SURVIVAL OF THE ACTION FOR DEATH BY WRONGFUL ACT

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A NOTE in a recent volume of the Harvard Law Review discusses the "Inadequacies of Existing 'Wrongful Death' and Survival Legislation." It fails to note one deficiency with which this note is concerned, viz., the failure in most jurisdictions to provide for the survival of wrongful death actions on death of the wrongdoer. It is stated in Johnson v. Farmer1 that survival in such cases is provided for by statute in only eight American jurisdictions.

Is it necessary in order that such an action may survive the death of the wrongdoer that the Lord Campbell's statute shall expressly so provide? There is a growing list of jurisdictions that have made an affirmative answer to this inquiry.3 The reason rather obviously is that there was no action for wrongful death at common law. Therefore, the survival statutes which provide for the survival of certain common law actions for a tort, e.g., for personal injuries, do not embrace it. That is to say, these survival statutes are strictly survival statutes. The death statute creates a new action which never accrued to the decedent and not having existed it cannot be said to survive unless there is specific provision therefor. There are six states that provide that all actions shall survive, viz., Connecticut, Iowa, Louisiana, Mississippi, Montana, and New Hampshire.4 No case raising the question of survival of the action for wrongful death in any of these save Montana has been found. One should expect that these statutes alone are insufficient for that purpose, as the action for

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1 44 Harv. L. Rev. 980 (1931).
2 89 Tex. 610, 35 S.W. 1062 (1896).
3 Davis v. Nichols, 54 Ark. 358, 15 S.W. 880 (1891); Clark v. Goodwin, 170 Cal. 527, 130 Pac. 357, L.R.A. 1916 A, 1143 (1915); Hamilton v. Jones, 125 Ind. 176, 25 N.E. 192 (1890); Demczuk v. Jenifer, 138 Md. 488, 114 Atl. 471 (1921); Green v. Thompson, 26 Minn. 500, 5 N.W. 376 (1880); Bates v. Sylvester, 203 Mo. 493, 104 S.W. 73 (1907); Hegerich v. Keddie, 99 N.Y. 258, 1 N.E. 787 (1885); Willard v. Mohn, 24 N.D. 390, 130 N.W. 979 (1913); Russell v. Sunbury, 37 Ohio St. 372 (1881); Moe v. Smiley, 125 Pa. St. 136, 17 Atl. 228 (1889); Carrigan v. Cole, 35 R.I. 162, 85 Atl. 934 (1913); Johnson v. Farmer, 89 Tex. 610, 35 S.W. 1062 (1896); Needham v. Grand Trunk Ry. Co., 36 Vt. 294 (1865); Rinker v. Hurd, 69 Wash. 257, 124 Pac. 687 (1912); Kranz v. Wisconsin Trust Co., 155 Wis. 40, 143 N.W. 1049 (1913); (A case in Virginia, Beaver v. Putnam, 170 Va. 713, 67 S.E. 533 (1910) is sometimes cited mistakenly as being in accord with this rule. The mistake consists in assuming that the statute does not provide that action for wrongful death shall survive the death of the wrongdoer. The statute expressly provides for such survival. In that case there was no survival because the murderer committed suicide, dying before the murdered person died. Thus it was held that no cause for wrongful death ever accrued, since the cause of action, the wrongful death, had not occurred when the wrongdoer died and a cause of action cannot for the first time arise against a dead man.)

4 See 29 Mich. L. Rev. 969, 972 (1931).
wrongful death is not a revived action. In Montana the action survives because there is express provision to that effect.\(^5\)

Two states, Illinois and Kentucky,\(^6\) have held that the action will survive under the survival statute. In Illinois the survival statute provides generally for the survival of actions for personal injuries\(^7\) and therefore includes actions for assault, but it makes no express provision for the survival of wrongful death actions. Illinois meets the contrary decisions of other states by the assertion that their survival statutes do not affect personal injuries while the Illinois statutes make specific provision therefor. This seems to imply that the action for wrongful death is a revived action rather than one newly created. The court, however, was clearly mistaken as to the statutes in several jurisdictions named, since several provided for survival in case of personal injuries.

A recent Kentucky case\(^8\) holds that the action for death by wrongful act arising from an assault (murder) survives the death of the wrongdoer, although actions for assault are specifically excepted from those actions that survive for injuries to the person. This peculiar result is reached: that if the assault produces bodily injuries only and the wrongdoer happens to die before judgment against him is obtained there is no recovery therefor, but if the assault results in death there is a recovery although the Kentucky Lord Campbell's Act contains no statement about survival. It is seen, therefore, that the Kentucky decision is even more difficult to reach and goes much further than the Illinois decision. We deduce from the Illinois decision that the action for wrongful death by assault survives because actions for assault not resulting in death survived.

The Kentucky court gets around this embarrassment by declaring that the action is not for the assault and death of the decedent but for the injury done to those for whose benefit the action is created. Is this a valid reason? The court does not disturb itself with the more or less metaphysical distinctions between the cause of action and the subject matter of the action. In order for an action for wrongful death to survive it does not argue (a) whether there must be a provision in the creating statute for survival or (b) whether the wrongful death action is a new creation or is merely a revived action which survives if there is a general survival statute. It has been held, however, in other cases that a new action was created by statute. Obviously, neither alternative will reach the conclusion which has been adopted and so a third theory is in order.

It seems clear that the injury for which the action is brought is the taking of the life of the decedent. The consequence of this act is the loss of support which

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\(^5\) Anderson v. Wirkman, 67 Mont. 176, 215 Pac. 224 (1923). The same effect was given to the statute in North Carolina. See Collier v. Arrington, 61 N.C. 356 (1867).

\(^6\) Devine v. Healey, 241 Ill. 34, 89 N.E. 251 (1909); Morehead v. Bittner, 166 Ky. 523, 50 S.W. 857 (1899); Merrill v. Puckett, 93 S.W. 912 (Ky. 1906); Hunt v. Mutter, 238 Ky. 396, 38 S.W. (2d) 215 (1931).

\(^7\) Cahill's Ill. Rev. St. of 1931, c.3, §125.

\(^8\) Hunt v. Mutter, *supra* n. 6.
the widow and children suffered and therefore the Kentucky court permits an action for consequential damages. This approach to a solution had been suggested in other jurisdictions only to be met by the response that an action for consequential damages does not come within the survival statute.9

The Kentucky decisions seem indefensible because (a) the wrongful death statute does not provide that the action shall survive the death of the wrongdoer, (b) the survival statute applies to injuries to the decedent and excludes actions for assault, and (c) the damages to the surviving widow are consequential in that a statute is required to provide any action at all. In other words, the statute does not provide for the survival of an action for personal injury to the widow because there was none. Further, the survival statute antedates by about forty years the death statute.

It has been held in Virginia that even if there is a statute providing for the survival of an action for wrongful death, there is no cause of action if the wrongdoer dies prior to the death of the injured person. Here is another deficiency. Technically, it would seem that a cause of action must accrue against a person while alive if at all. Yet the wrongdoer had as effectively committed an act which was to cause death as if he were still alive when the death he caused occurred. The reason for providing a right to sue in such case is identical with the right to sue in the other case, viz., the duty to provide for the support of the bereft family. Morally, it makes no difference whether the murderer died five minutes before or five minutes after the death of the murdered person.

It is suggested, therefore, that actions for wrongful death should by specific provision of statute survive the death of the wrongdoer and that the wrongful act which ultimately may cause the death of a person should be made actionable against the wrongdoer's personal representative even though he may have died before his victim.

9 Demczuk v. Jenifer, supra n. 3 (Murder. Murdered woman died before suit was brought by the husband of decedent. The cause of action pleaded was the husband's loss of the wife's services as a result of the wrongful act of another. Held, the term "injuries to the person" means injuries causing physical pain, discomfort or disability which occasions loss or damage either to such person or to any person entitled to the benefit of services of the injured person.); Moe v. Smiley, supra n. 3 (Murder. Defendant committed suicide three hours later. The cause of action is the wrong to the husband, not the wrong to his widow.); Kranz v. Wisconsin Trust Co., supra n. 3 (Negligent injury resulting in death. Defendant died after action was instituted. Held there is a difference between the survival of a cause of action and the survival of a liability. Plaintiff had no property right in life of decedent's husband. It is the property right of decedent to which the statute applies.)

10 Beaver v. Putnam, supra n. 3.