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PRACTICE AND PROCEDURE—CROSS CLAIM FOR WRONGFUL DEATH IN AN ACTION AGAINST DECEDENT'S ESTATE—Plaintiff's truck, driven by an agent, was involved in a collision with an automobile driven by defendants' intestate. The driver of the automobile was killed and plaintiff brought a damage action against his administrators. The trial court disallowed a cross claim brought by the administrators for the benefit of statutory beneficiaries. This cross claim was prosecuted under the wrongful death act and under a statute which permitted a defendant in a tort action to file a cross claim for damages arising out of the same transaction. Plaintiff objected to the cross claim on the ground that it was prosecuted by defendants in a different capacity than that in which they were sued. On review, *held*, reversed. The cause of action pursued in the cross claim was the same as the decedent would have had had he lived, and it was the purpose of the cross claim statute to permit questions of fault to be decided in one suit without circuitous approach or delay. *Hoffman v. Stuart*, 188 Va. 785, 51 S.E. (2d) 239 (1949).

It is a general rule of law that actions must be brought by and against the real parties in interest, and that joined claims and cross claims must be between the same parties and between them in the same capacity. Nevertheless, a majority of courts permit a plaintiff to join a cause of action for the benefit of decedent's estate with one for the benefit of beneficiaries under a wrongful death act although these causes are prosecuted by the administrator in different capacities.¹ The few cases in which a defendant administrator has sought to cross claim as representative under a wrongful death act are in accord with the principal case.² There are two classes of statutes that change the common law with respect to the effect of death

devolution made at the time of the donor's death." *State v. Pabst*, 139 Wis. 561 at 591, 121 N.W. 351 (1909); *State ex rel. Davis v. State Bd. of Equalization*, 104 Mont. 52, 64 P. (2d) 1057 (1937). Cf. *Succession of Tanner*, (La. App.) 24 S. (2d) 642 (1946).

²⁰ See the dissenting opinion in *Decker v. Fowler*, 199 Wash. 549 at 558, 92 P. (2d) 254 (1939).

¹ *Nemecek v. Filer and Stowell Co.*, 126 Wis. 71, 105 N.W. 225 (1905). But cf. *Bennett v. Spartanburg Ry., Gas & Electric Co.*, 97 S.C. 27, 81 S.E. 189 (1914). See also *Beauvais v. Springfield Institute for Savings*, 303 Mass. 136, 20 N.E. (2d) 957 (1939) and 124 A.L.R. 611 (1940).

² *In re Oldman's Estate*, 264 Mich. 32, 249 N.W. 471 (1933); *Buckeye Stages v. Townsend*, 28 Ohio Nisi Prius 222 (1930). See also *Silfies v. American Stores Co.*, 357 Pa. 176, 53 A. (2d) 610 (1947).

upon causes of action.³ The survival acts, with varying qualifications, allow an action to survive the death of either of the parties. Suit is brought by or against the administrator for damages that could have been claimed by or against the decedent had he lived. There are several types of statutes which give damages for death itself. Some of these merely enlarge recovery under the survival act so as to include damages to the estate for the death. The most common type of statute, however, is modeled after Lord Campbell's Act,⁴ which gives recovery to certain named beneficiaries according to their pecuniary loss⁵ resulting from the death of the decedent. The Virginia statute⁶ is of this latter type, and it is here that the question of capacity in the joinder of claims and cross claims is most likely to arise. Contrary to what was said in the principal case, it is generally held that such statutes create a new cause of action,⁷ although some wrong must have been done to the decedent which would have been actionable had he lived. In support of the principal case, it is argued that a multiplicity of suits and the absurdity of having a jury render conflicting verdicts in separate actions are avoided. Identical fact questions arise in the claim and cross claim. If, however, the cross claim or a joinder of claims by plaintiff is allowed, there may be difficulty with respect to weighing evidence in that statements of the deceased against his interests may be admissible in a survival action, but perhaps not in a death action.⁸ On the whole, it appears that the decision in the principal case is desirable and is justified on practical considerations.

C. J. Rice

³ See PROSSER, *TORTS* §103 (1941) and appendix to Rose, "Foreign Enforcement of Actions for Wrongful Death," 33 *MICH. L. REV.* 545 at 587 et seq. (1935) for a breakdown of various statutes. Such a breakdown is often helpful in analyzing decisions.

⁴ 9 & 10 *Vict.*, c. 93 (1846).

⁵ The Virginia statute, however, provides for "fair and just" damages. *Va. Code* (Michie 1942) §5787.

⁶ *Va. Code* (Michie 1942) §§5786-5790.

⁷ For example, cf. *Anderson v. Hygeia Hotel Co.*, 92 *Va.* 687, 24 *S.E.* 269 (1896); *Hindmarsh v. Sulpho Saline Bath Co.*, 108 *Neb.* 168, 187 *N.W.* 806 (1922).

⁸ *Eldridge v. Barton*, 232 *Mass.* 183, 122 *N.E.* 272 (1919).