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SURVIVAL OF CLAIMS FOR AND AGAINST EXECUTORS AND ADMINISTRATORS

The unfortunate condition of our law regarding the survival of claims both against and in favor of the personal representative has been frequently remarked upon.\(^1\) It is arguable that a policy which would support a general survival of claims in favor of a personal representative would not exist where the situation is reversed, and the wrongdoer has died in the lifetime of the claimant. The action of trespass was related to criminal appeals, and since a man cannot be punished in his grave, this action did not survive under the common law. To the extent then, that a recovery is vindictive, the maxim that personal actions die with the person might be held to support a desirable policy. It may be argued that if the claimant cannot enjoy the recovery \textit{in sua persona propria}, there should be no vicarious enjoyment of the proceeds of a recovery, yet it is believed that our modern concept of the proprieties tends to regard vicarious enjoyment as a reasonable substitute for personal enjoyment. If the wrongdoer has died, it can scarcely be called a penalty upon his legatees and distributees to take from them what would otherwise be a windfall. As between the injured plaintiff and them, the former may well have the greater equity.

While much has been written upon the subject of survival, and changes from the common law rule have occurred, still it seems worth while to study the American and English decisions as a background for the further study of American statutes on survival. This paper was originally intended to be a discussion of the cases where the wrongdoer was dead. That is to say, interest was directed toward the problem of the obligations of

the representative rather than toward the assets of the estate. It is impossible, however, to deal with this type of obligations without also dealing with this type of assets, although writers of treatises and casebooks may find it necessary to continue to examine them separately as a matter of classification.

This discussion then, deals with the following classes of cases:

I. CONTRACTS.
   1. Those contracts involving ordinary business transactions breached before death. This problem is quite different from the question whether death relieves the parties from further obligations where no breach prior to death has occurred.\(^3\)
   2. Obligations arising from judgments including decrees for alimony where the alimony is in arrears.
   3. Implied promises such as the promise of a physician and of an attorney to use due skill; of a seller that the article sold is wholesome; of an employer that the place of labor is safe and the tools are not defective; of a carrier to carry safely, etc.
   4. Breach of promise of marriage contracts.
   5. Quasi-contractual obligations arising generally from unjust enrichment where the gravamen of the complaint is grounded in fact in tort, but, as it is said, the complainant may waive the tort and sue in contract.

II. TORTS.
   1. Claims that fall under the old classification of trespass and case involving injury to property direct and indirect. These claims died with the person at common law, but were made to survive under the Statute of 4 Edward III (1330) and the equitable interpretation of it. There were also the additional statutes of 1357 and 1833 and others of minor importance.
   2. (a) Trespasses to the person (intended and unintended but negligent injuries) which are frequently accompanied with (b) Incidental pecuniary loss.
   3. Injuries to the person, not amounting to physical injuries, such as slander and libel, criminal conversation, malicious prosecution and false imprisonment, which violate the more intangible interests of personality.
   4. Claims arising as a consequence of fraud and misrepresentation, where there has been a pecuniary loss to the claimant but no injury to specific property, and where an action in indebitatus assumpsit will not lie.

I. CONTRACTS.
   1. In the ordinary case the contract action survived. Therefore the maxim regarding *actio personalis* was given a special meaning and applied only to choses of a tortious origin. It would accordingly seem that the rule of non-assignability of choses could not have had great influence in the development and interpretation of the maxim. Contract claims survived long

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\(^3\)These latter cases are more fully presented in an article in 7 New York Law Quarterly Review 17 (1929) entitled "The Contractual Obligations of Personal Representatives."
before the statute gave a remedy in trespass to the executor and long before assignability of contract rights came to be recognized.\(^3\)

So actions of covenant and of assumpsit survived.\(^4\) Yet some did not survive. It seems strange that one who has advanced money for the instruction of his son in a trade, cannot recover it back if the master died without giving the instruction, but such was the English rule.\(^5\) Williston suggests that the ground for the holding is perhaps that the payment by the father was not strictly for the instruction, but was paid in exchange for the chance of instruction; but he does not regard this theory as tenable in fact.\(^6\) The court urged that the premium was not apportionable, and that his executor continued liable for maintenance, and it cannot be known how much the master would have lost if the apprentice had died.

So also there run in favor of a representative, implied promises of a life tenant to make repairs;\(^7\) claims for rent in arrears;\(^8\) and contracts to renew leases.\(^9\) In many such cases the issue of survivability may in fact not be raised since the question whether performance by or in favor of the personal representative is excused by death may be the issue. The distinction between survival of contract obligations where the contract was breached and the excusing of performance because of death, should always be borne in mind.

2. Judgments; Arrears of Alimony.

Obligations survived both in favor of and against representatives based on a judgment,\(^10\) classified by Blackstone as cons-

\(^4\) Raymond v. Fitch, 2 Crampton, Meeson & Roscoe 588 (Exch. 1835) (not to fell trees); Hamilton v. Wilson, 4 Johns. 72 (N. Y. 1809) (covenants of seisin not running with the land). Farrow v. Wilson, L. R. 4 C. P. 744 (1869); Hall v. Wright, El. B. & El. 765 (994 Ex. Ch. 1869), and Siboni v. Kirkman, 1 M. & W. 418 (Exch. 1836), illustrate contracts regarded as personal which were breached by death and so the personal representative was excused. These cases accordingly do not raise the survival issue where a contract is breached otherwise than by death.
\(^5\) Whitcup v. Hughes, L. R. 6 C. P. 78 (1871), (1385); Ferns v. Carr, 28 Ch. D. 409 (1886) (overruling the earlier case of Hirst v. Tolson, 2 Mac. & G. 134) (Ch. 1850).
\(^6\) See 2 Williston on Contracts, sec. 838, n. 25.
\(^7\) Prescott v. Grimes, 143 Ky. 191 (1911).
\(^8\) Polgrave v. Windham, 1 Strange 212 (K. B. 1722); Harris v. Vickers, 1 Harr. 6 (Del. 1832).
\(^9\) Hyde v. Skinner, 2 P. Wms. 196 (Ch. 1723).
tracts of record. But at common law final judgment (in causes that do not otherwise survive) must have been rendered. So in the case of an interlocutory judgment quod computet, or a judgment quod recuperet, if the defendant died before the writ of inquiry as to the amount of damages had issued, the actio personalis maxim applied. Also where there is an appeal from a judgment in an action for assault and battery, and pending the appeal the defendant dies, there is no survival. So too, if an election contestee dies pending an appeal, the appeal abates. Some changes have been made by statutes in various states. Claims for arrears of alimony do not abate on the death of either party. In Brydges v. Brydges damages had been assessed against a correspondent in a divorce action and he was ordered to pay the sum awarded into court within one month. He died within the month. It was held that the executor was not liable for the sum, since the court had no jurisdiction save over parties over whom it was given by statute, and it was not given over executors merely because the court order would be otherwise ineffectual. It is said that such a claim is personal in the sense that it is neither assignable nor subject to garnishment or other lien, and cannot be diverted to any purpose other than that of the maintenance of the claimant, but is personal in no other sense.

2 II Blackstone's Commentaries 465.
3 Smith v. Haskins, 2 Atl. 385 (Ch. 1742).
4 Shields v. Rowland, 151 Ky. 136 (1912).
6 See for example South Dakota Compiled Laws (1929), sec. 2565; judgment may be entered where defendant dies before judgment but after verdict. But under the United States statutes, in order that final judgment may be entered after death of either party, the action must be one that survives. See Rev. St. U. S., see. 965 (Comp. St., sec. 1592).
7 For a general discussion of survival where death may occur at various stages of the trial see 49 L. R. A. 153, 161, 165.
8 Dinet v. Eigenmann, 80 Ill. 274 (1875); Gerrein v. Mitchie, 122 Ky. 250 (1906); In re Brace's Estate, 105 Misc. 178, 173 N. Y. S. 636 (1918); Haussauer v. Markbreit, 68 Oh. St. 554, 67 N. E. 1066 (1903); Knapp v. Knapp, 134 Mass. 353 (1883); Martin v. Thison, 163 Mich. 516, 116 N. W. 1013 (1908); Moltroy v. Moltroy, 208 Mass. 458 (1911); In re Stillwell, 1 Ch. 385 (1916); Vanness v. Ransom, 215 N. Y. 557, 109 N. E. 593 (1915); Coffman v. Finney, 65 Oh. St. 61 (1901). Cf. 32 Har. L. Rev. 556, 570, notes 76, 77 (1920).
9 (1909) P. D. 187.
10 Cf. 29 Har. L. Rev. 100 (1916).
3. *Implied Promises to Use Skill; Implied Warranties.*

The only reason why the breach of the implied promise of a physician to exercise skill did not survive against his executor, seems to be that the gravamen of the action is a tort, and tort actions for injury to the person did not survive. Consequently, these cases were regarded the same as trespass to the person where no contract was involved at all. In many jurisdictions there can be no recovery for incidental pecuniary losses such as for physicians' and hospital expenses, loss of services, time and the like. It is believed that the contracts of an attorney to use skill should fall under a different category. Here the injury is generally not to the physical person, but is pecuniary. There is no sufficient reason why such contract actions should not survive the same as those of other business transactions, and they did survive in most jurisdictions. These contracts should not be classed with those of physicians, the only common element being the failure to use due skill. If the latter cases must be treated as torts, then the Statute of 4 Edward III and of 3 and 4 William IV do not afford relief even under a liberal construction.

Undoubtedly in many cases the contract of a common carrier to carry safely; the obligation of an innkeeper to keep his guests' goods safely, and his premises in a safe condition, the injury may affect the person; and the same might be true of

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19 *Jenkins v. French*, 58 N. H. 532 (1879). In *Long v. Morrison*, 14 Ind. 595 (1860), it is intimated that where the husband employs a physician to perform services for his wife and the latter is injured by the malpractice of the physician, there is a breach of contract and the action would at common law survive the death of the wife. In two subsequent cases, *Staley v. Jameson*, 46 Ind. 159 (1874), and *Burns v. Barrenfeld*, 34 Ind. 43 (1882), it is intimated that a recovery may be had in contract for malpractice of a physician. No question of survivability was present. In the subsequent case, *Boor v. Lowrey*, 103 Ind. 468, 3 N. E. 151 (1885), it is declared, however, that if a recovery was had in the two prior cases in contract, for personal injuries the result was wrong and the cases overruled. No reference was made to the earlier case, but it seems overruled *sub silentio*, at least to the extent that it holds that an action against a physician for injury to the wife is a contract action and that recovery may be had for personal injuries after the death of the wife. See also *Vittum v. Gilman*, 48 N. H. 416 (1869), and *Wolf v. Wall*, 40 Oh. St. 111 (1883) (malpractice).

20 *Knights v. Quarles*, 2 B. & B. 102 (C. P. 1820); in *Scott v. Brown*, 24 Hun 620 (N. Y. Sup. Ct. 1883), an action against a plumber was allowed to survive his death for incidental losses arising from mal-performance but none for the physical injuries.
obligations of a landlord to repair, of a telegraph company to deliver telegrams promptly, as also may be the express or implied warranties of wholesomeness. But it may quite as well be also that the injury in any and all of these cases is largely pecuniary rather than personal, and they would thus more resemble the implied promise of an attorney to exercise due skill. In a good many cases of the latter type, fraud also is an element. In a number of jurisdictions recoveries in such cases are permitted for expenses for medical care and for loss of time and injury to business, though not for the purely personal injuries such as pain and suffering. They hold these losses are recoverable in contract though they are incidents of a tort. There are, however, many dicta to the effect that such damages are incidental to the personal injury and not recoverable.

4. Breach of Marriage Promise.

Causes of action for breach of promise do not survive in the absence of special damages. Expenses accruing in preparation for the wedding, giving up one’s business or position, and seduction and the birth of a child in reliance on the promise, are considered as merely incidental and not special damages. It seems reasonably clear here that the injury is comparable to those injuries to property for which trespass on the case afforded the appropriate remedy. An action was maintainable in contract inter vivos but after the death of one of the parties a contract action was not maintainable. Whether such causes of actions should survive will depend somewhat at least on the attitude the critic takes regarding similar actions inter vivos. Socially, survival here may well be undesirable.

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22 Cf. Cornell Law Quar. 1 c. note 20 and cases cited.
5. Quasi-Contractual Obligations.

The arbitrary character of the classification of actiones personales with the consequence that contract actions did but tort actions did not survive, was shown in the classical case Hambly v. Trott. There an action was brought in trover by the executor for the conversion of chattels of the testator. The Lord Chief Justice (Mansfield) indicated that claims must be considered first as to cause, and second as to form. He declared that there could be no recovery in trover in this case, but that plaintiff might sue the representative in contract by waiving the tort.

Some jurisdictions still hold to the doctrine of the theory of the pleadings even under modern code provisions, and insist that if the action is grounded in trover plaintiff cannot recover, although he may have proved facts which would have sustained a count in indebitatus assumpsit.

Suppose a man and woman purport to enter the marriage relation with each other, but due to some disqualification of the one or the other, and known to that one but fraudulently concealed, an action for damages for deceit arises. While the tort

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28 Cowp. 371 (K. B. 1776); see Fox v. Hale, 108 Cal. 478, 41 P. 328 (1895).
29 See Powell v. Rees, 7 A. & E. 426 (K. B. 1837) (coal tortiously mined); also Wynn v. Tallapoosa Bank, 168 Ala. 469, 53 So. 228 (1910) (tort without benefit to defendant's intestate); Alexander v. Dean, 157 Ga. 250, 121 S. E. 238 (1924) (tort and assumpsit, and action does not survive). Before statute of 4 Edward III caused trespass d. b. a. to survive in favor of executors, detinue and replevin would lie in many cases. Cf. Sherrington's Case, Saville 40 (C. P. 24 Eliz. 1582); Pinchon's Case, 9 Coke 36-b (K. B. 1612); LeMason v. Dixon, W. Jones 173 (K. B. 1625); Denny v. Booker, 2 Bibb. 427 (5 Ky. 1811) (detinue); Clapp v. Walters, 2 Tex. 130 (1847) (detinue); Allen v. Harlan, 6 Leigh 42 (Va. 1836) (detinue); Catlett v. Russell, 6 Leigh 344 (Va. 1835) (detinue); Viner's Abridgment Det. D. pl. 1. Cf. also Walter v. Miller, I Har. 7 (Del. 1832) (tort for slaves); Batty v. Greene, 206 Mass. 561 (1910) (obtaining property by pretended marriage); Neussum v. Neussum, 1 Leigh 86 (Va. 1829) (tort for slaves); Winchester v. Knight, 1 P. Wms. 406 (Ch. 1717) (bill for an account against executor for ore sold by a tenant in his lifetime). In Wisconsin an action in ejectment abates with the death of defendant and with it goes the incidental claim for mesne profits and the counterclaim for improvements. See Farrall v. Shea, 66 Wls. 561, 29 N. W. 634 (1886). For assumpsit for mesne profits see Pulteney v. Warren, 6 Ves. 73 (Ch. 1801); Gardiner v. Fell, 1 Joc. & W. 22 (Ch. 1819).
30 Alexander v. Dean, supra n. 27; State v. Blake, 107 Wash. 294, 181 Pac. 685 (1919). But cf. better view taken under similar circumstances, 32 Idaho 415, 184 P. 477 (1919); Raymond v. Bailey, 98 Conn. 201, 118 Atl. 915 (1922); Tichenor v. Hayes, 41 N. J. L. 138 (1879). In the two latter jurisdictions the tort action also survives.
action does not survive,\textsuperscript{29} a good many jurisdictions permit the spouse (if it be the wife) to recover in quasi-contract for the value of services rendered.\textsuperscript{30}

II. TORTS.

1. Trespass, Case and Trover.

The Statutes of 4 Edward III and 3 and 4 William IV caused certain tort actions to survive. The first Statute provided for the survival of trespass actions d. b. a. in favor only of the executor. It was given an equitable construction so that it included case,\textsuperscript{31} or actions for indirect injury to specific property, and sometimes it included actions for fraud and deceit.\textsuperscript{32} Actions in trover survived in favor of the representative under this equitable construction,\textsuperscript{33} but not against the representative,\textsuperscript{34} because the first named statute was passed in the interest of the representative only.

In Tucke's case\textsuperscript{35} it was declared that if the executor commits a \textit{devastavit} and dies, his executor is not liable for the waste because a personal action dies with the person. Nearly a century later the Lord Chancellor said: \textquoteleft\textquoteleft Although by common law when an executor wastes, his executor shall not be liable because it is a personal wrong, yet it is otherwise here; and the common law will come to it at last,'\textquoteright\textquoteright and it was so decreed.\textsuperscript{36} The com-


\textsuperscript{30} See Evans, \textit{Property Interests Arising from Quasi-Marital Relations}, 9 Cornell L. Quar. 246 (1924); 41 Har. L. Rev. 400 (1927).

\textsuperscript{31} \textit{Emerson v. Emerson} 1 Vent. 187 (K. B. 1672); \textit{Smith v. Colgay Oro.}, Eliz. 377 (K. B. 1590); Pinchon's Case, 9 Co. 86 B. (9 Jam. 1 K. B.); \textit{Nettles v. D'Oyley}, 2 Brevard 27 (S. C. 1806). See 1 Williams on Executors, 608-9.

\textsuperscript{32} \textit{Twycross v. Grant}, 4 C. P. D. 40 (1878) (fraudulent prospectus). Cf. \textit{Haight v. Hayt}, 19 N. Y. 464 (1859) (fraudulent representation as to incumbrance); \textit{Oker v. Crosier}, 5 Ala. 369 (1843) (fraud in the exchange of horses); \textit{Graves v. Spier}, 58 Barb. 340 (1870) (fraud in the purchase and sale of real estate); \textit{Brackett v. Griswold}, 103 N. Y. 425, 9 N. E. 435 (1886) (court says that a count alleging the organization of a company for the purpose of defrauding decedent and the public whereby decedent suffered loss, survives; but the cause arising under a penal statute for a false report as to the amount of capital stock paid in does not survive).

\textsuperscript{33} \textit{Russell's Case}, 5 Co. 27a (1566 K. B.). \textit{Rutland v. Rutland}, Cro. Eliz. 377 (K. B. 1590); 1 Williams on Executors 609.

\textsuperscript{34} \textit{Hambley v. Trott}, supra n. 26; \textit{Bailey v. Birtles}, T. Raymond 71 (K. B. 15 Car. II 1664); Sherrington's Case, supra n. 27.

\textsuperscript{35} 3 Leon. 241 (K. B. 1590) Wms. 1340.

\textsuperscript{36} \textit{Price v. Morgan}, 2 Ch. Cas. 215 (1676).
mon law courts never came to it until 1833 when the statute of that year provided for the survival of actions for injuries to real and personal property in favor of as well as against the personal representative. This case suggests that perhaps chancery might have found a way out of the difficulty regarding survival, at least in a limited type of cases.

The actions made to survive against the representative by the Statute of 3 and 4 William IV provided a remedy for trespasses to realty, as well as to personality, if the trespass was committed within six months of the death of deceased. So where coal had been tortiously taken from plaintiff’s lands, some of it more than and some of it within six months of the death of the wrongdoer, it was held that indebitatus assumpsit would lie for that first taken and trespass for that last taken. Hambly v. Trott antedates the statute making trespasses to real and personal property survive against as well as in favor of personal representatives.

Prior to the Statute of 3 and 4 William IV actions in trover did not survive against the representative, but as already indicated, if suit in indebitatus assumpsit would lie, the action might survive in contract form. Actions for statutory penalties did not even under the statute. It appears that the English courts never under these statutes allowed a claim for unliquidated damages for misrepresentation to survive.

2. Personal Injuries, Trespass.

Personal injuries may consist (a) in actual injuries to the physical person causing pain and suffering, the remedy for which at common law was the action of trespass; and (b) may give rise to incidental losses such as obligations for physicians and hospital services, the loss of time and compensation, and the

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37 See Reppy & Tompkins, History of Wills, page 305 (1928).
38 Cf. Winchester v. Knight, supra n. 27, where a bill for an accounting was decreed against a representative.
39 Powell v. Rees, 7 A. & E. 426 (K. B. 1837). North Carolina had a similar statute without the six months limitation, as early as 1799. Cf. Ten Eyck v. Runk, 31 N. J. L. 423 (1866). (The New Jersey Statute was passed in 1855.)
40 Supra n. 26.
41 See Reppy and Tompkins History of Wills, page 316 (1927).
42 Story v. Sheard (1892), 2 Q. B. 515; Shepheard v. Bray (1906), 2 Ch. 235.
43 Williams on Executors, p. 609, note (u).
payment for services of a substitute; and (e) may consist of such injuries as cause anxiety, indignation or mental anguish without immediate injury to the physical person, i.e., that is to say injuries to the more intangible interests of personality which affect the feelings, dignity and character of the injured person. These claims were not made to survive under the Statutes of 4 Edward III and 3 and 4 William IV.

It is generally held in the absence of an appropriate statute that for item (a) there is no recovery where either claimant or wrongdoer has died. In cases where both person and property are injured by the same act, recovery is allowed for the injury to the property only. In New York the statutes provide for survival of "actions for all wrongs done to the property rights and interests of another." But "interests of another" do not include personal injuries and presumably the Statute refers to pecuniary interests only, and it makes no difference whether the personal injury arises from a breach of contract or from a tort. As such actions did not survive against the representative, so they did not survive in his favor.

Even though no recovery was allowed under (a), a recovery might still be allowed under (b) for the pecuniary loss, but unless such loss was from a tort arising out of a contract there was no recovery, and many cases held there was no recovery even then.

Suppose causes of action for personal injuries survive by statute but the injury ultimately results in death and an action
is brought under some replica of Lord Campbell's Act, may there be a recovery in both cases? In the first place, a statutory provision that actions for "wrong to the person shall survive" does not apply to wrongs resulting in death, and there must be a specific provision in the wrongful death statute providing for survival of the cause both for and against the representative in order that such may be the result.\(^5\)

Assuming that the action for personal injuries survives by statute, and there is also a suitable provision for survival of the action for wrongful death against the representative of the wrongdoer, may the representative of the decedent prosecute both actions? This problem has been ably discussed by Bowen E. Schumacher.\(^2\) He shows that by the weight of authority in this country, a judgment or a settlement or release by the decedent with the wrongdoer bars the action by the representative. It appears that the two causes are entirely distinct and that the reasoning of the courts upon which the result is based is unsound. Mr. Schumacher compares the conclusions of the Federal Courts under the Federal Employers Liability Act and finds that they are essentially in conflict with the view that there should be only one recovery. The grounds for the confusion are well set forth. The result is in substance that though under an appropriate statute the action for personal injuries is made to survive the death of either party, still if there is also an action brought for damages for wrongful death, the statute is ineffective as to the personal injuries.

3. Injuries to the More Intangible Interest of Personality.

Causes of action arising for personal injuries to the feelings and to reputation never survive apart from some statute.\(^3\)

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\(^3\) Rights of Action Under Death and Survival Statutes, 23 Mich. L. Rev. 114 (1925), and see cases cited; 9 N. Carolina Law Rev. 101 (1930).

\(^2\) Harter v. Clark, 57 Cal. 245 (1881) (false imprisonment); Francis v. Burnett, 84 Ky. 23 (1886) (malicious prosecution); Johnson v. Haldeman, 102 Ky. 163 (1897) (libel); Nettleton v. Dinchart, 5 Cush.
There seems to be a general idea that such causes should not survive, based perhaps upon the notion that a judgment here is in the nature of a penalty rather than compensatory. This ground may be regarded by the critic as sufficient to warrant the exception, and if any exception should be made to a general survival statute, along with breaches of promise of marriage, these cases seem to be the most worthy of exception.

An interesting question has arisen whether or not an action may be maintained against the executor for damages for libelous matter contained in a will and probated by the executor. When such a case arose in Pennsylvania, it was held that such an action would lie, though no precedent could be found therefor.\textsuperscript{5}\textsuperscript{5} This view was also subsequently taken by the Supreme Court of Tennessee.\textsuperscript{5}\textsuperscript{5} There is properly here no question of survival, since no cause of action arose against the testator in his lifetime. It is clearly a case which calls for a remedy, and the result is desirable; but the court may be regarded here as making as well as finding the law for a new kind of wrong. A number of cases have arisen in England where a motion has been made either to strike libelous or objectionable matter from the will, or to omit it from probate. No general principle has been worked out. In several cases the motion has been overruled,\textsuperscript{5}\textsuperscript{6} but in several cases the motion to omit such matter from the probated copy was sustained.\textsuperscript{5}\textsuperscript{7}

4. Fraud, Misrepresentation and Conspiracy.

Tort actions did not survive at common law, but if property were acquired by the wrongdoer as distinguished from merely deriving a benefit, \textit{indebitatus assumpsit} would lie either for or

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\textsuperscript{5}\textsuperscript{4} Fraud, Misrepresentation and Conspiracy. Tort actions did not survive at common law, but if property were acquired by the wrongdoer as distinguished from merely deriving a benefit, \textit{indebitatus assumpsit} would lie either for or
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against the representative. Two successive statutes provided for survival of actions where the injury was to specific property. For personal injuries there was no recovery. What is to be said about those torts where there has been a pecuniary loss to claimant (though unliquidated at time of death) but no injury to specific property? Such wrongs are clearly distinguishable from personal injuries. It seems pretty clear that here was another flaw in the common law.

In Maine the statute of 1840 added to the actions that survive, replevin, trover, assault and battery, trespass d. b. a., and trespass on the case for damage done to real and personal property. Under this statute it was held that an action did not survive against a defendant who had caused a debtor to make a fraudulent transfer of his property. But when later the words “to real and personal property” were omitted from the statute, it was held that an action for deceit would lie in favor of a woman against the administrator of a man who purported to but had not married her because he was not free to do so.

Here is a liberal construction, applying the statute to an “action in case” for damages, which goes beyond the English rule that no action for unliquidated damages would survive.

In Pennsylvania back in 1830, it was held that a cause of action would survive in favor of a representative for a conspiracy to defraud the plaintiff under a liberal interpretation of the Statute of 4 Edward III. The action was in case, and was held to be a substitute for detinue if the property taken was still held, and for the common count of money had and received if the goods had been consumed. In New Jersey likewise, a statute providing for the survival of trespass to the person or property was given a liberal construction (equals tort or wrong) and was held to apply to a false representation whereby claimant had been induced to buy certain mortgaged premises to his pecuniary loss. In Alabama in 1843 an action grounded on

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* See for example, discussion in 13 Cornell L. Quar. 596, 598.
* Smith v. Estes, 46 Me. 158 (1858).
* Tichenor v. Hayes, supra n. 28; see also Ten Eyck v. Runk, supra n. 39.
fraud survived in favor of the representative but not against him.\(^6\)

In England it was held in the King’s bench that where a claimant had been fraudulently induced to enter a contract under which he had paid out money, he could rescind and get back the price if he could return what he had received; but if the parties could not be placed \textit{in statu quo}, the only action would be one for deceit,\(^6\) which of course did not survive; and subsequently it was held by the Chancellor in a similar transaction (claimant had bought worthless stock) that there could be no recovery against the executor of the wrongdoer\(^6\) where the damages were unliquidated. But in England, a recovery could be had under the liberal construction of the Statute of 4 Edward III where the damages were liquidated.\(^6\)

In Massachusetts it has been held that an action will not survive for falsely and fraudulently recommending the credit of another;\(^6\) for the fraudulent sale of poisoned corn causing the death of claimant’s horses;\(^6\) and for fraudulent representations inducing plaintiff to part with his land to his injury;\(^6\) or against an attorney for subornation of perjury whereby claimant’s debtor avoided the payment of the claim.\(^6\) It is probable that the Massachusetts rule in this respect agrees with the English rule, since in all these cases the damages were unliquidated.

The rule in Illinois\(^7\) and in Michigan\(^7\) (except as to fraud and deceit by statute), in Washington\(^7\) and in Wisconsin,\(^8\) is

\(^{6}\) \textit{Coker v. Crosier}, supra n. 32.
\(^{6}\) \textit{Ten Eyck v. Runk}, supra n. 39; In re Duncan (1899) 1 Ch. 387.
\(^{6}\) \textit{Twycoy v. Grant}, supra n. 32; see 1 Williams on Executors 609 (11th ed. 1921).
\(^{6}\) \textit{Leggate v. Moulton}, 115 Mass. 532 (1874).
\(^{6}\) \textit{Jones v. Barnum}, 217 Ill. 351, 75 N. E. 505 (1905) (malicious interference with claimant’s business relations).
\(^{6}\) \textit{State v. Blake}, supra n. 28 (fraudulent representations inducing decedent to buy worthless stock).
\(^{6}\) \textit{Lane v. Frauley}, 102 Wis. 373, 78 N. W. 593 (1899) (fraud of an attorney in procuring his client’s note); \textit{Farwell v. Wolf}, 96 Wis. 10, 70 N. W. 289 (1897) (conspiracy to defraud by purchasing goods from
similar to that in Massachusetts, and is just about the common law rule. In Rhode Island a conspiracy to prevent one from enjoying the benefits of a fraternal order does not give rise to a cause of action that survives, because it does not constitute trespass or case for damages to person or property.\footnote{74} It is not clear however, that these courts base the reason upon the ground that the claim is unliquidated. Claim in trover came to be regarded as covered by the statute of 4 Edward III, and under the statute of 3 and 4 William IV similar causes should survive against the representative. The Federal courts have held both ways with respect to a cause of action arising from a breach of the Sherman Anti-trust law.\footnote{75} The case allowing a recovery has been criticized. It is not so clear however, that the case is wrong in result. The English courts have expanded the application beyond that allowed by Mansfield.\footnote{76} A liberal interpretation of the term trespass to property might well include an action in the nature of case for injury to one's business, but the great weight of authority is against it.

To sum up: Contract actions survive both for and against the representative. Obligations based upon final judgments not appealed from, survive. Torts give rise to actions that survive where the action is based upon unjust enrichment. Actions for breach of promise do not survive in any jurisdiction save under an all embracing statute, and the policy of changing the rule may well be doubtful. The action for breach of a physician's obligation to use due skill did not survive because it was also regarded as essentially a tort action. There is a difference in point of view whether a recovery could be had in contract for incidental losses where the injury arose out of a contract. A good many rulings both in England and America now allow seller without paying for them. The New York statute was borrowed by Wisconsin by way of Michigan).

\footnote{74} Young v. AyIsworth, 35 R. I. 259, 86 A. 555 (1913).

\footnote{75} Caillouet v. American Sugar Refining Co., 250 Fed. 639 (D. C. La. 1917) (holding no survival in favor of the representative and declaring that the case is identical in principle with actions for fraud and deceit); see discussion by Warren in 33 Har. L. Rev. 556, 570 (1920); Sullivan v. Assoc. Bill Posters, 6 Fed. 2nd 1000 (C. C. App. 1925) (holding that such action survives the death of defendant). See comment thereon in 20 Ill. L. Rev. 716 (1925) by Professor Woodward.

\footnote{76} Cf. Williams supra note.
an action to survive for damages from tort where there is also a breach of contract.

The cause of action based upon the obligation of an attorney to use due skill, and other obligations somewhat similar, survived unless the only injury was personal. Such wrongs generally affected the "personal estate of the claimant whereby it became less beneficial" but were unliquidated and were not damages to specific property. The action survived as being based on a breach of contract.

Ever since the Statute of 4 Edward III, there has been constant statutory progress toward increasing the types of actions that survive. What that progress has been, and the dilemma the courts now find themselves in, will be examined in a subsequent paper.

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1 Williams on Executors 609.