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A NEW DEATH ACT

Milford J. Meyer*

The subject of actions for wrongful death has been always thoroughly complicated.¹ Appendages of minor importance have been added to the century old statutes of Pennsylvania² but modernization or codification has not been attempted. During all this time hundreds of judicial decisions have woven a clear pattern upon the bare outlines of the acts, bending and moulding uncertain terms to meet unusual factual situations, always founded upon the obscure maxim, "actio personalis moritur cum persona," except insofar as the statutes in question modified the rule. Today this rule is no more, and with its passing this intricate and elaborate child of logic and precedent may also be discarded.

On its face merely an innocuous and obviously necessary reenactment of the previously declared unconstitutional Section 35 (b) of the Fiduciaries Act,


²Probably the earliest statute modifying this rule of law in personal injury cases was the Massachusetts Act of 1648, Colonial Laws, Reprint of 1660 Ed., page 126, although there is evidence of departures from the rule in ancient times: cf. Coliseum Motor Co. v. Hester (Wyo.) 3 Pac. (2d) 105. The famous English statute of 9 and 10 Vict., ch. 93, called the "Fatal Accidents Act" but popularly known as "Lord Campbell’s Act," upon which most of the death acts are based, was not passed until 1846. An apt criticism will be found in Van Amburg v. Vicksburg, etc., Co., 37 La. Ann. 650: "Legislation and jurisprudence have combined to perpetuate the extraordinary doctrine that the life of a free man cannot be made the subject of valuation, and under the domination of that dogmatic utterance, made earlier than the Roman Digest, reproduced therein, and echoed by the courts of all countries from then till now, the singular spectacle has been witnessed of courts sanctioning damages for shortlived pains and refusing them for long-life sorrow and the pecuniary losses consequent upon the death of one from whom was derived support, comfort and even the necessary stays of life."

³The Pennsylvania statutes are: 1831, P. L. 669, secs. 18, 19; 1855, P. L. 309; 1911, P. L. 678; 1927, P. L. 992 (12 P. S. Ann. 1601-1604). The amendment of 1937, P. L. 196 (12 P. S. Ann. 1602) is considered infra. For an outline of the essential features of the statutes and decisions, which it is not our purpose to review, see 2 U. of Pitt. L. R. 167.
the Act of 1937, P. L. 2755 (20 P. S. Ann. 772) may be far reaching and perhaps even revolutionary in its effect upon this field. The Legislature, by failing to correlate this enactment to existing law, has raised complex problems which may not be solved adequately for some time. It is our purpose to consider these problems and suggest their solutions.

This act reads precisely as did the Act of 1917:3

"Executors or administrators shall have power, either alone or jointly with other plaintiffs, to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced, except actions for slander and libel; . . . ."

Obviously the first question to be determined is whether it encroaches at all upon the field of personal injury cases. But in answering this query we need go no further than the very decision which declared the prior enactment unconstitutional. In Strain v. Kern4 our Supreme Court said:5

"Considering this section alone, without reference to the title of the act, it would be exceedingly difficult to reach any other conclusion than that contended for by appellant, for the present is a 'personal action', not for slander or libel, and, by the language quoted, 'executors or administrators shall have power to commence and prosecute . . . . (it, if) the decedent whom they represent, might have commenced and prosecuted it, as unquestionably plaintiff's decedent might have done. It is not necessary to decide this point, however . . . ."

The reenactment, in amending the title of the Fiduciaries Act,6 specifically meets the constitutional objection and we well might assume that the "exceedingly difficult" task of arguing the act out of application to cases of this character will not be overcome now by our courts. This assumption, however, may be weakened considerably when it is noted that the learned judge of the court below in Strain v. Kern never had presented to him nor considered the consti-

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3P. L. 447, sec. 35 (b).
4277 Pa. 209. Suit was brought by an administrator as a result of negligence resulting in his decedent's death. The latter left no widow, children nor parents.
5Cf. Staggers v. Dunn-Mar O. & G. Co., 312 Pa. 269, 272: "... if there was negligence, the injured had a common law right of action against the tort-feasor. When he died without bringing suit, his right died with him."
6At page 211. Compare the similar situation which confronted the courts of Tennessee in the case of Ry. Co. v. Lilly, 90 Tenn. 563, 566, where it was held: "The very comprehensive language 'the right of action . . . shall not abate or be extinguished,' standing by itself, would undoubtedly embrace every case of wrongful death." The language of our act is even broader.
7So as to include "the survival of causes of action and suits thereupon by or against fiduciaries."
tional question. His decision that the act did not apply was reached by a
devious argument which begged the primary question involved. It held that
since the decedent could not have sued for his own death, no right was con-
ferred upon his representative since the act

"deals only with the survival of such actions as the injured man
could have brought. And clearly this could not include an action
based upon his death." 8

It is apparent that this logic is inexorable if the suit of the representative
were brought for the death of his decedent. But it is not. The "personal
action which the decedent whom (he) represents might have commenced" is an
action for personal injuries based upon the tort committed against him by the
defendant. 9 If he actually had begun suit in his lifetime, no question possibly
could arise as to the right of his representative to be substituted for him therein
after his death, even though such death resulted from the injuries inflicted. 10
The 18th section of the Act of 1851 11 provided for the survival of actions, that
is suits actually begun by the injured party during his lifetime, but made no
provision for the survival of the right of action or cause of action for or upon
which suit had not been begun when death occurred.

On the contrary the instant act is not confined to the survival of actions.
It vests in the representative power to "commence and prosecute . . . all
personal actions . . . which the decedent . . . might have commenced;" and

7 Cf. 2 Dist. & Co. 539, opinion by Finletter, J. A careful examination of the briefs filed
in the Supreme Court fails to disclose any discussion of or argument for or against the consti-
tutionality of the act. The only reference to the title of the act there made is in the appellee's
brief in support of his position that the Legislature did not intend to revolutionize the existing
law applicable to death actions.

8 The faulty logic of this decision follows the earlier case of Hill v. Penna. R. R., 178 Pa.
223, 228, which considered the respective effects of sections 18 and 19 of the Act of 1851, supra.
The court said: "While it is very true that the injured party could in no circumstances recover
damages for his own death, yet it is equally true that the cause of action provided for by both
sections is death resulting from injuries."

9 "It is idle to say that when a man is killed by unlawful violence it is not an injury to
the person." Moe v. Smiley, 125 Pa. 136, 141.

10 In Birch v. Railway, 165, Pa. 339, 344, it was argued (and the court below had decided)
that the death act applied to all cases where the death resulted from the injuries and that a
suit begun by the decedent would survive only in cases where the death resulted from other
causes. The Supreme Court reversed, holding that in such case the executor was properly sub-
stituted. Cf. Lutge v. Rosin, 32 D. & C. 338, 344. The opposite conclusion was reached in
Kansas: Hendrix v. Wyandotte County, 245 Pac. 1032.

11 Rights of action, and actions already begun, for personal injury where death does not
result therefrom would survive in any event under a general survival act; they would in no wise
partake of the nature of death actions. Prior to the act of 1937 even such rights of action would
not have survived if suit had not been begun during the lifetime of the injured person: Cf.
Act of 1895, P. L. 236.

It is interesting to note that in Crider v. Moorhead, 51 Pa. Super. 532, it was contended that
even though suit had been brought in the lifetime, the action would not survive if the death
did not result from the negligence charged, the converse of the Birch case. The contention was
again overruled.
that the action for personal injuries is of such nature is the burden of Strain v. Kern.

In considering the effect of this enactment upon existing law it may be well to bear in mind, first, that it is remedial in nature:

"The legislation under consideration is remedial and should be construed liberally so as to effect the intended purpose of changing the former law . . . ." 12

Secondly, that a new rule of statutory construction had been established just before this act was passed:

"The rule that laws in derogation of the common law are to be strictly construed, shall have no application to the laws of this Commonwealth hereafter enacted." 18

Before considering its proper place in this field of law let us enumerate some of the defects of the existing law and the probable effect upon them.

(1) The only parties benefited by the death acts are the surviving spouse, children and parents. 14 The tort-feasor whose victim is survived by none of these classes enjoys almost complete immunity from the effects of his tortious act by reason of the severity of the injuries inflicted. The survival statute would destroy this immunity since the suit under it would be brought for the benefit of the estate. 15

(2) Under existing law full immunity might be enjoyed by the tort-feasor even in some cases where the designated relatives survived. This would occur when the death of the injured party did not result from the injuries received but from some other cause. If he had instituted no suit in his lifetime, none could be brought for the death and none for the injuries. Although no case of this nature has been found, this may well be due to the appreciation of


Cf. Chief Justice Cooley upon the similar Michigan statute: "The statute . . . . is in the strictest sense a remedial statute and as such it should receive not a strict, but a favorable construction. It was passed to remedy a great defect in the law, whereby, through the very severity of the injury which a party's negligence or misbehavior had caused, he in many cases escaped responsibility altogether . . . ." Merkle v. Bennington, 58 Mich. 156.


the Bar that none would lie. The personal representative in such a case now would be empowered to sue for the personal injuries suffered and the damages consequent thereto.

(3) Actions under the death act frequently may be complicated with issues as to prior desertion of a spouse or parent. This issue under a survival statute would be eliminated from the case and relegated to its proper place, the tribunal determining the rights of distribution in the fund raised.

(4) The meagre damage recoverable under the death acts has been limited by the decided cases to the pecuniary loss suffered by the survivors. A far greater measure would be imposed under the survival statute since the suit would be brought not for the death but for the personal injury.

If the instant act is to be given full force and effect, it immediately becomes apparent that resort will be had to action under the survival statute in a great majority of cases.

Having determined that the act necessarily impinges upon the field in question, we next consider the effect to be given this new legislation. A number of possibilities will suggest themselves. The most obvious probably is that this enactment should be construed to repeal the death acts in toto, a

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17 Cf. the argument advanced in Lutge v. Rosin, 32 D. & C. 338, 342. Nor is such a situation within the protection of the Constitutional provision that no act of assembly "shall limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property; and, in case of death from such injuries, the right of action shall survive, and the general assembly shall prescribe for whose benefit such action shall be prosecuted." Constitution of 1874, Art. 3, sec. 21, as amended November 2, 1915. This provision has been held not to affect the death acts which precede it: Books v. Danville Boro., 95 Pa. 158.


19 Namely, the pecuniary loss to the survivor; compensation for the destruction of a reasonable expectation of pecuniary advantage from the decedent based upon reasonably continuous past acts or conduct of the deceased: Gaydos v. Domaly, 301 Pa. 523, and cases therein cited in extenso.

20 Cf. Penna. R. R. v. McCloskey, 23 Pa. 526, 530, decided before the Act of 1855. See Harper, op. cit. supra, sec. 279, p. 607: "But in a number of states, the so-called 'survival statutes' cause the right of action which accrued to the injured party to survive his death, as part of the estate which passes to the personal representative. Such right, of course, is the right which the decedent had immediately prior to his death to recover compensation for his suffering, loss of earnings and expenses incurred by reason of his injuries."

A novel situation might frequently arise were this rule not to be followed. Consider the case of Lutge v. Rosin, 32 D. & C. 338, 342. Here the injured party brought suit in his lifetime and substitution was made after his death. Defendant then sought to join another party as being solely liable for the cause of action sued upon. The latter's objection that the right of action of the decedent against him did not survive was overruled in reliance upon the Act of 1937. In this case if the measure of damage suggested did not apply to the surviving cause but only to that upon which suit had been brought we would have a situation in which two defendants in a single suit, possibly joint tort-feasors, might be held responsible for a single tort but accountable for different measures of damage. The possible question of contribution between them would be an insoluble one. The Court of Common Pleas, in there considering the question of the applicable measure of damage, said (p. 348): "There is no indication in the act, nor has any authority been discovered to the effect, that a different measure of damages is to be applied in the one type of suit (survival action) than in the other (survived cause of action)."
convenient solution to the entire problem, which hardly would be considered seriously by our courts. No express repeal will be found in the act for, we may say without fear of contradiction, the Legislature never considered the affect of this law upon the field here discussed. Implied repeal is not to be favored; a rule which is particularly applicable where at the same session the Legislature amends the earlier act as it did in the instant case.

A more difficult argument to refute will be that proposing the converse proposition: that, despite the apparent applicability of this statute to the field here discussed, our courts should hold now that the right of action of the deceased (in cases where he has not begun suit in his lifetime) already has been conferred by the death acts and that therefore there remains no necessity nor reason for the further disposition of this right to the personal representative. In other words, the argument will be presented on the basis that the "legislative intention" was not to create a remedy alternative to or cumulative with the death acts.

The proponents of this argument first must refine the words of the statute: "all personal actions," so as to eliminate or exclude the right of action for personal injuries, a refinement which to us appears to be possible only by means of some species of legal legerdemain. The specific language of Strain v. Kern then must be retracted in toto as dictum. Although it may be well characterized as such, its cogent logic hardly can be denied. The second burden of the proponents' argument is the substantiation of the minor premise that the right of action continued by the survival statute is the same as that conferred by the death acts.

21 "Laws in pari materia shall be construed together, if possible, as one law." Statutory Construction Act of 1937, P. L. 1019, Art. 4, sec. 62 (46 P. S. Ann. 562) and cases cited therein.


23 April 1, 1937, P. L. 196 (12 P. S. Ann. 1602) by adding: "If none of the above relatives are left to survive the decedent, then the personal representative shall be entitled to recover damages for reasonable hospital, nursing, medical, funeral expenses, and expenses of administration necessitated by reason of injuries causing death." This is also a conclusive answer to the argument that the sole intention of the Legislature was to permit a recovery in cases where there are no survivors in the favored classes. Were this true, the cited amendment would have been sufficient to supply this deficiency.

24 This proposition would not be founded upon an argument for a narrow construction of the act as that considered, supra, was. Rather it would be an argument ad necessitatum based upon the alleged nature of the rights of action treated by the two acts.

25 See note 48 infra.

26 "Manifestly, the Legislature had no proper conception of the subject-matter of these two different schemes of legislation with which they were dealing, and it is no particular ground of criticism of the Legislature, when the intricacy and difficulties of the subject are considered." Mobile R. Co. v. Hicks, (Miss.) 46 So. 394, 397.

27 Which is quoted, supra.

28 Since the point of the decision is the unconstitutionality of the act by reason of the defect in the title, it need not have been judicially determined that the act would have applied to the case. On the contrary, it is irrefutable that if the terms of the act could have been refined so as not to apply to the case at bar the question of constitutionality need not have been considered. In fact, the court below placed its decision entirely upon this basis: see note 7 supra.
death acts. The legal theory that the right of the beneficiaries is "derivative" must form the basis of this approach.

Astute analysis will be necessary before this term "derivative" is applied unqualifiedly to the action brought under the death act. This terminology may be and generally is used in contradistinction to the term "new cause of action" usually ascribed to the act. In this regard little assistance will be found by either side in the decided cases; the two labels being applied in specific situations so as to justify the decision sought to be reached. So it is held consistently that the act creates a "new cause of action" so as to fix the measure of damage thereunder as not the value of the life taken but the pecuniary loss suffered by the named survivors; and that contributory negligence of the plaintiff-survivor constitutes a complete defense; as does a personal disability of the survivor. So also recently it has been held conversely that it is not of such derivative nature as to carry with it the personal disabilities arising from the relationship of the injured party to the defendant. On the contrary the right of action is stated to be "derivative" to such extent that a release by the injured party

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28Cf. St. Louis R. Co. v. Goode, (Okl.) 142 Pac. 1183: "In approaching the matter, the investigator will be bewildered by the variety of views expressed and the apparently hopeless conflict into which the courts have fallen; but this is more apparent than real. Much of the trouble comes from the fact that the statutes involved in the various states differ widely."

See also Brown v. Chicago R. Co., (Wis.) 78 N. W. 771: "No attempt will be made to harmonize all the conflicting observations found in the decisions elsewhere regarding the nature of Lord Campbell's Act. That cannot be done, and it is not necessary, for most of the conflicts will disappear as one applies judicial observations to the particular facts in regard to which they were made."

See cases collected in Cooley, op. cit. supra, sec. 211, notes 88, 89.


32Denti v. P. R. R. Co., 181 Pa. 525; Maiorano v. B. & O. R. R. Co., 216 Pa. 402; in which cases non-resident aliens were barred from taking advantage of the death acts. Subsequent legislation now protects such parties: Act of 1911, P. L. 678.

33See text, infra, and notes 39, 40.


Resort to this nomenclature is unnecessary under the original Lord Campbell's Act and its more faithful offspring, since the statute itself specifically provides that the action may be maintained only under such circumstances as would support a recovery by the injured party had he survived. The sole condition attached to the Pennsylvania act is that no suit for damages shall have been brought by the injured person (Birch v. Railway, 165 Pa. 339). The failure to include the more specific proviso coupled with the desire of our courts to conform to the foreign decisions probably accounts to a great extent for the confusion in the uses of these terms.
totally extinguishes it; his contributory negligence constitutes a complete defense; the running of the statute of limitations against him bars the survivors; and the latters' right of action is subject to other disabilities of the decedent.

36 Hill v. Penna. R. R., 178 Pa. 223, 228; suggesting that an action brought by the injured party would have barred a subsequent action for his death, the court said: "... he had exercised his control over the right of action at a time when he alone had the whole right, with the same effect as if he had brought an action and had prosecuted it to judgment and satisfaction."

37 An apt and logical criticism of this doctrine will be found in many of the cases. One which is frequently cited is Rowe v. Richards, 35 S. D. 1: "We must confess our inability to grasp the logic of any so-called reasoning through which the conclusion is drawn that the husband, simply because he may live to suffer from a physical injury and thus become vested with a cause of action for the violation of his own personal right has an implied power to release a cause of action—one which has not then accrued; one which may never accrue; and one which from its very nature cannot accrue until his death; and one which if it ever does accrue will accrue in favor of his wife and be based upon the violation of a right vested solely in his wife." Cf. Railway Co. v. VanAlstine, 77 Ohio 395; 6 U. Cin. L. R. 212, and see Fink v. The Great N. Ry. Co., 4 B. & S. 596, where the Lord Chief Justice Cockburn answered the same argument:

"We were at first struck with this argument, but on consideration we are of the opinion that the husband, which is frequently cited is Rowe v. Richards, 35 S. D. 1: "We must confess our inability to grasp the logic of any so-called reasoning through which the conclusion is drawn that the husband, simply because he may live to suffer from a physical injury and thus become vested with a cause of action for the violation of his own personal right has an implied power to release a cause of action—one which has not then accrued; one which may never accrue; and one which from its very nature cannot accrue until his death; and one which if it ever does accrue will accrue in favor of his wife and be based upon the violation of a right vested solely in his wife." Cf. Railway Co. v. VanAlstine, 77 Ohio 395; 6 U. Cin. L. R. 212, and see Fink v. The Great N. Ry. Co., 4 B. & S. 596, where the Lord Chief Justice Cockburn answered the same argument:

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Some further light may be thrown upon this obtuse subject by the fine distinction drawn by our Supreme Court in the recent case of Kaczorowski v. Kalkosinski:

"We have announced the principle that the statutory action is derivative because it has as its basis the same tortious act which would have supported the injured party's own cause of action . . . . Its derivation however is from the tortious act and not from the person of the deceased, so that it comes to the parties named in the statute free from personal disabilities arising from the relationship of the injured party and tort-feasor."

If this be accepted as a basic axiom it follows that the action under the death act "derives" directly from the tortious act (i.e. directly inures to the beneficiary) while the action under the survival act "derives" from the person of the deceased by the very wording of the statute. This being so the latter act does more than embrace the same field as the death act and must be given its proper force and effect. Chief Justice Kephart in the last cited case said:

"It was intended to create a new right and to compensate for a loss independent of that suffered by the deceased . . . . Compensation is being sought therefore for the specific wrong to them (survivors) . . . . this death statute is an attempt to compensate an independent wrong to the parties named in the statute . . . ."

Hence it has been said that a substituted right of action was given to the survivors named in the Act of 1855 if no action had been actually begun by the injured person during his lifetime.

Perhaps the clearest characterization of the nature of a death act is that of Professor Harper:

"By Lord Campbell's Act, a new cause of action is created which is separate and distinct, it is said, from that created by the wrongful act of the defendant against the decedent, although it exists . . . ."


By the great weight of authority a judgment obtained by the injured person will bar a subsequent action for his death: Tiffany, op. cit. supra, sec. 124; Sutherland, op. cit. supra, 4894; 17 Corpus Juris 1185, sec. 38, note 42; Cooley, op. cit. supra, sec. 211, note 91; although this problem could not have arisen under the peculiar wording of our statute.


40321 Pa. 441, 442.

41See cases cited infra, note 61; and see note 35, supra.

only under circumstances necessary to entitle such person to recover had he not been killed."

Whatever its limitations and characteristics may be determined to be, the chameleon-like right of action created or preserved by the death act hardly can be said to fully exhaust or transmit the derivative rights which might be and are specifically conferred by a survival statute.

If the two statutes are reconcilable, undoubtedly they should be reconciled and a system developed whereby the application of each to a particular case may be free from doubt.

But the only case in which total reconciliation may be possible appears to be one in which the decedent, having brought no action in his lifetime, leaves none of the relatives named in the death act. In such case the Survival Statute might be said to transmit to his personal representative the "action which decedent . . . might have commenced" and the 1937 amendment to the Death Act permits an action by the personal representative but limits the damages recoverable to expenses incurred.48 Overlooking the distinctly different character of the two actions we might conclude that in such a case the specific limitation of the death act amendment would supersede.

In every other conceivable set of circumstances the parties apparently will have a choice of two actions. In many, perhaps most, cases, different parties will be interested in the two possible suits. This must result not only from the divergence in parties-plaintiff named in the statutes but also and perhaps more frequently from the method of distribution to be followed after the fund is raised. Other and additional persons are potential beneficiaries of a suit under the Survival Statute.

We are aware that the proceeds of the action under the Death Act are distributable solely to the persons named in the act44 and are not subject to the claims of creditors.46 The contrary would, of course, be true under the Survival Statute; distribution would follow the testament of the decedent or the provisions of the Intestate Act and the fund would form part of the general assets of the estate and be subject to the claims of creditors.46 Hence in every case

48See note 23, supra.
44See acts quoted supra, note 1.
46Except probably in cases covered by the amendment of 1937. It will be noted that the added sentence giving the right of action for limited damages to the personal representative is placed after the clause exempting the recovery from debts, supra, note 29. A student commentator in 42 Dick. L. R. 51 reaches the gratuitous conclusion, probably correct, that recovery under the amendment would be for the benefit of creditors of the class suggested to the exclusion of the heirs of the decedent.

"It is only by making this recovery an asset of the estate and as such subject to the claims of creditors that the interest of creditors is even partially taken care of. Certainly it is arguable that creditors have some kind of an 'interest' in the continuance of the debtor's life. Often times the chief factor in the giving of credit is the anticipation of repayment from the prospective
creditors of the deceased would prefer a suit under the Survival Statute, as would his relatives not named in the Death Act and legatees under his will. On the other hand, the surviving spouse, children or dependent parents of an insolvent decedent would desire to sue under the Death Act, although if the decedent's estate were solvent these same persons might change their preference because of the larger measure of damage under the Survival Statute. Again this larger measure might not be sufficient inducement for such a choice if other relatives survived who would share under the intestate laws.

It is apparent, therefore, that conflicting interests would arise in almost every case. The tort-feasor would, therefore, be subject to two suits based upon different rights of action and having different measures of damage. Each being of separate origin and distinct nature the institution of one hardly could be deemed an election of remedy except in the unusual case where the sole beneficiaries of the entire estate are the persons entitled to sue under the Death Act. A court could not be called upon to declare which of the two claims should be permitted and which enjoined. The conclusion that both should be permitted at first may be difficult but eventually necessary to accept.

The New York Law Revision Commission came to this inescapable conclusion after its careful survey:

"If a tort causes death, ordinarily two interests are invaded. The first is the interest of the deceased in the security of his person, an interest which is invaded by causing both pecuniary loss (medical expenses and loss of earnings) and personal suffering, both mental and physical. If the injured party brought suit while alive, the recovery would include these various items of damage. The second interest is that of the deceased's next of kin, an in-

earnings of the debtor. Especially in the case of personal loans to wage earners, the lender looks to the debtor's future earning power as the main item of security. The wrongdoer's act destroys his expectant 'interest' and real harm has been done the creditor who does not have other forms of security (including life insurance on the debtor's life.)" N. Y. Law Com. page 48, note 1. (The creditor's interest is an insurable one in Penna.) See also 15 Harv. L. R. 854.

47 Pollock on Torts, 60; 4 Ill. L. R. 425.

48 In a recent note in 42 Dick. L. R. 41, Judge Reese, without discussing the subject in detail, reaches an opposite conclusion. He merely says (page 42): "So far as injuries to the person of the decedent are concerned, it is believed that the intention of the legislature through this amendment was not to provide an alternative or cumulative remedy to the action for wrongful death when the injuries suffered cause the death of the decedent." Such a construction, we believe, would be diametrically opposed to the language of the act, as we have indicated. Contra: Judge Oliver in Lutge v. Rosin, 52 D. & C. 338, 347: "It is possible, and indeed it seems evident, that the legislature intended to provide for two causes of action to be brought in certain situations by the personal representative."

The language of that section is so comprehensive and its meaning so apparent that it would seem to need no construction.

"It is not the province of a court to say that the Legislature did not mean what the language employed clearly indicates."


49 N. Y. Law Com., page 48.
interest in the nature of an expectancy which is supposedly protected by the wrongful death statute."

The Supreme Court of the United States has similarly recognized the "double wrong" sought to be compensated for under the Federal Employers' Liability Act.\(^5\)

From an economic standpoint such a conclusion equally is sound. We have indicated that the measure of damage fixed under the Death Act never approximates and often falls immeasurably short of the actual value of the life taken. By this we mean not the ephemeral value of the life to the individual or his survivors, which is beyond human computation, but its monetary or pecuniary value.\(^6\) Just as two separate and distinct rights of action must be


\(^6\)What the actual or absolute value of a life lost may be was early in the history of our decisions defined by Justice Lowrie in Penna. R. Co. v. McCloskey, 23 Pa. 526, 531, 532: "The precept of the law is, 'Thou shalt not by negligence or violence take away the life of another'; and the sanction of the law lies in the duty of compensation for the life destroyed, measured according to its own merits and not according to the necessities and circumstances of his kindred. It is very hard to value; but not for that, more uncertain than the speculations in relation to damages, which are proposed in its stead.

"This thought is involved in the whole course of the legislation and jurisprudence already referred to, and it is a rejection of the idea that the negligence which destroys life is irresponsible, and an assertion of the principle that all negligence must answer for its result, however serious. We have not heretofore been startled at the absurdity of giving a pecuniary compensation for broken limbs, or ruined health, or shattered intellect, or tarnished reputation.

"If the body be all crushed, we have regarded its sufferings as a subject of civil compensation so long as life smoulders beneath the ruins; even though there be no capacity to appreciate or enjoy compensation. We ought not to be startled that the duty of compensation is continued, when such life is smothered out.

"We call it compensation, while we admit that money is a very insufficient and uncertain measure of all such injuries. But it is the best standard we have, and in practice it is not found to be absurd. The duty of the wrongdoer to make compensation is very plain, and such as he has, which the law can reach, it compels him to give; though it may never reach the consciousness of the person injured. It is an act of distributive justice in vindication of invaded right, and it adopts the best approximation to compensation, which the authority of the law can enforce. And in these times, when criminal justice presents so many symptoms of going out of repute, and police officers are so often held up to public indignation for their performance of duty, it is found to operate well. Call it punitive; yet it is only indirectly so, as all compensation is, and does not wipe out any offence that is involved against the state. From our present experience and observation, therefore, we are unable to discover any substantial error in the instructions complained of. It would be wrong to limit the value of a man's life by his probable accumulations, for many men make none in a lifetime, and many have arrived at an age when they no longer attempt to make any, and many women never make any; and yet every one is entitled to his life, and we have as yet discovered no standard for its valuation. It is not human possessions that are destroyed, but humanity itself; and as this has no market value, it must necessarily be very much a matter of human feeling.

"Hard, then, as the task may be, and however uncertain its results, it is to be performed by the jury, aided by the cautions and counsel of the judge, who has been trained in the consideration of juridical questions. Looking, on the one hand, to the dignity of human nature, as it has been assailed, and on the other to the position and rights of the defendant, and considering the dignity of their positions as judges of most sacred right, and their own dignity and responsibility as individuals, and loving mercy even while doing justice, the jury must place a money value upon the life of a fellow being, very much as they would upon his health or reputation. The law can furnish no definite measure for damages that are essentially indefinite."

Unfortunately this rule was swiftly departed from under the Act of 1855 and damages were limited to the pecuniary loss suffered by the survivors in conformity with the decisions of the
deemed to exist, so each protects or compensates for a specific, individuated loss. The situation bears striking analogy to the case in which a minor is permanently injured. It has never been doubted that at common law the two distinct rights of action exist for the one injury; one being that of the minor who is entitled to recover for pain, suffering, etc., and any loss of earning power from his twenty-first birthday until such time as he shall cease to suffer the loss; the second that of the parents who sue for expenses incurred and the loss of the minor's probable earnings to the date of his majority. It is only by virtue of statute that the actions are joined. Precisely the same situation arises in the case of injury to a married woman. Again two separate rights of action arise, and are joined only by virtue of the statute. In neither case does the dual obligation present a problem to the courts, for together the damages recovered fairly and adequately measure the losses occasioned.

So with the existing loss. The Death Act purports to repay to those who depended upon the decedent for support or received pecuniary advantage from him, precisely the amount of their loss. The Survival Statute would permit recovery for that other damage sustained by the injured person himself.

The casual examiner of our decided cases may be led to the conclusion that both actions may not be sustained simultaneously because of language of our courts in such cases as Birch v. Railway and Tayler's Estate. A careful analysis of these decisions will indicate clearly that in them the denial of a dual right of action is not predicated upon the absence of individual injuries but upon the specific language of the Death Act. The operation of the act is conditioned expressly upon the premise that "no suit for damages be brought by the injured party during his or her life." Since no right of action for personal injury survived unless action had been brought thereon, the rights were mutually exclusive. This situation is changed entirely by the instant action since the decedent's right of action now is made to survive his death even though no suit has been brought by him during his lifetime. The proviso of

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English courts. Perhaps one of the burdens of this or any other critical article on this subject is to indicate that this early simple rule worked more complete justice than does the later, more artificial measure applied under our statutes.

*For example: contributory negligence of the parents will constitute a complete bar to their right of action but will in no wise affect the minor's right to recover.*


*Act of 1895, P. L. 54; 12 P. S. 1621.*

*"Upon the injury of a person by the wrongful act of another and his death subsequent to and as a result of the injury, it would seem at a glance that there have been two wrongs done. First, there is the wrong to the injured person, giving rise to an action of tort against the wrong-doer, and secondly the injury to the relatives who, by the death are deprived of support or financial contribution from the decedent." Schumacher, Rights of Action Under the Death and Survival Statutes, 23 Mich. L. R. 114 (1924). Cf. Kaczorowski v. Kalkosinski, 321 Pa. 438, 571 Pa. 339.*

*Tiffany, op. cit. supra.*

*165 Pa. 339.*

*179 Pa. 234.*

*165 Pa. 339, at 343.*
the Death Act in such cases becomes inapplicable by virtue of its very words, "during his or her life." Of course, the instant case in no way can be construed to permit the maintenance of two actions if one be that brought by the decedent during his lifetime.

A careful survey of the law in our sister states and in England is convincing that the dual right of action is both logical and just. Professor Harper in his learned treatise on "The Law of Tort" discusses the conflicting views of many courts as to whether Death Acts provide merely a "substituted" right dependent upon non-exercise of the decedent's right of action. He says:

"A number of courts have refused to follow this reasoning, somewhat specious, it must be admitted, and have allowed a recovery under the death statute in spite of a former recovery or settlement by the injured party before death. It is believed that these latter are logically sound and socially desirable. They recognize the distinct and independent social interest protected by the action for death given by the statute and they thus permit compensation for harms of different character although arising from the same situation; first the wrong to the injured party in causing pain and suffering and loss of earning power, and secondly, the wrong to the surviving spouse, children, or next of kin in the loss by death, of the pecuniary benefit to be reasonably expected had the injured party not been killed. The compensation for the first wrong includes only damages sustained by the injured party between the time of injury and death; for the latter wrong, injuries resulting from and caused by the death itself. There is, upon this analysis, 'no double recovery' allowed by courts following the minority rule. On the other hand, the courts following the weight of authority

\[60(1933)\] sec. 279.

For cases discussing the "substituted right" theory, see 17 Corpus Juris 1185, sec. 38, notes 43, 44. And see Tiffany, op. cit. supra, 29, sec. 23: "It must be admitted that expressions occur in some of the opinions to the effect that the statute gives a substituted, and not a new, right of action, but, having regard to the provisions of the act in respect to the persons who are entitled to the benefit of the action and the measure of damages, such a position is entirely untenable."

\[62\] Harper, op. cit. supra, at page 609.
\[63\] Cf. Schumacher, op. cit. supra, 114; Tiffany, op. cit. supra, sec. 23.

\[64\] Cf. Note 80 U. of Pa. L. R. 993, 995: "It is evident that two interests have been violated by the same wrong, but as these interests differ in nature, and are predicated of different persons, two causes of action have accrued, one being for the injured party and the other accruing to the beneficiaries of that person. This statutory cause of the beneficiary is an inchoate one, contingent upon actionable negligence on the part of the defendant and upon the death of the aggrieved person. It depends upon the existence of a cause or right of action in the deceased before his death only to the extent that there was a wrongful act as towards him. In all other respects the right of action is a separate and distinct cause, ripening into actual being at the moment of death of the injured party."
are obviously denying compensation for a grave and serious aspect of the unfortunate situation which gave rise to the problem.

"The same problem and much the same result is created where a judgment or settlement has been made by an administrator of a cause of action under either a survival statute or Lord Campbell's Act and an action is subsequently started under the other type of statute. For the most part, the courts have held that the first recovery bars the second action, ignoring the different wrongs which the two types of legislation have attempted to remedy. A minority of cases, however, held otherwise and allowed both actions. The only justification for the former holding would be either the theory that a jury in estimating damages would violate its instructions or unconsciously allow damages for both wrongs in whichever action was first brought, or a rule of damages which violates the logic of the two statutes and allows recovery in either action both for the damages sustained up to the time of death and those sustained to the beneficiaries after and as a result of death."

The criticism here levelled at the courts may be justified but it is stated too broadly to be of useful application. A specific analysis of the situation in our various sister states should prove of considerable assistance in clarifying our own newly created predicament. No comment is necessary concerning the situation in states such as Connecticut, New Hampshire, Iowa and Tennessee, where a single act has been construed so as to provide a remedy for both the personal injury and the death.

In some states such as Michigan and Maine, the application of the Death Acts is limited to cases of instantaneous death, while all other cases fall under the Survival Statute. Since such a construction would be repugnant to the


The Iowa rule set forth in the early case of Muldowney v. Railway Co., 36 Ia. 462 was quoted with approval in Maher v. Phila. Traction Co., 181 Pa. 391, 398, but the Iowa law has never been followed in our Commonwealth.


As applied to cases of "instantaneous death" under survival statutes there is respectable authority for this proposition in many jurisdictions: Cf. The Corsair, 145 U. S. 335 and cases cited in extenso in 17 Corpus Juris 1197, note 83. Contra see ibid, note 84. Harper, op. cit. supra, 607, sec. 279.
long history of judicial construction of our own Death Act, in which it has been applied equally to both types of cases, it may be disregarded as a possible precedent.

In others, such as Alabama, Kansas, Illinois and Rhode Island, the application of the Survival Statute is limited to cases in which death results from causes other than the injuries inflicted by the tort-feasor. Since our courts have already reached a contrary conclusion on this specific point, we may not assume such a solution.

Kentucky requires an election of remedies, a conclusion which is the result of fear of double recovery rather than logic. We have examined sufficiently the divergent nature of the two actions and the diversity of interests involved to indicate the oppressiveness of such a rule.

Sixteen states permit the institution and prosecution of both actions in all or some types of cases, thereby protecting both individual interests and at the same time avoiding any danger of a double recovery.

Georgia presents a situation strikingly analogous to our own. Two separate and distinct actions there may be maintained: one by the administrator for all damages incurred to the date of the death of the injured person; the second by the widow, etc., for "the full value of the life of the deceased." These rights in no manner affect each other and even an adverse verdict in one will not bar the other.

In Arkansas an earlier Survival Statute co-exists with the later Death Act in the Code. It is held that two separate rights of action are conferred— "one for the benefit of the estate, to recover damages which decedent could have recovered had he survived the accident, and the other for the benefit

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67 For example: the case of Moe v. Smiley, 125 Pa. 136, presented a typical case of instantaneous death, having arisen from a shooting stated to have been murder. It was concluded by the court that the death act gave the survivor a right of action against the tort-feasor.
70 C. & O. Ry. v. Banks, (Ky.) 135 S. W. 285; cf. Ohio cases, infra note 110; Virginia, infra note 155.
71 This rule may seem arbitrary inasmuch as the action for injuries was one belonging to the decedent existing at common law which survived... and the recovery belongs to his estate; whereas the action for wrongful death is a new action which did not exist at common law and never belonged to the decedent and the recovery is not assets..." Dean Evans, Death by Wrongful Act-Survivorship of Tort Actions in Kentucky, 21 Ky. L. J. 369.
72 Spradlin v. Georgia R. and E. Co., 77 S. E. 799; Augusta Ry. Co. v. Glover, 18 S. E. 406. The court in the first case refused to pass upon the prior decision by a divided court in So. Bell Tel. & Tel. Co. v. Cassin, 36 S. E. 881, that the settlement of the personal injury claim during the decedent's lifetime constituted a bar to the death action. It is probable that the strong dissenting opinion would now be followed should the case again arise.
73 Unfortunately the otherwise clear logic of the decisions in this state is clouded by the holding in Crockett v. Missouri P. R. Co., 16 S. W. (2d) 989, that a release executed by the injured person during his lifetime bars a subsequent death action. The court did not consider the ultimate problem involved nor the cases here cited and relied for its holding solely upon cases in which releases of personal injury claims were held to completely bar actions for such injuries.
of the widow and next of kin, for damages which they sustained by reason of the death. . . ." 76 "The actions are prosecuted in different rights, and the damages are given upon different principles to compensate different injuries." 76

Under the Louisiana code one action is brought for both injuries, although they are recognized as giving rise to independent rights of action. 78

Despite the single survival action for death given by the general Iowa statutes, 79 a peculiar situation exists in cases involving the death of minor children. It is there held that two actions may be prosecuted simultaneously; one by the parents for their prospective pecuniary loss during the minority of the child and the other by an administrator for damage which would accrue subsequent to majority. 80

In Indiana it is held that the common law rights of action of a parent for the loss of the services of a minor child 81 and of a husband for the loss of society and services of a wife 82 survive in the absence of statute, and are independent of the death action granted by statute to those pecuniarily injured. Where no guardian exists to act for the minor, the parent may recover both measures of damage in a single action. 83

Maryland recognizes the right of two independent actions upon the separate causes arising from the injury and death. 84 It logically holds that an action begun by the deceased does not abate at his death, 85 but anomalously reaches the decision that a release of his right of action by the injured person constitutes a complete bar to an action under the Death Act. 86

The same conclusions are reached in South Carolina. 87 The right of action 88 or action already begun 89 survive in addition to the right under the Death Act but a lifetime release constitutes a bar. 90 The personal representa-

79Cf. note 65 supra.
80Walters v. Chicago, etc. R. Co., 36 Ja. 458.
81Louisville, etc. Co. v. Goddy Koontz, 119 Ind. 111.
82Ind. Transit Co. v. Reeder, 42 Ind. App. 520.
83Mayhen v. Burns, 105 Ind. 328.
87S. C. Code of 1932, secs. 411 and 419.
88Bennett v. Spartensburg, etc., Co., 81 S. E. 189.
89Claussen v. Brothers, 145 S. E. 539.
tive, who is authorized to bring both suits, may not join them because of the essential difference between the two capacities in which he sues.91

In Oregon it is provided specifically that the cause of action for personal injuries shall not survive,92 and the measure of damage under the Death Act is the full value of the life lost.93 It consistently is held that it is immaterial whether or not the death is instantaneous.94 However, in the case of the death of a minor, the personal representative may sue for the death95 and, if the parental relationship exists, the parent may sue simultaneously for loss of services.96

In California the death action given to parents of a minor or the representative of an adult97 is independent entirely of the representative's right to prosecute a survival action whether the status of employer and employee existed.98

Washington99 sustains the right to two separate, independent and concurrent actions100 which may be joined in a single suit.101 However, it follows the illogical rule that the death action is barred by a release executed by the deceased.102

Nebraska has worked out the logical solution of the problem to the full extent. Here the two causes of action are recognized as separate and distinct but may be joined in a single suit and determined by separate verdicts, but if not joined, a judgment in either case is no bar to the other.103 Consequently, a suit started in the lifetime of the injured person may be revived and amended so as to include damages for the death.104 Although the double remedy is recognized, double recovery is prevented by limiting damages in the survival suit to those sustained during the lifetime, except where no beneficiaries named in the Death Act exist. This contingency is also covered:

"Before his death he had a right to recover the total loss of earnings, based upon his full expectancy of life; but when death

91Granger v. Greenville, etc., Ry. Co., 85 S. E. 968.
92Ore. Code of 1930, secs. 3-701-703.
93Staats v. Twoley Bros., 123 Pac. 909.
95Shleiger v. No. Terminal Co., 72 Pac. 324.
98Taylor v. Albion Lumber Co., 168 Pac. 348; Gonsalves v. Petalinna, etc., Co., 159 Pac. 724.
101Whiting v. Seattle, 258 Pac. 824; cf. State v. Vinther, 48 Pac. (2d) 915; Mitchell v. Rice, 48 Pac. (2d) 949; Ryan v. Poole, 47 Pac. (2d) 981.
104Rasmussen v. Benson, 275 N. W. 674.
occurred the actual duration and period of his life became definite and fixed and no longer open to question, and, having left a widow and next of kin, a new cause of action sprang up in their favor, entitling them to recover, for themselves exclusively, a portion of the total loss which has grown out of the extinguishment of the deceased's earning capacity. And where no persons exist to benefit by the death action the survival statute gives the full measure to the representative in the one action."

Montana recognizes that the right to a survival action is independent entirely of the right of action created by the Death Act, but limits the application of the statute to cases in which death is not instantaneous.

Ohio has considered extensively the questions here discussed. In addition to the usual Death Act it has a Survival Statute comparable to our own act. The nature of the respective actions was fully considered in a case where the administrator had prosecuted and lost a survival action, and a death action was then brought. It was argued that since the parties and defenses to the two suits are identical the prior determination constituted a bar. The court held contra on the basis that one action is for the exclusive benefit of the survivors and the other for the estate, subject to the claims of creditors. In holding that two distinctly different rights were involved, the court said:

"It is the death which is the foundation of this action and not the injury . . . . the two actions, although instituted by the same personal representative, are not in the same right, and that a judgment for the defendant in one case is not a bar to a recovery in the other."

Similarly this court has held that a recovery by the administrator in a suit brought by the deceased is no bar to the death action, saying:

"The right of the administrator, therefore, to recover in the reviewed action, rested upon the common law right of action inhering in the injured person. . . ."

In Oklahoma the same situation exists. The suit of the injured person survives independently of the right of action for death and both may be

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109 Gen. Code, 11235: "In addition to the causes which survive at common law, causes of action for . . . injuries to the person . . . also shall survive . . . ."
prosecuted at once. Double recovery is prevented by confining damages in the survival suit to those incurred prior to death.\textsuperscript{118} It is held logically that a release by the injured party constitutes no bar to the death action.\textsuperscript{118}

South Dakota permits two independent actions,\textsuperscript{114} limiting damages in the survival suit to those accruing before death,\textsuperscript{116} and holding that instantaneous death gives no such cause of action.\textsuperscript{116} A release by the deceased is no bar to the death action.\textsuperscript{117}

Florida has the usual Death Act\textsuperscript{118} under which damages are measured as in Pennsylvania.\textsuperscript{119} However, a separate statute provides that for the death of a minor damages may be recovered for the mental pain and suffering of the suing father (or mother where there is no father).\textsuperscript{120} In such case the surviving parent has \textit{two} causes of action, one under the general act and the other under the specific statute, but double recovery is avoided by reason of the different measures of damage.\textsuperscript{121} A general survival statute preserving causes of action for personal injuries also exists,\textsuperscript{122} but no case has been noted in which the question of conflict has arisen in the death of an adult. Since the optional right of recovery under the then existing Employers' Liability Act was recognized,\textsuperscript{123} it is probable that both actions would be sustained.

On the other hand some states have solved the problem in a single act. In Massachusetts the necessity of bringing two actions is obviated by legislative provision that a count forconscious suffering\textsuperscript{124} and consequential damage\textsuperscript{128} may be included in the death action, so as to join both actions in one.\textsuperscript{126} The two counts, however, are still treated as being separate and distinct.\textsuperscript{127} The

\textsuperscript{118}St. Louis, etc. Co. v. Goode, 142 Pa. 1185. The case of St. Louis, etc., Co. v. Thompson, 281 Pa. 565, is often cited as authority for the proposition that two actions do not exist. A careful reading of the case will indicate that the decision is that two death actions cannot be brought by different survivors.

\textsuperscript{114}Rowe v. Richards, 142 N. W. 664.

\textsuperscript{115}Ibid.

\textsuperscript{116}Belding v. Black Hills, etc., Co., 53 N. W. 750.

\textsuperscript{117}Rowe v. Richards, 151 N. W. 1001.

\textsuperscript{118}Comp. Gen. Laws, secs. 7047, 7048.

\textsuperscript{119}Cudahy Packing Co. v. Ellis, 141 So. 918.

\textsuperscript{120}Comp. Gen. Laws, sec. 7049; but the father cannot recover for the mental anguish of the mother: Coon v. Atlantic C-L Ry. Co., 171 So. 207.

\textsuperscript{121}Miami Dairy Farms v. Tinsley, 155 So. 850.


\textsuperscript{123}Louisville & N. R. Co. v. Rhoda, 71 So. 369.


\textsuperscript{125}Act of 1934, C. 228, sec. 1.  

\textsuperscript{126}Gilpatrick v. Cotting, 101 N. E. 993; but they must be joined; Neiss v. Buriven, 191 N. E. 654.

instantaneous death rule is applied but a very brief period of life is sufficient to give rise to the count.\textsuperscript{128}

In Mississippi\textsuperscript{129} the Death Act is supplemented by the Survival Statute in a case where a suit begun by the injured party is revived\textsuperscript{130} but the Death Act action is exclusive if no suit was instituted for the personal injury since this act consolidated all actions and gave damages for all injuries to all parties in cases of death.\textsuperscript{131} Naturally it is held that a release given or judgment obtained by the injured person constitutes a bar to the death action.\textsuperscript{132} The instantaneous death rule is applied.\textsuperscript{133}

In England the dual right of action is recognized:

"Where the deceased himself had a cause of action which survives him . . . . his personal representative has a double right of action; he can sue both on behalf of the deceased's estate and also on behalf of the relatives."\textsuperscript{134}

In other respects the law resembles our own; judgment, release or contributory negligence constituting complete loss.\textsuperscript{135} Distribution of the fund raised is controlled by the court.\textsuperscript{136}

A few examples of states reaching the opposite conclusion should be noted. In Missouri\textsuperscript{137} only one cause of action exists\textsuperscript{138} unless death results from causes other than the injuries.\textsuperscript{139}

The New Mexico Survival Act refers only to "injury to real or personal estate"\textsuperscript{140} and so should not affect the Death Act.\textsuperscript{141} However, the latter is construed broadly:

"The statute clearly contemplates a recovery even if there be no surviving kindred of the favored classes."

Hence substantial damages are recoverable without actual proof of loss.\textsuperscript{142}

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\textsuperscript{128} Royal Ind. Co. v. Pittsfield Elec. Co., 199 N. E. 69. \\
\textsuperscript{129} Code 1906, 1908; secs. 2091, 2093, 721. \\
\textsuperscript{130} Hamel v. So. Ry. Co., 66 So. 426, 809. \\
\textsuperscript{131} Mobile v. Hicks, 46 So. 360, 394; and see Hamel v. So. Ry. Co., 66 So. at 810. \\
\textsuperscript{132} Harris v. Illinois Cent. R. Co., 71 So. 878. The court, however, relies upon the doubtful theory that the language of the act precludes recovery; see note 33, supra. \\
\textsuperscript{133} Illinois C. R. Co. v. Pendergrass, 12 So. 954; McVey v. Illinois Cent. R. Co., 19 So. 209. \\
\textsuperscript{134} Salmond on Torts, page 369, quoting Leggett v. Gt. N. Ry. Co., 19 Q. B. D. 599. \\
\textsuperscript{135} Read v. Gt. E. Ry. Co., L. R. 3 Q. B. 555; Salmond on Torts, page 367. \\
\textsuperscript{136} Bulmer v. Bulmer, 25 Ch. D. 409. \\
\textsuperscript{137} Mo. St. Ann. sec. 3262, et seq. \\
\textsuperscript{139} Beer v. Martel, 55 S. W. (2d) 482; Adelsberger v. Sheehy, 79 S. W. (2d) 109. \\
\textsuperscript{140} 1938 St. 335-1202; this is taken from the Kansas statute: Frompton v. Santa Fe Ry. Co., 287 Pac. 694; see note 68, supra. \\
\textsuperscript{141} 1938 St. 36-104; no case discussing the possible conflict has been found. \\
\textsuperscript{142} Hogsett v. Hanna, 63 Pac. (2d) 540, 545; citing Whitmer v. El Paso, etc., Co., 201 Fed. 193; Cerrillos C. R. Co. v. Deserant, 49 Pac. 807.
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In North Carolina the Death Act\textsuperscript{148} creates a new cause of action\textsuperscript{144} but its purpose is to continue the right of action for wrongful injury to the person.\textsuperscript{146} The Survival Statute\textsuperscript{144} does not apply where death results from the injury but may apply if it results from other causes,\textsuperscript{147} hence there is no conflict between them.\textsuperscript{148} A release by the injured person is held to be a bar to the death action.\textsuperscript{149}

The Utah Death Act\textsuperscript{150} is construed similarly to our own\textsuperscript{151} except in cases of wilful and malicious injury where damages for mental anguish are allowed.\textsuperscript{152} The Survival Statute\textsuperscript{153} has been held to be inapplicable to personal injury cases and even a pending action abates at the death of the injured person.\textsuperscript{154}

In Virginia, although only one action is permitted,\textsuperscript{155} damages may be recovered for loss of care, attention and society, sorrow and mental anguish, in addition to the pecuniary loss and punitive damage.\textsuperscript{156}

The same is true under the Death Act of West Virginia.\textsuperscript{157} It is provided specifically that compromise and satisfaction of the claim of the injured person (other than a minor) constitutes a bar to the death action.\textsuperscript{158} The act covers all deaths, whether instantaneous or not.\textsuperscript{159}

Wyoming has a Death Act\textsuperscript{160} which is construed like our own, applicable to all deaths.\textsuperscript{161} It also has a statute causing pending actions to survive,\textsuperscript{162} but the courts to date have expressly refused to determine whether the two actions can be prosecuted simultaneously.\textsuperscript{163}

In Texas the Death Act\textsuperscript{164} is held to provide the sole remedy in cases
where death results from the injury,\textsuperscript{186} and the Survival Statute\textsuperscript{166} protects from abatement actions for personal injuries only in cases where death results from other causes.\textsuperscript{167} Contributory negligence of the survivors is no bar to the death action.\textsuperscript{168}

In Idaho\textsuperscript{169} the same result is reached since the Survival Statute\textsuperscript{170} does not preserve either actions or causes of action for personal injuries.\textsuperscript{171} The measure of damage, however, includes loss of companionship,\textsuperscript{172} protection, bodily care, intellectual culture and moral training.\textsuperscript{173}

Colorado's Death Act for railroad accidents\textsuperscript{174} is penal in character,\textsuperscript{175} but the general Death Act is not\textsuperscript{176} except in cases of wanton and reckless acts\textsuperscript{177} and it is barred by a release during lifetime. The Survival Statute expressly excepts actions of trespass for injuries done to the person,\textsuperscript{178} and has been held to apply to causes of action as well.\textsuperscript{179} But an action for personal injuries based upon a contract of carriage survives.\textsuperscript{180}

The Nevada statute has been construed to permit both compensatory damages and exemplary damages where wantonness and recklessness are shown.\textsuperscript{182} The Survival Statute refers only to "actions" and apparently has never been construed in connection with the Death Act.\textsuperscript{183}

The North Dakota Death Act\textsuperscript{184} does not appear to have received construction in connection with the statute providing for the survival of existing actions.\textsuperscript{185}

In Wisconsin the early Survival Statute, similar to our own early acts, did not relate to causes of actions and it was held that the Death Act was the sole remedy.\textsuperscript{186} Under the later general Survival Statute, however, the cause of


\textsuperscript{166}Vernon St. (1936) sec. 5525-8306.


\textsuperscript{169}Dallas Ry. & Term. Co. v. High, 103 S. W. (2d) 735; overruling Galveston etc. Co. v. Kutac, 11 S. W. 127, 13 S. W. 327.

\textsuperscript{171}1932 Code Ann. 5-310, 311.

\textsuperscript{172}ibid, 5-319.

\textsuperscript{173}MacLeod v. Stelle, 249 Pac. 254.


\textsuperscript{175}Wyland v. Twin Falls C. Co., 285 Pac. 676.

\textsuperscript{176}Colo. St. Ann. C. 50, sec. 1.

\textsuperscript{177}Denver etc. R. Co. v. Frederic, 140 Pac. 463.

\textsuperscript{178}C. 50, secs. 2, 6, Hayes v. Williams, 50 Pac. 352.

\textsuperscript{179}Lindsay v. Chicago etc. R. Co., 226 Fed. 23, 26.


\textsuperscript{181}Micheletti v. Moidel, 32 Pac. (2d) 266.

\textsuperscript{182}Kelley v. Union Pac. Ry. Co., 27 Pac. 1058.

\textsuperscript{183}Comp. Laws 1929, sec. 9104, 8553-4.


\textsuperscript{185}Comp. Laws, sec. 8561. It is patterned, however, after the California Act and would probably receive the same construction.

\textsuperscript{186}Comp. Laws 1913, sec. 8321-8323 as amended 1925 Supp.

\textsuperscript{136}ibid, sec. 7408.

\textsuperscript{138}Randall v. Northwestern Tel. Co., 11 N. W. 419.
action survives to the administrator without affecting the death action,\textsuperscript{187} but the action of the injured person may not be amended so as to include damages for the death.\textsuperscript{188}

We have purposely withheld consideration of the law in New York. Prior to 1935 there was no Survival Statute applicable to personal injury cases,\textsuperscript{189} and settlement by the injured person was held to constitute a bar to the death action.\textsuperscript{190} The question of the creation of a double recovery was before the courts, and the reaction there is of great interest:\textsuperscript{191}

"There can be no doubt that the legislature had power to create the double liability contended for, nor would it necessarily involve any inconsistency. The damages of the party injured are different and distinguishable from those which his next of kin sustain by his death, and no double recovery of the same damages would result."

The harshness of the existing law was recognized by the New York Commission on the Administration of Justice and a bill was introduced in the Legislature of 1934 to remedy it:\textsuperscript{192}

Under its terms all causes of action and actions for torts would have survived without limitation as to the damages recoverable, and the wrongful death action would have been preserved. Hence the Commission's proposal would have created a situation precisely similar to our own at the present time.

The recommended statute, however, was not passed, and in 1935 the Law Revision Commission undertook a new study of the subject heretofore mentioned. Its recommendations substantially were enacted in 1935 so that the present law provides for two independent actions\textsuperscript{193} which may be consolidated, or the complaint in a lifetime suit may be enlarged to include the damages for death.\textsuperscript{194} Double recovery is prevented by a provision limiting the damages in the survival action to those accruing before death.\textsuperscript{195}

Not only from our analysis of our existing situation, but also from the development of the law in other states, we are forced to the inevitable conclusion that a dual right of action is now to be supported by a dual remedy, and a

\textsuperscript{187}Brown v. Chicago, etc. R. Co., 78 N. W. 771; Nemecek v. Filer & S. Co., 105 N. W. 225.
\textsuperscript{188}Quinn v. Chicago, etc. R. Co., 124 N. W. 653.
\textsuperscript{189}The death act was Dec. Est. Law, secs. 130-134; cf. N. Y. Law Com. op, cit. note 1, page 40.
\textsuperscript{190}Littlewood v. New York, 89 N. W. 24.
\textsuperscript{192}Leg. Doc. (1934), No. 50 (D), pp. 20-21.
\textsuperscript{193}Dec. Est. Law, sec. 119, 120.
\textsuperscript{194}Ibid, sec. 120.
\textsuperscript{195}Ibid.
"double recovery" must now be permitted. The final question for determination is the measure of damage to be applied. Our conclusion, unsatisfactory though it may seem, is compelled by the existing law: that the already established and well recognized measures in each of the two types of cases must be accepted and applied until legislative action correlates the subject. The survivors under the Death Act still must recover the actual pecuniary loss suffered by them. The personal representative, on the other hand, now will commence and prosecute an action whose measure has been determined in many cases in which he has been called upon merely to prosecute heretofore by way of survivorship. The action is the same, the measure of damage can hardly now be declared to be different except by legislative mandate.

In *Maher v. P. R. T.* our Supreme Court said:

"... it logically follows that the damages recoverable by her personal representative should be the same as she could have recovered had death not ensued. Included therein are damages for pain and suffering up to the time of her death, and diminution of earning power during a period of life which she would have probably lived had the accident not happened. It is a mistake to suppose that the recovery in this case is for the death. It is still for the personal injury. ... 'It is idle to say that when a man

196Cf. Lutge v. Rosin, 32 D. & C. 338, 347. The same argument against "double recovery" was answered in Ohio: "At least, it cannot avail if the right to a second action where death results from the injury is given by the statute." Mahoning Val. R. Co. v. Van Alstine, 83 N. E. 601.

197Survival of an action actually begun during the lifetime of the injured party is not a novel subject. It has been provided for by the Acts of 1834, P. L. 73, sec. 28; 1851, P. I. 669, sec. 18; and 1917, P. L. 447, sec. 35 (a) the constitutionality of which was not affected by the decision in Strain v. Kern.

Cf. N. Y. Law Com. page 44: "Should there be any difference whether or not the action is already instituted at the time of death? The theory upon which this distinction is based in those jurisdictions making such distinction is apparently that the claim is an asset of the estate if already sued upon because the claimant has so willed it. It is submitted that the basis of such distinction is erroneous and the argument without weight."

Ibid 48, note 2: "The fact that deceased had commenced the action in his lifetime should not be material in fixing the measure of recovery, unless we are to adopt the peculiar theory that only actions survive and that rights or causes of action do not survive."

In *Lutge v. Rosin*, 32 D. & C. 338, 343 the Court of Common Pleas No. 7 of Philadelphia County held: "Obviously, this is not a new cause of action but simply a survival of the cause of action which the deceased already had. It follows that the damages recoverable are no different from those which the decedent himself could have recovered had he lived to bring the action, and so the courts have universally held, in absence of an express statutory provision that a different measure of damages be substituted. See Kyes v. Valley Telephone Co., 132 Mich. 281; Oliver v. Houghton County Street-Ry. Co., 134 Mich. 367." And again at page 348: "There is no indication in the act, nor has any authority been discovered to the effect, that a different measure of damages is to be applied in the one type of suit than in the other."

198181 Pa. 391.

199At pages 397, 398, 399.
is killed by unlawful violence it is not an injury to his person."

One element of the injury in such case is the total impairment of the earning power, placed beyond the possibility of doubt by the death, and hence a simpler problem for the jury, but the measure of damages therefor is the same as if the party had survived . . . .

"In an action that has survived to and is prosecuted by the personal representative, under the statute, there can doubtless be a recovery, not only for mental and physical suffering of the injured decedent, but also for the value of his life. . . . With us, however, the right to recover a solatium necessarily follows from the fact that the action, as brought by the injured party, is continued by the statute."

This was followed by many decisions which elaborated and reaffirmed the principles stated. In McCafferty v. R. R. Co., the court said:

"If the action is continued for the benefit of the estate, the measure of damages is the loss sustained by the injured party . . . . the damages recovered by her personal representatives should be the same as she could have recovered had death not ensued. Included therein are damages for her pain and suffering up to the time of her death, and diminution of earning power during a period of life which she would have probably lived had the accident not happened . . . . the value of the advantages of which the injured party was deprived because of the diminution or loss of earning power."

In cases involving injuries to and deaths of minors, the same principles naturally would be applied: the death action of the survivors for pecuniary loss suffered by them would be supplemented by the survival action of the administrator. The measure of damage in the latter suit should be the same as in that brought on behalf of the minor during his lifetime: the pain and suffering during life and the probable loss of earning power after his majority.

For the death of a married woman the measure in the latter action would be pain and suffering and loss of any independent earning power she

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200Moe v. Smiley, 125 Pa. 136, 141. Cf. the language of the Superior Court in Crider v. Moorhead, 51 Pa. Super. 532, 537: "Death might be the immediate and direct consequence of the negligent act. In such case, of course, no right of action ever vested in the injured party." The fallacy of this logic has been demonstrated, supra.

201At page 346.

might have had, since in her lifetime her independent earnings would have belonged to her and not to her husband. 204

There will be an objection promptly that the tort-feasor now will be forced to pay in excess of the true, measurable, pecuniary value of the life. Until the legislature, in its wisdom, sees fit to codify the law on this subject 205 the tort-feasor will pay excessively, but will have great difficulty in finding the legal philosopher who will waste sympathy upon him. 206 As we have indicated here-tofore this is precisely the result recommended by the New York Commission on the Administration of Justice. 207

THE REMEDY

It has been suggested that if the courts would recognize the full logic of the decisions which hold that two separate and distinct rights of action exist 208 and would pursue this logic into the field of damages, a highly desirable result would be achieved. 209 This would entail the limitation of damages under the Death Act to the pecuniary loss occasioned to the survivors and the damages under the Survival Statute to those accruing up to the time of the death of the deceased, as has been done in New York. 210 It is argued that in this manner

205 Although the Legislature has, at almost every session, had before it many Bills to amend the death acts, none to our knowledge have attempted or purported to cover the entire field as is suggested herein.
206 The question of punitive damages was specifically considered in Palmer v. Phila., etc. R. Co., 218 Pa. 114. After reviewing the cases extensively, the conclusion was reached that there could be no recovery under the death act beyond purely compensatory damages. A great deal of influence seems to have been followed from the Act of 1868, P. L. 58 declaring the "pecuniary loss" rule in railroad cases, although the rule itself was well entrenched in the general field by the time this case reached the courts. The discussion in this case, however, is dictum, and although no case has ever permitted the recovery of punitive damages in Pennsylvania, a careful study of the cases will indicate that the question may still be an open one.

It is interesting to note that the expressed intention of the early Alabama statute was to punish the tort-feasor and evidence of loss of services, pecuniary loss, or mental suffering were equally immaterial: Richmond v. D. R. Co., 11 So. 800; Alabama G. S. R. Co. v. Burgess, 22 So. 913; Randle v. B. Ry. L. & P. Co., 53 So. 918. In Connecticut the statute was said to be partly penal or punitive: Broughel v. S. New Eng. Tel. Co., 48 A. 751. Punitive damages could be recovered in cases of gross negligence or wilful act in Kentucky: St. 1909, sec. 6. In Missouri in addition to the compensatory right of action it was provided that in most types of cases a forfeiture of between $2,000 and $10,000 could be sued for: Rev. Stat. 1909, sec. 5425; Boyd v. Missouri Pac. Ry. Co., 139 S. W. 561; Shaffer v. Chicago, etc. R. Co., 245 S. W. 257, 263 U. S. 687; as to Colorado see Rev. St. 1908, sec. 2056, 2059; New Mexico, Comp. Laws 1897, sec. 3213-3215; Nevada, Gen. St. 1855, sec. 3898, 3899; Texas, Rev. St. 1895, art. 3019, and see H. & T. C. Ry. Co. v. Moore, 49 Tex. 31. Cf. Cooley, op. cit. supra, sec. 219, notes 9 to 14, inc. West Virginia: Searle v. Kanawha, 9 S. E. 248; Turner v. Norfolk etc. R. Co., 22 S. E. 83; Virginia: Norfolk etc. R. Co. v. Chestwood, 49 S. E. 489; New Mexico provided a $5000 penalty under the Act of 1882: 1915 Code, sec. 1820; Clay v. Atchison, etc. Ry. Co., 228 S. W. 907; South Carolina provided for exemplary damages: 1932 Code, sec. 412, Osteen v. So. Ry., 57 S. E. 196; and in Massachusetts punitive damages are assessed according to the degree of culpability of the defendant: Macchioroli v. Howell, 200 N. E. 903.

207 Cf. N. Y. Law Com. page 8; see also text and note 191 supra.
208 See op. cit. note 47.
209 We revert to the earliest rule laid down in our courts, see note 51. Cf. Schumacker, op. cit. supra, at pages 126, 127, 128; 44 Harv. L. R. 980.
210 Cf. notes 193-195 supra.
there would be avoided the award of the probable contributions of the deceased to his survivors in addition to the loss of earnings out of which such contributions would have been paid.

The fallacy in applying such a rule lies in the fact that the joint measure of damage so established falls short of a fair estimate of the actual loss suffered. For example: a man earning $3000 per year contributes $1500 to his family, requires $1000 for himself, and saves $500. The total annual actual pecuniary loss suffered by reason of his death is $2000, $1500 to his family and $500 to his estate. The suggested measure fails to consider the latter item. Consider the situation of a father or mother in better than moderate circumstances. Children of such parents are furnished with the necessities and conveniences of life and the loss of these would be the measure of their damage under the suggested rule. But in addition thereto such a parent customarily and systematically sets aside a fund for use of the children upon the happening of certain contingencies. If this fund is in any form other than life insurance, the right to recover damage for the loss of expected contributions to it is lost.

In these and many similar cases the suggested remedy is as unfair to the parties plaintiff211 as the present state of the law212 is to the defendant.

The clear and unmistakable answer to this puzzling situation is a codification of the acts in question establishing a fair and adequate but not vindictive measure of damage.213 This should include damages for (1) pain, suffering, humiliation, disfigurement and loss of members during the lifetime of the injured party; (2) expenses incurred by reason of the injury and death (medical, nursing, hospital, funeral, transportation and identification); (3) the total loss suffered by reason of the death, measured in the ordinary case by the loss to the estate, which would include pecuniary loss to the survivors and probable accumulations of the deceased and would be determined by the loss of earning power to the end of his expectancy;214 and in the case of minors and married women by the loss of society and companionship, services, consortium and assistance.

211Cf. 44 Harv. L. R. 980.

212As herein interpreted.

213It has been well stated in 44 Harv. L. R. 980, 984: "Whatever desirable results have been reached in particular problems are due more largely to fortuitous judicial interpretation than to adequate statutory structure. There is an obvious need for the reconsideration of this legislation with a view to its complete and workmanlike revision."

The practical impossibility of having a uniform act adopted is conceded by Wendell D. Allen in his address delivered before the American Bar Association, July 26, 1938, on the subject of "Conflict in Laws of Various States Regarding Negligence Resulting in Death."

214Cf. cases cited supra notes 197 to 202 inclusive.

Cf. Olivier v. Houghton Co. Ry. Co., (Mich.) 101 N. W. 530: "When the deceased received his injury, he stood entitled to recover then and there the loss sustained by being deprived of the power to earn money during the period he would have lived, had he not suffered the injury. It would not, under these decisions, have been any answer for defendant to say that 'while this is precisely what we have deprived you of, you cannot recover at all, as we have, in addition to crippling you, shortened your life.'"
For the protection of the survivors the recovery should be exempt from the claims of creditors except those claims arising directly from the injury and death. The proceeds after payment of counsel fees and costs incurred in the prosecution of the suit should be distributed in such manner as provided by the will of the decedent for the remainder of his estate and, in cases of intestacy, in the manner provided by the Intestate Act. The single action should survive (if brought during the life of the injured person) to his personal representative and the right of action (if none has been brought) should vest in the latter. Settlement or judgment obtained by the injured party should not defeat the action of the personal representative unless it affirmatively appears that damages for total loss of earning power were released or claimed at the trial of the cause but evidence of the amount so received should be admissible in mitigation of the damages claimed by the latter. The statute of limitations should be two years from the date of injury and one year from the date of death whichever be the lesser. Contributory negligence of any beneficiary should constitute no bar to the action.

PHILADELPHIA

MILFORD J. MEYER

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216 There still remains the problem of caring for the conflicting interests of creditors and relatives. This is primarily a matter of social policy: N. Y. Law Com. page 57. The solution is there reached by exempting the proceeds of the death action and subjecting to the claims of creditors the proceeds of the survival action, the two being kept distinct under the proposed legislation. Under the Federal Employers' Liability Act both recoveries are exempt: 35 U. S. Stat. 65, c. 149; 36 U. S. Stat. 291, c. 143.

217 Some question may arise as to the constitutionality of such an exemption although it would appear to have sound reason and logic in its favor.

218 Cf. Thompson v. Mann, (W. Va.) 64 S. E. 920.

219 This is provided for under the statutes of 28 of the states of the Union; see Allen, op. cit., supra, note 5.

Institution of the suit by a representative will also cure one of the glaring defects of the present acts pointed out by the Superior Court in Shambach v. Middlecreek E. Co., 45 Pa. Super. 300, affirmed in 232 Pa. 641, 648. There a widow was held to be empowered to compromise a suit under the act despite the fact that she was entitled to only one-third of the proceeds; the children who were entitled to the balance of the fund were refused a voice in the settlement and forced to look to their mother to collect their just due. The court specifically suggested legislative remedy, which has never been provided.

218a Since the claim for personal injuries would survive under the general survival statute and would not be converted into a death action by the death of the injured party resulting from causes other than the injury.

219 Two considerations enter into the determination of this rule: (1) the prejudicial affect upon the injured person of a rule which would deprive "him of the power of settling his claim or 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." (Littlewood v. City of New York, 89 N. Y. 24, 32) and (2) the impropriety of denying a recovery after death if the damage released or claimed at the trial of the cause was not the full damage for which recovery could be had after the death. The rule suggested seems to work justice to all parties concerned.

220 Cf. Harper, op. cit. supra, 612, sec. 280, and cases cited therein at notes 98, 99—see also sec. 149.