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Torts

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though no such limitation exists under the federal estate tax statute.[9] The new statute clears up some ambiguities which existed under the former provision and clearly specifies that the relationship in both instances must be those specified in the case of class A exemptions.

Like the former statute the new provision does not afford an exemption for property upon which a gift tax has been paid by decedent's donor within the five-year period prior to the present decedent's death. The federal law applies the deduction to both types of cases. The avoidance of double taxation within a period of five years is the reason for allowing the exemption for property previously taxed. Whether the previous tax is imposed under the state inheritance tax statute or under the state gift tax statute would seem to be immaterial. Here, again, there seems to be no substantial reason for failing to follow the pattern of the federal estate tax law.

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[9]The difference in this respect between state and federal laws stems from the fact that the state imposes a classified inheritance tax whereas the federal tax is an estate tax levied without reference to the relationship between the decedent and those who take from him.

TORTS

Survival of Actions—Death of Tort-Feasor. This Act represents a long overdue attempt to reform a particularly barbarous segment of the law by providing for the survival of causes of action for bodily injuries, property damage, or wrongful death against the deceased tort feasor. It is not entirely clear that it will succeed; in 1869 a statute was passed saying that "all causes of action . . . by one person against another, whether arising on contract or otherwise, survive to the personal representative of the former and against the personal representative of the latter." One would suppose that nothing could be clearer—that the legislature could have done nothing more than to add the phrase "and we mean it"—but by that strange alchemy which courts occasionally practice the statute was transmuted to read "all causes of action which survive at common law . . . survive,"[2] thereby furnishing as neat an example of judicial legislation as can readily be brought to mind. Nor was it in a good cause, or for justifiable ends; the origin and limits of the common law scheme of survival are not only wrapped in

[1] RCW 4.20.040 [RRS §967].
[2] Slauson v. Schwabacher Bros., 4 Wash. 783, 31 Pac. 329 (1892).

mystery, but its results have been outrageous in terms of justice.[3] Reliance in support of it has always been placed on the maxim *actio personalis moritur cum persona.* This has a rolling sonority which is impressive, and in the days, fortunately passing,[4] when a Latin quotation was thought to ornament an opinion, might add a note of scholarship, the difficulty lies in the fact that it means nothing, since the word *"Personalis"* has no definite content at all.[5] Similar more current examples—the phrase *res inter alios acta* and the expression *res gestae*—are other illustrations of the squid-like process by which courts, having released an obscuring cloud of Latin, can scuttle to safety and take up the next point in the opinion secure from pursuit.

This time hope for judicial approval of the statute is bright, if only because the great majority of the states now go even farther than the present Act in permitting survival.[6] Six states in fact permit *all* causes to survive the death of either or both parties, though in some there are certain specified exceptions such as breach of marriage promise, slander, assault, and so on.

Several points may be made in connection with the Act before its *proviso* is considered. The first may seem over-meticulous, but it is certainly better to draft a statute affirmatively rather than negatively —to say, "all claims for damages . shall survive," rather than "no claims for damages . shall abate."

Secondly, the statute leaves entirely to speculation the question of the collection of the judgment on the surviving (or perhaps one should say non-abating) cause of action, and this is running something of a risk in a community property state. The decedent's separate property is clearly subject to levy, and his indemnity insurer will have to pay; if there is no separate property, or no insurance, or if either or both are inadequate, will the judgment run only against decedent's share of the community property, or against all of it? Building on *Bortle v. Osborne*[7] it is possible to make a convincing argument that *all* of the property is subject to the claim—indeed any other result might go far

[3] LAW REVISION COMMISSION, STATE OF N.Y. 159-229 (1935), an elaborate study of the entire problem of the survival of tort causes of action. See also similar reports for 1935, pp. 87-122, and 1942, pp. 21-25. The New York act on survival of tort actions would seem to be a model.

[4] But it is not quite gone, *see* Bortle v. Osborne, 155 Wash. 585, 592, 285 Pac. 425 (1930).

[5] For example, contract actions almost universally survive; are they any less "actio personalis" than tort claims?

[6] See note 3 *supra.*

[7] *Supra* note 4.

toward taking away the benefit of the statutory survival—but it would seem a matter best taken care of in the statute itself.

Thirdly, there is a point on which the statute should be promptly amended: in its present form it does not touch the wrongful death case in which the tort feasor predeceases plaintiff's decedent. Since no claim has arisen during the lifetime of the tort feasor,[8] obviously there is none to survive his death, and the benefit of the statute is lost by a perfectly fortuitous circumstance—a result supportable neither in reason nor justice. Provision should also be made for the simultaneous death of of the parties, or, what is in essence the same thing, for cases in which it is impossible to determine from the evidence which survived the other.

The *proviso* of the statute fixes the quantum or at least the source of the proof necessary to warrant a recovery: *"Provided,* however, that the plaintiff shall not recover judgment except upon competent evidence other than the testimony of said injured person or persons and the testimony of the injured person or persons, by itself, shall not be sufficient to overcome the presumption of due care on the part of the deceased tort feasor." This creates a new presumption on the lines of that anomaly,[9] the presumption of freedom from contributory fault on the part of plaintiff's decedent; it is one which has no backing in probability and would certainly be as baffling to handle in jury cases as the other, and for the same reason: the burden of proof on the issue is already fixed in any event. Fortunately confusion is likely resolved before it has been raised by *Hutton v. Martin,*[10] holding that it was not only unnecessary but in fact prejudicial error to instruct the jury on the presumption of lack of contributory negligence, since the whole matter is taken care of by the normal instruction on the burden of proof. It is difficult to conceive of any reason for not handling the statutory presumption in the same common-sense manner.

The requirement of proof by competent evidence other than that of the injured person seems unfortunate, if only because it runs counter to the trend from that anachronism, the "interested witness" rule. It is not so bad as it might be; the statute does not in terms mention the "interested witness" nor disqualify him from testifying. But "injured

[8] The action accrues at the death of plaintiff's decedent. Grant v. Fisher Flouring Mills, 181 Wash. 576, 44 P.2d 193 (1935).

[9] Falknor, *Notes on Presumptions,* 15 WASH. L. REV. 71 (1940).

[10] 41 Wn.2d 780, 252 P.2d 581 (1953). *Cf.* Smith v. Yamashita, 142 Wash. Dec. 446, 256 P.2d 281 (1953), where apparently the plaintiff still has the "benefit" of the presumption of due care, though no one can mention it under the rule of the Hutton case.

person or persons" and "interested witness" will be in fact just about the same thing and there is a quasi-disqualification in the statement that such testimony, "by itself," shall not be enough to satisfy the burden of proof on negligence, even assuming the court's subsumption of the statutory presumption in the burden of proof. Moreover it leaves the whole matter at loose ends, which is always frightening to one charged with concocting instructions. How *much* additional evidence is required? What *kind* of additional evidence? What should the jury be told about it, if anything? When can a mandatory instruction be given for the plaintiff? It must be remembered that the plaintiff must still runs the gantlet of the Deadman's Act,[11] and here he is put to the additional hazard of producing uninjured witnesses—the whole process demonstrating a somewhat alarming distrust of our normal methods of trial. If our judges and juries cannot cope intelligently with party testimony, we are in dire straits indeed.

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[11] RCW 5.60.030 [RRS § 1211].