

Date of Meeting: July 24-25, 1959

Date of Memo: July 17, 1959

Memorandum No. 6

Subject: Study #33 - Survival of Tort Actions

Attached is a draft of a recommendation of the Law Revision Commission relating to the survival of tort actions, as redrafted in light of the action taken and suggestions made by the Commission at the June meeting.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

RECOMMENDATION OF CALIFORNIA LAW REVISION
COMMISSION

Relating to Survival of Actions

Background

Under the common law and the earlier survival statutes in most jurisdictions causes of action based on physical injury to the person or on damage to intangible personal or property interests, such as reputation, privacy and the like, did not survive the death of either party. This appeared to be the law in California until 1946, when the California supreme court decided Hunt v. Authier. This and several succeeding decisions of the California courts involved the construction of Probate Code Section 574, which deals in terms only with the survival of actions for loss or damage to "property." These cases interpreted Section 574 as providing for the survival of causes of action not only for injuries to tangible property but also for physical injury to the person and for injuries to intangible personal or property interests, at least to the extent that the injured party sustained an out-of-pocket pecuniary loss as a result thereof, which they held to be an injury to his "estate."

In 1949 the Legislature enacted Civil Code Section 956 which specifically provides for the survival of causes of action arising out of wrongs resulting in physical injury to the person but limits to some extent the damages which may be recovered. At the same time Probate Code Section 574 was amended to provide that it does not apply to "an action founded upon a wrong resulting in physical injury or death of any person." It

appears to have been the intention of those sponsoring this legislation to limit the effect of Hunt v. Authier and succeeding cases by confining the survival of actions for injuries to the person to those based on physical injuries, as provided in Civil Code Section 956.

The opinion in a recent district court of appeal decision indicates, however, that the courts may hold that while Probate Code Section 574 as construed in Hunt v. Authier is no longer applicable to cases involving physical injuries to the person, it continues to have the effect of providing for the survival of all other causes of action for wrongs to the person or to property if and to the extent that they result in pecuniary loss to the plaintiff. Since it is not clear whether Section 574 will be so construed, the California law with regard to the survival of causes of action is in an uncertain and unsatisfactory state, particularly with regard to such actions as malicious prosecution, abuse or malicious use of process, false imprisonment, invasion of the right of privacy, libel, slander and the intentional infliction of emotional distress. These actions clearly do not survive under Civil Code Section 956 but they may survive under Probate Code Section 574 to the extent that the plaintiff has incurred a pecuniary loss. Because of these uncertainties the California Law Revision Commission was authorized and directed to undertake a study to determine whether the law in respect of survivability of tort actions should be revised.

What Tort Actions Should Survive

The Commission has concluded that with certain specific exceptions discussed below all tort causes of action should survive the death of either

party, whether the cause of action is based on injury to tangible property, on physical injury to the person or on injury to intangible personal or property interests.

When a person dies society and thus the law is faced with the problem of what disposition should be made of the various valuable economic rights which he held at his death and, conversely, the various claims and obligations which existed against him. Any of various solutions to this problem might have been adopted. The general answer which has in fact evolved has been that most valuable rights held by a decedent at the time of his death, whether they be rights in specific tangible property or claims against others, pass to his estate or heirs and may be exercised or enforced in much the same manner as if he were yet living. Conversely, his estate is held answerable for most valid claims which existed against him. In effect, the estate and thus the heirs and devisees stand in the shoes of the decedent. Historically, the most important exception to this principle has been that some tort causes of action do not survive. The Commission believes that no substantial basis exists for distinguishing those relatively few tort actions which do not now survive from the majority which do. The failure of these actions to survive at common law appears to rest in large part on nothing more than the continued application of the ancient maxim that "personal actions die with the person."¹ This maxim merely states a largely meaningless conclusion, has no compelling wisdom on its face, is of obscure origin, and appears to be of questionable application to modern conditions.

The Commission is not persuaded by arguments which have been made against the survival of such actions as actions for libel, slander and

1. Actio personalis moritur cum persona.

invasion of the right of privacy based on the allegedly speculative and noncompensatory nature of the damages involved. Even if these arguments were sound, they appear to be more properly relevant to the question of whether such causes of action should exist at all than to the question of whether they should survive. The Commission believes that so long as these actions do exist they should survive.

Limitation on Damages

The Law Revision Commission has concluded that if a cause of action survives it necessarily follows that the same damages should be recoverable by or against the personal representative as could have been recovered had the decedent lived, except where some special and substantial reason exists for limiting recovery. The Commission therefore makes the following recommendations:

The provisions in the 1949 survival legislation which limit damages recoverable by the personal representative of a decedent to those which he sustained or incurred prior to his death should be continued. When a person having a cause of action dies, all the damages he sustained as the result of the injury from which his cause of action arose have in fact occurred and can be ascertained. It would be anomalous to award his estate in addition to such damages such prospective damages as a trier of fact, speculating as to his probable life span, presumably would have awarded had he survived until judgment. Moreover, such a recovery would in many instances largely duplicate damages recoverable under the wrongful death statute.

Although the 1949 legislation does not expressly so provide, the California courts have held that punitive or exemplary damages or penalties may not be recovered against the estate of a deceased wrongdoer.

This limitation should be continued. Such damages are, in effect, a form of civil punishment of the wrongdoing defendant. When such a defendant is deceased awarding exemplary damages against his estate cannot serve this purpose and merely results in a windfall for the plaintiff or the plaintiff's estate.

The provision in the 1949 legislation that the right to recover punitive or exemplary damages is extinguished by the death of the injured party should not be continued. There are no valid reasons for this limitation. True, such damages are in a sense a windfall to the plaintiff's heirs or devisees, but since these damages are not compensatory in nature, they would have constituted a windfall to the decedent as well. The object of awarding such damages being to punish the wrongdoer, it would be particularly inappropriate to permit him to escape such punishment in a case in which he killed rather than only injured his victim.

The provision in the 1949 survival legislation that damages may not be allowed to the estate of the deceased plaintiff for "pain, suffering or disfigurement" should also be discontinued. One reason advanced in support of this limitation is that the victim's death and consequent inability to testify renders it difficult and speculative to award damages for such highly personal injuries. The Commission believes, however, that while it may be more difficult to establish the amount of damages in such a case the victim's death should not automatically preclude recovery. Other competent testimony relating to the decedent's pain, suffering or disfigurement will be available in many cases. The argument has also been made that the purpose of awarding such damages is to compensate the victim for pain and suffering which he himself has sustained and that when he is dead the

object of such damages is lost and his heirs receive a windfall. This argument suggests that the primary reason for providing for survival of actions is to compensate the survivors for a loss to or diminution in the expectancy which they had in the decedent's estate. The Commission does not agree. Causes of action should survive because they exist and could have been enforced by or against the decedent and because if they do not survive the death of a victim produces a windfall for the wrongdoer. Under this view it is inconsistent to disallow elements of damages intended to compensate the decedent for his injury merely because of the fortuitous intervention of the death of either party.

Some have also adverted to the speculative and uncertain nature of damages for pain, suffering, mental anguish and the like as an argument against permitting them to survive. But these considerations would appear to be more relevant to the question of permitting such damages to be recovered at all rather than to their survival. Moreover, not to permit survival of such elements of damage would substantially undermine the effect of the proposed new survival statute insofar as it purports to provide for the survival of such causes of action as those for false imprisonment, malicious prosecution, invasion of the right of privacy and the intentional infliction of emotional distress. Very often little pecuniary loss can be shown in such cases, the only really important element of damage involved being the embarrassment, humiliation and other mental anguish resulting to the plaintiff.

Proposed Legislation

To effectuate the foregoing recommendations the Commission recommends

that both Civil Code Section 956 and Probate Code Section 574 be repealed and that a comprehensive new survival statute be enacted as Probate Code Section 573.² (See proposed legislative bill following this recommendation.) The following points should be noted with respect to this recommended legislation:

1. It provides, with specific exceptions, for the survival of all causes of action. The Commission attempted originally to draft a statute limited to effectuating its view that all tort causes of action should survive, but encountered great difficulty in attempting to draft technically accurate and satisfactory language to accomplish this more limited objective. Legislation limited to "causes of action in tort," would create problems because there simply is not a satisfactory definition of the meaning and scope of the term "tort." Moreover, such language would raise questions as to whether actions arising from breaches of trust and purely statutory actions, whether or not "sounding in tort," were included. Similar questions would arise if a statute of limited scope were written in other terms. The Commission therefore recommends the enactment of a broad and inclusive provision, with specified exceptions which are discussed below, for the following reasons:

(a) A comprehensive survival statute would have the advantage of simplicity and clarity by eliminating difficult questions of construction which would result from the use of more restrictive language.

2. Although it involves another departure from the 1949 legislation, putting the new comprehensive survival statute in the Probate Code would appear to be logical. The original survival legislation was placed there. Probate Code §§ 573, 574. Survival legislation is located in analogous parts of the statutory law of other states. N.Y. Decedent Estate Law, Sec. 118, 119, 120; Smith-Hurd Ann. St. (Illinois) ch 3 (Probate Act) Sec. 494; Ariz. Rev. St., 1956, Sec. 14-477.

(b) Such a statute is sound in theory since, with the exception of certain specific kinds of actions discussed below, there does not appear to be any rational basis upon which to determine that some actions should survive while others do not.

(c) A comprehensive survival statute would make little or no substantive change in the present law with respect to survival of non-tort causes of action. The Commission's study of the present law has shown that actions based on contract, quasi-contract, trusts, actions to recover possession of property or to establish an interest therein, and most statutory actions already survive.³

3. Causes of action based on contract, quasi contract or judgments have long survived at common law; 1 Cal. Jur.2d 90; Prosser, Law of Torts 2 (2d ed. 1955); Heuston, Salmond on Torts 14 (12th ed. 1957). Actions for breach of trust, although technically based on neither "tort" or "contract" have been held to survive under Probate Code Section 574: *Fields v. Michael*, 91 Cal. App.2d 443, 205 P.2d 402 (1949); in addition, there appears to be some authority that equity did not recognize the maxim that personal actions die with the person and that actions for breaches of trust would survive even in the absence of statute: see *Evans, Survival of Tort Claims*, 29 Mich.L.Rev. 969, 974 (1931); see also *Robinson v. Tower*, 95 Neb. 198, 145 N.W. 348 (1914); 1 C.J.S. 182. It should also be pointed out that Section 954 of the Civil Code provides:

A thing in action, arising out of the violation of a right of property, or out of an obligation, may be transferred by the owner. Upon the death of the owner it passes to his personal representatives, except where, in the cases provided in the Code of Civil Procedure, it passes to his devisees or successor in office.

Under the above Section it has been held that the right to contest a will survives: *Estate of Field*, 38 Cal.2d 151, 238 P.2d 578 (1951); see also *Estate of Baker*, 170 Cal. 578, 150 Pac. 989 (1915). As to statutory actions, note that Civil Code Section 956 expressly applies to actions arising out of a statute; see also *Rideaux v. Torgrimson*, 12 Cal. 2d 633, 86 P.2d 826 (1939) (Workmens Compensation); *Stockton Morris Plan Co. v. Carpenter*, 18 Cal App.2d 205, 63 P.2d 859 (1936) (Unlawful Detainer). As to actions to recover property or to establish an interest therein, see *Sanders v. Allen*, 83 Cal. App.2d 362, 188 P.2d 760 (1948) (unlawful eviction); *Swartfager v. Wells*, 53 Cal. App.2d 522, 128 P.2d 128 (1942) (quiet title); *Stockton Morris Plan Co. v. Carpenter*, 18 Cal. App.2d 205, 63 P.2d 859 (1937)

Footnote 3 continued

detainer); Monterey County v. Cushing, 83 Cal. 507, 23 Pac. 700 (1890) (eminent domain); Barrett v. Birge, 50 Cal. 655 (1875) (ejectment). See also, Bank of America v. O'Shields, 128 Cal. App.2d 212, 275 P.2d 153 (1954)(quiet title action by executor); King v. Wilson, 96 Cal. App.2d 212, 215 P.2d 50 (1950)(action by estate to recover possession of property); Chase v. Leiter, 96 Cal. App.2d 439, 215 P.2d 756 (1950) (declaratory judgment action by executor).

2. The recommended legislation expressly excepts certain actions from the broad rule of survival which it would establish. The principal exception is of actions "the purpose of which is defeated or rendered useless by the death of either party." Such actions would include, for example, an action exclusively for the purpose of compelling a remainderman to restore possession of property to a life tenant now deceased, or an action to enjoin a person now deceased from pursuing an illegal course of action. It would also include actions for divorce and alimony (which do not now survive) since alimony may be awarded only in conjunction with a divorce action and by specific statutory provision in California marriage is automatically terminated by death. Nor would an action for separate maintenance survive under the proposed statute; being in effect an action for the specific enforcement of the obligation for support arising out of the marriage relationship, this action would be "defeated or rendered useless" by the husband's (or wife's) death.

It is, the Commission believes, less clear whether statutory obligations for the support of a minor child, father, mother, or adult child for the period following the decedent's death would be "defeated or rendered useless" by the death of the person on whom the obligation rests. Nor is the present law clear as to whether there is now an obligation on the part of a decedent's estate for support to be furnished after his death. There are California decisions holding that at least where provision for child support is made in a separate maintenance or divorce decree the obligation survives against the estate of the deceased parent for the period following his death.⁴

4. Taylor v. George, 34 Cal.2d 552, 212 P.2d 505 (1949); Newman v. Burwell, 216 Cal. 608, 15 P.2d 511 (1932); Estate of Smith 200 Cal. 654, 254 Pac. 567 (1927).

There is also language in some other cases indicating that such an obligation may exist even in the absence of such a decree.⁵ The Commission believes that it would be unwise in connection with this proposed legislation either to impose new liabilities for support after death on decedents' estates or to relieve such estates from liabilities which may presently exist. It has, therefore, drafted the proposed new survival statute in such a way as to preserve the status quo in this regard by providing that it does not create any right of action against an estate not otherwise existing for the support, maintenance, education, aid or care of any person furnished or to be furnished after the decedent's death.⁶

3. The report of the Commission's research consultant points out that the technical argument has been successfully made in at least one jurisdiction that in cases where the victim's injury occurs either after or simultaneously with the wrongdoer's death no cause of action comes into existence upon which a survival statute can operate because a cause

5. Myers v. Harrington, 70 Cal. App. 680, 234 Pac. 412 (1925).

6. It should be pointed out that Civil Code Section 205 provides that if a parent chargeable with the support of a child dies, failing to provide for its support and leaving it chargeable to the County or in a State institution to be cared for at State expense, the County or State may claim provision for its support from the parent's estate.

It will be noted that the proposed legislation also omits the provision of present Probate Code Section 573 with respect to survival of actions by the State or its subdivisions "founded upon any statutory liability of any person for support, maintenance, aid, care of necessaries furnished to him or to his spouse, relatives or kindred." This is because (1) such actions would be included within the broad language of the new statute insofar as the liability is incurred prior to death and (2) the language has not apparently been construed as imposing liability for support after death.

of action for personal injury cannot arise against a person who is dead and thus nonexistent. A simultaneous death provision has therefore been incorporated in the legislation recommended by the Commission to preclude the possibility of such a construction of the proposed new survival statute.

4. The proposed legislation includes amendments to Code of Civil Procedure Sections 376 and 377 and Probate Code Section 707 necessary to conform them to the proposed new survival statute. Thus, cross references to Civil Code Section 956 and Probate Code Section 574 are eliminated and replaced by references to the new statute. In addition, the specific survival provisions contained in Code of Civil Procedure Sections 376 and 377 are eliminated. Such provisions are rendered unnecessary by the all-inclusive language of the new survival statute. Moreover, the presence of such specific provisions for survival in these statutes might conceivably lead a court to hold that some other existing or future statutory cause of action does not survive because the Legislature has failed to include such specific provisions therein.

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The Commission's recommendation would be effectuated by enactment of the following measure:

An act to repeal Sections 956 of the Civil Code and 574 of the Probate Code and to amend Sections 573 and 707 of the Probate Code and Sections 376 and 377 of the Code of Civil Procedure, all relating to the survival of causes of action after death.

The people of the State of California do enact as follows:

SECTION 1. Section 956 of the Civil Code is repealed.

SEC. 2. Section 573 of the Probate Code is amended to read:

~~573. Actions for the recovery of any property, real or personal, or for the possession thereof, or to quiet title thereto, or to enforce a lien thereon, or to determine any adverse claim thereon, and all actions founded upon contracts, or upon any liability for physical injury, death or injury to property, may be maintained by and against executors and administrators in all cases in which the cause of action whether arising before or after death is one which would not abate upon the death of their respective testators or intestates, and all actions by the State of California or any political subdivision thereof founded upon any statutory liability of any person for support, maintenance, aid, care or necessities furnished to him or to his spouse, relatives or kindred, may be maintained against executors and administrators in all cases in which the same might have been maintained against their respective testators or intestates.~~

573. Except as provided in this section no cause or right of action shall be lost by reason of the death of any person. An action may be maintained by or against an executor or administrator in any case in which the same might

have been maintained by or against his decedent; provided, that this section does not apply to any cause or right of action to the extent that the purpose thereof is defeated or rendered useless by the death of any person, nor does this section create any right or cause of action, not otherwise existing, against an executor or administrator for the support, maintenance, education, aid or care of any person furnished or to be furnished after the decedent's death.

In an action brought under this section against an executor or administrator all damages may be awarded which might have been recovered against the decedent had he lived except penalties or punitive or exemplary damages.

When a person having a cause or right of action dies before judgment, the damages recoverable by his executor or administrator are limited to such loss or damage as the decedent sustained or incurred prior to his death.

This section is applicable where a loss or damage occurs simultaneously with or after the death of a person who would have been liable therefor if his death had not preceded or occurred simultaneously with the loss or damage.

SEC. 3. Section 574 of the Probate Code is repealed.

SEC. 4. Section 376 of the Code of Civil Procedure is amended to read:

376. The parents of a legitimate unmarried minor child, acting

jointly, may maintain an action for injury to such child caused by the wrongful act or neglect of another. If either parent shall fail on demand to join as plaintiff in such action or is dead or cannot be found, then the other parent may maintain such action and the parent, if living, who does not join as plaintiff must be joined as a defendant and, before trial or hearing of any question of fact, must be served with summons either personally or by sending a copy of the summons and complaint by registered mail with proper postage prepaid addressed to such parent's last known address with request for a return receipt. If service is made by registered mail the production of a return receipt purporting to be signed by the addressee shall create a disputable presumption that such summons and complaint have been duly served. In the absence of personal service or service by registered mail, as above provided, service may be made as provided in Sections 412 and 413 of this code. The respective rights of the parents to any award shall be determined by the court.

A mother may maintain an action for such an injury to her illegitimate unmarried minor child. A guardian may maintain an action for such an injury to his ward.

Any such action may be maintained against the person causing the injury, ~~or if such person be dead, then against his personal~~ representatives. If any other person is responsible for any such wrongful act or neglect the action may also be maintained against such other person, ~~or his personal representatives in case of his death.~~ The death of the child or ward shall not abate the parents' or guardian's cause of action for his injury as to damages accruing before his death.

In every action under this section, such damages may be given

as under all of the circumstances of the case may be just; ~~provided,~~
~~that in any action maintained after the death of the child or ward,~~
~~damages recoverable hereunder shall not include damages for pain,~~
~~suffering or disfigurement nor punitive or exemplary damages nor~~
~~compensation for loss of prospective profits or earnings after the date~~
~~of death.~~

If an action arising out of the same wrongful act or neglect may be maintained pursuant to Section 377 of this code for wrongful death of any such child, the action authorized by this section shall be consolidated therewith for trial on motion of any interested party.

SEC 5. Section 377 of the Code of Civil Procedure is amended to read:

377. When the death of a person not being a minor, or when the death of a minor person who leaves surviving him either a husband or wife or child or children or father or mother, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, ~~or in case of the death of such wrongdoer, against the personal representative of such wrongdoer, whether the wrongdoer dies before or after the death of the person injured.~~ If any other person is responsible for any such wrongful act or neglect, the action may also be maintained against such other person, ~~or in case of his death, his personal representatives.~~ In every action under this section, such damages may be given as under all the circumstances of the case, may be just, but

shall not include damages recoverable under Section 573 of the Probate 956-of-the-Civil Code. The respective rights of the heirs in any award shall be determined by the court. Any action brought by the personal representatives of the decedent pursuant to the provisions of Section 956-of-the-Civil-573 of the Probate Code may be joined with an action arising out of the same wrongful act or neglect brought pursuant to the provisions of this section. If an action be brought pursuant to the provisions of this section and a separate action arising out of the same wrongful act or neglect be brought pursuant to the provisions of Section 956-of-the-Civil 573 of the Probate Code, such actions shall be consolidated for trial on the motion of any interested party.

SEC 6. Section 707 of the Probate Code is amended to read:

707. All claims arising upon contract, whether they are due, not due, or contingent, and all claims for funeral expenses and all ~~claims for-damages-for-physical-injuries-or-death-or-injury-to-property or-actions~~ provided for in ~~Section-574-of-this-code,~~ Section 573 of the Probate Code must be filed or presented within the time limited in the notice or as extended by the provisions of Section 702 of this code; and any claim not so filed or presented is barred forever, unless it is made to appear by the affidavit of the claimant to the satisfaction of the court or a judge thereof that the claimant had not received notice, by reason of being out of the State, in which event it may be filed or presented at any time before a decree of distribution is rendered. The clerk must enter in the register every claim filed, giving the name of

the claimant, the amount and character of the claim, the rate of interest, if any, and the date of filing.