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STATUTORY LIABILITY FOR CAUSING DEATH.

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It has been held in Wisconsin, *Woodward* v. *Chicago & N. W. Ry. Co.* (1868), 23 Wis. 400, that an action, brought under the statute giving damages for the benefit of relatives, abates on the death of the beneficiary; and in Missouri, *Gibbs* v. *City of Hannibal* (1884), 82 Mo. 143, that the right of action will not survive to the administrator of a beneficiary; on the theory that the action, given by the act, is itself a continuance or survival of the right of action vested in the decedent. In Connecticut, however, a statute (distinct from the one heretofore quoted), making a railroad company liable when the life of a passenger is lost by negligence, it was held that the right of action would survive the death of the beneficiary named in the act: *Waldo* v. *Goodsell* (1866), 33 Conn. 432; and, in an early case in the New York Supreme Court, *Yertore* v. *Wiswall* (1858), 16 How. Pr. 8, which is followed in a recent case in the same Court, *Hegerich* v. *Keddie* (1884), 32 Hun. 141, DANIELS, J., dissenting, it is held that the right of action survives *against* the personal representatives of the wrong doer; the action authorized being, in the view of the Court, "a new action, not another action continued," and the subject of the action being regarded as "property, the value of a life."

In the Illinois case of *Holton* v. *Daly* (1883), 106 Ill. 131, it will be remembered that the Court wished an administrator continuing an action begun by his intestate for personal inju-

ries, to be regarded as continuing it under the act giving damages for death; it is therefore interesting to note that in the opinion in *Yertore* v. *Wiswall*, it is said that it would not be proper, if an action is begun during the life of a person injured, to ask for a continuance of it after his death under the statute: per HOGEBOOM, J., Id. 16 How. Pr. (N. Y.) 13.

To the same effect, it would seem, is the Indiana case of *Indianapolis & St. Louis R. R. Co.* v. *Stout* (1876), 53 Ind. 143. There a statute provided that—

"A cause of action, arising out of an injury to the person, dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person, and actions for seduction and false imprisonment."

An action having been brought by an injured person during his lifetime, pending which he died from the injuries, it was held that such action was abated by the death, and that it was consequently no bar to an action brought by the administrator under the statute giving damages for the benefit of the deceased's family.

In several instances, questions have arisen as to the application of the statutes of limitations to these actions, and have involved a discussion as to the nature of the right of action conferred. In Connecticut, under the Act of that State last referred to, *Andrews* v. *Hartford & N. H. R. R. Co.* (1867), 34 Conn. 57, it is held that the right of action accrues only upon death, and that therefore the statute of limitations will not begin to run until the appointment of an administrator.

In Iowa, *Sherman* v. *Western Stage Co.* (1868), 24 Iowa 516, in case of a death by drowning, it was held that the death should be considered as instantaneous, although the deceased struggled in the water for ten minutes before he drowned; and that, as the statute of limitations therefore did not begin to run in the lifetime of deceased, it was suspended until the appointment of an administrator. COLE, J., dissented in this case, holding that the cause of action rests upon the occurrence of the injury, and did so in the case at bar, upon the deceased's falling into the water, that the statutes do not create a new cause of action, but simply remove the common law bar to a recovery, when the wrongful act produces death; he quotes approvingly the language of COMSTOCK, J., in *Dibble* v. *N. Y. &*

E. R. R. Co. (1857), 25 Barb. (N. Y.) 183, and distinguishes the English statute from our American statutes, on the ground that, under the former, the parties receive damages severally proportioned to their losses. Subsequently to the last named decision, a provision seems to have been incorporated in the Iowa Code, to the effect that—

"Such action shall be deemed a continuing one, and to have accrued to such representative, or successor, at the same time as it did to the deceased, if he had survived."

Under this enactment, it is held that the statute of limitations runs from the time of the original injury: *Ewell* v. *Chicago & N. W. Ry. Co.* (1886), U. S. C. Ct., S. Dist. Iowa, 29 Fed. Repr. 57. It had previously been held in Iowa, *Sherman* v. *Western Stage Co.* (1867), 22 Iowa 556, that the action was one for injury to the person, and therefore subject to the two years statute of limitations, applicable to such actions.

In Tennessee, a case, *Fowlkes* v. *Nashville & Decatur R. R. Co.* (1872), 9 Heisk. (Tenn.) 829, involving the application of the statute of limitations, came before the Court, and was held under advisement until 1876, the Court being equally divided upon the case until the death of the Chief Justice occurred and left an odd number of judges. It will be remembered that the statute of Tennessee provides that the right of action, which the person killed would have had, shall not abate, or be extinguished, by his death, but shall pass to his personal representative for the benefit of his widow and next of kin. The statute is, in fact, a hybrid in form, being the result of an attempt to combine the two ordinary forms of enactment; that is, one making the right of action belonging to the injured person to survive his death, and the other creating a right of action in favor of third persons for the injury to them by the death. In dealing with the question of damages under it, and the question of its application to cases of instantaneous death, the earlier decisions treated the statute as merely a survival act, limiting the damages to such as the injured person himself could have recovered in his lifetime, and denying the application of the act altogether in cases of instant death; but a subsequent decision gave it a wider scope, acknowledged its applicability to cases of instant death, and permitted damages

to be assessed, both on account of decedent's sufferings, etc., in his lifetime, and the loss suffered by his relatives in consequence of his death. With this double theory of the purpose and operation of the statute, it naturally became a very difficult and embarrassing matter to say when the statute of limitations, in an action under it, would begin to run. In fact, the members of the Court were not able to agree after retaining the case for four years. The majority held that the statute of limitations began to run at the moment of the injury, and therefore was not suspended during the period between the death and the qualification of the administrator, as it would be if the cause of action did not accrue until after the death. The death, in the case before the Court, did not occur until a few days after the injury, and it, perhaps, was not necessary to decide anything with regard to the case of instant death, but the majority opinion nevertheless covers that question, holding that the statute, in such case, begins to run immediately, and is not suspended, upon the theory that, in every case, a moment elapses between the infliction of the injury and the death, there being strictly no such thing as instant death. The statute, the prevailing opinion says, merely repeals the rule of the common law, that actions for personal injuries die with the person, in cases where the person dies of the injury. A dissenting minority of two (there being five members of the Court), held that the statute did not begin to run until the death, and consequently not until the appointment of an administrator; the position being taken distinctly and emphatically, especially in the opinion of TURNEY, J., that the statute created a new cause of action which only accrued upon the death of the person injured.

With this review of the authorities, including all of importance which have come to our notice, bearing upon the question of construction which we proposed at the outset, let us return to a consideration of that question upon its merits. We have no hesitation in declaring a preference for the view which regards the right of action given by Lord Campbell's Act and those of our American statutes which do not differ widely from it in form, as a new right of action, and not a revival or continuation of a common law right possessed by the deceased.

When we consider (1) that the purpose of the action is to compensate certain persons for the indirect injury to them, involved in causing the death of another; (2) that the right of action thus given, is not conditional upon a right of action having vested in the deceased, but arises, as well in cases of instantaneous death, as others, the remedy being in fact particularly called for in cases of sudden death; and (3) that the damages given in the action, entirely exclude such as the deceased himself could have recovered, we find it impossible to reach any other conclusion.

It is frequently said that the scope of the original right of action, which the deceased would have had, is merely enlarged so as to embrace the injury resulting from the death (See Cooley on Torts * 264), but this attempted explanation of the different rule of damages applied in the action under the statute, will not serve its purpose, since not only are new damages included in the new action, but the old damages are entirely excluded; the remedy is not enlarged to embrace the death, but is, under the statute, confined to the death. It is sometimes said that it is impossible to draw a line, severing with accuracy the damages to the person injured, from those to his relatives. See, for example, *Holton* v. *Daly* (1883), 106 Ill. 131, page 140, of opinion; but it is a sufficient answer to this objection, that both the language of the statute, and all the decisions, construing it, require such a line to be drawn.

Then again it is said that, although the measure of damages is different from what it would be in an action by the injured person in his lifetime, the cause of action is in both cases the same, that is, the wrongful act, neglect or default. The simple answer to this statement is, that the two actions are brought for different consequences of the same act, and are certainly as distinct from each other as is the action brought by a husband, or father, for an injury to his wife, or child, from the personal action of the wife, or child, for the same injury.

The view that the right of action given by the statute is merely a continuance of the common law right of action was first broached, as we have seen, when the question of permitting two recoveries arose. In our view, the courts, in their anxiety to prevent what was deemed a most undesirable result,

overshot the mark and advanced a theory of the statute which they could not successfully defend, and which was perhaps not necessary to accomplish the desired end. We are disposed to agree with the recent New York case of *Littlewood* v. *Mayor of New York* (1882), 89 N. Y. 24, in thinking that enough is to be found in the language of the statute, to disclose an intention not to allow a suit to be maintained under the statute, when the injured person has recovered compensation in his lifetime, but not upon the theory that the statute provides for a continuation, in the representatives, of the cause of action which the deceased had. The original act, the wording of which is closely followed by the New York and other acts, although making the damages recoverable such as result to the relatives named, *from* the death, provides that—

"The person who would have been liable if death had not ensued, shall be liable to an action for damages, *notwithstanding* the death," etc.

This seems very much like a contradiction in terms, as if the statute spoke of one being liable *for* a death, and at the same time, *notwithstanding* the death. The use of the latter expression, taken by itself, favors the theory which we are opposing, but, for the reasons before given, we must regard it as controlled and outweighed for general purposes by the general scope, and the language of other parts of the act. As the whole clause quoted, however, indicates an intention on the part of the legislature to impose liability only upon one who would otherwise have escaped liability by the death of the injured person, effect may be given to it so far, and it may be construed to exclude liability under the statute, when the deceased has himself recovered damages in his lifetime. The phraseology of the statute shows confusion of thought, and this it is which is responsible for the controversies which have arisen.

The Pennsylvania statute, before referred to, commends itself to us as a model of clearness and brevity. It provides that—

"Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of such deceased, or, if there be no widow, the personal representative, may maintain an action for and recover damages for the death thus occasioned:" Act 15 April, 1851, § 18, P. L. 674.

This language is plain and consistent. Damages are to be recovered "*for* the death," not "*notwithstanding* the death," and yet only on condition that no suit was brought by the party injured during his or her life. Such stubborn controversies could hardly arise under this act, as we have found arising under the English act and most of its American descendants. In one Pennsylvania case, it was claimed that the act was "not intended to create any new cause of action unknown to the common law, but only to prevent the abatement of personal actions according to the common law maxim, *actio personalis moritur cum persona;*" but the claim was overruled by the Court: *Fink* v. *Garman* (1861), 40 Pa. 95. This American statute says directly what the English statute says inferentially, and, in both cases, the right of action given is not a *continuation* of that which the deceased had, but an independent remedy which, where no law provides expressly for the survival of the former, is, in effect, a *substitute* therefor.

As to the right to maintain two actions after the death of the injured person (supposing him not to have recovered damages in his lifetime), where there is, in addition to the special act, a general provision of law making rights of action, for injury to the person, survive, it seems that such right should be ordinarily recognized, in the absence of an express provision to the contrary. The opposite and inconsistent courses adopted by different courts, in the attempt to escape from this result, seem to convict them all of being without warrant. If this is the correct view, it will sometimes happen that two actions will be maintainable after death, one representing the injured person's cause of action, the other the family's cause of action, when, at the same time, a recovery upon the former, before death, would have precluded any further recovery whatever; and it may be urged as an objection to the view, therefore, that it involves an inconsistency. There is seeming force in this objection, but the charge of inconsistency should be laid at the door of the legislature which enacts the statutes. From the fact that the special statute only provides for an action after death, when none has been brought in the lifetime, it can not properly be inferred that there is to be only a single action after death, when there has been none during the lifetime; because, if for