Michigan Law Review

Volume 34 | Issue 7

1936

SURVIVAL OF ACTIONS-EFFECT OF PLAINTIFF'S DEATH ON CAUSE OF ACTION UNDER SHERMAN ACT-AVAILABILITY OF QUASI-CONTRACT REMEDY

SURVIVAL OF ACTIONS—EFFECT OF PLAINTIFF'S DEATH ON CAUSE OF ACTION UNDER SHERMAN ACT—AVAILABILITY OF QUASI-CONTRACT REMEDY—Testator had incurred losses on contracts for the sale of corn due to a

conspiracy and "corner" of the market by defendants. He sued at law to recover treble damages under the Sherman Anti-Trust Act for an "injury to property." Pending the appeal, testator died, and his administrators on petition were substituted in his stead. Defendants claimed that the cause of action, which was in tort, abated upon testator's death and did not survive. *Held*, on the basis of the statute, 4 Edw. III, c. 7, which was to be considered part of the common law and which did not presuppose the existence of a quasi-contract, testator's administrators could recover. *Moore v. Backus*, (C. C. A. 7th, 1935) 78 F. (2d) 571.

The early common-law rule extinguishing tort claims on the death of either the tortfeasor or the injured party[1] was early modified by the statute of 4 Edward III, c. 7, which allowed the representatives of deceased plaintiffs to recover for injuries to personal property. More recent legislation on the survival of tort claims has produced great variety of results in different states. In some jurisdictions it is provided that all tort claims except those for personal injuries will survive the death of either plaintiff or defendant.[2] Commonly, an extended list is provided of tort claims that will survive.[3] In the absence of federal survival legislation, the court in the principal case reverted to earlier common-law rules for the survival of tort claims.[4] By a liberal construction of the word "trespasses" in the statute of 4 Edward III, c. 7, to cover an injury done to the personal estate, the court avoided the necessity for a redefinition and extension of the concept "benefit" as used in quasi-contract actions. The adoption of quasi-

[1] Twycross v. Grant, L. R. 4 C. P. D. 40 (1878); Murphy v. Candor, 263 Ill. App. 226 (1931); POLLOCK, THE LAW OF TORTS, 13th ed., 62 (1928); 2 WILLIAMS, EXECUTORS, 11th ed., 1338 (1921); and see 1 Cyc. 50 (1901) for citation of numerous authorities.

[2] See Evans, "A Comparative Study of the Statutory Survival of Tort Claims," 29 MICH. L. REV. 969 (1931). Ariz. Rev. Code Ann. (Struckmeyer 1928), §§ 3725, 4003; Cal. Civ. Code (Deering, 1931), §§ 953, 954; Cal. Prob. Code (Deering 1931), §§ 573, 574; Colo. Ann. Stat. (Mills 1930), c. 172, § 8047; Del. Rev. Code (1915), § 4154; D. C. Code (1929), tit. 24, § 31; Idaho Code Ann. (1932), §§ 15-804, 805; Minn. Stat. (Mason 1927), § 9656; Mo. Rev. Stat. (1929), §§ 98, 99; N. M. Stat. Ann. (1929), § 105-1202; N. Y. Decedent Estate Law (McKinney 1932), § 120; 1 Ore. Code Ann. (1930), §§ 5-701, 5-702; Wyo. Rev. Stat. Ann. (Courtright 1931), §§ 88-2502 to 88-2504, 89-402; and the statutes of Utah by construction, Utah Rev. Stat. Ann. (1933), §§ 102-11-6, 102-11-7. See also, 48 HARV. L. REV. 1008 (1935) for a summary of statutory provisions.

[3] For example, see Ind. Stat. Ann. (Burns 1933), § 2-402; Maine Rev. Stat. (1930), c. 101, § 8, p. 1388; 3 Mich. Comp. Laws (1929), §§14040, 14042; Neb. Comp. Stat. (1929), § 20-1401; Wis. Stat. (1931), § 331.01. See also Evans, "A Comparative Study of the Statutory Survival of Tort Claims," 29 MICH. L. REV. 969 (1931).

[4] The court felt free to adopt its own construction of the common law and the statutes which were a part thereof, by the authority of Swift v. Tyson, 16 Pet. (40 U. S.) 1 (1842). It regarded the question of survival here as one of general jurisprudence and not of a local character, binding the federal court to follow the state decisions. However, it further found that there was nothing in the Illinois decisions opposed to the view of the common law it was taking, citing Bunker v. Green, 48 Ill. 243 (1868), in which like effect was given to the statute of 4 Edw. III, c. 7. The court also re-

contract tests has been an important device for avoiding the hardship of common-law rules as to the survival of tort claims. Starting from the asumption that "contract" claims in general will survive, the English courts came to the conclusion that quasi-contract claims for benefits received through tort could be treated as "contract" claims for this purpose.[5] In the leading case of *Phillips v. Homfray*,[6] however, a majority of the Court of Appeal adopted a very narrow definition of "benefit" and thus refused to permit the survival of a claim for use of an underground passageway during mining operations. In this country quasi-contract tests have been freely used to supplement the restricted provisions of modern survival legislation.[7] Presumably the narrow definition of "benefit" worked out in *Phillips v. Homfray* would not be accepted by American decisions.[8] But even the most extended definition of "benefit" would not have sufficed on the facts of the principal case to bring the plaintiff's claim into the field of quasi-contract.[9] The court chose the only avenue available for reaching a desirable result, one which is consistent with the tendencies of modern legislation and involves a further restriction of an arbitrary and highly technical common-law rule.

J. A. R.

garded the Illinois statute as to survival [Ill. Rev. Stat. (1935), c. 3, § 125] as preserving the enumerated actions in cases where a defendant died, and, therefore, not restrictive here.

[5] Hambly v. Trott, 1 Cowp. 373, 98 Eng. Rep. 1136 (K. B. 1776).

[6] 24 Ch. D. 439 (1883).

[7] Patton v. Brady, 184 U. S. 608, 22 S. Ct. 493 (1902); Head v. Porter, (C. C. Mass. 1895) 70 F. 498; Baker and Paul v. Huddleston, 62 Tenn. 1 (1873); Ferrill's Administratrix v. Mooney's Executors, 33 Tex. 219 (1870); and see Royal v. Byrd, 51 Ga. App. 387, 180 S. E. 520 (1935), where the question arose in connection with a problem of amending a pleading.

[8] See WOODWARD, THE LAW OF QUASI-CONTRACTS, § 275 (1913), and dissent of Baggallay, L. J., in Phillips v. Homfray, 24 Ch. D. 439 at 466 (1883).

[9] Singley v. Bigelow, 108 Cal. App. 436, 291 P. 899 (1930); Plefka v. Detroit United Ry., 147 Mich. 641, 111 N. W. 194 (1907); Payne's Appeal, 65 Conn. 397, 32 A. 948 (1895).