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# Procedure and Practise -- Relation Between Survival and Wrongful Death Statutes Where Death Follows Injury

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advisable. Experience tells us that back seat suggestions as to the handling of a car are disconcerting and irritating to the driver (more so as between husband and wife). Indeed this is one case where silence is generally golden. At present the cases seem to make no distinction between the liability of a host and that of a third party. The burdens of generosity should not be so great. It is submitted that the legislature should relieve the situation by a statutory change, and thereby relieve the host of part of his present burden.<sup>25</sup>

MILLS SCOTT BENTON.

### Procedure and Practise—Relation Between Survival and Wrongful Death Statutes Where Death Follows Injury

Two recent decisions construing the North Carolina survival<sup>1</sup> and wrongful death<sup>2</sup> statutes have aroused speculation as to what actions for personal injuries survive to the personal representative. In both cases the decedent was injured by the defendant's alleged negligence. In the state case<sup>3</sup> decedent died before the termination of his suit, but did not die from the injuries sustained by the defendant's negligence. In the federal case<sup>4</sup> the jury found that the decedent was injured by the defendant's negligence, and awarded damages, but found, also, that the decedent's death was not caused by the injuries inflicted by the defendant's negligence. In these cases it was held that the cause of action for personal injuries not resulting in death survived.

At common law no right of action for personal injuries survived the death of the injured or injuring party. Our survival statute<sup>5</sup> provides that all causes of action survive except those specifically declared not to survive. Since the amendment<sup>6</sup> of our survival statute, it is now clear that if the injured party dies without a recovery, compromise, or settlement, and not as a result of the defendant's negligence, the cause of action survives.<sup>7</sup> Also, the cause of action

<sup>25</sup> For discussion of proposed statute to meet this situation, see p. 47.

<sup>1</sup> N. C. ANN. CODE (Michie, 1927) §§159, 162, 163.

<sup>2</sup> *Ibid.*, §§160, 161.

<sup>3</sup> *Fuquay, Adm'x v. A. & W. R. R. Co.*, 199 N. C. 499 (1930).

<sup>4</sup> *James Baird Co., Inc., v. Boyd*, 41 F. (2d) 578 (C. C. A. 4th, 1930).

<sup>5</sup> *Supra* note 1.

<sup>6</sup> REV. (1905) §157 (2), as amended by N. C. PUB. LAWS (1915), c. 38.

*Infra* note 16.

<sup>7</sup> *Fuquay, Adm'x v. A. & W. R. R. Co.*, *supra* note 3; *cf. Bolick v. R. R. Co.*, 138 N. C. 370, 50 S. E. 689 (1905).

survives, under like circumstances, against the personal representative of a deceased defendant.<sup>8</sup>

The question of interest is raised by the situation in which the injured party dies from the injuries sustained through the defendant's negligence. Does the personal representative have one cause of action for the decedent's injury and suffering under the survival statute, and another cause of action for the wrongful death under the wrongful death statute?<sup>9</sup> It is settled in this state and by the majority opinion in this country, and in England<sup>10</sup> that a recovery, compromise, or settlement, prior to the death of the injured party will bar an action by the personal representative for the wrongful death. The reason for this rule is that the specific wording of the statute requires that the injured party have a cause of action against the defendant at the time of the former's death.<sup>11</sup> But, under the strict wording of our statutes, why should not a cause of action for unrecompensed injuries survive when there is a cause of action for the wrongful death. In some jurisdictions where there are both survival and wrongful death statutes, two separate causes of action exist to the personal representative and may be prosecuted concurrently.<sup>12</sup> The Federal Employers Liability Act provides for two separate causes of action, and treats them as capable of being joined by the personal representative.<sup>13</sup> Our court says that our law differs from the federal law on this subject<sup>14</sup> and holds that after the injured party's death there is only one cause of action, and that is for the wrongful death. This ruling seems to be based on decisions before the change of the statute.<sup>15</sup>

It would appear that the North Carolina statute of the survival of personal injury causes is independent of the wrongful death stat-

<sup>8</sup> *Tonkins, Adm'r v. Cooper*, 187 N. C. 570, 122 S. E. 294 (1924); *cf. Watts v. Vanderbilt*, 167 N. C. 567, 83 S. E. 813 (1914).

<sup>9</sup> *Supra* note 2.

<sup>10</sup> *Edwards, Adm'r v. Interstate Chemical Co.*, 170 N. C. 551, 87 S. E. 635, L. R. A. 1916D, 121 (1915); *Littlewood v. The Mayor, Etc.*, 89 N. Y. 24, 42 AM. REP. 271 (1882); *Sou. Bell Tele. Co. v. Cassin*, 111 Ga. 575, 36 S. E. 881, 50 L. R. A. 694 (1900); *Thompson v. R. R. Co.*, 97 Tex. 590, 80 S. W. 990 (1904); *Mich. Cent. R. R. Co. v. Vreeland*, 227 U. S. 59, 33 Sup. Ct. 192, 57 L. ed. 417 (1912); *Mellon v. Goodyear*, 277 U. S. 335, 48 Sup. Ct. 541, 72 L. ed. 906 (1927); *Read v. Great East. R. R. Co.*, L. R. 3 C. Q. B. 555 (1868).

<sup>11</sup> *Edwards v. Chem. Co.*, and *Mellon v. Goodyear*, *supra* note 10.

<sup>12</sup> *Sou. Bell Tele. Co. v. Cassin*, *supra* note 10; *Mahoning Valley R. R. Co. v. Van Alstine*, 77 Ohio St. 395, 83 N. E. 601, 14 L. R. A. (n. s.) 893 (1908).

<sup>13</sup> *St. Louis, Iron Mtn. & Sou. R. R. Co. v. Craft*, 237 U. S. 648, 35 Sup. Ct. 704, 59 L. ed. 1160 (1914).

<sup>14</sup> *Cobia, Adm'r v. A. C. L. R. R. Co.*, 188 N. C. 487, 125 S. E. 18 (1924).

<sup>15</sup> *Gurley v. Power Co.*, 172 N. C. 690, 696, 90 S. E. 943 (1916).

ute, and, if the cause of action not resulting in death should survive, that the cause of action resulting in death should also survive.<sup>16</sup> This is apparently the view of the court in the principal federal case<sup>17</sup> and it is submitted as correct.

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### Workmen's Compensation—Measure of Compensation for Loss of Member

In the workmen's compensation laws of various jurisdictions are found provisions for temporary total disability caused by industrial accidents and for specific injuries,—such as loss of fingers. For total disability of temporary or permanent character it is uniformly stipulated that the compensation shall run during such liability, or for the statutory period.<sup>1</sup> The three types of statute dealing with specific injuries are: (1) Those which provide that compensation for specific injuries shall "be in lieu of all other compensation,"<sup>2</sup> or its practical equivalent, that the compensation period shall begin to run from the date of the injury;<sup>3</sup> (2) Those which provide that compensation under one section of the law shall be in addition to other compensation;<sup>4</sup> (3) Those which simply set up a scale of compensation, or indemnity, and leave the court to work out a proper interpretation of the whole statute as best it can.<sup>5</sup>

Court decisions interpreting these provisions of the statutes likewise fall into fairly well defined groups. One group of courts holds that during the healing period while the workman is unable to work, he may recover for total disability, and then, when he has returned to work, he is to receive the full statutory amount for the specific

<sup>16</sup> Prior to the amendment of REV. (1905) §157 (2) by N. C. PUB. LAWS (1915) c. 38, striking out the clause, "where such injury does not cause the death of the injured party," the cause of action for personal injuries abated, and only the cause of action for the wrongful death remained. *Bolick v. R. R. Co.*, *supra* note 7; McINTOSH, N. C. PRACTICE AND PROCEDURE IN CIVIL CASES (1929) §424.

<sup>17</sup> *James Baird Co., Inc. v. Boyd*, *supra* note 4.

<sup>1</sup> N. Y. CONS. LAWS (Cahill's 1923) c. 66, §15; IOWA CODE (1927) §1394; N. C. PUB. LAWS (1929) c. 120, §29.

<sup>2</sup> GA. ANN. CODE (Michie, 1926) §3154 (32); KY. STAT. (Carroll, 1922) §4899.

<sup>3</sup> IOWA CODE (1927) §1396.

<sup>4</sup> MASS. GEN. LAWS (1921) c. 152, §36; COLO. ANN. STAT. (Courtright's Mills, 1927) §1853.

<sup>5</sup> N. C. PUB. LAWS (1929) c. 120, §31; N. C. ANN. CODE (Michie, Supp. 1929) §8081 (MM).