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AMENDMENT OF THE TITLE OF THE FIDUCIARIES ACT

If a plaintiff brings an action against a defendant and after suit is commenced either party dies, the action does not abate, except actions for libel and slander, but the executor or administrator of the deceased party may be substituted as plaintiff or as defendant as the case may be, and the suit prosecuted to final judgment and satisfaction: Section 35 (a) of the Fiduciaries Act of June 7, 1917, P. L. 447.

But suppose a person, in whose favor or against whom a cause of action exists, dies before the commencement of any action. Can an action be instituted by or against the executor or administrator of the deceased person; in other words, do *causes of action* survive the death of either party? This question was at first controlled by certain common law rules and later by Section 28 of the Act of Feb. 24, 1834, P. L. 70, and the Act of June 24, 1895, P. L. 236, all fully discussed in Patton's Pennsylvania Common Pleas Practice (2d Ed.), pp. 45-46.

The Fiduciaries Act of 1917 repealed the Acts of 1834 and 1895, *supra*, and Section 35 (b) thereof provided as follows:

"Executors or administrators shall have power, either alone or jointly with other plaintiffs, to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels; and they shall be liable to be sued, either alone or jointly with other defendants, in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived."

The title to the Fiduciaries Act of 1917 was "An act relating to the administration and distribution of the estates of decedents . . . ; the abatement and survival of actions, and the substitution of executors and administrators therein, and suits against fiduciaries. . . ."

It will be apparent at once that the title gave adequate notice of the provisions of section 35 (a), *supra*, pertaining to the *survival of actions*, but did not give, in the words "suits against fiduciaries," adequate notice of the provisions of section 35 (b) pertaining to the *survival of causes of action* and suits thereupon *by or against* fiduciaries. Accordingly it was indicated in *Strain v. Kern*, 277 Pa. 209 (1923), that, because of the defective title, Section 35 (b) was inoperative and ineffective insofar as it purported to provide what *causes of action* survived the death of the persons in whose favor they existed. On the other hand, it was decided in *Renard v. Kier*, 6 D. & C. 375 (1923) and *Wiesbeier v. Kessler*, 311 Pa. 380 (1933), that the title of the Fiduciaries Act was not defective so as to render inoperative section 35 (b) on the question of what causes of action survive

the death of the person against whom they existed and the court accordingly held that the plaintiff could institute an action for personal injuries against the executors of the wrongdoer.

However, after fourteen years, the doubt cast by *Strain v. Kern*, *supra*, upon the full effectiveness of section 35 (b) has been removed by the Act of July 2, 1937, No. 563, which re-enacts the provisions of section 35 (b) and amends the above quoted portion of the title of the Fiduciaries Act so that it now reads: "An act relating to . . . the abatement and survival of actions, and the substitution of executors and administrators therein; the survival of causes of actions and suits thereupon by or against fiduciaries."

So far as injuries to the person of the decedent are concerned, it is believed that the intention of the legislature through this amendment was not to provide an alternative or cumulative remedy to the action for wrongful death when the injuries suffered cause the death of the decedent. The Act of April 1, 1937, No. 48, giving the executor or administrator a limited right of action where the injuries cause death indicates that it is only in the situation covered by this amendment that the representative may sue for wrongful death injuries. The amendment to the Fiduciaries Act, however, will permit suit by the personal representative when the injuries do not cause the death of the injured party but he dies before suit is brought. In this situation, prior to this recent amendment, no action could be brought by anyone. Hereafter there should be no doubt as to what causes of action survive the death of either the persons in whose favor or the persons against whom they exist.

F. S. Reese

EXTENSION OF THE REMEDY OF ACCOUNTING IN ASSUMPSIT

The remedy for an accounting is engrafted upon the action of assumpsit under designated circumstances by the provisions of Section 11 of the Practice Act. "If the plaintiff avers that the defendant has received moneys as agent, trustee, or in any other capacity for which he is bound to account to the plaintiff, or if the plaintiff is unable to state the exact amount due him by the defendant by reason of the defendant's failure to account to him, the plaintiff may ask for an account."¹

In *Miller v. Belmont Packing and Rubber Co.*,² it was held that the section is not rendered invalid by reason of the fact that defendant as to a counterclaim or set-off on his part, is afforded no similar right to ask for an accounting. Said the Court, "If this is an incongruity, the legislature can remedy it." This the legislature of 1937 purports to do by amending the above quoted section to read:

¹1915, May 14, P. L. 483, Sec. 11, 12 P. S. 393.

²268 Pa. 51, 110 A. 802 (1920).