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

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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-

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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.


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 assumption that “con-
tract” 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. In the leading case of Phillips v. Homfray, 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 under-
ground passageway during mining operations. In this country quasi-contract
tests have been freely used to supplement the restricted provisions of modern
survival legislation. Presumably the narrow definition of “benefit” worked out
in Phillips v. Homfray would not be accepted by American decisions. 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. The court chose the only avenue available for reaching a desirable
result, one which is consistent with the tendencies of modern legislation and in-
volves a further restriction of an arbitrary and highly technical common-law rule.

J. A. R.

regarded 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); Fer-
rill’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 connec-
tion with a problem of amending a pleading.
8 See Woodward, The Law of Quasi-Contracts, § 275 (1913), and dissent
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).