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DEATH BY WRONGFUL ACT—SURVIVORSHIP OF TORT ACTIONS IN KENTUCKY

By Alvin Evans*

I. ACTIONS FOR WRONGFUL DEATH

An action for damages for death is maintainable (a) under section six of the Statutes (our replica of Lord Campbell’s Act), (b) under section four, (the wanton or malicious use of firearms section), (c) under section five (the dueling section), (d) under the Federal Employers Liability Act1 and (e) under the Kentucky Workmen’s Compensation Act.2

Various statutes to discourage dueling have been passed in Kentucky from a very early time3 under which enter alia various state officials (excluding members of the legislature by special act of 1842) were required to take the non-dueling oath. The first statute in Kentucky which actually gave a remedy for death by wrongful act, dueling, was passed in 1839 and antedated the Lord Campbell’s Act in England by seven years.4 I have found no court decisions dealing with recovery of damages under this section. That is not surprising in view of the other available remedies.

Section four goes back to an act of March 10, 1856.5 It was entitled “An Act to Prevent the Selling and Using of Certain Weapons”6 It afforded the widow, or if no widow, the heirs, a cause of action and was held to be unconstitutional because the title embraced two subjects.7 It, in the meantime, was supplemented by another act in 18668 which gave the widow and the

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1Carroll’s Kentucky Statutes (1930), sections four, five, six; U. S. Compiled Statutes on Employers Liability.
2Sections 4880-4987 of Carroll’s Statutes.
3Viz., in 1799, 1812, 1834, 1842.
5I Acts 1855—6 Chapter 656, p. 96; 2 Stanton R. S., p. 509.
6O’Donaghue v. Akin, 63 Ky. 478 (1866).
7Acts of 1865-6, Chap. 85, p. 6. See also Bullitt & Feland G. S., Chap. 1, Sec. 4, p. 162.
minor children a cause of action in certain cases. Its chief
difference from the dueling statute is that the cause of action
provided for arises from the "wanton or malicious use of fire-
arms or by any weapon known as Colts, brass-knuckles, or slung-
shots or other deadly weapon or sand-bag or imitation or sub-
stitute therefor"

Section six, our proper replica of the Lord Campbell's Act,
originated in 1854. The first section of this act was applicable
where the death of a non-employee of a railroad company had
been caused by negligence or carelessness of the railroad com-
pany. A cause of action was created in the personal representa-
tive. The third section applied where the death of any person
had been caused by the wilful negligence of any person, etc., or
corporation but there was in the original act no provision for
special distribution and the recovery became assets of the estate.
In 1859 an action was brought for damages occasioned by death
by shooting, under both the act "To Prevent the Selling and
Using of Certain Weapons" and under this act, but it was not
maintainable under the former act because the pleadings made it
inapplicable. It was maintainable, however, under the latter
act. Thus early the practical identity of the two statutory pro-
visions was recognized. Even to this day there is no substan-
tial difference since under section six the action must be brought
by the personal representative for the benefit of the surviving
spouse and minor children or if none of these exist for the sur-
viving parents both, or one, and if none of these, for the estate.
Under section four the widow and minor children, either or both,
must bring the action. So far the two are substantially parallel
save that section four provides only for the surviving widow. If,
however, there should be no widow or minor children there would
exist no cause of action under this section but a remedy would
still exist under section six, the action of course, being brought
by the personal representative.

It is noted that the original act made mere negligence of a
railroad company sufficient to create a cause of action for the
death of a non-employee. In other cases it was necessary to
prove wilful negligence. Consequently, for a wrongful act in-

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8 I Acts 1853-4, Chap. 964, p. 175.
10 Chiles v. Drake, 59 Ky. 146 (1899).
tended there could be no recovery. The court also interpreted this statute in such a way that there could be no recovery by the personal representative where there was no widow nor minor children though the statute declared no such limitation but provided the widow, heir, or personal representative might sue. In 1893 the legislature revamped this statute as a result of section 241 of the constitution of 1890. The important changes were (a) a cause of action was created in any case whether or not the decedent left behind him certain specially mentioned distributees and (b) the distinction between railroads and other persons was eliminated and the negligence of railroads and the wilful negligence of others (which excluded intended acts) was altered so that a cause of action for damages for wrongful death thereafter would arise out of "negligence or wrongful act." This alteration as above observed, made it possible to sue under section six where the action arose from the negligence of a railroad or the negligence or the intended wrongful act of anyone whatever.

It is not proposed here to make a study of the nature of the remedy under the Federal Employers Liability Act, nor the remedy under the Kentucky Workmen's Compensation Act.

**Parties, Defenses, Damages—Removal to Federal Court**

Under section four it has been held that the widow may sue alone without the minor children joining as plaintiffs and vice versa. The children may bring a separate action by next friend in such case and the widow cannot control the action nor have their action dismissed. It has been held, however, that if the widow does sue alone, the recovery is for both herself and the children. This does not seem consistent with the holding that each has a separate cause of action and that neither can control the suit as respects the other. It would seem that on motion of the defendant the parties should be required to join in

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12 U. S. Compiled Statutes, Sec. 8657.

13 Carroll's Statutes, Secs. 4880-4987.


15 *Archer v. Bowling*, 166 Ky. 139, 179 S. W. 15 (1915).
a single action. Subsequent remarriage of the widow has no effect upon her right of action.16

A principal or master may be made a party defendant solely on the ground of the rule respondeat superior. Thus certain steamboat owners were held liable for damages for the malicious act of a deck-hand causing death.17 Naturally, a police officer as well as his sureties, is liable for his own reckless conduct resulting in the death of another by shooting.18 In Howard v. Caudill19 it was held that a sheriff was liable on his bond for misconduct of his deputy in causing death of the decedent while making an arrest only if he were aiding and abetting the deputy. The court suggests the possibility of a different result if the action were brought under section six rather than under section four. It is held that there is no liability here because section four limits liability to the person who commits the killing. Another section,20 however, provides that a sheriff shall be liable on his bond for the act of his deputies and it is difficult to see how the doctrine of respondeat superior does not apply. There are many cases in which the servant and the master have been made joint defendants.21

An interesting set of facts is found in C. & O Ry. Co. v. Maggard.22 Decedent while in the employ of the railway company and while swinging a light from his window to signal the conductor, struck a lever by his seat and received an electric

15 Supra n. 15.
16 Morgan v. Thompson, 82 Ky. 333 (1884). This was under G. S. Chap. 57, Sec. 3.
17 Petrie v. Cartwright, 114 Ky. 103, 70 S. W. 297 (1902), Howard v. Hyden, 239 Ky. 233, 39 S. W. (2d) 265 (1931), Bolton v. Ayers, 110 S. W. 385 (1908 Ky.) (in such case the bond is given to the Commonwealth or to the municipality but it is unnecessary to make either a party.) Wells v. Lewis, 213 Ky. 846, 231 S. W 994 (1926) (the personal representative may sue under section six). But the chief police officer is also liable for the acts of his deputies. Veitch v. Derrick, 224 Ky 332, 6 S. W (2d) 279 (1928) (a question of survivorship is raised here where the deputy marshal injured plaintiff and the marshal died. The marshal and his surety and the deputy were made defendants. The court holds that the action for assault does not survive the death of the principal and as the principal is absolved so is the surety. No doubt the deputy continues liable. Commonwealth v. Hurt, 64 S. W 911 (Ky 1901). Action was under section four.
18 223 Ky. 408, 15 S. W (2d) 245 (1929).
19 Section 4141.
21 193 Ky. 259, 235 S. W. 736 (1921).
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shock from which he instantly died. His father, who was also his personal representative, recovered a judgment for $4,000 against the Electric Light Company under section six. An action was also brought by the same plaintiff against the Railway Company under the Federal Employers Liability Act. It was held that the Railway Company and the Light Company were joint tort-feasors but that credit for the $4,000 need not be applied on the judgment against the Railway Company because the recoveries were in two different capacities. In the one action plaintiff recovered for the benefit of the estate and it was a mere incident that the father was a sole distributee; whereas in the action under the Federal Act he recovered because of dependency. This seems technical. In the first place, however, the first recovery was for “damages to the estate.” The statute declares that if decedent leaves no widow, husband, or child, the recovery shall pass to the mother and father and if the mother be dead and the father living, the whole shall go to the father, though the action is brought by the personal representative.

The statute has been held inapplicable to a city where the negligent act causing death occurred in the performance of a public duty and in the exercise of a governmental power. Adoptive parents do not receive the distribution under this section but it goes to the natural parents. It is no defense to such an action that the wrongdoer is a lunatic. He may be wanton if not malicious.

Formerly and prior to 1893 it was necessary to allege gross and wilful negligence except where the suit was brought by the personal representative of a non-employee against a railway company in which case the allegation and proof of negligence was sufficient. The court was obliged to construe the words “wilful” and “wanton” under the older statute saying that “wanton” equals “careless” but not intentional. “Wilful” meant something more than “reckless,” “indifferent” and “careless” and the pleading must allege acts showing “positive

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23 Smith v. City of Louisville, 146 Ky. 562, 143 S. W 3 (1912).
24 Jackson v. Alexiou, 223 Ky. 95, 3 S. W. (2d) 177 (1928).
25 Young v. Young, 141 Ky. 76, 132 S. W 155 (1910).
26 Louisville Ry. Co. v. Raymond, 135 Ky. 738, 123 S. W 281 (1909) (Case gives a good history of the legislative policy.)
will or intention” to injure. Gross neglect was not necessarily wilful and was not alone sufficient to state a cause of action.

For a freight train to approach a crossing at usual speed without signaling is alone not sufficient to warrant exemplary damages.

Employment of a minor contrary to the terms of the statute is negligence per se and may give rise to an action under section six. This statute, however, does not prevent the employment of a minor under fourteen in the sale of newspapers upon the streets of a city of the sixth class, during a period other than school hours. Where the parents have consented to the employment, however, and the action is brought for their benefit by the personal representative, such consent will prevent a recovery perhaps on the theory of contributory negligence. Thus result clearly tends, however, to nullify the statute. Consent of one parent will not prevent recovery for the benefit of the non-consenting parent for whom one-half of the damages may still be recovered.

So violation of the Federal Statute limiting the number of consecutive hours of duty is negligence per se and violation of an ordinance requiring the maintenance of fire-escapes subjects landlord to liability for damages for death of tenants by fire.

Collusive settlements. If the personal representative makes a collusive settlement in fraud of the statutory beneficiaries the settlement may be set aside. If the defendant procures the appointment of the administrator and the latter collusively

27 City of Lexington v. Lewis, 73 Ky. 677 (1874) (Cistern was being built and a fragment of stone blown out by a charge of dynamite, killed plaintiff’s infant son.)
28 L. & N. Ry. Co. v. McCoy, 81 Ky. 403 (1883) (Brakeman killed while coupling cars.)
29 I. C. Ry. Co. v. Moss, 142 Ky. 658, 134 S. W. 1122 (1911) (A train was approaching and could not be seen by a traveller until he was upon the track.), Schmad v. L. & N. Ry. Co., 155 Ky. 237, 159 S. W. 786 (1913). (Whether there is evidence of gross negligence is a question of law, but whether defendant is guilty of it is one for the jury.)
35 Leach v. Owensboro Ry. Co., 187 Ky. 292, 125 S. W 708 (1910) (Widow killed by street car company. Her brother was appointed administrator and settled for $250.00. The children repudiate the settlement.)
refuses to sue, the widow and children may sue the wrongdoer directly and join the personal representative as a defendant. In one case the beneficiary was permitted to sue the wrongdoer without joining the personal representative. It is also held that the beneficiaries cannot make a private settlement that is binding on the personal representative and evidence of such a settlement is incompetent as a defense but defendant may have credit for the amount paid.

Various other interesting conclusions have been reached, for example, the fact that the wife is at the time living in adultery has no effect upon the right of recovery in her behalf. Under section six it is no defense to an action in behalf of the minor children that the wrongdoer was their father and husband of their mother. But it has been held that if the wife is childless her administrator cannot sue the husband for wrongfully causing her death. Where the personal representative has an action both for wrongful death and for injury to personal property caused by the same act, it is splitting the cause of action to sue for wrongful death only and later to bring a separate action for the personal property. The negligence causing liability may be of the attractive nuisance variety. Further, the one year limitation of actions is not violated by the fact that an amendment is made after the year is passed where the amend-
ment is germane and does not change the nature of the cause of action.  

If the cause of death was an act performed on a navigable river within the boundaries of the state the state courts have jurisdiction and the state law applies under the Federal Act of 1789 by which rights are saved to suitors in civil cases falling within United States admiralty and maritime jurisdiction.

The wrongful act alleged must have been the proximate cause of death. Thus where defendant sold liquor to A and as a result A became intoxicated and killed B, the act of defendant is not the proximate cause of the death of B. So a sale of whiskey by defendant to A who dies from the effects of the drinking of it does not make defendant liable in the absence of a showing either that the defendant intended to injure A, or knew that A intended to drink enough to injure himself, or had reasonable grounds to believe that A could not be trusted with whiskey.

Finally, it is held that claimant under the statute is forbidden by the Civil Code 606-2 from giving evidence regarding conversations and transactions with the decedent. So where a father claims to recover against an employer of his minor son employed contrary to statute, he may not give evidence as to what he said to the son about the employment. The rule would be different if the recovery went to the father as distributee of the intestate estate rather than as statutory distributee under section six. So in Souther v Belleau where defendant shot and killed plaintiff's intestate, he was not permitted to tell of the transactions between himself and the decedent just prior to the shooting.

Damages. The measure of damages in Kentucky for wrongful death is the sum which will reasonably compensate plaintiff for the loss she will sustain by the destruction of the power of

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44 L. & N. Ry. Co. v. Pointer, 113 Ky. 952, 69 S. W. 1108 (1902) (Act of causing death was committed in Virginia. The petition did not originally set out the Virginia statute on wrongful death), L. & N. v. Greenwell, 155 Ky. 799 (1913) (Amendments filed four years later.)
46 Walter v. Collinsworth, 144 Ky. 3, 137 S. W. 766 (1911) (We have no civil damage statute similar to that prevailing in many states.)
47 Britton v. Samuels, 142 Ky. 125, 136 S. W. 143 (1911).
48 Supra n. 32.
49 203 Ky. 508, 262 S. W. 619 (1924).
the husband to earn money.\textsuperscript{51} It is inaccurate to instruct the jury to find for the plaintiff in "such sum as you may believe from the evidence will fairly and reasonably compensate decedent's estate."

It is interesting to note that the damages so recovered never belonged to the estate\textsuperscript{52} and so do not pass under the will.\textsuperscript{53} But under the earlier statute such was not the case.\textsuperscript{54} The distribution is specially provided for by statute. The distributees under it are not entitled to be reimbursed out of the general estate as against the distributees under the will, for funeral expenses, attorney's fees and cost of administering the recovery.\textsuperscript{55}

Motion for removal. If a defendant railway company, which is a nonresident of the state, is made a co-defendant with its negligent servant, the fact that the servant is joined solely for the purpose of preventing removal of the action to the Federal court does not have the effect of requiring removal,\textsuperscript{56} provided there was sufficient ground on the merits for the joinder of the servant. But if after plaintiff's evidence is all in, and it is apparent that plaintiff could have had no reasonable ground to join the servant it is not then too late for a motion to remove the action to the Federal court on the ground of diversity of citizenship.\textsuperscript{57} But if a joint cause of action is stated, the defendant must set out all the facts showing the right of removal and they must be made to appear in the record when the motion is made.\textsuperscript{58} The Act of Congress provides that such motion may be made in the state court at the time or any time before defendant is required to answer.\textsuperscript{59} If the defendant files its answer, it waives its right to petition to remove. If such petition is filed and it is overruled but it should later appear that it should have been sustained, the transfer may thereafter be made. The defendant

\textsuperscript{51} Supra n. 49; Archer v. Bowling, 166 Ky. 139, 179 S. W. 15 (1915), Chiles v. Drake, 59 Ky. 146 (1859).

\textsuperscript{52} Supra n. 39.

\textsuperscript{53} Sturges v. Sturges, 126 Ky. 80, 102 S. W. 884 (1907).

\textsuperscript{54} Berg v. Berg, 105 Ky. 80, 48 S. W. 432 (1898).

\textsuperscript{55} O'Malley v. McLean, 113 Ky. 1, 67 S. W. 11 (1902).


\textsuperscript{57} Dudley v. I. C. Ry. Co., 127 Ky. 221, 96 S. W. 335 (1907).

\textsuperscript{58} I. C. Ry. Co. v. Sheegog, 126 Ky. 252, 103 S. W. 323 (1907).
will not be permitted to answer and thus proceed with the trial and thereafter make the motion for the first time.⁵⁹

II. The Survival of Tort Actions Under Section Ten

At common law in general contract actions survived,⁶⁰ but tort actions did not survive.⁶¹

Since contract actions (save those where the gravamen sounded in tort) survived without statutory provision, our courts hold that where the gravamen is breach of contract the action cannot be brought under section ten. There may be reasons why the personal representative would prefer to sue under section six protected by the survival provision of section ten especially in view of the possibility of vindictive damages.

Thus, in Lewis v. Taylor⁶² the injured party was a strike breaker whom defendant had promised to protect with a sufficient guard. After his death as a result of an attack by strikers his personal representative was not permitted to sue under sections six and ten. There was no breach of a common law duty so a judgment against a defendant in bastardy proceedings who dies, continues in force against his personal representative.⁶³ Similarly, recovery cannot be had under section six, where defendant landlord, in consideration of the acceptance of a lease for another year by the tenant, agrees to repair a certain cistern though because of the breach of the agreement to repair tenant's child loses its life in the cistern.⁶⁴ So if a physician is under contract for services by the year, and refuses to attend a member of the promisee's family when called and death occurs as a result, there is no recovery under section six.⁶⁵ In Winnegar v. Central Pass. Ry. Co.⁶⁶ where defendant's conductor assaulted decedent, a passenger, it was held that an action for personal injuries arising from an assault would survive as a contract.

⁶⁰ Emmons v. Commonwealth, 197 Ky. 674, 24 S. W. 956 (1923).
⁶² 112 Ky. 845, 66 S. W. 1044 (1902).
⁶³ Supra n. 60.
⁶⁴ Dice v. Zweigart, 161 Ky. 646, 171 S. W. 195 (1914).
⁶⁵ Randall v. Snyder, 139 Ky. 159, 129 S. W. 562 (1910).
⁶⁶ 85 Ky. 547, 4 S. W. 237 (1887).
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action though it would not survive as a tort action. In Conner v. Paul, however, where an apothecary's clerk delivered poison instead of the proper drug, it was held that the action for injuries would survive death of the purchaser under section 10. In such cases it seems thus one may choose whether he will sue on the contract or in tort. Actions for assault where there is no contractual relationship existing at the same time do not survive. The statute is not broad enough to include penal actions and they do not survive.

Our section ten reads.

"Actions that survive. No right of action for personal injury or injury to real or personal estate shall cease or die with the person injuring or injured, except actions for assault, slander, criminal conversation, and so much of the action for malicious prosecution as is intended to recover for the personal injury; but for any injury other than those excepted, an action may be brought or revived by the personal representative, or against the personal representative, heir or devisee, in the same manner as causes of action founded on contract."

In order that any action not based upon contract may survive, provision for it must be found within the statute. Hence in Kentucky there is no survivorship in an election contest where the contestee dies pending an appeal after judgment has passed in favor of contestant. It was declared that at common law courts had no jurisdiction to try contested elections, that the office is not an inheritance, and there is no statutory provision for survival. The fact that the losing party must pay the costs is not sufficient for revivor of the appeal. The same rule is applied where the action is for assault and plaintiff dies before judgment. A different rule was applied, however, in Taylor v Beckham where the Lieutenant-Governor was entitled to revive the contest which had not been decided during the life of the contestant.

The English statute of IV Edward 3 permitted a recovery

\[75\text{ Ky. 144 (1876).}\]
\[Veatch v. Derrick, 224\text{ Ky. 332, 6 S. W (2d) 279 (1923) (The marshal's agent, the deputy, assaulted B. The marshal died.)}\]
\[Cowan v. Campbell, 56\text{ Ky. 522 (1856) (The statute required of all persons who held a life estate in slaves to file a list annually with the county court under a $100 penalty. A had received dower slaves of his wife, coming to her from her former husband, and failed to make the return. The action on the penalty did not survive his death.)}\]
\[Galvin v. Shafer, 130\text{ Ky. 563, 113 S. W. 485 (1908).}\]
\[Shields v. Rowland, 151\text{ Ky. 136, 151 S. W 403 (1912).}\]
\[108\text{ Ky. 278, 56 S. W. 177 (1896).}\]

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for trespass to personal property which statute was liberally interpreted so as to include also actions arising in case. In Kentucky a similar statute was passed in 1797 though it was somewhat broader. But remedies for personal injuries were cut off by the death of either of the parties prior to judgment as at common law. In 1812 a statute was passed which was substantially like our present act, section ten, save that no provision was made for injuries to real estate. This addition was made in 1842 and the two provisions were united in 1893 under the present section ten.

**Injuries to the Person.**

It is clear that under our statute actions for all injuries to property both real and personal now survive. All injuries to the person save those excepted, survive. Injuries to the person may arise from negligence or they may be intended. Again intended injuries may arise from an assault for which the remedy was trespass or they may arise indirectly from the intended act of the defendant as for example, where an assault is not done directly to the person or is made by a servant at the instance of his master. Assaults may be made also by a servant for which the master is liable solely on account of the doctrine of respondeat superior and not from authorization. The common law action for such injuries would be case rather than trespass.

In *Meyer v. Zoll* a young child was bitten by defendant's dog. The child died and the personal representative sued not for death by wrongful act but for the personal injuries and attendant expenses. The defense made was that the parents had settled the claim for pain and suffering during the child's life-

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1 Littell's Laws, Sec. 55, p. 624, 1 Morehead & Brown Statute Law of Kentucky, Sec. 55, p. 670. See also *Lynn v. Sisk*, 48 Ky. 135 (1848) (An action was revived by scire facias against a sheriff for excessive levy.) But cf. *Shields v. Rowland*, supra n. 71. (An action held not to survive the death of defendant by whose negligence plaintiff's horse was killed by reason of a defective bridge.)

2 *Shields v. Rowland*, supra n. 71. (Defendant in an action for assault and battery died after judgment but pending an appeal and the action was held not to survive as at common law.)

3 Sec. 1, M. & B., p. 88 and the amendment at p. 86.


5 3 St. Law of Ky. (Loughborough), p. 573.

6 *Prescott v. Grimes*, 143 Ky. 191, 136 S. W. 206 (1911) (An action for waste by life tenant now survives the life tenant's death.)

7 119 Ky. 480, 84 S. W. 543 (1905).
time and had granted a full discharge. The reason for suing under section ten rather than under section six is clear. No recovery could be had under the latter section since the action must be brought for their benefit and payment to them of their claim would be an equitable bar to recovery for their benefit. But it was held that the personal representative of the child to whom the cause of action descended was not barred by the settlement since the parents did not own the cause of action for which they purported to settle. Recovery may also be allowed for pain and suffering and for medical and funeral expenses though the injury may result in death. Mere acts of negligence do not constitute an assault and so are not excepted.

Another type of injuries frequently called personal injuries are those offenses which affect the more intangible interests of personality, such for example, as slander and libel, criminal conversation, malicious prosecution, false imprisonment and the like. The older law classified these offenses on the basis of the remedy to be applied and with respect to these last named offenses, the remedy was case save that of false imprisonment which at least technically involved a trespass. Assault and battery though a typical trespass, also affects the integrity, personality, and self respect of the party assaulted. I should suppose that the same desire for retaliation does not arise where the injury is indirect. The law seeks to avoid the exercise of self-help. But the impulse to self-help does not arise in case of an assault where defendant is liable on the ground of respondeat superior. The statute probably did not except assaults from its operation because they were trespasses but rather because they provoked physical retaliation, which temptation is removed by death. An assault may be classified both as a direct injury to the physical person and as a wrong to the more intangible interests of personality.

The following cases have arisen (a) actions for libel;

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31 Perkins v. Stein, 94 Ky. 433, 22 S. W. 649 (1893) (Defendant's servant ran over plaintiff with a wagon and plaintiff died.)
32 For a fuller discussion of such injuries see 29 Mich. Law Rev. 969, 979.
33 Johnson v. Haldeman, 102 Ky. 163, 43 S. W. 226 (1897).
(b) alienation of affections;\(^{84}\) (c) unlawful arrest;\(^{85}\) (d) malicious prosecution.\(^{86}\) Our court has held that slander includes libel, that alienation of affections is like criminal conversation, that the action for unlawful arrest does survive and therefore is not included within assault nor malicious prosecution and that malicious prosecution is expressly excepted by the statute. We might well, however, have anticipated that illegal arrest would be regarded as \textit{ejusdem generis} with malicious prosecution.

\textit{Actions for Death and for Injuries Mutually Exclusive.}

It is well understood that though an action for injuries to the person may survive to the personal representative in the proper case under this section yet the personal representative cannot also sue for damages for wrongful death (if the injuries finally result in death) either in the same or in a separate suit and that a settlement of the claim for injuries made by the decedent with the wrongdoer will be a bar to any further action.\(^{87}\)

This rule may seem arbitrary inasmuch as the action for injuries was one belonging to the decedent existing at common law which survived to the personal representatives by statute and the recovery belongs to the estate, whereas the action for wrongful death is a new action which did not exist at common law and never belonged to the decedent and the recovery is not assets, save as under our statute it is provided that such amount goes to the estate as is required for "funeral expenses, the cost of administration and costs about the recovery including attorney's fees"\(^{88}\). But the reason for the rule, and it is undoubtedly the majority rule in the United States, is fairly clear. If a recovery should be allowed for each then the wrongdoer pays twice for

\(\footnotesize{84}\) \textit{Gross v. Ledford}, 190 Ky. 526, 228 S. W 24 (1921).

\(\footnotesize{85}\) \textit{Huggins v. Toler}, 64 Ky. 192 (1866).

\(\footnotesize{86}\) \textit{Francis v. Burnett}, 84 Ky. 23 (1886).


\(\footnotesize{88}\) \textit{O'Malley v. McLean}, 113 Ky. 1, 67 S. W. 11 (1902).
the same act. Whether the matter be one for injuries or for death is merely a matter of degree and the wrongdoer is not primarily concerned as to the ownership of the recovery providing that after he has paid he is free. Further the defenses in the one case are precisely and necessarily the same as in the other case.\textsuperscript{89}

\textit{Contributory Negligence, Assumption of Risk, Fellow Servant Rule.}

Sections four and six must constantly be construed with respect to section ten. In the first place it is observed that just as contributory negligence, assumption of risk and the negligence of a fellow servant, common law defenses, were available as defenses to an action for personal injuries, so were they available as defenses at least under section 6.\textsuperscript{90}

\textit{Assault Resulting in Death.}

Section ten dates back to 1812 and so antedates our Lord

\textsuperscript{89} But see \textit{Proctor Coal Co. v. Beaver}, 151 Ky. 839, 152 S. W. 965 (1913), where both claims are enforceable if they arise in a state permitting both.

Campbell's Act by forty-one years and the same construction was placed on it as was placed on the English survival statutes, viz., that it does not apply of its own force to cause a survival of actions for wrongful death. There could be no recovery if death were immediate.

An action for damages for injuries arising from an assault does not survive under section ten. But a very unusual theory has developed in Kentucky. Thus while an action for an assault does not survive the death of either party, yet if the action is brought under section four (and probably also under section six) as for example where A was feloniously killed by B the action will survive the death of B by virtue of section ten. Naturally in the case of death by wrongful act, if there is any remedy it accrues only when one of the parties has died. But it generally is held that there is no survivorship of wrongful death actions after the death of the wrongdoer unless the statute specifically so provides and our statute does not do so. Virginia has gone even farther and in a highly technical decision held that if the person whose life is wrongfully taken by another, yet survives that other person (A gave B a mortal wound and then shot and killed himself instantly, dying before B) no cause of action for wrongful death survives against the personal representative of the wrongdoer because the cause of action did not arise until after his death. The Virginia statute, however, provides that the action for wrongful death shall survive the death of the wrongdoer. Illinois alone has taken the same view as Kentucky that a cause of action for wrongful death shall survive the death of the wrongdoer implying such result from the statute which provides for the survival

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91 Eden v. L. & N. Ry. Co., 53 Ky. 165 (1853) (Death caused by negligence.)
93 Hunt v. Mutter, 238 Ky. 396, 38 S. W. (2d) 215 (1931) (H shot and wounded L. M., and H was immediately thereafter killed by G. M. L. M.'s cause of action did not survive), Anderson v. Arnold, 79 Ky. 370 (1881) (Negligent wounding of A by B is an assault and battery.)
95 Davis v. Nichols, 54 Ark. 585, 15 S. W. 880 (1891), and cases there cited; Hamilton v. Jones, 125 Ind. 176, 25 N. E. 192 (1890), Bates v. Sylvestor, 205 Mo. 493, 104 S. W. 78 (1907), Johnson v. Farmer, 59 Tex. 610, 35 S. W. 1062 (1896).
of actions to the person. But the result there is easier to reach than the result in Kentucky because unlike Kentucky the Illinois statute does not except from the survival statute injuries arising from assault. It seems extremely difficult that wilful shooting resulting in personal injuries shall be regarded as an assault and that the action shall not survive death of either party but that a shooting resulting in death is not an assault and the action shall survive the death of defendant. The result seems desirable but the interpretation seems highly questionable. The court says that the gravamen of the action is not the assault but the injury to the widow and children.

Problems of Survival as Affected by the Law of Conflict of Laws.

(a) It has been held that the personal representative of a non-resident injured in a state whose law does not provide for survivorship for personal injury cases, cannot recover in Kentucky. He may recover, however, if there is a survivorship statute in the jurisdiction where the injury occurred. If the injury occurred in Kentucky the non-resident decedent's personal representative may sue. It is also held that the personal representative of a Kentucky resident may sue in Kentucky for death by wrongful act done in another state whose wrongful death statute is similar. But a non-resident's personal representative may not sue where the act occurred in a foreign state if administration is granted for the sole purpose of bringing this action. The court regards the statutory provision for survivorship as not affecting the right but rather the remedy, hence an action brought before death here on a foreign cause of action which does not survive by the law of the place where the act was committed may still survive under our statute.

(b) Advantage cannot be taken of the fact that plaintiff

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100 L. & N. Ry. Co. v. Whitlow, 105 Ky. 1, 43 S. W. 711 (1898).
102 Supra n. 97.
is a personal representative appointed in another state to bring an action that would be barred here if she sued as a local personal representative and the action is also barred in the state of appointment. Thus, an Indiana personal representative sued in Indiana for personal injuries. Thereafter she sued here in the capacity of the Indiana personal representative for wrongful death. Since under our statute the first action is a bar to the second, recovery is not allowable because of the cause of action being foreign. On the other hand, if a Kentucky resident is injured by wrongful act in another state and dies as a consequence, recovery may be had both for the injuries and for the death if the double recovery is allowed by the law of that state though the action is brought in Kentucky and if the accident had occurred here the plaintiff would have to elect between the two causes of action.104

(c) Again in Kentucky contributory negligence is a defense in an action for wrongful death. It is not a complete defense in Tennessee.105 If a Kentucky resident is killed in Tennessee and his personal representative sues here is that defense permissible? Our court held that the law of Tennessee was applicable. This defense pertains rather to the right than the remedy. But it is observed that if the defense of set-off or counterclaim were offered under similar circumstances where the Tennessee law did not permit of it, still it would be allowed here,106 and the same rule applies to pleading the statute of limitations. In L. & N Ry. Co. v. Graham,107 the measure of damages of the jurisdiction where the wrong occurred was applied and it was also held that gross or wilful negligence need not be proved since that degree of negligence was not essential to a recovery in the state where the wrong occurred though in Kentucky at that time the defendant was not liable unless gross or wilful negligence were alleged and proved.

(d) Suppose a decedent domiciled in Ohio were killed in Kentucky by the negligent act of an employer domiciled in West Virginia, that the domiciliary personal representative settles with the employer at the latter's domicile after the appointment 

104 Proctor Coal Co. v. Beaver, 151 Ky. 839, 152 S. W. 965 (1913).
105 Supra n. 100.
106 Supra n. 101 (Davis v. Morton).
107 98 Ky. 688, 33 S. W. 1107 (1896).
of a Kentucky personal representative but that the former has no notice of such appointment. It is held that such a settlement will discharge the liability under our section 3880. The domiciliary personal representative may receive anything voluntarily released to him.

In conclusion one may observe that there seems no longer to be any policy involved in continuing these several statutory provisions for actions for death by wrongful act. The remedy of section five seems never to have been pursued. Section four is fully covered in section six. Under section four the widow and the minor children should be joint parties. The principal and the agent may be joint defendants but a plaintiff may not join the servants as defendants merely for the purpose of maintaining the action in the state courts. The doctrine of respondeat superior does not seem to prevail in wrongful death actions against a deputy sheriff or a deputy city marshal.

The exceptions in our survival statute do not seem to be based upon any principle. If any tort actions should survive it would seem that all should survive where there have been pecuniary losses to one party or an unjust enrichment to the other. To provide that assault actions shall not survive simply because of the nature of the action seems to be without rhyme or reason. To deny survival of actions for slander, criminal conversation, etc., is defensible on the ground that there is usually no pecuniary loss on the one hand nor profit on the other. We should definitely choose between the alternative (a) to permit survival in all cases where there is a remedy inter vivos and (b) to permit survival in those cases only where the inheritable assets have been decreased by the wrongdoer's act.