Survival of Tort Actions in Wisconsin in Relation to Real Property

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not be divested of the property, nor could the official be required to refund the money without a valid reconveyance of the land. Nebraska adopted the same rule in Shepard vs. Easterling, 61 Neb. 882, 86 N.W. 941 where the court said "a taxpayer may commence and prosecute to judgment an action to enforce for benefit for the municipal or public corporation, a right of action which its governing body has refused to enforce. In such case the corporation should be made a party defendant."

Section 260.19 (1) of the Statutes states that "the court may determine any controversy between the parties before it where it can be done without prejudice to the rights of others or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties or any persons have such interest in the subject matter of the controversy as requires them to be made parties for their due protection, the court shall order them to be brought in * * *" The theory, then, is that the interest of a corporate member is not that of the municipality although that member has an enforceable interest. The municipal corporation represents the interest of the entire group and since the interest of the entire group is being determined it is essential that the municipality be a party to the action.

Mathias J. Stich.

Survival of Tort Actions in Wisconsin in Relation to Real Property. The recent case of Zartner v. Holzhauer, 234 N.W. 508, has served to call attention to the uncertain status of the survival of tort actions in Wisconsin, especially in those concerning real property.

At common law tort actions did not survive, although property rights were incidentally affected,1 but early in its history Wisconsin began to recognize the hardship of this situation and has constantly liberalized the right of maintaining such actions. The statutory rights, however, must be strictly construed2 in view of their being derogatory of the common law.

The controlling statute on what actions survive is now section 331.01 which provides:

In addition to the actions which survive at common law the following shall also survive: Actions for the recovery of personal property or the unlawful withholding or conversion thereof, for the recovery of the possession of real estate and for the unlawful withholding of the possession thereof,3 for assault and battery, false imprisonment or

1 1 R.C.L. 25; John V. Farwell Co. v. Wolf, 96 Wis. 10.
3 Added by Chapter 56 of the Laws of 1917.
other damage to the person, for all damage done to the property rights or interests of another, for goods taken and carried away, for damages done to real or personal estate, equitable actions to set aside conveyances of real estate, to compel a reconveyance thereof, or to quiet title thereto, and for a specific performance of contracts relating to real estate; provided this act shall have no application to pending litigation. 4

The above section must be deemed controlling in view of the decision in Lane v. Frawley 5 which determined that section 3252 (now 287.01) is not a survival statute but only regulates procedure where actions survive under other sections. It will perhaps be of interest to follow the interpretation of that section.

In Farrall and others v. Shea 6 it was held that since section 4253 (now 331.01) provided only for a survival of actions for the recovery of real property, an action in ejectment abated upon the death of the sole defendant and could not be revived against the heir or personal representative of the deceased. In Cotter v. Plumer 7 an action to recover damages for the wrongful cutting and removing of timber was allowed although the defendant had died. It was held that under sections 4253 and 4254 the action could be revived against the administrator of the deceased's estate.

About ten years later the leading case of John V. Farwell Co. v. Wolf 8 was decided and the scope of the provision "Actions for damages done to real and personal estates" was under consideration. It was there held that actions for damages for conspiracies to defraud and damages for deceit did not lie under this section. The opinion of the court in this decision turned largely upon the fact that, while under the New York law such actions survived, 9 Wisconsin had not adopted the phrase "for all damage done to the property rights or interests of another" but was following the Massachusetts interpretation. 10 This case did not directly involve real property but clearly indicates the courts position in relation thereto.

In Lane v. Frawley 11 the executors of the deceased brought an action to recover general damages caused by the defendant's fraud and deceit. It was held on the authority of the Farwell case that this action

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4 Added by Chapter 353 of the Laws of 1907.
5 102 Wis. 373.
6 66 Wis. 561.
7 72 Wis. 476.
8 96 Wis. 10.
10 The Wisconsin statute was derived from the Massachusetts provision which was then in force in Michigan also.
11 102 Wis. 373.
did not survive. It was further held that even though section 3252 provided that executors or administrators might bring an action for "wrongs done to the property, rights or intersts, of another" that the action would not survive because this section merely regulated procedure and section 4253 was exclusive on the question of what actions survived.

In Killen v. Barnes\textsuperscript{12} the primary action was to wind up an insolvent banking corporation. The plaintiff was the assignee of a claim against the corporation and sought to recover therein damages for the deceit of a director. It was held that this was not a proper subject for litigation in these proceedings. There was dicta in the case to the effect that only actions for damages done to specific property survived, and these did not include cheats and frauds resulting in pecuniary loss. In further dicta Justice Marshall, referring to the New York provision "actions for all wrongs done to the property rights or interests, of another" wrote, "the latter language, we would say independent of authority, clearly covers actions for deceit \* \* \*".

A number of actions survived at common law and were not dependent on the statute. Allen v. Frawley\textsuperscript{13} presented one of these situations. There the executors and all the heirs at law of the deceased were joined in an action against defendants who were alleged to have fraudulently obtained a note and mortgage from deceased. The mortgage was later foreclosed. Plaintiffs asked judgment for the value of the premises, the amount paid on a deficiency judgment, for rents, etc. It was contended that this action did not survive as it was in effect for deceit. It was held, however, that the complaint charged defendant with the character of a trustee and sought to enforce this trust—an action which survived at common law and was not dependent on section 4253. But as the complaint did not connect the alleged deceit with the acquisition of title to the real estate it failed to state a cause of action of equitable cognizance. Borchert v. Borchert\textsuperscript{14} is another instance of a survival at common law. In that case the deceased was fraudulently induced to make a contract conveying her realty and personalty to defendant. It was held that the contract being void the property in effect remained the property of the deceased and an action to rescind survived and upon her death passed to her personal representatives.

Chapter 353 of the Laws of 1907 was passed at this period for the purpose, perhaps, of avoiding the rule in the Farwell case. This chap-

\textsuperscript{12} 106 Wis. 546.
\textsuperscript{13} 106 Wis. 638.
\textsuperscript{14} 132 Wis. 593.
ter provided for a survival "for all damage done to the property rights or interests of another."

The first two cases decided after this did not involve the construction of this added provision and Allen v. Frawley\(^{15}\) and Puffer v. Welch\(^{16}\) merely reiterated the rule of the Farwell case.

The unsettled condition of the law on the question of what actions survive is indicated by the dicta of Justice Jones, as late as 1921, in Meyers v. Ogden Shoe Co.\(^{17}\) to the effect that an action for deceit did not survive and was therefore not assignable.

Payne v. Meisser\(^{18}\) was the next case determined. Here a remainderman brought an action against the administrator of the deceased holder of a life estate for damages for waste committed by the latter. It was held that this action survived by virtue of sections 4253 ad 4254 but only for actual damages.

Again the unsettled status of the question crops out, this time in Howard v. Lunaberg\(^{19}\) where Vinje, C.J., calls attention to the statement in the Ogden Shoe case 'that an action for deceit does not survive' as being pure obiter and contrary to the rule announced in Puffer v. Welch. But, as seen before, Puffer v. Welch was determined by the Farwell case and the construction there given to Chapter 353 of the Laws of 1907 was also dicta. It seems very clear, however, that this amendment clearly contemplates a survival of actions for deceit.

The will of Emma Zartner is the center of the next litigation on the subject. Emma Zartner died testate. Charles Holzhauer was the executor of her will and Edward Zartner was one of four residuary legatees. Holzhauer, a real estate man and a close friend of the testatrix, was alleged to have fraudulently manipulated and to have acquired possession of the property of the testatrix before the execution of her will. In the case of Will of Zartner,\(^{20}\) Holzhauer was removed as executor, the Supreme Court affirming the findings of the trial court that Holzhauer acted in bad faith and fraud under his agency, that he was adversely interested in the estate, and that an action should be brought against him by an administrator with the will annexed to protect the rights of the estate, and that he was unsuitable to discharge the trust as executor. An administrator de bonis non was appointed. He brought an action\(^{21}\) for rescission of the fraudulent conveyance but it was

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\(^{15}\) 138 Wis. 295.
\(^{16}\) 144 Wis. 506.
\(^{17}\) 173 Wis. 317.
\(^{18}\) 176 Wis. 432.
\(^{19}\) 192 Wis. 507.
\(^{20}\) 183 Wis. 506.
\(^{21}\) Neelen v. Holzhauer, 193 Wis. 196.
determined that the personal assets being sufficient the administrator de bonis non was not a proper party to bring such action. The residuary legatee, waiving the right of rescission, then brought an action\textsuperscript{22} for damages for deceit against the fiduciary. On demurrer to the complaint, it was expressly decided that the cause of action for deceit survived. It was declared, however, that the personal representative (the administrator de bonis non in this case) rather than the legatees must bring the action.

To crystalize this discussion consider this situation. A, a widower, owns ten lots, and ten bonds each of the value of one hundred dollars. He dies testate leaving four children, L, M, N, and O. He has no debts. He devises a specific lot to L and the residue of his real property to M; he bequeaths one hundred dollars to N, and the residue of his personal property to O. B, a fiduciary, has, during the life of A, fraudulently obtained a deed to one of the ten lots, not the one specifically devised, however. C is appointed executor.

What are M’s rights against B?
What are O’s rights against B?
May C maintain an action against B, and if so, for what?

Under the decisions in the latter two cases it would seem that C may not rescind the fraudulent conveyance, but may maintain an action for damages for deceit, the proceeds of which being personal property would belong to O. M, the residuary devisee, and O, the residuary legatee, would be incompetent parties against B under the Zartner cases as it was there said that acquisition of the land by descent or purchase must be shown; and also that a residuary legatee may not maintain an action for deceit. This situation does not seem to be in harmony with the established principle that the right of the devisee is superior to that of a legatee in such situations, for there is an apparent cutting off of the devisee which leaves the proceeds of the action for deceit to the legatee as personal property.

This construction has occurred to the writer—the dominant right to maintain an action against B is in the personal representative. Where there is a residuary devisee the personal representative may elect to rescind or sue for damages for deceit—in both cases the real property or the proceeds of the suit as personal property to go to the residuary devisee, for his is the controlling right. In the absence of a residuary devisee the proceeds of the action for deceit go to the residuary legatee—the right of rescission to die with the testator.

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\textsuperscript{22}Zartner v. Holzhauer, 234 N.W. 508.