

ception. The old idea is still the weight of authority, and is backed by the non-entity theory of the common law and by the argument that Congress did not intend to cut off the common law liability of partners by passing the bankruptcy act. But these arguments may be met by others. The common law is constantly changing and adapting itself to modern conditions. The modern trend is for stability of business, one proof of this being the extraordinary growth of corporate business. Even the slow moving common law, depending on *stare decisis*, a system which tends to impede progress rather than to encourage it, has weakened to recognize joint stock companies and Massachusetts Trusts. Why then should not the common law give a little more in the face of a Federal Statute which clearly provides for a partnership entity?

The purpose of this article is not to advance any new and startling development of the law nor to upset certain fundamentals of the common law, but merely to bring out the fact that such a change as herein suggested is possible under the Federal Bankruptcy Act. The whole idea of firm insolvency and bankruptcy while one of the partners is totally solvent, presents an anomaly—the bankruptcy of a firm which is able to pay its creditors one hundred per cent of their claims.¹⁰ The theory is a new one and in order to have it function properly, a radical change in the common law of partnership, *i. e.*, the abolition of the partners' personal liability for firm debts, is necessary. The common law is perhaps not ready for such a deviation from its traditional view, and today the doctrine that a partnership is an entity in bankruptcy is probably too far out of accord with it. If so, it cannot be pushed to the limit suggested.

STANLEY WEISS, '29.

SURVIVAL OF CAUSES FOR PERSONAL INJURIES AND RELATED WRONGS IN MISSOURI

Although it is important to know the common law on a subject such as the survival of actions, it is equally important to know how far that law has been superseded by statutes and judicial interpretations of those statutes in a particular jurisdiction. It is here proposed to consider briefly the Missouri law as to the survival of causes of action for personal injuries not resulting in death and of related causes. At common law, of course, the doctrine was that the death of either the injured party or the wrongdoer ended the matter, or, as it was then expressed, "*actio personalis moritur cum persona.*" This common law rule is in effect unless changed by statute.

¹⁰ Incidentally this would open the Federal courts to suitors who desired to stay out of the state courts and give them full satisfaction in the Federal courts through the machinery of bankruptcy.

In 1835 the legislature enacted a statute which in its modern form is sections 97 and 98 of the Revised Statutes of Missouri. For convenience of reference, its present-day wording is set out:

Sec. 97. For all wrongs done to property, rights or interest of another, for which an action might be maintained against the wrongdoer, such action may be brought by the person injured, or, after his death, by his executor or administrator, against such wrongdoer, and after his death against his executor or administrator, in the same manner and with like effect, in all respects, as actions founded upon contract.

Sec. 98. The preceding section shall not extend to actions for slander, libel, assault and battery, or false imprisonment, nor to actions on the case for injuries to the person of the plaintiff, or to the person of the testator or intestate of any executor or administrator.

Obviously, section 98 expressly excludes actions for personal injuries. Yet in *Stanley v. Vogel*¹ the plaintiff attempted to recover on the theory that her estate had been lessened by her diminished power to earn a livelihood and by the expenditure of money for medical treatment. The suit was brought against the executor of the owner of a hotel for personal injuries sustained as the result of a fall through an unguarded doorway. It was held that the cause of action did not survive, since the wrong was not to the property rights of the plaintiff. It should be pointed out here that the Missouri courts long ago decided that "property, rights or interest" should be read as if there were no comma between "property" and "rights."²

In 1907, what is now section 4231³ was adopted. The title was "An act to provide for the survival of certain causes of action after the death of the parties." It reads as follows:

Sec. 4231. Causes of action upon which suit has been or may hereafter be brought by the injured party for personal injuries other than those resulting in death, whether such injuries be to the health⁴ or to the person of the injured party, shall not abate by reason of his death, nor by reason of the death of the person against whom such action shall have accrued; but in case of the death of either or both such parties, such cause of action shall survive to the personal representative of such injured party, and against the per-

¹ (1880), 9 Mo. A. 98.

² See *Bates v. Sylvester* (1907), 205 Mo. 493, 104 S. W. 73.

³ Laws Mo., 1907, p. 252.

⁴ For an example of injury to the health, see *Primm v. Schlingmann* (1923), 212 Mo. A. 133, 253 S. W. 469 (assault and battery).

son, receiver or corporation liable for such injuries and his legal representatives, and the liability and the measure of damages shall be the same as if such death or deaths had not accrued.

In *Shippey v. Kansas City*⁵ suit for personal injuries was filed against the city and individuals, the individual defendants died, and the suit was dismissed as to them. Where a city such as the defendant was sued on a cause of action arising from the wrongful act of another, the city could require that the other be made a party defendant and the suit could not proceed until then. The plaintiff received a payment from the estates of the individual defendants, agreeing not to prosecute them farther. It was held that the payment was a mere gratuity and that the city was not prejudiced. The Court said:

The right of action in cases for personal injury died with the person of the wrongdoer under the common law and under the express provisions of section 106^a of the Revised Statutes. Section 5438⁷ which was enacted in 1907 did not go into effect until after the deaths of the individual defendants, hence, does not apply.

In that case suit had been instituted before the deaths of the individual defendants, so at most it can be authority for no more than the dictum that if section 4231 had been in effect before the deaths the action would have survived.

In *Showen v. Metropolitan Street Railway*,⁸ suit was begun for personal injuries alleged to have been caused by defendant's negligence. While the cause was pending, the plaintiff died; the action thereafter was prosecuted by the administrator as plaintiff. He filed an amended petition alleging the fact of the death of the injured party, the appointment of the administrator, and his substitution as plaintiff. He did not allege that the injury did not result in death. It will be noted that the statute specifically refers to injuries other than those resulting in death. The discussion in the case was chiefly on the point as to whether the petition was fatally defective and the court held that it was. In the course of its opinion, the court quoted section 4231 and said:

This section does not apply to instances where the death of the injured party resulted from his injury nor to cases where the death was not caused by the injury but occurred

⁵ (1913), 254 Mo. 1, 162 S. W. 137.

⁶ R. S. Mo. 1909, the present section 98.

⁷ R. S. Mo. 1909, the present section 4231.

⁸ (1912), 164 Mo. A. 41, 148 S. W. 135.

before an action was commenced to recover damages for personal injuries which were not the cause of his death. In such cases the death of the plaintiff does not abate the action nor its cause but both survive to the personal representative of the deceased and such representative is entitled to be substituted in the action as plaintiff.

This case is a leading one, not only on the specific point involved, but also to the effect that a cause of action upon which suit has not been instituted prior to the death of either or both parties does not survive. It is interesting to note how far courts will go in giving effect to incidental dicta of an earlier court. Here, not only was the injury not shown to have resulted in death, but the action had been brought before the death.⁹ Obviously, the court did not stop to analyze the statute; yet the dictum is cited with the force of a decision in virtually all cases in which it is applicable.

In *Kohnle v. Paxton*,¹⁰ there is an attempt to study the statute with a view to determine its exact meaning. The action was brought against the executors of one Swope to recover for personal injuries received on account of the defective condition of the building occupied by the plaintiff as tenant of Swope. It was held on the landlord and tenant question that the plaintiff had no cause of action, and judgment was rendered for the defendant. However, Walker, J., took occasion to consider the further question involved, *viz.*, assuming that plaintiff could have recovered against Swope, did the cause of action survive, although no suit had been instituted? On this question the other two judges refused to express an opinion. Because of its importance (and incidentally because the writer inclines toward the result of that view) the portion of the opinion dealing with the question (omitting citations) is given in full:

Our own court defines "causes of actions" as employed in the above section to be matters for which an action may be brought. Elsewhere the words are defined as the right to bring suits; or the fact or combination of facts which give rise to rights of action, or the right to institute or prosecute proceedings. Notwithstanding the well understood meaning of the words, their explicit definition here is not inappropriate because when otherwise expressed than in the

⁹ *Greer v. St. Louis Iron Mountain and Southern Ry. Co.* (1913), 173 Mo. A. 276, 158 S. W. 740, is not distinguishable on its facts from the *Showen* case. Here, too, the court took occasion to utter by way of dictum, "the Statute provides that if the injured party has already commenced his suit and dies pending the same from causes other than the injury sued for, the suit survives to his personal representative."

¹⁰ (1916), 268 Mo. 463, 188 S. W. 155.

words used in the section it is as clearly disclosed, but not more so than in the statutory words, that it is not the suits or actions that are to survive upon the death of one or both of the parties but the causes or rights of action upon which suits are based. The right of survival was extended to suits brought under the section and pending at the time of its enactment as well as to causes of action upon which suits might thereafter be brought. This being true, the right of survival cannot be limited to cases in which actions were pending at the time of the death of one or both parties. Such a meaning, under well-recognized rules of construction, cannot be given unless words be interpolated or added to the text, which in view of the unambiguous character of the words employed, therefore, is that when a cause of action accrues under this section, a contingent right to a survival to the personal representative of either party to prosecute or defend, springs into existence upon such accrual, but does not become operative except upon the death of one or both of the parties. The right to the action having accrued, the death of a party in interest before the institution of a suit to enforce such right will not for the reasons stated, abate the action. It not only suffices but is an imperative rule that clear and comprehensive words demand no explanation to define their meaning; or, in other words, that which is clear cannot be made more clear. Sufficient, therefore, in itself, the section cannot in our opinion, be reasonably construed other than as we have indicated.

Walker, J., then proceeds to "overrule" the contrary conclusion reached in the *Showen* case.

In most of the cases arising after *Kohnle v. Paxton*, it is either ignored or dismissed with the bland acknowledgment of the fact that a single justice once expressed disapproval of the *Showen* case. The doctrine of the *Kohnle* case has been overruled by numerous dicta and finally by *City of Springfield v. Clement*.¹¹ This was a suit for contribution by the city. The injury was in 1913; the wrongdoer died testate in 1913; and final distribution of his estate was in 1914. Suit was brought against the city in 1916, and judgment recovered. The court said, approving the *Showen* case:

In our opinion section 5438, R. S. 1909, the same as section 4231, R. S. 1919, has no application to this case, for the reason that this section by its express terms applies only to actions pending at the time of the death of the deceased.

Now, what is the law and what should be the law? The

¹¹ (1922), 296 Mo. 150, 246 S. W. 175.

Courts of Appeal have definitely adopted the dictum in the *Showen* case. Divisional opinions, in their dicta and in at least one decision,¹² have also gone to that extent. The Supreme Court in banc has not, so far as the writer could determine, passed upon the point. What its attitude will be is of course, unknown, but it is improbable that the court will adopt the views expressed in *Kohnle v. Paxton*.

Consider the statute apart from authority. It reads "causes of action upon which suits have been or may hereafter be brought." Does this refer to *causes of action* or to *suits*? If to the latter, why mention causes? Obviously, there would be no sense in a provision for the survival of suits where no cause of action exists. It would appear that the unfortunate wording of the section was due to the fact that the legislators tried to make the statute apply to suits already brought and then, to insure its application to future causes of action, added the words, "or may hereafter be brought." It is quite true that this explanation is not completely satisfactory, but on the other hand, if the dictum of the *Showen* case is adopted, the words would be meaningless.

Two considerations have assisted the courts in reaching the conclusion that causes of action upon which suits have not been brought do not survive. First is the existence unrepealed of sections 97 and 98. These have been said to be not *in pari materia* with the later section 4231. Hence the courts will attempt so to construe the latter as to give effect to the former to as great an extent as possible. So, by construing section 4231 as applying only to causes upon which suit has been brought, it is said that the courts can give at least limited application to that portion of section 98 referring to actions on the case for personal injuries.

Then, too, there is the rule that statutes in derogation of the common law should be strictly construed. Where two constructions are possible the court will adopt that one which will least abrogate the common law. Since at common law no cause of action for personal injuries survived, it is self-evident that a holding that section 4231 refers only to "suits" is most consonant with the antecedent law. However, it would seem that this unnecessarily defeats the legislative intention. The cause of action is exactly the same before and after an action is instituted. Although there may be some justification for distinguishing between different kinds of causes, there is no basic reason for making a classification dependent upon the mere chance filing of a suit before death. Very often injured persons attempt to reach a settlement out of court, with or without the aid of lawyers. Rulings such as *Springfield v. Clement* would

¹² City of Springfield v. Clement, *supra*, note 11.

encourage them to retain lawyers in an increasing number of cases, and the lawyers in turn would be forced to file suit at once in self protection. The ultimate result would be to clog the dockets of the courts.

On the other hand, to give general application to section 4231 would put some meaning into the expression "causes of action," would not give an unfair advantage to those who happened to bring suit, prior to the death, and would undoubtedly accord with the intention of the legislature as expressed in the title to the act. Although in derogation of the common law, the statute should not be so construed as to lead to an unjust and arbitrary classification when with less difficulty an equitable result can be reached.

In spite of the cases above cited, it is believed that the Missouri law is not definitely settled. It is conceivable that when a case arises the Supreme Court will overrule the dicta and decisions which are based on little or no reasoning and rule that a cause of action is substantially the same before and after suit is filed, and that in either case the cause survives the death. If the Court should decide that it is bound by the previous rulings the Legislature should amend the statute to provide for all such causes of action.

Thus far only the cause for injury itself has been considered. The further problem remains as to the survival of causes which, ultimately, arise out of the principal transaction and are related to it.¹³ Such are causes of action for loss of services, for society and comfort, and for medical expenses incurred by those other than the injured party. Suppose a child has been injured as the result of D's negligence. The child later dies of influenza. No problem of survival is here involved so far as regards the parent's right to sue for loss of services. The right of the parent is separate and distinct from that of the child and exists irrespective of the death of the child. But suppose either D or the father dies. Few cases in point have been found.

In *James v. Christy*,¹⁴ a minor was killed as the result of an explosion on a ferry boat on which he was a passenger. An action was brought by the father of the child, but pending suit he died. It was held that the action did not abate, but survived to

¹³ There are a number of cases which involve the question of survivorship of causes of action for wrongful death. These are not within the scope of this note, but are here referred to because many courts do not clearly differentiate them from causes not resulting in death. Thus, *Bates v. Sylvester*, *supra*, note 5, often cited as well for inapplicable dicta as for its holding, decided that an action for wrongful death did not survive against the administrator of a deceased defendant. Many other cases hold that the action will not survive to the administrator of the plaintiff. See, for example, *Gilkeson v. Mo. Pac. Ry. Co.* (1909), 222 Mo. 173, 121 S. W. 138.

¹⁴ (1854), 18 Mo. 162.

his personal representatives, but recovery could be had only for the actual damages from the loss of the son's services. The Court said:

The administrator will not be entitled to any remuneration for the loss of society or comfort afforded by a child to his parent. Damages of this character died with the parent, and his estate is entitled to compensation, only so far as it has been lessened by the loss of his son's services.

This case has been termed "peculiar,"¹⁵ but it has never been overruled; the result has been said to have been reached upon the principle that "the action rested upon a breach of contract obligation (to the passenger of the common carrier), which breach involved injury to the property right of the father."

In *Toomey v. Wells*,¹⁶ Toomey filed suit for medical expenses and loss of services and companionship of his wife, resultant from injuries received while she was a passenger on defendant's street car on account of defendant's negligence. Toomey died and the case was revived in the name of his administrator. The St. Louis Court of Appeals sustained the ruling of the trial court limiting recovery to the actual expense incurred for the medical treatment, it being held that the cause of action for loss of services, comforts and society of the wife, if based on a personal injury to the wife, is the common law action of "trespass on the case," and there is no statute in Missouri abrogating the common law as to such actions.

Thus, it would appear that the only element of damage surviving is the actual amount of pecuniary loss, and this is certain only where there had been a contract relationship between the injured party and the defendant.

JOSEPH NESSENFELD, '29.

¹⁵ (1880), 9 Mo. A. 98.

¹⁶ (1926), 218 Mo. A. 534, 280 S. W. 441.