ORIGINAL

In the

Supreme Court of the United States

WILLARD E. ROBERTSON,

Petitioner,

V.

EDWARD F. WEGMANN, EXECUTOR OF THE ESTATE OF CLAY L. SHAW, ET AL.,

Respondent.

No. 77-178

Washington, D.C.
March 21, 1978

Pages 1 thru 36

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IN THE SUPREME COURT OF THE UNITED STATES

WILLARD E. ROBERTSON, Petitioner,	:	
v.	:	No. 77-178
EDWARD F. WEGMANN, EXECUTOR OF THE ESTATE OF CLAY L. SHAW, ET AL., Respondent.	:	

Washington, D. C.

Tuesday, March 21, 1978

The above-entitled matter came on for argument at 2:06 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

MALCOLM W. MONROE, ESQ., 4700 One Shell Square, New Orleans, Louisiana 70139; on behalf of Petitioner

EDWARD F. WEGMANN, ESQ., 1047 First National Bank of Commerce Building, New Orleans, Louisiana 70112; on behalf of the Respondent

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in Robertson v. Wegmann.

Mr. Monroe, you may proceed whenever you are ready.

ORAL ARGUMENT OF MALCOLM W. MONROE, ESQ.,

ON BEHALF OF THE PETITIONER

MR. MONROE: Mr. Chief Justice, and may it please the Court:

The pertinent facts of this case are not in dispute. The original plaintiff, Clay Shaw, filed suit under section 1983 of the Civil Rights Act against Jim Garrison, then District Attorney of Orleans Parish, State of Louisiana, and certain alleged co-conspirators including petitioner, a prominent New Orleans businessman.

The plaintiff claimed violation of his constitutional rights in connection with the District Attorney's prosecution of him for a New Orleans based conspiracy to assassinate President Kennedy, and the District Attorney's subsequent attempt to prosecute Shaw for perjury.

During the pendency of his civil rights action, Shaw died. He was a bachelor, leaving no spouse, child, parent, or sibling, but only a will naming a friend as residuary legatee of his estate. The executor of Shaw's estate, the respondent here today, was permitted over objections of defendants to substitute himself as plaintiff. The defendants moved to dismiss

the action because it did not survive Shaw's death under the law of Louisiana, under which law there is provision for survival of actions in favor of the stated familial beneficiaries only.

QUESTION: Is that because of the nature of the action, or does that apply across the board to any --

MR. MONROE: There is a distinction in the Louisiana law of survivorship between actions for damage to property as opposed to personal actions. As to all personal actions, Mr. Justice Rehnquist, the limitation as to the rights of a familial beneficiary are in force.

And the further basis, of course, of that motion being dismissed was that under section 1988 of the Civil Rights Act, the law of Louisiana providing for the limited survivorship must be applied to this action.

The District Court denied the defendant's motions and on interlocutory appeal the Fifth Circuit affirmed the District Court's holding that a federal common law of absolute survivorship of section 1983 actions should be formulated since the state law to which the federal courts must look under section 1988 does not permit this action to survive, and is therefore inconsistent with the purposes of the Civil Rights Act, despite both courts' acknowledgement that the Civil Rights Act is entirely silent as to survivorship in 1983 actions.

This is a case which has been charged with considerable

emotion, arising as it does from the assassination of a President of the United States, and the subsequent prosecution by the District Attorney of Orleans Parish of a well-known New Orleans businessman for his alleged role in the conspiracy, alleged conspiracy to perpetrate that assassination.

The extent of that emotion is perhaps reflected by the referral by the Court of Appeals and the respondent to Shaw's injunction suit against the District Attorney, as constituting established facts in this case, although neither Petitioner Robertson nor Garrison's other co-defendants in the Civil Rights Act action were defendants in that injunction suit, and obviously any findings there would not be binding on them in this proceeding.

And also by respondent's repeated references to the District Court's characterization of the matter as one of the most bizarre episodes in American political and legal history, and the Court of Appeals' designation of facts of this case as Kafkaesque, although this matter has been before both of those courts simply on defendant's motion to dismiss the complaint.

QUESTION: Are all of the defendants still living?

MR. MONROE: All of the defendants are still living.

QUESTION: And is Mr. Garrison still the prosecutor?

MR. MONROE: No, sir, he is not. He has been in private practice for several years and is readying his candidacy for the State Court of Appeals.

QUESTION: He was the only state agent, wasn't he?

MR. MONROE: There is one other --

QUESTION: There is somebody else in his office?

MR. MONROE: -- who was alleged to be a member of his staff, Dr. Fatter.

QUESTION: But your client is a private citizen?

MR. MONROE: That is correct, sir.

QUESTION: Is and was?

MR. MONROE: That's correct, sir.

Especially in light of this emotional background of the case, the holding of the two lower courts, refusing to apply the state law of survivorship to this case, pursuant to section 1988, since that law would not permit this action to continue, and instead fabricating out of new cloth a federal common law of absolute survivorship, brings to our mind the dissentingopinion of Mr. Chief Justice Burger in the Nixon case when he said, "Mr. Justice Holmes, speaking of the tendency of great cases, by hard cases to make bad law, went on to observe the dangers inherent when some accident of immediate overwhelming interest appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously seemed clear seem doubtful and before which even well-settled principles of law will bend."

The petitioner is here today before this Court seeking

to neutralize the past hydraulic pressures in this case and to restore the settled principles of law which have been bent by the courts below. We may start then with the basic principle that there has never been any common law rule, federal or state, of survivorship of personal actions. Thus, we submit that survivorship of an action is quite different from the matter of recoverable damages, which was the question we believe was sought to be presented to this Court in Jones v. Hildebrandt, and as to which there have been established federal rules which the federal courts have chosen to follow, rather than state rules, as was the case when the Third Circuit in Basista v. Weir.

As to survivorship of actions, however, we reiterate that there has never been any such federal rule to be utilized. A further basic principle recognized by the Firth Circuit in its earlier Brazier v. Cherry, is that any amelioration of the harshness of the principle of abatement of actions upon death of the injured person must come from legislation. That is certainly as much American rule as is the need for legislative authority for the award of attorneys fees which was acknowledge by this Court in Alyeska Pipeline Service Company v. Wilderness Society.

Turning then to the Civil Rights Act, it also stands beyond question that Congress made no provision for survival of civil rights actions under 1983. Both courts below readily

conceded that point, as have all courts as far as we are aware which have considered this question, and certainly this Court in Moor v. County of Alameda also recognize the silence of Congress as to survivorship in 1983 actions.

On the other hand, Congress dis speak explicitly when it enacted 1988 to provide that when there is such a gap in the provisions of the Civil Rights Act, a common law as modified and changed by the Constitution and the statutes of the state or the forum, so far as the same is not inconsistent with the Constitution and laws of the United States shall be extended to and govern the cause. Thus, as the appellate courts in the Fourth Circuit, in Dean v. Shirer, the Firth in the Brazier case, the Sixth in Hall v. Wooten, the opinion written by the present Solicitor General, and the Seventh in Spence v. Staras, have all recognized that Congress, in enacting section 1988 of the Civil Rights Act, has adopted the state law of the forum as the federal law or federal common law of survivorship of civil rights actions.

Amicus in its brief filed with the Court simply clouds the issue, we submit, by referring to choice of law rules, since they only apply when there is no such congressional mandate as section 1988. This Court so recognized in the Moor case when, in considering section 1988, it said that this in Moor is a wholly different case than those in which lacking any clear expression of congressional will we have

been called upon to decide whether it is appropriate to look to state law or to fashion a single federal rule in order to fill the interstices of federal law.

The instant case, we submit, accordingly involves statutory interpretation and not choice of law rules. This Court should cast aside these false issues which have been injected and follow we submit the clear language of 1988. The only qualification which Congress stated in that section was that the state law not be inconsistent with the Constitution and laws of the United States.

QUESTION: Suppose some state hasn't modified the common law at all, then that is the end of the matter?

MR. MONROE: Mr. Justice White, we would submit so, and --

QUESTION: And that the common law rule just couldn't possibly violate this one proviso you just spoke of?

MR. MONROE: We submit, sir, that under the direct dictate of Congress in 1988 that that law of the state would have to be applied since the law is entirely silent as to survivorship. There is no rule at all to which the Court can turn to --

QUESTION: And the only common law the statute refers to is state common law?

MR. MONROE: I would say so, Your Honor.

QUESTION: Although I suppose if the state, by

judicial decision, changed the common law, it would be acceptable?

MR. MONROE: That is an interesting --

QUESTION: Do you have state common law in Louisiana?

MR. MONROE: No, sir.

QUESTION: I didn't think so.

QUESTION: So in Louisiana, would you say that only the common law rule could apply?

MR. MONROE: No, sir, as I think you look to the law of the state as enacted by the constitution and the statutes of that state.

QUESTION: Yes, but my Brother White's question was what if it is not changed by the constitution or statute but by judicial decision, then what do you do?

MR. MONROE: I would say, sir, that if that were the rule in Louisiana, I would think that under 1988 it would have to be applied.

QUESTION: Now, which, the judicial decision or the -- is that it?

MR. MONROE: Yes, sir.

QUESTION: The law of Louisiana, however and by whomever declared?

MR. MONROE: That's correct, sir.

QUESTION: But that is not what the statute says.

MR. MONROE: I believe so.

QUESTION: What it says as modified and changed by the constituion and statutes of the state or in the court having jurisdiction.

MR. MONROE: Mr. Justice Brennan, I assume, of course, that we would have the situation, say, in this case that for whatever reason, the Supreme Court of Louisiana would reach a different interpretation of the Civil Code, Article 2315, that has been the case to date. I would say then that if the highest court of the state, in construing or intepreting the law, that it be common law --

QUESTION: Or statute?

MR. MONROE: -- or statute, to say that there is no hardship whatever --

QUESTION: That would be a statutory change for purposes of 1983?

MR. MONROE: I would say so, sir.

QUESTION: No, that would be the statute as construed by the highest court of the state.

MR. MONROE: Precisely, sir.

QUESTION: Otherwise you would have one rule in Louisiana and another rule for the other 49 states, I presume.

MR. MONROE: Oh, I think that is quite possible, and I think that is true. As far as I know, Mr. Justice Rehnquist, I readily concede that as far as I know the survivorship law of Louisiana is the only one, the only state in

enacting the qualifications to the survivorship rule which follows the federal pattern which you find throughout the federal statutes in designating familial beneficiaries who have that right. Now, there are some I think 22 states which have enacted --

QUESTION: Well, my question was directed more to this difference between the civil law, which I understand to obtain in Louisiana, and to depend entirely on code provisions and --

MR. MONROE: That's correct.

QUESTION: -- and the other four United States which have more or less common law antecedents and the idea of a seamless web where there is no statute, the common law presumably governs.

MR. MONROE: Yes, I understand, sir. That certainly would be -- you would have to look at the statute law of Louisiana to the same extent.

We submit that although the courts being in agreement that the Civil Rights Act is silent as to survivorship of 1983, and that there is a void in that respect, it runs counter to all basic tenets of logic to say that for Louisiana law providing for a limited survivorship is inconsistent with that Act. There cannot be any inconsistency with something which doesn't exist.

QUESTION: Would you think that it would be wholly

inappropriate to absent 1988 to construe that the statute is providing for survivorship?

MR. MONROE: Absent 1988, Mr. Justice White, I think you would bring into play those doctrines which amicus discussed at considerable length in its brief about the Rules of Decision Act and the choice of law which, of course, is being debated all the time and is causing this Court and other federal courts considerable problem as to the choice of law and what law to apply.

So I think absent 1988, you would have to -- this Court and other federal courts would have to be guided by those principles. Now, that, of course, is one of the tenets that we are holding forth today, that with 1988 that one must follow the dictate of Congress, and one does not look to the choice of law rules.

QUESTION: Of course, 1988 doesn't speak specifically of survivorship, does it?

MR. MONROE: No, sir. All gaps, and I think Congress was being all-encompassing --

QUESTION: Well, do we have to look, for example, to state law to determine the question of immunity of governmental officials under 1983?

MR. MONROE: 1983 -- excuse me, the question of immunity again I think might be analogized --

QUESTION: It isn't mentioned in 1983.

MR. MONROE: No, sir, it isn't, but I think it may be analogized to my point about recoverable damages. There you already have a well-established body of law as to immunity. There is I think a common law, federal common law.

QUESTION: That is federal law.

MR. MONROE: Yes, sir, federal law.

QUESTION: Common law.

MR. MONROE: So therefore you do not have a void or a gap in the federal law, would be my position.

QUESTION: You can't read that in 1983.

MR. MONROE: Yes, sir, I think you can, Mr. Jus-ice White, because the premise of 1983 --

QUESTION: Well, there are some things that you can construe in a statute.

MR. MONROE: No. 1983 starts off by saying in effect that when -- commands the courts to apply its jurisdiction under the Civil Rights Act in accordance with the federal law.

QUESTION: Well, it says laws.

MR. MONROE: Laws.

QUESTION: And do you think that includes -- laws generally connotes written statutes.

MR. MONROE: Well, that could be --

QUESTION: And do you think laws means that it includes federal common law?

MR. MONROE: It has been interpreted by this Court

I think in the immunity cases, as I recall it --

QUESTION: I thought we just said that immunity under 1983 was a matter of construing 1983, was the common law? It is just a matter of statutory construction.

MR. MONROE: Well, it could be approached from the matter of construction of the statute. I think some of the cases would indicate to me that they considered that as being an existing rule of law.

QUESTION: Pierson v. Ray didn't refer to 1988 at all.

MR. MONROE: No, sir. That is my point. I think that, rightly or wrongly, I think the courts have gone that way is my point, sir.

We submit that there is nothing in the legislative history of the Civil Rights Acts to sueport the proposition that when Congress enacted section 1986 in 1866 or section 1983 in 1871, that it intended that there should be an absolute survival of actions under the Civil Rights Acts. To the contrary that the survivorship law of Louisiana is not inconsistent with the Civil Rights Act we feel is demonstrated by the action of Congress itself in 1871 in enacting section 1986 when it rejected a Senate amendment in a subsequent committee version, both of which included a very broad absolute survivorship of actions provision. Instead, 1986, as adopted by Congress, provided, as explained by Representative Shellabarger, the floor manager of the bill, for limited survivorship sections under

both sections 1986 and section 1985, which are the sections of the Ku Klux Act specifically aimed at the acts of invidious discrimination of the Ku Klux Klan which so often resulted ultimately in death and which was certainly a prime motivation behind the enactment of the so-called Ku Klux Act in 1871.

If the purpose and policy of Congress were in fact that regardless of the provisions of state law to be applied under 1988, there should be absolute survivorship of actions under 1983. It seems obvious to petitioner at least that Congress would have required the same result as to actions under sections 1985 and 1986. However, again Representative Shellabarger, recognizing that under common law there is no survivorship of actions for the deceased person, praised the limited survivorship clause of the amendment which became section 1986 and advised his colleagues in the House that it operates as to actions under section 1985, which was section two of the bill, as well as those under section 1986, which was section three of the bill.

He went on to explain that that clause was in his words intended to secure it, that is the right of action, to the family of the deceased to the exclusion, for example, of the creditors, just as our statutes do in the case where death occurs from railroad negligence.

Congress had intended that there be all-encompassing unlimited survivorship section 1983 actions, as the courts

below have held, Congress could simply have so provided expressly. It has been asserted that the deterrence objective of the Civil Rights Act of 1871 requires rejection of the Louisiana law of limited survivorship. Here again, it is inconceivable to petitioner that any such objective of Congress was so strong as to permit the federal courts to refuse to comply with the dictates of 1988 to follow and apply this state law of survivorship.

When Congress itself adopted 1986, in that section a very similar limited survivorship of 1985 and 1986 actions, certainly any objective of deterrence which Congress had in mind would have been even stronger, we submit, with respect to the types of invidious class action embraced in those latter sections of the Act than would be so as to merely the state action-type of violation prescribed by section 1983.

The same analysis, it seems to us, is also appropriate with the argument of amicus that Louisiana's survival statute must be rejected as being inconsistent with the complete justice theme of the Civil Rights Act. In fact, not only does section 1986 restrict survival to certain designated beneficiaries, but unlike the Louisiana statute, it goes further and the federal Act also limits those beneficiaries to recovery of only $5,000. Thus, we submit Louisiana's statute cannot be said to be out of tune with the federal complete justice theme.

Moreover, Louisiana's statute is entirely consistent with

every other federal statute which is provided for survivorship. Thus, whether the injured party is a railroad worker, a seaman, the lord of the admiralty, a longshoreman-harborworker, or one killed on the high seas, his action upon death survives only in favor of certain designated familial beneficiaries, not a friend remembered in decedent's will as residuary legatee.

Congress has accordingly directed, we submit, a course of action to be followed by the federal courts in this action, and that is fill the interstices of the federal statute with the state law of survivorship, adopt as federal law or federal common law, if one will, the Louisiana law of survivorship. Congress having spoken as it did in section 1988 with respect to adoption of state law, but having been otherwise entirely silent as to survivorship of section 1983 actions, the view of this Court in Alyeska as to award of attorneys fees in a civil rights action is appropriate here. That is, the Civil Rights Acts do not contain the necessary congressional authorization for the courts to formulate a federal common law of absolute survivorship.

As this Court said in Chevron Oil v. Huson, interpreting a provision in the Outer Continental Shelf Lands Act, very similar to section 1988, Congress made clear provision for filling in the gaps in federal law. They did not intend that federal courts fill in those gaps by creating new federal common law.

The several arguments advanced by the respondent amicus as

well as by the courts below as to the need for uniform and absolute survivorship of civil rights actions are policy matters, we submit, which are properly addressed to Congress. It is respectfully submitted that the law of Louisiana as to survivorship of actions should have been followed and applied by the courts below to this action pursuant to section 1988 of the Civil Rights Act, and that since plaintiff left none of the designated familial beneficiaries in whom this action could survive, this action should be dismissed.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wegmann.

ORAL ARGUMENT OF EDWARD F. WEGMANN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. WEGMANN: Mr. Chief Justice, and may it please the Court:

I would like to say at the outset in response to Mr. Justice Rehnquist's question with respect to the fact that Louisiana has the civil law and not the common law, and the adoption by the courts of the state law if the state law is hospitable to the plaintiff's action, that it is no consequence that we deal with Louisiana Civil Code and that Article 2315 of the Code is our survival statute.

All concerned agree that if you are going to interpret 1988 to mean that the state law must be applied, the statute that would be applied would be Article 2315 of the Civil Code,

and the action of the plaintiff would abate.

Very briefly stated, our position with respect to the application of the state law is that the state law applies solely and only if through the application of the state law the action will be allowed to survive, that any inhospitable state statute or state survivor statute is not to be applied because of the very simple fact that the trend and the theory of the civil rights laws is for the actions to continue despite the fact of the death of the plaintiff.

QUESTION: Then you are not arguing based on 1988, because I don't see anything there about trend or hospitable or that type of language?

MR. WEGMANN: Well, I don't think I have any doubt but to argue on the basis of 1988.

QUESTION: Well, I thought that in 1988, if you will look at your own brief on page 6, the language of the statute, that it says in effect "the common law, as modified and changed by the Constitution and statutes of the state wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be" applied. Don't you have to show that the Louisiana statute is inconsistent either with the Constitution of the United States or with a law of the United States?

MR. WEGMANN: Yes, sir, I agree with that, and this

is exactly what Judge Wisdom did, Judge Wisdom of the Fifth Circuit did in affirming the decision of the trial court.

QUESTION: Well, that may be a matter of opinion as to whether he did it or not. How would you do it?

MR. WEGMANN: I would do it in exactly the same fashion.

QUESTION: But it is inconsistent with 1983?

MR. WEGMANN: Yes, sir, because you will find that all of the circuits which have considered this question have applied the state law solely and only because that state law was hospitable to the action and allowed the action to continue. This is the only case which I have been able to locate in which the state law is inhospitable to the continuance of the plaintiff's claim, as a result of which the Fifth Circuit did not apply the Louisiana law.

QUESTION: How about a statute of limitations?

MR. WEGMANN: They had one instance, I think it was the Lefton case, in which the state statute of limitations was ten days and the court refused to apply the state statute because they said that it was ridiculous, it was not anybody's intention to deprive a citizen of their rights to a ten-day statute of limitations.

QUESTION: But you have had other cases in which more normal statutes of limitations have been applied, haven't you?

MR. WEGMANN: The more normal statutes of limitations

would be one, two, and perhaps four years, and they do vary from state to state.

QUESTION: And haven't those been applied under 1988?

MR. WEGMANN: We don't here have a question of the statute of limitations.

QUESTION: But why is survival different than the statute of limitations if you are going to turn your argument on 1988?

MR. WEGMANN: Well, the statute of limitations doesn't enter into this case because this case was filed before Shaw died.

QUESTION: Mr. Wegmann --

MR. WEGMANN: We don't have to contend with the statute of limitations.

QUESTION: Mr. Wegmann, getting back to the argument, had there been familial descendents, the Louisiana statute would not have been inhospitable, would it?

MR. WEGMANN: No, sir, it would not have been.

QUESTION: So you are saying the statute is inhospitable because of the facts of the particular case?

MR. WEGMANN: Yes, we can say that, and it is hospitable because Shaw did not leave -- Shaw was not married. Is he to be penalized because he didn't marry? Is he to be penalized because his parents died before him?

QUESTION: The statute didn't prevent him from getting

married and didn't prevent him from leaving heirs. I mean the statute is inhospitable, to use your language, solely because there were no heirs.

MR. WEGMANN: There were heirs. He died testate. But there were no familial descendents, ascendents or collateral as applied by Article 2315.

QUESTION: Well, you understand what I am talking about and that is the reason --

MR. WEGMANN: He did have a family. He did have some collaterals. He had some nephews and nieces who survived.

QUESTION: So the reason the statute is in trouble is because of him?

MR. WEGMANN: If I might finish, sir, if he had not died testate but had died intestate, there were collaterals who were there to inherit the action.

QUESTION: But that is not before us, is it?

MR. WEGMANN: No, sir, but you are asking me about --

QUESTION: All I am saying is you are saying it is because the peculiar facts of this case, this statute is unconstitutional.

MR. WEGMANN: I don't say that the statute is unconstitutional.

QUESTION: Well, what do you say? You say it doesn't bar you.

MR. WEGMANN: I say it does not bar me from continuing.

QUESTION: And if it doesn't bar you, then by what right do you continue?

MR. WEGMANN: I continue because wearing my hat as executor of Clay Shaw's succession, I have been allowed by the trial court to substitute myself as the plaintiff in this damage suit. And the trial court, in a very well-reasoned opinion, affirmed by a second well-reasoned opinion, with no emotion in it, despite the remarks of petitioner to that effect, has held that because Article 2315 of the Louisiana Code is inhospitable to the application of state law, that it doesn't apply, and we bring into play the federal common law which Mr. Justice Stewart spoke of, and the Appellate Court in its opinion made the direct pronouncement to the effect that the federal common law is alive and well, and it is the federal common law which was applied both by the trial court as well as by the Appellate Court.

QUESTION: Mr. Wegmann, on your theory that if he had left his entire estate to Ford Foundation, let us say, your legal position would be the same, would it not?

MR. WEGMANN: Yes, sir, it would.

QUESTION: But are not survivorship concepts generally, although not strictly, but generally based on some traceable connection between the decedent and --

MR. WEGMANN: And the survivors, yes.

QUESTION: -- that is true in FELA and the others?

MR. WEGMANN: The ship's statutes, as a reule, are for the protection and the taking care of the decendents or the dependents of the individual who may have been injured or killed by virtue of the negligence of some third party. Ordinarily that is the case. But as I said before, if Shaw had died intestate, there are nieces and nephews surviving him. They were beneficiaries in his will. But it so happens, as is so often the case in life, his closest friend was closer to him than those collaterals, aunts, uncles, nieces and nephews, so he left his good friend,named his good friend as the residuary legatee, which is our Louisiana term, of his succession, one of the assets of which is this cause of action.

QUESTION: Mr. Wegmann, following up on the Chief Justice's question, supposing he had left the will he did leave and had also been survived by a son, and in his will he said "I don't want my son to have any benefit from my estate," under your theory of the case, who would own the cause of action?

MR. WEGMANN: Well, your hypothetical is a little bit difficult to answer, Mr. Justice Stevens, because of the fact that in Louisiana we have what is known as the law of forced heirship, and I can only disinherit my descendents for the specific reasons which are enunciated in the code in succession of procedure --

QUESTION: Well, say you had those reasons available?

MR. WEGMANN: -- and it is next to impossible.

QUESTION: Well, it is theoretically possible, isn't it?

MR. WEGMANN: Theoretically, yes, from a practical standpoint.

QUESTION: Now, which law would prevail, the federal common law that I take it you say gives the right to the estate or the Louisiana statute that says it goes to the son?

MR. WEGMANN: I don't know that I --

QUESTION: Isn't that the kind of question --

MR. WEGMANN: I don't know if I understand your question. You are saying assume that he had a son and he disinherited that son.

QUESTION: Or maybe he just said in the will, I want this cause of action to be prosecuted by my estate, not for the benefit of my son but for the benefit of my collateral heirs. Under federal common law, would that wish prevail?

MR. WEGMANN: Yes, sir.

QUESTION: Even though under Louisiana law there was a son available who could claim under 1988?

MR. WEGMANN: Yes, assuming that he did comply with the requirements of the code in the disinheritance of the son. I have to make that assumption because we do have our law of forced heirship which we are very proud of and which is very difficult to avoid.

QUESTION: The reason I asked the question, maybe that

is an improbable hypothetical, but if we accept your theory of the case and there are -- I suppose there will be possibilities of conflict between the federal rule as to who should get the surviving cause of action and the state law. I mean a state law might provide, as I say, the son gets the claim and under your theory, as I understand it, it goes to the estate.

MR. WEGMANN: Yes, because he died testate, and using your hypothetical he said I want this claim to be prosecuted by my executor for the benefit of my residuary legatee.

QUESTION: And there is some kind of a federal basis for doing this?

MR. WEGMANN: Well --

QUESTION: For giving preference to the estate over the person that the Louisiana statute says should have the case?

MR. WEGMANN: I think we are on a tangent because we are dealing --

QUESTION: Well, I am just trying to figure out what kind of questions are around the corner if we accept your theory of the case. This is not the only case in which a plaintiff of a 1983 action is going to die, certainly.

MR. WEGMANN: I am quite aware of that.

QUESTION: Does your theory of forced heirship apply where only a parent survives?

MR. WEGMANN: Yes, sir, if the ascendent is a forced heir.

QUESTION: And the same, also if there is only a brother?

MR. WEGMANN: Sir?

QUESTION: If I recall, your statute --

MR. WEGMANN: Collaterals are not forced heirs, no. Forced heirs are ascendents and decendents.

QUESTION: Well, suppose then a sibling survived?

MR. WEGMANN: A forced heir.

QUESTION: A forced heir.

QUESTION: Mr. Wegmann, not that it applies to your case, what do you call an administrator of a will in Louisiana? It is a funny name.

MR. WEGMANN: We call it a succession. We call it the succession of Clay Shaw. We do not refer to it as an estate. We do not have a final decree as you have in the common law states. We have what is known as a judgment of possession, recognizing the heirs as such and placing and putting them in the possession of the decedent's succession.

QUESTION: Immediately?

MR. WEGMANN: Sometimes immediately, sometimes after administration, depending upon the size of the succession and the involvements in it.

QUESTION: Mr. Wegmann, the Chief Justice asked you whether your position would be the same if the estate had been left to the Ford Foundation and your answer was in the

affirmative. I suppose it would be the same also if the entire estate had been left to the Ku Klux Klan?

MR. WEGMANN: I'm afraid it would have been. It would be, yes, sir.

QUESTION: I think it would have to be.

MR. WEGMANN: Yes, sir. I have to be consistent.

QUESTION: Yes.

MR. WEGMANN: It is of no consequence who the residuary legatee of the estate is or of the succession.

QUESTION: Would not precisely be compatible with --

MR. WEGMANN: To make it even worse, Mr. Justice Powell, supposing by some strange whim of fate he had left -- he had named the very nefarious Mr. Jim Garrison as his residuary legatee, my position would have to be the same.

QUESTION: Probably the plaintiff would have dismissed the lawsuit though.

MR. WEGMANN: I'm afraid so. This plaintiff would have.

QUESTION: Mr. Wegmann, let me go back to Mr. Justice Rehnquist's question about statutes of limitation. Now, I understand there is no limitations issue in this case, but your theory, as I understand it, is that you do not look to state law if the state law does not facilitate recovery. Now, sometimes --

MR. WEGMANN: I was asked that question repeatedly in

the Circuit Court when I argued this case, and one of the justices could not, just simply couldn't believe what my response was, because I think it is just that simple, and it is a simple proposition, as is stated by Professor Theis, in this Louisiana Law Review article which I cited to you, that if the state law allows the action to survive, it is hospitable and the state law is applicable. If a state law abates the action, it is inhospitable and it does not apply.

QUESTION: But would you respond in terms of the statute of limitations. If an action is brought, say, five years after it had accrued, and there is a four-year state statute of limitations in the state, now that would tend to defeat the claim and under 1988 I had thought we would then look at the state law to see if that statute of limitations applied. Would you agree that we look at the state law in that circumstance, or would you say no because it is not hospitable?

MR. WEGMANN: I'm sure you would.

QUESTION: You would look at it?

MR. WEGMANN: Yes, sir.

QUESTION: Well, why do we look at state law in limitation situations but not in abatement situations, that is what I don't understand?

MR. WEGMANN: I can only give you what I have read of the cases, and apparently the reasoning is that where the

statute of limitations of the state is for a reasonable period of time, in Louisiana it is one year, in Mississippi I believe it is two years, as I recall over in Georgia it is four years--

QUESTION: Then why don't we apply the same test in abatement?

MR. WEGMANN: -- which is reasonable periods of time for --

QUESTION: Then why don't we apply the same test in abatement and say is the state statute dealing with survivorship a reasonable statute, if it is something that says no civil rights action shall ever survive, we obviously wouldn't look to it?

MR. WEGMANN: I think I could best give you the Appellate Court's reasoning in that regard, and that was Judge Wisdom established a three-step procedure which he said we should follow. He said is the Civil Rights Act deficient in furnishing a remedy for vindication? That is the first step. He said then if the Act is deficient, we look to state law. He then said if state law is available, we must insure that state law is not inconsistent with federal and Constitutional law. Taking that three-step procedure, he held that there was a gap because the statute doesn't provide for survival, a survival line. He said that it is deficient and we look then to the state law, but he said the state law is inconsistent because the theory of Congress in enacting the Civil Rights Acts

was to see to it that the federally guaranteed rights of the citizen were protected.

QUESTION: Is the same reasoning applicable to my four-year statute of limitations? Precisely.

MR. WEGMANN: Well, as I say, I can only refer you to the Lefton case in which the statute of limitations was ten days and the court said --

QUESTION: Well, but it has to be reasonable and neutral, we assume that.

MR. WEGMANN: I'm injecting the reasonable in there.

QUESTION: But why doesn't your argument also say we won't apply a four-year statute of limitations? I just don't follow your reasoning. Maybe I'm missing something.

MR. WEGMANN: Because the courts have said that we want this civil rights claim to go forward. I had this same problem, I didn't enjoin Garrison once, I sought to enjoin him twice. I sought to enjoin Garrison prior to the first trial. I was faced with Dombrowski. Dombrowski, this Court said, applied only to the protection of my First Amendment rights. The trial court, in granting my temporary restraining order, adopted my argument. If the central government was here to protect my First Amendment rights, why wasn't it here to protect all of my federally guaranteed rights? My first injunction request was flatly denied. We went to trial. But then when this malicious District Attorney came along subsequent to

the trial of the case, we had a forty-day trial, we had a unanimous twelve-man verdict of aquittal within less than an hour after a forty-day trial. On the very next working day, Garrison himself goes in and files a bill of information against Shaw charging that he committed perjury when he took the witness stand to defend himself and testified that he did not know, had never seen nor was he ever acquainted with Oswald. The state court refused to suppress, refused to dismiss. I went into federal court and sought to gain an injunction. Fortunately, by this time, we had Younger v. Harris and Perez v. Ladezma, and I was able to convince the trial court that I had those special circumstances which would enable that court to enjoin that second state court criminal proceeding, and the judgment in that trial court in that second injunction suit was maintained again by the Fifth Circuit, and this Court refused writs.

This is not the first time the Shaw case has been before this Court. After the first injunction suit was filed and denied, I filed a very substantial jurisdictional statement seeking relief from this Court. I have been fighting this thing since March 1, 1967, and I say to this Court that, despite counsel's statements to the contrary, sure there is emotion, this man's federally guaranteed rights were maliciously violated. This man was used as nothing more than a conduit to an adversary proceeding for the trial of the

Warren Commission report.

QUESTION: Even if we accept all that as totally true, it doesn't really reach the fundamental question in this case, does it?

MR. WEGMANN: Yes, sir, it reaches it for the reason that the intent of Congress and the intent of the courts is to prevent people like Garrison from misusing his public office, to stop conduct which is more similar to what we might term a police state than a democracy, and to protect those rights to the fullest extent, even after the death of a plaintiff.

QUESTION: The voters of Louisiana have done something about that already, haven't they?

MR. WEGMANN: Fortunately, and they are going to have an opportunity to do something about it again, because now he is running for the bench and, God willing, he will be defeated as he was the last time he ran for the bench.

Now, I had a lovely argument outlined here for you but I think that I have given you my position actually in a -- oh, let me say one more thing. Counsel for the petitioner made mention of the fact that the findings of fact in the injunction suit, where the court specifically found that Shaw's constitutional rights had been violated were not binding upon the defendants in this civil proceeding. Well, I am not here asserting that those findings are binding upon these defendants at this time. I am here telling the Court that, in addition to

the fact that you must take my complaint for the purposes of this appeal as being factually accurate in every respect, you have another basis for taking it as factually accurate and taking as a statement of fact the fact that Shaw's federally guaranteed rights were violated because it has been judicially adjudicated that such is the fact. And I submit to you that it is a simple procedure. We can theorize, we can analyze, we can analogize. If the state statute allows the action to survive, the state statute is applied, and this is what the several circuits which have considered the question have done.

The Seventh Circuit did it recently in Byrd v. Johnson, decided in December '77. If the state statute is inhospitable, it does not apply, and we use this federal common law which is alive and well, and I submit to you --

QUESTION: And this Court of Appeals is the only one to have applied that second doctrine, isn't it?

MR. WEGMANN: So far as I know, yes, sir, finding that the state law was inhospitable and hence refused to apply the state law, and instead applied the federal common law. I submit that the petition should be denied.

Thank you.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Monroe?

MR. MONROE: We submit the matter.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The

case is submitted.

[Whereupon, at 2:58 p.m., the case in the above-entitled matter was submitted.]

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