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## NEGLIGENCE - WRONGFUL DEATH ACT-WIFE'S DEATH RESULTING FROM HUSBAND'S NEGLIGENCE

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NEGLIGENCE — WRONGFUL DEATH ACT — WIFE'S DEATH RESULTING FROM HUSBAND'S NEGLIGENCE — The Pennsylvania wrongful death statute provides that whenever death shall be occasioned by unlawful violence or negligence and no suit has been brought by the party injured during his or her life, the husband, widow, children, or parents of the deceased shall be entitled to recover for damages for injuries causing the death.<sup>1</sup> Under this statute a father sued to recover damages for the death of his daughter which resulted from an automobile accident caused by the negligence of her husband. *Held*, the wife's disability to sue her husband for tort is personal; it does not bar recovery of damages, from the estate of her husband, by her father for deprivation of support furnished by her. *Kaczorowski v. Kalkosinski*, 321 Pa. 438, 184 A. 663 (1936).

At common law no right of action existed to recover damages for the death of a person caused by the wrongful act of another.<sup>2</sup> Today all the American states have adopted statutes similar to Lord Campbell's Act,<sup>3</sup> enacted in England in 1846, which gave an action for wrongful death to certain individuals. Most of these statutes contain the provision that the wrongful act must be such as would have entitled the party injured to maintain an action therefor.<sup>4</sup> There is no such provision in the Pennsylvania statute,<sup>5</sup> and some of the contrary authorities might be reconciled with the principal case on the basis of the statutes

see opinion by Cardozo, J., in *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, 111 N. E. 1050 (1916). The minority decision proceeds on the theory that such a situation as developed in the principal case is a possibility which the telephone company had in mind when it contracted with the subscriber and therefore a duty will be imposed.

<sup>1</sup> Pa. Laws (1851), p. 669, § 19, Pa. Stat. (Purdon, 1931), tit. 12, § 1601, as amended by Pa. Laws (1855), p. 309, § 1, as amended by Pa. Laws (1911), p. 678, §§ 1 and 2, Pa. Stat. (Purdon, 1931), tit. 12, §§ 1602, 1603.

<sup>2</sup> TIFFANY, DEATH BY WRONGFUL ACT, 2d ed., § 1 (1913); HARPER, THE LAW OF TORTS, § 279 (1933).

<sup>3</sup> 9 and 10 Vict., c. 93 (1846); HARPER, THE LAW OF TORTS, § 279 (1933).

<sup>4</sup> In Lord Campbell's Act, the condition which qualifies the new right of action is where "the act, neglect or default is such as would, if death had not ensued, *have entitled the party injured to maintain an action and recover damages in respect thereof.*" *Read v. G. E. Ry. Co.*, L. R. 3 Q. B. 555 (1868).

By the Alabama statute it is provided that there may be an action for wrongful death "if the testator or intestate could have maintained an action for such wrongful act. . . ." Ala. Code (1896), § 27. *Suell v. Derricott*, 161 Ala. 259, 49 So. 895, 23 L. R. A. (N. S.) 996, 18 Ann. Cas. 636 (1909).

The New York statute provides that the executor or administrator of a decedent may maintain an action against a natural person who "would have been liable to an action in favor of the decedent by reason thereof if death had not ensued." N. Y. Code Civ. Proc., § 1902. *Kelliher v. N. Y. C. & H. R. R. Co.*, 212 N. Y. 207, 105 N. E. 824 (1914). See also, *Keister's Admr. v. Keister's Exrs.*, 123 Va. 157, 96 S. E. 315, 1 A. L. R. 439 (1918); *Wilson v. Brown*, (Tex. Civ. App.) 154 S. W. 322 (1913). *Contra*: *Robinson's Admr. v. Robinson*, 188 Ky. 49, 220 S. W. 1074 (1920).

<sup>5</sup> Note 1, *supra*. However, see TIFFANY, DEATH BY WRONGFUL ACT, 2d ed., § 63, note 6 (1913): "The condition is implied in the Pennsylvania act by the provision that the action may be maintained when no suit for damages be brought by the party injured."

involved.<sup>6</sup> However, the Pennsylvania court has announced the principle that the statutory action is derivative and dependent upon a right of action in the decedent at the time of his death and that there can be no recovery when the decedent's right of action was barred by contributory negligence,<sup>7</sup> or by the running of the statute of limitations before the death of the decedent,<sup>8</sup> or by a release executed by the decedent.<sup>9</sup> On the theory that a husband and wife were one, the common law did not permit a wife to sue her spouse for personal torts.<sup>10</sup> Pennsylvania is in line with the weight of authority in holding in the principal case that Married Women's Acts have not abrogated this rule.<sup>11</sup> Therefore, in order to avoid reversing the former decisions in regard to the derivative character of the action,<sup>12</sup> the court distinguished the instant case from those cases. It said, first, that, although the action is derivative, it comes from the tortious act, and not from the relationship of the injured party and the tortfeasor. This reasoning is very similar to that used by the federal court for the Eastern District of Pennsylvania in its interpretation of the same statute. That court concluded that the right of action given by the statute is distinguishable from the right of action of the decedent although both rights of action spring from the same tort, and, consequently, that the running of the statute of limitations before the death of the decedent did not bar the statutory action.<sup>13</sup> A second ground urged by the court for the present decision was that since the reasons for the rule barring suits between spouses have disappeared the rule should disappear also.<sup>14</sup> It seems that this is a sound basis for the decision, and that it more clearly distinguishes the instant case from those holding that the statutory action is barred<sup>15</sup> than does the first suggestion.

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<sup>6</sup> Note 4, *supra*.

<sup>7</sup> *Penna. R. R. Co. v. Zebe*, 33 Pa. 318 (1858); *Hughes v. Delaware & Hudson Canal Co.*, 176 Pa. 254, 35 A. 190 (1896); *Grant v. Philadelphia B. & W. R. Co.*, 215 Pa. 265, 64 A. 463 (1906).

<sup>8</sup> *Howard v. Bell Telephone Co.*, 306 Pa. 518, 160 A. 613 (1932).

<sup>9</sup> *Hill v. Penna. R. R. Co.*, 178 Pa. 223, 35 A. 997, 35 L. R. A. 196 (1896).

<sup>10</sup> 43 HARV. L. REV. 1030 (1930).

<sup>11</sup> *Thompson v. Thompson*, 218 U. S. 611, 54 S. Ct. 1180 (1910); *Peters v. Peters*, 156 Cal. 32, 103 P. 219, 23 L. R. A. (N. S.) 699 (1909); *Strom v. Strom*, 98 Minn. 427, 107 N. W. 1047, 6 L. R. A. (N. S.) 191 (1906); *Bandfield v. Bandfield*, 117 Mich. 80, 75 N. W. 287, 40 L. R. A. 757 (1898); *Schultz v. Christopher*, 65 Wash. 496, 118 P. 629, 38 L. R. A. (N. S.) 780 (1911). *Contra*: *Brown v. Brown*, 88 Conn. 42, 89 A. 889 (1914), noted in 12 MICH. L. REV. 700 (1914); *Crowell v. Crowell*, 180 N. C. 516, 105 S. E. 206 (1920), noted in 19 MICH. L. REV. 659 (1920).

<sup>12</sup> Cases cited in notes 7, 8 and 9, *supra*.

<sup>13</sup> *Western Union Telephone Co. v. Preston*, (C. C. A. 3rd, 1918) 254 F. 229, cert. denied 248 U. S. 585, 39 S. Ct. 182 (1918).

<sup>14</sup> The reasons for this rule as stated by the Pennsylvania court are: the policy of preserving domestic peace and felicity, the impossibility at common law of securing a plaintiff without having the same party defendant, and that damages recovered passed to the husband. See also, 7 TENN. L. REV. 63 (1928-29), for a discussion of the policy behind the rule which bars suits between spouses.

<sup>15</sup> Cases cited in notes 7, 8, and 9, *supra*.