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Actions-Survival-Wrongful Death

RECENT CASE NOTES

ACTIONS—SURVIVAL—WRONGFUL DEATH—One Ernest Husted was injured while working as a section hand on defendant's right of way and railroad tracks and filed a suit against defendant to recover for personal injuries alleged to have been sustained by reason of certain alleged negligence on part of defendant. While this action was pending and before any trial was had, said Ernest Husted died. The State Bank of Lapel was appointed administrator of his estate and as such administrator filed in the same case filed by Husted an amended complaint, whereby said administrator sought to recover damages of defendant claiming that the action survives. *Held,* the original action survives only in cases pending where the case has progressed to judgment and there is an appeal taken.[1]

The precise holding of the above case that the action for personal injuries does not survive the deceased may be open to doubt under the Indiana statutes. It is a settled rule of the common law that the death of a human being cannot be complained of as a cause of action in a civil court. In the absence of statutory enactments, actions arising *ex delicto,* for the injury to the person, abate on the death of the person injured, and do not survive to the personal representatives.[2] The above common law ruling was laid down by Lord Ellenborough in his case of *Baker v. Bolton,*[3] and was considered so harsh that it was abrogated in England in 1846 by the enactment of what is commonly known as "Lord Campbell's Act," which, in a more or less modified form, has been enacted in practically all of the states of the union.[4] In Indiana, Lord Campbell's Act has been adopted not by a single act but by several acts. By strict reading these statutes are conflicting in meaning as part sound in survival of the original action for personal injuries and not as creating a wholly new cause of action as "Lord Campbell's Act" has been construed to do. Section 290, Burns 1926 says "A cause of action arising out of an injury to the person dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person," and three other specified exceptions not connected with this case. Sec. 292 Burns 1926 gives a right of action against a wrongdoer to the personal representative of one whose death was caused wrongfully, "if the latter might have

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[1] *Central Indiana Railway Co. v. The State Bank of Lapel, Adm'r.,* Appellate Court of Indiana, Dec. 11, 1931, 178 N. E. 573.

[2] *Burns, Adm'r., v. The Grand Rapids and Indiana Railroad Co.* (1887), 113 Ind. 169; *Hilliker, Adm'r., v. Citizens Street R. Co.* (1889), 152 Ind. 86, 52 N. E. 607; *Hudson v. Indiana Union Traction Co.* (1912), 50 Ind. App. 292, 98 N. E. 188 (decided under Sec. 283, Burns 1908, which is the same as Sec. 290, Burns 1926); *Detiviler, Adm'r., v. Culver Military Academy, et al.* (1929), 91 Ind. App. 355, 168 N. E. 247; *Cincinnati, C. C. & St. L. R. Co. v. McCollom, Adm'r.* (1915), 183 Ind. 556, 109 N. E. 206, Ann. Cas. (1917E) 1165; *Harmon, Rec., v. Brown, Adm'r.* (1915), 183 Ind. 535, 109 N. E. 212.

[3] (1808), 1 Camp. 493.

[4] *Jeffersonville R. Co. v. Swayne's Adm'r.* (1866), 26 Ind. 477, 484.

maintained an action, had he or she lived, against the former for an injury for the same act or omission." Also in this statute the beneficiaries are specified. The second statute is copied from "Lord Campbell's Act" and gives a new cause of action but the first statute expressly excepts cases arising out of injuries causing the death of a party, and provides in express terms that such action shall survive. Strictly speaking, such a meaning is impossible as the cause of action does not survive because so far as the new plaintiff, the personal representative, is concerned the cause of action only accrues upon the death of the deceased. Fortunately this variance of the statutes has never confused the Indiana courts and they have considered all the survival and death statutes on the same subject matter and in *pari materia*.[5]

The consistent construction of the wrongful death statutes has been that the statutes do not profess to revive the cause of action for the injury to the deceased in favor of his personal representative, nor is such its legal effect, but it creates a new cause of action, unknown to the common law.[6] The right of action created by the statute is founded on a new grievance, namely, causing the death, and is for the injury sustained thereby, by the beneficiaries named in the statute.[7] Death is the foundation of the right given by statute.[7a]

There are two exceptions to the above construction, one is by statute and the other by decision.[8] Employers' Liability Law, says that "whosoever has a claim for personal injuries and obtains judgment for the same against any party in any trial court of this state and from which judgment any party against whom the same was obtained shall appeal to the Supreme or Appellate Court of this state, and such judgment is reversed by such Supreme or Appellate Court, and a new trial granted to appellant thereon; and if the person who obtained such judgment should die pending such appeal or before a new trial after such reversal can be had, such claim for personal injuries shall survive and may be prosecuted by the representative of such decedent as other claims are prosecuted for and on behalf of decedent's estate." This statute was somewhat modified in *Stout, Adm'r., v. Indianapolis & St. Louis R. Co.*[9]

The second exception to the general rule of a new action being created is that the recovery in his lifetime of the injured party for damages for his injuries, including permanent effects induced which later caused his death, is a bar to an action by his personal representative for damages

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[5] *Elliott v. Brazil Block Coal Co.* (1900), 25 Ind. App. 592 (decided under Sec. 8597 Burns 1908, mining act, corresponding to Sec. 292 Burns 1926.

[6] *Wilson v. Jackson Hill Coal and Coke Co.* (1911), 48 Ind. App. 150, 95 N. E. 589; *Elliott v. Brazil Block Coal Co.* (1900), 25 Ind. App. 592; *Indianapolis, etc., R. Co. v. Keeley* (1864), 23 Ind. 133; *Jackson v. Pittsburgh, etc., R. Co.* (1894), 140 Ind. 241, 40 Am. St. Rep. 192.

[7] *Jeffersonville R. Co. v. Swayne's Adm'r.* (1866), 26 Ind. 477.

[7a] *German American Trust Co., Adm'r. v. Lafayette Box, etc. Co.* (1912), 52 Ind. App. 211, 98 N. E. 874.

[8] See 293 Burns 1926, which is kindred statute to Sec. 9435, Burns 1926.

[9] (1872) 41 Ind. 149 and (1876) 53 Ind. 143, which is decided under 2 G. & H. 330, same as Sec. 283 Burns' 1894, same as Sec. 290 Burns' 1926, in *Hilker, Adm'r., v. Kelley* (1891), 130 Ind. 356, which holds that when deceased dies after verdict but before judgment the rule as set out in the statute does not apply.

caused by his death.[10] This rule sounds in with Sec. 290 Burns 1926 that the cause of action survives but the decision is treated as an exception to the general death statutes and not as following one of the acts. The result though hardly logical under the main rule is desirable as it prevents a double recovery.

The validity of the new and independent right of action created for the use of the beneficiaries named is to be tested by the right of the deceased to maintain an action for the same wrong, had he lived.[11] There is now in this state a well recognized exception to the broad rule just quoted for it was held that when one's death is caused by the wrongful act of another, the right of the personal representative to sue therefor is unaffected by the fact that the decedent's right of action for his injuries was barred by the statute of limitations before his death, upon the theory, as previously stated, that the right of action in the personal representative is a new and independent right of action created by statute, not arising until decedent's death and is not a survival of the decedent's right, and a statute of limitations cannot run against such right of action before it begins to exist.[12]

All Indiana decisions under the death by personal injury statutes are in point as the statutes in substance have not been changed but merely re-enacted and it is a settled rule that, when a legislature re-enacts a statute of the state, it adopts also the construction given to such statute by the courts of such state before such re-enactment.[13]

The original federal rule was the same as the present Indiana rule that cause of action for pain and suffering did not survive, but the present federal statute[14] changes the old rule. "Any right of action given by this chapter (Federal Employer's Liability Law) to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

The statute as thus amended forbids the prosecution of more than one action, and permits only one recovery; but the action is prosecuted after the death of the injured person, for the benefit of those named, and may include compensation for the pain and suffering incurred by the injured person as well as for pecuniary loss of earnings and contributions; in other words, compensation for all of the damages resulting from the injury for

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[10] *Golding v. Town of Knox* (1914), 56 Ind. App. 149, 104 N. E. 978; *Hecht v. Ohio, etc. R. Co.* (1892), 132 Ind. 507, 32 N. E. 302.

[11] *Pittsburgh, C., C. & St. L. R. Co. v. Hosea, Adm.* (1899), 152 Ind. 412; *Burns, Adm'r., v. Grand Rapids, etc. R. Co.* (1887), 113 Ind. 169; *Hamilton, Adm'r., v. Jones, Adm'r.* (1890), 125 Ind. 176; *Hanna, Adm'r., v. Jeffersonville R. C.* (1869) 32 Ind. 113; *Hilliker v. Citizens St. R. Co.* (1899), 152 Ind. 86, 52 N. E. 607; *Hecht v. Ohio, etc. R. Co.* (1892), 132 Ind. 507, 32 N. E. 302.

[12] *Wilson v. Jackson Hill, etc. Co.* (1911), 48 Ind. App. 150, 95 N. E. 589; *German American Trust Co. v. Lafayette Box, etc. Co.* (1912), 52 Ind. App. 211, 98 N. E. 874.

[13] *Hilliker, Adm'r., v. Citizens St. R. Co.* (1899), 152 Ind. 86, 52 N. E. 607.

[14] 36 St. at Large 291 (1910), 45 U. S. C. A. 59.

which the statute provides a remedy after the death of the injured person to the benefit of those named, but must be recovered in one action.[15]

J. D. W.

APPEAL AND ERROR—FINAL DISPOSITION OF EQUITABLE ACTION ON APPEAL—The pertinent facts of this case may be quite briefly stated for the purposes of this comment. An equitable suit was brought against a trust company for the removal of said company, as trustee, for an accounting, and for the appointment of a new trustee. The court, after several amendments had been made and innumerable motions passed upon, finally entered judgment removing the trust company as trustee, appointing another, and made further orders pertaining to the administration of the trust estate.

The plaintiff appealed from this judgment, and the Supreme Court of Indiana *held* that since this was an *equitable* case, the court could properly consider eighteen years of litigation between these same parties and the results thereof, and could enter a mandate consistent with past and present circumstances, disregarding formalities in presentation of question on appeal. The judgment and all orders of the trial court pertaining to the administration of the trust estate were set aside, and the case was disposed of as if tried *de novo*.[1]

This decision is an example of the proper exercise of the power of an appellate court to render final judgment as on a trial *de novo* in an equitable action. The common obstacle to the entering of final judgment by such a court, reversing a judgment for one party and then rendering a judgment in favor of the other party instead of sending the case back for a new trial, is the constitutional right to a trial by jury. Several states have statutes which have authorized an appellate court to direct the entry of the *proper* judgment.[2] But "the power conferred upon the Supreme Court *by* statutes to 'direct the entry of the proper judgment' must be so construed as not to confer upon this court the power to deprive parties of the right to trial by jury as guaranteed by them by the constitution."[3]

But the obvious answer to this in the present case is that in the absence of express constitutional or statutory provision, there is no right to a jury trial in suits in equity.[4] In this state it is expressly provided by statute that issues of fact as well as issues of law in causes that prior to June 18, 1852 were of exclusive equitable jurisdiction shall be tried by the court.[5] While the court may submit questions of fact to a jury, this is purely a matter of discretion, and the finding of a jury in such case is not binding, but merely advisory. Thus in a case of equity jurisdiction, it

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[15] *Northern Pac. R. Co. v. Maerkl* (1912), 198 Fed. 3, 117 C. C. A. 237; *St. Louis, etc. R. Co. v. Conarty* (1913), 106 Ark. 421, 155 S. W. 93; *Carolina, etc. R. Co. v. Shewalter* (1913), 128 Tenn. 363, 161 S. W. 1136, affirmed in (1915) 36 Sup. Ct. 166, 239 U. S. 630, 60 L. Ed. 476; *Baltimore, etc. R. Co. v. Carroll, Adm'r.* (1928), 200 Ind. 589.

[1] *Rooker, et al. v. Fidelity Trust Co., et al.*, Supreme Court of Indiana, Aug. 25, 1931, 177 N. E. 454.

[2] See Burns' 1926, Sec. 725.

[3] *Campbell v. Sutliff* (1927), 193 Wis. 370, 214 N. W. 374.

[4] *McBride v. Stradley* (1885), 103 Ind. 465, 2 N. E. 358; *Vandalia Coal Co. v. Lawson* (1909), 43 Ind. App. 226, 87 N. E. 47.

[5] Burns' 1926, Sec. 437.