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The Survival of Actions in Colorado

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the disadvantages of both and the advantages of neither. They are an incomplete code that is neither flesh, fowl, nor good red herring. They form a crooked splint that emasculates the flexibility of the law without even the compensating advantage of holding it straight and secure.

No glib and easy way to Utopia, the adoption of the American Law Institute Code of Criminal Procedure in place of the existing statutes would not fully meet popular criticism of criminal justice. It would, however, work a great substantive improvement in bringing the law up to the date of the society in which it exists, and achieve a desperately needed transition in mechanics from confusion to clarity, order, and practicability.

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THE SURVIVAL OF ACTIONS IN COLORADO

THE common law on the survival of actions was best expressed by the maxim *"Actio personalis moritur cum persona."* By enactment of the territorial legislature, January 10, 1868, that maxim, with the rest of the general common law as of the fourth year of the reign of James I (1607) became a part of the law of the territory which was to be the State of Colorado. Another act of the same legislature, in the same year, set out the rule of survival of actions which, with a slight modification, stands as law in Colorado today. Under the schedule to the Constitution, both acts became a part of the law of the State of Colorado. The statute declaring survival appears, as reenacted by Section 167 of the Session Laws of 1903, as Section 5383 of the Compiled Laws of 1921, reading: "All actions at law whatsoever, save and except actions on the case for slander or libel, or trespass for injuries done to the person, and actions for the recovery of real property, shall survive to and against executors, administrators, and conservators."

By the terms of this statute, the rule of the common law is reversed. Instead of *"Actio personalis moritur,"* we find the law to be "All actions . . . shall survive," and only the exceptions to the general statement of the Colorado statute are in accord with the common law. Let us then proceed to the interpretation of that statute.

Probably the most fundamental point decided under that statute is that it applies not only to "actions" in the technical sense of an action already commenced, but to "causes of action," whether action has been brought or not. The contrary apparently has never been suggested to the Colorado courts, and the first case declaring the statute to apply to causes of action, *Kelley v. Union Pacific,* 16 Colo. 455, laid down that rule apparently without realizing that it was doing so. It is said in that case (p. 458): "The act of 1868 was to prevent certain causes of action already accrued from abating by reason of the death of either of the parties, without regard to the cause of such death." The only intimation to the contrary is contained in the case of *Stratton's Independence v. Dines,* 126 Fed. 968, where in the nature of a *dictum* it is said that the statute applies only to "actions," and has no effect upon the common law rule that a cause of action, upon which action has not been brought, does not survive the death of either party. In view of the statement contained in *Kelley v. Union Pacific,* and the holdings in *DeFord v. Ins. Co.,* 75 Colo. 146, *Swartz v. Rosenkrans,* 78 Colo. 167, and other cases, it is clear that the *Stratton* case is in opposition to the proper interpretation of the statute. It is clearly settled that the terms of Section 5383 apply to causes of action, as well as actions already commenced.

With the meaning of "actions" settled, we may proceed to consider the meaning of the remainder of the statute. That consideration will resolve itself into a consideration of the exceptions contained in the statute, for the general declaration, "All actions shall survive," has been accepted at its face value by the courts, and we shall consider the exceptions in the order in which they occur.

". . . except actions on the case for slander or libel." The terms of the statute are so clear in this regard that neither of the Colorado courts, the Supreme Court and the Court of Appeals, nor the Federal court, has ever been called upon to consider them. Without argument, it seems to have been admitted that slander and libel do not survive.

". . . except . . . trespass for injuries done to the person." Under this second exception, there are two questions which arise. First, what is the meaning of the word "trespass"? And second, what is the meaning of the phrase, "injuries

done to the person"? *Kelley v. Union Pacific, supra,* presented the first of these questions to the court. In that case, the court realized that the meaning of the word "trespass" might be confined to actions which at the common law would have been actions of trespass, or it might have a broader meaning, and cover the type of action that would have been trespass on the case, as well as simple trespass. The court discussed, but did not decide, this problem, but based its decision on the ground that the action there was one in contract, and not within the exception in any case.

Munal v. Brown, 70 Fed. 967, presented this same question to Judge Hallett, sitting in the United States District Court, in such manner that it could not be avoided. He declared that, "Trespass for injuries done to the person" included an action for trespass on the case as well as an action for trespass, and dismissed an action based upon the negligence of a decedent, brought against his estate. The Colorado Court of Appeals cited and followed Judge Hallett's ruling on that point in *Letson v. Brown,* 11 Colo. App. 11, a case arising from the identical explosion.

The first question, as to the meaning of "trespass," may be regarded as settled by these two cases. The meaning of "trespass," for this purpose, includes both trespass and trespass on the case, and both die with the death of either party.

Our second question, as to the meaning of "injuries done to the person," is of greater difficulty, and has caused a great deal more trouble than has the first. The starting point is again *Kelley v. Union Pacific, supra,* containing *dictum* that depletion of an estate is an injury to the estate, and not an injury to the person within the contemplation of the statute. To that extent the *dictum* has been adopted, as will appear later, but the conclusion upon which the *dictum* was based—that depletion of an estate caused by injuries to the body and mind of its owner is properly to be considered an injury to the estate—is clearly unsupportable, and has never been accepted.

The first real light upon this subject came from *Mumford v. Wright,* 12 Colo. App. 214, a case concerned with the assignability of a cause of action for wrongful attachment of property. After stating that survivability of the cause was

the best test of its assignability, the court considered the Colorado survival statute and its application to the facts presented. It is there said, at page 217, "Torts may be divided into two classes, the first, designated as property torts, embracing all injuries and damages to property, real and personal; the second, known as personal torts, including all injuries to the person, whether to reputation, feelings, or to the body." And later, at page 218, "In our opinion, the legislature had in view upon the adoption of that statute the common law distinction then prevailing between personal and property torts and desired to permit actions on the latter to survive, . . . whilst the old rule should still prevail as to actions based upon the former character of torts."

Swartz v. Rosenkrans, supra, an action of trover, accepts the theory of *Mumford v. Wright,* that property torts survive while personal torts do not, and also the definitions of *Mumford v. Wright* as to what are personal and what property torts. It is there declared, in holding that the action survives: "This action is also in tort, arising out of a violation of the property rights of the deceased, causing a loss or damage thereto, by means of which his estate was depleted." *DeFord v. Ins. Co., supra,* follows the theory of *Mumford v. Wright* in holding that property torts survive while personal torts do not, though its holding on what constitutes a property tort is not entirely clear.

These three cases, and those of *Selkregg v. Thomas,* 27 Colo. App. 259; *Portland Co. v. Stratton's Independence,* 196 Fed. 716, and others, make it clear that tort actions, based upon trespass or trespass on the case, in which the injury or damage is to the property, survive the death of either party, while those same actions, in which the injury or damage is done to the person, die with either party.

This distinction between personal and property torts clarifies the issue to a great extent, but by no means completely, for it must still be determined what are personal torts, and what are property torts. Under the broad definitive statements of *Mumford v. Wright,* which seem to have been generally accepted, this is in most cases obvious, but there are at least two sorts of cases in which there is doubt as to which of the two classes the injuries come under.

Mumford v. Wright and *Swartz v. Rosenkrans* are both concerned, to a certain extent, with the matter of exemplary damages. The general tenor of *Mumford v. Wright,* although it is nowhere expressly so stated, is that the grant of such damages must be based upon the violation of a purely personal right, and an action whose gist is the grant of such damages must therefore be a personal tort, and does not survive. *Swartz v. Rosenkrans,* on the other hand, declares (p. 169), "There is no reason why we should not here follow the principles applicable to such class of damages in other similar suits," and allowed exemplary damages in the action by an administrator upon a tort committed against the decedent.

The cases are readily distinguishable in fact, of course, in that *Swartz v. Rosenkrans* is an action for conversion, while *Mumford v. Wright* is a special statutory action for wrongful attachment, but the reasoning of the two cases is clearly opposed. *Swartz v. Rosenkrans,* coming from the higher court, and at a later date, must of course take precedence, but there is much to be said for the attitude taken by the Court of Appeals in *Mumford v. Wright.* The matter of exemplary damages received but cursory consideration in *Swartz v. Rosenkrans.*

In all probability, the survival of the right to exemplary damages is determined by the survival of the action in which the damages are granted, but the matter cannot be regarded as conclusively settled, and it is the opinion of the writer that the Supreme Court would be willing to listen to arguments to the contrary.

The second class of cases in which the application of the rule and definitions of *Mumford v. Wright* is not quite clear is what is sometimes called "The Newer Forms of Tort Liability," involving injuries to rights of a rather anomalous character, in that they are not in the accepted sense injuries to either the person or the person's property. Such cases involve no injury to the reputation, feelings, or body, nor do they involve injuries to the property such as would be provable as damages in torts of a more classic character.

In two such cases the Colorado Supreme Court has been called upon to apply the survival statute. The first was

DeFord v. Ins. Co., supra, an action based upon the negligent failure of an insurance company to act upon an application for insurance. Upon demurrer to an action brought by the beneficiary named in the application, the court held that the action, if sustainable, must have been considered as an action for failure to discharge a duty owed to the deceased, and was not an action upon a contract, and sustained the demurrer. Therefore, the action was one in tort, and damages, if any, were to be provable as tort damages. In overruling a demurrer to action brought by the administrator, the court held that the action was one for trespass, within the meaning of the statute, but that the injuries were not injuries to the person, and the action survived to the administrator.

On the other hand, there is the case of *Clapp v. Williams,* 90 Colo. 13, an action brought for wrongful expulsion from a labor union. The death of plaintiff pending appeal made it necessary for the court to consider whether the action survived. It was there held that the action was one to recover "for the loss of good will, an asset peculiar to the plaintiff." The court held such injuries to be personal, and that the action did not survive.

The above cases are the only ones in which the court has applied the survival statute to these newer developments of the law of torts. In both cases th damages fall midway between damages to the person and damages to the property, as explained in the earlier cases. It cannot be said that the cases are in conflict, for they are not necessarily so. The better conclusion is that the law on such matters has not developed to an extent sufficient to warrant any general conclusions as to the type of injuries which are caused, and that the court must, by the pin-pricking process of judicial determination, establish a line of demarcation somewhere in the gap which the classifications and definitions of the earlier cases have left.

Such seems to be the determination of the second exception to the general law of Section 5383. The exception includes actions of trespass on the case, as well as trespass, and speaking generally, includes only injuries done to the reputation, feelings, or body, and not injuries done to the property. It is probable that the survival of the right to exemplary

damages depends upon the survival of the action upon which the right is based, but this is not certain, and there are excellent arguments to the contrary. As to the newer developments in the field of tort liability, no general statements may be made. Each action will survive or die upon its own facts, for there is scant authority on the matter.

The interpretation thus placed on this exception leaves some interesting anomalies in the law. If A negligently drives his car into that of B, causing injuries to B's person, clothes, and car, and A dies in the collision, B can recover the damages to his car and clothing from A's estate, but may have no recovery for the injuries to his person. Or, if A's car is driven by a chauffeur, C, who dies in the accident, A surviving, B may not recover from the estate of C for his personal injuries, but may recover from A, whose liability was not, so to speak, direct, but was based solely upon agency principles. But, at the same time, B may proceed against either A or the estate of C for the injuries to the car and clothing.

Lastly, we consider the third exception, ". . . except . . . actions brought for the recovery of real estate." The action covered by this exception seems to be contained in Chapter 23, and the latter part of Chapter 22, of Courtright's Mills Annotated Code, 1933. A consideration of such provisions of the code as relate to the survival and abatement of that action is of course necessary to a proper determination of the meaning of the exception.

Section 15, Courtright's Mills Annotated Code, 1933, provides that an action which survives shall not abate because of the death of either party during suit. Section 306 declares that the action for the recovery of real property shall not abate by the death of any or all parties, but may be continued against their heirs, representatives, or successors (or for such parties). Under the survival statute and Section 15 of the code, the action would abate; under Section 306 of the code, it specifically does not abate. There is an apparent conflict, but considering the survival statute to be substantive, and the code provisions to be procedural, we may reach a fair rationalization. Upon the death of either party during the pendency of suit, the action dies, under the statute, but the

interest of the deceased party passes to his heirs, representatives, or successors in interest at the moment of the death, and since this interest comes by inheritance, it is exactly the same as that of the deceased. Therefore, in order to avoid the expense and delay, both to the litigants and the court, which would be occasioned by the bringing of a new action on the identical facts and rights, the procedural law, expressed by the code, provides that the old suit may be continued. Viewed technically, this is not a continuation of the prior suit, but is the substitution of a new one, exactly on the footing of the old. The terms of the survival statute are not expressly overcome, although it must be admitted that the effect of this procedure is to overcome them in substance.

Section 293, Courtright's Mills Annotated Code, 1933, provides that the termination of the right of a plaintiff pending action shall not abate the action, but that he may have a verdict for damages. Considered in the light of the conclusion above, and assuming that the death of a plaintiff is a termination of his right within the meaning of the section, the conclusion is that this action is of a dual character, part for the recovery of the realty, part for damages for its detention. Section 293, allowing a recovery for damages only, would so imply. This section, and those previously considered, seem to indicate, in a case of death of plaintiff with suit pending, that his estate may recover damages for the withholding of possession, while the successor to his interest in the property may recover the possession. Likewise, in case of the death of a defendant, the person or persons entitled to recover as above may recover against the estate for the withholding of possession, and against the successor to the deceased's interest may recover the possession itself.

These are admittedly the bare conclusions of the writer, for neither Section 293 nor 306 has been considered in connection with the survival statute, so far as we are able to ascertain. We hazard no opinion as to whether such reasoning would stand before the questioning eye of the court.

Such seems to be the meaning of Section 5383 of the 1921 laws—clear in most cases, uncertain and confused on a few points, and completely open on others.

RICHARD P. BROWN,
Class of 1935.

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The Denver Bar Association is conducting a campaign to take vigorous action to suppress the unlawful practice of law in the City of Denver.

At the present moment in Denver many laymen are unlawfully preparing deeds, wills and legal papers of all kinds and giving legal advice. Laymen are prosecuting actions and appearing for corporations, individuals and agencies in the justice courts and other courts. These and many other practices must be stopped.

The success of this campaign must depend to a very large extent upon the interest and cooperation of each member of the Bar. It is to your interest to see that the practice of law in Denver is carried on only by duly licensed and authorized lawyers. The committee on unlawful practice of the law is making every effort to ferret out the various unlawful practices. However, although it can do much in that regard, it can do infinitely more if each member of the Bar will immediately communicate to the committee any information he may obtain concerning the unauthorized practice of law by any individual, agent, copartnership or corporation.

If any such practices are brought to your attention, will you kindly communicate such information at once to the undersigned?

Very truly yours,

MILTON D. GREEN,
Chairman, Committee on
Unauthorized Practice of Law.