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Recent cases

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Disbarment of Attorneys—Acts Outside Professional Duties

In re Falzone[1]

The principal case, decided by the St. Louis Court of Appeals, presents an interesting problem as to what types of misconduct not directly connected with the practice of law are grounds for disbarment.

A lawyer who was a member of the state senate was charged with soliciting a bribe from persons interested in certain legislation. The special commissioner, appointed by the court of appeals, found respondent guilty as charged and recommended his disbarment. The court upheld the findings of the commissioner and respondent was disbarred for violation of Rule 4.47[2] of the Missouri Supreme Court.

While Rule 4 of the Missouri Supreme Court is, in general, a restatement of the Canons of Profession Ethics of the American Bar Association, those canons contain no rule corresponding to Missouri Rule 4.47. This, however, does not mean that the Missouri courts require a higher standard of conduct than that called for by other courts. It is generally recognized by the courts that an attorney must maintain a standard of conduct in his dealings with his fellow men which is indicative of a moral fitness to be entrusted with the duties and privileges that are attached to the office of attorney. A lawyer's conduct must not tend to lower the Bar in the public estimation or bring disgrace upon the profession.[3]

In suspending a lawyer for misconduct while acting as probate judge and sheriff, the Kansas City Court of Appeals said:

> "*Any conduct* on the part of an attorney evidencing his unfitness for the confidence and trust which attend the relation of attorneys and client and practice of law before the courts, showing such a lack of personal honesty or of good moral character as to render him unworthy of public confidence, constitutes a ground for his disbarment." (Court's italics)[4]

The courts will not allow a lawyer to be an honest lawyer and a dishonest business man. Hence attorneys have been disbarred or suspended for fraud and

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1. 220 S.W. 2d 765 (Mo. 1949).
2. "General Rule Governing Certain Conduct of Lawyers—A lawyer should always maintain his integrity; and shall not wilfully commit any act against the interests of the public; nor shall he violate his duty to the courts or his clients; nor shall he, by any misconduct, commit any offense against the laws of Missouri or the United States of America, which amounts to a crime involving acts done by him contrary to justice, honesty, modesty, or good morals; nor shall he be guilty of any other misconduct whereby, for the protection of the public and those charged with the administration of justice, he should no longer be entrusted with the duties and responsibilities belonging to the office of an attorney."
3. *In re* Fischer, 231 App. Div. 193, 274 N. Y. Supp. 168 (1st Dep't 1930). (Suspension for owning a monetary interest in a club where gambling was allowed.)
4. *In re* Williams, 233 Mo. App. 1174, 128 S.W. 2d 1098 (1939), *conforming to mandate* State *ex rel.* Clarke v. Shain, 343 Mo. 542, 122 S.W. 2d 882 (1938), *quashing In re* Williams, 113 S.W. 2d 353 (Mo. App. 1938).

trickery in business transactions,[5] dishonestly evading personal debts,[6] passing worthless checks,[7] acting to defraud their creditors,[8] mishandling funds entrusted to their care for investment,[9] and for failure to pay income taxes.[10]

It is universally agreed that breach of the fiduciary duties created by a trustee-beneficiary relationship is ground for dsicipline.[11]

Misbehavior as a judge[12] as well as failure to carry out faithfully the duties of office as prosecuting attorney[13] have also justified discipline. Perjury[14] and participating in unlawful assemblies[15] and membership in revolutionary societies[16] are grounds for disciplinary action. In these instances, it is plain that the lawyer's conduct violates his oath to uphold the law.

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5. *Re* Cruickshank, 47 Cal. App. 496, 190 Pac. 1038 (1920); *Re* Wilson, 79 Kan. 450, 100 Pac. 75 (1909); *In re* Waleen, 190 Minn. 13, 250 N.W. 798 (1933); *Re* Skinner, 171 Minn. 437, 214 N.W. 652 (1927); *In re* Butcher, 269 App. Div. 545, 56 N.Y.S. 2d 230 (1st Dep't 1945); *Re* Goldstein, 220 App. Div. 107, 220 N. Y. Supp. 473 (3rd Dep't 1927); *Re* Issacs, 172 App. Div. 181, 159 N. Y. Supp. 403 (1st Dep't 1916); State *ex rel.* Montgomery v. Estes, 105 Ore. 173, 209 Pac. 486 (1922).

6. People *ex rel.* Chicago Bar Ass'n. v. Hoering, 317 Ill. 390, 148 N.E. 299 (1925); *Re* Young, 75 N. J. Law 83, 67 Atl. 717 (1907); *Re* Kalisky, 169 App. Div. 531, 155 N. Y. Supp. 550 (1st Dep't 1915).

7. *In re* Wells, 293 Ky. 201, 168 S.W. 2d 730 (1943); *In re* Shapiro, 263 App. Div. 659, 34 N.Y.S. 2d 285 (1st Dep't 1942); *Re* Smith, 216 App. Div. 173, 213 N. Y. Supp. 751 (1st Dep't 1926); *Re* Boland, 127 App. Div. 746, 11 N. Y. Supp. 932 (1st Dep't 1908); *In re* Osmond, 174 Okla. 561, 54 P. 2d 319 (1935); *In re* State v. Mannix, 133 Ore. 329, 288 Pac. 507, *rehearing denied* 290 Pac. 745 (1930).

8. *Re* Berkley, 174 App. Div. 205, 160 N. Y. Supp. 1093 (1st Dep't 1916); *Re* Egan, 52 S. D. 394, 218 N.W. 1 (1928).

9. *In re* Lundeen, 200 Minn. 577, 274 N.W. 825 (1937); State *ex rel.* Hunter v. Marconit, 134 Neb. 898, 280 N.W. 216 (1938); *Re* Boland, 127 App. Div. 746, 111 N. Y. Supp. 932 (1st Dep't 1908); *Re* Turner, 104 Wash. 276, 176 Pac. 332 (1918).

10. *In re* Kaemmerer, 178 S.W. 2d 474 (Mo. App. 1944).

11. *In re* Buder, 217 S.W. 2d 563 (Mo. 1949); *In re* Conner, 207 S.W. 2d 492 (Mo. 1948); *In re* Arrow, 248 App. Div. 490, 290 N. Y. Supp. 677 (1st Dep't 1936).

12. *In re* Williams, 233 Mo. App. 1174, 128 S.W. 2d 1098 (1939); Bar Ass'n. v. Sullivan, 185 Cal. 621, 198 Pac. 7 (1921); State v. Peck, 88 Conn. 447, 91 Atl. 274, L.R.A. 1915A 663, Ann. Cas. 1917B 227 (1914); People *ex rel.* Stead v. Phipps, 261 Ill. 576, 104 N.E. 144 (1914); Hobb's Case, 75 N. H. 285, 73 Atl. 303 (1909); *Re* Dellenbaugh, 170 Ohio C. C. 106, 9 Ohio C. D. 325 (1899).

13. *In re* Faubion, 101 S.W. 2d 103 (Mo. App. 1937); *In re* Lyons, 162 Mo. App. 688, 145 S.W. 844 (1912); *Re* Cowdery, 69 Cal. 32, 10 Pac. 47, 58 Am. Rep. 545 (1886); People *ex rel.* Colorado Bar Ass'n v. Anglim, 33 Colo. 40, 78 Pac. 687 (1904); *Re* Norris, 60 Kan. 649, 57 Pac. 528 (1899); *Re* Simpson, 9 N. D. 379, 83 N.W. 541 (1900); *Re* Voss, 11 N. D. 540, 90 N.W. 15 (1902); State v. Hayes, 64 W. Va. 45, 61 S.E. 355 (1908).

14. *Re* Mills, 1 Mich. 392 (1850); *Re* Popper, 193 App. Div. 505, 184 N. Y. Supp. 406 (1st Dep't 1920); *In re* Schecht, 242 App. Div. 495, 275 N. Y. Supp. 712 (1st Dep't 1934); *In re* Schachne, 5 Fed. Supp. 680 (E.D.N.Y. 1934); 9 A.L.R. at 200.

15. *Ex parte* Wall, 107 U. S. 265 (1882); *Re* Hanna, 30 N. M. 96, 227 Pac. 983 (1924); State *ex rel.* McLaughlin v. Graves, 73 Ore. 331, 144 Pac. 484 (1914); Jone's Case, 2 Pa. Dist. R. 538, 12 Pa. Co. Ct. 229 (1893); Doremenon's Case, 1 Mart. 129 (La. 1810).

16. *Re* Smith, 133 Wash. 145, 233 Pac. 288, 43 A.L.R. 102 (1925). Also see Margolis' Case, 269 Pa. 112 Atl. 478, 12 A.L.R. 1186 (1921).

In his private life, an attorney's conduct is expected to evince a standard that is compatible with common honesty and decency. Any action which is indicative of moral turpitude[17] warrants the lawyer's disbarment or suspension. The courts have disciplined for selling opium,[18] seduction on promise of marriage,[19] adultery,[20] obtaining money under a false promise of marriage,[21] selling liquor in violation of prohibition laws,[22] and habitual drunkenness which prevents a lawyer from properly discharging his duties to the court or his clients.[23]

An attorney who aids or abets the "policy" or "numbers" rackets by advising racketeers engaged therein,[24] or who, while knowing the guilt of a defendant in a criminal action, testifies as a character witness,[25] will be disbarred. Such conduct is a misuse of the office of lawyer.

Solicitation or acceptance of bribes as well as attempted bribery, has also been held to be conduct involving moral turpitude.[26] It would seem, therefore, that the principal case, decided under Missouri Rule 4.47, is consistent with the general trend of decisions as to what conduct not directly connected with the practice of the law justifies disciplinary proceedings.

GEORGE M. WINGER

PLEADING—AMENDMENT NAMING CORPORATION AS DEFENDANT—STATUTE OF LIMITATIONS

Daiprai v. Moberly Fuel & Transfer Co.[1]

Where an action is erroneously brought against a group of individuals as a

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17. Moral turpitude has been defined by the Missouri courts as: "an act of baseness, vileness, or depravity in private and social duties which a man owes to his fellow men or to society in general, contrary to the accepted and customary rule of right and duty between man and man; everything done contrary to justice, honesty, modesty and good morals." See *In re* Wallace, 323 Mo. 203, 19 S.W. 2d 625 (1929).

18. *In re* McNeese, 346 Mo. 425, 142 S.W. 2d 33 (Mo. 1942).

19. *In re* Wallace, *supra,* note 18.

20. Grievance Committee v. Broder, 112 Conn. 269, 152 Atl. 292 (1930); *Re* Titus, 66 Hun. 632, 21 N. Y. Supp. 724 (2nd Dep't 1892). *But see contra* State v. Byrkett, 40 Ohio S. & C. P. Dec. (1895), holding that a lawyer who seduced his secretary should not be disbarred unless the misconduct in his private capacity involved moral turpitude, or evinced a lack of honesty, integrity, and veracity; *Re* H..... T....., 2 Pennyp. 84 (Pa. 1882), holding by way of dictum that fornication was not an offense warranting disbarment.

21. *In re* Raileanu, 225 App. Div. 90, 232 N. Y. Supp. 175 (1st Dep't 1928).

22. Underwood v. Com., 32 Ky. L. Rep. 32, 105 S.W. 151 (1907); State *ex rel.* Young v. Edmunson, 103 Ore. 243, 204 Pac. 19 (1922); *cf.* Bartos v. United States District Ct., 19 F. 2d 722 (C.C.A. 8th 1927); *reversing* 13 F. 2d 138 (D. Neb. 1926) (manufacture of beer by an attorney for his own use, though illegal, involved no moral turpitude).

23. *In re* Wells, 293 Ky. 201, 168 S.W. 2d 730 (1943); *Re* Macy, 109 Kan. 1, 196 Pac. 1095, 14 A.L.R. 848 (1921); *In re* Osmond, 174 Okla. 561, 54 P. 2d 319 (1935).

24. *Re* Richards, 333 Mo. 907, 63 S.W. 2d 672 (1933); *In re* Davis, 252 App. Div. 591, 299 N. Y. Supp. 632 (1st Dep't 1937).

25. *In re* Schachne, 5 Fed. Supp. 680 (E.D.N.Y. 1934).

26. *In re* Wellcome, 23 Mont. 213, 58 Pac. 47 (1899); *In re* Chernoff, 344 Pa. 527, 26 A. 2d 335 (1942). See also cases cited under note 14, *supra.*

1. 223 S.W. 2d 474 (Mo. 1949).

partnership, and the petition is amended to correctly designate the defendant as a corporation, the statute of limitations having run in the interim, the question arises as to whether the cause of action has been so changed by the substitution of party defendant as to bar plaintiff's recovery against the corporation.

In the principal case, P sued A, B, and C as copartners doing business as the above-named company. The action was brought one day before the running of the statute of limitations. A, B, and C were all served with process, and filed a joint motion to make definite and certain, or for a bill of particulars. While this motion was still pending, and without leave of court, P amended her petition making the company the sole defendant, and alleging it to be a corporation, the statute of limitations having run on the action after the filing of the original petition and before the filing of the amended petition. Service of the amended petition was made on the corporation. A, B, and C were the sole "owners," *i.e.*, directors, officers, and shareholders of the company, both at the time the original petition was filed, and when the amended petition was filed. Defendant's motion to dismiss, on the ground that the amended petition constituted an entire substitution of parties defendant, was granted by the circuit court. The Supreme Court of Missouri, holding that the amended petition was barred by the statute of limitations, affirmed the judgment. In rejecting P's contention that her amended petition merely corrected a misnomer "by changing the description of the party defendant from that of a copartnership to a corporation," the court said that this was an amendment involving two different persons, and that a partnership and a corporation, though composed of the same members, are two different persons at law.

Amendment correcting misnomer even after the statute of limitations has run is permissible,[2] the courts applying the doctrine of relation back. Where, however, the amendment is deemed a substitution or entire change of parties the amendment will not be allowed,[3] the statute of limitations continuing to run in favor of new parties until they are brought in by process.

However, in addition to cases involving true misnomer, amendment has been allowed by some courts, after the statute of limitations has run, where both the original and substituted defendants were artificial legal entities, as distinguished from natural persons, apparently on the theory that the intent throughout was to sue a legal entity, and the error was merely in description.[4] A similar result has been reached where a corporation has been substituted for another corporation,[5]

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2. Godfrey v. Eastern Gas & Fuel Associates, 71 F. Supp. 175 (D. C. Mass. 1947); Evans v. List, 193 Ark. 13, 97 S.W. 2d 73 (1936); Marston v. Tibbetts Mercantile Co., 110 Me. 533, 87 Atl. 220 (1913).

3. Godfrey v. Eastern Gas & Fuel Associates, *supra* note 2.

4. Gozdonovic v. Pleasant Hills Realty Co., 357 Pa. 23, 53 A. 2d 73 (1947); Nelson v. Brenham Compress Oil & Mfg. Co., 51 S.W. 514 (Tex. Civ. App. 1899).

5. McLaughlin v. West End St. R. R., 186 Mass. 150, 71 N.E. 317 (1904). *Contra*: Schaffner v. B. & W. Auto Sales Co., 321 Ill. App. 632, 53 N.E. 2d 318 (1944) (innocent corporation sued—mistaken identity); *cf.* McGee v. Ferguson Seed Farms, 34 S.W. 2d 338 (Tex. Civ. App. 1931) (previously-dissolved corporation originally sued).

an individual for a corporation,[6] an individual for an individual,[7] and in class actions.[8]

Although under normal circumstances a corporation will be treated as a legal entity, where the fiction is relied upon ". . . to defeat public convenience, justify wrong, protect fraud, or defend crime, the law will regard the corporation as an association of persons."[9] It is submitted that the corporation might here be regarded as the three associates in determining the validity of the amendment, in order to avoid reaching an inequitable result, where the corporation is pleading the privilege of its separate legal entity merely to invoke the bar of the statute of limitations. This suggestion is further aided by the theory of the modern federal and state codes of civil procedure, that cases are to be tried on their merits, rather than defeated on technical errors.[10] A measure of liberality might be justified in determining the validity of amendment where, as here, the corporation, through its sole shareholders and officers, had ample notice from the beginning of the plaintiff's claim and her intention to assert it against the corporation.[11]

ROY W. MCGHEE, JR.

PROPERTY—RACIAL RESTRICTIVE COVENANTS—DAMAGES FOR BREACH

Weiss v. Leaon[1]

In the now famous case of *Shelly v. Kraemer*[2] the Supreme Court of the United States held that specific performance by judicial decree of a racial restrictive agreement is a violation of the Fourteenth Amendment, although the agreement itself is constitutionally valid. The court left undecided the question as to whether the Fourteenth Amendment also prohibits an action for damages for the breach of such an agreement.

6. Manistee Mill Co. v. Hobdy, 165 Ala. 411, 51 So. 871, 138 Am. St. Rep. 73 (1909). *But cf.* Abrams v. General Financial Corporation, 274 App. Div. 756, 79 N.Y.S. 2d 368 (1st Dep't 1948) (members of partnership substituted for corporation no longer in existence); Lingar v. Harlan Fuel Co., 298 Ky. 216, 182 S.W. 2d 657 (1944) (partnership and partners substituted for dissolved corporation); Hamilton-Brown Shoe Co. v. Berwald, 65 S.W. 2d 377 (Tex. Civ. App. 1933) (corporation substituted for partnership and partners).

7. Johnson v. Carroll, 272 Mass. 134, 172 N.E. 85 (1930).

8. Barnes v. Fort, 181 Tenn. 522, 181 S.W. 2d 881 (1944).

9. U. S. v. Milwaukee Refrigerator Transit Co., 142 Fed. 247, 255 (C. C. Wis. 1905); *accord,* State Trust & Savings Bank v. Hermosa Land & Cattle Co., 30 N. M. 566, 240 Pac. 469 (1925); Bressman, Inc. v. Mosson, 127 Misc. 282, 215 N. Y. Supp. 766 (1st Dep't 1926).

10. Fierstein v. Piper Aircraft Corp., 79 F. Supp. 217, 218 (D. C. Pa. 1948).

11. "Of course, an argument can be made on the other side, but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of specified conduct, the reasons for the statute of limitations do not exist, and we are of the opinion that a liberal rule should be applied." Holmes, J., in N. Y. Central & Hudson River R. R. v. Kinney, 260 U. S. 340, 346 (1922). See Godfrey v. Eastern Gas & Fuel Associates, *supra* n. 2, 71 F. Supp. 175 at 178 (D. C. Mass. 1947).

1. 225 S.W. 2d 127 (Mo. 1949).

2. Shelly v. Kraemer, 334 U. S. 1 (1948).

It seems that this question was not considered by any appellate court until December 12, 1949, when the case of *Weiss v. Leaon*[3] was decided by the Supreme Court of Missouri. In that case the defendants were owners of a certain lot and plaintiffs were the owners of other lots in the same subdivision. The lots were subject to a private restrictive agreement which provided that none of the lots should be devised, sold, leased or occupied by Negroes for a period of thirty years from November 5, 1931. Defendants Leaon sold or were about to sell their lot to Negroes and this suit was brought to enforce the covenant by a judicial decree cancelling any deed which may have been made to the Negroes or by an injunction restraining the defendants from conveying their lot to Negroes. This petition was dismissed by the lower court on the basis of the decision in *Shelly v. Kraemer.*[4] Plaintiffs then amended the petition, apparently for the purpose of seeking damages from the defendant for breach of the covenant; the trial court dismissed the amended petition. The Supreme Court of Missouri, in a per curiam decision, found that since this question had not been decided in *Shelly v. Kraemer*[5] they were free to decide it at this time. The court then held that a trial court may hear and determine an action for damages for the breach of a racial restrictive covenant without violating any provisions of the Federal or State Constitutions.

Although the appellate courts, with the exception of the Missouri Supreme Court, have been silent on the question as to whether a court may grant damages for the breach of a covenant such as this, there has been no lack of discussion of the problem in law reviews. William R. Ming, Jr.,[6] in his article in the *University of Chicago Law Review*[7] makes this observation on the judicial enforcement of penalties or damages for breach of restrictive covenants: "The superiority of specific performance over an action for damages as a means of excluding the proscribed group seems obvious. It would appear impossible, however, in the light of the reasoning of the court in these cases to distinguish a judgment to enforce such a penalty from a decree in equity ordering specific performance. Each would be equally state action—and each would be equally within the provision of the Fourteenth Amendment or the Civil Rights Acts as the case might be." Further on in this article,[8] Mr. Ming makes it more clear that he would not agree with the view of the Missouri court in the instant case. He points out that until the recent United States Supreme Court decisions on restrictive covenants, it was not felt that any provision on state action under the Fourteenth Amendment would impose a corresponding limitation on the conduct of individuals. However, now it is plain that that idea must be qualified since if the "private verdict" in question can only become effective by recourse to a state agency, the Fourteenth Amendment precludes such recourse. Therefore the amendment does affect some private conduct.

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3. *Supra* note 1.
4. *Supra* note 2.
5. *Ibid.*
6. Associate Professor of Law, University of Chicago Law School.
7. *Racial Restrictions and the Fourteenth Amendment: The Restrictive Covenant Cases,* 16 U. OF CHI. L. REV. 203 at 217 (1949).
8. *Id.* at 229.

The same conclusion is reached in a somewhat different way by another writer.[9] He points out that judicial enforcement of restrictive covenants involved two separate kinds of action; first, the act creating the covenant, and second, the act of enforcing the covenant. The covenant was created by individuals and was an individual act of discrimination. Therefore, this action is not within the provision of the Fourteenth Amendment. However, the enforcement of the covenant by the state court is state action and it is such action which is prohibited by the Fourteenth Amendment. As a result, then, we have a covenant which while it may be valid, is of little importance because it is unenforceable.

Most of the law review writers[10] seem to agree that any action by the state or any of its agencies is state action which is controlled by the Fourteenth Amendment.

If this view prevails in the Supreme Court of the United States, then the ruling by the Missouri Supreme Court in the principal case cannot stand. Judgment had been rendered for the defendant in the trial court, and the case was remanded for trial on the merits. In the event the plaintiff should recover damages, the Missouri Supreme Court invites a review by the Supreme Court of the United States, saying: "Furthermore, if a judgment shall be rendered on the merits, rather than the present judgment merely on the pleadings as now before this court, the Supreme Court of the United States may more readily grant a review, determine the question, and definitely settle the matter for the future."[11]

ROBERT O. HOELSCHER

TORTS—WRONGFUL DEATH—SURVIVAL OF ACTION

Mennemeyer v. Hart[1]

Action by Arnold Mennemeyer and Anna Mennemeyer, husband and wife, against Edward Hart, administrator of the estate of Virgil Mennemeyer, deceased, to recover for the wrongful death of Gregory, the deceased minor son of the plaintiffs who was riding in an automobile driven by his brother, Virgil, when he was killed. Virgil died as a result of the same accident. The plaintiffs alleged that Virgil was negligent, and asserted that they were proceeding under Section 98, *Missouri Revised Statutes* (1939), which provides for bringing actions for all wrongs done to property rights, or interest of another, against the wrongdoer or his executor or administrator.

On appeal from a judgment of dismissal in the trial court, the Missouri Supreme Court held that "this action is, in reality, a suit for wrongful death," and should have been brought under Sections 3562 *et seq., Missouri Revised Statutes* (1939).

9. Note, 17 U. OF CIN. L. REV. 277, 279 (1948).
10. Kiang, *Judicial Enforcement of Restrictive Covenants in the United States*, 24 WASH. L. REV. 1 (1949). Comments and Notes: 9 LA. L. REV. 394 (1949); 24 N. Y. U. L. Q. REV. 227 (1949); 27 N. C. L. REV. 224 (1949). *But contra:* Note, 17 GEO. WASH. L. REV. 398 (1949).
11. 225 S.W. 2d 127, 131 (Mo. 1949).
1. 221 S.W. 2d 960 (Mo. 1949).

Under this statute at the time of the death of the wrongdoer, the action did not survive.

At common law no action lay for the death of a human being occasioned by the negligent, or other wrongful, act of another, however close the relation between deceased and the plaintiff or however clearly the death may cause pecuniary loss to the latter.[2] Various reasons supported this holding. Originally, it was based on the doctrine that "by the death the civil injury was merged in the felony."[3] It was said to be inconsistent with the policy of the law to permit the value of human life to become the subject of judicial computation.[4] Another reason was the maxim *"actio personalis moritur cum persona,"* a personal action dies with the person.[5] But the real reason[6] has been said to be Lord Ellenborough's opinion in the case of *Baker v. Bolton.*[7] Of the result Prosser says,[8] "in 1808, Lord Ellenborough, whose forte was never common sense, held without citing any authority . . . and declaring in broad terms that 'in a civil court the death of a human being could not be complained of as an injury.'" This holding has been criticized both in England[9] and America,[10] but has been accepted and followed.

Though it has been suggested by at least one authority[11] that a change in this

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2. Braun v. Riel, 40 S.W. 2d 621 (Mo. 1931); Rositzky v. Rositzky, 329 Mo. 662, 46 S.W. 2d 591 (1931); Bloss v. Dr. C. R. Woodson Sanitarium, 319 Mo. 1061, 5 S.W. 2d 367 (1928); Freie v. St. Louis-San Francisco Ry., 283 Mo. 457, 222 S.W. 824 (1920); Buel v. United Rys., 248 Mo. 126, 154 S.W. 71 (1913); Gilkeson v. Missouri P. Ry., 222 Mo. 173, 121 S.W. 138 (1909); Bates v. Sylvester, 205 Mo. 493, 104 S.W. 73 (1907).

3. Conners v. Burlington, C. R. & N. Ry., 71 Iowa 490, 32 N.W. 465 (1887); McCarthy v. Chicago R. I. & P. R. R., 18 Kan. 46, 26 Am. Rep. 742 (1877); Louisville & N. R. R. v. McElwain, 98 Ky. 700, 34 S.W. 236 (1896). See Annotations: 41 L.R.A. 807 (1898); 19 L.R.A. (NS) 633 (1909).

4. King v. Henkie, 80 Ala. 505 (1886); Philby v. Northern P. Ry., 46 Wash. 173, 89 Pac. 468 (1907). Annotations: 41 L.R.A. 808 (1898); 19 L.R.A. (NS) 633 (1909).

5. Salsedo v. Palmer, 278 Fed. 92 (C.C.A. 2d 1921); McCarthy v. Chicago R. I. & P. Ry., 18 Kan. 46 (1877); Louisville & N. R. R., 98 Ky. 700, 34 S.W. 236 (1896). It must be noted that if the wrongful death statutes are regarded as creating a new cause of action in the named beneficiaries, the maxim does not apply. It only operates as to causes of actions belonging to injured persons which are made to survive to the personal representatives of those persons.

6. 16 Am. Jur. 39; 32 L. Q. Rev. 431 (1916); Pollock, Law of Torts 67 (11th ed. 1920).

7. 1 Camp. 493, 170 Eng. Rep. 1033 (1808).

8. Prosser on Torts 955 (1941).

9. Osborn v. Gillett, L. R. 8 Exch. 88 (1873); Clark v. London General Omnibus Co., 2 K.B. 648 (1906); Admiralty Comm'rs v. S. S. Amerika [1917] A.C. 38.

10. Van Amburg v. Vicksburg S. & P. R. R., 37 La. 650 (1885); Rowe v. Richards, 35 S. D. 201, 151 N.W. 1001 (1915); West v. Boston & M. & R. R., 81 N. H. 522, 129 Atl. 768 (1925). See Note, 7 Harv. L. R. 170 (1893).

11. W. S. Holdsworth, *The Origin of the Rule in Baker v. Bolton,* 32 L. Q. Rev. 431 (1916), "It may be urged that the rule in Baker v. Bolton, has been so long accepted as a rule of English Law that it would not be right for the House of Lords to disturb it." "It has been upheld in all the reported cases, not by reasoning based upon a discussion of the question of its policy or impolicy, not by any sufficient technical or historical reasons, but by the assertion that it is a rule

rule should be by common law judges instead of by statute, the intolerable situation was remedied in England by the passage of the Fatal Accidents Act of 1846[12] better known as Lord Campbell's Act, and today every American state has a statutory remedy for wrongful death.

Missouri first modified the common law in 1835, by the enactment of what is new Sections 98 and 99, *Missouri Revised Statutes* (1939), dealing with survival of tort claims against property rights. The wrongful death statutes closely resembling Lord Campbell's Act were first adopted in Missouri in 1855,[13] and since the decision in the *James* case[14] have provided the exclusive remedy for actions for loss of services resulting from wrongful death.[15]

There are two views as to the nature of wrongful death statutes. One, called the survival theory.[16] is based on the theory that the effect of the statutes is merely to pick up the abated right of the decedent and permit it to be prosecuted by the personal representative for the benefit of the designated beneficiaries. This view is probably based upon the provision commonly found in wrongful death statutes which allows the right of action only if the deceased could have maintained an action for the same wrongful act if death had not ensued. The other and newer cause of action theory[17] would seem to be based on the better reasoning, since the cause of action is not for the injury to the decedent, but is for the loss sustained by the beneficiaries because of the death and is distinct from any cause of action which the decedent might have had if he had survived. The provisions that a recovery for the benefit of the persons designated may be had only under circumstances which would have supported a recovery by the decedent had he survived

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of the common law which must be followed." "Nebraska [*In re* Grainger's Estate, 237 N.W. 153 (Neb. 1931)] is the only state that has changed the common law rule . . . by judicial decision without statutory authorization. All other state courts have waited for legislation and even then they have been reluctant to follow the statutes, saying that statutes in derogation on the common law are to be strictly construed." 10 TEX. L. REV. 247 (1932).

12. 9 & 10 Vict., c. 93.
13. MO. REV. STAT. 1855, p. 647, § 2 *et seq.*
14. 18 Mo. 162 (1853).
15. Mennemeyer v. Hart, 221 S.W. 2d 960, 962 (Mo. 1949).
16. Williams v. Alabama G. S. R. Co., 158 Ala. 396, 48 So. 485 (1908); Kling v. Torello, 87 Conn. 301, 87 Atl. 987 (1913); Cincinnati H. & D. Ry. v. McCullom, 183 Ind. 556, 109 N.E. 206 (1915), *aff'd* 245 U. S. 632 (1917); Sharp v. Cincinnati N. O. & T. P. R. Co., 133 Tenn. 1, 179 S.W. 375 (1915). The new event is not regarded as one which creates a cause of action, but one which has a bearing upon the award of damages.
17. "Missouri has now, after leaning the other way, . . . definitely taken the view that our statute gives a 'new and different cause of action to the beneficiary'; and that is because its very purpose was to give a cause of action where none existed at common law. It did not revive a cause of action theretofore belonging to the deceased, but it gave a new cause of action to named parties bearing relationship to the deceased." Cummins v. Kansas City Public Service Co., 334 Mo. 672, 66 S.W. 2d 920, 923 (1934); State *ex rel.* Thomas v. Daues, 314 Mo. 13, 283 S.W. 51 (1925). For earlier cases supporting the "survival theory," see Strode v. St. Louis Transit Co., 197 Mo. 616, 95 S.W. 851 (1906); Hennessy v. Bavarian Brewing Co., 145 Mo. 104, 46 S.W. 966 (1898); Miller v. Missouri P. Ry., 109 Mo. 350, 19 S.W. 58 (1891).

merely renders it possible for the defendent to interpose any defense which would have been available had the action been maintained by the decedent.[18]

Missouri has both the type of legislation which allows a survival of the cause of action with recovery by the personal representatives of the deceased for personal injuries which he suffered, and also the creation of a cause of action for the wrongful death for the benefit of certain named beneficiaries.[19]

Under Section 3670, *Missouri Revised Statutes* (1939),[20] the cause of action which the decedent had for personal injuries survived to his personal representatives and also against the personal representatives of the wrongdoer should he die. This statute had been declared not to be applicable to injuries resulting in death,[21] and the statute only permitted a survival where a suit had been instituted before the death both of the injured party and the tort-feasor.[22] Thus in the case of an action based on the wrongful death statutes, the tort action did not survive the death of the wrongdoer.

As is pointed out by the principal case, this situation has been remedied for the future by the amendment of Section 3670, *Missouri Revised Statutes* (1939). The legislature approved on May 6, 1948, an act (Laws of Missouri 1947, Vol. II, p. 225, which became effective July 19, 1948) which repealed and re-enacted Section 3670. The pertinent amendment provides: "Causes of action for death shall not abate by reason of the death of a party liable for such death, but shall survive against the legal representative of such party."

Such change in the rights of the parties in regard to wrongful death actions is held to create a substantive right rather than being merely a rule of procedure.[23] Since at common law the personal representative could not be sued for a tort committed by the decedent during his life time,[24] a new right has been given to the

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18. HARPER ON TORTS 610 (1933).

19. It might be well to emphasize, for the sake of clarity, that there are two general types of statutes which are sometimes confused because of the use of similar terms. One, known as the survival type, which allows the personal representative to recover for personal injuries or on causes of actions which the decedent had against a wrongdoer; and the second type, known as the wrongful death statute, under which the cause of action is for the wrong done to the named beneficiaries. There are two theories under the latter type—the survival theory and the new cause of action theory. We are primarily concerned with the wrongful death type, herein, though MISSOURI REVISED STATUTES, Section 3670, now provides as amended, that neither the cause of action of the decedent nor the cause of action of the beneficiaries shall abate by reason of death.

20. First adopted, Mo. Laws 1907, p. 252.

21. Hendricks v. Kauffman, 340 Mo. 74, 101 S.W. 2d 84 (1936); Burg v. Knox, 334 Mo. 329, 67 S.W. 2d 96 (1933); Ryan v. Ortgier, 201 Mo. App. 1, 208 S.W. 856 (1918); Downs v. United Rys., 184 S.W. 995 (Mo. 1916).

22. Walker v. Ross, 230 Mo. App. 378, 71 S.W. 2d 124 (1934); Heil v. Rule, 327 Mo. 84, 34 S.W. 2d 90 (1931); McIntosh v. Rule, 34 S.W. 2d 91 (Mo. 1931); Shupe v. Martin, 321 Mo. 811, 12 S.W. 2d 450 (1929); Primm v. Schlingmann, 212 Mo. App. 133, 253 S.W. 469 (1923).

23. Martin v. Railroad, 151 U.S. 692 (1893); Schreiber v. Sharpless, 110 U. S. 80 (1883); Siberell v. St. Louis-San Francisco Ry., 320 Mo. 916, 9 S.W. 2d 912 (1928); *also see* 25 R.C.L. 787; 77 A.L.R. 1344 (1932).

24. HARPER ON TORTS 673 (1933).

named beneficiary and a new obligation has been imposed upon the defendant—a new liability attached in respect of past occurrences. On the date of the fatal accident in the principal case, May 2, 1948, the newly amended provision was not in effect, and though the action was brought after it went into effect the determination of whether the right of action survived is governed by the statutes in force at the time of the wrongdoer's death.[25]

The court said in the principal case, "Unless there is a clearly expressed legislative intention to the contrary, which is not present here, such a statute is prospective, not retrospective, in its operation." If the inference to be drawn from the statement is that the legislature could, by manifesting a clear intention, have made this amendment retrospective in scope, it would seem that the inference is questionable. The *Constitution of Missouri,* 1945,[26] provides that "no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation, . . ." can be enacted. Thus it would seem that if the statute were given a retrospective effect it would be violative of the constitution.

In this regard the supreme court said in *Clark v. Kansas City, St. L. & C. R. R.*,[27] "the law must take away such vested right, or it must create a new obligation, impose a new duty or attach a new disability in respect to gone-by transactions in order to be retrospective and under the constitutional ban." Section 3670, as it now stands, imposes a new duty or creates a new obligation upon the personal representative of the wrongdoer and thus would seem to be exemplary of the nature of statutes prohibited by the constitution.[28]

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25. Bates v. Sylvester, 205 Mo. 493, 104 S.W. 73 (1907); Siberell v. St. Louis-San Francisco Ry., 320 Mo. 916, 9 S.W. 2d 912 (1928); Shupe v. Martin, 321 Mo. 811, 12 S.W. 2d 450 (1928); Rositzky v. Rositzky, 329 Mo. 662, 46 S.W. 2d 591 (1931). See 1 C.J.S. 181.

26. Art. 1, Sec. 13.

27. 219 Mo. 524, 118 S.W. 40 (1909). The Statute involved in the Clark case was an amendment changing the period of limitations, which the court recognized as procedural and not substantive in that the right or cause of action, itself, was not affected.

28. Smellie v. Southern P. Co., 211 Cal. 371, 287 Pac. 343 (1930); Chicago, St. Louis & N. O. R. R. v. Pounds, 11 Lea 127 (Tenn. 1883); Slate v. Fort Worth, 193 S.W. 1143 (Tex. Civ. App. 1917); *also see* 16 AM. J. 41; 77 A.L.R. 1344 (1932).