VIABILITY OF ACTIONS AFTER DEATH OF A PARTY: CONSTRAINTS AND VARIETIES IN PHILIPPINE PROCEDURE *

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Death is inevitable, none of us being immortal. Even so, the same certainty does not attach to the death of a party to a civil litigation—at least during the pendency of the litigation. But given the proverbial span of time—which can even be as long as 50 years[1]—during which a civil litigation may pend in our courts, the likelihood of a party to the litigation outliving it is becoming increasingly nil. If for this reason alone, the rules governing the effect of death of a party deserve close and careful attention.

The law governing the effect of death of a party to a pending civil litigation reflects a congeries of policies, not all of which are compatible. Pre-eminent among these policies is that which commands obedience to the Constitutional mandate of procedural due process—that a party already dead, or his heirs or legal representative, should not, absent an appropriate substitution procedure, be bound by any proceeding or by any judgment after his death. Another policy which competes for attention is that which calls for an orderly, expeditious and equitable distribution of a deceased person's estate. An equally pressing policy consideration is that which frowns on repetitious or duplicative proceedings. Running through the subsurface of judicial thinking on this matter is the inarticulate notion that a party ought not to be tricked or trapped into losing his claim or right of action.

The four score or so of published decisions of our Supreme Court which have addressed the question of the effect of death of a party to a pending civil litigation do not suggest any conscious or overt preference for one policy over the other. This may, however, simply be due to the style of opinion writing in our Supreme Court: there hardly ever is a juxtaposition or matching of all competing policy considerations and a reasoned choice of the policy to be upheld in a particular case.

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1 The point was made by the writer in the paper he prepared and read for the Philippines at the 1980 General Assembly of the ASEAN Law Association held on November 24-29, 1980 at the Plenary Hall, Philippine International Convention Center, Manila. The paper was published in ALA 1980 WORKSHOP PAPERS pp. 29-35.

I

WHERE PLAINTIFF IS THE PARTY WHO DIES

The impact of a party's death on a pending civil litigation varies radically depending as to whether the party who dies is the plaintiff or the defendant. As compared to the problem of viability of the action where it is the defendant who dies, the rules governing the effect of plaintiffs death are fairly simple and easy to apply. Indeed, the basic rule is one and straightforward: substitute the plaintiff with his heirs or the legal representative of his estate whenever his cause of action is viable; or, conversely put, dismiss the case if plaintiff's cause of action perishes with him.

Where the issue, however, relates to the viability of a counterclaim, then the plaintiff's death will be governed by the rules applicable to the case where it is the defendant who dies because plaintiff is then in reality a defendant on the counterclaim.[2] Upon the other hand, where it is only the nominal plaintiff, and not the plaintiff who is the real party in interest, who dies, then there is no problem of viability. Thus, in an action by a guardian in behalf of his incompetent ward for annulment of deeds of sale of real property, substitution was ordered where it was the ward, and not the guardian, who died.[3] The same result logically follows where the plaintiff, while alive, had assigned his rights of action to another, in which case it is his assignment, and not his death, which is the operative act to effect the substitution.[4]

A

The "Personal"/"Not Personal" Dichotomy

Viability of the action despite plaintiff's death depends on the characterization of the cause of action as either transmissible or non-transmissible. Actually, the Rules do not use the term "transmissible" to define viability of the action after plaintiff's death. The Rules use the term "thereby extinguished" and "not thereby extinguished", whereas the Supreme Court opinions manifest a partiality for the epithets "personal" and "not personal".

The transmissibility of rights of action is determined by substantive law. It is in the characterization of the right of action as transmissible or not where some fine line-drawing has sometimes become necessary. Nevertheless, determination of transmissibility has generally been made on a case-to-case basis. There have of course been attempts to spell out the

[2] *See* Viardo v. Gutierrez, 67 Phil. 416 (1939).
[3] Ypil v. Salas, G.R. No. 49311-12, March 27, 1979, 89 SCRA 172 (1979).
[4] Del Castillo v. Jaymalin, G.R. No. 28256, March 17, 1982, 112 SCRA 629 (1982).
[5] Bonilla v. Barcena, G.R. No. 41715, June 18, 1976, 71 SCRA 491 (1976).

criteria in general terms. Thus, in one case,[5] the following clarification was offered:

> "The question as to whether an action survives or not depends on the nature of the action and the damage sued for. In the causes of action which survive the wrong complained affects primarily and principally property and property rights, the injuries to the person being merely incidental, while in the causes of action which do not survive the injury complained of is to the person, the property and rights of property affected being incidental." [6]

The action involved in the case where the above-quoted distinction was made was an action to quiet title over certain parcels of land, and, true enough, the Court found no difficulty in ruling that the action was not extinguished by plaintiff's death.

In most cases, the transmissible nature of the right of action may be evident and not reasonably contestable. Thus, an action for unlawful detainer,[7] to recover inheritance,[8] for damages for libel,[9] or a money claim,[10] are held, without much ado, to be actions which survive plaintiff's death *pendente lite*. Contrariwise, an action by the wife against her husband for legal separation was held to have died with the plaintiff wife.[11] The action for legal separation was held to have been abated by plaintiff's death notwithstanding a prayer in her complaint to deprive her husband of his share in the conjugal partnership profits, this prayer being viewed to be a mere effect of a decree of separation.

The "personal"/"not personal" dichotomy has not proved to be an infallible litmus test. In one forceful dissent, it was suggested that the adjective "personal" is too hazy as to be practically meaningless.[12] The majority in that case[13] ruled that an action for mandamus to compel a Court of First Instance (CFI) judge to conduct a preliminary investigation of a charge filed by petitioners is a personal action which was abated by plaintiff's death. Making fun of the majority opinion, the dissent mockingly suggested that the only things truly personal as to die with the person are his organs and other parts of his physical body.

It is entirely possible that plaintiff's cause of action may have a mixed character in that it may have a personal and a non-personal aspect. In such case, only the personal aspect of plaintiff's claim is to be dismissed upon his death. That is what happened in *Santos v. Secretary of Labor*.[14]

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[6] *Id.* at 495-96.
[7] Francisco v. Tabada, 9 Phil. 568 (1908).
[8] Velayo v. Patricio, 50 Phil. 178 (1927).
[9] Imperial v. Ziga, G.R. No. 1926, April 13, 1967, 19 SCRA 726 (1967).
[10] Villegas v. Zapanta, 104 Phil. 973 (1958).
[11] Lapuz v. Eufemio, G.R. No. 30977, Jan. 31, 1972, 43 SCRA 177 (1972).
[12] Dissenting opinion of Justice Perfecto in Guevarra v. del Rosario, 77 Phil. 624 (1946).
[13] Guevarra v. del Rosario, 77 Phil. 615 (1946). *But cf.* People v. Misola, 87 Phil. 830 (1950) (death of offended party does not abate criminal prosecution).
[14] G.R. No. 21624, Feb. 27, 1967, 22 SCRA 848 (1968).

In this case, plaintiff filed a petition for mandamus in the CFI against the Secretary of Labor to compel him to uphold his promotional appointment as labor conciliator in the Department of Labor and for salary differentials. Before the case could be tried, plaintiff died. The mandamus aspect of the case was dismissed because the cause of action in this respect—relating to a public office—was held to be personal to the plaintiff and to have died with him. *Actio personalis moritur cum persona,* said the Court. But the CFI's jurisdiction was held to subsist in respect to the claim for salary differentials.

B

Substitution Procedure

The substitution procedure where the plaintiff dies and his claim is not thereby extinguished is plain and easy to understand. But, sadly, it has been misunderstood and the Supreme Court had gone on record at least three times[15] to correct miscomprehension of this simple procedure, which miscomprehension has been committed most recently by no less than the Court of Appeals.[16] This simple procedure is as follows: *First,* plaintiff's attorney should inform the court promtly of the death of the plaintiff and give the name and residence of his executor, administrator, guardian or other legal representative.[17] *Second,* the court shall order the legal representative of the deceased to appear and to be substituted for plaintiff within a period of 30 days or within such time as may be granted.[18] *Third,* if the legal representative fails to appear within the stated time, the court should order the opposing party to procure the appointment of a legal representative of the deceased within a time to be specified by the court and the representative should immediately appear in behalf of the deceased plaintiff.[19]

Under this procedure, it is mandatory for the court to order the legal representative of the deceased plaintiff to appear. Deviation from this procedure is held to be grave abuse of discretion.[20] So it is abuse of discretion for the court to order the plaintiff's representative to amend the complaint to effect the necessary substitution of party-plaintiff.[21] What is

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[15] Vda. de Haberer v. Court of Appeals, G.R. No. 42699-42709, May 26, 1981, 104 SCRA 534 (1981); Caseñas v. Rosales, G.R. No. 18707, Feb. 28, 1967, 19 SCRA 462 (1967); Sarmiento v. Ortiz, G.R. No. 18583, Jan. 31, 1964, 10 SCRA 158 (1964).

[16] Vda. de Haberer v. Court of Appeals, *supra,* note 15.

[17] RULES OF COURT, Rule 3, Sec. 16. (Hereinafter, for brevity, citations to the Rules of Court will be to the Rule and Section number only.) Compare the special internal rules adopted by the Supreme Court, as quoted and applied in Reyes v. Danao, 28 Phil. 462 (1914).

[18] Rule 3, Sec. 17.

[19] *Id.*

[20] Vda. de Haberer v. Court of Appeals, *supra* note 15.

[21] Caseñas v. Rosales, *supra,* note 15.

more, the attorney-client relationship between plaintiff and the attorney was already terminated upon his client's death.[22]

The rules on abatement of the action by plaintiff's death are the same regardless of the stage of the litigation when plaintiff's death occurs. Where the plaintiff dies after entry of judgment, the Rules say that execution may issue, or one already issued may be enforced, upon application of the plaintiff's executor, administrator or other successor-in-interest.[23]

II

WHERE DEFENDANT IS THE PARTY WHO DIES

It is where the defendant is the party who dies *pendente lite* that serious procedural problems arise. Viability of the pending action after the defendant's death depends not only on the nature of the action as is the case where it is the plaintiff who dies. An even more crucial factor is the stage of the litigation when defendant's death occurs.

Initially, it must be recognized that the defendant's death does not necessarily abate the action in the sense that the right of action itself is extinguished. Abatement, in the sense of extinguishment of the action, occurs only when defendant's obligation which is sought to be enforced in the action is too personal, as in the case of the duty to give support, as to die with the defendant. Defendant's death presents two alternative recourses: either the action is dismissed to be prosecuted in the probate court, or it is continued against the executor, administrator or other legal representative of the deceased defendant who is substituted for him.

The advantages of either alternative are, oddly enough, not apparent. Dismissal of the action may involve a re-litigation of plaintiff's claim and, if found to be valid, this claim will have to share *pari passu* with the decedent's other creditors. Upon the other hand, continued prosecution of plaintiff's claim in the CFI despite defendant's death may give no more than the illusion of saving time: while the claim if reduced to judgment need not be re-litigated, it may still have to be filed in the probate court to share proportionately with the other estate creditors. Worse, the claim may inadvertently be time-barred by the statute of non-claims. Where plaintiff had however levied execution of his judgment on specific properties of the defendant before the latter's death,[24] the advantage of plaintiff not being relegated to the probate court is obvious. Plaintiff then has the status of a secured creditor.

A

Where Defendant Dies after CFI Judgment

There is not much doubt or controversy as to the fate of the litigation where defendant's death occurs after judgment in the CFI. Whatever

[22] Sarmiento v. Ortiz, *supra*, note 15.
[23] Rule 39, Sec. 7(a).
[24] Rule 39, Sec. 7(c).

be the nature of the claim, the action must be continued against deceased defendant's substitute. But there is a vast practical difference when precisely after the CFI judgment defendant dies. After CFI judgment, the defendant's death may occur either while the case is pending appeal, or after the judgment has become final and executory.

1

Where Defendant Dies Pending Appeal from CFI Judgment

Whatever is the nature of the action, whether it be for damages[25] or on a money claim,[26] it must be continued notwithstanding defendant's death, where this death occurs after judgment in the CFI.[27] This procedure is rationalized upon the standing given to a judgment of the CFI. The underlying notion is that it would be absurd to convert plaintiff's claim, which had already been passed upon and determined by the CFI, into a contested claim to be passed upon again by the probate court (which is also a CFI).[28]

Notably, therefore, survival of the action does not follow where the defendant dies after judgment by an inferior court. The reason for this discriminatory result is no longer plausible or convincing. It has been suggested that this result derives from the fact that the evidence in the inferior court is not recorded and its judgment is vacated by an appeal to the CFI.[29] Inferior courts having long been made courts of record,[30] the rationale for the different treatment can now be put only on the basis of rank, that is, that the CFI outranks the inferior court.

The case for equal treatment for an inferior court judgment becomes more difficult to refute where this judgment has become final and executory before defendant's death. In such a case, the claim may fairly be regarded to have been merged in the inferior court's judgment. It would be procedurally anomalous, and possibly violative of due process as well, to have such a final judgment revoked, modified or undone by defendant's post-judgment death. The absurdity of such a nullification theory becomes patent upon reckoning with the situation where execution of this inferior court judgment has already been levied upon defendant's properties before his death. Fortunately, no Supreme Court decision has gone as far as to

[25] To Guioc-Co v. del Rosario, 7 Phil. 126 (1906). *See* also Torrijos v. Court of Appeals, G.R. No. 40336, Oct. 24, 1975, 67 SCRA 394 (1975), a criminal case where accused died pending appeal from the CFI's judgment of conviction; the offended party's civil claim was held to have survived and substitution of the deceased accused's heirs as defendants-appellants was ordered.

[26] Azarraga v. Cortes, 9 Phil. 698 (1906).

[27] Rule 3, Sec. 21.

[28] Laserna v. Altavas, 68 Phil. 703 (1939).

[29] I MORAN, COMMENTS ON THE RULES OF COURT 221 (1979 ed.).

[30] *See* JUDICIARY ACT OF 1948, Secs. 77, as amended by Rep. Act No. 6031, effective 4 August 1969.

affirm this absurd result as may be inferentially extracted from the phraseology of the Rules.[31]

Even if defendant dies after CFI judgment but before the appeal has been perfected, the action, if based on a money claim, will have to be dismissed to be filed in the probate court.[32] Here is where the result may be very harsh as it requires the plaintiff to re-prove his claim all over again. This ruling should be re-examined with the end in view of avoiding wasteful duplication of proceedings. Since the claim had already been reduced to judgment, fairness and good sense suggest that the judgment be accorded some respect. This respect may be in the form of a *prima facie* validity accorded the claim. Such *prima facie* validity should be extended the judgment regardless of whether it is that of a CFI or of an inferior court. For that matter, even if death occurs before judgment but after evidence on the claim has been received, prudent time and resource management would dictate that this evidence be made capable of being reproduced on mere motion in the probate court.

2

Where Defendant Dies after CFI Judgment has become Final and Executory

Where plaintiff has succeeded in obtaining a final and executory judgment from the CFI before defendant's death, his concern will no longer be with viability of his claim but with enforceability of his judgment. In the ultimate, however, the true worth of plaintiff's judgment will be measured by how soon, and to what extent, plaintiff may be able to realize on it.

The worth of the judgment will therefore necessarily depend on the method for its enforcement. The enforcement routes available to the plaintiff will depend, in turn, on the nature of his judgment and the stage of the proceedings for its enforcement at which defendant's death occurs.

If the judgment is for the recovery of real or personal property, or the enforcement of a lien thereon, execution may issue, or a writ already issued may be enforced, against the executor or administrator or successor-in-interest of the deceased defendant.[33] The execution writ may be enforced regardless of whether the defendant dies before, or after, entry of judgment.[34] Its enforcement is independent of the estate proceedings.[35]

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[31] This inference is justified by the wording of Section 21 of Rule 3 which mandates dismissal of a money claim where "the defendant dies before final judgment in the Court of First Instance."

[32] Pabico v. Jaranilla, 60 Phil. 247 (1934).

[33] Rule 39, Sec. 7(b).

[34] Manalansan v. Castañeda, G.R. No. 43607, June 27, 1978, 83 SCRA 777 (1978); Miranda v. Abbas, G.R. No. 20570, Jan. 27, 1968, 19 SCRA 117 (1967).

[35] Manalansan v. Castañeda, *supra*, note 34.

Plaintiff's recovery on his judgment acquires some chanciness where the judgment is for money. No writ of execution can be issued for a money judgment where defendant dies after this judgment has become final but before it has been executed.[36] The CFI which rendered the judgment is deemed powerless to order its execution and a levy thereof on the properties of the estate of the defendant because these are already in *custodia legis* in the probate court.[37] The money judgment must therefore have to be filed in the estate proceedings within the time limited in the notice to creditors, and if no such proceedings had been instituted the judgment creditor should institute them.[38]

There is one advantage, however, in plaintiff's money judgment having already become final. This judgment can no longer be litigated in the probate court unlike the other money claims whose validity may yet be challenged by the administrator.[39] But there is also a disadvantage. The judgment creditor will share the estate with the other creditors, subject only to such preferences as are provided by law.[40] An additional disadvantage may be in the possibility[41] that the claim may have been in the meanwhile time-barred by the statute of non-claims. This possibility is not a remote one because a plaintiff with a money judgment may well be lulled into thinking that he has all of ten years within which to enforce his judgment.

Some confusion has arisen as to the money judgment creditor's proper recourse where the judgment debtor dies after the lapse of the five-year period for enforcing the judgment by motion. One case[42] suggested that plaintiff should file his money judgment with the probate court. The argument for this suggested route is expediency: were plaintiff to be required to file an action to revive his original judgment, he would really obtain nothing more than a revival judgment which will also still have to be filed in the probate court, the judgment debtor having died before execution could actually be levied on any of his properties.

A more recent case,[43] however, ruled that the money judgment, having already become stale because of its non-execution after the lapse of five years, can no longer be filed in defendant's estate proceedings unless it is

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[36] Verhomal v. Sanchez, 88 Phil. 596 (1951).

[37] Paredes v. Moya, G.R. No. 38051, Dec. 26, 1974, 61 SCRA 526 (1974).

[38] Py Eng Chong v. Herrera, G.R. No. 31229, March 25, 1976, 70 SCRA 130 (1976).

[39] Paredes v. Moya, *supra,* note 37 at 526.

[40] Evangelista v. La Proveedora, Inc., G.R. No. 32824, March 31, 1971, 38 SCRA 379 (1971).

[41] Precisely such a possibility did arise in Laserna v. Altavas, 68 Phil. 703 (1939), where the time bar was avoided only because defendant's death, having occurred pending appeal from the CFI judgment, he was duly and promptly substituted by the executrix of his estate. Such timely substitution of party defendant by the administrator or executor keeps the estate proceedings from being closed. Dingdasan v. Ang Chia, 88 Phil. 476 (1951).

[42] First Nat. City Bank on New York v. Cheng Tan, G.R. No. 14234, Feb. 28, 1962, 4 SCRA 501 (1962).

[43] Romualdez v. Tiglao, G.R. No. 51151, July 24, 1981, 105 SCRA 762 (1981).

first revived by action. This latter ruling is bad law and is best confined to its facts which the concurring justice noted to be "singular". In this case, the ten-year period for enforcing the first judgment was about to expire and there was yet no notice to creditors in defendant's estate proceedings so that plaintiff could not file a claim for his unsatisfied judgment.

The better rule is that which would dispense with the need for an action for revival. Significantly, an action by a judgment creditor for the revival of his judgment had once been assimilated to the filing of a formal claim with the probate court.[44]

B

Where Defendant Dies before CFI Judgment

Defendant's death while the action is pending in the CFI, and before judgment therein, presents various vexatious ramifications. It is in this eventuality, which is evidently the more common situation, where survival of the action hinges on the nature of the claim. It is here where characterization of the claim becomes critical. And it is in the effort at characterization that grey areas and ticklish situations emerge.

The nature of the claim is solely determinative of survival where death occurs while the action is pending is the CFI and before judgment therein. The precise stage of the action at which defendant's death occurs is immaterial so long as it occurs within this broad time frame—from filing of the complaint until promulgation of judgment. Thus, where the action is one which survives, the defendant will be substituted by his legal representative if he dies before he has pleaded to the complaint.[45] A similar substitution should be made where the defendant dies even before he is summoned.

The Rules employ another terminology for defining viability of the action where the defendant dies before the judgment in the CFI. The catch-phrases are "claims which survive" and "claims which do not survive." These terms are not to be confused with the terms "extinguished" and "not extinguished" which the Rules use in referring to those actions which are held to be too personal to the party as to perish with him.

1

Money Claims

Our procedural law ascribes a special and technical meaning to the terms "claims which survive" and "claims which do not survive". A claim is said not to survive if it is for "recovery of money, debt or interest there-

[44] Phil. Nat. Bank v. Villarin, G.R. No. 41036, Sept. 5, 1975, 66 SCRA 590 (1975).

[45] Masecampo v. Masecampo, 11 Phil. 1 (1908).

on",[46] All other claims are, by necessary inference, understood to be claims which survive.

But not all claims for money or debt are money claims which do not survive. In order to fall within this category, the claim must not only be for money but must arise from "contract, express or implied."[47] It is only these contract-derived money claims which are provable in the probate court.[48]

It is precisely this character of the claim as being provable in the probate court which rationalizes its non-viability after the defendant's death. Such money claims should properly be filed in the probate court so that all the debts of the deceased defendant may be collated and settled in one proceeding prior to the distribution of the deceased's estate.[49] Dismissal of money claims in such cases is mandatory and is compellable by mandamus.[50] The theory is that all unsecured creditors should share proportionately in the estate of the deceased defendant where this estate is insufficient to pay fully all his debts.[51] The policy, therefore, which is sought to be subserved by this rule of non-survival of money claims is, simply, the policy of non-preference among general creditors.

So compelling is the mandate to dismiss money claims upon defendant's death that this mandate is deemed to be an exception to the rule that a complaint should not be dismissed where there is a pending compulsory counterclaim against the plaintiff.[52] This is fair enough a result because the administrator may still plead the counterclaim in the probate court.[53]

Even as dismissal of a non-surviving claim has been ruled to be mandatory, it is still possible for the CFI to validly continue trying this claim against the deceased defendant's legal representative. This is where the legal representative acquiesces to this continued prosecution of the action.[54] This is a sound rule because the defendant's administrator may fairly be presumed in such a case to have waived his right to have plaintiff's claim re-litigated in the estate proceedings. After all, the continuation of the case against the defendant's administrator may well be deemed equivalent to the filing of the claim in the probate court because the administrator represents the estate.[55] But plaintiff is not estopped from himself

46 Rule 3, Sec. 21. *See* also Rule 87, Sec. 1.
47 Aguas v. Llemos, G.R. No. 18107, Aug. 30, 1962, 5 SCRA 959 (1962).
48 Rule 86, Sec. 5.
49 Pabico v. Jaranilla, *supra,* note 32.
50 *Id.*
51 Macondray and Co., Inc. v. Dungao, G.R. No. 18079, May 26, 1964, 11 SCRA 72 (1964).
52 Dy v. Enage, G.R. No. 35351, March 17, 1976, 70 SCRA 96 (1976).
53 Rule 86, Sec. 10.
54 Ignacio v. Pampanga Bus Co., Inc., G.R. No. 18936, May 23, 1967, 20 SCRA 126 (1967).
55 *Id.*

moving for the dismissal of his complaint even if he had earlier opposed a similar motion by the deceased defendant's representative.[56]

2

Actions which Survive

All actions which are not properly claims for "money, debt, or interest thereon", survive so that the defendant's legal representative should be substituted in his place during the pendency of the CFI action. Among these actions are those which the Rules expressly authorize to be maintained against an executor or administrator of a decedent's estate. These actions are those "to recover real or personal property, or an interest therein, from the estate, or to enforce a lien thereon, and actions to recover damages for an injury to person or property, real or personal."[57]

An action which is neither for money, debt or interest thereon, or one expressly authorized to be maintained against an executor or administrator, is assimilated as a claim which survives. An example of this uncategorized type of action is an action by a child to compel recognition by his natural father, which action was held to survive the defendant's death.[58]

3

The Vacillating Penumbra of "Money Claims"

It is not always an easy matter to ascertain that an action is for money within the meaning of the rule mandating dismissal of money claims.[59]

Not infrequently, a claim which in terms is for money shades over into a damage claim which survives. If the claim for money is actually for damages arising from alleged tortious or criminal acts, then it is not really a money claim.[60] Similarly, an action for damages against a preliminary injunction bond is not a money claim.[61] So is a claim for unpaid rentals in an ejectment case not a mere "money claim" because this is really a claim for damages for the withholding of possession.[62]

But where the damage claim is dependent upon a claim for money, as a claim for damages arising out of defendant's alleged non-payment of loans, it is not really a damage claim but a money claim merely.[63] So also is it a mere money claim where what plaintiff seeks to recover is a sum

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56 Dy v. Enage, *supra*, note 52.
57 Rule 87, Sec. 1.
58 Masecampo v. Masecampo, *supra*, note 45.
59 An instance of a trouble-free determination that the action was on a money claim was that made in Vda. de Bonnevie v. Vda. de Pardo, 59 Phil. 486 (1934), an action to recover a profit share in a partnership.
60 Dy v. Enage, *supra*, note 52.
61 Javier v. Araneta, 90 Phil. 287 (1951).
62 Tanhueco v. Aguilar, G.R. No. 30369, May 29, 1970, 33 SCRA 234 (1970).
63 Torres v. Morales, 90 Phil. 128 (1951).

of money from two defendants, jointly and severally, the claim against deceased defendant being that he wrongfully induced plaintiff to loan the money to his co-defendant.[64]

Very questionable, however, is the holding in a case[65] that an action for damages for malicious prosecution is a money claim merely. The reasoning given is that such damages do not spring from any injury caused to plaintiff's person. One may fairly wonder if such injury were not to plaintiff's person, whether it is not to his property. Equally questionable is the ruling in another case[66] that an action for damages against the manager of a commercial partnership resulting from his wrongful acts as such manager is one which does not survive. These rulings will saddle the probate court with the task of trying and resolving highly litigious factual issues. This unwelcome burden goes against the summary character of probate proceedings. The better test of viability for cases of this kind would be the susceptibility of the claim to summary disposition. Claims which involve complex and highly litigious factual issues should be tried in courts of general jurisdiction even as these claims may superficially or ultimately be for money.

4

Money Claim Asserted in a Counterclaim

There is, however, at least one instance where an action on a money claim need not be dismissed despite the defendant's death before judgment in the CFI. This is where the money claim is asserted in a counterclaim. In such a case, it is the plaintiff who is really the defendant, but the money claim should nevertheless survive plaintiff's death.[67] Under the earlier procedural law, there was an express provision[68] which expressly excepted from the rule of mandatory dismissal money claims which are filed as counterclaims. While there is no counterpart or similar express provision in our present procedural law, the same result may still be easily justified at least where the counterclaim might be barred under the "compulsory counterclaim" rule.[69]

Even where the counterclaim is permissive, the case for non-dismissal is highly arguable on policy grounds. Consider the situation which actually happened under the old law:[70] Plaintiff files an action in the CFI for partition of real property. While the action is pending, plaintiff dies and is

[64] Villegas v. Zapanta, 104 Phil. 973 (1958).
[65] Climaco v. Siy Uy, G.R. No. 21118, Apr. 27, 1967, 19 SCRA 859 (1967). But compare Aguas v. Lemos, *supra*, note 47, which is discussed in the text for fn. 75-76.
[66] Po Yeng Cheo v. Lim Ka Yam, 44 Phil. 172 (1922).
[67] Viardo v. Gutierrez, *supra*, note 2.
[68] Act No. 190 (1901), Sec. 701.
[69] Rule 9, Sec. 4.
[70] These facts were simplified from those of Viardo v. Gutierrez, *supra*, note 2.

substituted by the administrator of his estate. Why should the CFI be powerless in such a case to adjudge the administrator liable to the defendant on the latter's counterclaim (even if permissive) for money? Considerations of fairness and mutuality dictate that defendant should not be hamstrung in defending or counterclaiming against the administrator. Worse still, dismissal of the counterclaim will conduce to undue multiplicity of suits.

5

Impact of Attachment on Viability of Money Claim

Where the action is on a money claim but the plaintiff had obtained a preliminary attachment on defendant's property prior to defendant's death, the action will have to be continued against the defendant's substitute. The theory for this result is that the money claim had thereby been converted by the attachment into a secured claim. But the claim should be dismissed to be prosecuted in the probate court where the attachment had been discharged prior to defendant's death by his filing of a counterbond.

There is a conflict of authority, however, as to the continuing liability of the surety on the counterbond in such a case. An earlier case[71] ruled that the surety's obligation became legally impossible of fulfillment upon the dismissal of plaintiff's claim. But a later case[72] stressed that the counterbond subsists and continues to answer for plaintiff's claim that may be allowed by the probate court, on the reasoning that the probate proceeding is just a continuation of the CFI action. This later ruling does not make good sense. If the counterbond subsists up to the probate proceedings, then plaintiff is being allowed to eat his cake and have it too. Plaintiff is thereby made a secured creditor. As such, he must, fairly and equitably, be put to an election of either relying on his security (the counterbond) or waiving this security and sharing in the estate as a general creditor.[73] The dominant notion is to treat all estate creditors equally, i.e., proportionately.

A preliminary attachment may however have to be automatically lifted upon defendant's death. This should be the case where the attachment was issued on the ground that defendant might fraudulently alienate his properties. The reason for automatic lifting of the attachment in such a case is obvious and eminently fair: defendant can no longer dispose of his property since he is already dead and his executor or administrator cannot do so without judicial sanction.[74]

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71 Luneta Motor Co. v. Abad, 67 Phil. 236 (1939).

72 Macondray and Co., Inc. v. Dungao, *supra*, note 51.

73 *See* Rule 86, Sec. 7, which actually allows the secured creditor three mutually exclusive options.

74 Gonzalez v. Castillo, 65 Phil. 486 (1938).

6

Tort Claims

Tort claims definitely survive defendant's death. Thus, an action for damages against defendant for allegedly tricking plaintiffs into travelling from Manila to Samar to attend a supposed court case is an action which survives.[75] The damages here are said to cause an injury to property because plaintiff's personal estate is thereby injured or diminished in that plaintiffs were thereby made to incur unnecessary expenses.[76] So is an action for damages arising from negligence of a firm's manager in entering into disadvantageous contracts an action which survives.[77]

7

Actions to Enforce Liens

Actions to enforce liens survive because these claims cannot be enforced in a probate court, which court, being of limited jurisdiction, has no authority to enforce a lien.[78] Legal fiction has it that the property given as security by the deceased during his lifetime had already been set aside and carved out of his estate except in so far as its value may exceed the deceased's debts.[79]

8

Other Non-Money Claims

Other non-money claims are held to survive defendant's death. For instance, an election contest has been held not to be abated by protestee's death.[80] In these election cases, however, the substituted legal representative is the protestee's successor in the office—not his heirs or the executor or administrator of his estate.

9

Substitution Procedure

Where the action survives defendant's death, the substitution procedure is exactly the same as the substitution procedure where the plaintiff is the one who dies. Thus, it is the CFI which should first order defendant's legal representative to appear and substitute the deceased, and, it is only when this legal representative fails to comply with this order that the

75 Aguas v. Llemos, *supra*, note 47.
76 *Id.*
77 Board of Liquidators v. Kalaw, G.R. No. 18805, Aug. 14, 1967, 20 SCRA 987 (1967).
78 Olave v. Canlas, G.R. No. 12709, Feb. 28, 1962, 4 SCRA 463 (1962).
79 *Id.*
80 Silverio v. Castro, G.R. No. 23827, Feb. 28, 1967, 19 SCRA 520 (1967); Vda. de Mesa v. Mencias, G.R. No. 24583, Oct. 29, 1966, 18 SCRA 533 (1966).

court should order the plaintiff to procure the appointment of a legal representative.[81] The case cannot validly proceed against the deceased defendant in an action which survives without this deceased defendant being properly substituted. Any judgment so rendered in these proceedings would be void for being issued without jurisdiction. The need for substitution is based, plainly, on the right of a party to due process.[82] Should plaintiff tarry in procuring a legal representative for the deceased defendant, he runs the risk of having his complaint dismissed for failure to prosecute.[83]

III

SUMMARY AND RECOMMENDATIONS

The death of a party to a pending civil litigation should not be the occasion for visiting injustice on either the surviving party or on the decedent's estate. Nor should the party's death be an occasion for giving either party an advantage which he did not have prior to this death. Given the policy for expeditious settlement of decedents' estates, litigious claims should not be railroaded into summary disposition by the probate court. Upon the other hand, what has already been proved should no longer be required to be re-proved in the probate court.

The present state of our procedural law governing death of a party deserves some patchwork repair and adjustments. In so far as abatement by reason of plaintiff's death is concerned, the procedural law is fairly well-formulated and is readily comprehensible. What requires re-thinking and re-casting are some of the codal provisions and the case law governing the effect of the defendant's death.

Towards this re-thinking and re-casting, and on the basis of the foregoing discussion, the following specific recommendations are proferred:

1. A judgment of an inferior court and that of a CFI on a money claim should be put on a parity. So, if the plaintiff has a money judgment, whether from a CFI or from an inferior court, he should be able to file this judgment in the probate court as an incontestable claim in the event defendant's death supervenes after this judgment had become final.

2. Following the proposed parity for judgments of the CFI and inferior courts, if execution of an inferior court's judgment had already been actually levied on defendant's properties before his death, then it should be made clear that the execution may proceed to its ultimate conclusion.

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[81] Barrameda v. Barbara, 90 Phil. 718 (1952).

[82] Vda. de la Cruz v. Court of Appeals, G.R. No. 41107, Feb. 28, 1979, 88 SCRA 695 (1979). *See* also Caisip v. Cabangon, 109 Phil. 150 (1960).

[83] Lota v. Tolentino, 90 Phil. 829 (1952).

3. Still following the proposed parity for CFI and inferior court judgments, if a money judgment from either court has not yet become final at the time of defendant's death, this judgment should at least be treated as prima facie valid in the probate court.

4. Where a money claim is dismissed due to defendant's death *pendente lite,* the evidence already adduced in proof and disproof of the claim should be allowed to be reproduced on mere motion in the probate court.

5. A money judgment, which has not been enforced for more than five years since its entry, should be admitted in the probate court without need of a revival judgment, provided that the judgment is not more than ten years' old.

6. No damage action should be dismissed for prosecution in the probate court.

7. A money claim asserted by defendant by way of counterclaim should not be dismissed upon plaintiff's death where plaintiff is duly substituted in the action.

8. Where plaintiff's money claim has been secured by a preliminary attachment which was discharged by the defendant's filing of a counterbond, the claim should not be dismissed outright upon defendant's death. Plaintiff should first be given an option of either continuing the action or of prosecuting his claim in the probate court as a general creditor without recourse to the counterbond.

This, perhaps, should be the overriding consideration of the law on the matter: While the party who dies should be allowed to rest in peace, the party he leaves behind, together with the decedent's heirs and creditors, should not have their equities unduly disturbed.