YALE LAW JOURNAL

SUBSCRIPTION PRICE, $2.50 A YEAR. SINGLE COPIES, 35 CENTS.

Published monthly during the Academic year, by students of the Yale Law School.
P. O. Address, Box 735, Yale Station, New Haven, Conn.

If a subscriber wishes his copy of the JOURNAL discontinued at the expiration of his subscription, notice to that effect should be sent; otherwise it is assumed that a continuation of the subscription is desired.

COMMENT.

A much mooted question has been decided by the Supreme Court of Michigan in *Dolson* v. *Lake Shore & Michigan Southern Ry. Co.*, 87 N. W. 629.

The action was brought by the administrator of a deceased brakeman, who was severely injured in a collision and died as a result of his injuries, being conscious for a few hours before his death. The declaration contained two counts; one under the "survivor act," so-called, and the other under the "death act." The former is a general provision that all causes of action for negligent injuries shall survive, while the latter is a special statute to the effect that in cases of death caused by negligence the personal representative may bring an action for benefit of widow or next of kin.

The question presented to the Court was whether the plaintiff was entitled to recover under both the "death act" and the "survivor act," and the majority of the Court decided that the plaintiff could not recover under both acts but that since the death was not instantaneous his remedy was under the "survivor act."

The situation presented in this case has proved most troublesome to the courts of all states where similar statutes exist. To quote the

dissenting justice, "No legal question has been brought to my attention recently in which there is more conflict in the decisions of the courts. The opinions are contradictory, and it would be difficult to reconcile them with each other."

This whole subject was discussed in an able and exhaustive manner in a series of articles entitled "Statutory Liability for Causing Death," which appeared in *28 Am. Law. Reg.* (N. S.) 385,513,577, published in 1889. The learned author, after reviewing and analyzing nearly all the cases which had been decided up to the time the articles were written, expressed his conviction that the true doctrine was, that where there is, in addition to the special act ("Death Act"), a general provision of law making rights of action for injury to the person survive, two actions will be maintainable after death, one representing the family's cause of action, the other the injured person's cause of action. This doctrine is diametrically opposed to that which the Michigan court is endeavoring to establish. A review of the cases decided since these articles were published tend to confirm the opinion of the author.

In Arkansas it has been held that the general statute providing for the survival of the common-law cause of action was not repealed by the subsequent enactment giving the personal representative of the injured party a new cause of action for benefit of widow, but that both causes of action exist and a recovery in a suit based upon one will not bar a recovery in a suit founded on the other. *Davis* v. *St. Louis R. R. Co.,* 53 Ark. 117.

In Kansas, where the contrary doctrine was thought to be firmly established by *Martin* v. *Railroad,* 58 Kan. 475, court has overruled the *Martin case* and declared that two causes of action exist. *Railroad* v. *Bennett,* 5 Kan. App. 231. The Supreme Court of Wisconsin in a recent case, after a thorough examination of authorities, confirms the decision of the Kansas Appellate Court. *Brown* v. *Chicago Railroad,* 102 Wis. 137.

A like conclusion has been reached in Pennsylvania. *Birch* v. *Pittsburg Railroad,* 165 Pa. St. 339.

In Vermont the case of *Legg* v. *Britton,* 64 Vt. 652, would seem at first blush to confirm the Michigan doctrine, but upon closer examination it is apparent that the Court decided against the right of the administrator to bring an action in favor of the widow because he had already recovered damages upon an action started by the intestate before his death. Under such a state of facts the Court of all States have uniformly held that but one cause of action exists.

Birch v. *Pittsburg Railroad, supra.* Such a case is analogous to one in which the intestate accepts compensation for the injury. *Vida Littlewood* v. *Mayor,* 89 N. Y. 24.

This present decision of the Michigan Court is consistent with that of *Sweetland* v. *Railroad Co.,* 117 Mich. 329. However, since the Court was divided three to two in both cases and no three justices took the same view in either case, it is questionable whether a definite doctrine can be said to have been established in this State.

LEGAL STATUS OF RAILROAD VOLUNTARY RELIEF DEPARTMENTS.

The increasing importance of the voluntary relief departments of railroads has necessitated some expression on the part of the courts, as to their legal status.

These departments were established about fifteen years ago presumably to place within reach of employés an inexpensive form of life and accident insurance, but more probably for the purpose of identifying the interests of employer and employé, rendering him less likely to antagonize the company during labor difficulties, and of preventing a large percentage of damage suits brought by employés or their representatives.

In determining the rights and liabilities of these concerns, three legal questions arise: (1) Is voluntary relief business of railroad companies "insurance business?" The weight of authority is decidedly in the negative. The only decision cited in support of the contention that it is insurance business, is *Commonwealth* v. *Witherbee,* 105 Mass. 149, decided in 1870, long before the institution of this class of business. The court there held that "a contract by which one party for a consideration promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest, is a contract of insurance, whatever may be the terms of payment of the consideration by the assured or the mode of estimating or securing payment of the sum to be paid by the insurer in event of loss, and although the object of the insurer in making the contract is benevolent and not speculative." In *Johnson* v. *Philadelphia & Reading R. R. Co.,* 163 Pa. St. Ry. it is specifically stated that a relief association of this nature is not an insurance company, but a beneficial association.

(2) Does a contract with a railroad voluntary relief department giving the employé the option between acceptance of relief and an action for damages, violate the statute prohibiting corporations from contracting against their liability for negligence? Although this is

contended in nearly very action involving such a contract, not a single decision can be found supporting it. As is said in *Johnson* v. *Philadelphia & Reading R. R. Co.* Supra, "The substantial feature of this contract which distinguishes it from those held void as against public policy is that the party retains whatever right of action he may have until after knowledge of all the facts, and an opportunity to make his choice between the sure benefits of the association or the chances of ligitation." To the same effect is the decision in *Donald* v. *Chicago B. & Q. R. R. Co.,* 93 Iowa 284 and *Eckman* v. *Chicago B. & Q. R. R. Co.,* 169 Ill. 312.

(3) What is the effect of a release of the company by the beneficiary of a member? In *Miller* v. *Chicago B. & Q. R. R. Co.,* 65 Fed. Rep. 305, the acceptance of relief under such a contract was held not to preclude a suit against the company for damages. In respect to this contract, defendant was held to be an insurance company, and having received the premium demanded of plaintiff, the latter was fully entitled to the benefits which he received, independent of any question affecting his relations to the railroad company as an employe. The circuit court of appeals in reviewing the case (40 U. S. App. 448) although affirming the decision of the lower court on a demurrer, held such contracts perfectly valid. That the obligation assumed by the employer to maintain and support such association by contributing the funds necessary for that purpose creates a privity of contract between the employer and all the members of the association, and furnishes a sufficient consideration to support such contract, is recognized by innumerable decisions. *Ringle* v. *Penn. R. R. Co.,* 164 Pa. St. 529. *Spitze* v. *Baltimore & Ohio R. R. Co.,* 75 Md. 162.

In the recent case of *Cowen* v. *Ray,* 108 Fed. Rep. 320 in Indiana the railroad company attempted to prevent the administratrix of a deceased member of its relief department, who had executed a release as beneficiary, from bringing an action as administratrix of his estate in Indiana where such an action is allowed, on the ground that by its own terms the contract with the relief department was to be general in its construction and effect by the laws of the state of Maryland. The court held that it was for the state within whose limits the negligent act is done, to prescribe when and under what circumstances a cause of action resulting in death shall arise against a person or corporation operating within its limits.

From these decisions it seems that the status of a railroad voluntary relief department is that of a beneficiary association with power to maintain a relief system, and to require beneficiaries to choose between relief benefits and cause of action for damages, and that such business is not *ultra vires* the charter of a railroad company nor opposed to public policy.