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Feb'y. 7.

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*Before Mr. Justice Markby.*

CHANDRAMOHAN DUTT v. BISWAMBHAR LAHA.

*Survivorship of Cause of Action—Act VIII. of 1859, s. 100.*

A. and B., as joint owners of certain land, brought an action for damages on account of trespass. B. died after action brought. *Held*, that the cause of action survived to A.

*Semble*, the words "cause of action," in section 100 of Act VIII. of 1859, mean "right to bring the action."

THIS was an action of trespass, brought by Chandramohan Dutt and two others, as joint owners of certain land, in respect of injuries thereto, for which damages were now sought against the defendants. After action was brought, one of the plaintiffs died; and the question arose whether the cause of action survived to the two surviving plaintiffs, within the meaning of sections 100 and 101 of Act VIII. of 1859.

Mr. *Newmarch* and Mr. *Marindin* for the plaintiffs.

Mr. *Woodroffe* and Mr. *Evans* for the defendant.

The exact nature of the question and the arguments upon it appear in the judgment, which was as follows:

MARKBY, J.—It is objected by Mr. Woodroffe that this suit cannot proceed, because, since it was commenced, one of the plaintiffs has died, leaving two sons, his heirs. The suit was brought to recover damages for an injury done to the land of the plaintiffs, and the case must be governed by the provisions of Act VIII. of 1859, if those provisions are applicable. Section 100 provides, that "if there be two or more plaintiffs, and one of them die, and if the cause of action survive to the surviving plaintiff or plaintiffs alone, the suit shall proceed at the instance of the surviving plaintiff or plaintiffs."

Mr. Woodroffe contends, that this section is not applicable, because the cause of action does not survive to the plaintiffs alone. I am of opinion that the cause of action did survive

to the surviving plaintiffs alone, within the meaning of the 100th section. I have no doubt that the words, "cause of action," are here intended to be used in this section in the same sense as in the English Statute, 8 and 9 Wm. III., c. xi., section 7, from which the provisions are evidently taken. Now there has been both here and in England a great deal of discussion as to the meaning of the words "cause of action," and the difficulties of the discussion have been increased by the words having been used in different senses in different places. Whatever may be the meaning of these words in other places, or even in other parts of this same Act, I cannot doubt that the words here mean "right to bring the action." In what other sense can it be said that the cause of action survives to a person? The expression is altogether an unfortunate one but by a cause of action surviving, I understand to be meant that, notwithstanding the death, a cause of action remains. And so far the words "cause of action" may have any one of the several meanings which have been attributed to it. One meaning—and I have no doubt it is the proper meaning—is "the state of facts which gives rise to an action." The technical meaning of the word 'cause' in the Roman law, is, I believe, "a state of facts," as in the phrase *sine justa causâ, i. e.*, in the absence of such a state of facts as can be made the foundation of *jus*. But it is impossible to apply that meaning here, because the section speaks of a cause of action which survives to a particular person. The state of facts might survive, that is, might remain after a death; but I am at a loss to conceive in what sense they can survive to a particular person. I, therefore, think that what is meant here is the right to bring the action, which, in language, extremely loose and inaccurate, but still intelligible, might be said to survive to a particular person.

I, therefore, think that the meaning of the words "cause of action" in this section is the right to bring the action, though I need hardly say, after the above remarks, that my decision in no way applies to the meaning of the words in any other part of the Act, or in any other place whatever.

The question then is, in whom did the right to bring this action remain after the death of one of the joint owners? It

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is admitted that the case must be governed by the English law, and I think it clear that, according to that law, it remained in the two plaintiffs now living. The English law is laid down in *Chitty on Pleading*, Vol. 1, page 76 (7th edition.) He says, “when one or more of several parties jointly interested in the property at the time the injury was committed are dead, the action should be in the name of the survivor, and the executor or administrator of the deceased cannot be joined, nor can he sue separately.” If the representative could not be joined in an action commenced after the death of one jointly interested, it seems to me, *pari ratione*, that if the action commenced before his death, then on his death the action remains in the surviving joint owners. It is true that only one case, *Kemp v. Andrews* (1), is cited by Chitty in support of the text, and certainly the report in *Showers* is not satisfactory. Chitty’s own authority, however, is not inconsiderable, but the principle in question by no means rests on his authority alone. It is laid down precisely in the same way in two passages in *Williams on Executors*, Vol. 1, page 790, and Vol. 2, page 1722 (8th edition.) It is clear that the very learned author of that work has carefully examined the principle he lays down, for which he quotes numerous authorities, and I do not feel the least hesitation in accepting it. And it being once established that the right to bring this action after the death of one joint owner vests in the survivors, I think it at once follows that the “cause of action” survives to the surviving plaintiffs in this suit, within the meaning of section 100; and that this suit, therefore, ought to proceed.

It is scarcely necessary to add that this decision in no way affects the question to whom the damages, if any should be recovered, will belong. The separation between these two questions is fully indicated by the authorities to which I have referred.

Attorney for plaintiffs: *Mr. Rogers.*

Attorneys for defendants: *Messrs. Swinhoe, Law, & Co.*

(1) 1 Show., 188.