Survival of Actions—Recovery by Administrator in Absence of Statute—Construction of Constitutional Provision Requiring Remedies for All Wrongs—[Nebraska].—The plaintiff, as administrator of the estate of his minor son, sued the defendant street car company for negligently causing the death of the son. His petition stated two causes of action: the first, for the pain and suffering sustained by the boy from the time he was struck and injured by the defendant's street car until the time of his death five hours later; the second, for his wrongful death, under the Nebraska death statute. In the trial court the defendant insisted that the first cause of action did not survive the boy's death. From a judgment for the plaintiff, the defendant appealed. *Held*, reversed. The action did survive. *Wilfong v. Omaha and Council Bluffs St. Ry. Co.*, 129 Neb. 600, 262 N.W. 537 (1935).

At common law, actions for torts did not survive the death of either party. 3 Blackstone, Comm. 302 (1778); *Florida East Coast Ry. Co. v. McRoberts*, 111 Fla. 278, 149 So. 631 (1933); *Miller v. Nuckolls*, 76 Ark. 485, 89 S.W. 88 (1905); *Castleberry v. Gulf Ry. Co.*, 274 S.W. 1014 (Tex. Civ. App. 1925); *Greer v. St. Louis, I. M. & S. Ry. Co.*, 173 Mo. App. 276, 158 S.W. 740 (1913). The maxim, *actio personalis moritur cum persona*, rested on the notion that the damages sought in actions of tort were punitive, and that the revenge motive died with the person of either party to the wrong. Pollock, Torts 64 (13th ed. 1929); Winfield, Death as Affecting Liability in Tort, 29 Col. L. Rev. 239, 242 (1929); Salmond, Torts § 20 (8th ed. 1934). Today, this justification for the common law rule no longer exists, because damages for torts are generally recognized to be compensatory. Sedgewick, Damages §§ 29–30 (9th ed. 1912); *Riewe v. McCormick*, 11 Neb. 261, 9 N.W. 88 (1881); *Winkler v. Roeder*, 23 Neb. 706, 37 N.W. 607 (1888). Extensive statutory inroads have been made upon the old rule. Most states have provided for survival of actions for torts to property but have excepted those for injuries to the physical person and to interests of personality. Evans, A Comparative Study of Statutory Survival of Tort Claims, 29 Mich. L. Rev. 969 (1931). And the courts have been reluctant to permit survival of claims without specific statutory authorization. *Wynn v. Fallapoosa County Bank*, 168 Ala. 469, 53 So. 228 (1910); *McNeely v. City of Natchez*, 148 Miss. 268, 114 So. 484 (1927); *Howard v. Lunaburg*, 192 Wis. 507, 213 N.W. 301 (1927). The Nebraska survival statute makes no provision for survival of claims for personal injuries except where an action was begun during the lifetime of the parties. Neb. Comp. St. 1929 §§ 20–1401, 20–1402. Therefore, in expressly departing from the common law rule, the court was forced to rely on other sources. In a former Nebraska case, a claim for personal injuries was held to survive the death of the tort-feasor. *In re Estate of Grainger*, 121 Neb. 338, 237 N.W. 153 (1931); see 10 Tex. L. Rev. 247 (1932); 78 A.L.R. 597 (1932). The court in that case found that the common law rule "was not needed" in Nebraska under a statute which provides that only so much of the common law shall be the law of Nebraska as is applicable to the needs of the state and is not inconsistent with statutory or constitutional provisions. Neb. Comp. St. 1929 § 49–101. In the instant case the court utilized this statute in conjunction with the provision of the Nebraska Constitution that all courts shall be open at all times to afford a remedy for every party injured in his person or property. Neb. Const. art. 1, § 13. The court thought the latter provision inconsistent with the common law rule of non-survival of personal injury claims. A Florida court in holding that a claim survives the death of the tort-feasor has placed the same construction on the same provision of the local Constitution, (*Waller v. First Savings & Trust Co.*, 103 Fla. 1025, 138 So. 780 (1931); 45 Harv. L. Rev. 1108 (1932); Fla. Const. Declar. of Rights § 4) al-

though a survival statute there provided that such a claim should not survive the death of the injured party. Fla. Comp. L. 1927 § 421. It is doubtful, however, if many other state courts will seize upon similar clauses in their constitutions as a wedge for breaking away from the common law rule on survival. Hitherto, such provisions have not been construed to create or afford a remedy not otherwise available. *De May v. Liberty Foundry Co.*, 327 Mo. 495, 37 S.W. (2d) 640 (1931); *Goddard v. City of Lincoln*, 69 Neb. 594, 96 N.W. 273 (1903); *Allen v. Pioneer Press Co.*, 40 Minn. 117, 41 N.W. 936 (1889).

Clearly, the common law rule is undesirable today. 19 Calif. L. Rev. 289 (1931); Evans, A Comparative Study of Statutory Survival of Tort Claims, 29 Mich. L. Rev. 969 (1931); *Finlay v. Chirney*, L. R. 20 Q. B. Div. 494 (1888); *Hyatt v. Adams*, 16 Mich. 180 (1867); *Harris v. Nashville Trust Co.*, 128 Tenn. 573, 162 S.W. 584 (1914). However, legislative attempts to make a list of those actions which shall and those which shall not survive leave much in doubt, and are a fruitful source of litigation. Evans, A Comparative Study of Statutory Survival of Tort Claims, 29 Mich. L. Rev. 969 (1931). Similarly, decisions such as that in the principal case, which allow the survival of certain actions according to judicial discretion, are partially objectionable in that they create uncertainty as to the status of other actions not within the survival statutes. 48 Harv. L. Rev. 1008 (1935).

Torts—Business Visitors and Invitees—Liability of Steamship Company to "Bon Voyage" Visitor on Steamer—[Federal].—The plaintiff went aboard the defendant company's transatlantic liner for the purpose of saying good-bye to her friend, who was a passenger. While on the ship, the plaintiff tripped and fell over a companionway negligently left out of repair. From judgment for the plaintiff the defendant appealed. *Held*, judgment affirmed; the plaintiff was a business visitor, rather than a mere licensee, and the defendant was liable to her for negligently leaving the companionway out of repair. *McCann v. Anchor Line Ltd.*, 79 F. (2d) 338 (C.C.A. 2d 1935).

Business visitors are defined as persons on the premises of another for some business-purpose of mutual benefit to both parties. Harper, Torts § 98 (1933); *Milauskis v. Terminal Ry. Ass'n of St. Louis*, 286 Ill. 547, 122 N.E. 78 (1919); *Kidder v. Sadler*, 117 Maine 194, 103 Atl. 159 (1918). The only prior decision involving a visitor aboard a ship under similar circumstances also brought the plaintiff within this definition and held him protected from hazards incident to the condition of the premises. *Powell v. Great Lakes Transit Corp.*, 152 Minn. 90, 188 N.W. 61 (1922). In analogous situations, where friends come onto trains or docks to see passengers, there is a long-standing conflict. Some cases have treated the plaintiff as a business visitor. *Banderob v. Wis. Cent. Ry. Co.*, 133 Wis. 249, 113 N.W. 738 (1907); *Hutchins v. Penobscot Bay & River Steamboat Co.*, 110 Me. 369, 86 Atl. 250 (1903); *Street v. Chicago, M. & St. P. R.R. Co.*, 124 Minn. 517, 145 N.W. 746 (1914). *Contra*, regarding him as a licensee, *Galveston, etc. Ry. Co. v. Matzdorf*, 102 Tex. 42, 112 S.W. 1036 (1908); *Hill v. Louisville & Nashville Ry.*, 124 Ga. 243, 52 S.E. 651 (1905); *Duhme v. Hamburg-American Packet Co.*, 184 N.Y. 404, 77 N.E. 386 (1906); *Arkansas & La. Ry. Co. v. Saine*, 90 Ark. 278, 119 S.W. 659 (1909). The Restatement of Torts has classified as business visitors all those making visits incidental to the business relations of the possessor of the land with third persons. Restatement, Torts § 332 (1934). While the Restatement and the Federal court, in the principal case, have taken desirable positions, it is questionable whether the traditional scope of the term "business visitor" permits its application to these per-