

THE AMERICAN LAW REGISTER

FOUNDED 1852.

UNIVERSITY OF PENNSYLVANIA
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Published Monthly for the Department of Law by JAMES H. LANGSTROTH, at S. W. Cor. Thirty-fourth and Chestnut Streets, Philadelphia, Pa. Address all literary communications to the EDITOR-IN-CHIEF; all business communications to the TREASURER.

ACTION FOR WRONGFUL DEATH—EFFECT OF PRIOR RELEASE BY PARTY INJURED.—*Southern Bell Telephone and Telegraph Co. v. Cassin et. al.*, 36 S. E. (Ga.) 881, (1900). Cassin was injured by the defendant company, May 6, 1892. He brought suit, and pending the action the company paid him \$2,500, taking a receipt which read as follows: "In full settlement of my action against said company now pending in the city court of Atlanta, and also in full settlement of all and any claim for damages, on my part, arising out of the injury received by me on or about May 6, 1892." Cassin died about five years after the injury, and his wife brought suit, on the ground that the death was due to the company's negligence. The wife died pending suit, and it was continued for the benefit of the children. Judgment for plaintiff. On appeal, judgment reversed; two judges dissenting.

The majority opinion commends itself to reason, and is based on the great weight of authority. Its grounds were, that the wife's right in her husband's life are subordinate to his course of action during his life; that the husband, by contributory negligence, settlement of the wrong by acceptance of payment, and by contract with the defendant, may free the latter from liability to him; and that, finally, to allow the wife to recover, when a settlement had been made by the husband, would destroy the likelihood of a compromise, and directly encourage litigation.

The dissenting judges found some trouble in dealing with prior decisions of their own court, but they satisfied themselves with the following distinction: Where the deceased does some act prior to or concurrent with the injury, and by it prevents any liability of the defendant from arising, the wife cannot recover. But if the defendant once becomes liable to the injured party, a right of action accrues to those entitled by law to compensation for his death, *i. e.*, widow and children, and when death occurs the right is full and complete. The injured party, before death, can do nothing to impair this cause of action. The theory is—a cause of action is given to the injured party, which he can use as he sees fit, and, by force of the survival statute, upon his death it vests in his personal representative. Another distinct and separate cause of action for the homicide is given to the widow and children. This view is supported by a number of decisions, some of which resulted from the peculiar nature of the statutes which controlled them. For instance, in Massachusetts, the statute (*Pub. Stat.*, c. 112., § 212) is penal in its effect. Under it, if the negligent act of the defendant causes death, he must pay a fine in damages (limited), recoverable by indictment for the use of the family. In *Com. v. Boston & L. R. Corp.*, 134 Mass. 211 (1883), it was held that negligence on the part of a passenger was no more a defence to an indictment for damages than it would be in a murder case. The damages belong to the next of kin, and not to the estate of the party injured. *Bowes v. Boston*, 29 N. E. 633 (1892). This distinction would lessen the effect of a Kentucky case, *Donahue v. Drexler*, 82 Ken. 157 (1884), in which case the party mortally injured by the criminal use of a deadly weapon executed a release to the defendant. The wife brought suit and recovered. The court said the statute created a new cause of action, but that it was "a highly penal statute." Other states which accord with the dissent are: Washington, *Adams v. R. R.*, 95 Fed. 938 (1899); Kansas, *R. R. v. Bennett's Est.*, 47 Pac. 183 (1896), under a statute very similar to Lord Campbell's Act; Mississippi, *R. R. Co. v. Phillip*, 64 Miss. 693 (1887); Arkansas, *Davis v. R. R. Co.*, 13 S. W. 801 (1890).

All the States, beginning with New York, in 1847, have passed statutes creating a cause of action for the benefit of the family, when the death of a member has resulted from a wrongful act. The majority resemble closely Lord Campbell's Act (1846). Though English judges have distinctly affirmed that the act created a new cause of action, the cases hold that a settlement by the husband will bar the right of the wife. *Read v. R. R.*, 9 Best & S. 714 (1868);

Wood v. Gray, App. Cases 576 (1892). The English rule, in another aspect, has been settled as follows: If the personal representative sues the defendant in tort for the benefit of the widow and children, and recovers damages for the death, he cannot later sue in tort for the injury to the person of the deceased, but he can bring an action of contract and recover "the expense of the decedent's sickness, nursing, medical attendance, and the like." *Bradshaw v. R. R. Co.*, 10 C. P. 189 (1875); *Leggett v. R. R.*, 1 Q. B. D. 599 (1876); *Pulling v. R. R.*, 9 Q. B. D. 110 (1882).

The Read case is generally followed in this country. Tiffany, after a consideration of all the statutes and citing many cases, states the rule as follows: "If the deceased, in his life-time, has done anything that would operate as a bar to a recovery by him of damages for the personal injuries, this will operate equally as a bar in an action by his personal representatives for his death. Thus, a release by the party injured of his right of action, or a recovery of damages by him for the injury, is a complete defence in the statutory action." "Death by Wrongful Act," § 124.

In New York the courts admit that the statute creates a new cause of action, yet it has been ruled that "this new cause of action is barred if there had been a previous judgment for the injury." *Littlewood v. Mayor*, 89 N. Y. 24 (1882).

The Pennsylvania rule is clearly stated in *Hill v. R. R.*, 35 Atl. 997 (1896). "The widow did not have such an independent action for injuries causing her husband's death that he could not, in his life-time, release or compound it."

Even where a statute has been construed to give two causes of action, and the right to maintain two concurrent suits, a court has held that the party injured could work "an extinguishment of the primary cause of action" (Wisconsin). *Brown v. R. R. Co.*, 78 N. W. 773 (1899). It can be said that while the authorities are fairly well balanced on the question of allowing concurrent suits, they generally agree in admitting the conclusive effect of a release. See also *Halton v. Daly*, 106 Ill. 131 (1883). *Hecht Case*, 32 N. E. 302 (Indiana, 1892); *Lubrano v. Atlantic Mills*, 32 Atl. 205 (Rhode Island, 1895). In this last case the court was influenced by the confusion of damages that would result if the defendant were subjected to two liabilities. Therefore if the personal representative of the deceased sued for the family and recovered he could not afterward sue for injuries to the estate. "The measure of pain and suffering or the estimated damage to one's estate cannot so definitely be marked as to limit the liberality of a sympathetic jury."

F. K. S.