

Recent Legislation

ABATEMENT AND REVIVAL—DEATH OF ONE PARTY—PROCEEDINGS PENDING MOTION FOR NEW TRIAL AND BEFORE APPEAL.—A new Missouri statute sets forth the steps to be taken by the parties after the death of one pending the hearing of a motion for new trial and also after a motion for new trial has been overruled but before appeal has been taken. Mo. Laws 1929, p. 137. The wording would seem to allow the substitution of the deceased party's personal representative in all causes, but it will undoubtedly be construed as applying only to those causes of action which survive, according to the substantive law of survival of actions. If this were not true the new provisions would be entirely inconsistent and divergent from the statute for revival after death while action is pending, R. S. Mo. (1919) sec. 1346, and the interpretation of the act allowing the substitution of the personal representative upon death of a party pending appeal, R. S. Mo. (1919) sec. 1507.

Of the provisions of the new statute, sec. 1352a, providing for continuance after death of a party before a motion for new trial is disposed of, is relatively unimportant because the situation is one of rare occurrence. The legislature seems to have included it to make a complete statutory basis for revival in all conceivable situations, and this justifies its existence.

The remainder of the new provisions set forth the steps to be followed where either party has died after the overruling of a motion for new trial but before appeal is taken. In this situation the fundamental law is that if the judgment was for the plaintiff the cause of action has become merged in it and the doctrine of abatement does not apply so as to prevent an appeal by the defendant or his personal representative. *Siberell v. St. Louis-San Francisco Ry. Co.* (1929) 320 Mo. 916, 9 S. W. (2d) 912; *Remmler v. Shenuit* (1884) 15 Mo. A. 192. But where the judgment was for the defendant the common law rules of abatement apply. *Woehrlin v. Schaffer* (1885) 17 Mo. A. 442; 1 R. C. L. 38. As was stated above, the statute does not change this, but it sets forth the time to be allowed for revival proceedings and the rights of the parties where the provisions are not complied with. Briefly stated, the surviving party is allowed the same time, either as appellant or appellee, as he would have had had the other party not died; while the personal representative of the deceased party is allowed one year, as appellant, from the date of the overruling of the motion for new trial, and as appellee, from the taking of the appeal, to complete revival proceedings. The setting forth of the time is a definite forward step, as previously the time within which proceedings for revival must be commenced was discretionary. *Matheson v. St. Louis R. Co.* (1890) 44 Mo. A. 97; *Phillips v. Preston* (U. S. 1850) 11 How. 294; 3 C. J. 1028. As the previous statutes provided only for the continuance of pending actions and appeals, the new provisions fill a gap, and put all revival proceedings after the death of a party on a statutory basis.

J. A. G., '31.