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SURVIVAL OF ACTIONS IN MONTANA

Actio personalis moritur cum persona is a maxim which reaches back far into English jurisprudence. Translated it means personal actions die with the person. The reasoning which supports it is "one of the least rational parts of our law."¹ It has no champion at this date, nor has any judge or law writer risen to defend it for two hundred years.² Actions *ex contractu* were conceived as not within the sweep of the principle, but *ex delicto* actions, involving injuries to the person, were. In the early common law the thought was that private suits for personal wrongs were in the nature of punitive recoveries, vindictive, which should not be prosecuted against the personal representatives who had no hand in the tort.³ The merit of the claim against the wrongdoer seemed not to occupy attention.

Later statutes alleviated the harsh rule. In 1330 a statute⁴ gave executors authority to sue for damages for their decedent's chattels asported in his lifetime. Again in 1833⁵ a remedy for injuries to decedent's real estate was enacted, and this worked the other way as well, for the deceased wrongdoer's estate was liable for his acts against another's property committed within six months of his death. The emphasis was on property interests. Personal actions were still governed by the Latin phrase. Blackstone⁶ suggested in 1770 that since the personal representatives of the plaintiff received no benefit and those of the defendant committed no wrong, the action should abate. *Ex contractu* actions were in the nature of property which descended

¹POLLOCK, THE LAW OF TORTS, (12th ed. 1923) p. 60.

²Harris v. Nashville Trust Co. (1914) 128 Tenn. 573, 162 S. W. 584, 49 L. R. A. (N. S.) 897, Ann. Cas. 1914C 885.

³POLLOCK, THE LAW OF TORTS, p. 61.

⁴ED. III, c. 7.

⁵3 & 4 WILL IV, c. 42. Traces of this statute and that referred to in *supra* note 4, appear in Montana's Probate Code, §§10258, 10259, 10260, R. C. M. 1935.

⁶III BLACKSTONE'S COMMENTARIES 302 (Chapter 20): ". . . . Or, it may be, that the plaintiff is dead, for the death of either party is at once an abatement of the suit. And in actions merely personal, arising *ex delicto*, for wrongs actually done or committed by the defendant, as trespass, battery, and slander, the rule is that *actio personalis moritur cum persona*; and it never shall be revived either by or against the executors or other representatives. For neither the executors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury. But actions arising *ex contractu*, by breach of promise and the like, where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suits shall abate by the death of the parties, yet they may be revived against or by the executors: being indeed rather actions against the property than the person, in which the executors have now the same interest that their testator had before."

to the personal representative, and they survived. The test seemed to be whether property rights were affected as distinguished from merely personal interests.⁷ Assignability of the cause of action has been urged as the criterion.⁸

The injustice of the maxim brought about Lord Campbell's Act.⁹ Passed in 1846, it gave to the deceased's personal representative the right to sue the person whose wrongful act, neglect or default caused the death of the party. Proceeds were for the benefit of the deceased's family. Similar legislation has been enacted in most American jurisdictions. We have it in Montana.¹⁰ There is properly no question of survival under this type of statute, for it confers a new cause of action.

The prime inquiry here is as to causes of action which had existence before the party's death. Unless saved by statute, such actions come under the common law rule and are subject to *actio personalis*. The appropriate statute on general survival in Montana is Section 9086, R. C. M. 1935:

"An action, or cause of action, or defense, shall not abate by death, or other disability of a party, or by the transfer of any interest therein, but shall in all cases, where a cause of action or defense arose in favor of such party prior to his death or other disability, or transfer of interest therein, survive, and be maintained by his representatives or successors in interest; and in case such action has not been begun or defense interposed, the action may be begun or defense set up in the name of his representatives or successors in interest; and in case the action has been begun or defense set up, the court shall, on motion, allow the action or proceeding to be continued by or against his represent-

⁷Jenkins v. French (1879) 58 N. H. 532; Boor v. Lowrey (1885) 103 Ind. 468, 3 N. E. 151, 53 Am Rep. 519; Sullivan v. Associated Billposters (1925) 6 F. (2d) 1000, 42 A. L. R. 503.

⁸See 1 C. J. 174, §303; 1 C. J. S. 179, §132.

⁹9 & 10 Vic., c. 93.

¹⁰§9076, R. C. M. 1935: "When the death of one person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person who is responsible for his conduct, then also against such other person. In every action under this and the preceding section, such damages may be given as under all the circumstances of the case may be just."

§9075, R. C. M. 1935: "A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person who is responsible for his conduct, also against such other person."

atives or successors in interest. In case of any transfer of interest, the action or proceeding may be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action or proceeding."

The history of Montana's survival statute shows it to have been taken from California, and it retained the California language¹¹ until 1883 when the present law was enacted.¹² American jurisdictions have varying survival statutes not susceptible of clear-cut classification.¹³ A summary¹⁴ breaks up the statutes into four groups. In five states,¹⁵ only injuries to tangible property survive. Fifteen states¹⁶ allow survival of all causes except personal injuries. Twenty two¹⁷ provide for survival of actions "for injury to the person," but this means physical injuries only and not the intangible interests of personality. The law of six states¹⁸ grants survival to all causes of action. Montana's broad statute places her in the fourth group where all causes survive.

*Lavell v. Frost*¹⁹ is apparently the first Montana case involving survival. The action had been instituted before the death of the defendant and the court applied the rule as set out

¹¹CAL. CODE OF CIVIL PROCEDURE, §385 (Deering 1937): "An action or proceeding does not abate by the death, or any disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue" Note the wording, ". . . if the cause of action survive or continue" Interpretation by California courts has been that the statute does not purport to change the common law rule that death abates personal actions. A line of authority commencing with *Clark v. Goodwin* (1915) 170 Cal. 527, 150 P. 357, LRA 1916A 1142, down to *Gosling v. Nichols* (1943)Cal....., 139 P. (2d) 86, sustains the view. Accordingly, in California the heirs or personal representatives may sue the living tortfeasor under the analogue of Lord Campbell's Act, but may not sue the tortfeasor's estate after his death.

¹²Modification of language occurred in 1895 by the enactment of §587 Code of Civil Procedure, but the change was slight and dealt with omission of the word "marriage."

¹³*Evans, A Comparative Study of the Statutory Survival of Tort Claims for and against Executors and Administrators*, 29 MICH. L. REV. 969, (1931).

¹⁴*Inadequacies of English and State Survival Legislation*, 48 HARV. L. REV. 1008, (1935).

¹⁵Alabama, Nevada, North Dakota, South Dakota, Tennessee.

¹⁶Arizona, California, Colorado, Delaware, District of Columbia, Idaho, Indiana, Minnesota, Missouri, New Mexico, New York, Oregon, Utah, West Virginia, Wyoming.

¹⁷Arkansas, Florida, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Nebraska, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Vermont, Virginia, Washington, Wisconsin.

¹⁸Connecticut, Iowa, Louisiana, Mississippi, Montana, New Hampshire. ¹⁹(1895) 16 Mont. 93, 40 P. 146.

in Section 22 of the Code of Civil Procedure:²⁰ "An action or defense shall not abate by the death of the party, but shall survive and be maintained by his representatives." This is apparently an abridgment of the original statute more fully set out above. *Lynde v. Wakefield*,²¹ decided the next year, raised the question of the right of a widow's personal representative to have dower assigned. The court quoted the statute at length and concluded that the common law would refuse the administrator this action, ". . . But we think under our statute, and the great weight of authority, a different rule prevails in equity." In *Melzner v. Northern Pacific Ry. Co.*²² an interpretation more extensive than equity adjudications was put upon the statute from a historical review of the legislation. Tort claims as well as others were deemed within the statute. There the administrator sued on the last clear chance theory for personal injuries to his decedent, and the objection was that the parent should bring the action under (now) Section 9075, R. C. M. 1935. The court held the complaint disclosed a cause of action in decedent at his death upon which the plaintiff administrator was suing.²³

*Dillon v. Great Northern Ry. Co.*²⁴ was an action by the widow in her own right and as guardian of her minor children against the employer of her husband who was killed in a train accident. Decedent did not live a second of time after the crash. In holding the railroad not liable, the court observed that ". . . the wrong and the death being coincident in point of time, the instant the wrong is committed the victim of the wrong has ceased to exist, and it seems impossible that there is any cause of action in favor of such victim." Here there was dictum that a cause of action cannot exist in favor of a deceased person. By that surely is meant that after death no personal actions can arise. Different is the cause of action arising during the life of deceased which is preserved by virtue of statute.

A survival point arose in *Johnson v. Butte & Superior Copper Co.*,²⁵ namely, whether a common law action could be carried

²⁰COMPILED STATUTES OF MONTANA, FIRST DIVISION, 1887.

²¹(1896) 19 Mont. 23, 47 P. 5.

²²(1912) 46 Mont. 162, 127 P. 146.

²³In wrongful death cases importance is attached to the fact of survival of deceased for an appreciable length of time. If death is instantaneous, no cause of action arises and there is nothing to survive. *Dillon v. Great Northern Ry. Co.* (1909) 38 Mont. 485, 100 P. 960; *Chicago M. & S. P. Ry. Co. v. Clement* (C. C. A. 9th 1915) 226 F. 426; see *Burns v. Eminger* (1927) 81 Mont. 79, 261 P. 613; *Melzner v. Northern Pac. Ry.* *supra* note 22.

²⁴(1909) 38 Mont. 485, 100 P. 960.

²⁵(1910) 41 Mont. 158, 103 P. 1057, 48 L. R. A. (N. S.) 938.

forward by the administrator of deceased. The injury to the workman resulted in death, and a statute²⁸ took away the defense of contributory negligence from the mine owner. Liability was fastened on the defendant because the action accrued to the party injured and remained available to him until the instant of his death. Expressly left undecided was the question whether the heirs of deceased could maintain an action under our equivalent of Lord Campbell's Act.

*Melville v. Butte-Balasklava Copper Co.*²⁷ illustrates a survival distinction. The plaintiffs were the widow and minor children of deceased who was killed in a mine accident in which his own negligence figured. Pleading under (now) Section 9076, R. C. M. 1935, which gives a cause of action to heirs or personal representatives for the wrongful death of a person not a minor, plaintiffs urged that defenses did not apply to them. The court defined "wrongful act or neglect of another" to mean wrongful as against the deceased, not as to the heirs. If fault lay in the injured party's conduct to deprive him of recovery, so it was with his heirs or personal representatives. They claim under him. *Maronen v. Anaconda Copper Mining Co.*²⁸ put the question in these terms: Would the same facts, if stated by the injured man, constitute a cause of action in his behalf? If so, the action could be carried forward.

A liability imposed by statute was sought to be enforced against the estate of a deceased director in *First National Bank v. Cottonwood Land Co.*²⁹ The court held that ". . . the cause of action survives the death of the party in the wrong as well as the death of the one whose rights are infringed." Here is the suggestion that the survival statute works both ways. This was not a personal action in the sense we have been using the term. The action affects property rights and hence conceivably could survive under statutes less broad than ours.

Breach of promise to marry³⁰ has long been cited to exemplify the typical personal action which dies with the person. It is damage to intangible interests that is sought to be recovered

²⁸Ch. 23, §1, LAWS OF MONTANA 1905, now §7763, R. C. M. 1935.

²⁷(1913) 47 Mont. 1, 130 P. 441.

²⁸(1913) 48 Mont. 249, 136 P. 968.

²⁹(1916) 51 Mont. 544, 154 P. 582.

³⁰Courts examine the substance of the cause of action without regard to the form in which it is cast. Breach of promise to marry is tort more than contract, the agreement affects persons not property, it is not assignable. The measure of damages will include considerations for the plaintiff's character, social standing and chastity. In *Warner v. Benham* (1923) 126 Wash. 393, 218 P. 260, 34 A. L. R. 1358, suit for breach of promise to marry was held not to survive under the Probate Code which provided for survival of actions based upon contract.

for. Property rights are not affected. The Montana court had opportunity to pass directly on the question as influenced by Section 9086. It held in *Kennedy v. Rogan*²¹ that such action survived. There was no doubt now that Montana's statute was a general survival law operating both in favor of and against the estate even in torts most personal in character.

*Bruce v. McAdoo*²² involved survival and Workmen's Compensation. A defective brake on a railroad car being moved in the yard of the coal company caused the car to stop abruptly and precipitated the deceased from the car to the ground. His employer and the worker were covered by the provisions of the Workmen's Compensation Act, and admittedly a settlement had been made. The action was against the Director-General of Railroads for negligence in providing defective equipment. Provisions of the Workmen's Compensation Act were held to be exclusive; and unless the wrongful act occurred off the premises of the employer there could be no action against a third party for his negligence. The suggestion in this case was that if an independent action under the survival statute were to be given, it was the legislature's business to provide it.²³

In *Anderson v. Wirkman*²⁴ defendant's intestate shot and killed L. O. B. Anderson and then committed suicide. Heirs of Anderson presented a claim against the estate of the murderer and it was rejected. Suit for damages ensued. The court held that Section 9076 authorized the suit and our survival statute preserved the action against the wrongdoer's estate. Defendant contended for a narrow construction of Section 9086 since survival of a cause of action *against* a tortfeasor was not in words provided for. Invoked also was the argument that this statute in derogation of the common law was to be strictly construed. The holding adhered to views expressed in former cases and the argument was not accepted.

The facts in the two *Burns v. Eminger*²⁵ cases were the same. The father as administrator sued for the death of his minor son who was run into by the servant of defendant. Seven hours later the boy died. Recovery in the first was for \$1500 on a cause of action arising in the child's favor before his death. \$2500 was recovered in the action prosecuted under the authority of Section 9075, and here the plaintiff sued in his

²¹(1916) 52 Mont. 242, 156 P. 1078.

²²(1922) 65 Mont. 275, 211 P. 772.

²³Finally in 1933 such a remedy was provided in Ch. 138, LAWS OF MONTANA 1933, carried into R. C. M. 1935 as §2839. See Toelle, *Workmen's Compensation in Montana*, 1 MONT. L. REV. 5, 30.

²⁴(1923) 67 Mont. 176, 215 P. 224.

²⁵(1927) 81 Mont. 79, 261 P. 613; (1929) 84 Mont. 397, 276 P. 437.

capacity as parent. Said the court, "In the case of an injury to a minor, there arise two causes of action—one in favor of the minor, the other in favor of the parents for loss of services during minority." *Res adjudicata* may not be pleaded in the second action since the character of the plaintiff has changed.

A county commissioner was charged with collecting illegal fees in *State v. Russell*.³⁶ From a judgment of conviction and removal from office an appeal was taken, but the death of the commissioner intervened. It was argued the action abated. The court heard the appeal and reversed the judgment. "While it is true that Russell cannot be reinstated, his right to the per diem and mileage in dispute and giving rise to the charge of illegal collection, as well as to emoluments accruing to him between the date of his removal and his death, depends upon the validity of the judgment." Actions penal in nature are the one class which are held not to survive. Here of course a property right is affected. On that basis the survival rested.

What is the measure of damages under our survival statute? The Dillon Case³⁷ in *obiter* suggests as the applicable standard what would have been proper had the decedent lived and sued. Compensation for mental and physical pain and suffering, for medical attention, for loss of time and for decreased earning capacity presumably would be allowed. To be carefully distinguished is the recovery under our Lord Campbell's Act.³⁸ Damages there are measured by the loss which the kindred sustain. Elements recoverable are the portion of deceased's earnings that would have come to them had deceased lived, plus possibly loss of companionship.³⁹ Furthermore, what is recovered by virtue of Lord Campbell's Act is not a part of decedent's estate. The proceeds are for the benefit of the heirs and the administrator acts as a trustee for them.⁴⁰ Exemplary damages are allowed under this section provided the actionable negligence is that of the defendant and not that of his servant.⁴¹

Interesting is the conflicts of law question presented where the cause of action arises in a jurisdiction with a broad survival statute and is sued upon where by the law of the forum the

³⁶(1929) 84 Mont. 61, 274 P. 148.

³⁷Dillon v. Great Northern Ry. Co. (1909) 38 Mont. 485, 100 P. 960.

³⁸The statute (§9076, R. C. M. 1935) directs that such damages may be given as under all the circumstances of the case may be just. For measure of damages in all states, see note, McCORMICK ON DAMAGES (1935) p. 366.

³⁹Recovery for the loss of companionship was specifically recognized in Mize v. Rocky Mountain Bell Telephone Co. (1909) 38 Mont. 521, 100 P. 971, 129 Am. St. Rep. 659, 16 Ann. Cas. 1189.

⁴⁰Batchoff v. Butte Pacific Copper Co. (1921) 60 Mont. 179, 198 P. 132.

⁴¹Olsen v. Montana Ore Purchasing Co. (1907) 35 Mont. 400, 89 P. 731.

action does not survive. Contractual actions give little trouble since their survivability is well nigh universal. Actions for death by wrongful act may well be litigious. In the days of swift automobile travel the wrongdoer is here today and gone tomorrow. Both wronged and wrongdoer may perish in the same accident. Suit against the estate of the party in fault may be in the courts of another state. Lord Campbell's Act presents the beneficiaries with the cause of action. The survival statute, if general, carries it forward against the estate of the tortfeasor.

The plaintiff in *Muir v. Kessinger*⁴³ was injured in Montana through the alleged negligence of defendant's intestate who died as a result of the accident. Plaintiff's claim against the estate of the deceased in Washington was rejected. By Montana's Section 9086, the action survived against the estate. In Washington, the narrow common law survival rule applied.⁴⁴ Holding that the procedural machinery through which the plaintiff acted was not adequate to receive a tort claim of this nature,⁴⁵ the court found for the defendant. "This is not because the tort does not survive in Montana, but the claim is excluded from claims which may be pressed by suit against the estate. A State may decline a remedy in its Courts upon a tort arising in another jurisdiction." The anomaly of success in one state and defeat in another is a part of the price of our federal system.

Progress away from the common law *actio personalis* rule has been slow. From the original Acts which saved actions in favor of the plaintiff as to real and personal property, the growth of the law has carried with it expanding doctrines, aided by statutes, which preserve actions in favor of and against both parties, and this to the extent of actions most personal in character. Common sense tells us that the exigency of plaintiff's or defendant's death should not forfeit the cause of action. Better it is to let the distributees of a tortfeasor's estate claim a less generous share than to deny relief to the party harmed. Compensation for a wrong done is the philosophy which should prevail. Exemplary damages are given in certain actions in addition to compensatory damages. They are assessed for the purpose of "visiting a punishment upon the defendant and not as a

⁴³(1940) 35 F. Supp. 116.

⁴⁴REM. REV. STAT. §193, §967, have been interpreted to mean only actions which survived at common law survive under these sections.

⁴⁵REM. REV. STAT. §1520. Actions on Torts of Decedent. "Any person, or his personal representatives, shall have an action against the executor or administrator of any estate or intestate who in his lifetime shall have wasted, destroyed, taken, or carried away, or converted to his own use, the goods and chattels of any such person, or committed any trespass on the real estate of such person."

measure of any loss or detriment of the plaintiff."⁴⁵ Accordingly, when an action under the survival statute is against the living tortfeasor, and the case is one where exemplary damages are otherwise appropriate, they may well be awarded. If, however, the tortfeasor is dead, no social interest can be served by holding his estate liable for punitive damages.

The vitality which *actio personalis* exhibits can be impaired only by statute, for already noted are its strong common law roots. Language as general as that in Section 9086 and interpretations as broad as Montana's are necessary to achieve the desired result. It is believed that our general survival statute merits wider initiation and adoption.

—James A. Nelson.

TEMPORARY ALIMONY IN A SUIT FOR ABSOLUTE DIVORCE—MONTANA

The doctrine of alimony is a necessary consequence of the legal relations between husband and wife.

At common law it appears that the husband became seized, during coverture, of a freehold estate in all the lands in which his wife had an estate of inheritance,¹ with control of such property.² All personal property in her possession at marriage, or which came to her during coverture, vested absolutely in the husband.³ In return, the law cast on the husband the duty of maintaining his wife according to his ability and condition in life.⁴

Temporary alimony and suit money were regularly granted by the ecclesiastical courts to a wife, defendant as well as plaintiff in a suit for divorce, on showing of marriage, if she were really in need, and had probable grounds for her success in the action.⁵ The natural result of the legal investiture of the husband with his wife's property was that the wife was generally in need! "If the woman's ante-nuptial money has practically vested in the man and is in his pocket, so that without the order of the court she can obtain control of none of it, her claim to what will enable her to live and carry on the lit-

⁴⁵MCCORMICK ON DAMAGES (1935) §77, p. 275.

¹30 C. J., *Husband and Wife*, p. 526, §42; see also 26 AM. JUR., *Husband and Wife*, p. 684, §55.

²30 C. J., *Husband and Wife*, p. 523, §47; see also 26 AM. JUR., *Husband and Wife*, p. 684, §55.

³30 C. J., *Husband and Wife*, p. 530, §50; see also 26 AM. JUR., *Husband and Wife*, p. 685, §57.

⁴II, BISHOP, MARRIAGE & DIVORCE (6th Ed.), p. 318, §369.

⁵II, VERNIER, AMERICAN FAMILY LAWS, p. 309, §110.