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SURVIVAL OF ACTIONS.

THE maxim *actio personalis moritur cum persona*, as a general principle, is not correct—it is confined generally to those cases which arise *ex delicto*, and not *ex contractu*, and even then, as we shall show, is subject to many restrictions, some the work of courts, some the work of legislators. There are actions *ex contractu* which do not survive, and there are actions *ex delicto* which do survive: *Stebbins* v. *Palmer*, 1 Pick. 71; *Lattimore* v. *Simmons*, 13 S. & R. 183. The words "personal action" are misleading, for the maxim was never held to extend to actions arising upon contracts for the payment of money or for the performance of duties where property is in question, but was from the first confined to actions for injury to the person or character: *Settler* v. *Barnett*, 8 Port. 181. It will indeed be found that whether or not a cause of action survives does not depend on the form of the remedy—whether it is on a tort or contract—but rather whether the damage affects the estate of the sufferer or is a mere personal injury.

The distinction seems to be between causes of action which affect the estate, and those which affect the person only; the former survive for or against the executor, the latter die with the person: *Stebbins* v. *Palmer*, 1 Pick. 71.

The ancient strictness of the ancient maxim has been constantly giving way before a more enlightened civilization, and a more full and perfect development of the principles of natural justice. Judicial expositions of the statutes, which have been passed concerning the survivorship of actions, and causes of action, seem to

have been made in the same liberal spirit which led to their enactment: *Hoofer* v. *Graham*, 45 Me. 213. Thus a statute which permitted actions of trespass on the case to be prosecuted or defended by an administrator or executor was held to apply to a case which had been commenced before the statute went into effect: Id. It has indeed been said by one court that at the hands of statute or judicial construction the maxim *actio personalis moritur cum persona* is itself dead, or has lost so much of its vitality as to be of very little use: *Peebles* v. *North Carolina Railroad Co.*, 63 N. C. 238.

What actions do and do not survive.—At common law, as has been said, no actions for *injury to the person* survive the death of the person receiving them. If either the plaintiff or the defendant should die before verdict, any existing action brought to recover for such injury would abate; and if none had been brought by the party injured, none could be commenced by his personal representative. But as to such personal actions as are founded upon any obligation, contract, debt, covenant or other duty, the general rule has been established from the earliest times that the right of action on which the testator or intestate might have sued in his lifetime survives his death and is transmitted to his executor or administrator: Williams on Executors 786. Therefore, an executor or administrator may maintain an action to recover debts of every description due to the deceased, whether debts of record, specialties or simple contracts: Id. On the other hand, it was equally a principle of the common law that if an injury was done to the person or property of another for which damages only could be recovered in satisfaction, the action died with the person *to* whom or *by* whom the wrong was done. Trespass, trover, false imprisonment, assault and battery, slander, deceit, diverting a watercourse, obstructing lights, escape, and many other torts were cases where, at common law, the maxim *actio personalis moritur cum persona* applied: Williams on Executors 790. But the statute of 4 Edw. III., c. 7, called the statute *de bonis asportatis in vita testatoris*, restricted the ancient maxim very much. Reciting that in times past executors have not had actions for a trespass done to their testators as of the goods and chattels of the said testators carried away in their life, and so such trespassers remained unpunished, it enacted that executors in such cases should have an action against the trespassers and recover their damages in like manner as they

whose executors they be should have had if they were living. This statute was subsequently extended to the executors of executors and to administrators, and being a remedial statute was construed liberally. As Lord ELLENBOROUGH said in an early case (*Wilson* v. *Knubley*, 7 East 134), "It is a very ancient statute passed at a period when no great precision of language prevailed, and the body of the act does not speak of actions of trespass, though the instance put is proper for such an action, but it speaks of actions *for* a trespass done to the testator's goods, and it enacts that executors in such cases shall have an action against the trespassers, apparently using the word *trespass* as meaning a wrong done generally and the trespassers as wrongdoers." The statute was, therefore, construed to include not only technical trespasses but all acts by which personal property was lessened in value. The statute, however, it is to be noted, only gave the action *to* executors and did not extend to actions against them, where as against the person committing the injury the action died with him: see *Coker* v. *Crozier*, 5 Ala. 369. The statutes of most of the states are broader than the English law, and where the action survives at all, by virtue of their provisions, it survives *against* as well as *to* the executor: *Potts* v. *Hale*, 3 Mass. 321; *Wilbur* v. *Gilmore*, 21 Pick. 250; *Towle* v. *Lovatt*, 6 Mass. 394; *Holmes* v. *Moore*, 5 Pick. 257; *Mellen* v. *Baldwin*, 4 Mass. 480; *Stetson* v. *Kempton*, 13 Id. 292; *Middleton* v. *Robinson*, 1 Bay 58; *Nettles* v. *D'Oyley*, 2 Brev. 27.

Even under the English statute there were cases in which the executor of a tort feasor might be charged, and this distinction has been made in several American cases in this way: Where the defendant by a tortious act acquires the property of the plaintiff, as by cutting his trees and converting them to his own use, or by converting his goods to his own use, the action will survive his death: but where by the act complained of the defendant acquires no gain, although the plaintiff may have suffered great loss, the action does not survive: *Cravath* v. *Plympton*, 13 Mass. 454; *Nettles* v. *D'Oyley*, 2 Brev. 27; *Vittum* v. *Gilman*, 48 N. H. 416; *Hambly* v. *Trott*, 1 Cowp. 376; *Arnold* v. *Lamer*, 1 N. C. Law Rep. 143. This distinction was first made by Mr. Justice MANWOOD, in a case in Saunders, where he said that in every case where any price or value is set upon a thing in which the offence is committed, if the defendant dies his executor shall be chargeable, but where the action is for damages only in satisfaction for the injury done,

then his executor shall not be liable. Lord MANSFIELD, in *Hambly* v. *Trott*, 1 Cowp. 376, after quoting these words, says: "Here is a fundamental distinction, if it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, then the person injured has only a reparation for the delictum in damages to be assessed by a jury. But where besides the crime property is acquired which benefits the testator, then an action for the value of the property shall survive against the executor. So far as the tort goes an executor shall not be liable, and, therefore, it is that all public and all private causes die with the offender, and the executor is not chargeable, but as far as the act of the defendant is beneficial to him, his assets ought to be answerable, and his executor therefore shall be charged:" see *Seeley* v. *Slosson*, 1 Root 216; *United States* v. *Daniel*, 6 How. 11; *Cooper* v. *Crane*, 9 N. J. L. 173; *Coleman* v. *Woodworth*, 28 Cal. 567.

A Missouri case (*Higgins* v. *Breen*, 9 Mo. 500), affords a good illustration of this distinction. A woman brought an action against the administrator of a man to whom she had been married by his deceit, alleging that he had been previously married and had another wife living at his death. She claimed to recover the value of her services while she lived with him as his wife. "If the injury of the man," said the court, "was a mere tort which resulted to no benefit to himself, then the action would not survive; but if it can be shown that the injury resulted in an advantage to him that he was made richer or his circumstances improved by the work and labor of the unfortunate plaintiff, then this action will lie. It is not maintained that for the deceit practised, for the injury to her person, the plaintiff has any redress against the administrator." So it was held in Pennsylvania that an action for conspiracy between A. and B. to prevent C. from recovering a debt of A., by means of A.'s assigning to B. without consideration choses in action, and thereupon taking the benefit of the insolvent law does not abate by the plaintiff's death: *Penrod* v. *Morrison*, 2 P. & W. 126.

But at common law, the following classes of actions, were regarded as strictly personal actions and did not survive.

Actions of assault and battery: *Harrison* v. *Moseley*, 31 Tex. 608; *Gibbs* v. *Belcher*, 30 Id. 79; *Miller* v. *Umbehower*, 10 S. & R. 311; *Kimbrough* v. *Mitchell*, 1 Head 539; to recover a penalty given by statute: *Watson* v. *Loop*, 12 Tex. 11; of criminal con-

versation: *Cox* v. *Whitfield*, 18 Ala. 738; *Clarke* v. *McClelland*, 9 Penn. St. 128; of seduction: *Brawner* v. *Sterdevant*, 9 Geo. 69; *George* v. *Van Horn*, 9 Barb. 523; *Shafer* v. *Grimes*, 23 Iowa 553; *Holliway* v. *Parker*, 23 Hun 71; for negligently causing death, under Lord CAMPBELL'S Act and the American statutes thereon: *Woodward* v. *Chicago, &c., Railroad Co.*, 23 Wis. 400; *Green* v. *Thompson*, 26 Minn. 500; for malicious prosecution: *Taney* v. *Edwards*, 27 Tex. 225; against physicians for malpractice: *Long* v. *Morrison*, 14 Ind. 595; for deceit in the sale or exchange of property: *Coker* v. *Crozier*, 5 Ala. 369; *Newsom* v. *Jackson*, 29 Ga. 31; for slander and libel: *Long* v. *Hitchcock*, 3 Ohio 274; *Alpin* v. *Morton*, 21 Id. 536; for fraudulently recommending a third party as worthy of credit, whereby loss was incurred: *Henshaw* v. *Miller*, 17 How. 212; for nuisance: *Ellis* v. *Kansas City, &c., Railroad Co.*, 63 Mo. 131; *Aldrich* v. *Howard*, 9 R. I. 125; an action against a marshal or sheriff for a false return: *United States* v. *Daniel*, 6 How. 11; *Benjamin* v. *Smith*, 17 Wend. 208; an action of deceit in falsely pretending that the party was divorced from his wife, whereby the plaintiff was induced to marry him: *Grim* v. *Carr*, 31 Penn. St. 533; *Price* v. *Price*, 18 N. Y. (S. C.) 299; an action of trover: *Hench* v. *Metzer*, 6 S. & R. 272; an action for forcibly seizing a vessel on the high seas: *Nicholson* v. *Elton*, 13 Id. 415; a prosecution for bastardy: *State* v. *Sullivan*, 12 R. I. 212; an action for trespass: *Baker* v. *Danshee*, 7 Heisk. 229; an action against a city for maintaining an excavation in a street into which the plaintiff fell and was injured: *Knox* v. *City of Sterling*, 73 Ill. 214; or an action against a sheriff for a nonfeasance in neglecting to levy an execution: *Hambly* v. *Trott*, Cowp. 371; *Cravatt* v. *Plympton*, 13 Mass. 454; *People* v. *Gibbs*, 9 Wend. 29; all these did not survive at common law but died with the person.

So also a mandamus against a public officer is regarded as a personal action and abates with the death or retirement of the officer: *United States* v. *Boutwell*, 1 Cent. L. J. 231.

Actions on contract growing out of tort.—It appears to be well settled in the courts of England that if the executor can show that damage has accrued to the personal estate of the testator by the breach of an express or implied promise, he may sustain an action at common law to recover such damage, although the action is to some extent founded upon a tort.

In *Knight* v. *Quailes*, 2 B. & B. 102, the plaintiff, as administrator, brought an action of assumpsit, alleging that the defendant for certain fees to be paid to him by the intestate undertook, as an attorney, to investigate and see that a title about to be conveyed to him was a good one. The breach was that he did not do so, whereby his intestate got a poor title and his personal estate was injured. The court held that the action survived, saying that it made no difference whether the promise was express or implied, the whole transaction resting on contract; that though perhaps the intestate might have brought case or assumpsit the latter was the only remedy for the administrator. The court further observed that if a man contracted for a safe conveyance by a coach and sustained an injury by a fall, by which his means of improving his personal estate were destroyed, and that property in consequence diminished, though it was clear that in his lifetime he might sue the coach proprietors in tort or contract at his election, his executor might sue in assumpsit for the consequences of the coach proprietors' breach of contract. An important *dictum* to the same effect is found in a case which arose in the Common Pleas in 1865. A master had brought an action against a railway company as a carrier of passengers to recover damages for a personal injury sustained through their negligence by his servant whereby the master lost the benefit of the services of the servant. The court held that the action would not lie, because the contract out of which arose the duty to carry safely, was a contract between the company and the servant. But in the course of his judgment Mr. Justice WILLES said: "I asked in the course of the argument, if the executor could sue upon such a contract as this, and Mr. *Keane* said he thought not. I am disposed to think the answer given right; it is probably like a promise of marriage, which not being within the statute of Edw. IV., *moritur cum persona*. But suppose the personal estate of the servant sustained injury through the defendant's breach of duty, as if he had taken a quantity of luggage with him which had been lost or damaged, it is clear his executor might have sued for that damage."

In *Bradshaw* v. *Lancashire, &c., Railroad Co.*, L. R., 10 C. P. 189, and *Potter* v. *Metropolitan, &c., Railroad Co.*, 30 L. T. (N. S.) 765, the question was considered at length and expressly decided. In the former case a passenger on a railway was injured, and after an interval died in consequence; it was held that his executrix might recover in an action for breach of contract

against the railway company, the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. "The ground of action," said Mr. Justice GROVE, "is that there has been a breach of a contract made with the testator during his lifetime, whereby in his lifetime his estate was injured by his having to pay medical and other expenses and injury to his business, the direct and immediate consequence of the accident." Similar rulings have been made in the American courts.

In *Miller* v. *Wilson*, 24 Penn. St. 114, the defendant, an attorney, agreed to draw up a mortgage for the plaintiff and place it on record. He, however, neglected to record it, and the plaintiff lost her money by reason of subsequent incumbrances made on the property. It was held that the action survived the defendant's death. In Missouri and in the federal courts, it has been held that an action by a father against a carrier for negligently causing the death of his child will survive, it being an action for the breach of a contract: *James* v. *Christy*, 18 Mo. 162; *The City of Brussels*, 6 Ben. 370.

Where damage consists only of personal suffering, action on contract does not survive.—To the general rule that an action on a promise express or implied does not abate by death the English courts have introduced a qualification, viz.: that the action though based upon an express or implied promise will *not* survive where the damage consists entirely in the personal suffering of the deceased, without any injury to his personal estate: *Chamberlain* v. *Williamson*, 2 M. & S. 409, which came before the King's Bench in 1814, is the leading case of this kind. The action was by the plaintiff as administrator upon a breach of promise of marriage made to the intestate in her lifetime. The jury found against the defendant for 200*l.* damages. On motion to arrest the judgment on the ground that the cause of action did not survive to the administrator, the court took time to consider the question, saying that it was a case of novelty and importance for which no precedent could be found in the report. After full consideration judgment was delivered against the plaintiff. "The general rule of law," said Lord ELLENBOROUGH, C. J., is *actio personalis moritur cum persona*, under which rule are included all actions for injuries merely personal. Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the

deceased, but not of their wrongs except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be stated on the record, otherwise the court cannot intend it. If this action be maintainable, then every action founded on an implied promise to a testator where the damage subsists in the previous personal suffering of the testator would be also maintainable by the executor or administrator. All injuries affecting the life or health of the deceased—all such as arise out of the unskilfulness of medical practitioners—the imprisonment of the party brought on by the negligence of his attorney—all these would be breaches of the implied promise by the persons employed to exhibit a proper portion of skill and attention. We are not aware, however, of any attempt on the part of the executor or administrator to maintain an action in any such case." But Lord ELLENBOROUGH in *Chamberlain* v. *Williamson* was careful to say that if there had been anything in the record to show that any injury had been done to the estate of the deceased though the breaking of the promise, the result would have been different.

Personal suffering the only damage.—The American rule.—In the American courts the same doctrine as was laid down in *Chamberlain* v. *Williamson* is adhered to, and where the damage consists only of personal suffering, the action will not survive although it may arise from a breach of a contract. The first cases illustrating this rule are like *Chamberlain* v. *Williamson*, actions for breach of contracts to marry. In *Stebbins* v. *Palmer*, decided in Massachusetts in 1822, the defendant died while the action of breach of promise of marriage was pending, and it was held that the action did not survive. "It is a contract," said the court, "merely personal; at least it does not necessarily affect property. The principal ground of damages is disappointed hope; the injury complained of is violated faith, more resembling in substance deceit and fraud than a mere common breach of promise:" *Stebbins* v. *Palmer*, 1 Pick. 71. The next case arose three years later in Pennsylvania, the defendant dying pending the action. The same conclusion was reached. "It cannot be said," said TILGHMAN, C. J., "that any injury has been done to the property of the plaintiff, nor is there any measure or standard for regulating the damages. But the counsel for the plaintiff rely on the contract in this case and on some general *dicta* that all actions founded on contract survive.

This position is too general. If true, it must extend to contracts implied as well as expressed. Suppose the case of a physician or surgeon who by unskilful treatment injures the health of a patient. Here is a breach of an implied contract; and yet it will hardly be contended that in case of death the cause of action would survive. It seems reasonable, therefore, to confine the survivor of action to cases in which actual property is affected, even though there be an express contract. A promise of marriage is undoubtedly a contract, though one of a singular nature. By its breach the feelings of the injured party may be deeply wounded, but it is not perceived that his property is in any manner affected. * * * It affects the hopes, the feelings, the imagination, the minds of the parties without touching their property. And whether these hopes and feelings would have been gratified or disappointed by the fulfilment of the contract, it is beyond the reach of human sagacity to decide. It is not pretended that in case of slander the action survives. Yet there the mental feelings may be as severely afflicted as by the loss of marriage. No benefit accrued to the estate of the defendant by the mutual promises in this case:" *Lattimore* v. *Simmons*, 13 S. & R. 183; *Wade* v. *Kalbfleisch*, 58 N. Y. 282, is a still stronger case for there the survival of the action (also breach of promise of marriage) was claimed under a statute which provided that "actions on contract" should survive. The court refused to rule that this was an "action upon contract" within the statute. And that an action for breach of promise of marriage will not survive has been held in Maine: *Hovey* v. *Page*, 55 Me. 142, and in New Jersey, 4 Vroom 179. In *Best* v. *Vedder*, 58 How. Pr. 187, it was held that an action against a physician for unskilful treatment did not survive against the defendant's executors. "Pain and bodily injuries," said the court, "do not possess such transmissible qualities as to compel the living to atone for such as the dead inflicted, nor to entitle them to receive satisfaction for such as the dead suffered.

A still more restricted doctrine prevails in the American courts. Notwithstanding the dictum of Lord ELLENBOROUGH, in *Chamberlain* v. *Williamson*, that if any special damage had been stated in the record the action might have been maintained by the administrator for the breach of promise of marriage, it is now generally held in the United States that where the primary cause of action dies with the person that which is merely incidental must go with

it. Thus SHAW, C. J., in *Smith* v. *Sherman*, 4 Cush. 408, ruled that expenditures made by the promisee by way of preparation for the marriage, although in some manner affecting her estate, must be regarded as merely incidental to the promise to marry, and would not afford a substantive cause of action or enable the plaintiff to maintain a suit which otherwise could not be maintained. In *Wade* v. *Kalbfleisch*, 58 N. Y. 282, an action for breach of promise of marriage, the court said: "The learned counsel suggested that upon a trial against executors or administrators, the personal elements of the action may be eliminated and a recovery confined to the pecuniary loss for support, dower, &c. There is no precedent for such a proceeding and no principle upon which it could be adopted. For some purposes where the relation exists, the pecuniary rights of the wife are estimated and protected by the courts. But what would be the rule of pecuniary loss hypothetically sustained for support? Would it be competent to prove the value of the defendant's property? Such evidence is admitted in this action, not to prove the pecuniary loss for support, but to show what the station of the plaintiff in society would have been which is purely a personal grievance and injury. The counsel likened it to an employment for a term of years at a fixed salary, and contract broken by the employer without cause. If it could be thus transformed it would be competent to show in defence that the plaintiff had an opportunity to contract an equally eligible marriage with another person, and the plea of the want of affinity or affection would not avail. As to dower there could be no certainty to base a recovery upon. It would have been competent for the defendant to have disposed of all real estate before marriage, and all personal estate before death. Aside from these considerations, suggested to show the novelty if not the absurdity of such a trial, the brief answer to this point is that the action is from its peculiar nature indivisible. If revived at all, it must be revived as an entirety. If its personal features are abandoned the incidents only remain. The circumstances relative to the property and standing of the defendant are admissible upon the question of damages, but they are incidental and subordinate and so complicated with personal injuries as to render their separation impracticable.

In *Vittum* v. *Gilman*, 48 N. H. 416, the court having determined that a cause of action against a physician and surgeon, arising from want of care or skill in the cure of a patient, did not survive the

death of the surgeon, it was held that no suit could be maintained against the executor to recover for increased expenses incurred by the patient which were merely incidental to the personal injury. A similar ruling is made in *Jenkins* v. *French*, 58 N. H. 532. The principle of these cases seems to be best summed up by a New York judge as follows: "In cases of slander, libel, assault or battery, or false imprisonment, there may be, and usually is, damage to both the person and the estate. But still the executor could not maintain an action for the injury to the clothes of the testator in the assault, nor for the money necessarily expended in his cure, nor for the profits of business or the wages of labor lost by reason of the slander, the libel, the battery or the imprisonment. For the gist of the several actions is injury to the person, and the other matters are mere aggravation of the damages: *Fried* v. *New York Central Railroad Co.*, 25 How. Pr. 287.

On the other hand there are some rulings that are in conflict with this principle. In *Lattimore* v. *Simmons*, 13 S. & R. 188, TILGHMAN, C. J., while deciding that the injury in that case being merely personal would not survive, thought that if any damage to the plaintiff's property had been shown, the result might have been different. In *Hovey* v. *Page*, 55 Me. 142, the court, while ruling the same way on the facts, said that the "allegation of special damage which would cause the action to survive must be of damage to the property," but held that an allegation that after the promise of marriage, the plaintiff's intestate had a child born to her out of wedlock, of which the defendant was the father, "was insufficient for two reasons—first, because the fact only injured the character of the woman and not her estate, for by statute the father was liable for the support of a bastard child. In *James* v. *Christy*, 18 Mo. 162, it was held that an action by a father against a common carrier for causing the death of his son, survived the death of the father, but this reasoning is apparently based on the ground that the action rested upon a breach of contract obligation, which breach injured the property rights of the father.

Other English Statutes.—In *Troycross* v. *Grant*, 27 W. R. 87, it was said by the English Court of Appeal that the statute of Edward III. had been construed by successive decisions to extend to all actions except those relating to the freehold or those affecting the person or reputation of the plaintiff, only such as assault, slander, breach of promise of marriage; and it was held that whenever the