

8/11/60

Memorandum No. 71(1960)

Subject: Study No. 33 - Survival of Causes of Action

The Recommendation on Survival of Causes of Action herewith is presented to the Commission for final approval prior to printing the Recommendation and Study. This Recommendation and Study is scheduled to be printed after the August meeting of the Commission. A copy of the Recommendation (including the proposed legislation) is attached as Exhibit I. Revisions in the Recommendation proposed by the staff for approval by the Commission are shown by strike-out and underscoring.

Background.

The Commission has not yet received an official report on this recommendation from the State Bar although it was sent to the Bar on July 31, 1959. However, the Commission has received and considered an informal interim report from the State Bar Committee on Administration of Justice. Also, representatives of the Commission have met with representatives of the State Bar Committee to discuss the recommendation. Certain technical changes were suggested in the informal report and at the meeting; these changes have either previously been accepted or rejected by the Commission or will be considered in this memorandum.

The informal interim report and meeting also disclosed that there is a disagreement between the Commission and the State Bar Committee on two basic policy questions:

(1) The form of the statute -- the Commission recommends a comprehensive survival statute covering every type of cause of action save for

those covered by specific and general exceptions; the State Bar Committee prefers a statute amending existing law to state specifically those causes of action that do not now survive but which will survive under the proposed legislation.

(2) The recommendation of the Commission to allow recovery of damages for pain, suffering, embarrassment, humiliation and the like suffered by a decedent.

After considering the informal report of the State Bar Committee, the Commission reaffirmed its position on the two basic differences between the Commission and the Committee. An interim report by the State Bar Committee was then submitted to the Board of Governors bringing these two basic differences between the Commission and the Committee to the Board's attention and requesting instructions from the Board with respect thereto. The Board considered the informal report but decided not to take any action on it. It seems unlikely that the State Bar Committee will change its views either now or after the Committee's final report is submitted to the Board of Governors. We have no indication as to what position the Board of Governors of the State Bar will take on this recommendation.

Attached as Exhibit II is a list of statutes that was prepared by the Committee on Administration of Justice as a part of its research on the effect of the comprehensive survival statute recommended by the Commission. This list is included here for your information and consideration in connection with the Commission's proposed legislation.

Matters to be considered before Recommendation is approved for printing.

The following matters should be considered before the Recommendation is approved for printing:

1. The State Bar Committee objects to Probate Code Section 707 as revised by the Commission. The text of the revised section is set out below. The Commission's revisions are indicated by strike-out and underscoring.

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, . . .

The State Bar Committee is concerned that the proposed revision of Section 707 will require the filing of numerous claims that are not presently required to be filed. The Commission previously considered this point and determined that it was not the intent of the Commission to require the filing of additional claims; in proposing the revision to Section 707 the Commission merely intended to make a technical, conforming amendment. At the time the Commission considered the point raised by the State Bar, the Commission agreed to defer action pending receipt of a suggested revision of Section 707 from the State Bar Committee. No such revision has been received. It appears unlikely that one will be submitted in view of the full agenda of the State Bar Committee.

The following revision of Section 707 is suggested as a substitute for the presently proposed revision to this section:

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 to or death of a person or injury to property [~~ex-actiens-provided-for-in Section-574-of-this-code~~], and all claims against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken or carried away or converted to his own use, the property of another person or committed any trespass on the real property of another person, 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,

The language inserted is substantially that of Section 574 of the Probate Code and is necessary because the repeal of Section 574 is recommended by the Commission. The word "physical" is deleted because not only physical injuries to the person but also other injuries to the person (such as pain, suffering, etc.) will survive under new Section 573.

2. The Commission has previously approved the principle that the proposed legislation be made applicable to any cause or right of action that survives where the cause or right of action arose before, but death occurred after, the effective date of the act.

The following effective date provision -- Section 8 of the proposed bill -- is submitted for Commission consideration:

SEC. 8. This act applies to all causes or rights of action heretofore or hereafter arising but nothing in this act shall be deemed to revive any cause or right of action that has been lost by reason of the death of any person prior to the effective date of this act.

If the above section is approved, the Commission may wish to add a statement in the recommendation concerning the application of the proposed legislation to causes of action existing on the effective date of the act. The following paragraph has been inserted in the recommendation set out in Exhibit I:

5. A provision is included in the proposed legislation to provide that a cause or right of action survives where the cause or right of action arises before, but the death occurs after, the effective date of the proposed legislation.

When the Commission previously considered a provision of this type, a question was raised as to whether such a provision would be constitutional.

16 C.J.S. Constitutional Law § 264 states:

An act providing for the survival of actions on the death of a party in cases where, under the previous law, such actions abated, even though made applicable to a cause of action already pending, or merely accrued, prior to its passage, is constitutional as applied to cases in which the death of a party occurs after the passage of the act; but it is beyond the power of the legislature to revive an action which has abated prior to the passage of the statute. (citations omitted)

A somewhat similar problem arose when Section 956 of the Civil Code -- the 1949 survival statute -- was enacted without an effective date provision. In Lebkicher v. Crosby, 123 Cal. App.2d 631 (1954) and Smith v. Finley, 112 Cal. App.2d 599 (1952), it was held that where Civil Code Section 956 (providing for survival of actions for personal injuries) was in effect on the date of the tortfeasor's death, the cause of action survived even though the section was not in effect on the date of the accident causing the injury. In neither case, however, did the court discuss the question of the constitutionality of this application of the statute.

3. The office of the Legislative Counsel suggested three revisions in the form of the proposed legislation. See Exhibit III. Two of these suggestions have been incorporated in the draft bill; one suggestion has not -- i.e., the suggestion that the word "as" be added to the last paragraph of amended Section 573 so that it would read "as if his death had not preceded."

4. Page 10 of the recommendation is substantially revised in Exhibit I. The revisions delete references to actions for alimony and separate maintenance as being actions the purpose of which is "defeated or rendered useless" by the husband's (or wife's) death.

5. Other revisions have been made in the recommendation set out in Exhibit I. These revisions are indicated by underscoring and strike-out.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

(33)

EXHIBIT I

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; Frosser, 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

(unlawful 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." This language is taken from the Connecticut survival statute.^{3a} [~~Such actions~~] It 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 actions for alimony separate maintenance and to enforce statutory obligations for the support of a minor child, [~~father, mother,~~] or parent or adult child for the period

3.(continued)

(unlawful 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).

3a. Conn. Gen. Stat. 1958, Sec. 52-599.

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 to a minor child, parent or adult child. 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 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

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).

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.

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 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 and cross references to Probate Code Section 574 are eliminated and replaced by language describing the claims now covered by Probate Code Section 574. In addition, the specific survival provisions contained in Code of Civil Procedure Sections 376 and 377 are eliminated and Vehicle Code Section 17157, a specific survival provision, is repealed. [~~Such~~] These specific survival 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.

5. A provision is included in the proposed legislation to provide that a cause or right of action survives where the cause or right of action arises before, but the death occurs after, the effective date of the proposed legislation.

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

An act to repeal Section 956 of the Civil Code, and to repeal Section 574 and to amend Sections 573 and 707 of the Probate Code, and to amend Sections 376 and 377 of the Code of Civil Procedure, and to repeal Section 17157 of the Vehicle Code, 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.

[956.- A-thing-in-action-arising-out-of-a-wrong-which-results-in-physical injury-to-the-person-or-out-of-a-statute-imposing-liability-for-such-injury shall-not-abate-by-reason-of-the-death-of-the-wrongdoer-or-any-other-person liable-for-damages-for-such-injury, nor-by-reason-of-the-death-of-the-person injured-or-of-any-other-person-who-owns-any-such-thing-in-action.--When-the person-entitled-to-maintain-such-an-action-dies-before-judgment,-the-damages recoverable-for-such-injury-shall-be-limited-to-loss-of-earnings-and-expenses sustained-or-incurred-as-a-result-of-the-injury-by-the-deceased-prior-to-his death,-and-shall-not-include-damages-for-pain,-suffering-or-disfigurement, nor-punitive-or-exemplary-damages,-nor-prospective-profits-or-earnings-after the-date-of-death.--The-damages-recovered-shall-form-part-of-the-estate-of the-deceased.--Nothing-in-this-article-shall-be-construed-as-making-such-a thing-in-action-assignable.]

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.~~]

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 damages awardable under Section 3294 of the Civil Code or other damages imposed primarily for the sake of example and by way of punishing the defendant.

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, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had he lived.

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.

~~[574.--Executors-and-administrators-may-maintain-an-action-against-any person-who-has-wasted,-destroyed,-taken,-or-carried-away,-or-converted-to his-own-use,-the-property-of-their-testator-or-intestate,-in-his-lifetime, or-committed-any-trespass-on-the-real-property-of-the-decedent-in-his-life-time;-and-any-person,-or-the-personal-representative-of-any-person,-may maintain-an-action-against-the-executor-or-administrator-of-any-testator-or intestate-who-in-his-lifetime-has-wasted,-destroyed,-taken,-or-carried-away, or-converted-to-his-own-use,-the-property-of-any-such-person-or-committed-any trespass-on-the-real-property-of-such-person.--This-section-shall-not-apply to-an-action-founded-upon-a-wrong-resulting-in-physical-injury-or-death-of any-person.]~~

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-ner punitive-or-exemplary-damages-ner-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 to or death of a person or injury to property [~~as actions provided for in Section 574 of this code~~] and all claims against the executor or administrator of any testator or intestate who in his lifetime has wasted, destroyed, taken or carried away or converted to his own use, the property of another person or committed any trespass on the real property of another person, 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.

SEC. 7. Section 17157 of the Vehicle Code is repealed.

~~[17157. -- No action based on imputed negligence under this chapter shall abate by reason of the death of any injured person or of any person liable or responsible under the provisions of this chapter. -- In any action for physical injury based on imputed negligence under this chapter by the executor, administrator, or personal representative of any deceased person, the damages recoverable shall be the same as those recoverable under Section 956 of the Civil Code.]~~

SEC. 8. This act applies to all causes or rights of action heretofore or hereafter arising but nothing in this act shall be deemed to revive any cause or right of action that has been lost by reason of the death of any person prior to the effective date of this act.

8/8/60

EXHIBIT II

BUSINESS AND PROFESSIONS CODE

- 1505.5 (Dentistry) - Ten or more license holders can apply for injunctive
2436 (Medicine) relief for offenses against the chapter.
- 4381 (Pharmacy) Gives Board right to civil action to recover penalties prescribed by the chapter. Can also proceed by criminal complaint. District Attorney to conduct all actions and prosecutions upon request of Board. (Penalties consist of (1) fines in connection with misdemeanor violations and (2) 4094 - penalty of \$5 for failure to notify Board of change of name and address and similar infractions)
- 7071.5 (Contractors) Gives right of action to persons injured. Action is on bond (running to state) or cash deposit.
- 7398 (Schools of Cosmetology and Electrology) Gives right of action on bond against school and surety to any person injured or damaged by any act of the school; includes costs, and reasonable attorney fee.
- 7547 (Private Detectives) Gives right of action on bond or cash deposit (7548) to every person injured by wilful, malicious or wrongful act.
- 8693 (Structural Pest Control Operators) Must carry liability insurance (8692) or in lieu thereof file a bond or cash deposit.
- 8968 (Yacht & Ship Brokers) License fee paid in advance to be returned if fails to pass examination.
- 9547.1 (Cleaners, Dyers & Pressers) Bond; gives action in court upon bond to recover damages not in excess of \$100 (9547.4 - bearer bonds or cash in lieu of surety bond).
- 9702.2 - .3 (Cemetery Brokers) Requires filing of bond running to state conditioned upon payment of all damages suffered by person damaged or defrauded and gives right of action against broker to any person who is injured by failure to perform duties or comply with certain statutory provisions.

- 10297.8 (Real Estate) Commissioner may require restricted licensee to file bond to protect persons or classes of persons with whom he deals.
- 10305 (Real Estate) Gives action to "principal" where "advertising agent" has misapplied an advance fee in violation of trust a/c provisions and Commissioner's regulations pertaining thereto - treble damages and reasonable attorney fee.
- 10540 (Mineral, Oil & Gas Brokerage) Surety bond requirement - injured party can sue surety for damages.
- 11542 (Subdivision maps) Gives any person, etc., right to file an action to enjoin a proposed subdivision or sale in violation of chapter.
- 11701 (Subdivision land exclusion law) Court, upon application, can cause land to be excluded from a subdivision or tract.
- 12808 (Terminal Weighing) Gives action on bond to person aggrieved.
- 14301 (Trade Marks) President of Trade Union may prosecute, in his own name, any action or proceeding he deems necessary to protect trade mark or rights or power accruing from use thereof (14300 gives injunctive relief).
- 14438 (Trade names - Container brands) Gives any registrant treble replacement cost of new containers, equipment or supplies and costs, including reasonable attorneys fees (when containers, etc., are used in violation of the article).
- 14494 (Trade names) Provides for recovery of actual damages for unauthorized use of trade name in certain situations (14493 gives injunctive relief).
- 16221 (State licensing) Gives every officer by or for whom any fee, tax or charge imposed by statute is collected authority to bring suit in name of state against any taxpayer failing to pay any sum due upon the fee, tax or charge (other than on a judgment for tax on realty).
- 16750 (Restraint of Trade) Gives a right of action to double damages and costs of suit to anyone injured in business or property by anything declared unlawful or forbidden by the chapter.
- 16754 (Restraint of Trade) Violators of chapter, after notice from attorney general, must forfeit \$50 per day which may be recovered in the name of the state. Attorney general or district attorney prosecutes for recovery of forfeit.

- 16804 (Combinations to obstruct sale of livestock) Violator of chapter liable to any person aggrieved to full amount of damages.
- 16904 (Fair trade act) Selling, etc., below contract price is actionable at the suit of any person damaged thereby.
- 17070 (Unfair trade practices) Gives any person or trade association right to enjoin any violation of chapter and in addition, recovery of damages (actual damages - 17082).
- 17765 (Trading Stamp Companies) Requires filing of bond with Commissioner of Corp. and (17766) gives right to holder of unredeemed stamps to file complaint with Commissioner who then can file suit in court for amount of unredeemed stamps if company doesn't redeem.
- 17778 (Trading stamp companies) Gives superior court power to enjoin any violation of chapter upon complaint of any interested person.
- 18413 (Special business regulations - auto) Gives person injured by violator of chapter double damages.
- 18451 (Special business regulations - auto dealers) Gives purchaser of auto treble damages from seller who accepts assignment of insurance policy and doesn't credit rights to buyer.
- 24752 (Alcoholic Beverages - Fair trade contracts) Gives right of action to person damaged by unfair competition (defined).
- 25372 (Alcoholic Beverages - Seizures) Any officer, employee or agent of the Department of Alcoholic Beverage Control who disposes of seized alcoholic beverages or other property other than as directed by court order or under provisions of this division is liable to state in a civil action.

NOTE: The following types of provisions have not been listed herein:

1. Criminal provisions (i.e., those making violation of section, chapter, etc., a crime and providing for fines and jail sentences for violation thereof).
2. Penalties for failure to pay license fees etc., (e.g., 3152 - Optometry) unless an action is given for recovery thereof (i.e., see under 4381 above).

LABOR CODE

Sect.

- 96-104
(incl.) Provide for assignment to the Labor Commissioner of specified claims and liens of employees for prosecution of actions.
- 203 Gives action for willful failure of employer to pay discharged or quitting employee.
- 210 Provides penalty to be recovered by Division of Labor Law Enforcement in civil action for failure to pay wages as required by sects. 204 & 205.
- 218 Provides that nothing in article limits the right of any wage claimant to sue directly or through an assignee for any wages or penalty due him under article (sects. 200-229).
- 229 Provides that actions under article may be maintained without resort to arbitration.
- 256 Gives Labor Commissioner right to impose civil penalty under terms of sect. 203 in the case of seasonal labor.
- 972 Gives C/A for double damages to any person aggrieved by violation of sect. 970, prohibiting influencing or persuading a person to change locality for work through knowingly false representations.
- 1054 Makes former employer who by misrepresentation prevents employee from obtaining subsequent employment liable to employee for treble damages.
- 1105 Provides that nothing in chapter shall prevent employee coerced in regard to political activity from recovering damages from employer.
- 1116 Any person injured by jurisdictional strike may obtain injunction "in a proper case" and recover damages.
- 1122 Organizer of employer-dominated group is liable for damages to any person injured thereby.
- 1133 Any person injured or threatened with injury by "hot cargo" or secondary boycott may obtain injunction "in a proper case" and recover damages.

- 1194 Woman or minor receiving less than the minimum wage may recover unpaid balance and costs.
- 1195 Authorizes Division of Industrial Welfare, following complaint, to "take all proceedings necessary" to enforce the payment of a wage not less than the minimum wage.
- 1197.5 Makes employer who pays females less than males for the same work liable to employees for difference.
- 1693 Authorizes Labor Commissioner to take assignment of and prosecute actions against farm labor contractors for persons financially unable to employ counsel.
- 1700.40 Requires artists' manager to repay fee to artist who fails to obtain the employment for which the fee was paid; requires double payment if repayment not made within 48 hours after demand.
- 1700.41 Requires reimbursement by artists' manager where artist sent beyond city limits in unsuccessful effort to obtain employment.
- 1729 Gives contractor the right to recover from a subcontractor penalties paid by the contractor on account of subcontractor's failure to comply with chapter (re public works projects).
- 1775 Permits awarding body or Division of Labor Law Enforcement, in public works contracts where not enough is due contractor to cover the amount of penalties forfeited by him, to bring an action to recover the penalties.
- 2800, 2802 Indemnification of employee by employer for losses or expenses due to employer's lack of ordinary care or obedience to employer's directions.
- 2803 Action by personal representative for wrongful death of employee.
- 2865 Employee liable for culpable degree of negligence; employer liable for only services properly rendered.
- 2923 Continuance of service after employer's death or incapacity -- successor to compensate.
- 2926, 2927 Dismissed or quitting employee entitled to compensation up to time of termination.

- 3084 Party to apprenticeship agreement aggrieved by order of Apprenticeship Council may bring proceeding in court on questions of law.
- 3201-6149 Workmen's Compensation.
- 3601 Exclusive remedy.
- 3850-3854 Gives employer right of subrogation against third parties.
- 6115 Gives State Fund right of subrogation for payments to state employees.

Note: A section-by-section check of rights under Workmen's Compensation was not made. Some rights survive at present; e.g. lump sum awards vest when award made, and may be recovered by heirs; payments which have accrued may be recovered. If proposed statute covers Workmen's Compensation there are problem areas; e.g. future payments which at present may not be recovered by heirs; widow's death benefit in event of widow's death before award.

- 6604 Employee laid off or discharged for refusing to do work which involves violation of code safety provisions or safety order of Division of Industrial Safety has a right of action for his wages while laid off or without work.
- 7403 Person injured because quartz mine does not have proper egress has action against mine owner.
- 7404-05 Owners of quartz mine jointly and severally liable; action survives in "heirs or relatives." (re 7403).
- 7459 Person injured by noncompliance with (safety) requirements of code re coal mines has right of action.

CIVIL CODE

- 41 Minors and persons of unsound mind civilly liable but not in exemplary damages unless capable of knowing wrongful.
- 42 Minors must enforce rights by civil action or proceeding by guardian.
- 43 Besides personal rights recognized in Government Code every person has right of protection from bodily restraint or harm, from personal insult, from defamation, and from injury to his personal relations.
- 48a (Libel) Exemplary damages if malice and no retraction.
- 49 Rights of personal relations forbid:
a. Abduction or enticement of child from parent or guardian.
b. Seduction of person under age of consent.
c. Injury to servant affecting ability to serve master, other than seduction, abduction or criminal conversation.
- 51-52 (Unruh Civil Rights Act) Gives right of action for actual damages plus \$250 for discrimination in denial of accommodations.
- 139 (Alimony etc.) "...Except as otherwise agreed by the parties in writing, the obligation of any party in any decree...shall terminate upon the death of the obligor or upon the remarriage of the other party."
- 140 Court may require reasonable security for payments including the appointment of a receiver.
- 205 If parent dies leaving child chargeable to county or State for support, the board of supervisors or director of the State Department may claim provision for its support from parent's estate by civil action, and for this purpose may have same remedies as any creditor against estate, and heirs, devisees, and next of kin.
- 956 Survival of personal injury action.
- 1033 One wrongfully employing materials of another is liable in damages (personal property).
- 1161(d) (Calif. Unif. Gifts to Minors Act) If custodian dies before minor reaches 21, the minor's guardian becomes successor custodian. If no guardian, a donor, his legal representative, custodian's legal representative, adult member of minor's family, or the minor, if 14, may petition the court for designation of a successor custodian.

1676

Parties to a contract may agree upon an amount which shall be presumed to be the amount of damage sustained from the breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.

OBLIGATIONS IMPOSED BY LAW

- 1708 Abstinance from injury to person or property of another, or infringing upon his rights.
- 1709 Deceit - damages.
- 1713 Restoration of thing wrongfully acquired.
- 1714 Responsibility for willful acts and negligence.
- 1714.1 Liab. up to \$300 for willful misconduct of child.
- 1714.5 (Defense shelters and disaster service workers) - not liable for damages unless willful.
- 1715 Other obligations are prescribed by Divisions First (Personal rights) and Second (Property rights).

UNIFORM SALES ACT (1721 - 1800)

Gives various rights and remedies in relation to contracts for sale of goods (e.g. damages, stoppage of goods in transit, action on warranty, specific performance, recission)

DEPOSIT (1813 et seq)

- 1814 Involuntary deposit by accident or emergency.
- 1845 Involuntary deposit - depositary gets no reward.
- 1846 Involuntary depositary must use, at least, slight care.
- Contains many other provisions re rights and obligations (liabilities) re deposits for hire and voluntary deposits.
- 1858 - 1858f right of civil action to any person aggrieved by violation by warehousemen, etc., of certain penal provisions (e.g. issuance of warehouse receipt without receipt of goods).
- 1859 - innkeepers liability as depositary for hire; limit of liability.

LOAN FOR USE (1884-1896)

- 1889 Borrower must repair damages to thing lent.
- 1893 Lender liable for damage caused by concealed defects in thing lent.
- 1894-1896 Provide for return of thing on demand or when time of loan is up. Lender liable.

LOAN FOR MONEY (Usury Law; 1912-1915)

- 1916-3 Any person paying over usury limit may, either in person or by personal representative, recover in an action at law against the person receiving the same, or his personal representative, treble the amount of the money paid.
- 2127b Carrier's liability for misdelivery of goods.
- 2128g Liability of carrier for non-receipt or misdescription of goods on bill of lading.

TRUSTS (2215-2289)

- Powers and duties to trustees, including involuntary trustees defined.
- 2287-2289 (Succession or appointment of new trustees) Method of appointment by superior court. Survivorship among co-trustees.

NOTE: RIGHTS AND OBLIGATIONS ARISING IN THE FOLLOWING CATEGORIES HAVE NOT BEEN LISTED:

1. Agency (2295 et seq)
2. Indemnity (2772 et seq)
3. Suretyship (2787 et seq)
4. Liens (2872 et seq)
Exception - 3081.9 - If charges on real estate loans are in excess of the maximum provided by statute, borrower can recover in civil action 3 times the amount of any portion of the entire charge which has been paid plus reasonable attorneys fee (2 year Statute of limitations).
5. Negotiable Instruments (3082 et seq)

PART I OF DIVISION FOURTH (3274 et seq) DEFINES THE TYPES OF RELIEF AVAILABLE WHICH ARE:

1. Compensatory relief (3281)
2. Specific and Preventative Relief (3366)

EXHIBIT III

State of California

OFFICE OF LEGISLATIVE COUNSEL
3021 State Capitol, Sacramento 14

July 20, 1960

Mr. John H. DeMouilly
Executive Secretary
California Law Revision Commission
School of Law
Stanford, California

Survival of Causes of Action - Notice
of Alibi Defense - #4208

Dear Mr. DeMouilly:

We have a few comments on the form of the tentative drafts of the bills on the above two sections.

A. Notice of Alibi Defense

(1) Section 1028.8 provides that "Nothing in this chapter prevents the defendant from testifying as to an alibi or as to any other matter." We suggest the possibility of tacking on this language at the end of Section 1028.1, with the aim of reducing the number of sections in the new chapter to be added by the bill. It may at some future date become necessary to add more sections to the chapter, and it would be desirable to avoid having to use section numbers carried out to the second decimal point.

B. Survival of Causes of Action After Death

(1) The title is legally adequate but its conventional form would be:

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

(2) To meet the requirements of Joint Rule 10, the text of Section 956 of the Civil Code, all in strike-out, should be set forth immediately below the present text of Section 1 in the draft. The same form should be followed in Section 3 of the bill.

(3) A word seems to be missing in the last paragraph of amended Section 573. It presumably should read: "as if his death had not preceded."

Very truly yours,
RALPH N. KLEPS
Legislative Counsel
By S/ Terry L. Baum
Terry L. Baum
Deputy Legislative Counsel

TLB:lz