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SURVIVOR OF ACTIONS UNDER THE SHERMAN ANTI-TRUST ACT

SURVIVAL OF ACTIONS UNDER THE SHERMAN ANTI-TRUST ACT.—The question of survival of actions *ex delicto* following the death of a party thereto has caused no small amount of litigation, and in actions under the Sherman Anti-Trust Act, due to the large sums that are always involved and a consequent desire on the part of the plaintiff to reach all possible sources of compensation, the problem assumes a peculiar importance. Section 7 of the Sherman Anti-Trust Act simply provides that, "Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue * * *". The problem was dealt with in a recent federal case in New York, *Sullivan v. Ass. Billposters & Distributors et al,* 6 F. (2d) 1000, where the plaintiff sued as assignee of creditors for the benefit of the S corporation against the defendant corporation and its directors, alleging that the defendants conspired to restrain trade and monopolize the billposting business with the result that the plaintiff's business was destroyed. During the pendency of the action one of the directors died and it was sought to revive the action against his executor. It was held that the action survived.

The court rested its decision on a broad interpretation of the aim, scope, and design of the Sherman Act as a regulation of business in interstate commerce, and on the theory that Congress did not intend such an action for injuries to business to die with the person, though it admitted that such an action *ex delicto* would not survive a person's death at common law since it was not an injury to property. The court evidently had in mind that the purpose of the Sherman Act was to put the protection of both business and property on the same plane, and that since at the common law an injury to property survived the death of the defendant, therefore in order to equalize protection to property and to business, it would be necessary either to have the action abate both as to injuries to property and to business, or to allow the action to revive in both instances, and that since the statute is remedial, a "giving" rather than a "taking", the legislative intent was presumed to be that the action should survive.

The court's interpretation seems to be a bit of judicial legislation. Since there is no statute on the subject, in determining what causes of action survive in federal courts, the law of the state where the action is brought governs,

1 R. C. L. 22, unless the action is brought under a federal statute in which case the common law governs. *Van Choate v. Gen. Elec. Co.* 245 Fed. 120. The latter is the case here. Further, it is established, as the court admits, that causes of action under remedial statutes to recover for torts abate according to ordinary common law rules unless they are saved by a statutory provision. 1 C. J. 210. Now at common law, an action survived against an executor if the decedent had tortiously added to his estate the property or proceeds of property belonging to another. POLLOCK ON TORTS, 11 ed. p. 71; *Phillips v. Homfray,* [1883] 24 L. R. Ch. Div. 439. In America the rule is generally limited to specific, tangible property, and therefore an injury to business is not deemed an injury to "property" within the meaning of the rule. *Jones v. Barmm,* 217 Ill. 381, 75 N. E. 505; *Shedd v. Patterson,* 312 Ill. 371, 144 N. E. 5; *Vencill v. Flynn Lumber Co.* 94 W. Va. 396, 119 S. E. 164; *Murray v. Buell,* 76 Wis. 657; *Mumpower v. City of Bristol,* 94 Va. 737, 27 S. E. 581; *Noonan v. Orton,* 34 Wis. 259; *Cleland v. Anderson,* 66 Neb. 252, 98 N. W. 1075. In analogous cases where the injury is caused by false representations or deceit resulting only in a general pecuniary loss, not involving specific property, the action is held not to survive. *Jenks v. Hoag,* 179 Mass. 583, 61 N. E. 221; *Henshaw v. Miller,* 17 How. 212; *Read v. Hatch,* 19 Pick. (Mass.) 47; *Tufts v. Matthews,* 10 Fed. 609; *Killen v. Barnes,* 106 Wis. 546, 82 N. W. 536. Thus under the American rule at common law, it would seem that the action in the instant case did not survive and a special statutory provision would be needed to save it. Yet the cases in the federal courts are not in harmony. An action under sect. 7 of the Sherman Act was held not to survive in *Caillouet v. Amer. Sugar Refining Co.* 250 Fed. 639, and *Gen. Film Co. v. Sampliner,* 252 Fed. 443. Such an action was held to survive in *Imp. Film Exchange v. Gen. Film Co.* 244 Fed. 985, and *Sampliner v. Motion Picture Patents Co.* 255 Fed. 242. In *United Copper Securities v. Amalgamated Copper Co.* 232 Fed. 574, the court held that the action would survive *if* the decedent acquired some benefit at the expense of the plaintiff but did not say what that "benefit" would have to be. In *Bonvillain v. American Sugar Refining Co.* 250 Fed. 641, although the court did not allow the action in that case to survive, it did say that some actions under sec. 7 would survive—the survival occurring where there was an actual injury to property.

It might be added here that statutes in the various states allowing actions for "injuries to personal or real property" or "estate" to survive the death of a party thereto have not helped to solve the problem. Despite the statute, questions as to what constitute "property" or "estate" continually arise and the courts are thrown back on the common law for a definition with results as set out above, all of those cases having been decided under such statutes. The New York survival statute, however, includes injuries to the "rights" of another and hence includes injuries of a pecuniary nature. *Cregin v. Brooklyn Crosstown R. Co.* 75 N. Y. 192; *Haight v. Hayt,* 19 N. Y. 464; *Squiers v. Thompson,* 73 App. Div. 552, 76 N. Y. S. 734; *Mayer v. Ertheiler,* 128 N. Y. S. 807.

The American rule has perhaps been too narrowly restricted. In an injury to "business" there would seem to be involved an injury to "property" such as to come within the proper meaning of the statutes of 4 Ed. III, and 3 & 4 Wm. IV, giving actions to and against personal representatives for injuries to property, real or personal. These statutes are part of the common law of America, I KENT COM. 14th. ed. sec. 473, and have been interpreted to include injuries to

credit, trademark, and rights of a pecuniary nature. *Baker v. Crandall,* 78 Mo. 584; *Hatchard v. Mege,* L. R. [1887] 18 Q. B. D. 771; *Twycross v. Grant,* L. R. (1878) 4 C. P. D. 40; 33 HARV. L. REV. 570. In this day of a complex civilization and a highly developed business and commercial life, there is no need to adhere to any hide-bound definition of "property" as something tangible, *Adams Express Co. v. Ohio State Auditor,* 166 U. S. 185, and the courts have not done so in other instances. Witness the protection to business afforded by equity against injury from strike. *Truax v. Corrigan,* 257 U. S. 312, 42 S. Ct. 124; *American Steel Foundries v. Tri-City Council,* 257 U. S. 184, 42 S. Ct. 72; and the recognition of good will as property. 22 R. C. L. 45. It would seem then that the same result might have been reached by the court in a more direct way by adopting a more modern, and perhaps more true, definition of property.

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