaic or unjust may be domestic or foreign.

As applied to domestic laws, the suggestion is a disturbing one, since opinions may differ as to the wisdom or obsolescence of laws, and courts do not lightly nullify the laws of their own state on such grounds. I do not question that courts have a degree of freedom to abrogate obsolete domestic laws. I do suggest that, when they are convinced that a domestic law is archaic and unjust, they should abrogate it entirely, instead of utilizing the looseness of the system of conflict of laws as an excuse for limited abrogation. Thus the Supreme Court of Nebraska severely limited the scope of the maxim, *actio moritur cum persona*, without waiting for statutory authorization, *In re Estate of Grainger*, 121 Neb. 338, 237 N.W. 153 (1941), and the California Supreme Court accomplished the same result by a tour de force of statutory construction, *Hunt v. Authier*, 28 Cal.2d 288, 169 P.2d 913, 171 A.L.R. 1379 (1946).

When the repugnant law is that of a foreign state, of course, the court has no opportunity to abrogate it for all purposes. But if interests of the foreign state alone are con-
2. The court might adopt a supremely selfish and provincial view. The action, after all, is by a foreigner against the estate of a local resident. Why not, then, withhold application of California's compensatory law? Why not adopt a rule that the California law will not be applied when the plaintiff is a nonresident and the tort-feasor was a resident? The rather clear answer is that such a rule, denying to residents of other states a privilege enjoyed by residents of California, would amount in substance to a discrimination against citizens of other states and would be in conflict with the privileges and immunities clause. The circumstance of residence does not have here any independent significance such as sometimes provides a basis for treating residents and nonresidents differently.

3. A refined version of the approach suggested in (2), above, might seem more civilized and more likely to surmount the constitutional barrier. The suggested rule discriminating between residents and nonresidents actually goes beyond the conditions on which our array of cases is constructed; in our table only two states are involved, and the content of each state's law is known. Case 10 is A C A C. The generalized case may involve California and one or two unidentified states, only the law of California being known. Thus in the complete array this basic set of facts will appear six times, one of the forms being X C X C, where X represents a third state whose law on survival is not known. The discriminatory rule suggested above is broad enough to apply to the generalized case; it discriminates against the nonresident irrespective of the law of his home state on survival. Suppose the court were to formulate a rule to the effect that California law will not be applied in an action by a nonresident against the estate of a resident except where the law of the state of the plaintiff's residence provides for survival. This is not a raw discrimination between residents (or citizens) of

...
California and nonresidents (or citizens of another state) as such. All injured persons are classified as belonging either to states which provide the protection of survival statutes or to states which do not. Yet the argument does not carry conviction. We cannot plausibly say that, in enacting the survival statute, California merely subordinated one interest to another, and that it retains a subsidiary interest in protecting local estates against "punitive" liability. Nor can we plausibly say that the law of the plaintiff's residence on the subject of survival defines the plaintiff's status. What would his status be: that of caput lupinum in relation to the Kamikaze driver? The suggested rule seems not so much a differential treatment in good faith of persons differently situated as a mere attempt to preclude recovery by as many foreigners as possible. It is questionable whether the classification overcomes the objection based on the privileges and immunities clause. In any case, that question ought to be academic; for if California's legitimate interests are consulted there is no reason whatever why the court should not willingly apply California law.

4. Finally, the court might apply California law simply on the basis that this is the rational and convenient way to try a lawsuit when no good purpose is to be served by putting the parties to the expense and the court to the trouble of ascertaining the foreign law. No useful purpose will be served by ascertaining and applying Arizona law, since the result is a matter of entire indifference in terms of the policies of both states.

In Case 12, application of the law of the place of injury advances Arizona interests without impairment of any interest of California —on the assumptions which have been made as to the scope of Arizona's interest. The case, however, sharply suggests the question, Who is to determine the proper scope of Arizona policy? In this Article, that scope has been made as extensive as possible, for the academic purpose of strengthening the argument. A California court, however, is under no compulsion to assume that Arizona's interests are

85. Standing alone, this argument is open to the objection that the case cannot be classified as one in which the result is a matter of indifference until the foreign law is known. If, however, there were a general presumption in favor of applying the law of the forum, and a disposition to apply foreign law only where some useful purpose would be served thereby, counsel and the court could know in advance that there would be no point in ascertaining the foreign law, since, even if it provided for abatement, no useful purpose would be served by applying it. A real economy might therefore result. In addition, an intelligent inquiry into the foreign law may well require more than a simple answer to the question whether survival is permitted; e.g., it may be significant that the foreign law allows revival. See Burg v. Knox, 334 Mo. 329, 67 S.W.2d 96 (1933); Parsons v. American Trust & Banking Co., 168 Tenn. 49, 73 S.W.2d 698 (1934), discussed in Appendix, p. 250 infra.
interest is similarly extensive—especially in the absence of any declaration in the matter by Arizona authorities—and might well interpret the legitimate scope of Arizona policy more narrowly. If, for example, California were to interpret Arizona's policy as being limited to the administration of property in that state, Case 12 would become, like Case 10, one in which the result would be a matter of indifference in terms of the respective policies, and in which California law should be applied for the reasons which have been stated.

Finally, Table 5 shows the three cases in which adoption of the rule that the law of the place of injury governs would be a renunciation of any desire on the part of California that her law be applied, and in which the result would be controlled by the foreign court.

<table>
<thead>
<tr>
<th>Case</th>
<th>Domicile of Plaintiff</th>
<th>Domicile of Trespasser</th>
<th>Place of Injury</th>
<th>Forum</th>
</tr>
</thead>
<tbody>
<tr>
<td>8</td>
<td>C</td>
<td>C</td>
<td>A</td>
<td>A</td>
</tr>
<tr>
<td>14</td>
<td>A</td>
<td>C</td>
<td>A</td>
<td>A</td>
</tr>
<tr>
<td>15</td>
<td>C</td>
<td>A</td>
<td>A</td>
<td>A</td>
</tr>
</tbody>
</table>

In Case 8, the application of the law of the place of injury will advance Arizona's interests while frustrating those of California.

In Case 14, the result will advance Arizona interests without impairing any interest of California.

In Case 15, the result will frustrate California interests while advancing the interests of Arizona.

Table 6 summarizes the results of applying the law of the place of injury. That table shows that to impose on the California court a statutory obligation to apply blindly the law of the place of injury would be to require the subversion of California policy in four of the fourteen possible cases (Groups IV and VI)—in one of them (Group VI)—with no compensating advancement of Arizona policy. In addition, it would require the application of foreign law.
Table 6

I. California interest advanced without detriment to Arizona interests .......... Case 2 (A C C C) (1)

II. Arizona interest advanced without detriment to California interests .......... Case 12 (A A A C) 
Case 14 (A C A A) (2)

III. California interest advanced at expense of Arizona interest ................. Case 3 (C A C C) 
Case 5 (C C C A) 
Case 6 (A A C C) 
Case 9 (A C C A) 
Case 11 (C A C A) 
Case 13 (A A C A) (6)

IV. Arizona interest advanced at expense of California interest ................. Case 7 (C A A C) 
Case 8 (C C A A) 
Case 15 (C A A A) (3)

V. Neither interest affected .................. Case 10 (A C A C) (1)

VI. California interest impaired without advancing any Arizona interest .......... Case 4 (C C A C) (1)

where the application of domestic law is more sensible and convenient (Group V). While California interests would be preferred to those of Arizona in six cases (Group III), the result is not, for all the cases, within California’s control; it will follow only if Arizona chooses to apply the same rule, since four of these cases are in Arizona courts. I repeat that the Law Revision Commission’s decision not to recommend the enactment of that choice-of-law rule was (shall we say) well advised.

Table 6 can be read also from Arizona’s point of view. Application of the place-of-injury rule would require the subordination of local to foreign interests in six cases (Group III)—four of them in Arizona courts—while local interests would be preferred to foreign in only three (Group IV). In addition, Arizona courts might well feel somewhat silly in striking down the progressive policy of California in Case 4 (Group VI) where the result would not advance any Arizona interest.86

86. From Arizona’s point of view the case in which the law to be applied is a matter of indifference (Group V) suggests an interesting question. Arizona, of course, can have no possible objection to the application of California law. How would Arizona decide the same case? The question is academic; the problem cannot possibly arise. The case is in a California court; and, since the forum in this problem is significant because the estate is being administered there, a significant factor is changed if a different forum is assumed. If we assume in Case 10 that the action is in Arizona, Case 10 becomes Case 14, in which
This should help to answer a question which Mr. Sumner states twice in his study. "Had death not occurred, the law of the place of the tort would have been used... Why should death affect this usual approach?"87 "Had there been no death this law would have been used. Why should death diminish the importance of the place of the wrong?"88 The answer is that, while it sometimes makes sense to apply the law of the place of the wrong with respect to some questions, it makes no sense whatever to apply the law of the place of the wrong concerning survival in a fact situation such as was presented in *Grant v. McAuliffe*.

It is true that the rule that the law of the place of injury governs will produce uniformity of result from state to state in any given fact situation if other states join California in adherence to the same rule and apply it consistently in the same way. Experience in this and other areas shows that it is unrealistic to expect that such uniformity will in fact result.89 Even in the field of conflict of laws, courts are inclined to be concerned with practical results, and may not concentrate exclusively on theories such as those of territorial jurisdiction and vested rights. When they recognize that the result dictated by the *summum bonum* of uniformity is a reprehensible one, they may revolt against the system, using one or another of the available escape devices. The uniformity and certainty promised by the system are therefore to a large extent illusory.90 But even if the discipline of the system were to hold, and the ideal of uniformity were attained as advertised, would the gain be worth its cost? Uniformity comes high when

the application of Arizona law advances Arizona interests without impairing those of California. If the question were presented, it would provide a hard test of the position taken in this Article as to how California should dispose of the case. An important question would be whether, no policy considerations being involved, uniformity of result from state to state is not in fact the highest goal. But the question is not raised. Whether it can be presented in the context of another type of problem I do not know.

87. **Recommendation and Study** 16.
88. Id. at 17.
90. See *Appendix*, p. 249 *infra*.
91. Moreover, the objective of uniformity, laudable enough when other things are equal, seems badly overgeneralized. So far as appears from the report of *Grant v. McAuliffe*, there was no possibility that the action could have been brought in any other place. The estate of the decedent was being administered at the domicile and nowhere else; so far as appears, he had no property that could have been the subject of administration elsewhere. Why, then, should California renounce its interests for the sake of averting a disuniformity which is impossible? So also, in Case 10, where the choice of law is a matter of indifference. Why should the California court be required to shape its judgment so as to conform to an imagined judgment in a foreign court, when such a foreign judgment is an impossibility? Certainly, minor changes in the fact situation in the *Grant* case could create the possibility of suit in two states. Does it follow that the court should distort its decision in a case in which no service to the ideal of uniformity is possible?
it results in the frustration of California law and policy in four of the possible fourteen cases, and in the other anomalies noted in Table 6.

In closing this phase of the discussion, it may be interesting to return to the suggestion made earlier, that liability insurance may be a factor worth considering in conflict-of-laws cases of this kind. In any of the fourteen cases, the tort-feasor may have carried insurance. The insurance may or may not be enough to cover the claims; the estate may or may not be sufficient to pay any excess of the amount recovered over the policy limits. For present purposes we are not particularly concerned with insurance when the choice of law results in application of California’s law of survival. In seven cases, however, the rule advocated by Mr. Sumner results in the application of Arizona law, abating the action. In three of these, that rule results in the advancement of Arizona interests at the expense of California interests (Case 7 [C A A C], Case 8 [C A A A], and Case 15 [C A A A]). It may be some small consolation to defenders of the system that, despite the subversion of California interests, those of Arizona are furthered. But suppose the truth in the case before the court is that the tort-feasor was fully insured? In that event, any interest of Arizona in the matter evaporates completely, unless, perchance, the insurance company is an Arizona enterprise, and the Arizona policy can rationally be interpreted as designed to protect such enterprises from liability in the fortuitous event of the tort-feasor’s death. Arizona’s policy, in the discussion thus far, has been charitably interpreted as a fairly intelligible, though primitive, desire to shield the innocent heirs of the wrongdoer from suffering the penalty for his misdeeds. But the estate cannot suffer where there is adequate liability insurance. In such circumstances, to apply the law of the place of injury to Cases 7, 8, and 15 would be to subvert California policy with no advancement of any Arizona policy whatever; and the result would be as unfortunate as it would have been in Grant v. McAuliffe if the court had applied that law.

92. See note 61 supra.
94. The insurance problem would not intrude here if it were universally the law that the injured person has a right against the insurance company which he can assert directly at least when his rights against the tort-feasor are abated by the tort-feasor’s death. Efforts to obtain general agreement on such a minimum principle would be better directed than efforts to achieve general agreement on the rule that the law of the place of injury controls.
IV

It would be less than frank not to confess that I find Mr. Sumner's views on the constitutionality of the decision in Grant v. McAuliffe simply flabbergasting. Mr. Sumner says: "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." As if that were not enough, he adds: "In a subsequent section 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."

Reflect upon this for a moment. California law was applied in a case being litigated in a California court. All persons involved in the collision were citizens of California. The deceased tort-feasor's estate was being administered at his domicile in California and nowhere else. That the result reached did justice as between the parties to the action has been questioned by no one. The decision furthered California's progressive policy of saving the injured person's right to compensation instead of terminating that right on the tort-feasor's death. It did this with no impairment whatever of any interest of Arizona. Arizona had no conceivable interest in the application of Arizona law to the case. If the Constitution of the United States forbids such a decision, and if it requires instead that California apply Arizona law, working a result which would be unjust as between the parties, subversive of California's humane policy, and devoid of any tendency to further the interests of a sister state, then the Constitution is an arbitrary and capricious instrument indeed.

Of course, there is nothing in the Constitution to warrant such ideas as these. They could result only from the inane automatisms of that mindless and ruthless machine for the disposition of conflict-of-laws cases in which we have been taught that we must place our faith, and which inexorably assigns to a single state "legislative jurisdiction" to control the outcome of any conceivable case, not

95. Recommendation and Study 9.
96. Id. at 10.
only without regard to the implications of the result but with utter indifference to what the result itself may be.

It seems quite unnecessary to lengthen this Article by an extended consideration of the constitutional "issues" involved in the Grant case. It may be conceded that the course of the Supreme Court's treatment of conflict-of-laws cases on the constitutional level has not been even. It may be conceded that there have been times in the past when the Court seemed disposed to abdicate its adjudicative function in favor of the machine. It may be conceded that there are still certain categories of cases in which the Court's decisions run counter to the developing trend. In recent years, however, it has become increasingly clear that the role of the full faith and credit clause and of the due process clause in choice-of-law cases is a minimal one. When a state has a policy of its own, and when the state's connection with a case is such as to constitute a reasonable and substantial basis for the state's assertion of an interest in applying its policy, neither the full faith and credit clause nor the due process clause requires it to apply the law of another state in preference to its own. When the asserted policy has no demonstrable existence, or when there is no such connection as to warrant the assertion of an interest in applying the policy, then these clauses have a function to perform. But the legitimacy of a state's asserted interest is no longer measured in terms of rubrics such as "substantive" and "place of injury." Fortunately, the shibboleths of the Restatement have not been incorporated in the Constitution.

If we are to talk constitutional issues, I have an opinion of my


"The connections or contacts which have been employed in determining the power of the state are of two principal kinds. One set is made up of the connections which are employed in the usual conflict of laws rules and which may have been refined into a somewhat artificial form. . . . The other set, which fortunately have been emphasized in the later cases, are the substantial rather than the technical connections of a state with the occurrence."

own to offer: The decision in *Grant v. McAuliffe* was not in con-
flict with any provision of the Constitution. On the contrary: if it is true, as I believe, that a "grossly unreasonable" choice-of-law rule denies due process of law; if it is true, as I believe, that a choice-of-law rule is grossly unreasonable when it invokes the law of a state having no substantial connection with the case; —and if it is true, as I believe, that the substantiality of a state's connection with a case is to be judged in terms of social and economic policy factors rather than in terms of refined, technical, and artificial concepts —then a different decision, employing the Arizona law of abatement, when Arizona had no such connection with the case as to provide any rational basis for an interest in the application of its law and policy, *would* have been a rather clear violation of the due process clause.

The fourteen cases, as arrayed in Table 6, fall into two main classes, if we defer for a moment consideration of the case in Group V. The four cases in the first class (Groups I, II, and VI) present no real problem. The nine cases in the second class (Groups III and IV) present real problems; but they are problems which cannot be solved by any science or method of conflict of laws.

The basic problem in conflict of laws is to reconcile or resolve the conflicting interests of different states. The four cases in the first class involve no conflicting interests. The result which should be reached in each is perfectly clear. In Group I, the interests of California can be advanced without impairment of those of Arizona. It happens that this is the result produced by choice of the law of the place of injury. In Group II the interests of Arizona can be advanced without detriment to those of California. It happens that this is the result produced by choice of the law of the place of injury. In Group VI the interests of California can be advanced without detriment to any interest of Arizona. This is not the result

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103. *Id.* at 601-2, A.A.L.S. *Readings* at 271-72. See also cases cited in note 100 *supra*.
104. "A rule of conflict of laws, for example, would be grossly unreasonable if it directed that the rights under an occurrence be governed by the law of a state which had no substantial connection with the occurrence." Cheatham, *supra* note 100, at 586, A.A.L.S. *Readings* at 259.
produced by choice of the law of the place of injury. Perversely, the system here demands that in the sacred name of uniformity, or something, California interests be frustrated although there is no conflicting interest.

In short, the system devised for dealing with the problem of conflicting interests generates in this situation nearly half as many false problems as there are real problems—and then proceeds to solve the false problems, in one fourth of the cases, in an obviously unacceptable way.

The nine cases in the second class present real problems of conflicting interests. The system conceived for solving them does not do so. It only creates an illusion of doing so by pretending that they do not exist. The system never composes nor reconciles; under a “choice-of-law” regime one interest or the other must yield. This unpleasant fact is concealed by the system, which does not countenance talk of conflicting interests. It talks of law and of the nature of law, and of transcendental principles which assign to one state, and only one, “jurisdiction” to determine the outcome of a case. Under such a system, of course, there can be no such thing as a conflict between the policies of two or more legitimately interested states.

And how does the system dispose of the nine cases which present real problems? In six of the cases it strikes down Arizona’s interest in favor of California’s; in three it strikes down California’s in favor of Arizona’s. It does this casually, impersonally, without malice—and also without any attention whatever to the relative merits of the respective policies, or even to their existence. The fact that California’s policy is allowed to prevail in a majority of the cases is, from the standpoint of the system, a fortuitous consequence of the fact that the critical factor—place of injury—is not wholly unrelated to the interests involved. In a different situation, where the decisive factor is quite irrelevant to the policy considerations, the policy of one state is made to yield exactly as many times as is the policy of the other—i.e., the result is dictated by pure chance.106

No state, by its unilateral action, can solve these problems. Nor can all states, by the concurrent adoption of the same choice-of-law

rule, solve them, even if all states consistently apply the common rule in the same way. We have seen the havoc that would be worked by uniform choice of the law of the place of injury. The rule that the law of the forum should govern—relied on to justify the result in Grant v. McAuliffe—if understood as a rule to be applied not only by the California courts but also, concurrently, by the courts of Arizona, would be scarcely preferable. While it happens that that rule would give satisfactory results in three of the false-problem cases (Cases 2, 4, and 14), it would result in subversion of California's interests in six of the nine cases that present real problems. This is why I cannot believe that the court meant its rationale to be interpreted as a choice-of-law rule to be adopted by all states in place of the rule of the Restatement. The court which decided Grant v. McAuliffe would not seek a result so absurd and so contrary to California's interests. 107

What, then, was the California court doing in Grant v. McAuliffe? What should a court do in such a case, if the taught system of choice of law is as wretched and spurious as it seems? The two questions, I think, can be given a single answer. In the first place, the court was deciding one case at a time—the case before it. It was not deciding 173 other cases, unstated, unvisualized, unbriefered, and unappraised. It did not try to formulate a universal rule for choice of the law governing survival. It turned its back on the whole futile business of universal choice-of-law rules, and on the machine for disposing of conflicts cases without thought. It set itself to determine whether justice under California law required application of California's survival statute to the case at bar, and decided that it did. Or, as I would put it, the court inquired whether California's connection with the case was such that California could legitimately assert an interest in the application of its policy, and found an affirmative answer. It found no reason why Arizona law should be considered. Or, as I would put it, the court inquired whether Arizona's connection with the

107. The rule that the law of the deceased tort-feasor's domicile should govern (advocated in Note, 68 Harv. L. Rev. 1260, 1263 [1955]) would give the following results (in shorthand terms of Table 6): California interests advanced without detriment to Arizona interests, one (Case 12); California interest advanced at expense of Arizona interest, three (Cases 5, 8, 9); Arizona interest advanced at expense of California interest, six (Cases 3, 6, 7, 11, 13, 15); neither interest affected, one (Case 10); Arizona interest impaired without advancing any interest of California (the converse of Group VI), one (Case 14).
case was such as to support the assertion of an interest on the part of Arizona in the application of Arizona policy, and found a negative answer. In other words, confronted with a false problem created by the machine, the court ignored the machine's perverse solution and adjudicated the case. This, I think, is precisely what it should have done.

Table 7 compares the results which would be reached in the fourteen cases if California's legitimate interests were consulted (column 1); if Arizona's interests were consulted (column 2); if the law of the place of injury were applied (column 3); and if the law of the forum were applied either on the theory that survival is a procedural matter or on the theory that it is a matter relating to the local administration of the decedent's estate (column 4). In addition, column 5 indicates, so far as possible, the result which seems clearly desirable on the basis of the foregoing discussion.

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<thead>
<tr>
<th>Case</th>
<th>Domicile of Plaintiff</th>
<th>Domicile of Tort-occurring</th>
<th>Place of Injury</th>
<th>Forum</th>
<th>1 California Interest</th>
<th>2 Arizona Interest</th>
<th>3 Place of Injury</th>
<th>4 Forum</th>
<th>5 Desirable Result</th>
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<td>A†</td>
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* Cause of action would survive
† Cause of action would not survive
Of the false-problem cases, three arise in California courts (Cases 2, 4, and 12), and one (Case 14) in Arizona. The simple application of the law of the forum (indicated by the language of the Grant case) would lead to the desirable result in all but one of these (Case 12). If the assumptions on which our analysis has been based are accepted, Case 12 is one in which California should apply Arizona law; so also if the domicile of the tort-feasor in the state is taken as the basis for the application of Arizona policy. But if the legitimate scope of Arizona policy is limited to property being administered in the state, this case, like Case 10, becomes one in which the interest of neither state is affected, and in which California law should be applied. Hence the rationale of the Grant case (that the law of the forum governs) cannot do any substantial harm in future cases, so long as it is understood as a principle for California courts to apply and not as a universal choice-of-law rule to be applied by other states.

Of the nine cases which present true problems of conflicting interests, three arise in California courts (Cases 3, 6, and 7). The science of conflict of laws provides, and can provide, no basis on which the legitimate interest of one state should be preferred to that of another. In such a situation, the California court should apply California law, for the reason that when one of two conflicting policies must yield, that of the judges' own state should prevail—and for the further reason that the parties and the court should not be saddled with the burden of ascertaining and applying foreign law unless some useful purpose is to be served thereby. This is emphatically true with respect to the three cases under discussion, since, if the scope of Arizona's policy is limited to the administration of property in the state, each of these three cases will present no real problem, and California law should clearly be applied.

The remaining six problem cases (Cases 5, 8, 9, 11, 13, and 15) arise in Arizona courts. It is no part of the function of the Arizona court to condemn Arizona law for its backwardness, and to apply foreign law for the purpose of defeating Arizona policy. No other basis exists on which that court can rationally prefer California law to that of Arizona. Although I deplore the results

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108. This assumes that the formulation of Arizona policy which we have used as a basis for discussion is the accepted one. A rational basis for the Arizona court's applying California law could be found if the Arizona policy were more narrowly interpreted.
which application of that benighted law would produce, I can reach no other conclusion than that Arizona should, in each of these cases, apply its own law.¹⁰⁹

The case in Group 5 (Case 10) presents no conflict of interests. It does pose a very real problem of disposition. Whether it is to be regarded as a true problem of conflict of laws or not seems a formal and unimportant question, so long as we recognize what the problem is and what it is not. As I have said, I think the sensible disposition is for the California court to apply California law.

The suggestion that either forum in any of the possible cases might reasonably apply its own law suggests opportunities for forum-shopping—a tactic which is rather generally condemned in the literature of conflict of laws, though not quite so generally in the cases.¹¹⁰ Just as the ideal of uniformity is given too high a priority and is too generally stated, so may forum-shopping be too bitterly and too broadly condemned. The two are nearly correlative: uniformity is desired largely to prevent forum-shopping; and, if the demand for uniformity is subject to moderation, so must be the distaste for forum-shopping. At any rate, let us examine the opportunities for forum-shopping which are afforded by the approach which has been suggested.

In its plainest meaning, forum-shopping presupposes a plaintiff—one who has the initiative—and at least two forums in which he can bring his action. The plaintiff in our situation will wish to avoid the Arizona court, in which he must always lose. His opportunities to do so are limited. In half of the cases, Arizona is the domicile of the decedent, and may be the only state in which there are assets making administration and suit possible.¹¹¹ Let us assume, however, that assets of the decedent are being administered in both states. By electing to bring his action in California rather than in Arizona, the plaintiff will win in every case except Case 12.

¹⁰⁹. From California's point of view, this over-all result in the problem cases would be more unfavorable than that produced by the rule that the law of the place of injury governs, since, under that rule, Arizona would (if California's hopes were fulfilled) apply California law in four of the six cases. The fact that, under the suggested approach, California law would suffer in all six cases is not California's doing; California cannot, by legislation or otherwise, control the result in the Arizona courts. California policy suffers because Arizona law is different. But California's adoption of the rule that the law of the place of injury should prevail as a universal guide to choice of law is a positive invitation to the Arizona courts to frustrate California policy in two of the problem cases.


¹¹¹. The plaintiff's opportunities are increased if the deceased's insurance carrier is amenable to process in California, see Gordon v. Shea, 300 Mass. 95, 14 N.E.2d 105 (1938); but, as we have noted, where the insurer is the real defendant the basis for applying the policy of abatement should disappear.
—and will win even in that case if the court, taking a less expansive view of the scope of Arizona policy than we have done, regards Arizona’s interest as limited to property administered in the state. But a major reason why he will win is that, instead of bringing the action in such a way as to create a conflict of interests between states, he brings it in such a way that there is no such conflict, and no problem; the case can be decided in his favor with justice to the parties and without impairment of the interest of any state.  

It may be said that the suggested approach offers an inducement to plaintiffs to choose their forums in such a way as to minimize true conflicts, and so avoid the necessity of one state’s striking down the interest of another. Such forum-shopping seems positively commendable. I am not quite sure how seriously I mean this; I do think the argument suggests that we need to take a harder and closer look at the ideal of uniformity and the condemnation of forum-shopping.

There remains the stubborn fact that under any conceivable conflict-of-laws method the interests of one state will be sacrificed to those of another whenever there is conflict. The only virtue of the method proposed here is that it at least makes the choice of interests on a rational and objective basis: the forum consistently applies its own law in case of conflict, and thus at least advances its domestic policy. This is not an ideal; it is simply the best that is available. I have pointed out elsewhere, as Cook pointed out as long ago as 1919, that in the United States we have available an effective means of resolving the conflicts which cannot be resolved

112. This is flatly true if we assume that Arizona’s interest is limited to property administered in the state. In that event, every case which in the Arizona court would present a conflict of interests is transmuted into a false-problem case if the action is brought in California. On the assumption employed in the text, which concedes Arizona two bases for an interest in applying its policy, the results of the plaintiff’s election to sue in California instead of Arizona are as follows: Case 14 becomes Case 10; Case 5 becomes Case 1; Case 8 becomes Case 4; Case 9 becomes Case 2; Case 11 becomes Case 3; Case 13 becomes Case 6; Case 15 becomes Case 7; and Case 16 becomes Case 12. Thus the pairs 5-1, 8-4, and 9-2 represent the elimination of conflicts by forum-shopping. The pairs 11-3, 13-6, and 15-7 pose the question whether California is prepared to sacrifice its governmental interest in order to make forum-shopping unprofitable.

Forum-shopping may also refer to the tactics of a defendant who maneuvers in such a way as to force trial in a forum favorable to him. It is difficult to see how the estate could avoid suit in California in Cases 2, 4, and 10, where California is the domicile of the tort-feasor. In the other four cases (Cases 3, 6, 7, and 12) suit in California might, perhaps, be avoided by the withdrawal of all assets from the state before the appointment of an ancillary administrator. See Potter v. First Nat’l Bank, 107 N.J. Eq. 72, 151 Atl. 546 (1930). Thus Case 3 would become Case 11, Case 6 would become Case 13, Case 7 would become Case 15, and Case 12 would become Case 16.

by conflict-of-laws methods: legislation by Congress under the authority of the second sentence of the full faith and credit clause.\textsuperscript{114} I see no reason why federal powers should not be brought to bear to solve this problem, if it is important enough to warrant the time which the California courts and the Law Revision Commission have devoted to it. Long disuse of those powers, however, discourages the hope that they may be soon revived for this particular problem. We may turn then, in conclusion, to the question of what the state legislatures can do about the matter.

First of all, the California Legislature can follow the good advice of the Law Revision Commission, and refrain from enacting a rule requiring the courts of California to apply the law of the place of injury as to survival or abatement.

Second, the California Legislature, and all others, would do well to avoid enacting choice-of-law rules in general. This is intended as a very narrow statement. It does not mean that legislatures should not concern themselves with problems of conflict of laws. There is a body of highly desirable legislation in the field. The statement means only that the legislature would be well advised not to express its will concerning conflict-of-laws problems in the form of traditional choice-of-law rules, such as that the survival of a cause of action for personal injuries is a matter of substantive law, to be determined by the law of the place of injury. There is a substantial body of opinion opposing the codification, constitutionalization, or even restatement of conflict-of-laws rules on the ground that, in the present state of development, any crystallization would be premature.\textsuperscript{115} The objection cannot be met, as is sometimes supposed, by devising narrower and more specific choice-of-law rules.\textsuperscript{116} The whole idea of the choice-of-law rule itself is suspect.

The choice-of-law rule is an odd creature among laws. It never tells what the result will be, but only where to look to find the re-\textsuperscript{117}

\textsuperscript{114} Currie, supra note 106. See also Jackson, Full Faith and Credit: The Lawyer’s Clause of the Constitution, 45 Colum. L. Rev. 1, 21 (1945), A.A.L.S. Readings at 244.


sult; and the author of the rule cannot foresee the outcome. Such rules are made by theorists in an effort to impose an external order upon the states; they do not come naturally from legislatures, which are interested in foreseeable results. Whatever virtue such rules may have lies in their tendency to foster uniformity of result from state to state; but, even if a legislature should be convinced that this is the highest goal of conflict of laws, it cannot enact the ideal into reality, because the legislature cannot control the decisions of courts of other states. For purposes of uniformity, a choice-of-law rule is worthless unless other states which may be concerned will voluntarily adhere to it. To the extent that such a rule enacted by the California Legislature asserts that California law should be controlling in certain cases, it need not necessarily be respected by other states; to the extent that it disclaims the applicability of California law, it provides an excuse for other courts to apply a different law. Even if the enactment by California of the rule of the Restatement on survival were to spur other states to adopt the same rule, the mandate would be a strange one in the mouth of the California Legislature: it would command California courts to frustrate the sovereign interests of California in two of the fourteen possible cases (in one of them without any contribution to the interests of any foreign state), and would cordially invite other states to do the same in two additional cases.

There is a contribution which legislatures can make to progress in this troubled field. They can cultivate the practice of adding to specific enactments a section specifying the extent to which the law is intended to apply to cases involving foreign factors. Thus California might reasonably specify that its law on the survival of personal injury actions is intended to apply to all cases in which the injured person is a resident of California, and also to all cases in which the injured person, though a nonresident, is present in California at the time of the injury. The Arizona legislature, if such should be its will, could specify that its law abating such actions is intended to apply to all cases in which the action is brought against a local executor or administrator, or to all cases in which the deceased tort-feasor was domiciled there, or both. The value of such directions would be tremendous—provided, of course, that they were drafted with careful regard to the moderate and legitimate interests of the state, and not with an overweening desire to impose the doubtful wisdom of the enacting state upon the rest of the
world. These would not be choice-of-law rules, in the sense of universals assigning "jurisdiction" to the only competent state. They would simply be exercises of the lawmaking power, directed to local courts, providing aids to statutory construction. Their great value would lie in the fact that they would make explicit the policy expressed in the statute, and the mode of application which will promote that policy. This is the great need of the courts. Without such guidance, they are compelled to choose between constructs of legislative policy which are often speculative, on the one hand, and the interest-wrecking mechanics of the system on the other. Since traditional judicial techniques do not emphasize nor systematize the ascertainment and implementation of policy, it is understandable that the courts have commonly shied away from the first alternative. If legislatures were to state their policies explicitly, in such a way as to reveal the significant factors which should bring those policies into play, the remaining task of the courts—to apply the law so as to effectuate that policy where no constitutional barrier is presented, and to avoid applying it needlessly to the impairment of interests of other states—would be a comparatively simple one. The formulation of such legislative guides is not easy. It must be done on a case-by-case basis, with great care and discrimination and moderation. But it is worth doing. Here is a richly constructive activity and a challenge for law revision commissions. If the job is not done in the statute, the problem of ascertaining the policy and the mode of effectuating it is left to the courts, imposing on them the too familiar task of making bricks without straw. The most conscientious and perceptive courts, like the California Supreme Court in the Grant case, will do their best to ascertain the policy and further it. Others, in bewilderment and frustration, will fall back on the machine.

117. It is not unreasonable to expect that this sort of legislative attention to conflict-of-laws problems might lead to the abandonment of obsolete domestic laws. Thus if we try to visualize how the Arizona legislature might approach a formulation of the policy embodied in its abatement rule, we can imagine that the legislature might be disposed to relax its policy of protecting locally administered property in certain situations—as, for example, where the injured person is a resident of a state having a compensatory policy, and where the decedent was domiciled in the same foreign state. Each such concession would provide additional ground for questioning the wisdom of retaining the rule for purely domestic cases. Recognition that local policy is relatively weak, and perhaps should not be extended to cases involving significant foreign factors, may force recognition of the undesirability of the policy even for home consumption.
APPENDIX

THE PRECEDENTS*

The following enumeration is confined to the cases cited in Grant v. McAuliffe, in Mr. Sumner's study, and in the law review comments on the decision. The only cases included are those dealing with the question whether a cause of action for personal injuries (or death) survives the alleged tort-feasor, since different policy considerations are suggested both by other torts and by the question whether the cause of action survives the injured party. In addition, cases dealing only tangentially with survival of the alleged tort-feasor have been excluded.

Cases in which the action was commenced before the death of the tort-feasor are included, since I can find no satisfactory ground for distinguishing between revival and survival in this context.

On this basis, there are twenty-five relevant cases. These may, with a fair degree of accuracy, be classified according to the groups shown in Table 6. Precise classification is not always possible, since the reports sometimes do not give the necessary information. In some instances, missing information has been discovered from sources outside the reports. Since the sources of such information are of merely collateral interest, documentation is omitted in the interest of brevity.

Our classification assumes only two different laws: complete survival or complete abatement. One case cannot be fitted into that classification because it involves a third type of law: partial survival. This is Wallan v. Rankin, 173 F.2d 488 (9th Cir. 1949). The court treated the law of the place of injury (Oregon), allowing complete survival, as applicable, finding in the fact that California allowed partial survival an indication that recovery was not opposed to the public policy of the forum. The analysis in the text would lead to the conclusion that recovery should be limited as provided by California law.

One case must be classified as belonging to Group II, in which application of the law of the place of injury advances the interest of the foreign state, which adheres to the rule of abatement, without detriment to any interest of the forum state, which provides for survival. The case is Potter v. First National Bank, 107 N.J. Eq. 72, 151 Atl. 546 (1930). Actually, this was a companion case to Matter of Killough, discussed at page 251 infra, so that we know that the law of the place of injury provided for survival. In that light, this would be classified as similar to Case 6, Group III. However,

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*I am indebted to Miss Anne von der Lieth, of the Class of 1958, Stanford University Law School, for assistance in the compilation of this Appendix.

118. In McIntosh v. General Chemical Defense Corp., 67 F. Supp. 63 (S.D.W. Va. 1946), the issue was whether of two statutes of limitation at the forum was applicable. In Hellrung v. Lafayette Loan & Trust Co., 102 F. Supp. 822 (N.D. Ind. 1951), an issue was whether the jurisdictional amount was in controversy.


120. P. 234 supra.
the law of the place of injury did not appear, and the court presumed that
the common-law rule of abatement was in force there.

The bulk of the cases—sixteen of them—fall into Group III. In this
group there is a real conflict of interests, in terms of the analysis in the text.
In the following cases, the court applied the law of the place of injury, thus
advancing the interest of the foreign state at the expense of the interest of the
forum:

Minnesota

*Chubbuck v. Holloway*, 182 Minn. 225, 234 N.W. 314 (1931)\(^{121}\)

*(Kertson v. Johnson*, 185 Minn. 591, 242 N.W. 329, 85 A.L.R. 1

[1932])\(^{122}\)

*In re Estate of Daniel*, 208 Minn. 420, 294 N.W. 465 (1940)\(^{123}\)

Missouri

*Burn v. Knox*, 334 Mo. 329, 67 S.W.2d 96 (1933)\(^{124}\)

New York


Dept. 1932)\(^{125}\)

Tennessee

*Parsons v. American Trust & Banking Co.*, 168 Tenn. 49, 73 S.W.2d

698 (1934)\(^{126}\)

On the other hand, in the following cases the court avoided application
of the law of the place of injury on one ground or another, thus preferring
local to foreign interests:

Colorado

*Gray v. Blight*, 112 F.2d 696 (10th Cir. 1940) (law of forum controls

as to remedy; forum has public policy against recovery)

District of Columbia

*Woollen v. Lorenz*, 98 F.2d 261 (D.C. Cir. 1938) (though law of

place of injury governs survival, law of forum prohibits suit against

estate for personal injury)

\(^{121}\) The authority of the case has not been, and probably should not be, impaired

because of the fact that on rehearing it was found that the foreign statute relied on by the

plaintiff was not a survival statute. 182 Minn. at 231, 234 N.W. at 316. It may be signifi-

cant, however, that the court left open the question whether a judgment for the plaintiff

would be on a par with other claims against the estate. *Id.* at 230, 234 N.W. at 316.

\(^{122}\) Since it clearly appears that the defendant was insured, this case may have

actually involved no detriment to any interest of the forum.

\(^{123}\) Application of the law of the place of injury with respect to survival has a

special charm here, since the court refused to apply the statute of limitations of the place

of injury, according to which the action was barred.

\(^{124}\) While the forum had no survival statute, it did have a revival statute. Under-

standably, the court felt that the forum's policy against holding the estate responsible

could not be very strong.


\(^{126}\) Again the forum had a revival statute.
New York

Clough v. Gardiner, 111 Misc. 244, 182 N.Y. Supp. 803 (Sup. Ct. 1920) (public policy of the forum)

Matter of Killough, 148 Misc. 73, 265 N.Y. Supp. 301 (Surr. Ct. 1933) (procedural: matter of administration of estates; analogy to statute of limitations; local public policy)


Washington

Muir v. Kessinger, 35 F. Supp. 116 (E.D. Wash. 1940) (local law on administration of estates controlling)

None of the six decisions applying the law of the place of injury seems to do so mechanically. The courts, understandably, were unable to see in the retention of the rule of abatement any clear policy of the forum—especially where the forum had a revival statute. Plainly, these courts deplored the archaism of their own laws and sought the just result in the progressive foreign law.127 The pity is that a court so disposed does not abrogate the archaic rule for all purposes, instead of seeking limited escape through the loose apparatus of conflict of laws. That it did not do so in the key case of Chubbuck v. Holloway, 182 Minn. 225, 234 N.W. 314 (1931), may be attributable to the unfortunate fact that Minnesota had enacted the common-law rule by statute. Abrogation for conflicts purposes alone tends to discriminate in favor of nonresidents. As the New York court observed: "A rule that would permit the depletion of the estate of a deceased resident through enforcement of claims for damages for personal injuries sustained outside of the State, where the Legislature has denied such remedy for injuries within the State, seems . . . unreasonable . . . ."128

In re Vilas' Estate, 166 Ore. 115, 110 P.2d 940 (1941), also belongs to Group III (Case 6 [A A C C]). Here the law of the place of injury and the law of the forum both provide for survival, and the application of that law advances the interest of the forum at the expense of the foreign interest. That was the result reached by the court, but it is not clear whether the rationale was that the law of the place of injury governed, or that survival is a question of remedy. Since it appears that the tort-feasor was insured, there may actually have been no impairment of any interest of the foreign state.

127. See Burg v. Knox, 334 Mo. 329, 338, 67 S.W.2d 96, 100 (1933), referring to the "erosion" of a statute said to declare the common-law rule.

At least two, and perhaps three, of the cases must be classified in Group V, where application of the law of the place of injury (or of the law of the forum) affects the interests of neither state. In all cases, the law of the place of injury was applied:

Maine

*Dalton v. McLean*, 137 Me. 4, 14 A.2d 13 (1940).

New Jersey


Pennsylvania

*Ormsby v. Chase*, 290 U.S. 387, 92 A.L.R. 1499 (1933)

In all these cases, of course, the law of the place of injury dictated abatement, and recovery was denied. The application of the rule seems purely mechanical, and the "illiberal" results are to be contrasted with the "liberal" results achieved by application of the law of the place of injury in the cases falling in Group III.

At least two, and perhaps five, of the cases fall into Group VI. Here application of the law of the place of injury frustrates the interests of the forum state with no advancement of any foreign interest; the cases are similar to *Grant v. McAuliffe*. In all five cases, the law of the place of injury was applied to deny recovery:

Connecticut

*(Orr v. Ahern*, 107 Conn. 174, 139 Atl. 691 [1928])\(^{130}\)

Michigan


New Jersey

*Friedman v. Greenberg*, 110 N.J.L. 462, 166 Atl. 119, 87 A.L.R. 849


Pennsylvania


The decision of the California Supreme Court in *Grant v. McAuliffe* was, indeed, unorthodox; the cases exactly in point are to the contrary. But the question is whether the court is to be condemned for preferring rationality to orthodoxy.

\(^{129}\) Perhaps this should be in Group VI.

\(^{130}\) Possibly this should be classified as Case 7 (C A A C) (Group IV), advancing the interest of the foreign state at the expense of that of the forum.

\(^{131}\) Professor Herbert R. Baer, of the University of North Carolina, of counsel for defendant, informs me that there was adequate liability insurance in this case.

\(^{132}\) See note 130 supra.

\(^{133}\) Possibly this should be classified as Case 10 (A C A C) (Group V), where neither interest is affected.