1892

# The Statutory Cause of Action for Wrongful Death as Independent of the Rights of the Deceased

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A

Thesis

by

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May 1892

WRITER'S PREFACE.

The purpose of this thesis is the determination of the intention of the British Legislature, and the legislatures of other sovereignties, as it is manifested in the enactment of Lord Campbell's Act and of those statutes for which it is the architype. The materials from which the pervading purpose is to be deduced are intended to be confined in their character to those which are the proper elements of interpretation.

An unfortunate method of treatment has resulted in the expansion of the subject to a tedious and wearisome degree. I have used for it's discussion an interplay of reasoning and constant adversity of argument, blended with a comparative analysis of pertinent authority. By the means I have given the affirmative or "contra" argument in the extracts from decisions which embody it, that I may answer them by the counter tenets of opposing cases or by such a logic as presents itself to my understanding.

If my criticisms of the theories of judges or the reasons of their opinions be free and impertinent I offer the apology of inability and plead the "infancy of inexperience.

William Allan Deford.

ANALYSIS and INDEX.



N.B. Citations to cases in post-index.

THE COMMON LAW. REMARKS UPON ITS NATURE AND CONSTITUTION.

A principle of the common law is the product develo-ped from the judicial precedents which define the rights of individuals in a specific situation of fact. This situation of fact is not the measure of the principle but the discovery of the principle by its application. It may apply equally to a different state of facts embodying rights of a like nature. An application of the principle to a new arraingment of facts is not the development of a new principle but merely an adaptation of the old, for by the theory of the common law it is assumed that from ti time immemmorial it has constituted a part of the common law of the land and that it has not been applied before because no occasion has arisen for its application.

A principle may apply to a situation of fact and enforce the rights and redress the wrongs that exist by virtue of it, or on the other hand the principle may be one that rejects the conditions as not containing within themselves rights which the policy of a certain period will suffer them to enforce. Such is the peculiar consti-tution of the common law, a constitution which confines the redress of its tribunals within the limits of its ordained and established principles, and which forbids the

construction of new, or the abrogation of old principles for the creation of new rights. The judges of the common law were not empowered to adapt the system to the satisfaction of the necessities of new conditions. They were bound by the authority of rigid precedent which in instances became disastrous dogma. Their ability to alleviate evils which resulted from the application of old principles to new conditions was confined to the remedies of the system, to the application of the principles which were its component parts and in harmony with which they must have constructed their decisions. The creation of laws by whatever authority is nothing else than legislation. Legislation is the function, not of the judiciary, who are but the interpreters and appliers of existing law, but of the supreme law making power which is itself the sole judge of the wisdom and policy of its enactment. and the adaptation of that enactment to the satisfaction of the public needs and the fulfillment of a public duty. When therefore the application of the iron rules of the system to new conditions results so largely in evil that that the law makers may deem it to effect materially the public good they are generally prompted to its protection by legislation.

REMEDIAL LEGISLATION, ITS NATURE AND SCOPE.

That legislation,in a large sense,must be deemed to be remedial of existing evil but with reference to the causes of that evil;that is,to the rules of the common law which produce that evil as the result of their application,they may be remedial or creative. They are in this sense remedial when they cure a defect inherent in the system,a defect that operates to produce the evil. This defect may be the application of a rule which causes the evil by reason of its being unsuited to a situation or conditions not contemplated when it was established.

This enactment is creative when it is directed to the establishment of a principle,the lack of which in the system,has caused the evil by its jurisdictional ignoring of a right for which new conditions demand a recognition.

To recapitulate,it is remedial when it cures an inherent,positive defect,-when it seeks to amend a principle that so operates as to result in evil. .It is creative when it cures a defect that exists by reason of there being a lack of the principle which would,if it were applied,create the actionable right demanded,-creative when it adds a new law to an imperfect science,a new part to a defective organism.

LORD CAMPBELL'S ACT: ITS TEXT.

It is with a single instance of the exercise of this sovereign function of legislature that we have to do,an

Act known to English jurisprudence as"Lord Campbell's Act". It is with the relation of this act to the pertinent common law and it's nature as an enactment that this argument is interested,so that a knowledge of it's text at this time is essential to an intelligent progress. The Act is entitled "An Act for the Purpose of Compensating the Families of Persons Killed in Accidents". Its provisions are as follows,-

That we may gather the full import of this legislation, that we may know it's nature and in that knowledge determine it's just and reasonable construction, it is essential that we have a knowledge of the influences which impelled it's enactment. The problem for solution is as to whether it was intended to create a right absolutely independent in itself of any previously existing legal relations or actionable rights, or whether from it's situation in the entire English Jurisprudence it can reasonably be said, in obedience to the proper elements of construction, that the right of action created was intended to be dependant upon or a continuation of a pre-exsisting legal right.

THE VALUE OF THE CONSIDERATION OF THE RELATION OF A REMEDIAL STATUTE TO THE EVIL SOUGHT TO BE CURED.

An elementary basis for the construction of a remedial statute is the determination of the evil which it was directed to cure. the nature of the one determines the nature of the other. A knowledge of the constitution of the one leads us to an understanding of the other. when therefore, from an analysis of the pertinent elements of jurisprudence, we have decided that the statute may have been directed to the elimination of one, or perhaps of two evils, the remedy applied to their cure will either establish or destroy or premise, for if one, or both, fit exactly in the notches of mutual relation there is a "

"Quod erat demonstrandum".,or,if contra,they fail,or either fails to sustain a logical relation to the remedy, in an argumentative adjustment,then it must be concluded that they,or one of the two,was not the cause of the legislation.

The nature of the statute itself directs our study in that it grants a right of action based upon the wrongful destruction of a life.which is in fact it's subject matter and for that reason guides us to the consideration of the status of human life,or more properly it's destruction,in law.

HISTORICAL DEVELOPMENT OF THE EVILS EXISTING IN THE SYSTEM OF THE COMMON LAW.

In the remote ages,the end of government was the conduct of war and inter-tribal negotiation coupled with the right of certain exactions from the governed for the maintainance of the political structure. Government,in short was the government of a people in their relation to other peoples. In the progress of time,submitting to the influences of an increasing civilization,it's scope became extended to an arraingment of the status of the governed and to the protection of the individual rights fixed by that status. This arraingment came to be called jurisprudence. As these systems of jurisprudence devel-

oped they agreed in drawing a distinction between offenses against the state or community and offenses against the individual. Natural and simple as may seem this seperation, it was, never-the-less, a growth. The law of ancient communities was not the law of crimes, it was the law of wrongs. In the early days of social organization the sole penalty for crime inflicted by authority of the state was a payment of compensation in damages or by way of penalty. All offenses alike gave rise to an obligation or "vinculum juris" and were all requited by the payment of money.

A complex system of money compensations were alike the characteristics of the law of the early Germanic and Anglo Saxon peoples. These compensations were gradations of life values proportioned to the rank of the several classes in the community or state. As for every man from carldorman to serf there was a fixed estimate of value, so for every injury inflicted there was a rated compensation dependant upon the nature of that injury, the sum varying according to the adventitious circumstances.

In time the ruling power (of a nature too feeble to be called government) came to demand of the homicide or his kin a certain penalty for the infringment of it's peace. This was a decided though insignificant advance by government toward the final assertion of the right to punish a wrong done the individual as an offense against the

state. The "bot", the fixed rate of compensation for a given life, was to be paid the family of the deceased for the injury they had suffered from his death. The penalty or "wehr", for the infringement of the kings peace, was paid to the officers of the crown.

In addition to this satisfaction of wrongs by the payment of money, this early law permitted the relatives of the deceased to revenge themselves upon the wrongdoer and his kindred, and by the infliction of this summary justice escape the slower and more regular process of the courts; and when resort was had to the courts the measure of vengance likely to be exacted was a guide in the estimation of damage. In the

In the advance of time these crude methods of punishment, from practical considerations of their in-efficiency for the restraint of crime, were superseded by punishments inflicted by the state. Accompanying the arrogation of this power by government was a correlative extinction of punishment by money compensations at law. To the judges of a latter period, the idea of personal vengance as a criterion of damage, the idea that one individual should hv have a personal and pecuniary interest in the life of another seemed barbarous and for that reason became abhorrent. A probable reason for their antipathy to such compensations was the constant prostitution in a court of jus-

tice,of natural sentiment to to substantial gain.

These evils resultant from the compensations system were the influences that effected the establishment of the rule of the common law that "IN A CIVIL COURT THE DEATH OF A HUMAN BEING COULD NOT BE COMPLAINED OF AS AN INJURY".

Baker vs. Bolton I Camp. 493. 5
Hutchins vs. Butcher, I Brown& G.20

This rule was established by the mere judicial fiat of Lord Ellenborough and was unaccompanied by an exposition of the "rationes decendendi". However precarious and ~~fr~~ frail may have been its basis in reason, it was universally accepted as an authoritative precedent and became a fixed principle of the common law. We have established then,as a basis for argument, the principle that the wrong-ful destruction of a human life was not cognizable at law,as a civil wrong.

Looking again to the common law we find that an individuals right of action for personal injuries perished with his life in obedience to the ancient maxim of the common law that "Actio personalis moritur cum persona".

If Lord Campbell's Act had,then,relation to any of the pre-exsisting principles or conditions of the common law,it must,and is conceded to have referred to the first named condition or the principle embodied in the maxim "Actio personalis".

Accepting these established doctines or principles

as the defects existing in the system of the common law, and proceeding in a quasi inductive method, it will be our purpose to discover the remedies which would have been the natural and reasonable means of legislative cure.

An effective presentation demands a primary inquiry into the nature of the maxim "Actio personalis" as fairly determinative of it's applicable remedy. The effect of the maxim "Actio personalis" was that a person's right of action for a wrongful injury done him was destroyed by the resulting death. That we may appreciate the evils flowing from the rule it is essential that we know the qualities of the right destroyed by the rule. The action maintainable by the injured party in his life-time, accrued at the time of the injury, and was based upon the loss resulting from the injured person's inability to attend to his usual trade or vocation, upon the surgical or medical expenses incurred in the treatment of the injury and the physical suffering of the person injured. If it was the destruction of this right which was to be subjected to remedial legislation what would have been the effective cure? It would have been simply a statute providing briefly that rights of action for personal injuries shall not be extinguished by the death of the person injured but shall survive for the benefit of the deceased's estate. Such an enactment would have effected a complete abrogation of the of-

fensive rule, and such survival statutes have been directed to that end in a large number of the Federal States.

If contra the evil which the Legislature intended to eradicate was, as comphrehended in the first premise, was the lack of a principle which would-per-mit a recovery based upon wrongful death, what would have been the adequate procedure by enactment? It would have been exactly Lord Campbell's Act as enacted by the British Parliament in the year I846, during the 9th and I0th Victorian Sessions. The debate in the house of commons conclusively demonstrates this to have been it's intended nature and I think that I may affirm, that in all the discussion that preceded it's passage there was no word or sentence which which indicated the act to have been directed to any other purpose than the establishment of the principle which, I have said, was sought to be incorporated in the law. There is no where a reference to the abrogation of the rule "Actio personalis" with the exception of the unnoticed suggestion of the Honorable Speaker that they could, in a large degree, eliminate the evil by a continuation or survival of the right of action destroyed by the operation of the maxim. The whole trend of the argument presented in support of the bill, Lord Campbell's exhaustive explanation of the effect intended, in it's critical review by the Lord Advocate and Attorney General for the

Crown,it every-where appears that the evil sought to be remedied was the lack of a principle which would grant to a bereaved family or kin,a recovery for the wrongful destruction of a life upon which they were dependant for support or subsistence,or from the continued existence of which they could reasonably expect pecuniary profit. The effort of evry speaker,except the few in criticism,was directed to the exposition of this evil and to the demand that the remedy formulated by Lord Campbell be enacted. In accepting these as proofs of intention in debate we may substantiate or destroy the conclusion that such was the intention by an analysis of the enactment.

AN ANALYTICAL DISCUSSION OF THE STATUTE "IN IPSE".

In dissecting this statute it will be our purpose to see if there is in it any where the slightest reference to any purpose other than the one which we maintain was intended to permeate it;whether in the whole text of the act there is anything which is inconsistent with an intention to establish an absolute and independant principle, that that the destruction of a human life shall be a civil wrong. In so doing it is inevitable that we enter into a comparative application of it's provisions to the principle mentioned and the maxim "Actio personalis".

The act is entitled"An Act for the Compensating of

Families of Persons Killed in Accidents".

The title in itself contains no reference to any right that has arisen anterior to the death. It premises death as the subject of action which is to compensate the families of persons killed in accidents. It does not read "An Act to Continue to the Personal Representatives of a Deceased Person his Rights of Action for Personal Injuries, or "AN Act to abrogate the Maxim Actio Personalis &c.&c. It refers simply to the giving of compensation for the reasons and under the conditions to be set forth in the body of the statute.

The exposition of the reason and purpose of the act is developed as follows in the Preamble. "Whereas NO ACTION AT LAW IS NOW MAINTAINABLE AGAINST A PERSON WHO BY HIS WRONGFUL ACT;NEGLECT OR DEFAULT MAY HAVE CAUSED THE DEATH OF ANOTHER PERSON,and it is oftimes right and expedient that the wrong-doer,in such a case,should be answerable in damages for the injury so caused by him,be it &c".

That part of this preamble which reads "Where-as no action at law is now maintainable against a person who by his wrongful act,neglect or default may have caused the death of another person"is significant and as plainly and clearly as language can express thought,expresses the evil,the defect in the system of the common law which the

statute it introduces is intended to cure. Yet learned Judges have attributed in effect to this simple expression an entirely diverse meaning. They have said that, in those words, the Legislature intended to say that "Whereas by virtue of the common law rule "Actio personalis" the rights of action which vest in persons who have received by reason of the wrongful act, neglect or default of another certain personal injuries, are extinguished by their death, and it is oftimes right and expedient that the wrong-doer should be answerable for the injuries so caused by him, there-fore be it &c."

For this construction they have no authority in law or basis in reason and it can only be explained in the theory that they attribute to the legislature not the language or meaning they intended, but a language or meaning THEY SHOULD HAVE USED AS BEING IN ACCORDANCE WITH THE JUDICIAL IDEA OF EXACT JUSTICE. The language is simple and plain and states explicitly and clearly the reason of the legislation. No Judiciary can rightfully over-ride it with a second or alternative meaning or an inferred latent intent.

The enacting clause of the statute proceeds as follows,- Be it there-fore enacted by the Queens most excellent Majesty &C----that whensoever the death of a person shall be caused by wrongful act, neglect or default and

the act neglect or default be such as would(if death had not ensued)have entitled the injured party to maintain an action and recover damages in respect there-of,then and in every such case,the person who would have been liable if death had not ensued shall be liable to an action for damages not-with-standing the death of the person injured and although the death shall have been caused under such circumstances as amount in law to a felony".

The words" whensoever death shall be caused" demonstrate the intent and nature of the enactmentand fix it's subject-matter.

The clause"The act,neglect or default is such as would(if death had not ensued)have entitled the injured party to maintain an action and recover damages in respect there-of"denotes the origin and quality of the action-a-bility upon which the action that is to be created shall depend for it's maintainance in a court of law.

The clause "notwith-standing the death of the person injured" is purposed to continue this action-a-bility in order that it may survive a death which,under the rule of "Actio personalis",would have been destroyed. It is likewise intended by this clause to withstand the effect of the principle that "the death of a human being could not be complained of as an injury in a court of law".

The words"and although death shall have been caused

under such circumstances as amount in law to felony"refer,and demonstrate the next preceding clause to have referred,to the conditions of actiona-bility made the test of the action under the statute,but which would have been of no effect if the rules of the common law had been suffered to operate. The clause clearly establishes the proposition that the object of it's own insertion together with the words"if death had not ensued" and "not-withstanding death"were intended to avoid the effect of certain principles which would have destroyed the action-ability upon which the statutory right is made to depend for it's maintainance.

The second section of the statute denominates the beneficiaries of the action under the statute and prescribes the personal representatives of the person deceased as trustees in respect of the right of action created by the Act. The beneficiaries under the act ,the widow and the next of kin,are of course,different and distinct from the person receiving the primary injury flowing from the wrongful act,neglect or default.The jury in awarding the damage are by the express terms of this section,limited to the award of such damage as they may think proportioned to the injury RESULTING FROM THE DEATH, to the parties respectively to whomn and for whose benefit such action shall be brought. By this explicit

definition of the nature of the damage to be awarded, the elements of damage flowing from the wrongful act, neglect, or default to the person injured, are pre-cluded from estimation as a basis of recovery under the statute. by express direction the damages to which recovery under the statute is limited, are for the injuries flowing, not for the primal injury, but for the injury to ~~determined~~ beneficiaries, which flows from the fatal result of the primal wrong to the individual, death.

The section continuing provides for the method of apportionment of the damages recovered. Section third of the statute is unimportant to the purpose of this theses.

I have postponed a detailed analysis of the context of the statute for the reason that the exposition and refutation of certain arguments, which I shall attempt to meet, will present more clearly the propositions and principles that are disputed in reason, and are universally opposed to each other in judicial construction; for the further reason that the arguments contra are there presented with all the clearness and in all the strength of which they are capable.

I have endeavored by the somewhat superficial discussion of the parts of the statute and the functions of it's various clauses, which I have just completed, to make clear the fact that each part serves an apparent and

necessary purpose, that each part was essential to the consummation of the end sought to be attained, that each sustains to the other a reasonable relation and that each part is in perfect consistency with the several parts and with the whole; that through the whole body of the act there runs a clear, pervading intention plainly evidenced by the expression employed, and and that however many alternate and latent meanings the words and sentences may be capable of affording to the person seeking for a different or additional intention, that there appears upon the face of the whole a simple, constant and logical purpose, which is, to incorporate with-in the law of England the principle that the wrongful destruction of a human life shall be a civil wrong and to provide for it's redress a suitable method of procedure.

Diverting our attention from the text of the act we will, for a time, devote ourselves to an exposition of the various decisions in construction of the statute, rendered by the courts in the jurisdiction of it's first application.

ENGLISH CASES IN INTERPRETATION AND CONSTRUCTION OF THE STATUTE.

The first of the adjudicated cases having pertinence to the question with which we are involved, is that of BLAKE vs. THE MIDLAND RAILWAY CO. decided by the court of

the Queen's Bench, Febuary 22nd., I852, with Lord Campbell C.J. presiding, the opinion delivered by Coleridge J. The question directly presented for determination was as to whether the mental suffering of the bereaved family could be taken into the estimation of damages. In the solution of this question the court collaterally considered the real nature of the act by the particular terms of which they were to be controlled. Pertinent to this thesis the Court said:-

"It will be evident that this action does not transfer the right of action to his representatives but gives to his representatives a totally new right of action on different principles."

This sentence is the more significant in that it was approved by Lord Campbell, and the rule made absolute.

In I868, in the Court of the Queen's Bench, a decision was made in the case of READ vs. THE GREAT EASTERN RAILWAY CO., which is directly antagonistic to the theory that the act was intended to incorporate a new principle with-in the English law, and contends to the contrary that it was directed to the obviation of the effect of the maxim "Actio personalis" as will appear in the prevailing and affirming opinions. The facts are in substance these. The deceased Read was injured by the wrongful neglect of the Company and died of the hurts received. Before death he accepted a sum of money in full satisfaction and discharge of all his claims and causes of

action against the defendants The action was brought by the widow under Lord Campbell's Act for the injury resulting to her from the death. In adjudication Blackburn,J. said:-

"Before the statute a person who had received apersonal injury and survived it's consequences,could bring an action and recover damages for the injury;but if he died from it's effects then no action could be brought To meet this state of the law the 9 and IO Victoria, Chapter 93 was passed and "whenever the death of person is caused by a wrongful act,and the wrongful actis such as would(if death had not ensued) have entitled the injured person to maintain an action and recover damages in respect there-of,then and in every such case,the person who would have been liable if death had not ensued shall be liable to an action for damages not-with-standing the death of the party injured." Here taking the plea to be true the party injured could not maintain an action in respect there-of because he has already received satisfaction".

Lush,Judge,affirming the opinion above quoted in pat part says:-

"The intention of the statute is not to make the wrongdoer pay twice for the same wrongful act,but to engable the representatives of the person injured to recover in a case where the maxim "Actio personalis moritur cum persona"would have applied"

It was there-fore held that the action under the statute could not be maintained. Of the "rationes decendendi" I can speak but briefly here,for the reason that in each succeeding case the same logic appears for analysis , and I would there-fore be involved in a continuous repetition.

Blackburn,J., declares tha statute to have been directed to the obviation of the maxim "Actio personalis". Of the soundness of that conclusion hereafter. He conditions the right to maintain the action,not upon the actionable quality of the deceased's injury,but upon the

status of the right arising by virtue of it. He makes the clause"which would(if death had not ensued)have entitled the injured party to maintain an action"refer,not to the actionable origin of the wrong but to the condition of that wrong as a right in law. What is the plain and reasonable effect of the clause? Is it not to make the nature of the wrongful act,neglect or default,in it's relation to the injured and deceased party the test of the right to main-tain the action under the statute? Does it not,in effect,say,that if the act was wrongful and the deceased or injured party did not contribute to the commission of the wrong in a way to relieve the wrong-doer of civil liability for the act,then,and in every such case the relatives injured by the death,in which the personal injury to the deceased results,shall have a right to recover of the wrong-doer for the damage they have sustained. Such appears to me to be the simple,reasonable and patent meaning of the clause. As to the consideration of any further meaning it may have had,see analysis of the opinion of Rapallo,J,in Littlewood vs. the Mayor, succeeding.

Lush,J., affirming,says,that"it was not the intention to make the wrong-doer pay twice for the same wrongful act". It was not the intention to make the wrong-doer pay at all for the wrongful act.The wrongful act is the mere origin of the injury not the injury itself. It was

the intention that he should be compelled,by the action created,to pay for the injury that resulted from the wrongful act to the family or next of kin. That injury is only a part of the entire injury flowing from the wrong. The damage the deceased or his estate sustained by virtue of the personal injury,is not an element of damage under the statute. The injury that any one else may have sustained is precluded. Further,when you pay for one evil result of an act are you "ipso facto" compensating for the injury inflicted by another result. Is it impossible that two separate and distinct injuries to separate and distinct persons originate in one wrongful act? The position is untenable.

The intention of the statute,he continues,"was to enable the representatives of the person injured to recover in a case where the maxim "Actio personalis"would have applied". By this it is meant that in a case where the operation of the maxim"Actio personalis" had defeated by it's operation the right of the person injured to recover,then,and only upon such condition,shall the action created by the statute be maintainable at law. In effect he affirms that the principle incorporated in the law by the statute is only to have effect where the operation of a different principle based upon a different species of damage,has been defeated by the operation of a maxim which

the statute itself in no way purports to effect. That I think cannot be maintained in reason and in adherence to the elementary principles of construction. His logic derives it's nature from and originates in the fact that the wrong which gives the actionable quality to the injury maintainable at the common law, is made to give the same quality to the action created by the statute. See Littlewood vs the Mayor ante.

Continuing Lush, J., says, "It only points to a case where the party injured has not recovered compensation against the wrong-doer". By this he must mean that an actionable right based upon an imjury which arises subsequently to the primary injury, and whose elements of damage are based upon the totally different interests of persons other than those who could have been effected by the injury to the person deceased, shall only be maintained when that different right of a different person based upon damage to a different interest shall have been destroyed. The proposition refutes itself. In any event it rests upon the naked fiat of a single judge and is in it's very nature, a highly arbitrary rule.

The case of Read vs. the Great Eastern Railway Co., while being an authority in law contrary to the theory

which we favor, adds little, if any strength to the logic of the opposing argument and introduces for the first time that all pervading desire to conform law and legal construction to certain ideas of right and justice pertaining to the individual Judges.

The case of Pym vs. The Great Northern, decided in 1863, which we next consider, should have preceded chronologically the case of Read vs. The Great Eastern, supra. Erle J., in the solution of a collateral point, presented the following dicta in his opinion:-

"The statute, as it appears to me, gives this personal representative a cause of action beyond that which the deceased would have had if he had survived".

This annotation is given merely to preserve the connection of authority.

Next succeeding Read vs. The Great Eastern and directly antagonistic to it in spirit and principle appears the decision and "rationes decendendi" in the case of Bradshaw vs. The Lancashire & Yorkshire R.R. Co. In Read vs. Great Eastern &c., to recapitulate, Read had entered into a settlement and received a satisfaction for the personal injuries he had sustained and the action was brought under the statute by the widow for the injury resulting to her from his death. In this case of Bradshaw vs. Lancashire &c. the action was based upon the breach by the defendant company in that they did not exercise due care in the carrying of the party injured upon their train. The plaintiff as ex-

ecutrix sought to recover for the damage his estate had sustained in the payment of medical expenses, and the loss accruing to the estate by reason of his inability to attend to business.

Before entering into a review of the opinion in this case I desire to remark upon the nature of the action. It was brought to recover the damage sustained by the estate by reason of the breach of contract to carry safely. The breach, viz., the wrongful neglect, resulted in a personal injury to the deceased, the injury resulting in a loss to the estate by reason of the payment for medical attendance and his inability to attend to business. Actual injury flowed from the same wrong. No recovery was claimed for the physical suffering of the deceased as it seems to have been admitted that the right to recovery for such suffering was personal in it's nature and that for that reason it perished with the individual. It may be said with some show of reason, that there is no inconsistency in fact with the case of Read vs. The Great Eastern and it like-wise may be said that there is a perfect inconsistency. Was not the right of the injured party to a recovery for the personal injury based as much upon the payment of medical expenses and inability to attend to his business as upon his physical suffering? As a matter of fact did not the Maxim "Actio personalis" operate to

destroy the right to recover upon any of the elements of damage pertaining to the injured persons right, for the reason that they arose from the same personal injury?

Admitting that there is no inconsistency of fact between the cases of Read vs. The Great Eastern and Bradshaw vs. Th Lancashire & Yorkshire(as contended in Littlewood vs. The Mayor)does it necessarily follow that there must be a like consistency in the tenets of the opinions in the principles applied to the situation of fact. I think not. One situation of fact may be rightfully determined in the result of the decision while the logical processes of the determination may be entirely in the wrong; again, a different situation of fact may call for a determination or reasoning in principle, that would apply with equal force to diverse circumstances and surroundings. On the other hand two different situations of fact may call for the consideration of the same essential principle which, by a wrong application came in the one case to a wrong a, and in the other a right result.

Proceeding then to a comparison or analysis of the principles deduced in the case of Bradshaw vs. The R.R. Co. I submit this extract from the opinion of Grove, judge.

"Does the fact that in this case, besides the injury to the estate, the testator's death has like-wise resulted from the breach of contract, make any difference, or does the fact that provision has been made in such a case for

compensation in respect of the death, take away any right of action that the executrix would have had but for the Act? It does not seem to me that the act has that effect either expressly or by necessary implication". (See writers note*.) "The intention of the Act was to give the personal representatives the right to recover compensation as a trustee for children or other relatives left in a worse pecuniary condition by reason of the injured person's death, not to effect any existing right belonging to the personal estate in general." "There is no reason why the statute should interfere with any right of action an executor would have had at the common law." "In thecase of such a right of action he sues a legal owner of the general personal estate which has descended to him in course of law, -under the Act he sues as trustee in respect of a different right altogether on behalf of particular persons designated in the Act."

This quotation, I think, expressly negatives the proposition that Lord Campbell's Act was intended to create an action, which could only be maintained when recovery of damage sustained by the deceased in his life time could not be obtained by reason of the rule "Actio personalis". It does at least so far as the elements of medical expenses &c * *are, concerned, as also the loss to the estate of the injured ~~concerned as also the loss to the estate of the injured~~ party by reason of his inability to attend to his customary trade or vocation. A reference to these elements, which for the greater part composed the right of action which vested in the person injured, satisfy the principle that the ACTION WAS INTENDED TO GIVE OR ESTABLISH, NOT TO AB?

* Note.-If it was the intention as maintained in Read vs. Great East. &c. and Littlewood vs. mayor that the act should only grant recovery when the person injured had not obtained releif and did not mean a recovery upon both rights, how are they reconciled with the cases in hand? These hold that the act is prospective and creative.

RIDGE,ABROGATE OR FIX DEPENDANCY UPON A PAST CONDITION OR THE STATUS OF A PRE-EXISTING RIGHT. IT WAS NOT INTENDED TO BE RETROACTIVE IN IT'S EFFECT UPON RIGHTS ALREADY GIVEN OR TO ABROGATE PRINCIPLES ALREADY ESTABLISHED BUT TO INCORPORATE A NEW PRINCIPLE AND PROVIDE A METHOD IN LAW FOR IT'S RECOGNITION,TO DETERMINE IT'S QUALITY AND MEASURE THE EXTENT OF IT'S LIMIT.

The succeeding and the l ast of the English cases pertinent to this theses,is the case of Leggott vs. The Great Northern Rail-road Co.which interprets the decision and submits to the authority of Bradshaw vs. Lancashire&C. which preceeded it by one year. The decision in review was rendered in I876. The action was broughtby the widow, as the administratrix of the estate of her deceased husband,who had been injured by the neglect of the defendant Company and who died from the effects of the injuries received,to recover the damage sustained by his estate in the payment of medical and other expenses incident to the treatment of his injuries,and for the loss occasioned to his business. It was admitted that she had brought, as administratrix,and recovered judgment in a previous action under the statute,and it was contended by the defense that such a recovery was a bar to any causes of action originating in the same wrongful act. Inquiring into the nature of the action granted by the statute and comparing it with the action brought upon the common law

right,Mellor,J.,says:-

"It seems that though nomina ly the machinery of tha action in the one case is the same as the machinery of the action in the other,yet the action(statutory)in which the verdict has been rendered was an action of a very special and limited description. It was an action given expressly by the statute and must be confined within the limits of the statute. It was to provide for what the law had not before provided for,namely,the right of an administrator or executor to sue for the benefit of the familyin respect of the death of the deceased,occasioned by the negligence of other persons.**** **** It is to be observed that the executrix in a case under the act,does not sue in respect of anything that belonged to the deceased,but by force of the statute which enacts that the deceased's death is to be made the subject of an action just as if he had lived".

Quain,J.,affirming,says:-

"Lord Campbell's Act enables an action to be brought in a case where it could not have been brought before that act. ******* Now Lord Campbell's Act gives an entirely new right of action and not connected with the estate of the deceased in the slightest degree,and the damages recoverable in it would be no part of the estate of the deceased."

The parts of the opinions that I have offered are in direct opposition to the "rationes decendendi" of Read vs. The Great East.. They thouroughly demonstrate the enactment to have been aimed at the incorporation of a new, not the abrogation or obviation of an old principle;they affirm the absolute independency of the right created and expose clearly the nature of the enactment and the quality of it's effect.

It is said, in Littlewood vs. The Mayor ,ante,that in the Leggott case the soundness of the decision in the Bradshaw case was doubted but that it was yielded to as an authority. The principles or logic,pertinent to this

argument, established in the Bradshaw case are expressly affirmed and are more clearly exposed in the case we have in hand. It is true that Mellor, J. said, that "With a single exception, as far as I am aware, of the case in the common pleas (Bradshaw vs. Lancashire), there appears to be no authority that an action will lie by an executor or administrator in respect of what is claimed in this action. . But as the case has been decided, I yield entirely to the authority of the decision, so far as to say, that in this court it cannot be questioned and we must there-fore abide by it". (Above has been quoted.)

These words have no reference to the parts of the opinion in the Bradshaw case refering to the nature of Lord Campbell's Act or it's relation to antecedent rights, but doubts the authority and reason of permitting damage to the personal estate, which flowed from the personal injury causing death, to be the subject of an action brought by the executor and intimates that it should have been deemed as much subject to the rule actio personalis as the element of physical suffering. Instead of proving an inconsistency or questioning of the principles there-in enunciated it has the reverse effect. It says plainly that while the mere giving of the new action by Lord Campbell's Act is not to be construed as effecting any-prev ious ri right, we are in doubt as to whether the action which the

executrix brings should have escaped the maxim "Actio personalis". The question in direct consideration was one of estoppel and it was expressly held that there was no estoppel in as much as"the actions are not brought in the same right.

Barnett vs. Luca.,the report of which is not accessable to the writer of this theses,decides the same point in affirmation of the same principles,decided in the Leggott case. A review of the opinion in this case, containing an identical matter,would be surplusage.

Having,in this somewhat limited sense,reviewed the opinions in construction of the statute in the country of it's origin,I have deemed it essential to the purpose of this theses,to enter into a somewhat prolonged discussion of the cases,involving the same problem and like principles,which have presented themselves for adjudication to the New York Court of Appeals and several of the inferior trbunals of that state. These cases present substantially the various arguments upon the proposition pro and con. For that reason, having neither the space nor the disposition,I shall be content with their exposition,in the consideration that the numerous cases in point,decided in the jurisdictions of other states,while determining our proposition either for or against advance in either direction the"rationes decendendi" which are clearly developed in the English and New York cases and which vary

EXPOSITION AND DISCUSSION OF PERTINENT NEW YORK CASES.

The earliest case demanding a construction of the New york statute, which is substantially the English Act, is that of Dibble vs: The New York & Erie R. R. Co. The action was brought by the personal representatives under the statute to recover damage for a wrongful death. An accord and satisfaction with the injured party was offered in bar by the defendant company. The fact was not disputed. The Court, by Johnson, J., said:-

"The right of action is made to depend not only upon the character of the act from which death ensued but upon the condition of his claim at the time of death also ! *****"The object of the statute was to continue the cause of action which the injured party had and which he had not enforced, but might have enforced if death had not ensued, for the benefit of the widow and next of kin to enable them to obtain damages resulting from the same primary cause and not to create an entirely new and additional right of action. . The plaintiff's construction would give two actions for a single wrongful act and frequently a double compensation for the injury flowing from it to the same individuals".

The refutation of the proposition that the statute made the action it created, depend upon the status of the claim arising from the wrongful act as well as upon the actionability of the wrong itself, I leave to the analysis in Littlewood vs. The Mayor. The proposition that the object of the statute was simply to continue the cause of action which the person injured had and not to give a new and additional right will not bear scrutiny. An act pro-

viding for the survival of rights of action for personal injuries would have accomplished the desired end and have completely obviated the operation of the maxim "Actio p personalis". Can it be said, with reason, that LordCampbell's Act, an act providing for the "compensation of families of persons killed in accidents" was the legislative method of effecting the abrogation of the simple rule that personal actions die with the person? Can it be said that an action making the fatal result of an injury a civil wrong actionable for the benefit of different persons, was merely a means of providing for the survival of the right of action which vested in the party injured? If the theory was the fact, the Legislature, for the cure of a simple defect, have staggered blindly and circuitously to a goal which they have not reached, if the universal construction of the act is to be accepted.

The Judge says, that "the plaintiff's construction would give two rights of action for a single wrongful act and frequently a double compensation for the injury flowing from it to the same individuals". Rights of action are never given for a wrongful act. They are given for the injuries that flow there-from. The wrongful nature of the act is the test of the actionability of the injury w ich gives that injury the legal right to redress. Continuing, he says, "that it would give frequently a

double compensation for the injury flowing from the act to the same individuals." That could not be so. The injury to the deceased, if compensated for, would bar the rights accruing by virtue of that injury. It is an absurdity to maintain that he could recover for his own death or that a recovery for the injury flowing from his death is in fact a recovery for the personal injury primarily flowing from the wrong. To conclude, the injury which is the subject matter of the statutory action flows to and accrues for the benefit of the wife, children or kin; the primary injury to the person of the individual flows to and accrues for his sole benefit, so that it is obvious that there are DIFFERENT AND DISTINCT INJURIES TO DIFFERENT AND DISTINCT PERSONS, WHICH ARE TO BE DISCHARGED BY A SEPERATE AND DIFFERING SATISFACTION.

The decision in this case was appealed from and the argument in the Court Of Appeals resulted in an equal division for and against it's affirmance. A reargument was ordered but the appeal seems never to have been finally determined. The re-argument was heard during the term with which the Court was engaged with the case of Whitford vs. The Panama R.R. Co. which we shall next consider and in which, the same principles substantially being in controversy, the court, by a division of five to one, over-ruled in effect the decision of the general term

in the Dibble case. In the Whitford case Denio,J., writing the opinion said:-

> "It is not a simple devolution of a cause of actionwhich the deceased would have had that the statute effects,but it is an ENTIRELY NEW CAUSE OF ACTION WHICH IS SOUGHT TO BE ENFORCED. The statute does not profess to revive his cause of action in favor of the executor or administrator. The compensation for the bodily injury remains extinct,but a new grievance of a distinct nature,namely,the deprivation suffered by the wife and children or other relatives,of their natural support and protection,arises upon the death, the subject of a new cause of action in favor of those surviving relatives, but to be prosecuted in point of form by the executor or administrator"

Comstock,J., dissented from this decision on the ground that the statute was only required to create a survivorship of the cause of action existing at the common lawand maintained the double damage theory in the view that whatever the deceased might have recovered in his life time,would have become a part of the estate and thus have passed to the widow and the next of kin.

I cannot see why the fact that they were indirectly the gainers by the well deserved compensation which the deceased had recovered in his life time should preclude them from the far greater damage which they had sustained by reason of his death. In any event the reasoning is mere abstraction and not in the slightest degree based upon elements of construction afforded by the statute. Admitting,for the sake of argument,the plausibilty and force of the suggestion,it's weakness is,I think,exposed by this following concrete illustration. Suppose "A"

receives personal injuries from "B" and six months thereafter dies leaving ~~him~~ surviving him a widow and one child. His estate is insolvent. Before his death however he settles the matter of his injury at the hands of "B" for $500 ($500.00) and takes "B's" note there-for at seven months. After his death the note passes to the administrator who collects it and pays the proceeds to his creditors. In such an event *the slight gain* which they might heve derived from the compensation for the personal injury is made conditional upon the solvency of the deceased's estate, and in any event they are but the gainers in the sole respect of what he has received for his Physical suffering, for the reason that the compensation for medical expenses, nursing &c. as also the loss to his business, merely fill up a gap made in the estate by the personal imjury itself, and leave the estate in the same financial position which it had before the commis ion of the wrong.

The above illustration demonstrates conclusively thatthat if recovery or settlement for the personal injury is to bar the statutory action then, in the cases for which it is really intended to provide, the statute itself will sub vert it's own purpose.

Following the case of Whitford vs. The Panama and submitting to the authority of the principles enunciatted in that case, it was decided in SSchlichting vs. Wintgen

"that it was no defense to an action brought under the statute that the deceased had in his life time brought an action and recovered and collected a judgment against the same defendant, for damage sustained by him by reason of the same wrongful act". After quoting Whitford vs. Panama Dykman, J., continues:-

"There are facts for it's (the statutory action's) maintainance now which had no existence at the time of such judgment: now the husband is dead, and although the wrongful act of the defendant remains the same, yet that event has shown that other persons are effected by it who were not before, - the wife and next of kin are deprived of protection and support". The common law gave no redress for such loss, because legal liability departed with the person receiving the wrong. All remedy was interscinded by the decease, but this statute created an action for surviving relatives for the pecuniary injuries resulting to them from the death".

The last sentence prompts the remark that the evil to the wife and kin has ever existed, there loss has ever been a consequent of the wrongful act, which the law, by the statute, for the first time offers cognizance and suffers a redress.

We have now arrived, in chronological progress, to the discussion of a case which presents the argument in opposition to the theory which we have seen fit to favor, in the strongest aspect of which it is capable, with a clearness and force, (and I may add an ingenious logic) which has ever characterized the opinions of the learned judge who is the author of the prevailing opinion.

To the trained intellect of Judge Rapallo it was

clearly evident that the "rationes decendendi" advanced in the case of Read vs. The Great Eastern, and the subsequent decisions of the same import, were the sophistries devised for the defence of a construction that was purposed to defeat an effect which failed to accord with certain judicial criteria of justice. These "rationes decendendi may be classified as follows,-

(I). That the action for which the statute provided was the mere survival or continuation of the right of action that had or would have vested in the deceased.

(II). That the actionable right under the statute, while it's scope is enlarged and it is based upon entirely new elements or principles of damage, deriving it's actionability, as it does, from the same wrongful act from which the primary injury flowed, it is for that reason dependent for it's maintainance upon the status of the right created by that primary injury.

(III). That to allow a recovery upon both the common law and statutory right would be to suffer a dual compensation to be had for the injuries that resulted from the same wrongful act. (to restate the double damage theory).

His negative of the first and third propositions is

embodied in the sentence"That the right of action given by the Act of I847(substantially Lord Campbell's Act)to the personal representatives of one whose death has been caused by the wrongful act,neglect,or default of another, is a new right of action created by the statute and is not a continuation in the representatives of the right of action which the deceased had in his life-time."

The third proposition is rejected from consideration in these summary terms,-"The damages of the party injured are different and distinguishable from those which his next of kin sustained by his death and no DOUBLE RECOVERY OF THE SAME DAMAGE WOULD RESULT."

It is thus apparent that he has refused to resort to the reasoning or the authority of fallacious precedent in accomplishing a determination of the question in controversy. Seeking an identical result he has chosen other means for the attainment of his end. The method he has adopted has little to do with the relation of the respective rights. His argument is confined to the interpretation of certain of the enacting clauses in the statute and upon these clauses,or parts of clauses,he has placed reliance for the maintainance of the proposition,which is incorporated in the following extract from the opinion,and which presents,in substance,his argument in contravention of the theory whih we incline to

to favor;-"That it was the intention of the statute to provide for the case of an injured party who had a good cause of action,but died from his injuries without having recovered his damages,and in such a case to withdraw from the wrong-doer the immunity afforded by the common law rule that personal actions die with the person,and to give the statutory action as a substitute for the action which the deceased would have had while he lived"

The clauses upon which he has made dependent the esta-blishment of this construction are these;-

N.B. See next page i.E. 42.

"That the wrongdoer shall be liable to an action for damages notwithstanding the death of the person injured,and a though the death shall have been caused under such circumstances as amount in law to a felony."
(2). "That the act,neglect or default is such as would(if death had not ensued) have entitled the injured party to maintain an action and recover damages".

Of the first clause Judge Rapallo has this to say,- "It does not say that the wrong-doer shall have satisfied the party injured,or notwithstanding that the latter has recovered judgment against him,or notwithstanding any other defense that he might have had at the time of the death,but merely that the that the death of the party shall not free him from liability,showing that this is the point at which the statute is aimed."

I think that the language will not warrant the attaching of this further significance and alternate meaning to the clause in question,and that an analysis of the clause will establish the soundness of my criticism. It's intendment is explained by the nature of the function it fulfills. This clause is incorporated in the statute for the purpose of effecting the survival of that quality of the wrong,in relation and subject to the environing facts which would,by virtue of the rule "Actio p ersonalis", have been destroyed at the common law,or which,if not destroyed,would have been futile,for the reason of there being no principle upon which the injuries flowing from and based upon the death,could have been redressed at law. It was intended by this clause that death should be a wrong to the next of kin or the widow,that wrongful homicide should be a tort. It was intended by this clause

To preserve the quality which gave the original injury it's actionability at law, so that it might be the actionable basis for the statutory wrong, which is death; that that the actionability pertaining to the right which the deceased had, shall survive to the statutory right for upon the actionability of the deceased's right of action that statutory action is made to depend. If the statute had made the action it created dependent upon the existence of a right of action in the deceased, or a right of action that survived the deceased, the statutory action could not, for the most part, be maintained. If death had been instantaneous no right could vest and the statutory action would not accrue. If the primal right had vested and the person injured had died before recovery there-upon, the statutory action could not be maintained for the reason of the maxim "Actio personalis". This very fact controverts conclusively Judge Rapallo's proposition that the Legislature intended that that the statutory action should depend upon the existence, in the injured party, of a right to sue if he were still alive. If the statute, as he contends, was directed to the obviation of that rule, it would not make the right created, dependent upon a right which must have been destroyed (according to his theory) before the statutory action could have been maintained, ~~for~~

for it is not pretended that the statute effects the survival of the common law right.

I think, then, that it is clear that if the intention of the statutory clause in discussion is accepted as being intended to effect the survival of the quality of actionability derived from the original wrong, that is to obviate the principles or defects in the system of the common law that would have accomplished it's destruction, then it may be said to effect perfectly it's purpose and that any reference to the status of one right, existing by virtue of the wrong, would have been foreign to it's object, futile and mere surplusage.

But he says:-

"It says notwithstanding death, and notwithstanding merger, if it meant that the statutory action should not be dependent upon the condition of the deceased' claim (Note,-that is to say upon the status of the right of action for the personal injury primarily flowing from the wrong) why does it not say that the action may be maintained notwithstanding satisfaction and judgment for the deceased's right?"

For the reason that, as I have said, the clause deals with the actionability of the personal injury which it seeks to preserve to the resulting death. Actionability is the quality which creates the original or primary right to sue. It has to do with the circumstances that make the injury wrongful. A satisfaction or judgment has not the slightest reference to the quality of the act which created the right to sue, but relates strictly to the extinguishment of the right which the deceased had, by virtue

of the actionable wrong. The clause is not aimed at the continuation of his action, why then, should it refer to his right and how would the extinction by satisfaction, or judgment of the right, which arose by virtue of one injury which flows from the wrong, destroy the actionability which the statute says shall survive to the action which it creates. The fact that two rights spring from the same actionable source does not make ipso facto recovery upon the one dependant upon the legal status of the other. In short, how can the maintainance of the statutory action which Judge Rapallo admits to be a creation, a new right based upon a different principle, be made, in the absence of an express provision to that effect, to depend upon the status of another and wholly different right. It I affirm, cannot be reasonably so concluded. For in the absence of an express provision the logic of the situation must prevail which renders clear the soundness of the conclusion that the Legislature did not intend to effect the situation of the respective claims; that this clause in review was intended solely to provide that the actionability which arose from the original wrong should survive certain obstacles, and render the death resulting from such injury likewise actionable.

The confusion in the respect of this clause arises from the fact, that the statutory right of action is based upon an injury that flows secondarily from the primal wrong,

that the common law and statutory rights have the same actionable source. This created in the superficial constructionist the idea that the satisfaction of two injuries resulting from the same wrongful act is a dual payment for the damage it occasions and that there-fore such a situation could not have been intended by the legislature. Nothing was ever more apparently absurd.

In conclusion, this clause was intended to fix the test of the liability for the statutory wrong, which is death. It serves it's purpose adequately and completely. It provides against and obviates the only principles in the system of the common law which could have effected the destruction of the actionable quality essential to the statutory action. It is sufficient for itself and a reference to rights would have been surplusage.

Judge Rapallo referring to the second clause continues:-

"The condition upon which the statutory action depends is declared to be that the act, neglect or default is such as would (if death had not ensued) have entitled the injured party to maintain an action and recover damages. This language was strictly accurate if the language was intended to apply to the case of a party, who, having a good cause of action for a personal injury, was prevented by the death which resulted from such injury from pursuing his legal remedies, or who omitted in his life time to so do. It precisely fits such a case but it is singularly inappropriate to one who in his life time had maintained an action and actually recovered his damage".

It is apparent, as Judge Rapallo admits in a latter clause, that the condition that the wrongful act must be such as would have entitled the injured party to maintain

an action"refers to the circumstances of the injury and the character of the act,including the question of contributory negligence" but,he adds,"it does not follow that it can have no further effect".

For the purpose of maintaining the construction which he favors,he extends it's meaning from an express reference to the quality of the wrong (which looks to a resulting actionability) to a reference to the legal status of the claim,or the condition of the vested right accruing to the injured party by reason of the injury which he has sustained from the wrong done him. In effect,he changes,colors and extends the clause to a further meaning expressed accurately in this sentence:-That the statutory liability shall depend upon the condition that the wrongful act,neglect or default is one (not such) which would have entitled the injured party to maintain an action if he were alive. That is to say,substantially, that if the injured party had extinguished his right of action,a right of action which would vest and perish before the right of action created by the statute can exist, then the statutory action shall be barred before it can possibly come into being. I think that this further effect is not warranted by the language and that if it were warranted it would be inharmonious with the body of the statute.

The clause makes the condition upon which the statutory action shall depend,to be,that the"act neglect or default is such"-

The clause is manifestly directed to the nature of the wrong from which tha actionable right of the party injured arose. It cannot be rightfully be strained from a reference to the nature of a wrong,to the condition of a right which that wrong creates. If such had been the purpose of the Legislature they would not have intrusted their intendment to the doubtful expression that is said to embody it;they would not have left so vital an element to the uncertain interpretation of a varying judicial intellect but would have,by an express provision,placed the intention beyond judicial conjecture. If such had been the effect they had intended,could it not have been plainly and accurately accomplished,by a clause which would have made the statutory liability dependent,not upon the nature, ~~of the nature~~ of the act,neglect or default,but upon the right of the injured party to have maintained an action for the wrongful act &c. at the time of his death or,in another form,if he were still alive. How simple and adequate would such a provision have been to the construction for which the learned Judge argues! How significant is the omission, and can he in the consideration of the various rights effected,substitute,by interpretation,a meaning totally diverse to the one so accurately express-

-ded in the language,when by a simple provision,the Legislature could have expressed the intention,which as he maintains,governs their enactment. I think that it is manifest that the Legislature intended to confine the clause to it's patent nature,strictly to the wrong from which the statutory right is to derive it's actionability.

Continuing,the clause makes the statutory action dependant upon the condition that the act,neglect or default is such;-

The word,such,demonstrates a reference to it's nature,not it's condition showing that if the condition and not the quality had been in mind,the word used would have been inapplicable.

Again,the act,neglect or default must have been such as would:- The word would Judge Rapallo relates,by his interpretation,to the period of the death,to the abiltiy of the injured party to maintain an action as if he had lived. I think that not to be the proper interpretation. It means that the act &c. must have been such as would,by reason of it's nature,have entitled the injured party to maintain an action from the very time of the happening of the injury, that it does not mean that the statutory action shall depend upon the continued existence of the injured party's right of action from it's accrual to the period of his death. It refers to a single vesting and not a con-

tinuance until the right shall have been destroyed by death or merger.

The act,neglect or default is such as would(if death had not ensued).

To the words"(if death had not ensued)"the Judge attaches the deepest significance. He affirms that it shows that the legislature had in mind the case of one whose death prevented him from enforcing his right and not the case of one who had recovered his damages and then have died. I think that it does not purport such a meaning. or that the clause was incorporated in that thought. This expression for it's fair analysis must be taken in connection with the next two succeeding words "have entitled". Taken together their meaning must be construed to be(if Judge Rapallo's interpretation is to prevail) that when the wrongful act,neglect or default was of such a nature that the deceased could not have recovered at the period of his death,then,and in every such case the personal representatives may maintain an action for the benefit of the widow and the next of kin. If such were the true intent of the clause,that is to say if it referred to the deceased's existing right to sue at the period of his death,then in every case where the death is instantaneous there could be no recovery under the statute,for there would have been no vested right in the deceased upon which it could have been based. If the

import of the statute is that the statutory action can only be had where death or merger prevented the deceased from being"entitled" to sue,then the action could only be maintained where the death was instantaneous,for the reason that the survival of a minute would have entitled him for that minute to maintain his action and as he "would have been entitled to sue" the statute cannot operate to give the action for the benefit of the widow and the next of kin. It is apparent,I think,that if you adopt the judge's intrepretation as to any one word,to obtain anything like sense you are compelled to eliminate or change entirely the meaning of the others which perfect the clause. Such a construction is untenable.

This last argument may of course be answered by the substitution of the word "could" for "entitled" which,I must admit,would be in strict accord with the judge's mode of construction which is merely a confirmation of the statute to his standard of justice and the judicial idea of what would have been the wise,*and expedient measure. The word "entitled" manifestly confines the scope of the phrase to this,that the deceased must have at onetime,if had lived long enough for the vesting of an action,been entitled to maintain an action;that the nature of the wrong must have been such as would have given him a subsisting right of action,;that the fact that the deceased

was or would have been entitled to maintain an action , shall be the test of the right of the representatives to sue under the statute." Judge Rapallo to the contrary maintains that it means that the wrongful act, neglector default must have been such that it prevented the injured party from obtaining his redress at law before his death, such being, as he thinks, the sole situation which the Legislature had in mind. In my opinion to so interpret the clause would be to unwarrantably alter the expression which so accurately and consistently embodies the condition, that as the statutory action is dependent upon the actionable quality of the primary wrong, that that actionable quality shall survive the effect of those principles which would have otherwise extinguished it and shall be the basis of the created right.

In a subsequent paragraph of his opinion Judge Rapallo says:-

"That the language of the act plainly indicates, I think, that the framers had in mind the common law rule "Actio personalis", and that their main purpose was to deprive the wrongdoer of the immunity afforded by that rule".

If I may differ with the learned judge, I can see nothing in the general scope of this enactment from it's first to it's last word, which indicates expressly, or indeed inferentially, the intention of effecting the abroga-

tion of that rule. The very nature of the "rationes decendendi" in the case at hand demonstrate most thoroughly that if there is in the enactment any such latent intention,that it is only to be derived from such materials as an inference(which borders on creation),an alternate and presumed significance of words and phrases bearing upon their face a plain and consistent meaning. The title declares it to be"an act for the compensating of the families of persons killed in accidents";the preamble recites the evil to be remedied by the act to be "that no action at law now exists for a wrongful death;the enacting part of the statute creates the right to such an action and the subsequent section confines the measurement of damage,under the new right,to the damages resulting from the death. A proposition could not be more completely refuted if we are to be guided by the express provisions of the statute. If indeed it were the true purpose and intent of the act to deprive the wrongdoer of the immunity from liability afforded by the common law rule,then the Legislature must be deemed to have adopted a widely circuitous means for the attainment of their end,and to have intrusted their real intention to the thick shade of inference and ambiguity which is said to surround it.

In the concluding paragra h of t'e opinio the Judge continues :-

"If the act had squarely declared that the action might be maintained notwithstanding recovery and ~~an~~ accord and satisfaction with the deceased in his life time, the legislature might well have paused before enacting it to consider the policy of such a provision".

The Judge ~~castigates~~ castigates the intellect and far seeing prudence of ~~the legislature~~ the legislature when he presumes ~~that~~ t that they were not as fully aware as he, of the state of the common law and the effect of their legislation thereupon, and that they did not know the relation and effect of their enactment to that status. The "assembled wisdom of ~~Brit~~ Britain" or his own new York, must have known that an action existed at the common law for a personal injury, that men sometimes die slowly, and that it was not improbable that a person, between the happening of the injury and the perid period of his death, might bring an action for the personal injury to him and the damage accrued thereupon and recover there-for, or enter into an accord and satisfaction for the same, and that after such satisfaction or recovery the injury might result in death.

Such a contingency would have been patent to the least intelligence and the fact that thy they did not declare that a recovery or satisfaction in the lifetime of the deceased should be a bar to the action under the statute, conclusively warrants the inference that they intended that it should not so operate.

If their desire was to merely avoid the effect of the maxim "Actio personalis" why then did they not adopt the simple measure that would most naturally suggest itself, a survival statute. Why does not that purpose appear somewhere in the act expressly? Why is there intention left to inference and presumption? If the intention was that the action created should be a substitue for the commonlaw right of action, would it not have been natural, in view of the great diversity in the nature of the rights, that they somewhere express so vital an element of their intention? since they have not is it not a highly arbitrary rule and an unwarranted one, that effects a bar?

Continuing the foregoing sentence, he concludes:-

"The legislature might well have paused to consider the policy of such a provision and how prejudicially it would operate against the interests of the party injured by depriving him of the power of settling his claim or of realizing anything from it in his lifetime. It would naturally, if not inevitably prevent such settlements and procrastinate litigation until it could be determined whether death would ensue from the injury."

I cannot see, in a broad sense, how it would operate prejudicially upon the interests of the party injured in depriving him of the power of settlig his claim or realizing anything upon it in his lifetime. The existence of his right of action is as well established by the authority of the common law as the action which vests in the personal representatives by the enactment of the Legislature. They are absolutely independent one of the other.

A settlement or recovery for his injuries by the deceased in his life-time, would bar the right of action which was his. The primal right would be, in such a case, that is by the agreement of the parties or the operation of law, absolutely extinguished and the right of action thereby accruing be barred If there were no such agreement or recovery the death itself, per the common law rule, would prevent recovery. Of course it would be the natural policy of the wrongdoer to refuse settlement for the right of action based upon the personal injuries in the hope that the fatal result of his own wrong would extinguish the right of action before recovery could be had, and it would in that degree procrastinate litigation. While the refusal of the wrongdoer would render an action, in a sense imperative, and in that procrastinate litigation, the evil occasioned by such procrastination is insignificant when we view it in comparison with the result occasioned by the construction which would compel the injured party, if he were to care at all for the interests of a dependent family and wished to guard those interests, to foresee his own death and by such a foresight refuse the acceptance of a pittance which would if accepted, bar the right of the representative from recovering the far greater damage under the statute; and to the very money which he might accept in satisfaction of his injury would

not,if his estate were insolvent,benefit in the least degree his family,for the reason that it would be subjected to the payment of his debts.

We have now completed the discussion of the substitute theory" which is given it's most forcible presentation,by Judge Rapallo,in the case reviewed,and which comes nearer,than any other propounded,to a forcible argument contrary to the view which seems the best to us. It is not arrived at by a logical progression,by a comparative study of the relation of the statute to antecedent law ,~~but~~ but is evolved from the unsubstantial basis of inference, alternate and dual meaning,and a creation and acceptance of a secondary meaning in a case where inference is tolerable,such secondary meaning being inconsistent with the general frame of the act.

Succeeding the case of Littlewood vs. the Mayor in June,I885,it was said,upon a collateral question,in Hederich vs Keddic,-

"That the wrong defined by the statute,indicates no injury to the estate of the person killed,and cannot either logically or legally be said to effect any property rights of such person unless it can be maintained that a person has a property right in his own existence. The property right created by the statute is one existing in favor of the beneficiaries of the recovery only,and depends for it's existence upon the death of the party injured. It has no previous life and can~~er~~not be said to have been injured by the very act which creates it"

Again it is said contra to Littlewood vs. The Mayor,s supra,

"That the description of the actionable clause seems to be inserted merely to characterize the nature of the act which is intended by the statute to be made actionable, and to define the kind and degree of delinquency with which the defendant must be chargeable in order to subject him to the action, or, as said in the Whitford case, "the act, neglect or default must be such as would, if death had not ensued, have entitled the injured party to maintain an action. The significance of the words "if death had not ensued" is apparent. Had the description ended with the words "who would have been liable to the decedent" it might have been contended with force that the statute did not apply where death was instantaneous, for in such a case it might have been said that the decedent had no cause of action in his life-time. The words "if death had not ensued" indicate that the test is not the decedent's actual opportunity for bringing suit, but whether the wrongful action and his relation to such, as if he hed lived, would have given him a right of action".

In the case of Murphy vs. N.Y. Central & H.R.R.R. Co. it was held,-

"That the right of action given by the statute to the representatives of one whose death had been caused by the wrongful act, neglect or default of another, is a new right of action created by the statute, and is not the mere continuation by the personal representatives of the right of action which the deceased had in his life-time".

In Murray vs. Usher, an action for the wrongful death, evidence was offered by the defendants that they had paid the expenses of the support and maintainance of the person injured up to his death and for his burial. Upon this point, the Court in the opinion delivered, said:-

"That the proof was not offered with a view of showing that the cause of action in favor of the decedent had been satisfied or discharged, and no such defense was set up in the answer".

This ruling of the court followed the logical premise established in the case of Littlewood vs. The Mayor, supra, which the court accepted as determining

"That the action given to the next of kin by the statute while not a continuation

of the same right of action which vested in the intestate, was, nevertheless, made dependent upon the existence of a cause of action in the decedent at the time of his death, not satisfied or otherwise discharged, for the recovery of damages for the same negligence".

In following, as I have said, this premise, The court has involved itself in a glaring and almost ridiculous inconsistency. The satisfaction of the very elements of damage upon which the deceased's right of action would have been based, are offered in evidence in mitigation of the damage sought to be recovered under the statute, and, as being of that nature and inasmuch as they are offered for such a purpose, they are excluded from consideration, the court saying, "that if these elements of damage had been offered, not in the intrinsic form of acts or payments, as the MITIGATION OF THE RIGHT TO RECOVER, BUT IN THE FORM OF THE EFFECT OF THE ACTS OR PAYMENTS, NAMELY, OF A SATISFACTION OR DISCHARGE, THAT IS TO SAY, IF THE LEGAL FORM HAD BEEN PRESENTED, RATHER THAN THE REAL SUBSTANCE OF WHICH IT WOULD HAVE BEEN COMPRISED, then and in every such case, these elements of damage, or rather their satisfaction, might be properly admitted. This suprising reverence for legal form was inevitable if they were to submit to the "rationes decendendi" presented in the case of Littlewood vs. The Mayor. It reveals the very falsity of the situation by the shifts to which it is reduced in the submission to the authority.

The latest case decided in New York, pertinent to this thesis, is that of Wooden vs. The N.Y. & Penn. R.R. Co. It repeats substantially the propositions which we have previously exposed.

Before resigning the discussion of the cases in point I am constrained to saythat in a case which was argued in the Moot Court of this University, and which embodied the precisely the situation which we discuss, an opinion was delivered which I may say(disregarding the suspicion which such a statement may create)more clearly developed the status in jurisprudence of the rights considered, more logically deduced conclusions from their relations and nature, and more squarely conformed to the established and fundamental rules of construction and interpretation, than any opinion upon the point in issue which has been rendered in any court since the question was first mooted. It covers completely and succinctly the arguments "pro and con" and arrives at a judgment of reason Reason, unhampered and unimpeded by judicial sophistry, error or particular criteria of justice.

RECAPITULATION.

I have treated, certainly with length, and I think with thouroughness, every case materially in point which has been adjudicated within the jurisdictions of England and the State of New York, cases which present every adverse and affirming argument.

My annotations or criticisms I have intended and believe have ,to a great degree exposed the "rationes decendendi", and if they have not demonstrated their fallacy have at least manifested their strength,as resistance will. I have directed therefore,in conclusion,to a recapitulatory consideration of the rights whose nature and relation we seek to know as a means of determining the intendment of the act and the solution of the problem which is the subject of this theses.,to which I shall at once proceed.

Existing in the system of the common law were two defects or evils,the one positive,the other negative,. The first consisted in an established ,operating rule . The second,in the lack of a principle,which lack precipitated evil upon the interests and rights of individuals. The first was the rule"Actio personalis moritur cum persona". The second the established doctrine of the common law that the death of a human being could not be complained of as a civil wrong.

A statute bearing the name of "Lord Campbell's" ACt was enacted by the parliament of Great Britian to remedy one of these existent evils. Its title expressly states that it is directed to the creation of an action for the compensating of families of persons killed in accidents. It's preamble recites that the evil which it is intended to cure is the lack of a principle in the system of the com-

mon law which would have enforced the right whose recognition they deemed essential to the welfare of society. This purpose is manifest in the phrase "where-as no action at law is now maintainable against a person who by his wrongful act ,neglect or default,may have caused the death of another person".

The enacting clause of the statute consistently,accurately,and adequately provides for the incorporation of the desired right in the system of jurisprudence. It states plainly the nature of the action,the test of the right to maintain which,they established as the wrongful quality of the injury which caused his death;and lest this actionable quality,by the operation of certain rules or principles of law,should perish,they expressly obviate their effect by saying that the action shall be maintaind not-with-standing the death of the person injured and although the death shall have been caused under such circumstances as amount in law to a felony".

It's nature,the very provisions of the act ,refute conclusively the proposition that the act was intended to obviate the rule"actio personalis"for at no place in it's context does there appear the slightest reference to the rule,but the very reverse. The enacting method taken

for the remedy is strangely, ridiculously inapplicable to the rule or it's obviation. A new interest is guarded and new persons are created its beneficiaries, persons upon whom that rule could have had no effect; and the very elements of damage for which a cure of the rule should have provided a recovery not-with-standing death, are disregarded utterly, and new elements designated and substituted. That, there-fore, the intention of the Act as gathered from it's structure, inherent nature, fair effect and expressed purpose, is not the abrogation of the maxim "Actio personalis moritur cum persona" is demonstrated, and it is established contra that the principle to be affected was the one which provided that the wrongful destruction of a human life should not be recognized as a civil wrong.

Accepting these last conclusions as our premises we will develop the various theories of it's nature and purpose here-to-fore propounded.

(I). It has been said that it is a continuation of the deceased's right of action.

This proposition needs no refutation in reason or authority. It arose and was plausible in the fact that the thing continued was the actionable quality of the wrong and not the primary right which sprang from it.

(II). The second theory advanced was that it was a continuation of the deceased's right of action with it's scope enlarged to include the damage

resulting from the death".

This theory was as erronious as the other for the reason that it was based on a refuted continuance. It is slightly more plausible in that it accounts for the new and different damage awarded. It's error is based like-wise upon the survival or continuance of the action able quality of the wrong.

(III). The last theory of the Act ,which is propounded in the case of "Littlewood vs. the Mayor",is the one which affirms the statutory action to have been intended by the legislature,as a substitute for the right of action which the deceased had,and for which,by virtue of his omission or inability,he had neither effected a settlement or obtained a recovery.

The first two theories are admitted fallacious and are denied by the author of the third. He perceived that the very act itself and it's intended effect furnished th the means of their complete refutation.

In the pursuance of some idea of which he was possessed,or in the desire to satisfy Authority by submission to the judicial idea of justice or WHAT SHOULD HAVE BEEN DONE,he developed a most ingenious theory and one ~~th~~ that from it's very nature defies a conclusive refutation. Like the infallible arguments of Henry George they present a fallacious front but,for the life of you, you cant get at their roots,-for the very good reason,in

the case in hand,that they are beyond the Act itself,~~whi~~ which is ordinarily the basis for construction,and lie far out in intangible realms of justice,of mental intention,of things that should have been. His processes of argument are inference,alternate meaning and ideas as to a certain policy they would have pursued,if they had perceived a certain evil that has since arisen.

Though the statute is adverse in it's provisions,~~tha~~ though it looks directly to the cure of another evil and states clearly the purpose,though in truth it proceeds to cure in the enactment the evil sought to be remedied, the "Theory" interposes and says,"That it is all very well,but that they did not mean what they said,that they had in mind a very different evil,and that this different evil,not-with-standing the inapplicable method of cure,~~wa~~ was the evil they intended to remedy. It in effect maintains,that when the statute provided that the quality and the conditions which render the primary injuries flowing from the wrong actionable ,should be the test of the right to maintain the action under the statute,-they in reality meant more and differently than they said for the reason that their purpose was to make the right to sue under the statute dependant upon the status in law of the deceased's right to sue for the primary injury.

Turning from the theory itself,we will for a time consider the logic of it's effect. A person receives an injury from a wrong done him by another. It costs him pain and suffering,medical or surgical expenses,loss of business and such other damage as might naturally have flowed from the circumstances of the injury. The wrongdoer perceiving his liability enters into an accord and satisfaction with the person injured,He compensates him for the apparent damage occasioned him and the injured party,not knowing that he is about to die(as the case may be),accepts that recompense for the damage he has received in satisfaction of his right,and by that fact bars a different right,which vests in different persons,based upon different and distinct elements of damage and which in truth,IS NOT AND CANNOT BE IN EXISTENCE AT THE TIME OF IT'S LEGAL DESTRUCTION. There appears a slight fallacy in the reasoning. How can a person release that over which he has no control,and in which he has neither right or interest.

Suppose the injured party to have received a latent hurt,which to the eye is slight and which threatens no danger of life and,relying upon the appearance,he enters into an accord and satisfaction with the wrongdoer upon the basis of the injury which he beleives he has received "Ipso facto" the right of action which would have arisen at his death,from the injuries fatal result,is extinguish-

-ed.Is that a rational effect which rests the utility of the statute and the right which it creates upon the judgment of a single,injured and disinterested man,which makes the right to recover for the great wrong of his death dependent upon his ability to foresee it. The effect seems as absurd as the intention applied to the language.

The cause of the conflicting interpretations of the statute,the origin and plausible bases of the various theories developed to satisfy individual ideas of justice, consist in the fact that the injury to the deceased,and the death or injury to his family and kin,both originate and derive their actionability from the same wrongful act. It is therefore said that compensation for the two injuries which flow therefrom is a dual satisfaction for the same wrong. A man fires and hits one man and the ball passes through and strikes another. The first recovers for the injury he has received. Should that recovery bar the right of action of the second. The injuries flow from the same wrongful act. You respond that the person secondarily injured does not claim damage through the injury arising from the first effect.ie§,the injury to the man first shot. You are assuredly right. Neither could the injured party or his representatives maintain an action for the death after recovery for the primary wrong.

Again, while it is true that the widow and the next of kin, recover for an injury which flows from a wrong that worked a primary injury to the deceased, yet they recover by the express authority of the statute which affords their right to redress.

A second cause of the conflicting interpretations, consists in the use of the words and sentences which operate to effect a survival of the actionable quality of the wrongful act, with reference to the surrounding circumstances. "If death had not ensued", -Notwithstanding death". and "Although death shall have been caused under such circumstances as amount in law to felony", are the clauses that have afforded, in interpretation, color for the argument, that the legislature referred to the condition of the right and not the nature of the wrong. It is said that they might have meant the one, viz., the actionable quality, as a test for the statutory action, and likewise have included the other and different meaning, which would have so qualified the right as to have made it in a great measure inoperative. If the act had squarely said as they contend it to have been the intention of the legislature, that the statutory action could only be maintained when the decedent could have recovered for his right at the period of his death. The theory would be incontrovertible. In the absence of such an expression, any rule gathered from the

slight and dubious material for inference incorporated in the statute, would be of a highly arbitrary nature and must rest upon the fiat of the court, which is a species of legislation.

Another element of the argument which I am constrain-ed to note, in relation to the theory of substitution, is the fact that the act itself is creative, a creation pure and simple. If the legislature had in mind the intention of substitution or dependency for, or upon the common law right, the action would not have been the clearly independent creation that it is, -or accepting the interpretation of the clause questioned, they would not have left their intention to substitute or render dependent, to mere inference but would have clothed it in explicit and express language.

The opinions of the various judges who favor the construction which appears to us to be the wrong one, dew-elop, as we have shown, different and more or less falla-cious means of attaining the desired end. The very fact of their divergency is evidence that they were written from the standpoint of the judicial idea of justice and that they were attempted to be sustained by a judicial logic, varying in ingenuity and force. With a discussion of this inherent justice we will conclude a lengthy thesis.

Aperson upon whomn a personal injury is inflicted receives,to a greater or less degree,or rather suffers, physical pain and whatever of an estate he may possess is subjected to the payment of the expenses that are necessarily incurred in the treatment of the hurt received. For this he may effect a settlement or obtain a satisfaction. His death results. A dependent family is suddenly deprived of the means of subsistence and support and not,infrequently,face the direst want. More valuable interests are affected,-ties are sundered which result in injuries that lie beyond the domain of pecuniary estimation. Is it just that the compensation received for the personal injury,which results,with the exception of the part awarded for physical suffering,in actual pecuniary loss,should bar the damage for the greater and inestimable Wrong,Death,for which a money judgment is a paltry,mocking satisfaction.

Are we to lean,in our clemency,toward the wrongdoer, the devastator,or toward the wronged,the devastated? If there is no injustice in compelling one who does a wrong to another to satisfy that other for the damage he has sustained then,assuredly,there is no injustice in compelling a person to pay for the consequences of the injury he has inflicted,even though from their grave,fearful nature they can never be compensated for,by the means or methods

of man. A

Allying natural and inherent justice to the determining command of the political sovereign that a death resulting from a wrongful act, neglect or default, should be compensated for within a determined limit, shall we make the effect of it's mandate, depend upon the frail and uncertain structure of human judgment or the condition of a diverse right.

--THE END.--

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