



UNC
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 35 | Number 3

Article 13

4-1-1957

Survival of Actions -- Alienation of Affections and Criminal Conversation

Henry W. Connelly

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Henry W. Connelly, *Survival of Actions -- Alienation of Affections and Criminal Conversation*, 35 N.C. L. REV. 428 (1957).

Available at: <http://scholarship.law.unc.edu/nclr/vol35/iss3/13>

This Note is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized editor of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

Survival of Actions—Alienation of Affections and Criminal Conversation

In a recent North Carolina decision,¹ the court raised in a dictum² the question whether or not an action for alienation of affections or for criminal conversation would survive the death of the tort-feasor.³

It was the accepted view at common law that these actions were personal actions and as such did not survive the death of either of the parties thereto.⁴ However, statutory modification of the common-law rule has now been enacted in Great Britain⁵ and in most of the states.⁶ It is therefore necessary to consider the survival statute of the particular jurisdiction to determine whether or not a certain action will survive. In North Carolina there are two statutes that must be construed to ascertain whether actions of alienation of affections and criminal conversation survive. The first provides:

“§ 28-172. *Action survives to and against representative.*—

Upon the death of any person, all demands whatsoever, and rights to prosecute or defend any action or special proceeding, existing in favor of or against such person, except as hereinafter provided, shall survive to and against the executor, administrator or collector of his estate.”⁷

This statute was adopted in 1868,⁸ and has not been modified from that date. The phrase “except as hereinafter provided” refers to the exceptions which are included in the other relevant statute, which provides:

“§ 28-175. *Actions which do not survive.*—The following rights of action do not survive:

“1. Causes of action for libel and slander, except slander of title.

“2. Causes of action for false imprisonment and assault and battery.

“3. Causes where the relief sought could not be enjoyed, or granting it would be nugatory, after death.”⁹

¹ *Hardison v. Gregory*, 242 N. C. 324, 88 S. E. 2d 96 (1955), 34 N. C. L. Rev. 362 (1956), affirming award to the plaintiff in action for alienation of affections and criminal conversation. Appeal based on application of “dead man’s statute”: N. C. GEN. STAT. § 8-51 (1953).

² *Hardison v. Gregory*, *supra* note 1, at 331, 88 S. E. 2d at 101.

³ The answer to the question of the court would also be determinative of the abatement of these actions in North Carolina. N. C. GEN. STAT. § 1-74 (1953).

⁴ *Suskins v. Maryland Trust Co.*, 214 N. C. 347, 350, 199 S. E. 276, 278 (1938) (dictum); *Mast v. Sapp*, 140 N. C. 533, 53 S. E. 350 (1906) (dictum); PROSSER, *TORTS* 706 (2d ed. 1955).

⁵ PROSSER, *TORTS* 707 (2d ed. 1955).

⁶ Evans, *A Comparative Study of the Statutory Survival of Tort Claims For and Against Executors and Administrators*, 29 MICH. L. REV. 969 (1931).

⁷ N. C. GEN. STAT. § 28-172 (1950). ⁸ N. C. Public Laws 1868-9, c. 113, § 98.

⁹ N. C. GEN. STAT. § 28-175 (1950).

This statute was also enacted in 1868;¹⁰ but, unlike G. S. § 28-172, there has been a significant modification of this statute. In 1915 this statute was amended to delete an additional provision to the effect that "other injuries to the person, where such injury does not cause death of the injured party,"¹¹ shall not survive.

In its more recent cases the court has given little attention to these statutes, assuming that nearly all actions survive unless they fall into the specifically named categories of subsections one and two of G. S. § 28-175. The writer's research has not uncovered any mention by the court whatever of subsection three. The closest the court has come to dealing with survival in this type of case is in *Allen v. Baker*,¹² which was decided before 1915 and placed its major reliance on the phrase now deleted from G. S. § 28-175. Because of precedent,¹³ the court felt constrained to hold that an action for breach of promise to marry would survive the death of the tort-feasor. However, the court indicated that as an original construction of the statute it would have reached the opposite conclusion. It thus is clear the actual case law of North Carolina gives no support for answering the courts recent query as to the survival of these two "heart balm" actions in the negative. Even the analogous dicta which can be marshalled for the negative would appear to be based on an obsolete statutory clause.

In raising the question the court cited various authorities which were based on the law of other jurisdictions.¹⁴ An analysis of these authorities shows that the other jurisdictions are not in accord on the survival of the actions of alienation of affections and criminal conversation. However, this divergence is due mainly to the variance in the survival statutes themselves in the different jurisdictions. It is possible to classify the application of the various survival statutes as to alienation of affections and criminal conversation into three groups.

First: cases applying a statute which states affirmatively that actions for "injuries to the person" or "damages to the person" will survive. Construing such a phrase the courts generally hold that "personal injury" does not include the two actions in question, and that there is no survival.¹⁵ This result is justified on two bases, both grounded on rules of

¹⁰ N. C. Public Laws 1868-9, c. 113, § 64.

¹¹ N. C. Public Laws 1915, c. 38; see *Hoke v. Greyhound Corp.*, 226 N. C. 332, 38 S. E. 2d 105 (1946); Note, *Survival of Personal Injury Actions in North Carolina*, 25 N. C. L. Rev. 84 (1946).

¹² 86 N. C. 91 (1882).

¹³ *Shuler v. Millsaps' Executor*, 71 N. C. 297 (1874).

¹⁴ 1 C. J. S., *Abatement and Revival* § 147 (1936); 1 AM. JUR., *Abatement and Revival* § 99 (1936); Annot., 14 A. L. R. 693 (1921), 24 A. L. R. 488 (1923), 57 A. L. R. 351 (1928); N. C. GEN. STAT. § 1-74 (1953); *Suskins v. Maryland Trust Co.*, 214 N. C. 347, 199 S. E. 276 (1938); N. C. GEN. STAT. § 28-175 (1950). The citation order is that of the court.

¹⁵ *Howard v. Lunabury*, 192 Wis. 507, 213 N. W. 301 (1927); But see *Roberts v. Turner*, 49 Ga. App. 510, 176 S. E. 91 (1934); *C. v. D.*, 10 ONT. L. R. 641 (1905).

construction. (1) Since the provision allowing survival of personal actions is in derogation of the common law, it is to receive a strict interpretation; such an interpretation would limit the survival to those personal injuries that may be classified as tangible or physical.¹⁶ (2) To allow these two intangible actions to survive would be to allow all personal actions to survive; yet, since the legislature had not stated that all personal actions were to survive, such a result should not be sanctioned by the court.

Second: cases applying a statute which provides that all actions shall survive *except* certain listed ones, which list includes the same phrase "injuries to the person" or "damages to the person." North Carolina's statute prior to the 1915 amendment was of this type. Paradoxically, in these cases it is also held usually that the two causes of action do not survive.¹⁷ Here, since the term denoting personal injuries is not used in derogation of the common law, it is given its broad meaning and the two actions are included.

Third: cases applying a statute which does not include the phrase "injuries to the person" or any phrase of similar import as the criterion for survival of the action or not. It would appear that under this type of statute the actions for alienation of affections and criminal conversation would generally survive¹⁸ unless some other phrase excludes these actions either expressly or by implication.¹⁹

Thus it would appear that the authorities cited by the court turn on the interpretation of a provision that no longer exists in the North Carolina law. One possible basis for holding that actions for alienation of affections and criminal conversation do survive under the present North Carolina statute would be the invoking of the subjective third subsection of G. S. § 28-175. Yet, the writer has been unable to discover any instance of the application of this provision by the court. Although at the present time these two causes of action are in disfavor,²⁰

¹⁶ Tangible injuries are to be distinguished from intangible injuries, usually classified as intangible injuries are those resulting from malicious prosecution, illegal arrest, false imprisonment, abuse of process, slander, libel, alienation of affections, seduction, criminal conversation, invasion of privacy and actions of similar character. Evans, *A Comparative Study of the Statutory Survival of Tort Claims For and Against Executors and Administrators*, 29 MICH. L. REV. 969, 975 (1931).

¹⁷ Hollett v. Wilmington Trust Co., 36 Del. (6 W. W. Harr.) 170, 172 Atl. 763 (1934); White v. Safe Deposit & Trust Co., 140 Md. 593, 118 Atl. 177 (1922) (pointing out the dual construction given to the phrases "injury to the person" and "damages to the person").

¹⁸ Powers v. Sumbler, 83 Ky. 526, 110 Pac. 97 (1910); Smith v. Brown, 17 Pa. D. & C. 548 (1932).

¹⁹ Gross' Adm'r v. Lerford, 190 Ky. 526, 228 S. W. 24 (1921) (provision excepting criminal conversation from surviving extended to include action for alienation of affections); Justice v. Clinard, 142 Tenn. 208, 217 S. W. 663 (1919) (provision excepting "wrongs affecting the character of the plaintiff" from surviving held to include action for alienation of affections).

²⁰ Feinsinges, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935); Kingsley, *The Anti-Heart Balm Statute*, 13 So. CALIF. L. REV. 37 (1939).

it would not appear that this would cause them to become "nugatory" under the third subsection. Therefore, it is felt that when the court examines the law on this subject in greater detail it would hold that actions for alienation of affections and criminal conversation do survive.

HENRY W. CONNELLY

Tenancy in Common—Equitable Partition—One Cotenant's Attempt to Devise or Convey a Specific Portion of Common Property

A point decided in the recent North Carolina case of *Taylor v. Taylor*¹ raised the question of the effect of one cotenant's purporting to devise or convey an absolute interest in a specific quantity of the land held in common. The decisions in this area are not numerous, and the ones found seem to apply a particular rule to each differing fact situation. Nevertheless, the cases would appear to be divisible into three logical categories, and it is believed that certain fairly consistent principles lie behind the results of the cases involving this question.

Purported Conveyance or Devise of the Whole of the Common Property

One of the most commonly encountered situations is that in which one cotenant, who owns only an undivided interest in the land, attempts to transfer by deed or will the entire interest in the whole tract held in common. As to the effect of this, all the cases seem to be in accord. The rule here is that the transferor conveys or devises his entire interest in the property, which is his undivided interest in the whole tract described.²

Purported Conveyance or Devise by Metes and Bounds of a Specific Portion of the Common Property

Where one cotenant purports to transfer by metes and bounds a specific portion of common property, there are two defects in the transaction. *First*, the tenant attempts to transfer the entire fee in the land described rather than his undivided interest in it. *Second*, the attempted transfer of a specific portion of the undivided tract is in effect a unilateral attempt to partition. Thus the courts do not ipso facto give effect to such an attempted transfer. However, most of the states which have passed on the question find such a transfer to be merely voidable at the election of the grantor's cotenants; and only they can avoid it if, and to the extent that, it prejudices them.³ This has been called the equitable

¹ 243 N. C. 726, 92 S. E. 2d 136 (1956).

² *Devises*: *Spitzer v. Branning*, 139 Fla. 259, 190 So. 516 (1939); *Van Reuth v. Mayor and City Council*, 165 Md. 651, 170 Atl. 199 (1934); *Lushington v. Sewell*, 1 Russ. & M. 174, 39 Eng. Rep. 65 (1830). *Deeds*: *Home Owners' Loan Corp. v. Cilley*, 125 S. W. 2d 313 (Tex. Civ. App. 1939); *Bailey v. Howell*, 209 N. C. 712, 716, 184 S. E. 476, 478 (1936) (dictum) (grantee of cotenant takes only cotenant's share and steps into his shoes).

³ *Highland Park Mfg. Co. v. Steele*, 235 Fed. 465 (4th Cir. 1916); *Lane v.*