son, also allow recovery by the representatives under a wrongful death statute.[16]

Only one case, *Buel v. United Rys. Co. of St. Louis*,[17] had been decided on prenatal injuries in Missouri prior to the principal case. In that case suit was brought under the wrongful death statute,[18] and recovery was denied to the representative of a child whose death was caused by injuries inflicted while in the mother's womb. The court held that since an infant could not recover for prenatal injuries if he himself were alive, the presence of the statute was no reason to grant relief to the survivors. By expressly overruling the *Buel* case, the court in the principal case joined the progressive minority of courts. The court would allow recovery to a person prenatally injured and therefore did allow recovery to the representatives of the child where the injuries were fatal, under the "plain terms" of the wrongful death statute.[19]

The trend of the recent cases is definitely toward allowing recovery to persons injured before birth, and allowing recovery by the representatives of such persons where the injury is fatal. Commendable though the trend may be, until there is a definite determination of when a child is viable, and more adequate proof as to the causal connection, extreme caution should be exercised before allowing recovery.

WORKMEN'S COMPENSATION—COMMON LAW ACTION AGAINST EMPLOYER FOR INJURY NOT COMPENSABLE UNDER THE ACT

McDaniel v. Kerr, 258 S.W.2d 629 (Mo. 1953)

Plaintiff developed an abscessed lung from exposure to plaster dust in the course of employment. He brought an action against his employer to recover damages for injuries resulting from defendant's alleged breach of his common law duty to provide a safe place in which to work and adequate protective devices. Both plaintiff and defendant had accepted coverage of the Missouri Workmen's Compensation Act relating to injury by accident,[1] but not to occupational diseases.[2] The trial court entered judgment for defendant notwithstanding the verdict for plaintiff on the ground that the evidence showed as a matter of law that plaintiff's injury was an accident within the meaning of

16. Verkennes v. Corniea, 229 Minn. 365, 38 N.W.2d 838 (1949); Jasinsky v. Potts, 153 Ohio St. 529, 92 N.E.2d 809 (1950); Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

17. 248 Mo. 126, 154 S.W. 71 (1913).

18. See note 1 *supra*.

19. Steggall v. Morris, 258 S.W.2d 577, 581 (Mo. 1953).

1. MO. REV. STAT. § 287.010 *et seq.* (1949).

2. MO. REV. STAT. § 287.020 (4) (1949). The court did not decide whether plaintiff's injury was or was not an occupational disease, because the parties had not accepted the occupational disease provision.

the Act, and, consequently, that plaintiff's proper remedy lay within the jurisdiction of the Workmen's Compensation Commission. The Supreme Court of Missouri reversed the trial court's judgment and directed reinstatement of the judgment and verdict for plaintiff. The court in the principal case held that an employer can be liable at common law for injuries not compensable under the Workmen's Compensation Act.[3]

While it is settled in Missouri that the sole remedy for an injury compensable under the Act is by a procedure before the Workmen's Compensation Commission,[4] there are two possible views of the effect of a workmen's compensation statute upon noncompensable injuries. The minority view is that an employee cannot have an action at law against his employer for such injury.[5] This view is reasoned from the proposition that workmen's compensation is essentially a balanced agreement whereunder the employer has exchanged his common law liability for a statutory liability. The common law liability was limited in scope by both the fault concept and by common law defenses, but was extended in depth by heavy adverse judgments. The statutory liability is considerably broader in scope because not confined to recoveries for fault, but shallower in depth through lighter awards. Consequently, to permit an employee an action at law is to invade that immunity for which the employer has bargained.[6] The majority rule is that workmen's compensation does not constitute an exclusive remedy so as to bar an employee's common law action for an injury not compensable under the particular act in the jurisdiction.[7] The theory

3. McDaniel v. Kerr, 258 S.W.2d 629 (Mo. 1953). For a general discussion of some of the various types of fact situations productive of noncompensable injuries, see 1 SCHNEIDER, WORKMEN'S COMPENSATION 233 *et seq.* (1941).

4. McKay v. Delico Meat Products Co., 351 Mo. 876, 174 S.W.2d 149 (1943).

5. Thomas v. Parker Rust Proof Co., 284 Mich. 260, 279 N.W. 504 (1938); Lee v. American Enka Corp., 212 N.C. 455, 193 S.E. 809 (1937); Francis v. Carolina Wood Turning Co., 208 N.C. 517, 181 S.E. 628 (1935). At the present time the minority view seems confined to Michigan and North Carolina, but a recent New York decision, Citolo v. General Electric Co., 305 N.Y. 209, 112 N.E.2d 197 (1953), has held that an employee with an occupational disease not compensable under the statute is not entitled to a common law remedy. The facts, however, involve a peculiar statutory situation. Partially disabling silicosis was removed from the list of occupational diseases and the court felt this indicated a legislative intent to deny all remedies to the plaintiff. This case has received adverse comment in 28 ST. JOHN'S L. REV. 142 (1953), but it is suggested that the problem is one for legislative solution.

6. *See* Mabley & Carew Co. v. Lee, 129 Ohio St. 69, 75, 193 N.E. 745, 747 (1934), overruled by Triff, Admx. v. National Bronze & Aluminum Foundry Co., 135 Ohio St. 191, 20 N.E.2d 232 (1939). *But see id.* at 208, 20 N.E.2d at 239 (Weygandt, C.J., dissenting opinion); *id.* at 209, 20 N.E.2d at 240 (Matthias J., dissenting opinion). See Rhoads, *The Workmen's Compensation Act*, 9 MICH. B.J. 129, 130-131 (1930).

7. Foley v. Western Alloyed Steel Casting Co., 219 Minn. 571, 18 N.W.2d 541 (1945); Billo v. Allegheny Steel Co., 328 Pa. 97, 195 Atl. 110 (1937); Triff, Admx. v. National Bronze and Aluminum Foundry Co., 135 Ohio St. 191, 20 N.E.2d 232 (1939); 2 LARSON, THE LAW OF WORKMEN'S COMPENSATION 136 (1952); PROSSER, TORTS 544 (1941).

of the majority view is that while workmen's compensation was perhaps originally conceived as the sole occupant of the area of litigation by employees against employers covered by the system, its failure to provide compensation over the whole of that area should not deprive the uncompensated employee of his common law remedy where the act is inapplicable.[8]

The Missouri Workmen's Compensation Act provides: "The rights and remedies herein granted to an employee, shall exclude all other rights and remedies of such employee . . . except such rights and remedies as are not provided for by this chapter."[9] In the light of this statutory language, a holding contrary to that in the principal case could scarcely be imagined. The minority view is based on statutory wording quite different from that of the Missouri statute.[10]

While the question in *McDaniel v. Kerr* appears to have been treated as one of first instance, the court cited an earlier case which reached the same result on similar facts.[11] The decision in the principal case resolves any doubt and places Missouri squarely in alignment with the prevailing and better view.

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8. *See* Triff, Admx. v. National Bronze & Aluminum Foundry Co., 135 Ohio St. 191, 106, 20 N.E.2d 232, 239 (1939). 2 LARSON, *op. cit. supra* note 7, at 135.

9. MO. REV. STAT. § 287.120 (2) (1949).

10. N.C. GEN. STAT. § 97-10 (1950):

> The rights and remedies herein granted to an employee where he and his employer have accepted the provisions of this article, respectively, to pay and accept compensation on account of personal injury or death by accident, shall exclude all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin, as against his employer at common law, or otherwise, on account of such injury, loss of service, or death. . . .

11. In Row v. Cape Girardeau Foundry Co., 141 S.W.2d 113 (Mo. App. 1940), plaintiff brought a claim for workmen's compensation. The referee for the Workmen's Compensation Commission decided that plaintiff's injury was not compensable. Plaintiff subsequently brought a common law action against his employer and obtained a default judgment. In a garnishment proceeding to satisfy the judgment of the trial court, issue was joined on the validity of the trial court judgment, which the St. Louis Court of Appeals affirmed as being within the exercise of the lower court's proper jurisdiction. Although the court in the *Row* case achieved the same result as in *McDaniels v. Kerr*, the decision has not been relied upon for this point for the probable reasons that the judgment went by default in the trial court, and that the issue was presented to the appellate court by way of a collateral attack upon the jurisdiction of the trial court.