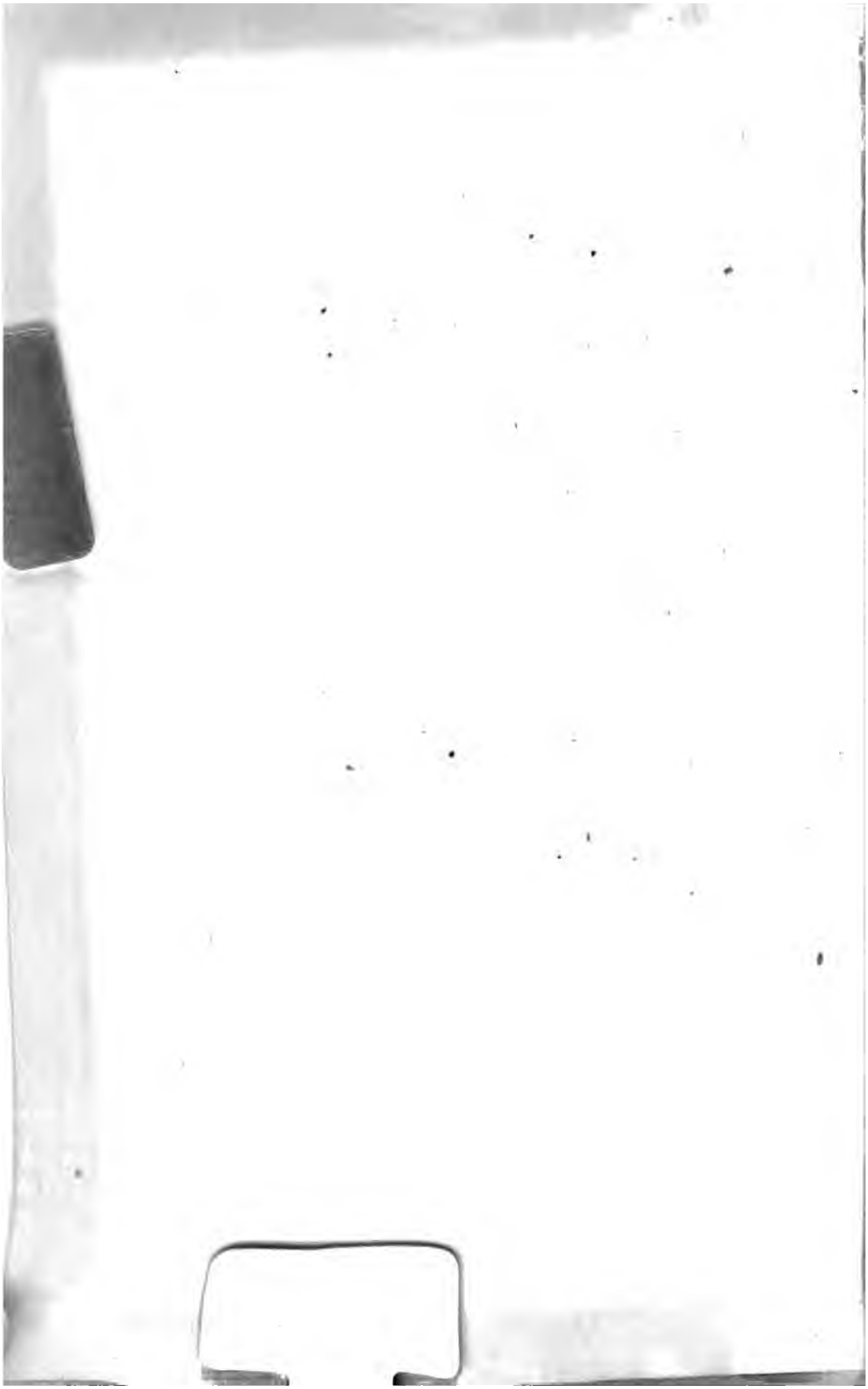

DEATH BY WRONGFUL ACT

A TREATISE

ON

THE LAW PECULIAR TO ACTIONS FOR INJURIES RESULTING IN DEATH

INCLUDING

THE TEXT OF THE STATUTES AND AN ANALYTICAL TABLE OF THEIR PROVISIONS

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PREFACE.

THE purpose of this book is to treat of those questions of law which are peculiar to the various statutory civil actions maintainable when the death of a person has been caused by the wrongful act or negligence of another. The statutes by which a right of action in such case has been created are to a great extent modeled upon the English statute known as "Lord Campbell's Act," which was enacted in 1846. Lord Campbell's act provides that, "whensoever the death of a person shall be caused by the wrongful act, neglect, or default of another, and 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, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured." The American acts, with some exceptions, have followed the language of the parent act in providing that the action may be maintained whenever death is caused by "wrongful act, neglect, or default." For the sake of brevity, the book has been entitled "Death by Wrongful Act," though "Death by Wrongful Act or Negligence" would more accurately describe it. This subject, although it has been briefly considered in several text-books, has never been treated with any degree of fullness.

These acts in effect provide that the statutory action may be maintained for the benefit of the persons whom they designate, whenever the wrongful act, neglect, or default is such that if it had resulted merely in bodily injury, without causing death,

the person injured might have maintained an action. It is obvious, therefore, that in the statutory action the same questions in respect to the wrongfulness of the act or the negligence of the defendant must arise that would arise in an action for personal injury founded upon the same wrongful act, neglect, or default. These questions are sufficiently treated in books upon torts, upon personal injuries, and especially upon negligence. It is not the purpose of this book to consider the rules and principles of law upon which the answers to questions of this character depend. Its purpose is simply to treat of those questions which are peculiar to the various statutory actions. In other words, it is, as a rule, assumed that the death was caused under such circumstances that, if death had not ensued, an action might have been maintained by the person injured.

Although most of the acts have been to a great extent modeled upon Lord Campbell's act, and consequently can be considered together, some of the acts are peculiar in whole and many in part; and all these, so far as they are peculiar, require separate treatment. Again, some states, while they have passed acts similar to Lord Campbell's act, have enacted additional provisions granting a right of action when death is caused under particular circumstances; for example, when it is caused by certain kinds of negligence on the part of common carriers, or when the person killed is a minor and leaves a surviving parent. Peculiar provisions of this sort also require separate treatment. It is the plan of the book to consider the peculiarities of the various statutes separately before proceeding to a discussion of the principles common to those of the general type of Lord Campbell's act. The writer has endeavored to cite all the cases that have arisen in the United States and in England under these acts, so far as the decisions relate to matters peculiar to the statutory actions, whether the cases turn upon the special features of particular acts or are of more general applicability. The Canadian cases have also been freely

cited. References have been given, in all cases concurrently reported, to the National Reporter System, as well as to the official reports. Whenever it seemed to the writer that a statement of the facts of the case would be of value, such a statement has been given in the text or in the notes.

In determining the effect of a decision, it is of course necessary to have in mind the provisions of the statute under which the action was brought. For this reason the various enactments in force in the United States and in Canada, and also the English act, have been printed in full in the appendix. An analytical table of these statutes has also been prepared. It is believed that the analytical table will be found of convenience (1) as a ready means of ascertaining the provisions of a particular statute upon a given point, and (2) as a means of ascertaining what statutes have provisions of a similar nature to the statute which may be under consideration. It is believed that the table will be found of especial value in the newer states and territories whose statutes have not yet been construed by the courts. For example, an examination of the table would inform a person wishing to arrive at a proper construction of the many peculiar provisions of the act of New Mexico, which has received little or no construction, or of the act of Colorado, which has received comparatively little, that these acts are nearly identical with that of Missouri, which has been fully construed by the courts of that state, and which is discussed in the text and notes. The table may also be useful to persons interested in legislation upon this subject.

F. B. T.

ST. PAUL, March 1, 1898.

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ANALYTICAL TABLE

SHOWING IN COMPARATIVE FORM THE LEADING PROVISIONS OF THE STATUTES NOW IN FORCE GOVERNING ACTIONS FOR PERSONAL INJURIES RESULTING IN DEATH.

NOTE. Many of the statutes provide that the action may be maintained, although the death shall have been caused under such circumstances as amount in law to felony. (See § 79.) These provisions have not been included in this table. The language of the provisions included has been followed so far as is consistent with brevity, but for the exact phraseology the reader is referred to the Appendix.

STATE AND STATUTE.	WHEN ACTION LIES.	WHO MAY SUE.	FOR WHOSE BENEFIT.
ENGLAND.			
9 and 10 Vict. c. 93. 27 and 28 Vict. c. 95.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action. Not more than one action lies for same subject-matter.	Executor or administrator. If no executor or administrator, or if no action is brought in his name within six calendar months, action may be brought by all or any of persons for whose benefit action lies.	Wife, husband, parent, (which includes grandparent and stepparent,) and child, (which includes grandchild and stepchild.)
ALABAMA.			
Code, §§ 2587, 2588.	When death of minor child is caused by wrongful act or omission or negligence.	Father; or, in case of his death, or desertion of his family, or of his imprisonment for a term of two years under conviction for crime, or of his confinement in insane asylum, or if he has been declared of unsound mind, mother, or personal representative. But suit by father or mother is bar to suit by personal representative.	
Code, § 2589.	When death is caused by wrongful act, omission, or negligence, if the testator or intestate could have maintained an action if it had not caused death.	Personal representative.	
Code, §§ 2590, 2591.	Master or employer is liable for death of servant or employe in certain cases enumerated in section 2590, (Employers' Liability Act.)	do.	
ARIZONA.			
Rev. St. 1887, §§ 2145-2155, 2909.	When death of any person is caused: (1) By negligence or carelessness of proprietor, owner, charterer, or hirer of any railroad, steamboat, stagecoach, or other vehicle for conveyance of goods or passengers, or by unfitness, gross negligence, or carelessness of their servants or agents; or (2) By wrongful act, negligence, unskillfulness, or default of another. The wrongful act, etc., must be such as would, if death had not ensued, have entitled party injured to maintain action for injury.	All parties entitled thereto, or one or more for benefit of all. If parties entitled fail to sue within six months after death, it shall be duty of executor or administrator to do so, unless requested by all parties entitled not to do so.	Exclusive benefit of surviving husband, wife, children, and parents.

How Distributed.	Measure of Damages.	When to be Commenced.	Remarks.
After deducting costs not recovered from defendant, among parties for whose benefit action is brought, in such shares as jury by verdict shall find.	Jury may give such damages as they may think proportioned to injury resulting from death to parties, respectively, for whose benefit action is brought.	Within 12 calendar months after death.	Plaintiff must, together with declaration, deliver to defendant full particulars of persons for whom action is brought, and of nature of claim in respect to damages sought to be recovered. Defendant may pay money into court, and, if an issue is taken as to its sufficiency, and jury shall think it sufficient, defendant shall be entitled to verdict on that issue.
	Such damages as jury may assess.		Personal representative and sureties on bond liable for due distribution in actions under §§ 2588, 2589, 2591.
Damages are not subject to payment of debts or liabilities of testator or intestate, but must be distributed according to statute of distributions.	do.	Within two years after death.	Action shall not abate by death of defendant.
Among persons entitled to benefit of action, or such of them as shall then be alive, in such shares as jury shall find by verdict. Not liable for debts of deceased.	Jury may give such damages as they may think proportioned to injury resulting from death. When death is caused by willful act or omission or gross negligence of defendant, exemplary, as well as actual, damages may be recovered.	Within one year after death.	Action shall not abate by death of either party, if any person entitled survives. If sole plaintiff dies, one or more of parties entitled may be made plaintiff for benefit of all.

State and Statute.	When Action Lies.	Who may Sue.	For Whose Benefit.
ARKANSAS.			
Mansf. Dig. §§ 5225, 5226.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain an action.	Personal representatives, and, if none, heirs at law.	Exclusive benefit of widow and next of kin.
CALIFORNIA.			
Code Civil Proc. §§ 335, 339, 376, 377.	When death is caused by wrongful act or neglect.	Heirs or personal representatives. Father, or, in case of his death or desertion of his family, mother, for a minor child. Guardian for ward.	
COLORADO.			
Gen. St. 1883, §§ 1030–1033.	Whenever any person shall die from any injury occasioned by negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employe, while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or other public conveyance, and when any passenger shall die from any injury occasioned by any defect or insufficiency in any railroad or part thereof, or in any locomotive or car, stagecoach, or other public conveyance, employer or owner shall be liable. Defendant may show in defense that defect or insufficiency was not negligent.	Husband or wife; and, if no husband or wife, or if he or she fails to sue within one year after death, heirs; and, if deceased was a minor or unmarried, father or mother, who may join, or survivor.	
	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action.	do.	
Code Civil Proc. § 9.	Father, or, in case of his death or desertion of his family, mother, may maintain action for death of child, and guardian for death of ward.		
CONNECTICUT.			
Gen. St. 1883, §§ 1008, 1009, 1883.	All actions for injury to the person, whether the same do or do not instantaneously or otherwise result in death, and actions to recover damages for injury to the person of wife, child, or servant of any person shall survive, provided cause of action did not arise more than one year before death of deceased.	Executor or administrator.	Husband, or widow and heirs.
DELAWARE.			
Rev. Code 1852, as amended by Laws 1874, p. 644, § 2.	Whenever death shall be occasioned by unlawful violence or negligence, and no suit is brought by party injured.	Widow, or, if no widow, personal representatives.	

How Distributed.	Measure of Damages.	When to be Commenced.	Remarks.
In proportion provided by law in relation to distribution of personal property of intestates.	Jury may give such damages as they shall deem fair and just compensation, with reference to pecuniary injuries resulting from such death to wife and next of kin.	Within two years after death.	
	Such damages may be given as, under all circumstances of case, may be just.	Within two years.	
	Defendant shall forfeit not exceeding $5,000, and not less than $3,000.	Within two years from commission of negligence.	
	Jury may give such damages as they may deem fair and just, not exceeding $5,000, with reference to necessary injury resulting from such death, to surviving parties who may be entitled to sue, having regard to mitigating or aggravating circumstances.	do.	
After deducting expenses of suit, half to husband or widow, and half to lineal descendants, *per stirpes*; but, if no descendants, whole to husband or widow; and, if no husband or widow, whole to heirs, according to law regulating distribution of intestate personal estate.	Just damages, not exceeding $5,000.	Within one year after neglect. In a suit against a railroad company, within 18 months after death.	Executor or administrator may prosecute action begun by person injured, the recovery to be distributed as in suit begun after the death.
	May recover damages for the death.		

STATE AND STATUTE.	WHEN ACTION LIES.	WHO MAY SUE.	FOR WHOSE BENEFIT.
DIST. OF COLUMBIA. 23 U. S. St. p. 307.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled the person injured, or, if person injured be a married woman, have entitled her husband, either separately or joining with wife, to maintain an action, provided person injured has not recovered damages.	Personal representative.	Family.
FLORIDA. Laws 1883, c. 3429.	Whenever death is caused by wrongful act, negligence, carelessness, or default, such as would, if death had not ensued, have entitled party injured to maintain action.	Widow or husband; if there is neither surviving the deceased, minor children; if neither husband, widow, nor minor child, any persons dependent on deceased for support; if neither of the above, executor or administrator. Action in behalf of a person under 21 years of age shall be brought in name of next friend.	
GEORGIA. Code, § 2971, as amended by Laws 1887, No. 588; Code, § 2967, as amended by Laws 1889, No. 735.	In case of homicide of husband, wife, parent, or child upon whom parent is dependent for support, unless child leave wife, husband, or child. "Homicide" includes all cases where death results from crime or from criminal or other negligence.	Widow, or, if no widow, children, for homicide of husband or parent, and, if suit be brought by widow or children, and former or one of latter dies, action survives in first case to children, and in latter case to surviving children. Husband for homicide of wife, and, if she leave children, husband and children jointly, with right of survivorship in action. Mother, or, if no mother, father, for homicide of child upon whom she or he is dependent, or who contributes to his or her support, unless child leave wife, husband, or child.	
IDAHO. Rev. St. 1887, §§ 4099, 4100, 4050, 4085.	When death is caused by wrongful act or neglect.	Heirs or personal representatives, for a person not minor. Father, or, in case of his death or desertion of his family, mother, for a minor child. Guardian, for ward.	

How Distributed.	Measure of Damages.	When to be Commenced.	Remarks.
According to provisions of statute of distributions, free from debts and liabilities of deceased.	Damages for the death, which shall be assessed with reference to injury resulting from act, neglect, or default causing death, to widow and next of kin, not exceeding $10,000.	Within one year after death.	
	Jury shall give such damages as party or parties entitled to sue may have sustained by reason of death.	Within two years after death.	
Widow shall hold amount recovered as personal property descending to her and children from the deceased. No recovery shall be subject to debts of deceased husband or parent.	Full value of life, as shown by evidence, without any deduction for necessary or other personal expenses of deceased had he lived.		Cause of action does not abate by death of either party; on death of plaintiff, if no right of survivorship in any other person, survives to personal representative.
	Such damages may be given as, under all circumstances of case, may be just.	Within two years.	

STATE AND STATUTE.	WHEN ACTION LIES.	WHO MAY SUE.	FOR WHOSE BENEFIT.
ILLINOIS.			
Starr & C. Ann. St. c. 70, §§ 1, 2.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action.	Personal representatives.	Exclusive benefit of widow and next of kin.
3 Starr & C. Ann. St. c. 93, § 14.	In case of loss of life by reason of willful violation of this act, (Miners' Act,) or willful failure to comply with any of its provisions.	Widow, lineal heirs, or adopted children, or any other persons who were dependent for support on deceased.	
INDIANA.			
Rev. St. 1881, § 284.	When death of one is caused by wrongful act or omission of another, if former might have maintained action had he lived.	Personal representatives.	Exclusive benefit of widow and children, if any, or next of kin.
Rev. St. 1881, § 266.	Father, or, in case of his death, or desertion of his family, or imprisonment, mother, may maintain action for death of child; and a guardian for death of ward.		
IOWA.			
McClain's Ann. Code, §§ 3730–3732, 3734.	All causes of action survive, and may be brought, notwithstanding death of person entitled or liable to same.	Legal representatives, or successors in interest of deceased.	
McClain's Ann. Code, § 3761.	Father, or, in case of his death or imprisonment, or desertion of his family, mother, may prosecute, as plaintiff, action for expenses and actual loss of service resulting from death of a minor child.		
KANSAS.			
Gen. St. 1889, §§ 4518, 4519.	When death of one is caused by wrongful act or omission of another, if former might have maintained action had he lived.	Personal representatives. Where deceased was a nonresident, or no personal representative has been appointed, widow, and if no widow, next of kin.	Exclusive benefit of widow and children, if any, or next of kin.

How Distributed.	Measure of Damages.	When to be Commenced.	Remarks.
In proportion provided by law in relation to distribution of personal property left by persons dying intestate.	Jury may give such damages as they shall deem a fair and just compensation, with reference to pecuniary injuries resulting from such death to wife and next of kin, not exceeding $5,000. Direct damages for the injuries sustained by reason of such loss of life.	Within two years after death.	
In same manner as personal property of deceased.	Cannot exceed $10,000.	Within two years.	
When wrongful act produces death, damages shall be disposed of as personal property belonging to estate of deceased, except that, if deceased leaves husband, wife, child, or parent, it shall not be liable for payment of debts.		Within two years. The action shall be deemed a continuing one, and to have accrued to representative or successor at same time it did to deceased, if he had survived.	May be brought against legal representatives of deceased defendant.
In same manner as personal property of deceased.	Cannot exceed $10,000.	Within two years.	

STATE AND STATUTE.	WHEN ACTION LIES.	WHO MAY SUE.	FOR WHOSE BENEFIT.
KENTUCKY.			
Gen. St. c. 57, § 1.	If life of any person not in employment of railroad company be lost by negligence or carelessness of proprietors of railroad, or by unfitness, or negligence or carelessness of their servants or agents.	Personal representative.	
Gen. St. c. 57, § 3.	If life of any person is lost by willful neglect of another his agents or servants.	Widow, heir, or personal representative.	
Gen. St. c. 1, § 6.	Where person is killed by the careless, wanton, or malicious use of firearms, etc., not in self-defense, action lies against person committing killing and all others aiding or promoting.	Widow and minor children, or either.	
Gen. St. c. 82, § 1.	Where person is killed in duel, action lies against principal, seconds, and all others aiding or promoting the duel.	do.	
LOUISIANA.			
Civil Code, art. 2315, as amended by Acts 1884, No. 71, p. 94.	Every act of man that causes damage to another obliges him by whose fault it happened to repair it. The right of this action survives, in case of death.	Minor children, or widow, or either; and, in default of these, surviving father and mother, or either.	
MAINE.			
Acts 1891, c. 124.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action.	Personal representatives.	Exclusive benefit of widow, if no children, and of children, if no widow; if both, then of her and them equally; if neither, of heirs.
Rev. St. 1883, c. 51, §§ 68, 69; c. 52, § 7.	When life of any person, in exercise of due care, is lost by negligence of any railroad or steamboat corporation, proprietors of stagecoaches, or common carrier, or by that of their servants or agents. No railroad corporation shall be sued for death of person on its road contrary to law or to its rules.	The state by indictment.	Wholly to use of widow if no children, and of children if no widow; if both, to her and them equally; if neither, to heirs.
Rev. St. 1883, c. 18, § 80.	If life of any person is lost through any defect in any highway, etc., action lies against county or town, if it had notice of defect, etc.	Executors or administrators.	Estate of deceased.
MARYLAND.			
Pub. Gen. Laws, art. 67.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action. Not more than one action lies in respect to the same subject-matter.	The state, for use of the person entitled to damages.	Wife, husband, parent, and child.

How Distributed.	Measure of Damages.	When to be Commenced.	Remarks.
	May recover damages in same manner that person himself might have done for any injury where death did not ensue.		
	May recover punitive damages for loss or destruction of life.		
	Jury may give vindictive damages.		
	do.		
	Survivors may also recover damages sustained by death of parent or child, or husband or wife.	Within one year after death.	
	Jury may give such damages as they shall deem fair and just compensation, not exceeding $5,000, with reference to pecuniary injuries resulting from such death to persons for whose benefit action is brought.	Within two years after death.	
	Defendant forfeits not less than $500, nor more than $5,000.	Within one year.	
	Such sum as jury may deem reasonable as damages.		
After deducting costs not recovered from defendant, among parties for whom the action is brought, in such shares as jury by verdict shall find.	Jury may give such damages as they may think proportioned to injury resulting from such death to parties, respectively, for whom and for whose benefit the action is brought.	Within twelve calendar months after death.	Equitable plaintiff must deliver to defendant full particulars of persons for whom and on whose behalf action is brought, and of nature of claim.

STATE AND STATUTE.	WHEN ACTION LIES.	WHO MAY SUE.	FOR WHOSE BENEFIT.
MASSACHUSETTS.			
Pub. St. c. 112, § 212.	If by negligence or carelessness of corporation operating railroad or street railway, or by unfitness or gross negligence or carelessness of its servants or agents, life of passenger or of person in exercise of due diligence, and not passenger or in employment of corporation, is lost, such person not being on the road of railroad contrary to law or to its rules; or	Commonwealth by indictment.	
Pub. St. c. 112, § 213.	If life of a person is lost by collision with engines or cars of railroad corporation at crossing such as described in c. 112, § 163, and corporation neglected to give signals required by said section, and such neglect contributed to injury, unless it is shown that in addition to mere want of ordinary care, person injured or person having charge of his person was guilty of gross or willful negligence, or was acting in violation of law, and that such negligence or act contributed to injury.	do.	
Pub. St. c. 112, § 212, as amended by St. 1883, c. 243; Pub. St. c. 112, § 213; St. 1886, c. 140.	Under same circumstances above set forth, and also in case employe of a railroad in exercise of due care is killed under such circumstances as would have entitled him to maintain action if death had resulted and he had not been an employe.	Executor or administrator.	
Pub. St. c. 73, § 6.	If life of a passenger is lost by negligence or carelessness of proprietors of a steamboat or stage-coach, or of common carriers of passengers, or by unfitness or gross negligence or carelessness of their servants or agents.	do.	
Pub. St. c. 52, § 17.	If life of a person is lost by defect, etc., of highway, etc., county, town, or person obliged to repair same is liable, provided defendant had reasonable notice of defect.	do.	
St. 1887, c. 270, as amended by St. 1888, c. 155, and by St. 1892, c. 260.	Where employe is killed [and death is not instantaneous or is preceded by conscious suffering] by reason of any negligence for which employer is made liable by employers' liability act. [St. 1887, c. 270, as amended.]	Legal representatives in action to recover damages both for the injury and for the death.	
do	Where employe is killed instantly or without conscious suffering by reason of any negligence for which employer is made liable by employers' liability act. [St. 1887, c. 270, as amended.]	Widow, and, if no widow, dependent next of kin.	

How Distributed.	Measure of Damages.	When to be Commenced.	Remarks.
To executor or administrator for use of widow and children in equal moieties; if no children, to use of widow; if no widow, to use of next of kin.	Fine, not less than $500 nor more than $5,000.	Within one year from the injury causing death.	
do.	do.	do.	
do.	Not exceeding $5,000 nor less than $500, to be assessed with reference to degree of culpability of defendant, its servants or agents.	do.	
do.	do.	do.	
do.	Not exceeding $1,000, to be assessed with reference to degree of culpability of defendant.	do.	
	Not exceeding $5,000 for injury and death, to be apportioned by jury between legal representatives and widow, or, if no widow, dependent next of kin. If no widow or dependent next of kin, damages to be assessed with reference to degree of culpability of defendant and person for whose negligence he is made liable.	Within one year from accident causing injury or death.	Notice of injury must be given.
	Not less than $500 nor more than $5,000, to be assessed with reference to degree of culpability of defendant or person for whose negligence he is made liable.	do.	do.

STATE AND STATUTE.	WHEN ACTION LIES.	WHO MAY SUE.	FOR WHOSE BENEFIT.
MICHIGAN. How. St. 1882, §§ 8313, 8314. See, also, §§ 8391, 8392, 8491, 8492.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action.	Personal representatives.	
MINNESOTA. Laws 1891, c. 123.	When death is caused by wrongful act or omission, if deceased might have maintained action had he lived.	Personal representative.	Exclusive benefit of widow and next of kin.
MISSISSIPPI. Code 1892, § 663.	Whenever death is caused by wrongful or negligent act or omission, such as would, if death had not ensued, have entitled party injured to maintain action, and deceased leaves widow or children, or both, or husband, or father, or mother.	Widow, for husband. Husband, for wife. Parent, for child. Child, for only parent.	
MISSOURI. Rev. St. 1889, §§ 4425-4427, 4429.	Whenever any person shall die from any injury occasioned by negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employe while running, conducting, or managing any locomotive, car, or train of cars, or of any master, pilot, engineer, agent, or employe, while running, conducting, or managing any steamboat, or any machinery thereof, or of any driver of any stagecoach or other public conveyance; and when any passenger shall die from any injury occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive, car, steamboat, or the machinery thereof, or in any stagecoach or other public conveyance, employer or owner shall be liable. Defendant may show in defense that defect or insufficiency was not negligent.	Husband or wife, or, if no husband or wife, or if he or she fails to sue within six months after death, minor children, whether natural born or adopted; and if deceased was minor and unmarried, whether natural born or adopted, father and mother, who may join, or survivor.	
	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled the party injured to maintain action.	do.	
Rev. St. 1889, § 7074.	In case of loss of life by willful violation of this article, (Miners' Act.) or willful failure to comply with any of its provisions.	Widow, lineal heirs or adopted children, or any persons who were dependent on deceased for support.	

How Distributed.	Measure of Damages.	When to be Commenced.	Remarks.
To persons and in proportions provided by law in relation to distribution of personal property left by persons dying intestate.	Jury may give such damages as they shall deem fair and just, with reference to pecuniary injury resulting from such death, to those persons who may be entitled to such damages.		
To widow and next of kin, in same proportion as personal property of deceased persons; any demand for support of deceased and funeral expenses allowed by probate court to be first deducted.	Cannot exceed $5,000.	Within two years after the act or omission.	
For use of widow, husband, or child, except that, in case a widow should have children, damages shall be distributed as personal property of husband.	Jury may give such damages as shall be fair and just, with reference to the injury resulting from such death to person suing.	Within one year after death.	Representatives of person whose act or omission causes death are liable.
	Defendant shall forfeit $5,000.	Within one year after cause of action shall accrue.	
	Jury may give such damages, not exceeding $5,000, as they may deem fair and just, with reference to necessary injury resulting from such death to surviving parties who may be entitled to sue, and also having regard to mitigating or aggravating circumstances. Direct damages sustained by reason of such loss of life.	do.	

State and Statute.	When Action Lies.	Who may Sue.	For Whose Benefit
MONTANA.			
Comp. St. 1888, p. 62, § 14.	Where death of a person not a minor is caused by wrongful act or neglect.	Heirs or personal representatives.	
Comp. St. 1888, p. 62, §§ 13, 14.	Father, or, in case of his death or desertion of his family, mother, may maintain action for death of child, and guardian for death of ward.		
Comp. St. 1888, pp. 911, 912, §§ 981, 982.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action.	Personal representatives.	Exclusive benefit of widow and next of kin.
NEBRASKA.			
Comp. Laws 1881, c. 21.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action.	Personal representatives.	Exclusive benefit of widow and next of kin.
NEVADA.			
Gen. St. 1885, §§ 3298, 3299.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain ac-	Personal representatives.	

How Distributed.	Measure of Damages.	When to be Commenced.	Remarks.
	Such damages may be given as, under all circumstances of case, may be just.		
	do.		
In proportion provided by law in relation to distribution of personal property left by persons dying intestate.	Jury may give such damages, not exceeding $20,000, as they shall deem a fair and just compensation, with reference to pecuniary injuries resulting from such death to wife and next of kin.	Within three years after death.	
In proportion provided by law in relation to distribution of personal property left by persons dying intestate.	Jury may give such damages as they shall deem a fair and just compensation, with reference to pecuniary injuries resulting from such death to wife and next of kin, not exceeding $5,000.	Within two years after death.	
If there be surviving husband or wife, and no child, to such husband or wife; if there be surviving husband or wife, and a child, or children, or grandchildren, then equally to each, the grand child or children taking by right of representation; if there be no husband or wife, but a child or children, or grand child or children, then to such child or children and grand child or children by right of representation; if there be no child or grandchild, then to surviving brother or sister, or brothers or sisters; if there be none of kindred above named, then in manner authorized by law for disposition of personal property of deceased persons. Not liable for any debt of deceased, if he or she left husband, wife, child, father, mother, brother, sister, or child of deceased child.	Jury may give such damages pecuniary and exemplary, as they shall deem fair and just, and may take into consideration pecuniary injury resulting from such death to kindred named.		

State and Statute.	When Action Lies.	Who may Sue.	For Whose Benefit.
NEW HAMPSHIRE. Pub. St. 1891, c. 191, §§ 8–13.	Actions of tort for physical injuries to the person, and the causes of action therefor, survive.	Administrator.	
NEW JERSEY. Revision 1878, p. 294, §§ 1–3.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action.	Personal representatives.	Exclusive benefit of widow and next of kin
NEW MEXICO. Comp. Laws 1884, §§ 2308–2310, 2316, as amended by Laws 1891, c. 49.	Whenever any person shall die from any injury occasioned by negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employe, while running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any stagecoach or other public conveyance, and when any passenger shall die from any injury occasioned by any defect or insufficiency in any railroad or part thereof, or in any locomotive or car, stagecoach, or other public conveyance, employer or owner shall be liable. Defendant may show in defense that defect or insufficiency was not negligent. Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action.	Husband or wife; if no husband or wife, or if he or she fails to sue within six months after death, minor children; and if deceased was minor and unmarried, father and mother, who may join, or survivor. Personal representatives.	

How Distributed.	Measure of Damages.	When to be Commenced.	Remarks.
Damages, less expenses of recovery, shall be distributed (1) to widow or widower one half, and to children one half, in equal shares; (2) if no child, to widow or widower; (3) if no child, widow, or widower, to heirs at law, according to laws of distribution.	Shall not exceed $7,000. If death was caused by injury complained of, mental and physical pain suffered by deceased in consequence of injury, reasonable expenses occasioned to his estate by injury, probable duration of his life but for injury, and his capacity to earn money, may be considered as elements of damage, in connection with other elements allowed by law.	If not barred by statute of limitations, within two years after death.	
To widow and next of kin in proportions provided by law in relation to distribution of personal property left by persons dying intestate.	Jury may give such damages as they shall deem fair and just, with reference to pecuniary injury resulting from such death to wife and next of kin.	Within 12 calendar months after death.	On request, plaintiff must deliver particular account of nature of claim.
	Defendant shall forfeit $5,000.	Within one year after cause of action accrued.	
To surviving husband or wife, if no child; if there be surviving husband or wife and child or children or grandchildren, then equally to each, grandchildren by right of representation; if there be no husband or wife, but children or grandchildren, then to children and grandchildren by right of representation; if there be no child or grandchild, then to surviving brothers or sisters. If there are any of the kindred above named, the proceeds are not liable for debts of deceased. In default of any such kindred, proceeds shall be disposed of in manner of personal property of deceased persons.	Jury may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration pecuniary injuries resulting from such death to surviving parties entitled to judgment, or any interest therein, and also having regard to mitigating or aggravating circumstances.	do.	

STATE AND STATUTE.	WHEN ACTION LIES.	WHO MAY SUE.	FOR WHOSE BENEFIT.
NEW YORK. Code Civil Proc. §§ 1902–1905, 1870.	Action may be maintained for wrongful act, neglect, or default by which death of decedent, who has left husband, wife, or next of kin, was caused, against person who, or corporation which, would have been liable to action in favor of decedent, if death had not ensued.	Executor or administrator.	Exclusive benefit of husband or wife and next of kin.
NORTH CAROLINA. Code 1883, §§ 1498–1500.	Whenever death is caused by wrongful act, neglect, or default, such as would, if injured party had lived, have entitled him to action.	Executor, administrator, or collector.	
NORTH DAKOTA. Comp. Laws Dak. §§ 5498, 5499.	If life of any person, not in employment of railroad corporation, is lost by reason of negligence or carelessness of proprietor of any railroad, or by unfitness or negligence or carelessness of their employes, or agents.	Personal representatives.	
Comp. Laws Dak. § 5499.	If the life of any person is lost or destroyed by the neglect, carelessness, or unskillfulness of any person.	Widow, heir, or personal representatives.	
OHIO. Rev. St. §§ 6134, 6135, as amended by Act April 13, 1880.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action.	Personal representative.	Exclusive benefit of wife, or husband and children, or, if neither, of parents and next of kin.
OKLAHOMA. St. 1890, c. 70, art. 4, §§ 4336, 4338.	When death is caused by wrongful act or omission, if person injured might have maintained action had he lived.	Personal representatives.	Widow and children, if any, or next of kin.
OREGON. Hill's Code, §§ 369–371.	When death is caused by wrongful act or omission, if person injured might have maintained action had he lived.	Personal representatives.	
Hill's Code, § 34.	Father, or, in case of death or desertion of his family, mother, may maintain action for death of child; and guardian for death of ward.		

How Distributed.	Measure of Damages.	When to be Commenced.	Remarks.
As if unbequeathed assets, left in hands of plaintiff after payment of debts and expenses of administration; but plaintiff may deduct expenses of action and commissions.	Damages may be such sum, not exceeding $5,000, as jury, court, or referee deems to be a fair and just compensation for pecuniary injuries resulting from decedent's death to persons for whose benefit action is brought. Amount recovered shall draw interest from time of death, which interest shall be added to verdict, and inserted in entry of judgment.	Within two years after death.	
Not liable as assets for debts or legacies, but shall be disposed of as provided for distribution of personal property in case of intestacy.	Plaintiff may recover such damages as are a fair and just compensation for pecuniary injury resulting from death.	Within one year after death.	Defendant's executors or administrators are liable.
	May recover damages in the same manner that person might have done for injury where death did not ensue. Damages for the loss or destruction of life.		
Among beneficiaries, unless adjusted between themselves, by court appointing administrator, in such manner as shall be fair and equitable, having reference to their age and condition and laws of descent and distribution of personal estates left by persons dying intestate.	Jury may give such damages, not exceeding $10,000, as they may think proportioned to pecuniary injury resulting from death to persons, respectively, for whose benefit action is brought.	Within two years after death.	Personal representative, if appointed in state, with consent of court making appointment, may settle with defendant.
In same manner as personal property of the deceased.	Cannot exceed $10,000.	Within two years.	
Shall be administered as other personal property of the deceased.	Shall not exceed $5,000.	Within two years after death.	

STATE AND STATUTE.	WHEN ACTION LIES.	WHO MAY SUE.	FOR WHOSE BENEFIT.
PENNSYLVANIA.			
2 Bright. Purd. Dig. pp. 1267, 1268, §§ 1-7.	Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by party injured.	Husband, widow, children, or parents.	Husband, widow, children, or parents, and no other relative.
Bright. Purd. Dig. Supp. p. 2252, § 70.	In case of loss of life by violation of act, (Miners' Act,) or willful failure to comply with its provisions.	Widow and lineal heirs.	
RHODE ISLAND.			
Pub. St. 1882, c. 204, §§ 15-20; c. 205, § 3.	If life of passenger in any conveyance, when used by common carriers, or life of any person, whether passenger or not, in care of proprietors of, or common carriers by means of, railroads or steamboats, or life of any person crossing upon public highway with reasonable care, is lost by reason of negligence or carelessness of such common carriers or proprietors, or by unfitness, or negligence, or carelessness of their servants or agents.	Executor or administrator, whether appointed within or without the state, in actions for benefit of widow and next of kin; but, where there is widow only, she may, at her option, sue in her own name. Any person having a direct pecuniary interest in the continuance of the life.	Husband or widow and next of kin. Any person having direct pecuniary interest in continuance of life.
	In all cases in which death of any person ensues from injury inflicted by wrongful act of another, and in which an action for damages might have been maintained at common law, had death not ensued.	do.	Husband, widow, children, or next of kin.
SOUTH CAROLINA.			
Gen. St. 1882, §§ 2183-2186.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action. No action lies in case there has been final judgment before his death in action by him for the injury.	Executor or administrator.	Wife, husband, parent, and children.
SOUTH DAKOTA.			
Comp. Laws Dakota, §§ 5498, 5499. Same as North Dakota.			
TENNESSEE.			
Mill. & V. Code, §§ 3130-3134.	The right of action which a person who dies from injuries received from another, or whose death is caused by wrongful act, omission, or killing by another, would have had in case death had not ensued, shall not abate by his death.	Personal representative; but, if he declines, widow and children may, without his consent, use his name, on giving bond, or in form prescribed for paupers. Also widow in her own name, or, if no widow, children. If deceased had commenced action, it shall proceed without revivor.	Widow, and, in case there is no widow, children or personal representative, for benefit of widow or next of kin.

How Distributed.	Measure of Damages.	When to be Commenced.	Remarks.
In proportion persons entitled would take personal estate of deceased in case of intestacy, without liability to creditors.	Damages for the death. Direct damages for the injury sustained by the loss of life.	Within one year after death.	Declaration shall state who are parties entitled.
One half to husband or widow, and one half to children; if no children, whole to husband or widow; and if no husband or widow, to next of kin, according to law regulating distribution of intestate personal estate among next of kin.	Damages for the injury caused by the loss of life.	Within six years after cause of action accrues.	
do.	Damages for injury caused by death.	do.	
Among wife, husband, parents, and children, in such shares as if deceased had died intestate and amount recovered were personal assets.	Jury may give such damages as they think proportioned to injury resulting from death to parties, respectively, for whom action is brought.	Within two years after death.	Executor or administrator is liable to costs of action out of estate, and, if no estate, personally.
To widow and next of kin, free from claims of creditors, as personal property.	Party suing shall have right to recover for mental and physical suffering, loss of time, and necessary expenses resulting to deceased from personal injuries, and also damages resulting to parties for whose benefit right of action survives from death.		

STATE AND STATUTE.	WHEN ACTION LIES.	WHO MAY SUE.	FOR WHOSE BENEFIT.
WASHINGTON.			
Hill's Ann. St. & Code, § 138.	When man is killed in a duel, action lies against persons killing him, and seconds, aiders, and abettors.	Widow, or widow and children, or children.	
do.	When death is caused by wrongful act or neglect of another.	Heirs or personal representatives.	
do.	When death is caused by injury received in falling through opening or defective place in sidewalk, street, alley, square, or wharf, action lies against person whose duty it was to keep in repair.	do.	
Hill's Ann. St. & Code, § 139.	Father, or, in case of his death or desertion of his family, mother, may maintain action for death of child, and guardian for death of ward.		
WEST VIRGINIA.			
Code, c. 108, §§ 5, 6.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action.	Personal representative.	
WISCONSIN.			
Rev. St. 1878, §§ 4255, 4256, 4224.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action.	Personal representative.	
WYOMING.			
Rev. St. 1887, §§ 2364a, 2364b.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action.	Personal representative.	

How Distributed.	Measure of Damages.	When to be Commenced.	Remarks.
	Jury may give such damages, pecuniary or exemplary, as, under all circumstances of case, may seem just.		
	do.		
	do.		
To parties and in proportions provided by law in relation to distribution of personal estate left by persons dying intestate. Not subject to debts and liabilities of deceased.	Jury may give such damages as they shall deem fair and just, not exceeding $10,000.	Within two years after death.	
To husband or widow, if such relative survive deceased; otherwise, to lineal descendants of deceased, and to his lineal ancestors in default of such descendants.	Jury may give such damages, not exceeding $5,000, as they shall deem fair and just, in reference to pecuniary injury resulting from such death, to relatives specified.	Within two years.	
To parties and in proportions provided by law in relation to distribution of personal estates left by persons dying intestate. Not subject to debts and liabilities of deceased.	Jury may give such damages as they shall deem fair and just, ~~not exceeding $5,000.~~ Amended July 4, 1909 by omitting $5000 limit.	Within two years after death.	

STATE AND STATUTE.	WHEN ACTION LIES.	WHO MAY SUE.	FOR WHOSE BENEFIT.
NEW BRUNSWICK. Consol. St. c. 86, §§ 1-7.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action. Not more than one action lies for same subject-matter.	Executor or administrator.	Wife, husband, parent, (which includes grandparent,) and child, (which includes grandchild.)
NOVA SCOTIA. Rev. St. 1884, c. 116.	Whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled party injured to maintain action. Not more than one action lies for same subject-matter.	Executor or administrator.	Wife, husband, parent, (which includes grandparent and stepparent,) and child, (which includes grandchild and stepchild.)
ONTARIO. Rev. St. 1887, c. 135.	Where death is caused by such wrongful act, neglect, or default as would, if death had not ensued, have entitled party injured to maintain action. Where death is caused by wound or injury received in a duel, and inflicted by firearms or other deadly weapons, person inflicting wound or injury and seconds or assistants in duel may be proceeded against, although no action could have been brought by person whose death is caused, had death not ensued. Not more than one action lies for same subject-matter.	Executor or administrator. If no executor or administrator, or if no action is brought within six months, action may be brought by all or any of persons for whose benefit action lies.	Wife, husband, parent, (which includes grandparent and stepparent,) and child, (which includes grandchild and stepchild.)
QUEBEC. Civil Code L. Can. p. 287, art. 1056.	Where person injured by commission of offense or *quasi* offense dies in consequence, without having obtained indemnity or satisfaction. In case of duel, action lies against immediate author of death, and all who took part as seconds or witnesses. Not more than one action lies.	Consort and ascendant and descendant relations.	

How Distributed.	Measure of Damages.	When to be Commenced.	Remarks.
After deducting costs and expenses not recovered from defendant, among parties for whose benefit action is brought, in such shares as jury by verdict shall find.	Jury may give such damages by way of fair compensation as they may think proportioned to pecuniary loss resulting from death to parties, respectively, for whose benefit action is brought: provided, that reasonable expectation of pecuniary benefit from continuance of life of deceased shall not be estimated for period exceeding 10 years. Expenses incurred or pecuniary loss sustained by person injured in consequence of injury may also be recovered; and such amount as may be found by jury in respect thereof shall be assets.	Within 12 calendar months after death.	Plaintiff must, together with declaration, deliver to defendant full particulars of persons for whom action is brought, and of manner in which pecuniary loss to different persons is alleged to have arisen.
After deducting costs not recovered from defendant, among parties for whom action is brought, in such shares as jury by verdict shall find.	Jury may give such damages as they may think proportioned to injury resulting from death to parties, respectively, for whose benefit action is brought.	Within 12 months after death.	Plaintiff must, with writ, deliver to defendant full particulars of persons for whom action is brought, and of nature of claim.
After deducting costs not recovered from defendant, among parties for whose benefit action is brought, in such shares as judge or jury find. If compensation is not so apportioned, it shall be referred to a judge to apportion same.	Judge or jury may give such damages as he or they may think proportioned to injury resulting from death to parties, respectively, for whose benefit action is brought.	Within 12 months after death.	Plaintiff shall, in statement of claim, deliver full particulars of persons for whom action is brought. Defendant may pay money into court, and if an issue is taken as to its sufficiency, and judge or jury shall think it sufficient, defendant shall be entitled to verdict on that issue.
Judgment determines proportion of indemnity which each is to receive.	All damages occasioned by death.	Within year after death.	

DEATH BY WRONGFUL ACT.

CHAPTER I.

THE COMMON LAW.

§ 1. No action for death at common law.
2. Higgins v. Butcher.
3. Baker v. Bolton.
4. Lord Campbell's act.
5. Osborn v. Gillett.
6. Early American cases.
7. Carey v. Berkshire R. Co.
8. Eden v. Lexington & F. R. Co.
9. James v. Christy.
10. Shields v. Yonge.
11. Later American cases.
12. Reason for the rule.
13. Merger.
14. Forfeiture.
15. *Actio personalis moritur cum persona.*
16. Public policy.
17. Limitation of the rule.
18. Right of action where death is caused by breach of contract.

§ 1. No action for death at common law.

At common law the right of action for an injury to the person abates upon the death of the party injured, the case falling within the familiar rule, *actio personalis moritur cum persona.* Hence, where death results, whether instantaneously or not, from such an injury, no action can be maintained by the personal representative of the party injured to recover damages suffered by the decedent.

In cases of injury to the person, however, in addition to the right of action of the party receiving the physical injury, causes of action may accrue to persons who stand to him or her in the relation of master, parent, or husband for the recovery of damages for loss of service or society. To these persons the rule of *actio personalis moritur cum persona* has no application. It might naturally be supposed, therefore, that damages could be recovered by persons of this description, not only for the loss of service or society before the death, but also for the permanent loss of service or society, caused by the death. It might perhaps be supposed that the law would even grant a remedy, as is done by the Scotch law,[1] to the children and to other members of the family of the deceased who might have suffered injury by his death, irrespective of any technical loss of service or of society; but to both classes alike the common law denies a remedy. The law has not become established, indeed, without vigorous dissent upon the part of able judges, but the common-law rule may now be broadly stated to be that no civil action can be maintained against a person for causing the death of a human being.

[1] Weems v. Mathieson, 4 Macq. H. L. C. 215; Patterson v. Wallace, 1 Macq. H. L. C. 748; Cadell v. Black, 5 Paton, 567. It is said in The Harrisburg, 119 U. S. 199, 7 Sup. Ct. Rep. 140, that such also is the law of France, citing 28 Merlin Repertoire, 442, *verbo* "Reparation Civile," § iv; Rolland v. Gosse, 19 Sirey, (*Cour de Cassation,*) 269. That such was the civil law was denied in Hubgh v. New Orleans & C. R. Co., 6 La. Ann. 495, and Hermann v. New Orleans & C. R. Co., 11 La. Ann. 5. See Ravary v. Grand Trunk Ry. Co., 6 Low. Can. Jur. 49, and Canadian Pac. Ry. Co. v. Robinson, 14 Can. Sup. Ct. 105, as to the existence of such a right of action under the civil law as administered in Lower Canada irrespective of statute.

§ 2. Higgins v. Butcher.

The earliest case is Higgins v. Butcher,[2] which arose in the king's bench in 1606. The plaintiff declared that the defendant assaulted and beat his wife, of which she died, to his damage. It was objected "that the declaration was not good, because it was brought by the plaintiff for beating his wife; and that, being a personal tort to the wife, is now dead with the wife; and if the wife had been alive, he could not without his wife have this action, for damages shall be given to the wife for the tort offered to the body of his wife. *Quod fuit concessum.* And by Tanfield, J., if a man beats the servant of J. S., so that he dies of the battery, the master shall not have an action against the other for the battery and loss of service, because, the servant dying of the extremity of the battery, it is now become an offense to the crown, being converted into felony, and that drowns the particular offense and private wrong offered to the master before, and his action is thereby lost. *Quod* Fenner and Yelverton, *concesserunt.*" The declaration seems to have been for the damage to the wife, and not for loss of services, so that all that the case actually decided is that, where a wrong is done to a person who dies, the action dies. In a report of the case in Rolle's Abridgment,[3] it is said: "If one

[2] Yelverton, 89.

[3] 2 Rolle's Abridgment, 575, *placita* 2 and 3. So in another report of the case, (Noy, 18,) Tanfield, J., is made to say "that it will not lie, as the case is, because the wife is dead, and that she ought to have joined in the action; but *otherwise of a servant.*" In Smith v. Sykes, Freem. 224, it was held that if A. beat the wife of B., so that she dies, B. can have no action on the case for that, because it is criminal, and of a higher nature. And it was urged that if a man beat a *feme covert*, the husband could have no action *per quod consortium amisit*, but that the husband and wife ought to join in the action, and, if the husband dies, it shall survive to the wife; but the action shall not survive to the husband, if the wife dies. *Curia advisare vult.* The reporter adds: *Mes semble a*

beat my servant so that I lose his service for some months, and the servant then dies, still I shall have an action of trespass against the trespasser, for this was a distinct trespass to me." The case is usually cited as deciding that, in case of an injury resulting in death, the right of action is merged in the felony.

§ 3. Baker v. Bolton.

The question was not again raised in England until 1808, in Baker v. Bolton,[4] which, although only at *nisi prius*, is the leading case upon the subject. This was an action against the defendants as proprietors of a stagecoach on which the plaintiff's wife was traveling when it was overturned, whereby she was so severely hurt that she died within a month. The declaration, besides other special damage, states that, "by means of the premises, the plaintiff had wholly lost and been deprived of the comfort, fellowship, and assistance of his said wife, and had from thence hitherto suffered and undergone great grief, vexation, and anguish of mind." It appeared that the plaintiff was much attached to his wife, and that, being a publican, she had been of great use to him in conducting his business. Lord Ellenborough told the jury that they could only take into consideration the loss of the wife's society to the plaintiff, and his distress of mind on her account, from the time of the accident till the moment of her dissolution. He then laid down his famous proposition that, "in a civil court, the death of a human being could not be complained of as an injury." In support of this, he cited no authority, and stated no reason. Nevertheless, his statement of the law has been accepted in nearly all subsequent cases as final.

moy: q'le action per quod consortium amisit gist bien per 2 Roll. 556; 2 Roll. Rep. 51.

[4] 1 Campb. 493.

§ 4. Lord Campbell's act.

Such were the decisions in England when, in 1846, the statute commonly known as "Lord Campbell's Act"[5] was enacted,—an act which has served as the model for similar acts in most of the states in this country. Lord Campbell's act is entitled "An act for compensating the families of persons killed by accidents." It gave an action to the family for the recovery of damages resulting from death, irrespective of any technical loss of service or of society, thereby introducing into the law an entirely new principle of recovery. It left the existing action for loss of service or of society untouched. Nevertheless, the preamble of the act broadly recites: "Whereas *no action* at law is now maintainable against a person who by his wrongful act, neglect, or default, may have caused the death of any person." As the preamble was doubtless intended to be declaratory of the law, it has generally been taken to be a parliamentary recognition of Lord Ellenborough's rule, though the force of the argument was denied by Bramwell, B., in the case of Osborn v. Gillett,[6] in which an effort was made, in 1873, to overrule Baker v. Bolton.

[5] 9 & 10 Vict. c. 93.

Probably the earliest statute giving a remedy for death caused by negligence was enacted in Massachusetts in 1648: "The court considering the great danger that persons, horses, teames, are exposed to by reasons of defective bridges, & country highways in this jurisdiction, Doth Order & declare: That if any person, at any time loose his life, in passing any such bridge or highway, after due warning given unto of any of the Select men of the towne in which such defect is, in writing under the hand of two witnesses or upon presentment to the shire Court, of such defective wayes or bridges, that then the county or towne which ought to secure such wayes or bridges, shall pay a fine of one hundred pounds, to the parents, husband, wife or children or next of kin, to the partie deceased." Colonial Laws of Massachusetts, (reprinted from the edition of 1660,) Boston, 1889, p. 126.

[6] L. R. 8 Ex. 88; 42 L. J. Ex. 53; 28 L. T. (N. S.) 197; 21 Wkly. R. 402

§ 5. Osborn v. Gillett.

The declaration in Osborn v. Gillett stated that the defendant, by his servant, negligently drove a wagon and horses against the plaintiff's daughter and servant, whereby she was injured, and by reason thereof afterwards died; whereby the plaintiff lost her service, and incurred the expenses of burial. The defendant pleaded that she was killed on the spot, so that the plaintiff sustained no damages which entitled him to sue; and also that the acts of the defendant amounted to a felonious act by his servant, and that the servant had not been tried, convicted, or acquitted of, nor in any manner prosecuted for, the offense. The court (Kelly, C. B., Pigott, B., and Bramwell, B.) unanimously held the latter plea bad; but a majority of the court held the former plea good, Bramwell, B., dissenting. Pigott, B., said: "It may seem a shadowy distinction to hold that, when the service is simply interrupted by accident resulting from negligence, the master may recover damages, while in case of its being determined altogether by the servant's death, from the same cause, no action can be sustained. Still I am of opinion that the law has been so understood up to the present time; and, if it is to be changed, it rests with the legislature, and not with the courts, to make the change. It is admitted that no case can be found in the books where such an action as the present has been maintained, although similar facts must have been a matter of very frequent occurrence. This alone is strong to show that the general understanding has been to the effect laid down by Lord Ellenborough in Baker v. Bolton. That was, no doubt, a *nisi prius* decision; but it does not appear that it has ever been questioned." He also relies on the preamble to Lord Campbell's act. As to the plea that the act amounted to a felony, he observed that "it only affords a defense, *if at all*, when the action is brought against the supposed criminal, and before prosecution."

The dissenting opinion of Bramwell, B., is a strong presentation of the case against the existence of any rule forbidding the maintenance of an action for loss of service resulting from death. In conclusion he says: "It seems to me that the principle the plaintiff relies on is broad, plain, and clear, viz., that he sustained a damage from a wrongful action for which the defendant is responsible; that the defendant, to establish an anomalous exception to the rule, for which exception he can give no reason, should show a clear and binding authority, either by express decision, or a long course of uniform opinion, deliberately formed and expressed by English lawyers or experts in the English law. I find neither. With the exception of a short note of the case of Baker v. Bolton, there is no semblance of an authority on this side of the Atlantic, and the cases from the other side[7] are merely founded on that one, and some vague notion of a merger in a felony."

§ 6. Early American cases.

The earliest American cases were not in accord with Baker v. Bolton. Cross v. Guthery,[8] in the supreme court of Connecticut, (1794,) was an action on the case against a surgeon for unskillfully performing an operation on the plaintiff's wife, as the result of which she died, whereby the plaintiff had been put to cost and expense, and had been deprived of her service, company, and consortship. After a verdict in favor of the plaintiff for £40, the defendant moved in arrest of judgment that the declaration was insufficient, on the ground that the offense charged appeared to be a felony, and by the laws of England the private injury was merged in the public offense. But the court held

[7] The American cases referred to in his opinion are Carey v. Berkshire R. Co., Skinner v. Housatonic R. Corporation, *infra*, § 7, and Eden v. Lexington & F. R. Co., *infra*, § 8.

[8] 2 Root, 90.

the declaration sufficient, saying that the rule urged was applicable in England only to capital crimes, where, from necessity, the offender must go unpunished, or the injured individual go unredressed.

In Ford v. Monroe,[9] in the supreme court of New York, (1838,) the declaration charged that, by the negligence of a servant of the defendant, an infant son of the plaintiff, of about 10 years, was run over and killed. The plaintiff alleged, by way of special damage, that in consequence of the occurrence, his wife became sick, and that he was deprived of her society, and subjected to expense in attendance upon her; and also alleged the loss of service of the child for a period of 10 years and upwards. The judge charged the jury that the plaintiff would be entitled to recover for the value of the child's services until he became 21 years of age, and also the damages occasioned by his wife's sickness. The main ground urged upon an application for a new trial, which was denied, was the failure of proof that the servant was acting within the scope of his authority. On the question of damages the court observed that they were clearly proved to have been the direct consequence of the act complained of.

Both Cross v. Guthery and Ford v. Monroe, so far as they are authorities that an action may be maintained for loss of service caused by death, have been overruled.[10] They are of interest, however, as showing that, at the time they were decided, Lord Ellenborough's rule was not universally recognized in this country. This is shown, also, by the *dictum* of Ware, J., in Plummer v. Webb,[11] which arose in the United States district court for Maine, in 1825. He was of opinion that a libel might be maintained by the father for the consequential damages resulting from the assault and battery of a minor child, on the high seas, *per quod servitium amisit*, notwithstanding the death

[9] 20 Wend. 210. [10] *Infra*, § 11.

[11] 1 Ware, 69. See, also, Cutting v. Seabury, 1 Sprague, 522.

of the child in consequence of the battery. The case was in admiralty, but he did not rest his opinion upon any difference of the admiralty rule from that of the common law.

§ 7. Carey v. Berkshire R. Co.

The earliest discussion of the question in the United States, except the remarks of Ware, J., which were unnecessary to the decision, occurred in the cases of Carey v. Berkshire R. Co. and Skinner v. Housatonic R. Corp., which were considered together by the supreme court of Massachusetts, in 1848.[12] The first of these cases was an action on the case to recover damages for the loss of life of the plaintiff's husband, in consequence of the negligence of the defendant's servants. The second was an action on the case brought by the plaintiff for the loss of service of his son, aged 11 years, who was killed by the cars of the defendant. The court, in its opinion, by Metcalf, J., says that these cases raise a new question in our jurisprudence. Referring to the case of Higgins v. Butcher,[13] the court says that, whatever may be the meaning of the maxim that a trespass is merged in a felony, it has no application to the cases under consideration, in neither of which was the killing felonious. "If these actions, or either of them, can be maintained," the court says, "it must be upon some established principle of the common law; and we might expect to find that principle applied in some adjudged case in the English books, as occasions for its application must have arisen in very many instances. At least, we might expect to find the principle stated in some elementary treatise of approved authority. None such was cited by counsel, and we cannot find any. This is very strong evidence, though not conclusive, that such actions

[12] 1 Cush. 475. See Palfrey v. Portland, S. & P. R. Co., 4 Allen, 55.
[13] *Supra*, § 2.

cannot be supported. But it is not necessary to rely entirely on this negative evidence, for we find it adjudged in Baker v. Bolton and others that the death of a human being is not the ground of an action for damages. * * * Such, then, we cannot doubt, is the doctrine of the common law; and it is decisive against the maintenance of these actions." The court dismisses Ford v. Monroe[14] as a case in which the question under discussion was not raised. It was commented on as strange, by Bramwell, B., in Osborn v. Gillett,[15] that these two cases "are supposed to present a single question only for the court, while it is obvious that the case of master and servant raises a different question from that of husband and wife."

§ 8. Eden v. Lexington & F. R. Co.

In Eden v. Lexington & F. R. Co.,[16] in 1853, the court of appeals of Kentucky held that a husband could not maintain an action for the injury sustained by him in consequence of the death of his wife, caused by the negligence of the defendant's servants. The court denied the existence in Kentucky of the common-law rule suspending the civil remedy in cases involving felony until after the conviction or acquittal of the felon, but declared that, "for injuries to life, the civil remedy is considered as being entirely merged in the civil offense." "This," the court incorrectly says, "was said to be the established common-law doctrine in the case of Baker v. Bolton."

§ 9. James v. Christy.

In James v. Christy,[17] in the supreme court of Missouri, in 1853, it was assumed that an action could be maintained by the father to recover for the loss of the services of his

[14] 20 Wend. 210.
[15] *Supra*, § 5.
[16] 14 B. Mon. 165.
[17] 18 Mo. 162.

minor son, who had been killed by the negligence of the defendant, a common carrier. After beginning suit the plaintiff died, and the point of the decision was that the action survived, under the Missouri statute governing the survival of actions. The court observed: "The statute extends to all cases where personal property is lessened. Here the father was entirely deprived of all property in his son's services." The case is cited without disapproval in a recent Missouri decision.[18]

§ 10. Shields v. Yonge.

In Shields v. Yonge,[19] in 1854, the supreme court of Georgia refused to follow Baker v. Bolton, and held that a suit could be maintained by a father for the death of a minor son, caused by the defendant's negligence, to recover damages for the loss of his service until the age of 21. Benning, J., in delivering the opinion of the court, takes the position that the supposed rule that in a civil court the death of a human being cannot be complained of as an injury is in reality no rule of law at all, but a mere statement of the practical working of the old law of forfeiture, taken in connection with the rule that, in cases where the wrong complained of amounted to a felony, the remedy was suspended until after conviction. Because in former times, he argues, all homicides were felonies, and all felonies were punished by forfeiture of goods, if not of life, nothing remained after conviction out of which to satisfy a judgment in a civil action. Hence, he argues, arose the erroneous notion that in cases of homicide the private injury was merged in the public wrong, which he assumes to be equivalent to the rule declared by Lord Ellenborough. Shields v. Yonge has recently been approved by the same court.[20]

[18] Stanley v. Bircher, 78 Mo. 245. [19] 15 Ga. 349.

[20] Chick v. Southwestern R. Co., 57 Ga. 357; McDowell v. Georgia R. Co., 60 Ga. 320. See chapter III., note 10.

§ 11. Later American cases.

The question under discussion has been repeatedly before the courts, and the cases, with the exception of those which have been above referred to, and of Sullivan v. Union Pac. R. Co.,[21] which will be referred to presently, have been unanimous in yielding to the authority of Baker v. Bolton. The rule has been applied equally in actions brought by the husband for the death of the wife;[22] by the wife for the death of the husband;[23] by the parent for the death of a minor child;[24] by the widow suing in her own right, and as tutrix of her minor children;[25] by the executor or administrator suing in his representative capacity;[26] and by an insurance company suing to recover damages by reason of having been forced to pay an insurance policy on the life of a person killed by the

[21] Sullivan v. Union Pac. R. Co., 3 Dill. 334.

[22] Worley v. Cincinnati, H. & D. R. Co., 1 Handy, 481; Hyatt v. Adams, 16 Mich. 180; Green v. Hudson River R. Co., 2 Keyes, 294; 2 Abb. Dec. 277, (affirming 28 Barb. 9; 16 How. Pr. 230;) Lucas v. New York Cent. R. Co., 21 Barb. 245; Grosso v. Delaware, L. & W. R. Co., 50 N. J. L. 317, 13 Atl. Rep. 233.

[23] Lyons v. Woodward, 49 Me. 29; Wyatt v. Williams, 43 N. H. 102.

[24] Nickerson v. Harriman, 38 Me. 277; Kramer v. Market St. R. Co., 25 Cal. 434; Covington St. Ry. Co. v. Packer, 9 Bush, 455; Little Rock & F. S. Ry. Co. v. Barker, 33 Ark. 350; Davis v. St. Louis, I. M. & S. Ry. Co., 53 Ark. 117, 13 S. W. Rep. 801; Edgar v. Castello, 14 S. C. 20; Natchez, J. & C. R. Co. v. Cook, 63 Miss. 38; Scheffler v. Minneapolis & St. L. Ry. Co., 32 Minn. 125, 19 N. W. Rep. 656; Sherman v. Johnson, 58 Vt. 40, 2 Atl. Rep. 707; Thomas v. Union Pac. R. Co., 1 Utah, 232; Sullivan v. Union Pac. R. Co., 2 Fed. Rep. 447, 1 McCrary, 301.

[25] Hubgh v. New Orleans & C. R. Co., 6 La. Ann. 495; Hermann v. New Orleans & C. R. Co., 11 La. Ann. 5.

[26] Kearney v. Boston & W. R. Corp., 9 Cush. 108; Whitford v. Panama R. Co., 23 N. Y. 465; Crowley v. Panama R. Co., 30 Barb. 99; Beach v. Bay State Co., 30 Barb. 433. These cases, however, are really rather illustrations of the rule of *actio personalis*, as was pointed out by Denio, J., in Whitford v. Panama R. Co. See § 195.

defendant.[27] In Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co.,[28] which was a case of the last description, the supreme court of Connecticut gave its adherence to the rule, without even referring to Cross v. Guthery. In Green v. Hudson River R. Co.,[29] the New York court of appeals overruled Ford v. Monroe. In Sullivan v. Union Pac. R. Co.,[30] mentioned above as in conflict with the current of the decisions, which arose in the United States circuit court for Nebraska, in 1874, it was held that an action was maintainable by a father, whose son had been killed by the defendant's negligence, to recover damages for the loss of service until the son's majority; and Dillon, J., delivered an able opinion in support of the position of the court. But since that case the question has been before the supreme court of the United States in Mobile Life Ins. Co. v. Brame,[31] a case similar in its facts to Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co. The court held that the action could not be maintained, and Hunt, J., who delivered the opinion, says: "The authorities are so numerous and so uniform to the proposition that by the common law no civil action lies for an injury which results in death, that it is impossible to speak of it as a proposition open to question." This

[27] Connecticut Mut. Life Ins. Co., v. New York & N. H. R. Co., 25 Conn. 265; Insurance Co. v. Brame, 95 U. S. 756.

[28] 25 Conn. 265.

[29] 2 Keyes, 294; 2 Abb. Dec. 277, affirming s. c. 28 Barb. 9, and 16 How. Pr. 230. Views in accordance with the decision of this case had been expressed by judges of the court, although the point had never been formerly decided. See Pack v. Mayor, 3 N. Y. 493; Oldfield v. New York & H. R. R. Co., 14 N. Y. 310; Whitford v. Panama R. Co., 23 N. Y. 475. A *dictum* opposed to the decision had been expressed in Lynch v. Davis, 12 How. Pr. 323. But see McGovern v. New York Cent. & H. R. R. Co., 67 N. Y. 417, in which Andrews, J., refers to Ford v. Monroe as if it were good law.

[30] 3 Dill. 334. In Cutting v. Seabury, 1 Sprague, 522, (1860,) Sprague, J., denied that it could be considered as settled law that no action could be maintained for damages occurring from the death of a human being.

[31] 95 U. S. 756.

statement of the law was approved by the same court in The Harrisburg,[32] which held that the same rule was applicable in this respect in courts of admiralty as at common law.

§ 12. Reason for the rule.

No satisfactory reason for the rule has ever been suggested, though attempts have been made to base it upon the merger of the civil remedy in the felony, upon the law of forfeiture, upon the maxim *actio personalis moritur cum persona*, and upon public policy.

§ 13. Merger.

Blackburn, J., says[33] that the *dictum* of Tanfield, J., in Higgins v. Butcher, is the earliest authority we can find for the notion that the civil remedy was merged in the felony. Whether the doctrine of an absolute merger ever existed has been doubted.[34] In recent times it has been held in England that the merger is only temporary, and that it amounts only to a suspension of the civil remedy until the wrongdoer has been prosecuted.[35] Thus, the fact that the thief had not been prosecuted was held no defense in an action of trover against the innocent purchaser of stolen goods;[36] and where the wrong complained of was committed, not by the defendant, but by his servant, the failure to prosecute was no defense.[37]

It has been recently questioned,[38] moreover, whether the

[32] 119 U. S. 199, 7 Sup. Ct. Rep. 140. See § 204.

[33] Wells v. Abrahams, L. R. 7 Q. B. 554.

[34] Wells v. Abrahams, *supra*.

[35] Lutterell v. Reynell, 1 Mod. 282; Crosby v. Leng, 12 East, 409; Wells v. Abrahams, *supra;* Osborn v. Gillett, 8 Exch. 88, 42 L. J. Exch. 53; 28 L. T. (N. S.) 197, 21 Wkly. R. 409.

[36] White v. Spettigue, 13 M. & W. 603.

[37] Osborn v. Gillett, *supra*.

[38] Wells v. Abrahams, *supra*.

doctrine of merger existed even to this limited extent, and it has been held that, although the evidence shows that the wrong complained of amounts to a felony, this is no ground for a nonsuit. In the United States the doctrine of the suspension of the civil remedy has been held by some courts, but has more frequently been denied.[39] Be the rule of the common law what it may, it can obviously furnish no reason for Lord Ellenborough's rule; for in Baker v. Bolton it was not suggested that the killing was felonious, and Lord Ellenborough did not confine the rule to cases of felony. That merger was a ground for the rule was denied in Osborn v. Gillett, and the notion has been universally repudiated in this country.[40]

§ 14. Forfeiture.

It was suggested in Shields v. Yonge, as has been pointed out,[41] that the explanation of the supposed existence, if not the reason, of the rule was to be found in the law of the forfeiture of the goods and life of the felon upon conviction, taken in connection with the suspension of the civil remedy until after prosecution. But this explanation is open to the objection that forfeiture and suspension of the civil remedy were not confined to homicide, but accompanied other felonies, in respect to which it is not pretended that a complete merger took place, so that the argument proves too much.[42]

[39] 2 Bishop, Criminal Law, (7th Ed.) § 270 *et seq.*

[40] Carey v. Berkshire R. Co., 1 Cush. 475; Hyatt v. Adams, 16 Mich. 180.

[41] *Supra*, § 10.

[42] Hyatt v. Adams, 16 Mich. 180; Grosso v. Delaware, L. & W. R. Co., 50 N. J. L. 317, 13 Atl. Rep. 288.

§ 15. Actio personalis moritur cum persona.

This maxim simply means that the right of action dies with the person who was a party to the action, and therefore does not meet the case of the master, parent, or husband. This argument was disposed of by Hunt, J., in Green v. Hudson River R. Co.,[43] which was an action by the husband for the killing of his wife. "That principle, in my judgment," he says, "does not touch the present class of cases. In its legal aspect, the injury here complained of was done to the plaintiff, and not to his deceased wife. The claim is for compensation for injury to his rights, and not to hers. Should her executors bring their action to recover damages for the pain and anguish suffered by her for the cause alleged, the principle of *actio personalis* would find its proper application. It is not applicable to the action of the present plaintiff, in which the party alleged to be injured, and the party inflicting the injury, are still in existence."

§ 16. Public policy.

This term may be used to express various vague reasons which different judges have urged in support of the rule. For example, Christiancy, J.,[44] says that "the reason of the rule is to be found in that natural and almost universal repugnance among enlightened nations to setting a price upon human life." And Storrs, J.:[45] "It is manifestly not one reason but many, which lie at the basis of the common-law rule. Considerations of the most varied and grave character would present them-

[43] 2 Keyes, 294; 2 Abb. Dec. 277. See, also, opinion of Bramwell, B., in Osborn v. Gillett, and of Benning, J., in Shields v. Yonge, *supra*, § 10.

[44] Hyatt v. Adams, 16 Mich. 180.

[45] Connecticut M. L. Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265.

selves to the minds of any court, even though the matter should be presented to them as an original question, to dissuade them from entertaining any action, sounding in damages, and seeking a recovery on account of the destruction of life. * * * If a suit should be brought to recover for the mental suffering, loss of society, comfort, support, and protection resulting from the death of another person, we should see at once, so intertwined is the web of human affection, interest, and relationship, that the author of his death, however slight or accidental his default, would be responsible in numberless actions brought on behalf of wives, children, friends, brothers, sisters, and dependents of all degrees, to say nothing, for the present, of creditors; and, for an injury of such incalculable extent, writers on jurisprudence, perhaps without strict accuracy, have assigned the awful magnitude of the wrong as the reason why neither court nor jury have ever been trusted by the law with the function of estimating it."

However strange it may be that the common law, which provides a remedy for the seduction of a daughter based upon what is in most cases the legal fiction of a loss of service, should have denied a remedy for a permanent loss of service caused by death, an examination of the cases leads to no more satisfactory conclusion than that reached by Leonard, J., in Green v. Hudson River R. Co.:[46] "It is of no practical utility to search for the reason of the rule. It remains somewhat obscure."

§ 17. Limitation of the rule.

The scope of the rule being that no action can be maintained for causing death, the rule does not preclude an action to recover damages for loss of the service of the injured party dur-

[46] 2 Keyes, 294; 2 Abb. Dec. 277. But see article by R. C. McMurtrie, 16 Am. Law Rev. p. 128.

ing the period between the injury and the death, although the death resulted directly from the injury. Thus, in Baker v. Bolton, Lord Ellenborough told the jury that they could take into consideration the loss of the wife's society, and the distress of mind the plaintiff had suffered on her account, from the time of the accident until the moment of her dissolution; and this distinction has been followed.[47]

§ 18. Right of action where death is caused by breach of contract.

It has been held in England that, where death is caused by the breach of a carrier's implied contract for safe carriage, the executor or administrator, although he could not sue in tort, may sue in contract, and recover damages suffered by the decedent's estate. The first authority to this effect is a *dictum* in Knights v. Quarles,[48] (1820,) which was cited with approval in Alton v. Midland Ry. Co.[49] In Potter v. Metropolitan District Ry. Co.[50] it was held that the right of a husband to sue for loss in respect to injuries suffered by his wife, who had been injured while a passenger, by the defendant's negligence, being founded on a breach of contract, survived to his administratrix. In Bradshaw v. Lancashire & Y. Ry. Co.,[51] (1875,) where a passenger on a train was injured, and, after an interval, died in consequence, it was held that his executrix might, in an action for breach of contract, recover the damages to his per-

[47] Hyatt v. Adams, 16 Mich. 180; Nickerson v. Harriman, 88 Me. 277; Philippi v. Wolff, 14 Abb. Pr. (N. S.) 196; Covington St. Ry. Co. v. Packer, 9 Bush. 455; Natchez, J. & C. R. Co. v. Cook, 63 Miss. 88; Davis v. St. Louis, I. M. & S. Ry. Co., 53 Ark. 17, 13 S. W. Rep. 801; Mowry v. Chaney, 43 Iowa, 609.

[48] 2 Brod & B. 102.

[49] 19 C. B. (N. S.) 213.

[50] 30 L. T. (N. S.) 765.

[51] L. R. 10 C. P. 189; 44 L. J. C. P. 148.

sonal estate arising in his lifetime from medical expenses, and loss occasioned by his inability to attend to business. Grove, J., remarks that up to Potter v. Metropolitan District Ry. Co. no action of this kind appears ever to have been brought, but that the case is indistinguishable, and that they are bound by it. Bradshaw v. Lancashire & Y. Ry. Co. was followed in Leggott v. Great Northern Ry. Co.,[52] (1876,) in which the queen's bench held on demurrer that a prior recovery by the plaintiff as administratrix under Lord Campbell's act was no bar to an action by her as administratrix to recover damages to his personal estate by his inability to attend to his business from the time of the accident until his death, as the plaintiff sued in a different right in each case. The court, (Mellor and Quain, JJ.,) however, while yielding to Bradshaw v. Lancashire & Y. Ry. Co. as binding upon them, questioned its correctness. The right of the personal representative to maintain an action for a breach of the contract of carriage, resulting in the death of his intestate, was sustained without discussion by Blatchford, J., in The City of Brussels,[53] and in Kentucky in Winnegar's Adm'r v. Central Pass. Ry. Co.[54] In New Hampshire it has been held that an action founded upon contract cannot be maintained against the personal representative of a deceased surgeon to recover damages arising from his unskillful treatment of the plaintiff, the court declaring that, when the breach of contract results in an injury purely personal, an

[52] 1 Q. B. D. 599; 45 L. J. Q. B. 557; 35 L. T. (N. S.) 334; 24 Wkly. R. 784. Where a boiler sold by defendant to decedent exploded, injuring his goods and killing him, *held*, that a judgment recovered by his administratrix under Lord Campbell's act was no bar to a subsequent action by the administratrix to recover damages from the same cause to his personal property. Barnett v. Lucas, 6 I. R. C. L. 247, (affirming s. c. (5 I. R. C. L. 140.) See Pulling v. Great Eastern Ry. Co., 9 Q. B. D. 110.

[53] 6 Ben. 370.

[54] 85 Ky. 547, 4 S. W. Rep. 287.

exception arises to the general rule that actions *ex contractu* survive.[55]

[55] Vittum v. Gilman, 48 N. H. 416; Jenkins v. French, 58 N. H. 532. In Cregin v. Brooklyn C. T. R. Co., 75 N. Y. 192, the plaintiff sued the defendant, who was a carrier of passengers, for the loss of services of his wife, and for expenses paid in consequence of injuries to her person while she was a passenger. The court said that the action was grounded on tort, and that at common law it would have abated on the death of the plaintiff, although they held that the action survived under the New York statute preserving from abatement wrongs done to the property, rights, or the interest of another. S. C. 83 N. Y. 595. See, also, Crowley v. Panama R. Co., 30 Barb. 99; Hyde v. Wabash, St. L. & P. Ry. Co., 61 Iowa, 441, 16 N. W. Rep. 351.

CHAPTER II.

THE STATUTES.

§ 19. Lord Campbell's act.
20. Scope of Lord Campbell's act.
21. Provisions of the act.
22. Distinguishing features of action.
23. The act creates a new cause of action.
24. Statutes similar to Lord Campbell's act.
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26. Statutes providing for survival of right of action of party injured.
27. Georgia and Kentucky.
28. Statutes granting remedy by indictment.
29. Massachusetts.
30. Statutes granting additional remedies.
31. Constitutionality of statutes.
32. Liberal or strict construction of statutes.
33. Analytical table.

§ 19. Lord Campbell's act.

Lord Campbell's act was passed in 1846, and beginning with New York, whose act was passed in 1847, all the states and territories of the United States have followed the example of England, and have granted a remedy to the families of persons killed by wrongful act, neglect, or default. Similar statutes have also been enacted in Canada.

§ 20. Scope of Lord Campbell's act.

The scope of Lord Campbell's act is indicated by its title, viz.: "An act for compensating the families of persons killed by accidents." The preamble recites: "Whereas, no action at law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another

person, and it is often expedient and right that the wrongdoer in such case should be answerable in damages for the injury so caused by him." The title and preamble together show the intention of the framers of the act, namely, to make an exception to the common-law rule, by creating a new right of action in favor of the family of the deceased.

§ 21. Provisions of the act.

The act provides as follows: (1) That whensoever the death of a person shall be caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured; and (2) although the death shall have been caused under such circumstances as amount in law to felony; (3) that the action shall be for the benefit of the wife, husband, parent, (which includes grandparent and stepparent,) and child, (which includes grandchild and stepchild;) (4) that the action shall be brought by and in the name of the executor or administrator; (5) that the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought; (6) that the amount so recovered, after deducting costs not recovered from the defendant, shall be divided among the before-mentioned parties in such shares as the jury by their verdict shall find and direct; (7) that not more than one action shall lie for and in respect of the same subject-matter; (8) that every such action shall be commenced within 12 calendar months after the death; (9) that the plaintiff shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the person or persons, for whom

and on whose behalf such action shall be brought, and of the nature of the claim in respect of the damages sought to be recovered.

In 1864 the act was amended as follows: (1) That if there shall be no executor or administrator, or if, there being such executor or administrator, no action shall within six calendar months after the death have been brought by the executor or administrator, then such action may be brought by all or any of the persons for whose benefit such action would have been brought, if brought by the executor or administrator; and (2) that the defendant may pay a sum of money into court as compensation to all persons entitled, without specifying the shares into which it is to be divided by the jury, and if such sum is not accepted, and an issue is made as to its sufficiency, and the jury shall think it sufficient, the defendant shall be entitled to the verdict upon that issue.

§ 22. Distinguishing features of action.

The distinguishing features of the new action are three in number: (1) That it may be maintained whenever death is caused by wrongful act, neglect, or default, such as would, if death had not ensued, have entitled the party injured to maintain an action; (2) that it is for the exclusive benefit of certain designated members of the family of the deceased; and (3) that the damages recoverable are such as result to the beneficiaries from the death.

§ 23. The act creates a new cause of action.

It is manifest that the act did not repeal, or create an exception to, the rule of *actio personalis moritur cum persona*, by providing for the survival of the action which the party injured might have maintained; for, though the action can be main-

tained only when the death is caused under such circumstances as would have entitled the party injured to maintain an action, it is not maintainable for the recovery of the damages resulting from the personal injury to him, and hence, by survival, to his estate; but is maintainable only for the recovery of damages for the pecuniary loss resulting from the death to the surviving members of his family. As Coleridge, J., said in one of the first cases[1] that arose under the act: "This act does not transfer this right of action to his representative, but gives to his representative a totally new right of action, on different principles." 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;[2] 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.[3] Said Lord Blackburn, in Seward v. The Vera Cruz:[4] "A totally new action is given against the person who would have been responsible to the deceased if the deceased had lived,—an action which * * * is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who, under such circumstances, suffers pecuniary loss."

[1] Blake v. Midland Ry. Co., 18 Q. B. 93, 21 L. J. Q. B. 233, 16 Jur. 562.

[2] See § 124.

[3] Leggott v. Great Northern Ry. Co., 1 Q. B. D. 599; Whitford v. Panama R. Co., 23 N. Y. 465; Littlewood v. Mayor, 89 N. Y. 24; Russell v. Sunbury, 37 Oh. St. 372; Hamilton v. Jones, 125 Ind. 176, 25 N. E. Rep. 193; Hulbert v. City of Topeka, 34 Fed. Rep. 510; Mason v. Union Pac. Ry. Co., (Utah,) 24 Pac. Rep. 796.

[4] 10 App. Cas. 59.

§ 24. Statutes similar to Lord Campbell's act.

The states and territories, including the District of Columbia, which have to-day upon their statute books acts substantially similar to Lord Campbell's act are the following: Alabama, Arizona, Arkansas, California, Colorado, Delaware, District of Columbia, Florida, Idaho, Illinois, Indiana, Kansas, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Wisconsin, and Wyoming. The statutes of New Brunswick, Nova Scotia, Ontario, and Quebec may also be included with the above.

These various statutes differ greatly in the language in which they are expressed, both from the English act and from each other, even in respect to the three features which have been called the "distinguishing features" of the action created by Lord Campbell's act. For example, in some statutes it is not expressly provided that the act, neglect, or default must be such as would have entitled the party injured to maintain an action; in others it is not expressly provided that the action is for the benefit of particular members of the family; and in others it is not expressly provided that the damages recoverable are such as result from the death. It is believed, however, that in all these statutes there is, in effect, no substantial difference in these respects. On the other hand, in matters which are not distinguishing features of the action created by Lord Campbell's act, these statutes differ greatly from that act, and from each other. These differences are mainly in respect to the particular members of the family for whose benefit action may be brought, the persons in whose names it may be brought, the time within which it may be brought, the manner of distribu-

tion, and in respect to practice. They differ also materially in their provisions concerning the measure of damages; some fixing one amount, some another, and some none at all, as the limit of recovery; and a few providing for the recovery, also, of exemplary or punitive damages, or containing other peculiar provisions.

§ 25. Statutes giving damages resulting from the death to the estate.

Iowa, Oregon, and Washington have not been included with the states having statutes similar to Lord Campbell's act, for the reason that the acts of these states, as construed by the courts, provide for a recovery, not for the benefit of the family, but for the benefit of the estate. Moreover, in Iowa the statute in terms provides that the right of action of the party injured shall survive.

North Carolina, Virginia, and West Virginia have not been included, for the reason that in these states it is held, for different reasons, that the action is maintainable notwithstanding that there may be in existence no one of the relatives for whose benefit the action is primarily given.

In their other features, however, the statutes of these six states substantially resemble those of the states included in the preceding group.

§ 26. Statutes providing for survival of right of action of party injured.

Connecticut, Iowa, Louisiana, New Hampshire, and Tennessee, instead of in terms creating a new right of action, provide that the right of action of the party injured shall survive. In different ways, however, the statutes of these states provide for the recovery of damages resulting from the death, and indirectly

accomplish nearly the same result as do those statutes which expressly create a new cause of action.

§ 27. Georgia and Kentucky.

In Georgia the measure of damages is arbitrarily fixed at the full value of the life, without deducting the expenses of the deceased had he lived.

In Kentucky there are two remedies,—one where the life of a person not an employe is lost by the negligence of a railroad company; the other where a person is killed by "willful neglect." The right of action, it will be observed, is more strictly confined, and the Kentucky statute is in many respects unlike that of any other state.

§ 28. Statutes granting remedy by indictment.

In Maine, in addition to the remedy by civil action, a remedy is given by way of fine, to be recovered by indictment, for the use of the widow and children or heirs, but is confined to cases where the loss of life is occasioned by the negligence of a common carrier. Remedy by indictment also exists, with other remedies, in Massachusetts, and until recently existed in New Hampshire.

§ 29. Massachusetts.

In Massachusetts, besides the remedy by indictment, various actions may be maintained, in different cases, by the executor or administrator, for the benefit of the widow or children or heirs. The provisions of the Massachusetts statutes are various and complicated, and are in most respects totally unlike those of the other states. They require separate consideration. Massachusetts stands alone, unless Kentucky be included with that state, in failing to provide a remedy broad enough to in-

clude all cases in which death is caused by wrongful act, neglect, or default.

§ 30. Statutes granting additional remedies.

Many of the states and territories provide for still other actions which may be maintained in certain cases for causing death. Thus, in Alabama, Indiana, Iowa, Oregon, and Washington, a special action may be maintained by the parent for the death of a child. In Colorado, Missouri, and New Mexico, if the death is caused by the negligence of a railroad company or common carrier, under certain circumstances, the defendant is liable to a forfeiture, to be recovered in a civil action. In Kentucky and Washington, and also in Ontario and Quebec, an action is given where a person is killed in a duel; and in Kentucky another action is given where a person is killed by the careless use of firearms. In Illinois, Missouri, and Pennsylvania, an action may be maintained, in case of loss of life, by reason of willful failure to comply with the provisions of acts regulating the operation of mines. These various provisions will be considered in their proper connection. All the statutes in force in the United States, together with those of England and of Canada, are contained in the appendix.

§ 31. Constitutionality of statutes.

The constitutionality of the various acts which give a remedy in case of death has rarely been questioned. Such an act does not impair the obligation of the contract entered into between the state and a previously chartered corporation, the act imposing no new duties, and simply giving a new remedy for the breach of an acknowledged obligation.[5] Even when the act is

[5] Boston, C. & M. R. Co. v. State, 32 N. H. 215; Southwestern R. Co. v. Paulk, 24 Ga. 356; Board of Shelby Co. v. Scearce, 2 Duv. 576. See Georgia R. & B. Co. v. Oaks, 52 Ga. 410.

made to apply exclusively to railroad corporations, it is not open to exception on that account.[6] This objection was considered by the court in passing upon the constitutionality of the former New Hampshire act, which gave a remedy by indictment, but solely against the proprietors of railroads. "This law," says Bell, J., "applies to a class, well defined, of common carriers, distinguished by the circumstance that they use, in their business, steam locomotives, * * * and attended with risks peculiar to themselves, and far exceeding those of other carriers. The same reason for this provision does not apply to any other class of persons, and we think the law is free from just exception on this account."[7] And a recent Kentucky case has held that a provision which gives a right of action to the representatives of one who shall lose his life through the negligence of the operators of a railroad is not in violation of the fourteenth amendment to the constitution of the United States, which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws, and also is not in violation of the provisions of the state bill of rights which guaranties equal rights to all persons under the law, and the impartial administration of justice.[8] It has also been held in Missouri that the provision which authorizes the recovery of the fixed sum of $5,000 in case of death occasioned by the negligence of certain classes of carriers is not in violation of the same provision of the fourteenth amendment, in authorizing a judgment against such defendant as one of a special class. The same

[6] Boston, C. & M. R. Co. v. State, *supra*. But under Const. Ala. art. 14, § 12, providing that "all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons," etc., section 2899 of the Code of 1876, which gave an action exclusively against incorporated companies and private associations, was held unconstitutional. Smith v. Louisville & N. R. Co., 75 Ala. 449.

[7] Boston, C. & M. R. Co. v. State, *supra*.

[8] Louisville, S. V. & T. Co. v. Louisville & N. R. Co., 17 S. W. Rep. 567.

provision of the Missouri statute is held not to be in violation of the seventh amendment to the constitution of the United States, as arbitrarily liquidating damages without a trial by jury as to the amount.[9] Where a right of action has accrued under a statute giving a remedy in case of death, a constitutional provision against retroactive legislation has been held to operate to preserve the right, notwithstanding the repeal of the statute,[10] as well as to exclude the persons entitled to such a right of action from the benefit of an amendment authorizing the recovery of damages additional to those previously allowed.[11] In Kentucky the act entitled "An act for the redress of injuries arising from the neglect or misconduct of railroad companies or others," which gives a right of action for death against railroad companies in case of negligence, and against all persons in case of willful neglect, has been held not to be in conflict with an article of the constitution that no law shall relate to more than one subject, which shall be expressed in the title.[12]

Such statutes, although they apply to persons engaged in interstate commerce, and to marine torts occurring upon the navigable waters of the United States, within the limits of the states by which they are enacted, do not constitute an encroachment upon the commercial power of congress.[13]

§ 32. Liberal or strict construction of statutes.

The cases contain many conflicting *dicta* as to whether these statutes are to be liberally or strictly construed. On the one hand, it is said that they are remedial, and should conse-

[9] Carroll v. Missouri P. Ry. Co., 88 Mo. 239.

[10] Denver, S. P. & P. Ry. Co. v. Woodward, 4 Colo. 162: Lundin v. Kansas P. Ry. Co., Id. 433.

[11] Chicago, St. L. & N. O. R. Co. v. Pounds, 11 Lea, 180.

[12] Chiles v. Drake, 2 Met. (Ky.) 146.

[13] Sherlock v. Alling, 93 U. S. 99. See § 199.

quently receive a liberal construction;[14] and, on the other hand, it is said that they are in derogation of the common law, and should consequently receive a strict construction.[15] In Kentucky it has been said that the first section of the act, being entirely remedial, should be construed liberally; but that the third section, which allows punitive damages, is chiefly penal, and should be interpreted more strictly.[16]

§ 33. Analytical table.

The analytical table of the statutes has been prepared as a ready means of ascertaining what states have statutory provisions upon a given subject similar to those which may be under consideration, and thereby as a guide to the decisions in which such provisions may have been construed.[17]

[14] Merkle v. Bennington Tp., 58 Mich. 156, 24 N. W. Rep. 776; Haggerty v. Central R. Co., 31 N. J. L. 349; Bolinger v. St. Paul & D. R. Co., 36 Minn. 418, 31 N. W. Rep. 856; Wabash, St. L. & P. Ry. Co. v. Shacklett, 10 Ill. App. 404; Hayes v. Williams, (Colo. Sup.) 30 Pac. Rep. 352; Beach v. Bay State Co., 6 Abb. Pr. 415, 16 How. Pr. 1, 27 Barb. 248; Soule v. New York, etc., R. Co., 24 Conn. 575; Lamphear v. Buckingham, 33 Conn. 237.

[15] Pittsburgh, C. & St. L. Ry. Co. v. Hine, 25 Oh. St. 629; Hamilton v. Jones, 125 Ind. 176, 25 N. E. Rep. 192, (see Burns v. Grand Rapids & I. R. Co., 113 Ind. 169, 15 N. E. Rep. 230;) Jackson v. St. Louis, I. M. & S. Ry. Co., 87 Mo. 423; Daly v. Stoddard, 66 Ga. 145, (statute giving a right of action for homicide.) See Eustace v. Jahns, 38 Cal. 3.

[16] Board of Shelby Co. v. Scearce, 2 Duv. 576.

[17] See preface.

CHAPTER III.

THE STATUTES, (WHEN ACTION LIES.)

§ 34. Peculiar provisions.
35. Alabama.
36. Colorado.
37. Connecticut.
38. Georgia.
39. Indiana.
40. Iowa.
41. Kentucky.
42. Louisiana.
43. Maine.
44. Massachusetts.
(a) Indictment.
(b) Civil action.
(c) Employers' liability act.
45. Missouri.
46. Nevada.
47. New Hampshire.
48. New Mexico.
49. North Carolina.
50. North Dakota.
50a. Oregon.
51. Pennsylvania.
52. Rhode Island.
53. South Dakota
54. Tennessee.
55. Texas.
56. Virginia.
57. Washington.
58. West Virginia
59. Miners' acts.

§ 34. Peculiar provisions.

Many of the statutes in force in the United States contain peculiar provisions which cannot conveniently be considered in

the general treatment of the subjects to which they relate. So far as these peculiar provisions relate to the circumstances under which an action can be maintained, they will be considered in the present chapter. The statutes of some of the newer states and of the territories have not yet been construed by the courts, and so far as this is the case no discussion of these statutes will be attempted, and the reader is referred to the analytical table and to the appendix for information.

§ 35. Alabama.

Code 1887, § 2589, gives to the personal representative a right of action for injuries resulting in death, if the testator or intestate might have maintained an action. The employes' act (sections 2590, 2591) enlarges the liability of employer to employe in certain cases, and provides that an action may be maintained under it both by the party injured and by his personal representative if the injury results in death. In addition to the right of action given by these sections to the personal representative, a right of action is by section 2588 given to the father or mother or personal representative when the death of a minor child is caused by wrongful act, omission, or negligence. The right of action under section 2588 is not restricted in express terms to cases where the party injured could have maintained an action, and a recent case[1] has held that no such limitation will be implied, and declares that the father can recover in all cases where at common law he might have recovered if the injury had not resulted in death. The case turned upon the question whether the father consented to the employment of the minor, the court holding that, if the father did consent, he would be barred by the minor's contributory negligence, but that, if he did not consent, the negligence of the child would not be imputed to the father. The action given by the em-

[1] Williams v. South & N. A. R. Co., 91 Ala. 635, 9 So. Rep. 77.

ployes' act exists only in favor of the personal representative, and its provisions do not inure to the benefit of the parent in a suit under section 2588.[2]

§ 36. Colorado.[3]

§ 37. Connecticut.[4]

§ 38. Georgia.

Code 1882, § 2971,[5] as amended by Laws of 1887,[6] provides that a widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent; that the husband may recover for the homicide of his wife; and that, if she leaves child or children surviving, the husband and children shall sue jointly, with the right of survivorship in the action; and that a mother, or, if no mother, a father, may recover for the homicide of a child, minor, or *sui juris*, upon whom he or she is dependent, or who contributes to his or her support, unless said child leave a wife, husband, or child. The amendment enacts that the word "homicide" "shall be held to include all cases where the death of a human being results from a crime, or from criminal or other negligence."

Before the amendment, section 2971 provided simply that

[2] Lovell v. De Bardelaben, C. & I. Co., 90 Ala. 13, 7 So. Rep. 756. See Grimsley v. Hankins, 46 Fed. Rep. 400.

[3] See § 45.

[4] See § 132.

[5] Section 2971 is based on Act Feb. 23, 1850, (Cobb's Digest, p. 476,) and Acts 1855–6, p. 155, which were section 2971 in Code 1873, as modified by Act Dec. 16, 1878. See Mott v. Central R. Co., 70 Ga. 680.

[6] The amendatory act is not unconstitutional, as containing more than one subject matter, or in usurping a judicial function, (by defining "full value of the life,") or as a special act. Clay v. Central R. & B. Co., 84 Ga. 345, 10 S. E. Rep. 967.

"a widow, or, if no widow, a child or children, may recover for the homicide of a husband or parent." It was held, therefore, before the amendment, that no action could be maintained for the homicide of a wife[7] or child,[8] though, in accordance with Shields v. Yonge,[9] a common-law action was maintainable by a parent, based upon the loss of service of a child whose death had been caused by the defendant.[10] A recovery could

[7] Georgia R. & B. Co. v. Wynn, 42 Ga. 331; Womack v. Central R. & B. Co., 80 Ga. 132, 5 S. E. Rep. 68.

[8] Bell v. Wooten, 53 Ga. 684; Allen v. Atlanta Street R. Co., 54 Ga. 503; Bell v. Central R. Co., 73 Ga. 520; Smith v. East & West R. Co., 84 Ga. 183, 10 S. E. Rep. 602; Perry v. Georgia R. & B. Co., 85 Ga. 193, 11 S. E. Rep. 605.

[9] 15 Ga. 349.

[10] In Bell v. Wooten, 53 Ga. 684, a father sued defendant for negligently amputating the leg of his son, whereby he died, and a demurrer to the declaration was sustained on the ground that no action lay for the homicide of a child. Warner, C. J., observed that it was not alleged that the son was a minor, or that the father was entitled to his services as such minor, and that consequently the case was not within Shields v. Yonge. In Allen v. Atlanta St. R. Co., 54 Ga. 503, the declaration alleged that the child was two years old, and would have become, at an early age, of great value to the plaintiff, to wit, the sum of $3,000 for services to be rendered by the child until his majority. A demurrer was sustained, the court distinguishing the case from Shields v. Yonge on the ground that the child was not old enough to render service. In Chick v. Southwestern R. Co., 57 Ga. 357, the declaration claimed damages for the loss of service of a minor son who died four days after the injury, and alleged the value of the services. It was held that the action was not under section 2971, for the homicide, but was for loss of service; that the right to recover was authorized by Shields v. Yonge; but that the declaration, failing to allege that the plaintiff had complied with section 2970 in respect to prosecuting for a felony, was bad on demurrer. In McDowell v. Georgia R. Co., 60 Ga. 320, it was held that a father might recover damages for the loss of services of his minor daughter, to the time of her majority, sustained by reason of her killing. Followed in Augusta Factory v. Davis, 87 Ga. 648, 13 S. E. Rep. 577. In Bell v. Central R. Co., 73 Ga. 520, the declaration, in an action by the father, merely alleged killing by negligence, and it was held that there was no foundation for an amendment setting up loss of

be had by a minor child for the homicide of a mother,[11] but not by an adult child of one who left no widow,[12] nor by a minor child if the father was still alive.[13] Under the amendment, a mother cannot recover for the homicide of a child who contributed to her support, unless she was dependent upon him,[14] but it is not necessary that she be wholly dependent upon him.[15]

Section 2971, before the amendment, contained no definition

service, the court observing that the amendment would have made a good cause of action, but that without it no cause of action was set out. Referring to section 2960, which provides that "every person may recover for the torts committed to himself, or his wife, or his child, or his ward, or his servant," Blandford, J., says that this is but declaratory of the common law, and that it must be averred that such torts resulted in loss of service. Smith v. East & West R. Co., 84 Ga. 188, 10 S. E. Rep. 602, is to the same effect as Bell v. Central R. Co., the court distinguishing the case from East Tennessee, V. & G. R. Co. v. Maloy, 77 Ga. 237, 2 S. E. Rep. 941, in which the loss of service and the mother's right to the same were alleged, and it was held that the action was maintainable. And in Perry v. Georgia R. & B. Co., 85 Ga. 193, 11 S. E. Rep. 605, it was held that, under the law of Georgia in 1886, the parent's only right of action for the negligent killing of a minor child was for the loss of service; and that a declaration which failed to allege loss of service was fatally defective. It seems that the rule of Shields v. Yonge would not be applied in actions by a husband for the loss of his wife's services, except during the interval between the injury and her death. Womack v. Central R. & B. Co., 80 Ga. 132, 5 S. E. Rep. 68. And see Georgia, R. & B. Co. v. Wynn, 42 Ga. 331.

[11] Atlanta & W. P. R. Co. v. Venable, 65 Ga. 55; s. c. 67 Ga. 697. "Parent" is held to include either parent on whom the duty of supporting the child was cast by law.

[12] Mott v. Central R. Co., 70 Ga. 680.

[13] Scott v. Central R. Co., 77 Ga. 450; Snell v. Smith, 78 Ga. 355.

[14] Clay v. Central R. & B. Co., 84 Ga. 345, 10 S. E. Rep. 967. Blandford, J.: "We read the little word 'or' as 'and,' by which we think we have correctly construed the intent of the legislature."

[15] Plaintiff was dependent on her son, on her husband, and on her own labor for support. Her son contributed. *Held*, that the judge erred in ordering a nonsuit. Daniels v. Savannah, F. & W. Ry. Co., 86 Ga. 236, 12 S. E. Rep. 365; Richmond & D. R. Co. v. Johnston, 15 S. E. Rep. 908. Where the declaration fails to allege that plaintiff was

of "homicide." It was then held that, to authorize a recovery, it must be made to appear that the homicide amounted to a crime,[16] although an exception existed in actions against railroad companies, and such actions were maintainable although the negligence was not criminal.[17] It would seem that the amendment is broad enough to cover all cases of negligence for which a recovery can be had for wrongful death under the statutes of other states.

§ 39. Indiana.

Rev. St. 1881, § 266,[18] provides that a father, or in case of his death, or desertion of his family, or imprisonment, the

dependent, it may be amended. Ellison v. Georgia R. & B. Co., 18 S. E. Rep. 809.

[16] For the unlawful, willful homicide of a husband, whether it be murder, or only voluntary manslaughter, his widow may recover. Weekes v. Cottingham, 58 Ga. 559. The declaration alleged that the defendant employed a careless and negligent superintendent to manage a derrick, and careless, incompetent, and negligent laborers, whereby the plaintiff's husband fell, by want of their care and diligence. *Held*, that these facts did not amount to criminal negligence, and did not constitute a cause of action. McDonald v. Eagle & P. Manuf'g Co., 67 Ga. 761; s. c. 68 Ga. 839.

The declaration alleged that defendants erected and rented a building having a platform as the only means whereon to move furniture therein, and that the deceased, while endeavoring to move an iron safe into the building, at the request of certain of defendant's tenants, was killed by the platform giving way, resulting from its defective construction. *Held* demurrable, for not showing criminal negligence, as defendants' act or negligence was not murder, manslaughter, or "involuntary manslaughter." Daly v. Stoddard, 66 Ga. 145; Rankin v. Merchants' & M. T. Co., 73 Ga. 229; Bain v. Athens F. & M. Works, 75 Ga. 718; Allen v. Augusta Factory, 82 Ga. 76, 8 S. E. Rep. 66; Augusta Factory v. Hill, 83 Ga. 709, 10 S. E. Rep. 450.

[17] Central R. & B. Co. v. Roach, 70 Ga. 434. The reason for this distinction is not clear. In McDonald v. Eagle & P. Manuf'g Co., the court had said that "the liability of railroad companies rests on other grounds."

[18] This section is substantially a re-enactment of Civil Code 1863, § 784, (2 Rev. St. 1876, p. 309,) the only material change being that un-

mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward. Section 284 provides that, when the death of *any one* is caused by wrongful act or omission, the personal representative may maintain an action, for the benefit of the widow and children, if any, or next of kin, if the party injured, had he lived, might have maintained an action.

It was formerly held that these sections must be construed together, and that while the former applied to infants, and the latter to adults, the father or mother in the one case, as the personal representative in the other, could sue only in a representative capacity.[19] But this construction was repudiated in Mayhew v. Burns.[20] In that

der the former the damages could not exceed $5,000. Stewart v. Terre Haute & I. R. Co., 103 Ind. 44, 2 N. E. Rep. 208. Civil Code 1852, § 784, repealed by implication 1 Rev. St. 1852, p. 426, § 3, which gave the action to the wife, etc., of a person killed by the negligence of the officers of a railroad, etc. Peru & I. R. Co. v. Bradshaw, 6 Ind. 146; Madison & I. R. Co. v. Bacon, 6 Ind. 205; Indianapolis & C. R. Co. v. Davis, 10 Ind. 398.

[19] An action for causing the death of a child cannot be brought by the administrator. Pittsburgh, F. W. & C. Ry. Co. v. Vining's Adm'r, 27 Ind. 513. The court said that the sections must be construed together; that, if there were neither father, mother, nor guardian, the administrator would be the proper plaintiff; and that in either case the limitation of the action, the amount of recovery, and the distribution would be governed by section 784. (Rev. St. 1888, § 284.) In Cincinnati, H. & D. R. Co. v. Chester, 57 Ind. 297, it was held that an action by the father to recover damages for the death of a minor child could not be joined with an action by him to recover for personal injuries received by himself, and caused by the same wrongful act, since, in the first action, he sued in a representative capacity. In Gann v. Worman, 69 Ind. 458, it was held that by the construction of the two sections, when taken together, the father could not maintain the action in his own right, but only as the representative of his child's right. It was said in that case that "there is no statute in this state giving the father the right of action for the lost services of his child after the child's death."

[20] 103 Ind. 328, 2 N. E. Rep. 798, approved in Ft. Wayne, C. & L. R. Co.

case the father sued to recover damages for the loss of the services and society of his child from the time of his death until he should have attained his majority, and it was held that the action could be maintained. The court said: "The reasonable and natural interpretation of the language employed in the first section is to give the parent who sustains injury by the death of his child a remedy for such injury in his own right, while the latter gives to the widow or next of kin, through the personal representative, a right to recover for any injury which they may have sustained by reason of the death of an adult, or one emancipated from parental service,[21] and in whose life they may have had a pecuniary interest. * * * In our view, both the common-law and statutory damages may be recovered under that section,[22] * * * and, when recovered, they belong to the parent in his own right, and are not distributable under section 284. During the continuance of the relation of parent and child, the right of action is in the parent entitled to its service. This relation presumptively continues during the

v. Byerle, 110 Ind. 100, 11 N. E. Rep. 6. In the latter case it was held that there could be no recovery against the defendant for causing the son's death, he having been guilty of contributory negligence; but that the defendant, having knowingly employed the infant without the father's consent, was liable by the common law for the value of the son's services up to the time of his death. In Louisville, N. A. & C. Ry. Co. v. Goodykoontz, 119 Ind. 111, 21 N. E. Rep. 472, Mitchell, J., said: "Section 284 * * * is entirely disconnected from section 266, and exerts no sort of influence upon the construction of or right conferred under the latter section."

[21] Unless a minor has been emancipated, the father cannot, instead of suing under section 266, sue as administrator under section 284. Berry v. Louisville, E. & St. L. R. Co., 28 N. E. Rep. 182.

[22] The measure of damages under section 266 is the value of the child's services from the time of the injury until majority, taken in connection with his prospects in life, less his support and maintenance. To this may be added in proper cases the expense of care, attendance, funeral expenses, and medical services. Pennsylvania Co. v. Lilly, 72 Ind. 252.

minority of the child. If the relation does not exist, then the action is to be brought by the personal representative, regardless of the age of the person whose death has been caused, provided there are persons sustaining such relation to it as that they may be supposed to have sustained pecuniary injury on account of its death. If the relation of parent and child continues after majority, the parent receiving the support or service may, nevertheless, maintain the action." The right of action of the guardian under section 266 is limited to the recovery of damages to reimburse the personal estate of the ward for any actual loss.[23]

§ 40. Iowa.

Code, § 3730, provides that all causes of action shall survive, and may be brought notwithstanding the death of the person entitled to the same; section 3731 provides that the right of civil remedy is not merged in the public offense, and that, when a wrongful act produces death, the damages shall be distributed as personal property belonging to the estate, except that, if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts; and section 3732 provides that the action contemplated in the last two sections may be brought or continued by the legal representative of the deceased; and shall be deemed a continuing one, and to have accrued to the representative at the same time it did to the deceased if he had survived. It is held that the effect of these provisions is to give the representative an action for death for the benefit of the estate.[24] Section 3761 provides that "a father,

[23] Where a minor is instantly killed, and has a mother living, and it does not appear that the guardian paid from the ward's estate for the funeral expenses, no suit lies by the guardian under section 266. Louisville, N. A. & C. Ry. Co. v. Goodykoontz, 119 Ind. 111, 21 N. E. Rep. 472.

[24] Conners v. Burlington, C. R. & N. Ry. Co., 71 Iowa, 490, 32 N. W.

or in case of his death or imprisonment, or desertion of his family, the mother, may prosecute as plaintiff an action for the expenses and loss of service resulting from the injury or death of a minor child." For the death of a minor two actions may be maintained,—one, under section 3732, to recover damages to his estate accruing after the infant should have attained his majority; and one by the father or mother, under section 3761, to recover damages for the loss of his services until his majority.[25]

§ 41. Kentucky.

Gen. St. c. 57, § 1, provides that if the life of any person not in the employment of a railroad company shall be lost by reason of the negligence and carelessness of the proprietor of any railroad, or by the unfitness or negligence or carelessness of their servants or agents, the personal representative may sue and recover damages in the same manner that the person him-

Rep. 466; Worden v. Humeston & S. R. Co., 72 Iowa, 201, 33 N. W. Rep. 629. In Conners v. Burlington, C. R. & N. Ry. Co., Reed, J., observed: "For many years before the enactment of the present Code, a statute was in force in this state which provided, in express terms, that, 'when a wrongful act produces death, the perpetrator is civilly liable for the injury.' Revision 1860, § 4111; Code 1851, § 2501. When the present Code was enacted, the section in which the provision was contained was repealed, and the sections quoted above were enacted in lieu thereof. As appears, the language of this provision is not contained in any of them. But we think the effect of these provisions is the same as though that express language had been retained." The court goes on to say that the common-law rule that in a civil court the death of a human being could not be complained of as an injury was founded (1) on the merger of the civil remedy in the public offense; and (2) on the rule of *actio personalis*. Both of these rules, the court holds, are abrogated by the statute.

[25] Walters v. Chicago, R. I. & P. R. Co., 36 Iowa, 458; Lawrence v. Birney, 40 Iowa, 377; Walters v. Chicago, R. I. & P. R. Co., 41 Iowa, 71; Benton v. Chicago, R. I. & P. R. Co., 55 Iowa, 496, 8 N. W. Rep. 330; Morris v. Chicago, M. & St. P. Ry. Co., 26 Fed. Rep. 22.

self might have done for any injury where death did not ensue. Section 3 provides that if the life of *any person* is lost or destroyed by the *willful neglect* of another person, company, or corporation, their agents or servants, then the widow, heir, or personal representative may sue and recover punitive damages for the loss or destruction of life.

Under section 1 a recovery may be had for ordinary negligence,[26] though there can of course be no recovery if the deceased was an employe,[27] or unless the defendant is a railroad company.[28] But a recovery can be had for ordinary negligence, although the deceased was an employe, or the defendant not a railroad company, provided the death was not instantaneous, under Gen. St. c. 10, § 1, by force of which the right of action for personal injury, except actions for assault and battery, survives.[29]

Under section 3 a recovery can be had only if the negligence be "willful."[30] It has been said that "willful neglect" must in-

[26] Louisville & N. R. Co. v. Smith's Adm'r, 87 Ky. 501, 9 S. W. Rep. 493; Givens' Adm'r v. Kentucky C. R. Co., 12 S. W. Rep. 257; Conley v. Cincinnati, N. O. & T. P. Ry. Co., 12 S. W. Rep. 764.

[27] Cincinnati, N. O. & T. P. Ry. Co. v. Adam's Adm'r, 13 S. W. Rep. 428; Louisville & N. R. Co. v. Coniff's Adm'r, 14 S. W. Rep. 543. The petition need not state that the deceased was not an employe. 87 Ky. 501, 9 S. W. Rep. 493. But see note 42, *infra*.

[28] Section 1 is applicable to a horse railway. Johnson's Adm'r v. Louisville City Ry. Co., 10 Bush, 231. Where a company is both a railroad company and a mining company, it is not liable under section 1 for a death caused by negligence in its mining operations. But it may be liable under section 3 for willful neglect in the management of a tramway attached to its mines. Claxton's Adm'r v. Lexington & B. S. R. Co., 13 Bush, 636.

[29] Louisville & P. Canal Co. v. Murphy, 9 Bush, 522; Hansford's Adm'x v. Payne, 11 Bush, 380; Newport News & M. V. R. Co. v. Dentzel's Adm'r, 14 S. W. Rep. 958. Shooting and wounding another, although unintentionally, is an assault and battery, and an action therefor does not survive. Anderson v. Arnold's Ex'r, 79 Ky. 370.

[30] In an action for loss of life from a defect in a bridge, *held*, that

volve "either an intentional wrong, or such reckless disregard of security and right as to imply bad faith;" [21] that it must be "so great as to evidence reckless indifference to the safety of the public, or an intentional failure to perform a plain and manifest duty, in the performance of which the public has an interest;" and even that the "motive must be bad. The negligence must be *quasi* criminal." [22] It seems, however, that the latter statement is too broad. At any rate, the decisions give a practical construction to "willful neglect" that appears to be nearly as broad as that elsewhere given to "negligence," under statutes giving a right of action when death is caused by "wrongful act,

it must be shown that the defendant was guilty of willful negligence in failing to repair the bridge; that is, that defendant had knowledge of the insufficiency, and voluntarily failed to remedy it. Board of Shelby Co. v. Scearce, 2 Duv. 576.

A child, five years old, lost its life by falling through the railing of defendant's private bridge, which was safe for ordinary travel. *Held*, that the evidence failed to show willful negligence. Louisville & P. Canal Co. v. Murphy, 9 Bush, 522.

An engineer was instantly killed by his engine being thrown from the track, in the night, by a dead and decayed tree, which stood upon the roadbed, and fell across the track. The court instructed the jury that it was the duty of the defendant to keep the road free from *all objects and obstructions* which *might* imperil the safe transit of trains; that if the defendant, by its agents, knew or was notified that the tree was decayed and subject to fall, and was so apprised long enough to have removed it, and failed to do so, such failure was "willful neglect." *Held*, that the instruction was misleading, and also erroneous as instructing the jury that the facts constituted "willful neglect," instead of allowing them to infer it from the facts; and that the court should have substantially informed the jury that "willful neglect" must involve either an "intentional wrong, or such reckless disregard of security and right as to imply bad faith." Louisville & N. R. Co. v. Filbern's Adm'x, 6 Bush, 574.

[21] Louisville, C. & L. R. Co. v. Caven's Adm'r, 9 Bush, 559.

[22] Jacobs' Adm'r v. Louisville & N. R. Co., 10 Bush, 268, *per* Lindsay, J.; Kentucky C. R. Co. v. Gastineau's Adm'r, 88 Ky. 119. "There must be such conduct as implies actual malice, or anti-social recklessness." Claxton's Adm'r v. Lexington & B. S. R. Co., 13 Bush, 636.

neglect, or default."[33] The question of willful neglect is a mixed question of law and fact, to be determined by the jury.[34]

[33] Where the plaintiff claimed that the death was caused by a defective plank furnished by defendant in the work in which deceased was employed, the court charged that no recovery could be had unless defendant knew of the defective materials used, and willfully neglected to remedy the defect. *Held*, that the instruction should have been that if the defects were such as defendant ought to have known, or by the exercise of ordinary vigilance could have known, it was responsible. Sullivan's Adm'r v. Louisville Bridge Co., 9 Bush, 81.

A freight train, drawn by a defective engine, burdened beyond its capacity, fell behind 4 hours, and, while running without signals or lights, was run into by an extra, which was ordered by a train dispatcher, whose duty it was to regulate the running of delayed and extra trains, no notice having been given to the extra of the delay of the freight. The engineer of the extra was killed without fault of himself or anyone on his train. *Held*, that the dispatcher and freight conductor were guilty of "willful" negligence. Louisville, C. & L. R. Co. v. Caven's Adm'r, 9 Bush, 559.

Defendant operated an inclined tramway, opposite the lower terminus of which it owned a tenement house, which it leased to C. A car loaded with coal became detached from its fastenings, (by the breaking of a hook,) and was precipitated against C.'s house, and killed his child. Defendant's machinery was inferior, and there was no provision to stop a car which might become detached. *Held*, that the question was for the jury whether defendant was guilty of willful negligence. Claxton's Adm'r v Lexington & B. S. R. Co., 13 Bush, 636.

Deceased was killed in a collision caused by his misconstruing a dispatch, which was not written by the dispatcher clearly, or according to the rules of defendant. *Held*, that the question of defendant's "willful" negligence was properly left to the jury; that the intentional omission of such precautionary signs or words in the dispatch, as a person of ordinary prudence would have used, whether contrary to or pursuant to the rules, amounted to willful neglect. McLeod v. Ginther's Adm'r, 80 Ky. 399.

The declaration alleged that the defendants had possession of an unfenced lot on a public street on which they had stacked lumber so negligently that, as an infant was playing near it, one of the timbers fell and killed him. *Held* good on demurrer. The court distinguishes the

[34] Needham v. Louisville & N. R. Co., 85 Ky. 428, 3 S. W. Rep. 797.

No action can be maintained under section 3 when the killing was willful, or the death caused by an intentional injury.[35] The remedy for willful killing is under Gen. St. c. 1, § 6.[36] In actions founded on willful neglect the contributory negligence of the deceased is immaterial,[37] though under section 1 it is a defense.[38]

Under section 1 the personal representative; under section 3 "the widow, heir, or personal representative," may sue. "Heir"

case from Louisville & P. Canal Co. v. Murphy, *supra*, on the ground that in that case the bridge was not a proper resort for children. Bransom's Adm'r v. Labrot, 81 Ky. 688.

Defendant's train crossed the railroad of another company on which a train, which had the exclusive right to cross, was approaching at a distance of a few yards. *Held* willful neglect. Chesapeake & O. Ry. Co. v. McMichael, 15 S. W. Rep. 878.

[35] An action cannot be maintained against a street-railroad company for the death of a passenger caused by the driver willfully assaulting him, and throwing him off the car. Winnegar's Adm'r v. Central Passenger Ry. Co., 85 Ky. 547, 4 S. W. Rep. 257.

[36] The declaration must allege that the killing was not in self-defense. Becker v. Crow, 7 Bush, 198. The action cannot be maintained by the personal representative. Spring's Adm'r v. Glenn, 12 Bush, 172; Morgan v. Thompson, 82 Ky. 383. See O'Donoghue v. Akin, 2 Duv. 478.

[37] Louisville, C. & L. R. Co. v. Mahony's Adm'x, 7 Bush, 235; Jacobs' Adm'r v. Louisville & N. R. Co., 10 Bush, 272; Claxton's Adm'r v. Lexington & B. S. R. Co., 13 Bush, 636; Louisville & N. R. Co. v. Brice, 84 Ky. 298, 1 S. W. Rep. 483; Louisville S. V. & T. Co. v. Louisville & N. R. Co., 17 S. W. Rep. 567. But, if the death was caused wholly by the negligence of the deceased, the action cannot be maintained. Jones' Adm'r v. Louisville & N. R. Co., 82 Ky. 610; Derby's Adm'r v. Kentucky C. R. Co., 4 S. W. Rep. 803; Nichols' Adm'r v. Louisville & N. R. Co., 6 S. W. Rep. 339. Where an employe is killed in consequence of risks voluntarily assumed, defendant is not guilty of willful negligence. Needham v. Louisville & N. R. Co., 85 Ky. 423, 11 S. W. Rep. 806; Sullivan's Adm'r v. Louisville Bridge Co., 9 Bush, 81. It seems that, in an action under section 3, the fact that the death was caused by the negligence of a fellow servant is no defense. McLeod v. Ginther's Adm'r, 80 Ky. 399.

[38] Kentucky C. R. Co. v. Thomas' Adm'r, 79 Ky. 160.

means child, and does not include parents or other relatives, and the action given by section 3 is solely for the benefit of the widow and children.[39] Therefore, when the deceased leaves no widow or child, no action can be maintained under section 3,[40] but an action may be maintained by the personal representative under section 1.[41] The degree of neglect alleged determines the question under which section the action is brought; and, if the averment be that the life was lost by willful neglect, then a recovery can be had only under section 3.[42] Only one action can be maintained, and a recovery under section 1

[39] Henderson's Adm'r v. Kentucky C. R. Co., 86 Ky. 389, 5 S. W. Rep. 875; Jordan's Adm'r v. Cincinnati, N. O. & T. P. Ry. Co., 11 S. W. Rep. 1013.

[40] Koening's Adm'r v. Covington, 12 S. W. Rep. 128; Henning's Adm'r v. Louisville Leather Co., 12 S. W. Rep. 550; Conley v. Cincinnati, N. O. & T. P. Ry. Co., 12 S. W. Rep. 764; Louisville & N. R. Co. v. Merriwether's Adm'r, 12 S. W. Rep. 935; Cincinnati, N. O. & T. P. Ry. Co. v. Adam's Adm'r, 13 S. W. Rep. 428; Kentucky C. R. Co. v. Wainwright's Adm'r, 13 S. W. Rep. 488; Louisville & N. R. Co. v. Coppage, 13 S. W. Rep. 1086; Kentucky C. R. Co. v. McGinty, 14 S. W. Rep. 601; Cincinnati, N. O. & T. P. Ry. Co. v. Prewitt's Adm'r, 17 S. W. Rep. 484.

[41] Givens' Adm'r v. Kentucky C. R. Co., 12 S. W. Rep. 257; Morris' Adm'x v. Louisville & N. R. Co., 12 S. W. Rep. 940. Under section 3 there is but one cause of action, and hence, if the widow is barred by the statute of limitation, children will also be barred. Louisville & N. R. Co. v. Sanders, 86 Ky. 259, 5 S. W. Rep. 563.

[42] Givens v. Kentucky C. R. Co., 89 Ky. 231, 12 S. W. Rep. 257; Baker's Adm'r v. Louisville & N. R. Co., 17 S. W. Rep. 191; Cincinnati, N. O. & T. P. Ry. Co. v. Prewitt's Adm'r, 17 S. W. Rep. 484; Louisville S. V. & T. Co. v. Louisville & N. R. Co., 17 S. W. Rep. 567.

The earlier cases had held, or at least said, that under an allegation of "willful neglect," a recovery might be had according to the negligence established, either under section 1 or section 3. Louisville, C. & L. R. Co. v. Case's Adm'r, 9 Bush, 728; Claxton's Adm'r v. Lexington & B. S. R. Co., 13 Bush, 636. In Cincinnati, N. O. & T. P. Ry. Co. v. Prewitt's Adm'r, the court says: "The 'willful neglect' of the statute does not embrace any other character of negligence. There is some confusion upon this subject in the decisions of this court, or at least in the arguments to be found in the opinions; but that character of negli-

is a bar to a recovery under section 3, and *vice versa*.[42] Under section 1 the sum recovered becomes assets of the estate of the deceased;[44] but under section 3 it goes solely to the statutory beneficiaries.[45]

gence is the creature of the statute. It signifies a reckless indifference to, or intentional disregard of, the safety of others. It is *sui generis*. The word 'willful' was not used as synonymous with 'gross;' and, if declared on, the action must be considered as brought on, and must be confined to the third section. * * * If the averment be that the life was lost by 'willful neglect,' then a recovery can only be had under section 3." But where the petition alleged that the intestate died unmarried and childless, and that the killing was by "the gross and willful negligence" of defendant, it was held that as the petition negatived a right to recover under section 3, yet set up a cause of action under section 1, the allegation as to "willful" negligence might be disregarded as surplusage. Morris' Adm'r v. Louisville & N. R. Co., 12 S. W. Rep. 940. It is not enough to allege that deceased lost his life by the willful neglect of defendant. The plaintiff should state some act or failure to perform some legal duty, which act or failure contributed directly to the loss of life. Louisville & P. Canal Co. v. Murphy, 9 Bush, 522. The petition need not state the circumstances by which the negligence is to be inferred; it is sufficient to allege the extent of the injury, and the manner of its infliction, and to charge negligence generally. Louisville, C. & L. R. Co. v. Case's Adm'r, 9 Bush, 728. An allegation that defendant railroad company "carelessly, negligently, wrongfully, and unlawfully" ran its cars over and killed the intestate, does not amount to an allegation that the neglect was willful. Jacob's Adm'r v. Louisville & N. R. Co., 10 Bush, 263. Nor does an allegation that the work was done "so recklessly and wantonly, and with such indifference to the rights of others," that a person was killed. City of Lexington v. Lewis' Adm'x, 10 Bush, 677. An allegation of "gross and culpable negligence" is not sufficient. Hansford v. Payne, 11 Bush, 380.

[43] Hansford's Adm'x v. Payne, 11 Bush, 380; Conner v. Paul, 12 Bush, 144. A pending action by the widow under section 3 is a bar to an action by the administrator under the same section. Henderson's Adm'r v. Kentucky C. R. Co., 86 Ky. 389, 5 S. W. Rep. 875.

[44] Givens' Adm'r v. Kentucky C. R. Co., 12 S. W. Rep. 257.

[45] Carrithers v. Cox, 14 S. W. Rep. 599.

§ 42. Louisiana.

Civil Code, art. 2315, as amended, reads: "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. *The right of this action shall survive in case of death in favor of the minor children and widow of the deceased, or either of them, and, in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from death.* The survivors above mentioned may also recover the damages sustained by the death of the parent or child, or husband or wife, as the case may be." The part in italics was added by amendment in 1855,[45] and the last sentence in 1884.[47]

Prior to the amendment of 1855 no action was maintainable to recover damages for injuries that resulted in death.[46] The amendment of 1855 simply gave the right to maintain an action for the same damages which the party injured might have recovered.[48] The amendment of 1884 gave a new right of action, viz., for damages resulting from the death.[50] Contributory negligence of parents is a defense in the latter action, but not in the former.[51]

[45] Acts La. 1855, p. 270. [47] Acts La. 1884, p. 94.

[46] Hubgh v New Orleans & C. R. Co., 6 La. Ann. 495; Hermann v. New Orleans & C. R. Co., 11 La. Ann. 5.

[48] Earhart v. New Orleans & C. R. Co., 17 La. Ann. 243; Frank v. New Orleans & C. R. Co., 20 La. Ann. 27; Vredenburg v. Behan, 33 La. Ann. 629; Van Amburg v. Vicksburg, S. & P. R. Co., 37 La. Ann. 651; McCubbin v. Hastings, 37 La. Ann. 713.

[50] Myhan v. Louisiana, E. L. & P. Co., 41 La. Ann. 964, 6 So. Rep. 797; McFee v. Vicksburg, S. & P. R. Co., 42 La. Ann. 790, 6 So. Rep. 720.

[51] Westerfield v. Levis, 9 So. Rep. 52.

§ 43. Maine.

Rev. St. 1883, c. 51, § 68, provides that any railroad corporation by whose negligence the life of any person, in the exercise of due care,[52] is lost, shall forfeit not more than $5,000, nor less than $500, to be recovered by indictment, to the use of the persons specified. Section 69 excepts persons on the railroad contrary to law or to the valid rules of the corporation. Chapter 52, § 7, makes chapter 51, § 68, applicable to other common carriers.

No recovery can be had in case of the death of an employe of the defendant.[53] An indictment can be maintained only when death was instantaneous. In other cases the action must be for the recovery of such damages as the party injured might have recovered if he had lived, under Rev. St. c. 87, § 8, by force of which such actions survive.[54] An indictment cannot be main-

[52] State v. Maine C. R. Co., 76 Me. 357; State v. Maine C. R. Co., 77 Me. 538, 1 Atl. Rep. 678.

[53] State v. Maine C. R. Co., 60 Me. 490. Walton, J., says that the act of 1855, c. 161, which is the basis of the existing law, did not apply to the employes,—the first section applying only to passengers, and the second to persons other than passengers, but expressly excluding employes; that in the Revised Statutes (Rev. St. 1857, c. 51, § 42; Rev. St. 1871, c. 51, § 36; Rev. St. 1883, c. 51, § 68) these several provisions were crowded into one section, and expressed in more general language; but that there was nothing therein to lead to a belief that a change of the law was intended.

[54] State v. Maine C. R. Co., 60 Me. 490; State v. Grand Trunk Ry., 61 Me. 114. Walton, J., says, in State v. Maine C. R. Co., that, if the party injured does not die immediately, a right of action accrues to him which survives by Rev. St. c. 87, § 8, and that no other remedy is needed; but that, if he does not die immediately, no right of action accrues to him, and consequently none survives. "The remedy by indictment was intended to apply to the latter class of cases alone. To hold otherwise would involve the legislature in the absurdity of creating two independent, and, to some extent, conflicting, remedies, for one and the same injury." The Massachusetts court reached an oppo-

tained where none of the beneficiaries specified in section 68 survive.[55]

Acts 1891, c. 124, provides for a civil action substantially similar to that given by Lord Campbell's act.

§ 44. Massachusetts.

(a) *Indictment.*

By Pub. St. c. 112, §§ 212, 213,[56] an indictment may be

side conclusion. See chapter III., note 68. "In addition to those surviving by the common law, the following actions survive: * * * assault and battery, trespass, trespass on the case, * * * and these actions may be commenced by or against an executor or administrator, or, where the deceased was a party to them, may be prosecuted or defended by them." Rev. St. Me. 1883, c. 87, § 8. An action upon the statute against a town for a personal injury, caused by a defect in a highway, may be prosecuted under this statute. Hooper v. Gorham, 45 Me. 209.

[55] The indictment must aver that the deceased left a widow or heirs, or both. State v. Grand Trunk Ry. Co., 60 Me. 145.

[56] The first statute upon this subject was St. 1840, c. 80, which provided: "If the life of any person, being a passenger, shall be lost by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, steamboat, stage coach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, in this commonwealth, such proprietor or proprietors, and common carriers, shall be liable to a fine not exceeding $5,000, nor less than $500, to be recovered by indictment, to the use of the executor or administrator of the deceased person, for benefit of his widow and heirs; one moiety thereof to go to the widow, and the other to the children of the deceased; but, if there shall be no children, the whole to the widow, and, if no widow, to heirs according to the law regulating the distribution of intestate personal estate among heirs." St. 1853, c. 414, subjected a railroad corporation to the same liabilities as St. 1840, c. 80, if from the same causes "the life of any person, not being a passenger or employe of such corporation, shall be lost, such person being in the exercise of due care and diligence," etc. In Gen. St. the provisions of St. 1840, c. 80, were re-enacted, and, so far as they related to railroad corporations, were contained in Gen. St. c. 63, § 97, and the provisions of St. 1853, c. 414, were re-enacted in Gen. St. c. 63, § 98. So far as the provisions of St. 1840, c. 80, related to persons, or corporations other than railroads, they were re-enacted in Gen. St. c. 160, § 34, which was superseded by St. 1881, c. 199, § 8, now Pub. St. c.

maintained against a railroad or street-railway corporation for the recovery of a fine of not less than $500, nor more than $5,000, to be paid to the executor or administrator[87] for the use of the widow or children, in equal moieties, or, if no widow, to the use of the next of kin,[88] in the following cases: (1) If by reason of the negligence or carelessness of a corporation[89] operat-

78, § 6, which confines the remedy to an action for tort. In the revision and consolidation, in 1874, of all general acts relating to railroads, the provisions of Gen. St. c. 68, §§ 97, 98, became St. 1874, c. 372, § 163, which forms part of Pub. St. c. 112, § 212. See Commonwealth v. Boston & L. R. Corp., 134 Mass. 211, per Colburn, J. The civil remedy was added by St. 1881, c. 199, §§ 1, 5, 6, which likewise form part of Pub. St. c. 112, § 212.

[87] The indictment must allege that administration has been taken out in Massachusetts. If it alleges appointment by the laws of Maine, without alleging ancillary administration in Massachusetts, it is fatally defective. Commonwealth v. Sanford, 12 Gray, 174. But an indictment describing the deceased as of Boston, etc., and alleging that A. B., of said Boston, has been appointed administrator, sufficiently shows that administration was taken out in the state. Commonwealth v. East Boston F. Co., 13 Allen, 589.

[88] An indictment cannot be maintained unless the deceased left widow or children, or next of kin. It must aver that he left widow or heirs, or both, as the case may be. Commonwealth v. Eastern R. Co., 5 Gray, 473; Commonwealth v. Boston & A. R. Co., 121 Mass. 36. But it need not set out their names, if it aver that they are unknown. Commonwealth v. Boston & W. R. Co., 11 Cush. 512. It is otherwise in Maine where the forfeiture is payable not to the administrator, but directly to the heirs. State v. Grand Trunk Ry. Co., 60 Me. 145.

[89] An indictment alleged the neglect *of the corporation* to reduce the speed of a train, and to give the proper signals. *Held*, that the negligence alleged was that of the servants of the corporation, and not of the corporation itself, and that the indictment was insufficient. Commonwealth v. Boston & M. R. Co., 133 Mass. 383. What was said inconsistent with this in Commonwealth v. Fitchburg R. Co., 120 Mass. 372, was not necessary to the decision. A corporation operating a leased railroad is not responsible in an action under section 212 for the defective condition of the road unless it had, or by the exercise of due care might have had, notice of the same. "The present action is statutory and penal in its character. * * * The action which is given to the administrator is merely a substitute for the indictment." Per Holmes, J., Littlejohn v. Fitchburg R. Co., 148 Mass.

ing[60] a railroad or street railway, or of the unfitness or gross negligence or carelessness of its servants or agents[61] while employed in its business, the life of a *passenger*[62] is lost;[63] (2) if by

478, 20 N. E. Rep. 108. A memorandum on a season ticket that the corporation assumes no liability for any personal injury *held* no defense to an indictment under Gen. St. c. 63, § 97, (Pub. St. c. 112, § 212.) Commonwealth v. Vermont & M. R. Co., 108 Mass. 7.

[60] Section 212 applies to a case where such a corporation is using a *railroad track reasonably incident* to the business in which the corporation is lawfully engaged, although the track is *not within* the *chartered limits* of the corporation, or of a road then under its control, but is a private track which it is using by the mere sufferance and license of its owner. Commonwealth v. Boston & L. R. R. Co., 126 Mass. 61. Also to a case where death is caused through the negligence of a railroad corporation in unloading coal from a vessel into its cars. Daley v. Boston & A. R. Co., 147 Mass. 101, 16 N. E. Rep. 690.

[61] An allegation that by reason of the unfitness, gross negligence, and carelessness of A., the servant of defendant corporation and engaged in its business, the life of a passenger was lost, is sufficient. Commonwealth v. Brockton St. Ry. Co., 143 Mass. 501, 10 N. E. Rep. 506.

[62] A passenger left the train after the conductor had called the station and the car had almost stopped, and while crossing the track to the station was killed by a locomotive on a parallel track, which he might have seen. *Held*, that deceased had ceased to be a passenger by leaving the train while it was in motion. Commonwealth v. Boston & M. R. Co., 129 Mass. 500. A person who gets upon a train after it has started does not become a passenger until he reaches a place of safety inside the car. Merrill v. Eastern R. Co., 139 Mass. 238, 1 N. E. Rep. 548. The mere fact that one has not paid his fare or delivered up his ticket does not prove that he is not a passenger. If a passenger, he continues to be such while rightfully leaving the train and station. McKimble v. Boston & M. R. Co., 139 Mass. 542, 2 N. E. Rep. 97; s. c. 141 Mass. 463, 5 N. E. Rep. 804. A person ceases to be a passenger when he has alighted from a train, taken a position upon the highway, and thence started to cross the track upon his way from the station. Allerton v. Boston & M. R. Co., 146 Mass. 241, 15 N. E. Rep. 621. Defendant, in consideration of payment to it, and of an agreement to supply

[63] It is immaterial that the death was not instantaneous. Commonwealth v. Metropolitan R. Co., 107 Mass. 236.

reason of the above causes the life of a person being in the exercise of due diligence, and *not a passenger or in the employment* of such corporation, is lost; (3) if the life of a person is lost by collision with the engines or cars of a railroad corporation at a crossing upon the level with the highway, and it appears that the corporation neglected to give the signals required by Pub. St. c. 112, § 163, and that such neglect contributed to the death, unless it be shown that, in addition to mere want of ordinary care, the person injured, or the person having charge of his person, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury.[64] In the first and second cases the corporation is not liable for the loss of life of a person while walking or being upon

passengers on one of its trains with ice water, issued a season ticket to deceased, and permitted him to sell pop corn on all its trains. *Held*, that he was a passenger. Commonwealth v. Vermont & M. R. Co., 108 Mass. 7. Children of such an age that they are carried free, if accompanied by adults, are passengers, though the accompanying adults are riding on free passes. Littlejohn v. Fitchburg R. Co., 148 Mass. 478, 20 N. E. Rep. 108. It is no defense to an indictment or action for causing the death of a *passenger* under section 212 that the deceased was not in the exercise of due care. Commonwealth v. Boston & L. R. Corp., 134 Mass. 211; McKimble v. Boston & M. R. Co., 139 Mass. 542, 2 N. E. Rep. 97; s. c. 141 Mass. 463, 5 N. E. Rep. 804.

[64] Pub. St. c. 112, § 213, is founded on St. 1874, c. 372, § 164, and St. 1881, c. 199, §§ 2, 5, 6. St. 1874, c. 372, § 164, was substantially a reenactment of St. 1871, c. 352. See Commonwealth v. Boston & M. R. Co., 133 Mass. 383; Kelley v. Boston & M. R. R., 135 Mass. 448. The civil remedy was added by St. 1881, c. 199, §§ 2, 5, 6.

In an action to recover for killing B. at a highway crossing, there was evidence that there was a gate which, when closed to indicate the approach of a train, crossed the highway at the side of the railroad opposite to that from which B., approaching in a covered wagon, was about to cross; that the gate-keeper began to close the gate, swung his lantern, and shouted to B. to stop, but immediately afterwards shouted to hurry up; that B. then started his horse, but before getting across the track

its road contrary to law or its reasonable rules and regulations.[65] The indictment must be prosecuted within one year from the time of the injury causing the death.

(*b*) *Civil action.*

An action for tort may also be maintained by the executor or administrator for the recovery of damages, not exceeding $5,000, nor less than $500, to be assessed with reference to the degree

was struck by the locomotive, and that no bell or whistle was sounded as required by St. 1874, c. 372, § 164, (Pub. St. c. 112, § 213.) *Held*, that the jury were warranted in finding for the plaintiff. Bayley v. Eastern R. Co., 125 Mass. 62.

The distance across defendant's railway tracks, at a street crossing, was about 160 feet. Plaintiff's evidence tended to show that on a dark morning plaintiff's intestate had driven half-way across when the gates were closed, and the gateman shouted to him to stop, whereupon he whipped up his horse, and the gateman then shouted to him to "Come on," at the same time opening the gate in front. Before reaching the opposite side he was struck by an engine, and killed. *Held* that, as a matter of law, deceased was not guilty of such gross or willful negligence as would, under section 213, preclude recovery. Doyle v. Boston & A. Ry. Co., 145 Mass. 386, 14 N. E. Rep. 461.

If an indictment alleges, as the only act of negligence, that the servants of the corporation ran a locomotive engine "rashly, and without watch, care, or foresight, and with great, unusual, unreasonable, and improper speed," evidence is inadmissible to show that the servants neglected to ring the bell on the engine or to sound the whistle. Commonwealth v. Fitchburg R. Co., 126 Mass. 472.

A declaration contained two counts, the first alleging that plaintiff's intestate was a passenger, and claiming under section 212; the second claiming under the second part of the same section. *Held*, that the pleadings did not state facts sufficient to bring the case within section 213, it being nowhere alleged that the accident occurred at a highway crossing, or was caused by a collision with cars or engines. Allerton v. Boston & M. R. Co., 146 Mass. 241, 15 N. E. Rep. 621.

[65] An indictment need not negative that the deceased was on the track contrary to law, etc. Commonwealth v. Fitchburg R. Co., 10 Allen, 189.

of culpability of the defendant or its servants or agents, for the use of the persons specified in the case of an indictment, when the life of the deceased was lost under the circumstances which authorize the maintenance of an indictment; but the executor or administrator shall not avail himself of both civil and criminal remedy.[66]

The executor or administrator may also maintain a like action for tort (4) against a corporation operating a railroad, if an employe of such corporation, being in the exercise of due care, is killed under such circumstances as would have entitled the deceased to maintain an action for damages if death had not resulted, and the corporation will be liable in the same manner and to the same extent as if the deceased had not been an employe;[67] (5) against the proprietor or proprietors of a steamboat or stagecoach, or common carriers of passengers, if the life of a passenger is lost by reason of the negligence or carelessness of such proprietor or proprietors or common carriers, or by the unfitness or gross negligence or carelessness of their servants or agents;[68] (6) if the life of a person is lost by reason of a defect or want of repair of a highway, townway, causeway, or bridge, or for want of suitable rails on such way or bridge, against the county, town, or person by law obliged to repair the same, provided the defendant had reasonable notice of the defect or want of repair, for the recovery of damages, not exceeding $1,000, to be assessed with reference to the degree of culpa-

[66] Pub. St. c. 112, §§ 212-3; St. 1886, c. 140. Before St. 1886, c. 140, the remedy against a street-railway corporation was solely by indictment. Holland v. Lynn & B. R. Co., 144 Mass. 425, 11 N. E. Rep. 674.

[67] St. 1883, c. 248, amendatory of Pub. St. c. 112, § 212. This act does not render the corporation liable for the loss of life of an employe who is killed by the negligence of a coemploye. Dacey v. Old Colony R. Co., 26 N. E. Rep. 437.

[68] Pub. St. c. 73, § 6. See note 56. Commonwealth v. Coburn, 153 Mass. 555.

bility of the defendant.[69] All such actions must be commenced within one year from the injury causing the death.[70]

The executor or administrator may also maintain an action upon the cause of action which accrued to the party injured for the recovery of the same damages which he might have recovered if he had lived.[71] This action cannot be maintained if the death was instantaneous.[72] In the absence of evidence of conscious suffering, or of loss incurred before the death by means of the injury, the damages are only nominal.[73]

[69] Pub. St. c. 52, § 17. The remedy was formerly by indictment. Gen. St. c. 44, § 21; Commonwealth v. Wilmington, 105 Mass. 599. Where a woman, four or five months pregnant, fell on a defective highway, and was delivered of a child, which survived but a few minutes, *held*, that the child was not a "person" within the statute. Dietrich v. Northampton, 138 Mass. 14. The right of action is independent of the administrator's right to sue for damages suffered by the intestate during his lifetime from the injury which caused his death, and both actions may proceed at the same time. Bowes v. City of Boston, 29 N. E. Rep. 633; Fegan v. Same, Id.

[70] As to the statutory provisions concerning notice of the injury to be given to the defendant, see Pub. St. c. 52, §§ 19, 21; St. 1882, c. 86; St. 1888, c. 114. Mitchell v. Worcester, 129 Mass. 525; Taylor v. Woburn, 130 Mass. 494; Nash v. Town of South Hadley, 145 Mass. 105, 13 N. E. Rep. 876.

[71] "In addition to the actions which survive by the common law, the following shall also survive: actions of replevin, of tort for assault, battery, imprisonment, or other damage to the person," etc. Pub. St. c. 165, § 1. Demond v. City of Boston, 7 Gray, 544; Norton v. Sewall, 106 Mass. 143.

[72] See § 74.

[73] Kennedy v. Standard Sugar Refinery, 125 Mass. 90; Tully v. Fitchburg R. Co., 134 Mass. 499; Mulchahey v. Washburn Car-Wheel Co., 145 Mass. 281, 14 N. E. Rep. 106.

(c.) *Employers' liability act.*

By the employers' liability act,[74] where personal injury is caused to an employe who is in the exercise of due care,[75] in the cases therein provided for, which results in death, the legal representatives have the same right of compensation and remedies against the employer as if the employe had not been an employe, etc.[76] By this act damages or compensation in lieu thereof may also be recovered for the death, as follows: (1) If such death is not instantaneous, or preceded by conscious suffering,[77] the legal representatives may, in the action under the act upon the cause of action of the party injured, also recover damages for the death,[78] the total damages for the death or the injury not to exceed $5,000, and to be apportioned by the jury between the legal representatives and the widow, and, if no widow, the next of kin, provided that the next of kin were dependent on the wages of the deceased for support;[79] but, if there are no such persons, then no damages for the death can be recovered, and the damages, so far as awarded for the death, shall be assessed with reference to the degree of culpability of

[74] St. 1887, c. 270, as amended by St. 1888, c. 155, and St. 1892, c. 260. The amendment of 1892 did not go into effect until January 1, 1893.

[75] Lothrop v. Fitchburg R. Co., 150 Mass. 423, 23 N. E. Rep. 227; Shea v. Boston & M. R. Co., 27 N. E. Rep. 672.

[76] See Dacey v. Old Colony R. Co., 26 N. E. Rep. 437.

[77] A dump-car going 10 or 12 miles an hour struck deceased on the back of the head, and bounced him against a stationary car. The blood gushed from his nose and mouth in streams. He was picked up apparently unconscious, and died within two hours. There was no testimony as to whether he regained consciousness, though the actual facts might have been shown. *Held*, that the evidence failed to prove that deceased died "without conscious suffering." Hodnett v. Boston & A. R. Co., 30 N. E. Rep. 224.

[78] Before the amendment of St. 1892, c. 260, the legal representative could not recover for the death. Ramsdell v. New York & N. E. R. Co., 151 Mass. 245, 23 N. E. Rep. 1103.

[79] *Quære*, whether this proviso applies to section 1.

the employer, or the person for whose negligence he is made liable; (2) if the death is instantaneous or without conscious suffering, the widow, or, if no widow, the next of kin, provided that the next of kin were dependent upon the wages of the deceased for support,[80] may maintain an action to recover compensation, in not less than $500, nor more than $5,000, to be assessed with reference to the degree of culpability of the employer, or the person for whose negligence he is made liable. The action must be commenced within one year from the accident. No action can be maintained unless notice in writing, signed by the person injured, or by some person in his behalf, of the time, place, and cause of the injury, be given to the employer within 30 days. No notice shall be deemed insufficient by reason of any inaccuracy in stating the time, place, and cause, provided it is shown that there was no intention to mislead, and that the party entitled to the notice was not in fact misled. If from physical or mental incapacity it is impossible for the person injured to give the notice within 30 days,[81] he may give it within 10 days after the incapacity is removed; and in case of his death without having given the notice, and

[80] Only such of the next of kin as have been dependent need join. Daly v. New Jersey, S. & I. Co., 29 N. E. Rep. 507. An invalid sister, unable to work regularly, or to earn enough to pay her doctors' bills, who has received from her brother on an average $30 to $35 a month for three or four years, and who in fact receives from and is dependent on him for support, is within the statute. Daly v. New Jersey S. & I. Co., 29 N. E. Rep. 507. Plaintiff testified that she was decedent's half-sister, and had two children; that he came to see her at times, and gave her money, and sent her money every other week or so to pay her rent; and that she had no other means of support but her earnings, and since his death she had to support herself. There was nothing to show what her earnings or expenses were, or that she was in fact dependent on him. *Held*, that the evidence failed to show that plaintiff was dependent on deceased for support. Hodnett v. Boston & A. R. Co., 30 N. E. Rep. 224.

[81] See Mitchell v. Worcester, 129 Mass. 528.

without having been for 10 days at any time of sufficient capacity to give the notice, his executor or administrator may give it within 30 days after his appointment.[83]

§ 45. Missouri.

In addition to the action for the recovery of such damages, not exceeding $5,000, as the jury shall deem fair and just with reference to the necessary injury resulting from the death, which is given by Rev. St. 1889, § 4426, whenever death is caused by wrongful act, neglect, or default such as would, if death had not ensued, have entitled the party injured to maintain an action,—an action is by section 4425 given when death is caused by the negligence of common carriers in certain cases for the recovery of the fixed sum of $5,000 by way of forfeiture. Section 4425 provides that (1) whenever "any person" shall die from any injury occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employe while running or managing a locomotive, car, or train of cars,[83] or of any master, pilot, engineer, agent, or employe while running or managing a steamboat,[84] or of any driver of a stagecoach or

[83] In case of death without conscious suffering, it is not necessary to appoint an administrator to give the notice, but it may be given by the widow or her attorney. Gustafsen v. Washburn & Moen Manuf'g Co., 27 N. E. Rep. 179. *Cf.* Nash v. Town of South Hadley, 145 Mass. 105, 13 N. E. Rep. 376. Taylor v. Woburn, 130 Mass. 494. But notice given by the administrator within 30 days after his appointment will support an action by the widow or next of kin. Daly v. New Jersey S. & I. Co., 29 N. E. Rep. 507; Jones v. Boston & A. R. Co., 31 N. E. Rep. 727; Dickerman v. Old Colony R. Co., Id. 728.

[83] The negligence need not be that of the superior in charge. Rine v. Chicago & A. R. Co., 100 Mo. 238, 12 S. W. Rep. 640.

[84] A suit for death, based on the theory that defendant, a steam-boat company, wrongfully landed deceased at an unsafe place, so that, after landing, he fell into the river, comes under this clause. Buddenberg v. Charles P. Chouteau Transp. Co., 18 S. W. Rep. 970.

other public conveyance while in the charge of the same as driver; and (2) when "any passenger"[85] shall die from any injury resulting from any defect or insufficiency in any railroad, locomotive, car, steamboat, stagecoach, or public conveyance, the employer or owner[86] shall be liable; but that the defendant may show in defense that the defect or insufficiency was not negligent, and that the injury was not the result of unskillfulness, negligence, or criminal intent.[87] Under this section it was formerly held that "any person," as used in the first branch of the section, included fellow servants of a servant whose negligence caused the death.[88] But this construction has been overruled, and the later cases hold that under section 4425, as at common law, the master cannot be held liable for injuries caused by the negligence of a fellow servant of the party injured, unless the master was negligent in selecting the servant or in retaining him after knowledge of his character.[89] The court says that "any person"

[85] The petition should allege that deceased was a passenger, but the defect is waived if defendant, without objection, by his answer puts that question directly in issue. Wagner v. Missouri Pac. Ry. Co., 97 Mo. 512, 10 S. W. Rep. 486; Zuendt v. Same, 10 S. W. Rep. 491.

[86] No new right is given by the second clause of section 4425 to the representative of a deceased passenger against an "owner" of the road as contradistinguished from the corporation having charge of it. The term "owner" is therein used in the sense of "proprietor" or "operator" at the time of the accident. Proctor v. Hannibal & St. J. R. Co., 64 Mo. 112.

[87] It seems that the act implies a *prima facie* case of negligence which the defendant may rebut. Schultz v. Pacific R. Co., 36 Mo. 13.

[88] Schultz v. Pacific R. Co., 36 Mo. 13; Conner v. Chicago, R. I. & P. R. Co., 59 Mo. 285, (by a divided court.)

[89] Proctor v. Hannibal & St. J. R. Co., 64 Mo. 112. (overruling Schultz v. Pacific R. Co., *supra*.) Proctor v. Hannibal & St. J. R. Co. was approved in Elliott v. St. Louis & I. M. R. Co., 67 Mo. 272, but Henry, J., erroneously states the doctrine of that case to be that no action can be maintained under that section (section 4425) by an *employe*. This is pointed out in Miller v. Missouri Pac. Ry. Co., 19 S. W. Rep. 58.

does not include fellow servants, and that the right conferred by section 4425 is analogous to that conferred by section 4426, and is not an original right created on the death of the employe.[90] But "any person" includes an employe whose death is caused by the negligence of a servant not a fellow servant.[91] On the other hand, "any passenger," as used in the second branch, does not include employes;[92] so that if an employe dies from an injury occasioned by any defect or insufficiency in the railroad, etc., the remedy is under section 4426, for damages not exceeding $5,000, and not under section 4425, for the fixed sum of $5,000 by way of forfeiture.[93] Neither does "any passenger"

[90] Proctor v. Hannibal & St. J. R. Co., *supra*. The petition embraced two counts, framed, respectively, on section 4425 and section 4426, the first charging that the killing was caused through the negligence, unskillfulness, and criminal intent of defendant's employes; the second that the death was owing directly to the negligence or default of the company. *Held*, that the two counts contained but one subject-matter of complaint, although stated in different ways to meet the evidence; that there could be but one verdict and one assessment; and that a general verdict was properly returned. Brownell v. Pacific R. Co., 47 Mo. 240.

[91] Where a track hand was run over and killed by reason of the negligence of the engineer and fireman of a locomotive, *held*, that the engineer and fireman were not fellow servants of the deceased, and that an action could be maintained for his death under section 4425. Sullivan v. Missouri Pac. Ry. Co., 97 Mo. 118, 10 S. W. Rep. 852, followed in Miller v. Missouri Pac. Ry. Co., 19 S. W. Rep. 58; Parker v. Hannibal & St. J. R. Co., 19 S. W. Rep. 1119; Schlereth v. Missouri Pac. Ry. Co., Id. 1134, (the decision on this point in the same case, 96 Mo. 509, 10 S. W. Rep. 66, was erroneous.) For the death of a postal clerk in a collision occasioned by negligence, the railroad company is liable under the first branch of section 4425. Magoffin v. Missouri Pac. Ry. Co., 102 Mo. 540, 15 S. W. Rep. 76.

[92] Where a brakeman not on duty was killed while riding in the baggage car contrary to the rules of the company, *held*, that he was not a "passenger" within section 4425, and that, if a passenger, his misconduct or negligence contributed to the death, and prevented a recovery. Higgins v. Hannibal & St. J. R. Co., 36 Mo. 418.

[93] Holmes v. Hannibal & St. J. R. Co., 69 Mo. 536; Elliott v. St. Louis

include persons driving across the railroad; so that, if the death of such person is caused by a defective crossing or other defect or insufficiency in the railroad, his remedy is solely under section 4426, though, if his death is caused by the failure of the railroad company to ring the bell or sound the whistle, such failure entitles his representative to sue under the first branch of section 4425, the deceased in such case being a "person" whose death results from the negligence of the servants running the locomotive.[94]

& L. M. R. Co., 67 Mo. 272; Flynn v. Kansas City, St. J. & C. B. R. Co., 78 Mo. 195; Parsons v. Missouri Pac. Ry. Co., 94 Mo. 286, 6 S. W. Rep. 464.

[94] In an action for the death of one killed while driving over a railroad crossing, the court instructed the jury that if they found for the plaintiff, (both causes of action having been set up in the petition,) either on the ground of a failure to ring the bell or sound the whistle, or on the ground of a failure to construct and maintain a crossing as prescribed by the statute, or on both grounds, they should assess damages at $5,000. The verdict was for the plaintiff for $5,000. The record failed to show on what ground the finding was based. *Held*, that the judgment must be set aside; that the first ground came within the first branch of section 4425, but that the second ground (the deceased not being a passenger) did not come within the second branch of section 4425, but came within section 4426; and that, as the jury might have found on the second ground, the instruction, as to damages, was erroneous. Crumpley v. Hannibal & St. J. R. Co., 98 Mo. 34, 11 S. W. Rep. 244.

In an action for negligently killing plaintiff's husband at a railroad crossing, it is error to direct a verdict for the plaintiff for $5,000, if the death resulted from failure to ring the bell or sound the whistle, *or* from failure to erect a sign board, because, while failure to ring the bell or sound the whistle brings the case within the first branch of section 4425, failure to erect a signboard (the deceased not being a passenger) brings the case within section 4426. King v. Missouri Pac. Ry. Co., 98 Mo. 235, 11 S. W. Rep. 563.

Where the deceased was killed at a railroad crossing, *held*, proper to instruct the jury that, if the death resulted from the failure to light the headlight of the locomotive, they should find a verdict for the plaintiff for $5,000. Becke v. Missouri Pac. Ry. Co., 102 Mo. 544, 18 S. W. Rep. 1053.

Where the deceased was using the railroad by license of defendant as

The Colorado[95] and New Mexico[96] statutes are in most respects substantial copies of the Missouri statute. In Colorado it has been held, following Missouri, that "any person" does not include servants killed by the negligence of a fellow servant while acting in the common employment.[97]

§ 46. Nevada.

Gen. St. §§ 3898, 3899, provide that whenever death is caused by wrongful act, etc., the personal representative may maintain an action for the benefit of the kindred named, but, in default of such kindred, the proceeds to be disposed of as personal property; and that the jury "may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the kindred" named.

Under this statute there are two causes of action,—one for the injury to the deceased for the recovery of such damages, pecuniary and exemplary, as the jury shall deem fair and just, and one for the injury to the kindred for the pecuniary injury to them. Under the first cause of action the plaintiff need not

a tow path, and was run over by defendant's cars owing to the negligence of defendant's employes managing the same, *held*, that an instruction that if the jury found for plaintiff it should be in the sum of $5,000 was correct. Le May v. Missouri Pac. Ry. Co., 16 S. W. Rep. 1049.

Where a person is killed at a crossing by a train, and the negligence relied on is the maintenance by the company of obstructions along its right of way, it is error to charge that if the company was so negligent, and the death resulted therefrom, the verdict should be for $5,000. Rapp v. St. Joseph & I. R. Co., 17 S. W. Rep. 487.

[95] Gen. St. 1883, §§ 1080–1083. This is the act of March 7, 1877, which repealed the act of February 8, 1872. Rev. St. 1883, §§ 1080–1083 are §§ 1508–1511, in Mills' Annotated Statutes, 1891.

[96] See appendix.

[97] Atchison, T. & S. F. R. Co. v. Farrow, 6 Colo. 498.

allege or prove the existence of such kindred, but under the second he must do so.[98]

§ 47. New Hampshire.

Pub. St. 1891, c. 191, § 8, provides that actions for tort for physical injuries to the person, and the causes of such actions, shall survive. Section 12 provides that, if death was caused by the injury, the mental and physical pain of the deceased, the expenses occasioned to his estate by the injury, the probable duration of his life but for the injury, and his capacity to earn money, may be considered as elements of damage. Section 13 designates the persons among whom the damages shall be distributed. These provisions appear to contemplate an action in which, in effect, are joined the right of action of the party injured, which survives, and a right of action for damages resulting from his death to the persons designated. No decisions have yet been rendered under this statute.

Until 1879 the only remedy was by indictment, under a statute similar to those of Maine and Massachusetts.[99] This

[98] Roach v. Consolidated I. M. Co., 7 Sawy. 224, 7 Fed. Rep. 698. The decision rests on the peculiarity of the statute in allowing exemplary, as well as pecuniary, damages and a recovery in default of kindred.

[99] "If the life of any person not in their employment shall be lost by reason of the negligence or carelessness of the proprietors of any railroad, or by the unfitness or gross negligence or carelessness of their servants or agents, in this state, such proprietors shall be fined not exceeding five thousand dollars, nor less than five hundred dollars, and one half such fine shall go to the widow and the other half to the children of the deceased. If there is no child, the whole shall go to the widow, and, if no widow, to his heirs according to the law regulating the distribution of intestate estates." Gen. Laws 1878, c. 282, § 14. An indictment against the stockholders, and not against the corporation, *held* bad. State v. Gilmore, 24 N. H. 461. A corporation operating a railroad, and having exclusive possession and control, *held* liable to indictment as proprietor, without evidence that it was owner, lessee, or mortgagee. State v. Boston & M. R., 58 N. H. 410.

remedy was abolished in 1879, by an act which gave a right of action to the executor or administrator for injuries resulting in death.[100] In 1885 an additional act was passed, providing that all actions and causes of action should survive.[101] In 1887 the act of 1879 was repealed, and a remedy given similar to that now embodied in the provisions of Pub. St. 1891, c. 191, §§ 8–13.[102]

§ 48. New Mexico.[103]

§ 49. North Carolina.

Code, §§ 1498–1500,[104] provides that whenever death is caused by wrongful act, neglect, etc., the executor, administrator, or collector may maintain an action, and recover such damages as are a fair and just compensation for the pecuniary injury result-

[100] "When the death of a person is caused by a wrongful act of neglect of another which, if death had not ensued, would have entitled the person injured to recover damages therefor, then, on the death of such person, his executor or administrator may, by suit brought within two years of such death, recover damages for the injury; and one half of such damages shall go to the widow or widower, and the other half to the children, of the deceased. If there is no child, the whole shall go to the widow or widower; and if no widow or widower, to the heirs of the deceased according to the law regulating the distribution of intestate estates." Laws 1879, c. 85, § 1. Under this act the right of action did not depend on whether the death was instantaneous. The damages were for the injury resulting in death, not for the injury to the surviving relatives. Clark v. City of Manchester, 62 N. H. 577; Corliss v. Worcester, N. & C. R. Co., 63 N. H. 404; Clark v. Manchester, 64 N. H. 471, 13 Atl. Rep. 867.

[101] Laws 1885, c. 11.

[102] Laws 1887, c. 71. This act did not repeal Laws 1885, c. 11. French v. Mascoma Flannel Co., 20 Atl. Rep. 868. This case gives the history of the New Hampshire legislation.

[103] See § 45.

[104] See Kesler v. Smith, 66 N. C. 154.

ing from the death, and that the amount recovered "is not liable to be applied as assets, in the payment of debts and legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy." Section 1504 provides that all sums of money which shall remain in the hands of the executor, administrator, or collector for five years after his qualification, unrecovered or unclaimed by suit, by creditors, next of kin, or others entitled thereto, shall be paid to the University of North Carolina.

By reason of the latter provision it is held, anomalously, that the statute gives the action in any event, irrespective of the existence of next of kin.[105]

§ 50. North Dakota.[106]

§ 50*a*. Oregon.[106*]

§ 51. Pennsylvania.

The act of April 15, 1851, § 19,[107] provides that whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his life, the widow, or, if no widow, the personal representatives, may maintain an action. The act of April 26, 1855, §§ 1, 2,[108] provides that the persons entitled to recover shall be the husband, widow, children, or parents. The act of April 4,

[105] Warner v. Western N. C. R. Co., 94 N. C. 250.

[106] See § 53. The statute is the same as that of South Dakota.

[106*] See § 144.

[107] 2 Bright. Purd. Dig. pp. 1267-8, §§ 2, 3.

[108] 2 Bright. Purd. Dig. pp. 1267-8, §§ 4, 5. The act of 1851 gives the right of action; the act of 1855 defines who may sue. North Pennsylvania R. Co. v. Robinson, 44 Pa. St. 175. See Conroy v. Pennsylvania R. Co., 1 Pittsb. R. 440.

1868, § 1,[109] limits the application of the act of 1851, by providing that when any person, not a passenger, shall sustain loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employe, the right of action and recovery shall be such only as would exist if such person were an employe.[110]

§ 52. Rhode Island.

Pub. St. c. 204, § 15, provides for an action, if the life (1) of any passenger in any stagecoach or other conveyance, when used by common carriers, or (2) of any person in the care of the proprietors of, or common carriers by means of, railroads or steamboats, or (3) of any person crossing upon a public highway, with reasonable care, shall be lost, by reason of the negligence or carelessness of such proprietors or common carriers, or by the unfitness, negligence, or carelessness of their servants. Section 20 provides for an action whenever the death of any person ensues from an injury inflicted by the wrongful act of another, etc.

Under the third branch of section 15 an action may be maintained for death caused by the deceased being run over by a steamboat while crossing navigable waters in the state.[111] Under section 20 an action can be maintained when death en-

[109] 2 Bright. Purd. Dig. pp. 1267-8, §§ 6, 7. The acts of 1855 and 1868 are *in pari materia*, and both make a system. Pennsylvania R. Co. v. Keller, 67 Pa. St. 300. Section 6 is constitutional as a police regulation. Kirby v. Pennsylvania R. Co., 76 Pa. St. 506.

[110] No action can be maintained against a railroad company for the death of one employed by contractors to work on its railroad, and killed by the negligence of its servants. Fleming v. Pennsylvania R. Co., 134 Pa. St. 477, 19 Atl. Rep. 740, 26 W. N. C. 180.

[111] Chase v. American Steamboat Co., 10 R. I. 79, (Narragansett Bay.)

sues from an act carelessly or negligently done,[112] but not when it ensues from mere passive neglect.[113]

§ 53. South Dakota.

Comp. Laws, § 5498, provides that if the life of any person, not in the employment of a railroad corporation, shall be lost by reason of the negligence or carelessness of the proprietors of any railroad, or by the unfitness or negligence or carelessness of their employes, the personal representatives may institute suit, and recover damages in the same manner that the person might have done for any injury when death did not ensue. Section 5499 provides that if the life of any person is lost by the neglect, carelessness, or unskillfulness of another, then the widow, heir, or personal representative shall have the right to sue and recover damages for the loss or destruction of the life.

[112] Chase v. American Steamboat Co., 10 R. I. 79. Defendants were constructing a building, part of which, being insecurely placed, fell and killed a laborer. *Held*, that defendants were liable. McCaughey v. Tripp, 12 R. I. 449. See, also, Cassidy v. Angell, 12 R. I. 447, where a laborer fell into an excavation in a highway negligently guarded, and it was *held* that the town was liable. Cassidy v. Angell, 12 R. I. 447. In Iowa, under Revision 1860, § 4111, since repealed, making the perpetrator of a "wrongful act" producing death liable, it was held that an action founded on negligence could be maintained. Donaldson v. Mississippi & M. R. Co., 18 Iowa, 280.

[113] Defendant owned and for purposes of repair controlled a yard, occupied by a tenant, in which was a cistern on which defendant had put a proper cover. Without his knowledge an improper cover was substituted, and a child from a tenement, the yard of which connected by an open gateway with defendant's yard, fell in the cistern and was drowned. *Held*, that no action could be maintained. Bradbury v. Furlong, 13 R. I. 15. The court cites Chase v. American Steamboat Co., and McCaughey v. Tripp, observing that the court has gone thus far in compliance with the rule that remedial statutes are to be liberally construed, but says that section 20 and section 15 must be construed together; that the former includes all cases of negligence; but that the latter applies only where death results from injury *inflicted* by wrongful *act*.

Section 5498 is a survival statute, and only damages sustained by the estate are recoverable under it, and not those caused by the loss of life. Section 5499 creates a new cause of action for the recovery of damages sustained by the widow and heirs. Under this section, first the widow, and then the heirs, have the right to sue; and, if there be a widow or heirs, the suit cannot be sustained by the personal representative.[114]

§ 54. Tennessee.[115]

§ 55. Texas.

Sayles' Civil St. art. 2899,[116] provides that an action for actual damages may be brought when the death of any person is caused (1) by the negligence or carelessness of the proprietor, owner, charterer, or hirer of any railroad, steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence, or carelessness of their servants or agents;[117] (2) by the wrongful act, negligence, unskillfulness,

[114] Belding v. Black Hills & Ft. P. R. Co., 53 N. W. Rep. 750.

[115] See § 107.

[116] Sayles' Civil St. art. 2899, is based on Act Feb. 2, 1860. The original act read "unfitness, *gross* negligence, or carelessness of their servants," etc. This was amended by Act March 25, 1887, by omitting "gross." Before the amendment a defendant was not liable for the ordinary negligence, but only for the gross negligence, of his servants. Sabine & E. T. Ry. Co. v. Hanks, 73 Tex. 328, 11 S. W. Rep. 377; s. c. 79 Tex. 642, 15 S. W. Rep. 476; Dallas City R. Co. v. Beeman, 74 Tex. 391, 11 S. W. Rep. 1102; Missouri Pac. Ry. Co. v. Brown, 75 Tex. 267, 12 S. W. Rep. 1117; Galveston, H. & S. A. Ry. Co. v. Kutac, 76 Tex. 473, 13 S. W. Rep. 327; San Antonio St. Ry. Co. v. Caillouttc, 79 Tex. 341, 15 S. W. Rep. 390; Galveston, H. & S. A. Ry. Co. v. Cook, 16 S. W. Rep. 1068; Missouri Pac. Ry. Co. v. Hill, 9 S. W. Rep. 351. See Austin v. Cameron, 18 S. W. Rep. 497.

[117] The wrongful act, etc., must be such as would, if death had not ensued, have entitled the party injured to maintain an action. Article 2900.

or default of another. Article 2901[118] provides that exemplary, as well as actual, damages may be recovered when the death is caused by the willful act, omission, or gross negligence of the defendant.

Liability for the acts of servants and agents is confined to the persons enumerated in the first branch of article 2899, and other persons are liable only for their own acts.[119] Under article 2901 a corporation is liable in exemplary damages only for the willful act, omission, or gross negligence of persons representing it as corporate officers, not of mere servants or agents.[120] A receiver of a railroad company is not a "proprietor, owner, charterer, or hirer," and hence is not liable under article 2899.[121]

[118] Article 2901 is based on Const. art. 16, § 26. See appendix. The earlier constitutional provision (Const. 1869, art. 12, § 30) did not contain the words "gross neglect." See Houston & T. C. Ry. Co. v. Baker, 57 Tex. 419. Const. 1869 provided that the defendant should be responsible to the persons specified "separately and consecutively." The omission of these words in Const. 1876 indicates an intent to allow only one suit for the benefit of all persons jointly interested. Galveston, H. & S. A. R. Co. v. Le Gierse, 51 Tex. 189. The constitutional provisions did not repeal the earlier act, but gave the right to exemplary damages in the cases named in addition to compensatory damages. March v. Walker, 48 Tex. 372; Houston & T. C. Ry. Co. v. Moore, 49 Tex. 31; Gohen v. Texas Pac. R. Co., 2 Woods, 346. See Houston & T. C. R. Co. v. Bradley, 45 Tex. 171; March v. Walker, 48 Tex. 372. Where both actual and exemplary damages are sought, the allegations should be in the nature of two distinct counts. Galveston, H. & S. A. R. Co. v. Le Gierse.

[119] Hendrick v. Walton, 69 Tex. 192, 6 S. W. Rep. 749; Asher v. Cabell, 50 Fed. Rep. 818.

[120] Houston & T. C. Ry. Co. v. Cowser, 57 Tex. 306. If the act of a servant, it must have been performed by the direction of the employer, or he must have ratified and adopted it. Mere retention of the servant after the act is not ratification. International & G. N. Ry. Co. v. McDonald, 75 Tex. 41, 12 S. W. Rep. 860; Winnt v. International & G. N. Ry. Co., 74 Tex. 32, 11 S. W. Rep. 907.

[121] Turner v. Cross, 18 S. W. Rep. 578; Yoakum v. Selph, 19 S. W.

§ 56. Virginia.

Code, §§ 2902–2904, provide that whenever death is caused by wrongful act, neglect, etc., the personal representative may maintain an action; that the jury may award such damages as to it may seem fair and just, not exceeding $10,000, and may direct in what proportion they shall be distributed to the wife, husband, parent, and child; and that the amount recovered shall be paid to the wife, husband, parent, and child, in such proportion as the jury may have directed, or, if they have not directed, according to the statute of distributions, and shall be free from all debts and liabilities of the deceased; but that, if there be no wife, husband, parent, or child, the amount shall be assets in the hands of the personal representative, to be disposed of according to law.

By reason of the amount recovered being assets if there are none of the beneficiaries named, it is held that the existence of beneficiaries is not necessary to the maintenance of the action.[122]

Rep. 145; Texas P. Ry. Co. v. Collins, 19 S. W. Rep. 365; Houston & T. C. Ry. Co. v. Roberts, 19 S. W. Rep. 512. In a joint action against a railroad company and its receiver for the death of a servant caused by the negligence of the receiver, a recovery cannot be had against the company where the receiver is not primarily liable. Texas P. Ry. Co. v. Collins. But in Texas & P. Ry. Co. v. Geiger, 79 Tex. 13, 15 S. W. Rep. 214, it was held that an action lay against the company for the death of a servant resulting from the negligence of a receiver in failing to keep the track in repair, on the ground that his negligence was that of one who stood in the relation of proprietor.

[122] Baltimore & O. R. Co. v. Wightman, 29 Grat. 431. The point actually decided was that it is not necessary to aver in the declaration for whose benefit the suit is prosecuted. This case was followed in Matthews v. Warner's Adm'r, 29 Grat. 570; Baltimore & O. R. Co. v. Noell's Adm'r, 32 Grat. 394; Harper v. Norfolk & W. R. Co., 36 Fed. Rep. 102. The existence, etc., of widow and children may be proved, however, for the ascertainment and apportionment of damages. Baltimore & O. R. Co. v. Sherman, 30 Grat. 602.

§ 57. Washington.

Hill's Ann. St. § 138,[123] gives a remedy when the death of a person is caused by wrongful act or neglect; and section 139 gives a remedy to the parent or guardian for the death of a child or ward. For the death of a minor child two actions may be maintained,—one under section 138, for the loss to the estate accruing after majority; and the other under section 139, for the loss of service accruing before.[124]

§ 58. West Virginia.

Code, c. 103, §§ 5, 6, provide that whenever death is caused by wrongful act, neglect, etc., the personal representative may maintain an action; that the amount recovered shall be distributed to the parties and in the proportions provided by law in relation to the distribution of personal estate left by persons dying intestate; and that the jury may give such damages as they shall deem fair and just, not exceeding $10,000, and the amount recovered shall not be subject to any debts and liabilities of the deceased.

Although the statute declares that the amount recovered shall not be subject to the debts and liabilities of the deceased, it seems to be held that the existence of next of kin is not necessary to the maintenance of the action.[125]

[123] Section 703, which gave a remedy to the personal representative, is inconsistent with section 138, and is not law. Graetz v. McKenzie, 28 Pac. Rep. 331; Northern Pac. R. Co. v. Ellison, Id. 333.

[124] Hedrick v. Ilwaco Ry. & Nav. Co., 30 Pac. Rep. 714.

[125] It is not necessary to aver in the declaration that the decedent left wife, children, or other next of kin. Madden v. Chesapeake & O. Ry. Co., 28 W. Va. 610. But the declaration is not demurrable because it names the widow and children. Searle v. Kanawha & O. Ry. Co., 32 W. Va. 370, 9 S. E. Rep. 248. Under an earlier act providing that the amount recovered should be for the exclusive benefit of the widow and next of kin, it was held that the declaration was defect-

§ 59. Miners' acts.

In Illinois,[126] Missouri,[127] and Pennsylvania [128] there exist special acts for the protection of the life and safety of persons employed in coal mines. The Illinois act gives a right of action, in cases of loss of life by reason of willful violation of the act, or of willful failure to comply with its provisions, in favor of the widow of the person so killed, his lineal heirs or adopted children, or any other person dependent upon him, for a recovery of damages for the injuries sustained by reason of such loss of life, not to exceed $5,000. The acts of Missouri and Pennsylvania are in their principal features the same. In order to render the defendant liable, the failure must be willful,[129] and the safeguard omitted must have been such that it would have prevented the fatal result;[130] but, if it would have prevented such result, it is immaterial that the occasion for the safeguard arose from a purely accidental cause.[131] There can be no recovery unless the party injured could have maintained an action if death had not ensued.[132] The action is properly brought by the widow, not the personal representative;[133] and, as only one action is contemplated, evidence that the deceased left children, as well as a widow, is admissible.[134]

ive for failure to allege that the decedent left widow or next of kin. Baltimore & O. R. Co. v. Gettle, 3 W. Va. 376.

[126] Starr & C. Ann. St. Ill. 1887, c. 93, § 14, as amended by Act of June 16, 1887, (3 Starr & C. Ann. St. c. 93, § 14, p. 400.)

[127] Rev. St. Mo. 1889, § 7074.

[128] Bright. Purd. Dig. Sup. p. 2252, § 70.

[129] Hawley v. Dailey, 18 Ill. App. 391.

[130] Coal Run Coal Co. v. Jones, 127 Ill. 379, 20 N. E. Rep. 59, affirming 8 N. E. Rep. 865.

[131] Wesley City Coal Co. v. Healer, 84 Ill. 126.

[132] Spiva v. Osage Coal & M. Co., 88 Mo. 68; Silliman v. Marsden, 9 Atl. Rep. 689; Cambria Iron Co. v. Shaffer, 8 Atl. Rep. 204.

[133] Litchfield Coal Co. v. Taylor, 81 Ill. 590.

[134] Beard v. Skeldon, 118 Ill. 564, 18 Ill. App. 54; Consolidated Coal Co. v. Machl, 130 Ill. 551, 22 N. E. Rep. 715.

CHAPTER IV.

THE WRONGFUL ACT, NEGLECT, OR DEFAULT.

§ 60. When action lies.
61. The wrongful act, neglect, or default.
62. "Wrongful."
63. Act or neglect must be such that party injured might have maintained action.
64. Intentional killing.
65. Death caused by negligence.
66. Contributory negligence of deceased.
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71. Contributory negligence of beneficiaries not a bar in Iowa, Virginia, and Ohio.
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73. Instantaneous death.
74. Instantaneous death under statutes providing for survival of action.
75. Instantaneous death—Connecticut, Iowa, Louisiana, Tennessee.
76. Proximate cause of death.
77. Death resulting from neglect of statutory duty.
78. Death resulting from liquor sold by defendant.
79. Felonious killing.

§ 60. When action lies.

In order that a cause of action under Lord Campbell's act and similar statutes shall exist, it is necessary that the following circumstances concur: (1) That the death shall have been caused by such wrongful act, neglect, or default of the defendant that an action might have been maintained therefor by the party injured if death had not ensued; (2) that there be in existence some one of the persons for whose benefit the action may be brought; (3) that there be in existence a proper party

plaintiff,—that is, that an executor or administrator shall have been appointed,—unless the statute authorizes the action to be brought directly by the beneficiaries; (4) that the time within which the action must be brought has not elapsed; and, (5) according to some authorities, that the beneficiaries, or some one of them, shall have suffered pecuniary loss by reason of the death. Whether, if no pecuniary loss has been sustained, the action may be maintained for nominal damages, is a question upon which there is a conflict of authority, and which will be discussed later.

§ 61. The wrongful act, neglect, or default.

Lord Campbell's act provides that whenever the death of any person is caused by wrongful act, neglect, or default, and 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, then, and in every such case, the person who would have been liable if death had not ensued shall be liable notwithstanding the death.

This language has been followed in nearly all the American acts, except those which in terms provide for the survival of the action of the party injured, although some of the acts do not expressly provide that the act, neglect, or default must be such as would have entitled the party injured to maintain an action. Differences occur, however, in the description of the act or default. For example, the language used in Alabama is "wrongful act, omission, or negligence;" in Arizona and Texas, "wrongful act, negligence, unskillfulness, or default;" in California, Idaho, and Utah, "wrongful act or neglect;" in Delaware and Pennsylvania, "unlawful violence and negligence;" in Florida, "wrongful act, negligence, or carelessness;" in Indiana, Kansas, Minnesota, Oklahoma, Oregon, and Washington, "wrongful act or omission;" in Mississippi, "wrongful or

negligent act or omission;" in Tennessee, "wrongful act, omission, or killing;" in Rhode Island, "wrongful act." In Georgia action lies in case of "homicide," which is made to include all cases where death results from a crime, or from criminal or other negligence.

§ 62. "Wrongful."

The word "wrongful" requires little comment. To be "wrongful," an act need not be intentional.[1] Whether an act is wrongful depends upon the duty or obligation which the defendant owed to the party injured. As was observed in a Minnesota case:[2] "In the case at bar, any act or omission violative of the obligations which the appellants as common carriers of passengers assumed towards the intestate would be a 'wrongful act or omission,' within the meaning of the statute. The word 'wrongful' in the statute is not used in the sense of 'willful' or 'malicious.'"

§ 63. Act or neglect must be such that party injured might have maintained action.

An essential limitation upon the words "wrongful act, neglect, or default" is created by the provision that they must be such as would have entitled the party injured to maintain an action therefor. This provision makes it a condition to the maintenance of the statutory action that an action might have

[1] Baker v. Bailey, 16 Barb. 54; McLean v. Burbank, 12 Minn. 530, (Gil. 438.) The words "wrongful" and "negligent" being synonymous, plaintiff, by asking to go to the jury on the question of the act being "wrongful," did not abandon the theory of negligence. Wells v. Sibley, 56 Hun, 644, 9 N. Y. Supp. 848.

[2] McLean v. Burbank, *supra;* State v. Baltimore & O. R. Co., 24 Md. 84; Baltimore & O. R. Co. v. State, 29 Md. 460; Evans v. Newland, 34 Ind. 112.

been maintained by the party injured for the bodily injury.[3] The condition has reference, of course, not to the loss or injury sustained by him, but to the circumstances under which the bodily injury arose, and to the nature of the wrongful act, neglect, or default;[4] and, although this condition has not been expressed in California, Idaho, Kentucky, North Dakota, South Dakota, and Utah, no case has been found in which it has not been implied.[5]

A preliminary question arises, therefore, in every action for death, namely, was the act, neglect, or default complained of such that if it had simply caused bodily injury, without causing death, the party injured might have maintained an action?

§ 64. Intentional killing.

Where the death results, not from mere negligence, but from intentional violence, the question whether the wrongful act was such that the party injured might have maintained an action if death had not ensued will of course depend upon whether the defendant had any excuse or justification.[6] This question, being the same as that which arises in actions for trespass to the person not resulting in death, requires no extended examination here. The law of self-defense is the same as in a criminal

[3] Neilson v. Brown, 13 R. I. 651; Martin v. Wallace, 40 Ga. 52; Wallace v. Cannon, 88 Ga. 199.

[4] *Per* Cockburn, C. J., in Pym v. Great Northern Ry. Co., 2 B. & S. 759. The objection had been raised that no action could be maintained, inasmuch as action lay only in case the deceased could have recovered and he could have had no right of action in respect of a pecuniary loss arising only on his death.

[5] 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.

[6] White v. Maxcy, 64 Mo. 552; Morgan v. Durfee, 69 Mo. 469; Nichols v. Winfrey, 90 Mo. 408, 2 S. W. Rep. 305; Fraser v. Freeman, 56 Barb. 234.

prosecution for homicide, except that the burden does not rest upon the plaintiff of proving the case beyond a reasonable doubt.[7] The plea of self-defense does not cause the burden to shift.[8] Contributory negligence on the part of the deceased, when the action is founded upon intentional violence, is of course no defense.[9]

§ 65. Death caused by negligence.

Where the death results from negligence, the question whether the negligence was such that the party injured might have maintained an action will depend primarily upon the relation borne by the defendant to the party injured, as determining whether the neglect was in respect to any duty owed by the former to the latter. According to the circumstances of the particular case, the answer may depend upon the law of master and servant,[10] of passenger and carrier,[11] of landlord and tenant,[12] of vendor and purchaser;[13] upon the law in respect to the liability

[7] March v. Walker, 48 Tex. 372. But the doctrine that he who seeks and originates an affray resulting in homicide cannot avail himself of the plea of self-defense is not applicable to a civil suit for damages brought by a representative of the deceased. Besenecker v. Sale, 8 Mo. App. 211.

[8] Nichols v. Winfrey, 79 Mo. 544. But see Brooks v. Haslam, 65 Cal. 421, 4 Pac. Rep. 399, to the contrary.

[9] Gray v. McDonald, 16 S. W. Rep. 398; Kain v. Larkin, 56 Hun, 79, 9 N. Y. Supp. 89; Matthews v. Warner, 29 Grat. 570. Proof that the deceased commenced the fatal affray will not warrant an instruction that, if his fault contributed to the injury resulting in his death, no recovery can be had. Darling v. Williams, 35 Ohio St. 58.

[10] See notes 19 and 20, *infra*.

[11] Sheridan v. Brooklyn & N. R. Co., 36 N. Y. 39.

[12] Moore v. Logan I. & S. Co., (Pa.) 7 Atl. Rep. 198; Albert v. State, 66 Md. 325, 7 Atl. Rep. 697; State v. Boyce, (Md.) 21 Atl. Rep. 322.

[13] The wife of G., being ill, expressed to her husband a desire for a harmless medicine. G. called at the drug store of D. for the desired medicine. D.'s agent, without informing himself by whom or for what it was intended, carelessly sold to G. a poisonous drug. G., supposing

of the owners of property of every description for injuries arising from its use;[14] upon the law of highways,[15] of municipal corporations,[16]—in short, upon any one of the many branches of the law that are commonly treated of in works upon negligence.[17]

it to be what he had called for, gave it to his wife, who drank of it, in the belief that it was a harmless medicine, and instantly died. *Held*, that these facts constituted a cause of action against D., in favor of the administrator of the deceased wife. Davis v. Guarnieri, 45 Ohio St. 470, 15 N. E. Rep. 350. In an action for negligently causing the death of plaintiffs' child, a complaint alleging that plaintiffs' agent, as customer of defendants, druggists, demanded quinine, but was by defendants' clerk given morphine instead, and, that relying on the representation of said clerk that the drug was quinine, plaintiffs administered the same to their daughter, from the effects of which she died, states a good cause of action. Brunswig v. White, 70 Tex. 504, 8 S. W. Rep. 85.

[14] Klix v. Nieman, 68 Wis. 271, 32 N. W. Rep. 223; Simmons v. Everson, 124 N. Y. 319, 26 N. E. Rep. 911; Trask v. Shotwell, 41 Minn. 66, 42 N. W. Rep. 699; O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. Rep. 269; Sherman v. Anderson, 27 Kan. 333; Callahan v. Warne, 40 Mo. 131.

[15] Pennsylvania Tel. Co. v. Varnau, (Pa.) 15 Atl. Rep. 624.

[16] Kunz v. City of Troy, 104 N. Y. 344, 10 N. E. Rep. 442; Koenig v. Town of Arcadia, 75 Wis. 62, 43 N. W. Rep. 734.

[17] Defendant's dogs ran out and fought with a strange dog accompanying a passing wagon in which deceased was driving. The dogs got under the horses' feet and caused the horses to run away and to upset the wagon, thereby causing the death of deceased. *Held* that, upon proof of the vicious character of defendant's dogs and of his knowledge of it, an action was maintainable against him for wrongful death. Mann v. Weiand, *81 Pa. St. 243.

Where the death was caused by the explosion of a blast in a thickly-settled portion of a city, it is no defense that defendant used the highest degree of skill and care in exploding the blast. Munro v. Pacific Coast Dredging & Reclamation Co., 84 Cal. 515, 24 Pac. Rep. 303.

In an action by E.'s administratrix to recover for the drowning of E. by a collision with the defendant's steamtug, there was evidence that at the time of the accident E. and her husband, J., were crossing Buffalo river in a small scow which J. was sculling; that J. was blind but able-bodied, and familiar with the management of such boats; that the night was so light that the scow could be seen 100 feet distant, and there was a lighted lantern in it; that J. called out, but the tug did not slacken speed, and that the tug would not have collided if it had kept

A considerable proportion of all the actions for death turn simply upon the questions whether the party injured was guilty of contributory negligence,[18] whether he was a fellow servant of

straight on without sheering towards the scow. There was no proof that the board of supervising inspectors had prescribed the manner of showing a light on the scow and similar craft. *Held*, that the evidence warranted a finding of negligence on the part of the defendant's employes. Harris v. Uebelhoer, 75 N. Y. 169.

The court properly refused to instruct that if defendant's servant left the team beside the highway, and, while he was getting a drink of water at a well at a distance of only 10 or 12 feet away, the team ran away, causing decedent's death, that fact alone was not such negligence as would make defendant liable, as it ignored other facts, besides taking the question of negligence from the jury. Hudson v. Houser, 120 Ind. 309, 24 N. E. Rep. 243.

Defendants, who were the board of health of a city, removed the deceased, who was ill with small pox. *Held* that, if they failed to exercise the care which the circumstances demanded, they were liable in an action for wrongful death, though they acted under a city ordinance. Aaron v. Broiles, 64 Tex. 316.

[18] Tucker v. Chaplin, 2 Car. & K. 730; Thorogood v. Bryan, 8 C. B. 115, 18 L. J. C. P. 336; Dynen v. Leach, 26 L. J. Exch. 221; Senior v. Ward, 1 El. & El. 385, 28 L. J. Q. B. 139, 5 Jur. (N. S.) 172, 7 Wkly. R. 261; Witherley v. Regent's Canal Co., 12 C. B. (N. S.) 2, 3 Fost. & F. 61, 6 L. T. (N. S.) 255; Memphis & C. R. Co. v. Copeland, 61 Ala. 376; Holland v. Tennessee Coal Co., 91 Ala. 444, 8 South. Rep. 524; Little Rock & Ft. S. Ry. Co. v. Cavenesse, 48 Ark. 106, 2 S. W. Rep. 505; Jackson v. Crilly, (Colo. Sup.) 26 Pac. Rep. 331; Chicago, B. & Q. R. Co. v. Triplett, 38 Ill. 482; Abend v. Terre Haute & I. R. Co., 111 Ill. 202; Evansville & C. R. Co. v. Lowdermilk, 15 Ind. 120; Kansas Pac. Ry. Co. v. Salmon, 14 Kan. 512; Baltimore & O. R. Co. v. State, 29 Md. 252; Northern C. Ry. Co. v. State, 54 Md. 113; Kelly v. Hendrie, 26 Mich. 255; Michigan C. R. Co. v. Campau, 35 Mich. 468; Harris v. Minneapolis & St. L. R. Co., 37 Minn. 47, 33 N. W. Rep. 12; Carney v. Chicago, St. P., M. & O. Ry. Co., 46 Minn. 220, 48 N. W. Rep. 912; Fulmer v. Illinois C. R. Co., 68 Miss. 355, 8 South. Rep. 517; Devitt v. Pacific R. Co., 50 Mo. 302; Karle v. Kansas City, etc., R. Co., 55 Mo. 476; Telfer v. Northern R. Co., 30 N. J. Law, 188; Hamilton v. Delaware, L. & W. R. Co., 50 N. J. Law, 268, 13 Atl. Rep. 29; Willetta v. Buffalo & R. R. Co., 14 Barb. 585; Lehman v. City of Brooklyn, 29 Barb. 234; Button v. Hudson River R. Co., 18 N. Y. 248; Wilds v. Hudson River R. Co., 24 N. Y. 430; Wilds v. Hudson River R. Co., 29 N. Y.

the person actually causing the injury,[19] whether the injury was within the ordinary risks of the employment;[20] in all of which cases the same rule applies as if the action were brought by the party injured. It is obvious that if it were to be attempted to answer in detail the question for what act, neglect, or default resulting in death an action may be maintained, it would be

815; Curran v. Warren Chemical Co., 86 N. Y. 153; San Antonio & A. P. Ry. Co. v. Wallace, 76 Tex. 636, 13 S. W. Rep. 565; Langhoff v. Milwaukee & P. du C. Ry. Co., 28 Wis. 43; Burhop v. Milwaukee, 21 Wis. 259; Baltimore & O. R. Co. v. Sherman, 30 Grat. 602.

[19] Hutchinson v. York, N. C. & B. Ry. Co., 5 Exch. 343, 14 Jur. 837; Wigmore v. Jay, 5 Exch. 354, 19 L. J. Exch. 300; Smith v. Steele, L. R. 10 Q. B. 125, 44 L. J. Q. B. 60; Congrave v. Southern Pac. R. Co., 88 Cal. 360, 26 Pac. Rep. 175; Chicago & A. R. Co. v. Kelly, 127 Ill. 637, 21 N. E. Rep. 203, 25 Ill. App. 17; Slattery v. Toledo & W. R. Co., 23 Ind. 81; Troughear v. Lower V. C. Co., 62 Iowa, 576, 17 N. W. Rep. 775; Kansas Pac. Ry. Co. v. Salmon, 11 Kan. 83; Fort Hill Stone Co. v. Orm's Adm'r, 84 Ky. 183; Connors v. Holden, (Mass.) 26 N. E. Rep. 137; Besel v. New York Cent. & H. R. R. Co., 70 N. Y. 171; Quinn v. Power, 87 N. Y. 535; Butler v. Townsend, 126 N. Y. 105, 26 N. E. Rep. 1017; Kumler v. Junction R. Co., 33 Ohio St. 150; Shea v. Pennsylvania R. Co., (Pa.) 13 Atl. Rep. 198; Texas & N. O. R. Co. v. Berry, 67 Tex. 238, 5 S. W. Rep. 817.

[20] Dynen v. Leach, 26 L. J. Exch. 221; Lord v. Pueblo S. & R. Co., 12 Colo. 390, 21 Pac. Rep. 148; Drake v. Union Pac. Ry. Co., (Idaho,) 21 Pac. Rep. 560; Cincinnati, etc., Ry. Co. v. Lang, 118 Ind. 579, 21 N. E. Rep. 317; Kuhns v. Wisconsin, I. & N. Ry. Co., 70 Iowa, 561, 31 N. W. Rep. 868; Brown v. Chicago, R. I. & P. R. Co., 64 Iowa, 652, 21 N. W. Rep. 198; Carey v. Sellers, 41 La. Ann. 500, 6 South. Rep. 813; Baltimore & O. R. Co. v. State, 41 Md. 268; Boyle v. New York & N. E. R. Co., 151 Mass. 102, 23 N. E. Rep. 827; Balle v. Detroit Leather Co., 73 Mich. 158, 41 N. W. Rep. 216; Devitt v. Pacific Railroad, 50 Mo. 302; Elliott v. St. Louis & I. M. R. Co., 67 Mo. 272; Gleason v. Excelsior Manuf'g Co., 94 Mo. 201, 7 S. W. Rep. 188; Gibson v. Erie Ry. Co., 63 N. Y. 449; De Forest v. Jewett, 88 N. Y. 264; Titus v. Bradford, B. & K. R. Co., 136 Pa. St. 618, 20 Atl. Rep. 517; McGrath v. New York & N. E. R. Co., 14 R. I. 357; s. c. 15 R. I. 95; Southwest Imp. Co. v. Andrew, 86 Va. 270, 9 S. E. Rep. 1015; Carbine's Adm'r v. Bennington & R. R. Co., 61 Vt. 348, 17 Atl. Rep. 491; Davis' Adm'r v. Nuttallsburg, C. & C. Co., (W. Va.) 12 S. E. Rep. 539.

necessary to write a complete treatise upon the law relating to personal injuries. The answer to that question is outside the scope of this book.

§ 66. Contributory negligence of deceased.

As the contributory negligence of the party injured is in general a defense in an action by him, founded upon negligence, for the personal injury, it follows that his contributory negligence is to the same extent a defense in the statutory action.[21]

The defense of the contributory negligence of the party injured applies not only under statutes which expressly provide that an action for death may be maintained whenever the party injured might have maintained an action, but also under statutes which do not contain this express provision;[22] and of course it applies under statutes which in terms provide for a survival of the original cause of action.[23] So, in jurisdictions where the

[21] Note 18, *supra*. The rule applies in an action by a parent for the death of a minor child, although the latter was employed by the defendant without the parent's consent. Texas & P. Ry. Co. v. Carlton, 60 Tex. 397; Texas & N. O. R. Co. v. Crowder, 61 Tex. 262, 63 Tex. 502; 70 Tex. 222, 7 S. W. Rep. 709. But see § 35.

[22] Gay v. Winter, 34 Cal. 153; Noyes v. Southern Pac. R. Co. (Cal.) 24 Pac. Rep. 927; Bertelson v. Chicago, M. & St. P. Ry. Co., 5 Dak. 313, 40 N. W. Rep. 531; Rowland v. Cannon, 35 Ga. 105; Southwestern R. Co. v. Johnson, 60 Ga. 667; Berry v. Northeastern R. Co., 72 Ga. 137; Central R. Co. v. Thompson, 76 Ga. 77; Central R. & B. Co. v. Kitchens, 83 Ga. 83, 9 S. E. Rep. 827; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Pennsylvania R. Co. v. Lewis, 79 Pa. St. 33; Pennsylvania R. Co. v. Bell, 122 Pa. St. 58, 15 Atl. Rep. 561; Helfrich v. Ogden City Ry. Co. (Utah,) 26 Pac. Rep. 295.

[23] Quinn v. New York, N. H. & H. R. Co., 56 Conn. 44, 12 Atl. Rep. 97; Lane v. Central I. R. Co., 69 Iowa, 443, 29 N. W. Rep. 419; Newman v. Chicago, M. & St. P. Ry. Co., 80 Iowa, 672, 45 N. W. Rep. 1054; Beck v. Firmenich Manuf'g Co., (Iowa,) 48 N. W. Rep. 81; Knight v. Pontchartrain R. Co., 23 La. Ann. 462; Murray v. Pontchartrain R. Co., 31 La. Ann. 490; Weeks v. New Orleans & C. R. Co., 32 La. Ann. 615; Nashville & C. R. Co. v. Smith, 6 Heisk. 174.

rule of contributory negligence is modified by the rule of comparative negligence, the modification applies as much in actions by the party injured as in the statutory action.[24] In Kentucky, however, under Gen. St. c. 57, § 3, which provides for the recovery of damages where the life of any person is lost by "willful neglect," contributory negligence is no defense.[25]

§ 67. Imputed negligence.

It follows also from what has been said that, wherever the negligence of a third person would be imputed to the plaintiff in an action for personal injury, it will be equally imputed to the deceased in an action for his death. Indeed, the famous case of Thorogood v. Bryan,[26] which established the rule that the negligence of the carrier, contributing, with the negligence of a third person, to the injury of a passenger, will be imputed to the latter, was an action under Lord Campbell's act; and although Thorogood v. Bryan has been overruled in England,[27] and generally repudiated in the United States,[28] the rule of that case, in jurisdictions where it applies at all, applies to actions for death.[29]

[24] Chicago, B. & Q. R. Co. v. Triplett, 38 Ill. 482; Chicago, B. & Q. R. Co. v. Payne, 49 Ill. 499; Toledo, W. & W. R. Co. v. O'Connor, 77 Ill. 391; Chicago & A. R. Co. v. Fletsam, 128 Ill. 518, 15 N. E. Rep. 169.

[25] See note § 41.

[26] 8 C. B. 115.

[27] The Bernina, L. R. 13 App. Cas. 1.

[28] See Beach, Contr. Neg. § 84 *et seq.*; Shearman & Redfield, Neg. § 66.

[29] Lockhart v. Lichtenthaler, 46 Pa. St. 151; Philadelphia & R. R. Co. v. Boyer, 97 Pa. St. 91; Payne v. Chicago, R. I. & P. R. Co., 39 Iowa, 523; Stafford v. City of Oskaloosa, 57 Iowa, 749, 11 N. W. Rep. 668.

CHAPTER IV.

THE WRONGFUL ACT, NEGLECT, OR DEFAULT.

§ 60. When action lies.
61. The wrongful act, neglect, or default.
62. "Wrongful."
63. Act or neglect must be such that party injured might have maintained action.
64. Intentional killing.
65. Death caused by negligence.
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71. Contributory negligence of beneficiaries not a bar in Iowa, Virginia, and Ohio.
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73. Instantaneous death.
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75. Instantaneous death—Connecticut, Iowa, Louisiana, Tennessee.
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77. Death resulting from neglect of statutory duty.
78. Death resulting from liquor sold by defendant.
79. Felonious killing.

§ 60. When action lies.

In order that a cause of action under Lord Campbell's act and similar statutes shall exist, it is necessary that the following circumstances concur: (1) That the death shall have been caused by such wrongful act, neglect, or default of the defendant that an action might have been maintained therefor by the party injured if death had not ensued; (2) that there be in existence some one of the persons for whose benefit the action may be brought; (3) that there be in existence a proper party

plaintiff,—that is, that an executor or administrator shall have been appointed,—unless the statute authorizes the action to be brought directly by the beneficiaries; (4) that the time within which the action must be brought has not elapsed; and, (5) according to some authorities, that the beneficiaries, or some one of them, shall have suffered pecuniary loss by reason of the death. Whether, if no pecuniary loss has been sustained, the action may be maintained for nominal damages, is a question upon which there is a conflict of authority, and which will be discussed later.

§ 61. The wrongful act, neglect, or default.

Lord Campbell's act provides that whenever the death of any person is caused by wrongful act, neglect, or default, and 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, then, and in every such case, the person who would have been liable if death had not ensued shall be liable notwithstanding the death.

This language has been followed in nearly all the American acts, except those which in terms provide for the survival of the action of the party injured, although some of the acts do not expressly provide that the act, neglect, or default must be such as would have entitled the party injured to maintain an action. Differences occur, however, in the description of the act or default. For example, the language used in Alabama is "wrongful act, omission, or negligence;" in Arizona and Texas, "wrongful act, negligence, unskillfulness, or default;" in California, Idaho, and Utah, "wrongful act or neglect;" in Delaware and Pennsylvania, "unlawful violence and negligence;" in Florida, "wrongful act, negligence, or carelessness;" in Indiana, Kansas, Minnesota, Oklahoma, Oregon, and Washington, "wrongful act or omission;" in Mississippi, "wrongful or

Michigan,[36] and Wisconsin,[37] and this application of the rule has been approved in Minnesota.[38] The rule of Hartfield v. Roper has also been applied in Indiana,[39] in actions by the parent for the death of a minor child; and in Massachusetts,[40] in actions by the administrator for personal injuries sustained

necessary to a right of recovery, the requirement of ordinary care on the part of the father, was prejudicial error. Chicago, M. & St. P. Ry. Co. v. Mason, 27 Ill. App. 450. And see City of Chicago v. Hesing, 89 Ill. 204; Chicago & A. R. Co. v. Becker, 84 Ill. 483; Chicago City Ry. Co. v. Robinson, 27 Ill. App. 26, affirmed, 127 Ill. 9, 18 N. E. Rep. 772.

[36] Apsey v. Detroit, L. & N. R. Co., 88 Mich. 492, 47 N. W. Rep. 319.

[37] Ewen v. Chicago & N. W. R. Co., 38 Wis. 613; Johnson v. Chicago & N. W. R. Co., 49 Wis. 529, 5 N. W. Rep. 886; Hoppe v. Chicago, M. & St. P. Ry. Co., 61 Wis. 357, 21 N. W. Rep. 227; Parish v. Town of Eden, 22 N. W. Rep. 399.

[38] O'Malley v. St. Paul, M. & M. Ry. Co., 43 Minn. 289, 45 N. W. Rep. 440.

[39] In an action by the father for the death of a child of tender years, the complaint is sufficient if it allege that the child was on defendant's track without the negligence of the parents. Pittsburgh, Ft. W. & C. Ry. Co. v. Vining's Adm'r, 27 Ind. 513. The court says that the unnecessary exposure by the parents, or other person having the custody of a child incapable of exercising care and judgment, is an act of negligence, and is sufficient to defeat a recovery unless defendant's negligence is willful. This rule was applied in an action by the child in Lafayette & I. R. Co. v. Huffman, 28 Ind. 287, and the above case was quoted as in point. In Jeffersonville, M. & I. R. Co. v. Bowen, 40 Ind. 545, s. c. 49 Ind. 154, which was an action by the father for the death of the child, the evidence did not show that the child was on the track without the negligence of the parents, as alleged in the complaint, and it was held that the action could not be maintained, the court citing both the above cases, as if they rested upon the same principle. In Evansville & C. R. Co. v. Wolf, 59 Ind. 89, an action by the father for the death of the child, where the child was suffered to wander unattended from its home to defendant's track, it was held that the facts showed such contributory negligence on the part of the parents that there could be no recovery unless defendant's negligence was willful.

[40] Wright v. Malden & M. R. Co., 4 Allen, 283; Gibbons v. Williams, 135 Mass. 333; Slattery v. O'Connell, 153 Mass. 94, 26 N. E. Rep. 430.

by the intestate. In Kansas the question seems to be undecided.[41]

§ 69. Contributory negligence of beneficiaries a bar.

It is not clear that all of these cases rest upon the rule of Hartfield v. Roper, or, at any rate, that they rest exclusively on that ground. In Maryland and Michigan, at least, the decisions are placed rather upon the ground that the parents are the real parties in interest, and that consequently no recovery can be had if their negligence contributed to cause the death. Thus, in a Maryland case,[42] where the child, when killed, was accompanied by her grandfather, under whose care her father had placed her, and the judge charged that, if the jury should find that the death resulted from the defendant's negligence, the plaintiff could recover provided the accident could not have been avoided by the exercise of due care and caution on the part of the child, or of her father, or of the person accompanying her, the court, in sustaining the charge, observed that to allow recovery in cases where the party entitled to the action was guilty of contributory negligence would be to allow parties to take advantage of their own wrongful or negligent conduct. And in a Michigan case,[43] in which the administrator sued for

[41] In Central Branch U. P. R. Co. v. Henigh, 23 Kan. 347, which was an action by the administrator for the death of a child, it was held that the facts did not show negligence of the defendant. The court said: "Whether the negligence of his parents or guardians could be imputed to him we do not now choose to decide."

[42] Baltimore & O. R. Co. v. State, 30 Md. 47. In State v. Baltimore & O. R. Co., 24 Md. 84, the court observed that the same policy would require the plaintiff, in an action for injuries resulting in death, to show that neither the party injured nor the parties for whose use the action was brought had contributed by neglect or want of care to the calamity complained of.

[43] Hurst v. Detroit City Ry. Co., 84 Mich. 539, 48 N. W. Rep. 44. The case was disposed of on other grounds.

the death of a child, and it was contended that the case was one where the parents sought to benefit themselves, and that, if their negligence contributed to the injury from which they sought a benefit, they should be barred, Long, J., said that he should be of that opinion if the question were necessary to the determination of the case.

In Illinois the rule of Hartfield v. Roper was repudiated in the recent case of Chicago City Ry. Co. v. Wilcox.[44] This was an action brought by an infant for personal injury, and the court distinguishes such a case from an action by the administrator of an infant for death. Bailey, J., says: "It seems to be assumed by several of the writers that this court is committed to the doctrine that in a suit by a child to recover damages caused by the negligence of the defendant, the negligence of the plaintiff's parents or custodians may be imputed to the plaintiff in support of the defense of contributory negligence. While there is in some of the cases some foundation for this assumption, yet, in our opinion, the question has never been so considered or determined by this court as to make it the settled rule in this state. Most of the cases to which reference is made were suits brought by a parent in his own right, or as the legal representative of the child, where the death of the child was alleged to have been caused by the negligence of the defendant. Such was the case in City of Chicago v. Major, 18 Ill. 349; City of Chicago v. Starr, 42 Ill. 174; Chicago & A. R. Co. v. Becker, 76 Ill. 25, 84 Ill. 483; Hund v. Geier, 72 Ill. 393; City of Chicago v. Hesing, 83 Ill. 204; and Toledo, W. & W. Ry. Co. v. Grable, 88 Ill. 441.[45] Where an action for the negligent injury of an infant is brought by a parent, or for the parent's own benefit, it is very justly held that the contributory negligence of such parent may be shown in bar of the action. That is only a phase of the general rule that the contributory negligence of the plaintiff is a defense."

[44] 27 N. E. Rep. 899.

[45] Note 34, *supra*.

Where the parents are the persons solely entitled to the benefit of the action, as is the case under most of the statutes when the action is brought for the death of a child who leaves no issue, there seems to be no reason why their contributory negligence should not be a bar to the action, notwithstanding the fact that it is brought in the name of the administrator, just as it is a bar to an action by the father for the loss of service of his child caused by personal injury;[46] and even where the father, and not both parents, is entitled to the sole benefit, it would be not unreasonable to hold that he was affected by the negligence of the mother contributing to the death of the child. Where, however, there are other persons entitled to the benefit of the action besides the one guilty of contributory negligence, such contributory negligence could not defeat the action.[47]

§ 70. Contributory negligence of parents in action by them a bar.

The distinction taken by the Illinois court has also been taken in Pennsylvania[48] and Texas.[49] In these cases the action was

[46] Beach, Con. Neg. § 44; Shearman & R. Neg. § 71.

[47] See Cleveland, C. & C. R. Co. v. Crawford, 24 Oh. St. 631; Davis v. Guarnieri, 45 Oh. St. 470, 15 N. E. Rep. 350.

[48] In the suit of the parent for the death of a child the contributory

[49] In an action by the parent for the death of a child, the contributory negligence of the parent is a defense. Williams v. Texas, T. & P. Ry. Co., 60 Tex. 205. The court says that in a suit by a child for injuries resulting from the negligence of another, the child will be charged with only such discretion as a child of its years would exercise, and, if it be wanting in discretion, the fact that the negligence of its parents may have contributed to the injury can offer no excuse; yet, if the action be by the parent for the child's death, the contributory negligence of the parents is a defense, distinguishing the case from G. H. & H. Ry. Co. v. Moore, 59 Tex. 64, in which Hartfield v. Roper is expressly repudiated. The rule as to the negligence of the parents in an action for death was applied in T. M. Ry. Co. v. Herbeck, 60 Tex. 602, and Cook v. Houston Direct Nav. Co., 76 Tex. 353, 13 S. W. Rep. 475, and approved in San Antonio St. Ry. Co. v. Caillouttc, 79 Tex. 341, 15 S. W. Rep. 390.

brought directly by the parents; but, where the parents are the sole beneficiaries, it would seem, upon principle, to make no difference whether they or the personal representatives are the nominal plaintiffs. In these jurisdictions the rule of Hartfield v. Roper is denied.[50] That the contributory negligence of parents in actions by them for the death of a minor child is a defense is also held in Missouri,[51] and it was so held in Arkansas,[52] under

negligence of the parent is a defense. Pennsylvania R. Co. v. James, 81* Pa. St. 194. *Per Curiam:* "A distinction is taken between the case of a father or mother bringing an action for the death of a child, and a child bringing an action for personal injury. In the former the contributing negligence of the parent may be used in defence, while in the latter case the negligence of an infant of tender years will not be available." The rule that the contributory negligence of the parents is a bar in actions by them for the death of the child is applied in Pittsburg, A. & M. Ry. Co. v. Pearson, 72 Pa. St. 169; Philadelphia & R. R. Co. v. Long, 75 Pa. St. 257; Pennsylvania R. Co. v. Lewis, 79 Pa. St. 33; Smith v. Hestonville, M. & F. P. R. Co., 92 Pa. St. 450; Pennsylvania R. Co. v. Bock, 98 Pa. St. 427; Westerberg v. Kinzua, C. & K. R. Co., 142 Pa. St. 471, 21 Atl. Rep. 878; Birmingham v. Dorer, 3 Brewst. 69. In Smith v. Hestonville, M. & F. P. R. Co., Trunkey, J., says: "The argument of counsel is certainly ingenious in supporting his proposition that the negligence of the statutory plaintiff, arising from knowledge or direct act, cannot preclude a recovery where there has been no contributory negligence on the part of the deceased. However, this is not an open question."

[50] Smith v. O'Connor, 48 Pa. St. 218; Kay v. Pennsylvania R. Co., 65 Pa. St. 269; G. H. & H. Ry. Co. v. Moore, 59 Tex. 64.

[51] Where a mother set a cup of milk before a child 16 months old, and went into an adjoining room, and the child wandered out of the house upon a railroad track, and was killed, *held*, that it is for the jury to say, in an action by the parents, whether the mother was guilty of contributory negligence. Reilly v. Hannibal & St. J. R. Co., 94 Mo. 600, 7 S. W. Rep. 407. In an action by the parents for the death of a child, *held*, that it was error to instruct the jury to find for the plaintiffs, "if they believed that plaintiffs permitted their son to wander from his home and go upon the turntable of defendant, and that the son was killed by the turntable, and was so young and inexperienced as not to possess sufficient judgment to warn him of the danger, and that he was killed by

[52] St. Louis, I. M. & S. Ry. Co. v. Freeman, 36 Ark. 41.

an act, now repealed, permitting the father to sue. In Louisiana a distinction is drawn between the right of action for damages to the child which passes to the parents by inheritance and the right of action for damages from his death. In respect to the former, the court say that their negligence would not be imputed to him, and therefore not to them; but, in respect to the latter, they say that the contributory negligence of the parents would be a defense.[52]

§ 71. Contributory negligence of beneficiaries not a bar in Iowa, Virginia, and Ohio.

The decisions in Iowa and Virginia are hardly to be reconciled with the foregoing, and hold that the contributory negligence of the parents is no defense, even where they are the sole beneficiaries of the action. In Ohio, also, it is denied that the contributory negligence of the beneficiaries of the action is a defense, although in the Ohio cases the contributory negligence

the negligence of defendant." Koons v. St. Louis & I. M. R. Co., 65 Mo. 592. In Boland v. Missouri R. Co., 36 Mo. 484, an action by the parents for the death of a child, it was held that there was no evidence of defendant's negligence. The court says, however, that the same rigid rule, as to contributory negligence, will not be applied to one infant as to another, but all that is necessary to give a right of action to the plaintiffs for an injury inflicted by the negligence of the defendant is that the child should have exercised care and prudence equal to his capacity. This case is sometimes cited as an authority to show that the rule of Hartfield v. Roper does not prevail in Missouri. But in Stillson v. Hannibal & St. J. R. Co., 67 Mo. 671, where a child of tender years, in the presence and by the direction of her father, attempted to cross defendant's track, and was injured, it was held in a suit by her for the personal injury that the father's negligence must be imputed to her. In Isabel v. Hannibal & St. J. R. Co., 60 Mo. 475, and Donahoe v. Wabash, St. L. & P. Ry. Co., 83 Mo. 548, it was held that a recovery by the parents for the death of a child would not be barred if their contributory negligence was not the proximate cause of the death.

[52] Westerfield v. Levis, (La.) 9 South. Rep. 52. This case repudiates Hartfield v. Roper.

was not common to all the beneficiaries, and the decisions might have been put upon that ground alone.

In an Iowa case[54] the administrator sued for damages to the estate from the death of a child caused by the breaking of a bridge over which the child was riding in a carriage, with his parents, and it was held that their negligence would not defeat the action. The court repudiates the rule of Hartfield v. Roper, and says: "If his parents, by their negligence, contributed to his death, that does not seem to be a sufficient reason for denying his estate relief. Such negligence would prevent a recovery by the parents in their own right. * * * It is claimed that, * * * since they inherited his estate, the rule which would bar a negligent parent from recovering in such a case in his own right ought to apply. But plaintiff seeks to recover in the right of the child, and not for the parents. It may be that a recovery in this case will result in conferring an undeserved benefit upon the father, but that is a matter which we cannot investigate. If the facts are such that the child could have recovered had his injuries not been fatal, his administrator can recover the full amount of damages which the estate of the child sustained." It It is to be noted that, under the circumstances of this case, the amount recovered was not liable for the debts of the deceased, but belonged solely to the parents.

The same position has recently been taken in Virginia, in a suit by the father as administrator of an infant.[55] "Such negli-

[54] Wymore v. Mahaska Co., 78 Iowa, 396, 43 N. W. Rep. 264. The court points out that it was assumed in Walters v. Chicago, R. I & P. R. Co., 41 Iowa, 71, that in such a case the negligence of the parents would be imputed to the child, and, consequently, defeat the action by the administrator; but that in that case the point actually decided was, simply, that when the parents of a child two years old are unable to give him their personal care, and intrust him to a suitable person, the negligence of the latter cannot be imputed to the parents so as to defeat an action by the administrator for the death.

[55] Norfolk & W. R. Co. v. Groseclose's Adm'r, 18 S. E. Rep. 454.

gence," says the court, "is not imputable to the child, and is consequently not to be considered when the suit is by the child or his personal representative. * * * The doctrine of Hartfield v. Roper has been repudiated in this state. * * * Hence, when the facts are such that the child could have recovered had his injuries not been fatal, his administrator may recover, without regard to the negligence or presence of the parents at the time the injuries are received, and although the estate is inherited by the parents."

The question was presented in Ohio under peculiar circumstances.[66] The administrator sued for the death of a father and mother killed by the collision of a wagon, in which they and three of their four children were driving, with the defendant's locomotive. The children were the sole next of kin. The defendant requested the court to charge that, if the persons for whose benefit the action was brought were guilty of contributory negligence, a recovery could not be had for their benefit. This request, the court held, was properly refused, because, first, the statute gives the right of action to the personal representative upon the same conditions that would have entitled the party injured to an action if death had not ensued, and because the right of action of the parents would not have been defeated, if they were free from negligence themselves, by the contributory negligence of the children. The court assigns as a second reason that the amount recovered is a gross sum to be distributed to the next of kin in the proportion provided by law, and that, if the contributory negligence of some would defeat a recovery as to them, it would also defeat it as to those who in no wise contributed to the injury. And in a later Ohio case[67] it was held that the contributory negligence of a husband in purchasing a drug to be used by his wife is not to be imputed to her, and would not defeat an action by her admin-

[66] Cleveland, C. & C. R. Co. v. Crawford, 24 Oh. St. 631.

[67] Davis v. Guarnieri, 45 Oh. St. 470, 15 N. E. Rep. 350.

istrator against the dealer for her death, resulting from the use of a poisonous drug, which the dealer negligently delivered to the husband, instead of the drug requested, unless she constituted him her agent. Owen, C. J., says: "The plaintiff does not prosecute the action as husband, but as the administrator, of his wife. It is prosecuted for the benefit of the children, as well as the husband, of the intestate. The right of the beneficiaries, as well to a recovery as to the fruits of it, are to be tested by the statutes which the law would have ascribed to the wife and mother if she were alive and prosecuting her injury to her health or person."

So far as the Ohio decisions rest on the ground that the contributory negligence of one of the beneficiaries of the action cannot be permitted to defeat it where the other beneficiaries are free from negligence, their reasoning is unassailable. So far, however, as they rest on the ground that the right of the administrator to maintain the action depends upon exactly the same conditions that would have determined the right of the party injured, the Ohio cases, in common with those in Iowa and Virginia, are open to the criticism that they make the right of the party injured to maintain an action the sole test of the right of the beneficiaries to recover damages for his death, instead of treating it merely as one of the conditions of their right.

§ 72. Contributory negligence of personal representative no bar.

Of course the contributory negligence of the executor or administrator, unless he is the sole beneficiary, is no bar.[68]

[68] Indiana Manuf. Co. v. Millican, 87 Ind. 87.

§ 73. Instantaneous death.

It follows from what has been said that under statutes of the general type of Lord Campbell's act, which create a new cause of action, and give damages for the injury resulting from the death, it is immaterial whether the death is or is not instantaneous.[59] This point seems too clear for argument, and that such is the law has been tacitly assumed in nearly all the cases which have arisen under these statutes, and in which death resulted immediately from the injury. In Brown v. Buffalo & S. L. R. Co.[60] the point was briefly disposed of. After referring to the first section of the New York act, the court says: "This provision settles the question, and leaves nothing for debate or doubt. No one would question the right of the intestate, in this case, if he had survived the injury, to have maintained an action for it. * * * The statute gives the action to the personal representative of the individual injured, when the injury causes his death, and it makes no distinction between cases where the death was immediate or instantaneous, or where it was consequential."

Under the Maine statute giving a remedy by indictment where the life of any person is lost by the negligence of a railroad corporation, it has even been held that no indictment can be maintained if the death was not instantaneous.[61] The court says that, if the party injured does not die immediately, a right

[59] Brown v. Buffalo & S. L. R. Co., 22 N. Y. 191; International & G. N. R. Co. v. Kindred, 57 Tex. 491; Roach v. Imperial Min. Co., 7 Fed. Rep. 698; 7 Sawyer, 224; Reed v. Northeastern R. Co., (S. C.) 16 S. E. Rep. 289. In South Dakota a recovery may be had, if the death was instantaneous, under Comp. Laws, § 5499, but not under section 5498. Belding v. Black Hills & Ft. P. R. Co., 53 N. W. Rep. 750.

[60] 22 N. Y. 191.

[61] State v. Maine C. R. Co., 60 Me. 490; State v. Grand Trunk Ry. Co., 61 Me. 114.

of action accrues to him which, under the act of that state providing for the survival of actions for personal injury, will survive to his personal representative; but that, if he does not die immediately, no right of action will accrue to him, and, of course, none will survive; and that the remedy by indictment was intended to apply to the latter class of cases only. An opposite conclusion was reached in Massachusetts, under a similar statute; the court holding that an indictment could be maintained, although the death was not instantaneous, upon the ground that there was no limitation to cases of instantaneous death in the express terms of the statute.[62]

§ 74. Instantaneous death under statutes providing for survival of action.

Under statutes which provide simply for a survival of the common-law cause of action, and do not in terms or by implication provide for the recovery of damages for the injury resulting from the death, a totally different question is presented. The question has frequently arisen in various forms in Massachusetts, under a statute which enacts that "the action for trespass on the case, for damages to the person, shall hereafter survive; so that, in the event of the death of the person entitled to bring such action, or liable thereto, the same may be prosecuted or defended by or against the executor or administrator in the same manner as if he were living." Under this statute the rule has been repeatedly affirmed that no action can be maintained where the death was instantaneous.[63] This statute

[62] Commonwealth v. Metropolitan R. Co., 107 Mass. 236.

[63] Kearney v. Boston & W. R. Corp., 9 Cush. 108; Mann v. Same, 9 Cush. 108. An action for personal injuries caused by falling 40 feet and resulting in instant death cannot be maintained. Moran v. Hollings, 125 Mass. 93. An action cannot be maintained for personal injuries resulting in death, if the evidence wholly fails to show whether or not death was instantaneous. Riley v. Connecticut R. R. Co., 135 Mass. 292; Corcoran v. Boston & A. R. Co., 133 Mass. 507.

supposes the party deceased to have been once entitled to an action for the injury, and either to have commenced the action and subsequently died, or, being entitled to bring it, to have died before exercising the right.[64] The mere fact that there was evidence of some slight spasmodic action on the part of the deceased, where the other evidence tended to show that death was immediate, has been held not sufficient to prevent the court from directing a verdict for the plaintiff, on the ground that the death was instantaneous;[65] but where the injured party

[64] Hollenbeck v. Berkshire R. Co., 9 Cush. 478.

[65] Kearney v. Boston & W. R. Corp., 9 Cush. 108. In discussing this question in that case, Shaw, C. J., says: "What constitutes that termination or period of life which is necessary to give the party's representatives a right of action? It is not necessary to go into a minute, metaphysical discussion of the question. We are to ascertain what the intent of the legislature was when they passed the law. It is not to be supposed that they intended to make a distinction between a case where death was so instantaneous that there was no manifestation of life whatever and a case where there might be some slight spasmodic action of the body of the sufferer to indicate that life was not quite extinct. * * * The statute must have a practical construction, and supposes a case where a cause of action accrued to the injured party in his lifetime, which, by force of the statute in question, devolved upon and vested in his personal representative, at his decease afterwards. * * * The question is, was the death instantaneous, or did the party injured live after the accident happened? It is in evidence that there was only a momentary, spasmodic struggle, and the death instantaneous."

The deceased was last seen alive in the mill 10 or 15 minutes before the accident; three quarters of an hour after the accident his dead body was found about 20 feet below where he had been last seen, with no marks of injury upon it, surrounded by loose grain over his head. There was expert evidence that he died of suffocation, and that a person so situated would retain consciousness from 3 to 5 minutes. *Held*, that the jury were warranted in finding that the death was not instantaneous. Nourse v. Packard, 188 Mass. 307.

In an action for injury to plaintiff's intestate by suffocation in a steamer in which the hatch had been closed to check fire, from the position of the body it was to be inferred that his death was not instantaneous, and that he lived in a state of conscious suffering for a

lived after the accident only 15 minutes, though in a state of unconsciousness, it was held that the action survived.[66]

In the absence, however, of evidence of conscious suffering on the part of the deceased, or of expenses or loss incurred before the death by reason of the accident, only nominal damages can be recovered.[67] In Kentucky[68] and Maine,[69] likewise, under statutes providing for the survival of the right of action for personal injury, the courts have declared that no right of action survives where the death was instantaneous.

§ 75. Instantaneous death—Connecticut, Iowa, Louisiana, Tennessee.

The question, however, whether a right of action exists where death was instantaneous, even when the question arises under

greater or less time. *Held*, a proper case for the jury. Pierce v. Cunard S. S. Co., 26 N. E. Rep. 415.

[66] Bancroft v. Boston & W. R. Corp., 11 Allen, 34. The deceased lived 15 or 20 hours, and there was some evidence that she manifested intelligence and consciousness, but it was held that, independently of this consideration, the action might be maintained. Hollenbeck v. Berkshire R. Co., 9 Cush. 478.

[67] Kennedy v. Standard S. R., 125 Mass. 90; Tully v. Fitchburg R. Co., 134 Mass. 499; Mulchahey v. Washburn C. W. Co., 145 Mass. 281, 14 N. E. Rep. 106.

[68] Hansford's Adm'r v. Payne, 11 Bush, 380; Newport News & M. V. R. Co. v. Dentzel's Adm'r, 14 S. W. Rep. 958. The Kentucky statute provides that "no right of action for personal injury * * * shall cease or die with the person injuring or the person injured, except actions for assault and battery, * * * but for any injury other than those excepted an action may be brought or revived by the personal representative," etc. Gen. St. c. 10, § 1.

[69] State v. Maine C. R. Co., 60 Me. 490. The Maine statute provides: "In addition to those surviving by the common law, the following actions survive: replevin, trover, assault and battery, trespass, trespass on the case; * * * and these may be commenced by or against an executor or administrator, or when the deceased was a party to them, may be prosecuted or defended by them." Rev. St. c. 87, § 8.

statutes which in terms provide for the survival of the action, necessarily depends greatly upon the language and purpose of each particular enactment.[70] In Connecticut, Iowa, Tennessee, and, it seems, in Louisiana, under statutes which so provide, it has been held that the fact that death was instantaneous is immaterial.

The question arose in Connecticut under the former statute, which provided that "actions for injury to the person, *whether the same do or do not result in death*, * * * shall survive." The court pointed out the difference between this language and that of the Massachusetts statute, and held that the right of action was not confined to cases where an interval of time intervened between the accident and the death.[71] The Connecticut

[70] In Illinois and Kansas, under statutes which provide that, in addition to actions which survive at common law, causes of action for injury to the person shall also survive, it is held that the right of action survives only in cases where death results from some other cause than the injury. Holton v. Daly, 106 Ill. 131; Chicago & E. I. R. Co. v. O'Connor, 19 Ill. App. 591; s. c. 119 Ill. 586, 9 N. E. Rep. 263; McCarthy v. Chicago, R. I. & P. R. Co., 18 Kan. 46; Hulbert v. City of Topeka, 34 Fed. Rep. 510. In the latter case Brewer, J., doubts the correctness of McCarthy v. Chicago, R. I. & P. R. Co., but is constrained to follow it. Under similar statutes in Mississippi and Vermont, the survival of the cause of action is not confined to cases where death results from some other cause than the injury. Vicksburg & M. R. Co. v. Phillips, 64 Miss. 698, 2 South. Rep. 537; Needham v. Grand Trunk R. Co., 38 Vt. 294.

[71] Murphy v. New York & N. H. R. Co., 30 Conn. 184. Referring to the Massachusetts cases, Ellsworth, J., says: "These decisions obviously do not turn at all on the want of injury, * * * but upon the want of a perfect cause of action before death, which alone could bring the case within their statute. We think that construction rather nice and technical, and, were our statute the same as theirs, we are not prepared to say we should adopt it; but our statute is quite different. * * * Its language is merely 'whether the injury do or do not result in death.' This certainly puts an end to the application of the common-law maxim to this class of cases." The point was raised but not decided in Murphy v. New York & N. H. R. Co., 29 Conn. 496.

statute has since been amended, and now reads: "Whether the same do or do not *instantaneously or otherwise* result in death."

In Iowa the statute enacts that "all causes of action shall survive, and may be brought, notwithstanding the death of the person entitled or liable to the same." In Conners v. Burlington, C. R. & N. Ry. Co.[72] the court, after quoting the various statutory provisions, says: "For many years before the enactment of the present Code, a statute was in force * * * which provided that, 'when a wrongful act produces death, the perpetrator is civilly liable for the injury.' When the present Code was enacted, the section in which that provision was contained was repealed, and the sections quoted above were enacted in lieu thereof. * * * But we think the effect of these provisions is the same as though that express language had been retained."

In Tennessee the statute enacts that "the right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer in case death had not ensued, shall not abate or be extinguished by his death," etc. In respect to this section the supreme court of Tennessee has said: "It cannot be controverted that the language 'whose death is caused by the wrongful act or omission of another' includes cases of instantaneous death; and the language which immediately follows, 'would have had against the wrongdoer, in case death had not ensued, shall not abate and be extinguished by his death,' necessarily means that the representative of the deceased person shall have a right of action, whether the deceased person died after the injuries were received, or died simultaneously with the infliction of the injury which caused death."[73]

[72] 71 Iowa, 490, 32 N. W. Rep. 465, followed in Worden v. Humeston & S. R. Co., 72 Iowa, 201, 33 N. W. Rep. 629.

[73] Nashville & C. R. Co. v. Prince, 2 Heisk. 598, overruling Louisville

In Louisiana the statute reads: "Every act whatever that causes damage to another obliges him by whose fault it happened to repair it. The right of this action shall survive in case of death in favor of the minor children or widow of the deceased," etc. Under this provision it seems that damages may be recovered although the death was instantaneous.[74]

§ 76. Proximate cause of death.

It is of course necessary to the maintenance of the action that the death should have been caused by the wrongful act, neglect, or default; that is, that the death should have been the natural and proximate result.[75] Thus, where, prior to the

& N. R. Co. v. Burke, 6 Coldw. 45, and followed in Fowlkes v. N. & D. R. Co., 5 Baxt. 663; Haley v. Mobile & O. R. Co., 7 Baxt. 239; Kansas City, Ft. S. & M. R. Co. v. Daughtry, 88 Tenn. 721, 13 S. W. Rep. 698.

[74] Van Amburg v. Vicksburg, S. & P. R. Co., 37 La. Ann. 651. This case was before the amendment which provides that the survivors may also recover the damages sustained by them by the death; and damages were recovered, although the court remarks that "the death was immediate, if not instantaneous." See, also, Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824, 8 South. Rep. 586. In the latter case an infant child was instantly killed, and the father sued on the cause of action which accrued to the infant and survived to him. Punitive damages were awarded. *Held*, that though punitive damages were not recoverable, and there was no evidence of actual damages to the infant, the court would, in the exercise of its equitable powers, award the father compensatory damages in the nominal sum of $250, the circumstances of the injury having been such that the father had cause to seek a judicial investigation. But see Weeks v. New Orleans & C. R. Co., 32 La. Ann. 615, in which Levy, J., says that the article only subrogates the plaintiff to the right of action of the deceased, and that the plaintiff could only recover the damages suffered by the deceased himself. And see, also, The Corsair, 12 Sup. Ct. Rep. 949, where a vessel met with an accident, and sank 10 minutes later, drowning libelant's daughter, and it was held that an action for her suffering and fright during such 10 minutes, separate and apart from the cause of action arising out of her subsequent death, could not be maintained.

[75] If, having exercised reasonable prudence, considering the time,

injury, some cause, such as disease, existed, the question is whether the death resulted from the previously existing cause

place, and circumstances, as also the condition of the drunken man himself, the conductor expels such passenger, who is afterwards run over and killed by another train, not in fault, the expulsion itself is not such proximate cause of the death as will make the company liable. Railway Co. v. Valleley, 32 Ohio St. 345.

Plaintiff's intestate was ejected from defendant's train, and left, in the nighttime, in a state of intoxication, near the track. Several hours after, at a distance of half a mile from where he was ejected, he was killed by another train. Verdict for plaintiff. *Held* that, to entitle plaintiff to recover, it should have been made to appear that the killing was the natural and proximate result of the ejectment; that the attention of the jury should have been called to the distance from the place where he was ejected to where he was killed, and to the question whether or not his faculties and power of locomotion had so far recovered as to enable him to understand and avoid the danger; and that the failure so to instruct the jury was ground for a new trial. Haley v. Chicago & N. W. Ry. Co., 21 Iowa, 15.

The evidence showed that the deceased was driven from from his home by defendants; that he afterwards enlisted in the Federal army, was captured and detained as a prisoner of war, and died in prison. *Held*, that the death was not the proximate result of defendants' acts. Wagner v. Woolsey, 1 Heisk. 235.

A. and B. fought, and B.'s son came to his father's rescue, and killed A. A.'s wife sued B. *Held*, that she could not recover, the homicide not being the natural and proximate result of B.'s wrong. White v. Conly, 14 Lea, 51.

The intestate was injured by a fall through defendant's negligence. By the fall he fractured his arm, and the broken bone developed a poisonous discharge, which, being absorbed into the blood, caused his death. *Held*, that death was the proximate result of the act. Ginna v. Second Ave. R. Co., 8 Hun, 494.

The jury were instructed that, "unless the death was caused directly and primarily by some wrongful act or omission of the defendants, the defendants are not liable." *Held* that, as the word "directly" is sometimes used in the sense of "proximately," a verdict against the plaintiff would not be disturbed on account of the instruction, unless there was something in the case to show that injury resulted to the plaintiff. McLean v. Burbank, 11 Minn. 277, (Gil. 189.)

Deceased was driving on a street, and was thrown from his wagon

or from the act complained of.[76] And it has been held that the fact that the death has been merely hastened by the injury is

by the wheel running into a hole by the side of a street-railway track, and was killed by striking his head on a loose rail and protruding spike. *Held*, that the railway company was liable for the death, its negligence in having its track in bad repair being the proximate cause of the accident, though the city was also negligent in permitting the hole to remain in the street; but that the negligence of the city was not the proximate cause of the death, and that the city was not liable. Cline v. Crescent City R. Co., (La.) 9 South. Rep. 122.

The declaration alleged that the deceased, while in the office of defendant's agent for the transaction of business pertaining to the agency, was killed by the latter; that the agent was subject to aberration of mind which became at times homicidal mania; and that defendant employed him, knowing this fact. *Held* a good cause of action. Christian v. Columbus & R. Ry. Co., 79 Ga. 460, 7 S. E. Rep. 216.

[76] Defendant requested the court to charge (1) that if, before the accident, plaintiff's intestate was taking or had incipient pneumonia, and that she died from such pneumonia, then the presumption is that the injury did not cause the death; (2) that if the jury believed that if she had been in ordinary health when the accident occurred, her injury would not have produced death, and that her death was the result of bad health at the time of the injury, then the plaintiff cannot recover. The judge refused these requests, and charged that if the plaintiff's intestate was injured through the negligence of defendant, and such injury caused her to take pneumonia, or aggravated the pneumonia from which she was then suffering, so that death resulted on that account, the plaintiff was entitled to recover, unless she would have died from pneumonia, as an independent cause, if she had not received the injury. *Held*, that the refusal and the charge were correct. Louisville & N. R. Co. v. Jones, 83 Ala. 376, 3 South. Rep. 902.

Where the jury was instructed to find whether or not the death was caused by defendant's act, *held*, that it was not error to refuse to instruct the jury that the injury could not be regarded as the proximate cause of the death, if the deceased had a tendency to insanity and disease, and the injury received by him producing death would not have produced the death of a well person. Jeffersonville, M. & I. R. Co. v. Riley, 39 Ind. 568.

Directly after the injury complained of decedent began to fail, and so continued, with but a slight change for the better, until about one year thereafter, when he died. Two or three years previous to the in-

not sufficient.[77] Where the death is the proximate result, it is immaterial that there was concurrent negligence on the part of other persons.[78] The answer to the question whether the death was caused by the act or neglect complained of is, of course, generally determined by the same considerations that would determine the answer to the question whether the injury, if death had not ensued, was caused by the act or neglect in question.

In cases, however, where the death does not follow immedi-

jury he had some ribs broken, but he fully recovered, and was a hearty man until the accident. The expert testimony differed as to the cause of the death. *Held*, that the evidence sustained the finding that the injury complained of was the cause. Sorenson v. Northern Pac. R. Co., 36 Fed. Rep. 166.

[77] Plaintiff sued for the death of her husband, caused by the wrongful act of defendant in receiving him on its train against his will and the protest of plaintiff, while he was in a mortally wounded condition. The judge instructed the jury that if the defendant's act caused or *hastened* the death, they should find for plaintiff. *Held* error; that the statute, being in derogation of the common law, must be strictly construed; that the word "caused" could not be construed to mean "hastened;" and that the judge should have charged the jury that they must find a verdict for defendant unless the act was the cause of the death. Jackson v. St. Louis, I. M. & S. Ry. Co., 87 Mo. 422.

But see Louisville & N. R. Co. v. Jones, *supra*, in which Stone, C. J., says: "Even if Mrs. Jones had pneumonia at the time she received the injury, and it could be shown that she would ultimately die of that disease, this would not necessarily, and as a matter of law, relieve the railroad of all responsibility. If the injury * * * contributed to and *hastened* her death, then the corporation would not be guiltless. * * * In such case the wrong and injury are, in fact, the cause of the death." Also, Thompson v. Louisville & N. R. Co., 91 Ala. 496, 8 South. Rep. 406, *infra*.

[78] Cline v. Crescent City R. Co., (La.) 9 South. Rep. 122; Consolidated Ice M. Co. v. Keifer, 134 Ill. 481, 25 N. E. Rep. 799; Quill v. New York Cent. & H. R. R. Co., 11 N. Y. Supp. 80.

As all the parties in any way concerned with an unlawful killing by a mob are liable *in solido*, it is proper to join, as a party defendant with the individuals who participated in the killing, the city in which the act was committed, on the ground of its negligence in not preventing the killing. Comitez v. Parkerson, 50 Fed. Rep. 170.

ately after the injury, the question is often presented under somewhat peculiar circumstances. The question may arise whether the death was caused by the act or neglect complained of, or by some intervening cause. In such cases it must appear that the death was the result of the act or neglect, and not of the intervening cause.[79] But the death will be referred to the act complained of, if it was sufficient to cause the death, unless it be shown that the death must have resulted from the intervening cause, independently of the injury.[80] The mere fact that the party injured was unskillfully treated, or did not

[79] A passenger was so injured that he became insane, and eight months after the accident committed suicide. *Held*, that his own act was the proximate cause of his death. Scheffer v. Washington City, V. M. & G. S. R. Co., 105 U. S. 249.

In an action for the death of plaintiff's intestate, caused by the negligence of the driver of the defendant's horse car, it appeared that intestate was taken to a hospital, and lived for 20 days after the accident, and that while there his arm was amputated, but no evidence was given that the injury was sufficient to cause death or to require amputation. The only witness relied on to prove that the death of intestate resulted from the accident was a physician who made a *post mortem* examination, and gave it as his opinion that the cause of death was exhaustion and pleurisy following amputation, but he did not account for the origin of the pleurisy. *Held*, that the complaint was properly dismissed for want of proof that the death was the legitimate result of defendant's negligence. Schoen v. Dry-Dock, E. B. & B. R. Co., 58 N. Y. Super. Ct. 149, 9 N. Y. Supp. 709.

It was a controverted question whether the intestate died of disease or from a fall in the street. The jury were instructed that plaintiff could not recover unless it was shown by a preponderance of the evidence that the injury received from the fall was the proximate cause of intestate's death, and there was no instruction in conflict with that one. *Held*, that the charge was not open to the objection that it was so framed as to sustain the theory of the defendant's liability, notwithstanding the fact that the intestate died of disease. City of Mt. Carmel v. Howell, (Ill.) 27 N. E. Rep. 77.

[80] It was contended that the death was not the proximate result of the injury, but of pneumonia. *Held*, that the death must be referred to the injury, unless it be shown that the death must have resulted if the in-

adopt the best remedies, and that this contributed to his death, will not defeat the action, but the question should be left to the jury whether or not the death was caused by the injury.[81]

jury had not been done. Beauchamp v. Saginaw Min. Co., 50 Mich, 163, 15 N. W. Rep. 65.

The evidence showed that the immediate cause of death was peritonitis. Plaintiff's medical witnesses testified that that disease might be caused in seven different ways. There was proof that a certain cause, which the jury might competently find ensued from defendant's negligence, already existed. The jury found for plaintiff. *Held*, that it was no objection that there was no proof but that several causes which could not be attributed to defendant's negligence existed in the case, as, if a sufficient cause was shown, the presumption is that causes not made to appear did not exist. Looram v. Third-Ave. R. Co., 6 N. Y. Supp. 504.

The evidence tended to show that the child was 22 months old, and previously in good health; that defendant's engine struck the child, and threw it 15 feet; that it was taken up senseless, with one leg broken; that the leg was set, and the physician's directions followed; that a cough set in, and the child manifested great pain, etc; that in a few days it had an unnatural appearance in the eyes; that these symptoms increased until its death; that about 8 days before its death it grew much worse; that a few days before the death the physicians removed the splints and bandages; that the death occurred about a month after the injury. *Held*, that the question whether the death was caused by the injury ought to have been left to the jury. Jucker v. Chicago & N. W. Ry. Co., 52 Wis. 150, 8 N. W. Rep. 862.

[81] An instruction that, if the jury believed that the injury was the immediate cause of death, the fact that the person injured was unskillfully treated is no defense, is correct. Nagel v. Missouri Pac. Ry. Co., 75 Mo. 653.

It is no defense that the party injured did not adopt the best remedies, or follow explicitly the directions of the physician. It should be left to the jury whether his conduct was reasonable, and whether the death was caused by the injury. Texas & St. L. Ry. Co. v. Orr, 46 Ark. 182.

Where plaintiff's intestate, through the negligence of defendant, had received an injury which, without a surgical operation, would have caused death, and employed a competent surgeon, by whose mistake the operation was not successful, and the intestate died in consequence, *held*, that there was no error in refusing to charge that, if death was

In a recent Alabama case[32] the court went a step farther. The intestate was injured in an accident, and afterwards, by mistake, poison was given him, sufficient to cause the death of a well man, from the immediate effect of which he died. There was evidence tending to show that the injuries received were mortal, and that they caused him to succumb more quickly to the poison than if he had been well. It was held that, under the provision of the Code giving a right of action when the injury "results" in death, the action could be maintained against the original wrongdoer. The reasoning of the court is to the effect that when the result is the necessary result of the first cause, and a cause intervenes, sufficient, also, to produce the result, whose operation is, however, hastened by the concurrent operation of the first cause, the latter may be regarded as a proximate cause.

A person who aids and abets the wrongful act is equally liable with the person who actually perpetrates it.[33]

proximately caused by pressing the intestines into the abdominal cavity, (the alleged mistake,) the plaintiff could not recover. Sauter v. New York Cent. & H. R. R. Co., 66 N. Y. 50, affirming s. c. 6 Hun, 446. The judge also charged that if death was produced by the error, ignorance, or maltreatment of the surgeon, the plaintiff could not recover, which the appellate court said was quite as favorable to the defendant as the case would warrant.

Plaintiff's intestate rejected the advice of his physician, and refused to submit his injured leg to amputation; the physician testifying that such an operation would merely "have improved the chances" of recovery. *Held*, that the refusal could not, as a matter of law, be said to be negligence. Sullivan v. Tioga R. Co., 112 N. Y. 643, 20 N. E. Rep. 569.

[32] Thompson v. Louisville & N. R. Co., 91 Ala. 496, 8 South. Rep. 406.

[33] Gray v. McDonald, (Mo.) 16 S. W. Rep. 898, 28 Mo. App. 477.

§ 77. Death resulting from neglect of statutory duty.

It is immaterial that the injury causing death results from the neglect of a statutory duty, provided that the party injured thereby might have maintained an action if death had not ensued.[84] Thus railway companies are liable when the failure to give signals required by statute is the proximate cause of death.[85] Nor is it material that the statute creating a right of action for personal injury was enacted subsequently to the act creating a right of action for injuries resulting in death. Thus, in a Michigan case,[86] it was held that the personal representative of a person whose death was caused by a bridge being allowed to be out of repair might maintain an action against the township whose duty it was under a certain statute to keep the bridge in repair, although the statute imposing such duty upon townships was passed subsequently to the act creating a

[84] Whether the act of a drug clerk in selling poison without labeling it was negligence on common-law principles, or was made so by the Minnesota statutes, the druggist is liable for the clerk's negligence committed in the course of his employment, and resulting in the death of the purchaser of the poison. Osborne v. McMasters, 40 Minn. 103, 41 N. W. Rep. 543; Nugent v. Vanderveer, 39 Hun, 328.

[85] Becke v. Missouri Pac. Ry. Co., 102 Mo. 544, 13 S. W. Rep. 1053; Crumpley v. Hannibal & St. J. R. Co., 98 Mo. 34, 11 S. W. Rep. 244; King v. Missouri Pac. Ry. Co., 98 Mo. 235, 11 S. W. Rep. 563. See Palmer v. New York Cent. & H. R. R. Co., 112 N. Y. 234, 19 N. E. Rep. 678; Rodrian v. New York, N. H. & H. R. Co., 125 N. Y. 526, 26 N. E. Rep. 741. It was held in Texas that Rev. St. art. 4232, which makes it negligence *per se* for an engineer to neglect to ring or whistle on approaching a crossing, and makes railroad companies liable "for all damages sustained by any person by reason of such neglect," does not give a right of action on account of an accident causing death. But this decision rests upon the law as it then stood, which gave a right of action for death in such case only when the negligence was "willful." Galveston, H. & S. A. Ry. Co. v. Cook, 16 S. W. Rep. 1038.

[86] Merkle v. Bennington Tp., 58 Mich. 156, 24 N. W. Rep. 776.

right of action for injuries resulting in death, and although the later statute did not expressly provide that townships should be liable in case of death. The opinion was delivered by Cooley, C. J., who says: "The statute of 1848 [giving a remedy for injuries resulting in death] is in the strictest sense a remedial statute, and as such it should receive, not a strict, but a favorable, construction. * * * But a liberal construction of the statute is not necessary to make it applicable in these cases. * * * It is general, and applies 'whenever' a death has been caused under circumstances which would have given a cause of action had the person survived. It was not made for cases which might arise under the law as it then was, but it was enacted to establish a general and very wholesome rule, as applicable to causes of action that might arise under subsequent remedial statutes, and as to those arising under the common law or under statutes then existing." And in a later case[87] it was held by the same court that a city was liable under a later act rendering cities liable in damages to persons injured upon highways although the act provided that no municipality should be liable to any person for "bodily injury" sustained upon public highways except under the provisions of the act, and abrogated the common-law liability for such "bodily injuries," and made no provision for the recovery of damages in cases of death resulting therefrom. A different conclusion, however, was reached in South Carolina, where it was held that the act giving to the personal representative a right of action in case of death did not apply to a case under a subsequent statute, which gave a right of action "against a county for damages sustained by any one injured through a defect in the repair of a highway or bridge." The court rests its decision both upon the ground that the legislature could not have intended to embrace within the pro-

[87] Racho v. City of Detroit, 51 N. W. Rep. 360.

visions of the earlier act new rights to be subsequently created by statute, and upon the ground that the right of action given by the later act was not based upon negligence, but upon a defect in the repair of the highway or bridge, regardless of negligence, and that consequently the wrong complained of did not come within the words "wrongful act, neglect, or default."[88]

§ 78. Death resulting from liquor sold by defendant.

Where the death of a person results from intoxication caused by liquor furnished him by the defendant, no action can, under ordinary circumstances, be maintained by the personal representative, since none could have been maintained by the party injured if death had not ensued.[89] But if, when the liquor is furnished, the decedent is already so intoxicated as to be incapable of intelligent action, a different question is presented, and it has been held that in such case the action can be maintained. Thus, where the decedent was a confirmed inebriate, and the defendants made a wager that he could not drink three pints of whisky, and persuaded him to try, and after drinking two pints he became helplessly intoxicated, but the defendants, although warned by a bystander that it would kill him, induced him to

[88] All v. Barnwell County, 29 S. C. 161, 7 S. E. Rep. 58.

[89] King v. Henkie, 80 Ala. 505; Hackett v. Smelsley, 77 Ill. 109, per Sheldon, J.

The facts that defendant furnished liquor to a third person while the latter was drunk, and failed to protect plaintiff's husband from such person, and that the latter killed plaintiff's husband in defendant's saloon, while defendant was present, deceased not being there as a guest, do not render defendant liable in damages for the killing, under Acts Ga. 1887, p. 45, allowing a recovery for death caused by crime, or "criminal or other negligence." Belding v. Johnson, 86 Ga. 177, 12 S. E. Rep. 304.

drink a third pint, which caused his death, it was held that the defendants were liable.[90] The court said that, whatever effect the consent of the decedent might otherwise have had in excusing the acts of the defendants, their conduct in persuading him to drink the third pint when he was in a helpless condition amounted to deception, and was equivalent to force. And in Pennsylvania, where the decedent was already intoxicated when the liquor was sold, it was held that there was not such concurrent negligence on the part of the deceased as to relieve the defendant from liability.[91] This case certainly goes to the extreme limit, and is opposed to a recent Alabama case,[92] where it was held that, even if the action was within the purview of the statute, the contributory negligence of the decedent in becoming intoxicated would constitute a defense, notwithstanding the fact that he was already helplessly drunk when the liquor was sold. Where the wrongful act of the defendant who sold the liquor consisted in expelling the decedent from a saloon, late at night, after he had become helpless, it was held that the question of contributory negligence was not involved.[93]

The question whether an action can be maintained by the widow for loss of support caused by her husband's death under the so-called "civil damage acts" is, of course, totally distinct. The weight of authority is in favor of such an action,[94] although the contrary doctrine is also maintained.[95]

[90] McCue v. Klein, 60 Tex. 168.

[91] Fink v. Garman, 40 Pa. St. 95.

[92] King v. Henkie, 80 Ala. 505.

[93] Weymire v. Wolfe, 52 Iowa, 533, 3 N. W. Rep. 541.

[94] Emory v. Addis, 71 Ill. 273; Hackett v. Smelsley, 77 Ill. 109; Schroder v. Crawford, 94 Ill. 357; Flynn v. Fogarty, 106 Ill. 263; Rafferty v. Buckman, 46 Iowa, 195; Brockway v. Patterson, 72 Mich. 122, 40 N. W. Rep. 192; Roose v. Perkins, 9 Neb. 304, 2 N. W. Rep. 715; Mead v. Stratton, 87 N. Y. 493; Davis v. Standish, 26 Hun, 608; McCarty v. Wells, 51 Hun, 171, 4 N. Y. Sup. 672; Black on Intoxicating Liquors, §§ 310, 311.

[95] Barrett v. Dolan, 130 Mass. 366; Harrington v. McKillop, 132 Mass.

§ 79. Felonious killing.

Most of the acts, following Lord Campbell's act, provide that the action may be maintained although the death has been caused under such circumstances as amount in law to felony.[96] This provision, however, has been omitted in many of the acts; and the failure to prosecute where felony was involved in the act complained of has never been allowed as a defense, and has seldom been raised. In a case under the Indiana act, which contained no such provision, it was held that failure to prosecute was no defense, the court observing that the common-law rule requiring prosecution of the felon before a civil action could be maintained did not prevail in the United States.[97] In Geor-

567; Davis v. Justice, 31 Oh. St. 359; Kirchner v. Myers, 35 Oh. St. 85; Pegram v. Stortz, 31 W. Va. 220, 6 S. E. Rep. 435.

[96] Arizona, Arkansas, District of Columbia, Florida, Illinois, Maine, Maryland, Michigan, Montana, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, South Carolina, Texas, Utah, Vermont, Virginia, Nova Scotia, and Ontario.

In New Hampshire, "although inflicted by a person while committing a felony." In Rhode Island, "it shall not be necessary first to institute criminal proceedings against the defendants." In Ohio, West Virginia, and Wyoming, "although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree or manslaughter." In Alabama, "though there has not been prosecution or conviction or acquittal of the defendant." In Iowa, Missouri, New York, and perhaps other states, the provision against the merger of the civil in the criminal offense is general. In Quebec, the act provides that the "actions are independent, and do not prejudice the criminal proceedings to which the parties may be subject."

[97] Lofton v. Vogle, 17 Ind. 105. In Lankford v. Barrett, 29 Ala. 700, it was said that the provision that the action must be brought within 12 months precludes any application of the common-law rule of merger. In Martin's Ex'x v. Martin, 25 Ala. 201, it was *held* that an action of trover for the conversion of a slave could not be maintained without instituting a prosecution for felony. See, also, Middleton v. Holmes, 3 Port. (Ala.) 424, (killing slave;) Blackburn v. Minter, 23 Ala. 613. In Neal

gia the act formerly required, as a condition of the right to maintain the action, that, if the injury amounted to a felony, the person injured by the death must either simultaneously or concurrently or previously prosecute for the same, or allege a good excuse for failure to do so, except in cases of torts committed by corporations;[88] but this requirement has been repealed.[89]

v. Farmer, 9 Ga. 555, (followed in Williams v. Fambro, 30 Ga. 282,) it was *held* that, while in cases of felony the civil remedy is suspended, the killing of a slave was not felony. See, also, Adams v. Barrett, 5 Ga. 404. The rule of merger of the civil action in the felony is denied in the following cases: Blassingame v. Glaves, 6 B. Mon. 38; Nash v. Primm, 1 Mo. 125, (killing slave;) Mann v. Trabue, 1 Mo. 709, (killing slave;) White v. Fort, 3 Hawks, 251.

The plaintiff may commence a civil action without a previous acquittal or conviction of the felon. Pettingill v. Rideout, 6 N. H. 454; Newell v. Cowan, 30 Miss. 492. In an action by an overseer for wages, defendant may recoup any damages he has sustained on account of the killing of his slave by plaintiff, if the killing was done negligently and without necessity. The rule of merger in felony has been changed by statute. Brunson v. Martin, 17 Ark. 270. See Hyatt v. Adams, 16 Mich. 180, for full discussion by Christiancy, J.

[88] Code, § 2970; Allen v. Atlanta St. R. Co., 54 Ga. 503; Chick v. Southwestern R. Co., 57 Ga. 357; Southwestern R. Co. v. Johnson, 60 Ga. 667; Sawtell v. Western & A. R. Co., 61 Ga. 567; Western & A. R. Co. v. Sawtell, 65 Ga. 235. See Dodson v. McCauley, 62 Ga. 180; South Carolina R. Co. v. Nix, 68 Ga. 572.

[89] The act of August 27, 1879, entitled "An act to amend section 2970 of the Code" repealed the entire section. It is embodied in Code 1882, § 2970. "As no persons of any sort, either natural or artificial, were left, to whom the section could apply, the effect of the amending act was to strike it out entirely." Western & A. R. Co. v. Meigs, 74 Ga. 857.

CHAPTER V.

THE BENEFICIARIES.

§ 80. Existence of beneficiaries essential.
81. Otherwise in Virginia, West Virginia, and North Carolina.
82. Widow and next of kin.
83. Whether husband is next of kin.
84. Posthumous child.
85. Illegitimate child.
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§ 80. Existence of beneficiaries essential.

The statutes which require the action to be brought in the name of the executor or administrator generally provide in express terms that the action shall be for the benefit of the widow and next of kin, or other members of the family, of the deceased, and that the amount recovered shall be divided among the persons for whose benefit the action is brought to the exclusion of creditors of the estate. The executor or administrator, as such, has no interest in the recovery, and he acts in effect as trustee for the persons beneficially entitled.[1] It follows that, unless the deceased left surviving some one of the

[1] Leggott v. Great Northern Ry. Co., 1 Q. B. D. 599, 45 L. J. Q. B. 557, 35 L. T. (N. S.) 334; Bradshaw v. Lancashire & Y. Ry. Co., L. R. 10 C. P. 189, 44 L. J. C. P. 148, 31 L. T. (N. S.) 847; Kramer v. Market St. R. Co., 25 Cal. 434; Lamphear v. Buckingham, 33 Conn. 237; City of Chicago v. Major, 18 Ill. 349; Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 49; Stewart v. Terre Haute & I. R. Co., 103 Ind. 44, 2 N. E. Rep. 208; Kansas P. Ry. Co. v. Cutter, 16 Kan. 568; Perry v. St. Joseph & W. R. Co., 29 Kan. 420; Dickins v. New York Cent. R. Co., 23 N. Y. 158; Yertore v. Wiswall, 16 How. Pr. 28; Hegerich v. Keddie, 99 N. Y. 258, 1 N. E. Rep. 787.

persons entitled to the benefit of the action, no cause of action accrues; and that, unless it be alleged and proved that some such person survived, the action cannot be maintained.[2] The rule is the same where the remedy is by indictment,[3] or where, as in Maryland, the action is brought in the name of the state.[4] The beneficiary must be in existence when the action is brought.[5]

[2] Lamphear v. Buckingham, 33 Conn. 237; Chicago, etc., R. Co. v. Morris, 26 Ill. 400; Conant v. Griffin, 43 Ill. 410; Quincy Coal Co. v. Hood, 77 Ill. 68; Indianapolis, P. & C. R. Co. v. Keely's Adm'r, 23 Ind. 133; Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48; Stewart v. Terre Haute & I. R. Co., 103 Ind. 44, 2 N. E. Rep. 208; Clore v. McIntire, 120 Ind. 262, 22 N. E. Rep. 128; Missouri Pac. Ry. Co. v. Barber, 44 Kan. 612, 24 Pac. Rep. 969; Schwarz v. Judd, 28 Minn. 371, 10 N. W. Rep. 208; Barnum v. Chicago, M. & St. P. Ry. Co., 30 Minn. 461, 16 N. W. Rep. 364; Serensen v. Northern Pac. R. Co., (Mont.) 45 Fed. Rep. 407; Warren v. Englehart, 18 Neb. 283, 13 N. W. Rep. 401; Burlington & M. R. Co. v. Crockett, 17 Neb. 570, 24 N. W. Rep. 219; Dunhene's Adm'x v. Ohio Life I. & T. Co., 1 Disney, (Oh.) 257; Conlin v. Charleston, 15 Rich. Law, 201; Lilly v. Charlotte, C. & A. R. Co., 32 S. C. 142, 10 S. E. Rep. 932; Louisville & N. R. Co. v. Pitt, (Tenn.) 18 S. W. Rep. 118; East Tennessee, V. & G. Ry. Co. v. Lilly, (Tenn.) 18 S. W. Rep. 243; Westcott v. Central Vt. R. Co., 61 Vt. 438, 17 Atl. Rep. 745; Geroux's Adm'r v. Graves, 62 Vt. 280, 19 Atl. Rep. 987; Northern Pac. R. Co. v. Ellison, (Wash.) 28 Pac. Rep. 233; Woodward v. Chicago & N. W. R. Co., 23 Wis. 400; Wiltse v. Town of Tilden, 77 Wis. 152, 46 N. W. Rep. 234; Safford v. Drew, 3 Duer, 627; Lucas v. New York Cent. R. Co., 21 Barb. 245. Some of the New York cases contain *dicta* that the action lies in every case where the party injured might have maintained an action, (Oldfield v. New York & H. R. Co., 14 N. Y. 310; Quin v. Moore, 15 N. Y. 432; Keller v. New York Cent. R. Co., 2 Abb. Dec. 480;) but no New York case has decided that it lies where the deceased left surviving neither widow, husband, nor next of kin. See, also, § 41, and cases cited in note 40. Muhl v. Southern M. R. Co., 10 Oh. St. 272; Little Rock & Ft. S. Ry. v. Townsend, 41 Ark. 382, (under the earlier act of 1875;) and Kesler v. Smith, 66 N. C. 154,—*contra*.

[3] Commonwealth v. Eastern R. Co., 5 Gray, 473; Commonwealth v. Boston & A. R. Co., 121 Mass. 36; State v. Grand Trunk Ry. Co., 60 Me. 145; State v. Gilmore, 24 N. H. 461; State v. Manchester & L. R. Co., 52 N. H. 528.

[4] State v. Baltimore & O. R. Co., 17 Atl. Rep. 88.

[5] Woodward v. Chicago & N. W. R. Co., 23 Wis. 400; Wiltse v. Town

§ 81. Otherwise in Virginia, West Virginia, and North Carolina.

Under the Virginia statute, although the damages are given first to the husband or wife, parent or child, yet, if neither of these is alive, the damages are assets to be disposed of according to law. For this reason it is held that the existence of husband, wife, parent, or child is not necessary to the maintenance of the action.[6] The rule in West Virginia appears to be the same, although the statute expressly declares that the amount recovered shall not be subject to the debts and liabilities of the deceased, and the reason for the rule is not clear.[7] In North Carolina the same rule also prevails, for, though the amount recovered is not liable to be applied as assets, it is required to be paid, if it remains unclaimed for five years in the hands of the executor or administrator, to the state university.[8]

§ 82. Widow and next of kin.

Many of the statutes provide that the action may be brought for the benefit of the widow and next of kin. This provision does not mean, however, that the action is maintainable only when there are both widow and next of kin; it is sufficient if there be either.[9]

of Tilden, 77 Wis. 152, 46 N. W. Rep. 234; State v. Baltimore & O. R. Co., (Md.) 17 Atl. Rep. 88; Westcott v. Central Vt. R. Co., 61 Vt. 488, 17 Atl. Rep. 745; Lougue v. Memphis & C. R. Co., (Tenn.) 19 S. W. Rep. 480.

[6] See § 56.

[7] See § 58.

[8] See § 49.

[9] Chicago v. Major, 18 Ill. 349; Oldfield v. New York & H. R. Co., 14 N. Y. 310; Quin v. Moore, 15 N. Y. 432; Tilley v. Hudson R. R. Co., 24 N. Y. 471; McMahon v. City of New York, 33 N. Y. 642; Haggerty v. Central R. Co., 31 N. J. L. 349.

§ 83. Whether husband is next of kin.

It has been held in New York that the husband is not included among the "next of kin."[10] The same decision was reached in Nebraska, on the ground that he does not inherit under the statute of descent and distribution.[11] In Ohio, for the reason that he does so inherit under the statute of that state, it is held that he is included.[12] In Tennessee, also, he is held to be included.[13]

§ 84. Posthumous child.

The action may be maintained for the benefit of a posthumous child of the deceased.[14]

§ 85. Illegitimate child.

A bastard is not a "child," within Lord Campbell's act.[15] Under the Pennsylvania statute, giving a right of action to the

[10] Dickins v. New York Cent. R. Co., 23 N. Y. 158. By the amendment of 1870, the law was changed so as to make him a beneficiary; but where a husband brought action as administrator before the amendment, and after its passage settled the suit, it was held that he was not entitled to share in the distribution. Drake v. Gilmore, 52 N. Y. 389.

[11] Warren v. Englehart, 13 Neb. 283, 13 N. W. Rep. 401.

[12] Steel v. Kurtz, 28 Oh. St. 191.

[13] Bream v. Brown, 5 Coldw. 168; Trafford v. Adams Ex. Co., 8 Lea, 96. In East Tennessee, V. & G. R. Co. v. Lilly, 18 S. W. Rep. 243, it is suggested that these decisions may rest on the ground that "widow" includes both feminine and masculine.

[14] In a suit for limitation of liability instituted on behalf of the owners of a vessel, an appearance was entered on behalf of a child of one of the drowned men *en ventre sa mere*. The court reserved leave to the child, if born within due time, to prefer its claim. The George & Richard, L. R. 3 Ad. & Ecc. 466, 24 L. T. (N. S.) 717, 20 Wkly. R. 245. So held under a statute for the benefit of "the surviving children." Nelson v. Galveston, H. & S. A. Ry. Co., 78 Tex. 621, 14 S. W. Rep. 1021; Texas & P. Ry. Co. v. Robertson, 17 S. W. Rep. 1041.

[15] Dickinson v. Northeastern R. Co., 2 Hurl. & Colt. 735, 33 L. J.

"parent," the mother of an illegitimate child cannot recover.[16] Under the Missouri statute, which gives a right of action in case of the death of a minor unmarried child, whether "natural born or adopted," it seems that the rule is the same.[17] And under a Vermont statute, giving a right of action to one dependent on a person whose death is caused by intoxication from the use of liquor unlawfully sold, an illegitimate child cannot recover.[18] In Ohio a different construction has been placed upon the statute.[19]

§ 86. Aliens.

It is immaterial that the next of kin or other persons entitled to the benefit of the action are residents of another state from that under whose law the remedy is sought.[20]

§ 87. Survival of right of beneficiary.

The action for death, being an action of tort, falls within the common-law rule that such an action does not survive the death of the party in whose favor it existed. It is immaterial that the nominal plaintiff is the administrator or the state. This has been decided in cases where the question was presented by

Ex. 91, 9 L. T. (N. S.) 299, 12 Wkly. R. 52. The mother of an illegitimate child cannot recover. Gibson v. Midland R. Co., 2 Ont. Rep. 658.

[16] Harkins v. Philadelphia & R. R. Co., 15 Phila. 286.

[17] Marshall v. Wabash R. Co., 46 Fed. Rep. 269. The case was in the United States circuit court, and was dismissed on the ground that a federal court in another state could not entertain the action.

[18] Good v. Towns, 56 Vt. 410.

[19] Muhl v. Southern M. R. Co., 10 Oh. St. 272. The case seems to have been decided on the ground that the action might be maintained irrespective of the existence of next of kin.

[20] Philpott v. Missouri Pac. Ry. Co., 85 Mo. 164; Luke v. Calhoun Co., 52 Ala. 115; Chesapeake, O. & S. W. R. Co. v. Higgins, 85 Tenn. 620, 4 S. W. Rep. 47.

the death of the sole party in interest pending the suit.[21] Where there are several beneficiaries, it would seem to be clear that, upon the death of one, the action would survive solely for the benefit of the others, and to the exclusion of the estate of the beneficiary so dying, though the point has not been actually decided.[22] In Indiana, where the common-law rule is abrogated by statute, the right of action of a father for death of his child survives.[23] In Arizona, Georgia, and Texas, the statutes provide that the cause of action shall not abate by the death of either party.

[21] Under the Wisconsin statute, which provides that the damages shall go to the husband or widow, if such relative survive the deceased, and otherwise to the descendants, etc., of the deceased, where the husband dies pending the action, it abates. Dixon, C. J., observes that while it is apparent that, under the English and New York statutes, the right of action vests at once for the benefit of each and all of the persons entitled to receive any part of the money recovered, and may be maintained so long as any one of such persons survives, it is equally apparent that, by the Wisconsin statute, the right of action vests solely for the benefit of the husband or widow, and for the benefit of descendants only if no husband or widow survive. Woodward v. Chicago & N. W. R. Co., 23 Wis. 400. Under the Maryland statute providing that the action shall be for the benefit of the wife, husband, parent, and child, where the husband died pending the action it was held that it abated, the Code, which provided for the survival of personal actions, expressly excepting actions for personal injury. (This was before the act of 1888, c. 262.) State v. Baltimore & O. R. Co., 17 Atl. Rep. 88.

[22] Taylor v. Western P. R. Co., 45 Cal. 323. The action cannot be maintained if neither the widow nor any of the next of kin are in existence. Westcott v. Central Vt. R. Co., 61 Vt. 438, 17 Atl. Rep. 745. In Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48, the court says that children of a daughter of the deceased, dying since the commencement of the action, would inherit her share, but this was not involved in the decision. See Lougue v. Memphis & C. R. Co., 19 S. W. Rep. 480.

[23] Rev. St. Ind. § 282, provides that actions for personal injuries die with the party, "except in cases in which an action is given for an injury causing the death of any person," etc. Section 283 declares that all other causes of action survive to his representatives. *Held*, that an action by a father for the death of his child survives. Pennsylvania Co. v. Davis, (Ind.) 29 N. E. Rep. 425. See § 119.

§ 88. Assignment of right of beneficiary.

In New York it has been held that the interest of a beneficiary in the damages to be recovered stands on the same footing as a distributive share in any other fund, and is assignable, and that the suit may be prosecuted, notwithstanding such assignment, by the sole beneficiary.[24]

§ 89. Distribution.

Lord Campbell's act provides that the amount recovered shall be divided among the parties for whose benefit the action is brought in such shares as the jury by their verdict shall find. This provision has been substantially followed in Arizona, Maryland, Texas, and Virginia, and also in New Brunswick, Nova Scotia, and Ontario. In Texas it has been held that the failure of the jury to apportion the damages assessed is error,[25] but, in the absence of objection, is not ground for reversal.[26] It is proper for the jury to exclude from the verdict a party who fails to prove pecuniary loss.[27]

It was enacted by 27 & 28 Vict. c. 95, that the defendant may pay money into court as compensation in one sum to all the persons entitled, without specifying the shares into which it is to be divided by the jury, and that if such sum is not accepted, and an issue is taken as to its sufficiency, and the jury shall think it sufficient, the defendant shall be entitled to a verdict on that issue.[28] Where money has been paid into court under this

[24] Quin v. Moore, 15 N. Y. 432. See Blakeley v. Le Duc, 22 Minn. 476.

[25] Houston & T. C. Ry. Co. v. Moore, 49 Tex. 31. See Galveston, H. & S. A. R. Co. v. Le Gierse, 51 Tex. 198.

[26] March v. Walker, 48 Tex. 372.

[27] Missouri Pac. Ry. Co. v. Henry, 75 Tex. 220, 12 S. W. Rep. 838.

[28] In an action by the widow, as administratrix, the defendants paid money into court with their defense. The plaintiff admitted its suffi-

provision, and received by the plaintiff, he is not liable therefor in an action at law, but may be compelled as trustee to administer the fund in favor of all the persons entitled.[30] On a special case being presented to the chancery division for advice as to the proper proportion in which such compensation should be divided, it was held that, by analogy of the statute of distribution, the widow should take one third and the children two thirds;[30] but in such case the court may order the fund distributed in the same manner as the jury could have done, *i. e.* it may adjudge the individual claims separately, or may fix an aggregate sum, and divide this among the persons entitled.[31]

Most of the acts in force in the United States provide, in substance, that the amount recovered shall be divided among the widow and next of kin, or other persons entitled to the benefit of such action, in the proportion provided by law in relation to the distribution of the personal property of persons dying intestate. Creditors are by the terms of most of the acts expressly excluded from the distribution. In Iowa and Virginia they may participate if there be no husband, wife, child, or parent. In Oregon and Washington it is held that they may participate.[32] In North Carolina, if there are no next of kin entitled, the amount recovered goes to the University.[33]

ciency, and joined issue, to enable the rights of all persons to be determined. The father of the deceased applied to have his name added as a party, for the purpose of establishing his claim to part of the money. Application refused, but leave granted to appear and tender evidence as to the amount of his share. Johnston v. Great Northern Ry. Co., 20 L. R. Ir. 4.

[30] Condliff v. Condliff, 29 L. T. (N. S.) 881, 22 W. R. 835. In Shallow v. Verden, 9 Ir. Com. Law, 150, the widow was allowed to draw the money out, on a consent signed by her being made a rule of court, whereby she agreed to a division in a certain proportion.

[31] Sanderson v. Sanderson, 36 L. T. (N. S.) 847.

[31] Bulmer v. Bulmer, 25 Ch. D. 409, 53 L. J. Ch. 402, 32 W. R. 380.

[32] See § 144.

[33] Warner v. Western N. C. R. Co., 94 N. C. 250. See § 49.

It was pointed out in a recent Michigan case[34] that there is a seeming contradiction or inconsistency between the provision that the jury may give such damages as they shall deem fair and just with reference to the pecuniary injury resulting to the persons who may be entitled to the damages, and the provision that the amount recovered shall be distributed, not in proportion to the pecuniary injury severally suffered, but in the proportion provided by law in relation to the distribution of the personal property of persons dying intestate; since it might follow that some persons of a class would get more and some less than the share which they would receive upon the basis of pecuniary injury, or even that a person might participate in the distribution who had suffered no pecuniary injury at all. In that case the distribution of the fund was not in controversy, and it seems to be intimated that there would be no serious difficulty in the way of those of the next of kin who had suffered the pecuniary injury obtaining the amount of the recovery from the administrator to the exclusion of those of the next of kin who had suffered no pecuniary injury; but it is difficult to see how it could be shown who were entitled to participate and who not, even if any discrimination were possible within the terms of the statute.[35]

The distribution is governed by the law in force at the time of the death.[36] Where money is paid to the administrator by way of compromise, it is to be distributed in the same manner

[34] Richmond v. Chicago & W. M. Ry. Co., 49 N. W. Rep. 621, *per* Morse, J. To the same effect, opinion of Hoar, J., in Richardson v. New York C. R. Co., 98 Mass. 85.

[35] An action for the death of a father is properly brought in the name of all the children, the recovery being for the benefit of all, and not merely of those who prove actual damage. North Pennsylvania R. Co. v. Robinson, 44 Pa. St. 175. See opinion of Earl, J., in Murphy v. New York Cent. & H. R. R. Co., 88 N. Y. 445; St. Louis, I. M. & S. Ry. Co. v. Needham, 52 Fed. Rep. 371, 3 C. C. A. 129.

[36] Richmond v. Chicago & W. M. Ry. Co., *supra*.

as if paid upon judgment, and may be recovered from him by the beneficiaries.[37] Although the amount recovered is not strictly assets, the sureties of the administrator are liable upon his bond for its proper application.[38] The shares of the distributees are subject to the payment of their proportionate part of the expenses of litigation.[39] In Alabama it is provided that the personal representatives and the sureties on his bond are liable to the parties in interest for the due distribution of the damages recovered.

[37] Goltra v. People, 53 Ill. 224; Perry v. Carmichael, 95 Ill. 519; Powell's Adm'x v. Powell, 84 Va. 415, 4 S. E. Rep. 744.

[38] Goltra v. People, *supra*.

[39] Baker v. Raleigh & G. R. Co., 91 N. C. 308.

CHAPTER VI.

PARTIES.

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§ 90. Who may sue.

Most of the statutes provide that the action may be prosecuted by the executor or administrator, or by the "personal

representatives," though many provide that it may be prosecuted directly by the parties for whose benefit it is given. In Maine, and in certain cases in Massachusetts, the remedy is by indictment. In Maryland, also, the action, though in all respects a civil proceeding, is brought in the name of the state. The peculiar provisions of the different acts, so far as they have been construed by the courts, will be considered before proceeding to the more general discussion of this subject.

§ 91. Lord Campbell's act.

By the amendment to Lord Campbell's act it is provided that if there be no executor or administrator, or if the executor or administrator fails to bring action within six months, the action may be brought by any or all the persons entitled to the benefit of it; and this provision exists also in Ontario.[1]

§ 92. Alabama.

Except in case of the death of a minor child, as provided in Code, § 2588, the action must be brought by the personal representative.[2] For the death of a child no action can be brought by the father under the employes' act, (§§ 2590–1.[3])

§ 93. Arkansas.

Mansf. Dig. § 5225, provides that the action shall be brought by the personal representatives, and, if there be no personal

[1] An action can be sustained by a relative, though brought within six months, unless there be an executor or administrator. Holleran v. Bagnell, 4 L. R. Ir. 740; Lampman v. Gainsborough, 17 Ont. Rep. 191.

[2] South & N. A. R. Co. v. Sullivan, 59 Ala. 272; Columbus & W. Ry. Co. v. Bradford, 86 Ala. 574, 6 South. Rep. 90; Stewart v. Louisville & N. R. Co., 88 Ala. 498, 4 South. Rep. 378.

[3] Lovell v. De Bardelaben C. & I. Co., 90 Ala. 18, 7 South. Rep. 756; Williams v. South & N. A. R. Co., 91 Ala. 635, 9 So. Rep. 77.

representatives, by the heirs at law. The term "heirs at law" includes the widow and all other persons entitled to share in the distribution of the proceeds, and, if the action is brought by one of the heirs at law, all must be joined.[4]

§ 94. Colorado.[5]

§ 95. Georgia.[6]

§ 96. Indiana.[7]

§ 97. Iowa.[8]

§ 98. Kentucky.[9]

§ 99. Louisiana.

Under the first branch of aritcle 2315, as amended, the action survives in favor of the minor children or widow, or either of them, or, in default of these, in favor of the surviving father or mother, or either of them.[10] This right of action does not survive in favor of the husband, but, in case of the death of a minor married daughter, the parents may sue.[11] The right to sue under the second cause of action given by article 2315 is expressly given to the husband. An action for the death of a husband and father may be brought by the widow individually and as tutrix of her minor children.[12]

[4] St. Louis, I. M. & S. Ry. Co. v. Needham, 53 Fed. Rep. 871, 3 C. C. A. 129.

[5] See § 103.

[6] See § 38. No action can be maintained by an administrator. Miller v. Southwestern R. Co., 55 Ga. 143.

[7] See § 39. [8] See § 40. [9] See § 41. [10] See § 42.

[11] Walton v. Booth, 34 La. Ann. 918.

[12] Curley v. Illinois C. R. Co., 40 La. Ann. 810, 6 South. Rep. 106; Clairain v. Western U. T. Co., 40 La. Ann. 176, 3 South. Rep. 695.

§ 100. Maryland.

Pub. Gen. Laws, art. 67, § 2, provides that the action shall be for the benefit of the wife, husband, parent, and child, and shall be brought by and in the name of the state for the use of the person entitled to damages.

Except in respect to the provision as to who may sue, the statute is a close copy of Lord Campbell's act.[13] The state is merely a formal party.[14] The action is brought for the use of such of the beneficiaries as have been actually damaged, and others need not be joined.[15]

§ 101. Massachusetts.[16]

§ 102. Mississippi.

Rev. Code, § 1510, as amended by Laws 1884, c. 62, provides that the action may be brought in the name of the widow for the death of her husband, or by the husband for the death of his wife, or by the parent for the death of a child, or in the name of a child for the death of an only parent.[17]

[13] State v. Baltimore & O. R. Co., 24 Md. 84.

[14] State v. Baltimore & O. R. Co., 17 Atl. Rep. 88. See Baltimore & O. R. Co. v. State, 62 Md. 479.

[15] Deford v. State, 30 Md. 179. In an action by a minor, the insertion of the name of a *prochein ami*, though not improper, is not required. Albert v. State, 66 Md. 325, 7 Atl. Rep. 697.

[16] See § 44.

[17] These provisions are now Code 1892, § 663. Prior to the amendment of 1884, the mother had no right of action. Amos v. Mobile & O. R. Co., 63 Miss. 509. See Vicksburg & M. R. Co. v. Phillips, 64 Miss. 698, 2 South. Rep. 537.

§ 103. Missouri.

Rev. St. §§ 4425–4427, provide that the action may be brought[18]—*first*, by the husband or wife; *second*, if there be no husband or wife, or if he or she fails to sue within six months after the death, by the minor children,[19] whether natural born or adopted, provided that, if adopted, they shall have been adopted according to the laws of adoption of the state where the person executing the deed of adoption resided; or, *third*, if the deceased be a minor[20] and unmarried,[21] whether natural

[18] Where husband, wife, and children all perished in the same disaster, *held*, in an action by the wife's administrator, that no action could be maintained. Gibbs v. Hannibal, 82 Mo. 148.

[19] Where the deceased leaves widow and minor children, and the widow fails to sue within 6 months, her right is barred. Coover v. Moore, 81 Mo. 574. But the children must sue within 12 months after the cause of action accrued, (the death.) Kennedy v. Burrier, 86 Mo. 128. If the widow sues within 6 months, and is nonsuited, she may begin again after the 6 months. Shepard v. St. Louis, I. M. & S. Ry. Co., 3 Mo. App. 550. And, if she begins suit within 6 months, and dismisses it, the children cannot, after the 6 months, maintain an action. McNamara v. Slavens, 76 Mo. 329. If she sues after 6 months, she must aver and prove that there was no minor child. Barker v. Hannibal & St. J. R. Co., 91 Mo. 86, 14 S. W. Rep. 280. *Cf.* Hayes v. Williams, (Colo.) 30 Pac. Rep. 352.

[20] Under section 4425, the parents may sue although the child has been emancipated. The court says that the statute is penal as well as compensatory. Philpott v. Missouri Pac. Ry. Co., 85 Mo. 164.

[21] In a suit by the parents for the death of a minor child, it must be alleged and proved that he left neither wife nor children. McIntosh v. Missouri Pac. Ry. Co., 108 Mo. 131, 15 S. W. Rep. 80; Dulaney v. Missouri Pac. Ry. Co., 21 Mo. App. 597; Sparks v. Kansas City S. & M. R. Co., 31 Mo. App. 111. But in an action by a mother for the death of her sons, under the Colorado statute it is sufficient to allege that plaintiff is the sole heir of the decedents, without further averring that they were unmarried and childless; nor need she allege that she was dependent on them for support. Brennan v. Molly Gibson Consolidated M. & M. Co., 44 Fed. Rep. 795.

Under the New Mexico statute, giving to the parent a right of action

born [22] or adopted, by the father and mother,[23] who may join in the suit, with an equal interest in the judgment; or, if either of them be dead, by the survivor.[24]

The Colorado statute,[25] in respect to who may sue, is the same as that of Missouri, except that in the second case the action may be brought, if there be no husband or wife, or he or she fails to sue within *one year* after the death, by the *heirs*.[26] The Code of Civil Procedure (section 9) also provides that a father, or, in case of his death or desertion of his family, the mother, may maintain an action for the death of a child, or the guardian for the death of his ward.[27]

If the deceased be a "minor and unmarried," the word "and" cannot be read "or." Isaac v. Denver & Rio Grande Ry. Co., 12 Daly, 349.

[22] It seems that no action can be maintained by a mother for the death of her bastard child. Marshall v. Wabash R. Co., 46 Fed. Rep. 269.

[23] The father and mother may sue, though divorced before the death. Buel v. St. Louis T. Co., 45 Mo. 562; s. c. Crockett (late Buell) v. St. Louis T. Co., 52 Mo. 457.

[24] Where both parents sue, and one of them dies before judgment, the entire right of action survives to the other, and the suit may be continued in his or her name alone for the full amount of the recovery authorized by law. Tobin v. Missouri Pac. Ry. Co., 18 S. W. Rep. 996.

[25] Gen. St. 1883, §§ 1030–1033.

[26] The wife may maintain an action at any time before the expiration of the period of limitation, (two years,) provided there be no heirs, or provided the heirs, if any, have not instituted judicial proceedings, or where a *bona fide* action was instituted during the first year, which, having, through an excusable mistake, been brought against a wrong party, was ineffectual. Hayes v. Williams, 30 Pac. Rep. 352.

[27] Gen. St. §§ 2529, 2530, render children liable for the support of indigent parents. In a suit by the parents for the death of a son 25 years old, the court said that the action could be maintained for the recovery of substantial damages. Denver S. P. & P. R. Co. v. Wilson, 12 Colo. 20, 20 Pac. Rep. 340. Since the son was not a minor, the action would not be maintainable under sections 1030–1033, unless they receive a different construction from that which appears to prevail in Missouri. Since the action was by both parents, it would not seem to be maintainable under Code Civil Proc. § 9. *Cf.* Brennan v. Molly Gibson C. M. & M. Co., *supra*, note 21.

The New Mexico statute also closely resembles that of Missouri.[28]

§ 104. New Mexico.[29]

§ 105. Pennsylvania.

The act of April 15, 1851, § 19,[30] provides that the widow, or, if no widow, the personal representatives, may sue; the act of April 26, 1855, § 1,[31] that the persons entitled to recover shall be the husband, widow, children, or parents.[32] By the earlier act the damages recovered were general assets of the estate, and available to creditors; by the later act the right of action was taken away from the personal representatives, and given, according to the circumstances of each case, to one of the four designated parties;[33] though the damages recovered are not necessarily to be retained by the plaintiff in his own right, but are to be distributed like personal estate in case of intestacy.[34] The act of 1855 is not changed by Const. art. 3, § 21.[35]

[28] See appendix.

[29] See § 103.

[30] 2 Bright. Purd. Dig. p. 1967, § 8.

[31] 2 Bright. Purd. Dig. pp. 1967-8, § 4.

[32] The right vests in the widow solely where the deceased leaves surviving him a widow and parents, but no children; the parents, in such case, are entitled to no part of the damages which the widow may recover. Lehigh Iron Co. v. Rupp, 100 Pa. St. 95.

[33] Huntingdon & B. T. R. Co. v. Decker, 84 Pa. St. 419; Books v. Danville, 95 Pa. St. 158. An action for the death of a father is properly brought by all the children, not merely those who prove actual damage. North Pennsylvania R. Co. v. Robinson, 44 Pa. St. 175.

Where the widow brings suit, joining the minor children, such joinder is not ground for reversal after verdict, no objection having been previously taken. Philadelphia, W. & B. R. Co. v. Conway, 112 Pa. St. 511, 4 Atl. Rep. 362; Borough of South Easton v. Reinhart, 18 Wkly. Notes Cas. 389.

[34] Huntingdon & B. T. R. Co. v. Decker, 84 Pa. St. 419.

[35] Books v. Danville, 95 Pa. St. 158.

§ 106. Rhode Island.

Pub. St. c. 204, § 18, provides that the action may be brought by the executor or administrator, or, where there is a widow only, by her.[36]

§ 107. Tennessee.

Code, § 3130, provides that the right of action shall pass to the widow, and, in case there is no widow, to the children, or to the personal representative, for the benefit of the widow and next of kin, free from claims of creditors. Section 3131 provides that the action may be instituted by the personal representative, but, if he declines it, that the widow and children may use his name on giving bond for costs, or in the form prescribed for paupers. Section 3132 provides that the action may also be instituted by the widow in her own name, or, if there be no widow, by the children.[37] If there is a widow, the right

[36] The action cannot be maintained by the father. Goodwin v. Nickerson, 28 Atl. Rep. 12.

[37] Sections 3130–1 originated with the act of 1851, c. 17, and were sections 2291–2 in Code of 1858. Section 3133 originated with Code of 1858, § 2293. The original act provided that the right of action should pass to the personal representative for the benefit of the widow and next of kin. Code 1858, § 2291. The act of 1871, c. 78, amended Code 1858, § 2291, so that the language should be the same as that of section 3130 of the present Code; and also enacted that, in addition to the remedy existing by sections 2291–2, the widow, or, if no widow, the children, might institute the suit. The latter enactment is substantially section 3132 of the present Code. Webb v. East Tennessee, V. & G. R. Co., 88 Tenn. 119, 12 S. W. Rep. 428. Before the amendment of 1871 the action could be maintained only by the executor or administrator. Bledsoe v. Stokes, 1 Baxt. 314; Flatley v. Memphis & C. R. Co., 9 Heisk. 230. See Trafford v. Adams Ex. Co., 8 Lea, 96; Chambers v. Porter, 5 Coldw. 273. Where a widow brought suit after the amendment for the death of her husband, which occurred before its enactment, it was held that the action could be maintained, and that the act was not retroactive, since it only

to sue vests in her. If there are also children, they are not necessary parties, although the action is for their benefit, as well as hers;[38] and she may dismiss or compromise the action without their consent or that of their guardian.[39] But she may waive her right, and in such case the personal representative may sue.[40] If she die pending the action by her, her administrator cannot revive and prosecute it.[41]

§ 108. Texas.

Rev. St. art. 2903, provides that the action shall be for the benefit of the surviving husband, wife,[42] children,[43] and parents, and that the amount recovered shall not be liable for debts. Article 2904 provides that the action may be brought by the parties entitled thereto, or by any one of them for the benefit of all. Article 2905 provides that, if the parties entitled shall fail to commence action within three months after the death, it shall be the duty of the executor or administrator to commence action, unless requested by all parties entitled not to do so.[44]

The persons entitled must all be made parties, or else the

affected the remedy. Collins v. East Tennessee, V. & G. R. Co., 9 Heisk. 841.

[38] Collins v. East Tennessee, V. & G. R. Co., 9 Heisk. 841.

[39] Greenlee v. East Tennessee, V. & G. R. Co., 5 Lea, 418; Stephens v. Nashville, C. & St. L. Ry., 10 Lea, 448.

[40] Webb v. East Tennessee, V. & G. R. Co., 88 Tenn. 119, 12 S. W. Rep. 428.

[41] Lougue v. Memphis & C. R. Co., 19 S. W. Rep. 490.

[42] See Dallas & W. R. Co. v. Spicker, 61 Tex. 427; International & G. N. Ry. Co. v. Kuehn, 70 Tex. 582, 8 S. W. Rep. 484; San Antonio St. Ry. Co. v. Cailloutte, 79 Tex. 341, 15 S. W. Rep. 390.

[43] An action may be brought by the guardian of minor children, (Houston & T. C. R. Co. v. Bradley, 45 Tex. 171,) or by their next friend, (International & G. N. Ry. Co. v. Kuehn, 70 Tex. 582, 8 S. W. Rep. 484.)

[44] Article 2905 does not limit the right to sue after three months to the executor or administrator. Houston & T. C. R. Co. v. Bradley, 45 Tex. 171; March v. Walker, 48 Tex. 372.

petition must set forth the names of all who are entitled.[45] But a recovery by others will not bar a beneficiary who was not included in the prior action.[46] Although by article 2904 parents are included among the parties entitled, they are not included in Const. art. 16, § 26, among the persons to whom the defendant is responsible in exemplary damages, and hence parents cannot maintain an action for exemplary damages.[47]

§ 109. Executor or administrator.

"Personal representatives" means the executor or administrator.[48] The sole right of the personal representatives to maintain the action is not affected by the fact that the deceased was a mar-

[45] Galveston, H. & S. A. R. Co. v. Le Gierse, 51 Tex. 189; Dallas & W. R. Co. v. Spiker, 59 Tex. 435; Texas & N. O. R. Co. v. Berry, 67 Tex. 238, 5 S. W. Rep. 817; East Line & R. R. R. Co. v. Culberson, 68 Tex. 664, 5 S. W. Rep. 820; Missouri P Ry. Co. v. Henry, 75 Tex. 220, 12 S. W. Rep. 828. A widow who has compromised her claim is not a necessary party in a suit in behalf of the children. Houston & T. C. R. Co. v. Bradley, 45 Tex. 171. Where certain beneficiaries were not mentioned in the original petition, and, after the expiration of the period of limitation, the plaintiff filed an amended petition in which they were mentioned, *held*, that the defendant could not object that the action was not brought for their benefit. Paschall v. Owen, 77 Tex. 583, 14 S. W. Rep. 208. The petition need not negative the existence of other beneficiaries than those named. Southern C. P. & M. Co. v. Bradley, 52 Tex. 587.

[46] Nelson v. Galveston, H. & S. A. Ry. Co., 78 Tex. 621, 14 S. W. Rep. 1021; Galveston, H. & S. A. R. Co. v. Kutac, 72 Tex. 643, 11 S. W. Rep. 127.

[47] Winnt v. International & G. N. Ry. Co., 74 Tex. 32, 11 S. W. Rep. 907; Gulf, C. & S. F. Ry. Co. v. Compton, 75 Tex. 667, 13 S. W. Rep. 667. See, also, Houston & T. C. Ry. Co. v. Cowser, 57 Tex. 306; International & G. N. R. Co. v. Kindred, Id. 496; Houston & T. C. Ry. Co. v. Baker, Id. 419. Whether article 2904 is constitutional, so far as it gives such a right of action to parents, *quære*. Texas & P. Ry. Co. v. Hall, 19 S. W. Rep. 121.

[48] Dennick v. Railroad Co., 103 U. S. 11.

ried woman, and that the husband must have joined had the action been brought by her in her lifetime, as the condition that the act or neglect must be such that the party injured might have maintained an action was intended to declare the character of the act or neglect, and not the person by whom the action could be maintained.[49] A temporary administrator may sue.[50]

§ 110. Foreign administrator.

A foreign executor or administrator, in the absence of a statute empowering him to do so, cannot sue,[51] but, in jurisdictions where such statutes exist, a foreign administrator may maintain an action for the death of his intestate.[52] In a Kansas

[49] Green v. Hudson River R. Co., 31 Barb. 260; affirming s. c. 16 How. Pr. 268. Lynch v. Davis, 12 How. Pr. 328, overruled. Whiton v. Chicago & N. W. R. Co., 21 Wis. 310; Dimmey v. Wheeling & E. G. Ry. Co., 27 W. Va. 32; South & N. A. R. Co. v. Sullivan, 59 Ala. 272. See Long v. Morrison, 14 Ind. 595.

[50] Louisville & N. R. Co. v. Chaffin, 84 Ga. 519, 11 S. E. Rep. 891; Houston & T. C. Ry. Co. v. Hook, 60 Tex. 408.

[51] Williams, Executors, 362. A Georgia statute authorized foreign executors and administrators to sue in cases where the decedent was not a citizen, and died without the state. *Held*, that an administrator appointed in Alabama could not maintain an action where deceased was killed in Georgia. Southwestern R. Co. v. Paulk, 24 Ga. 356. See Conner's Adm'x v. Paul, 12 Bush, 144. Where the remedy is by indictment, it must allege that administration has been taken out in the state. Commonwealth v. Sanford, 12 Gray, 174; Commonwealth v. East Boston F. Co., 13 Allen, 589.

[52] Jeffersonville R. Co. v. Hendricks, 26 Ind. 228; s. c. 41 Ind. 48. The court says that the foreign administrator will hold the fund in trust for the benefit of the beneficiaries under the Indiana statute, and that it is not to be presumed that the foreign courts will permit the fund to be divested.

The Illinois statute authorizes foreign administrators to sue to enforce claims of the estate. *Held*, that a foreign administrator could maintain an action to recover for the death of his intestate. The court says that, while it may be that this is not in the strictest sense a claim of the estate, yet, in a broad and general sense, it is a part of the es-

case it was held that a foreign administrator might sue by force of the statute conferring a right of action on executors and administrators in all cases of death caused by wrongful act, etc.; Brewer, J., observing that the language was general, and purported to give the cause of action in every case happening within the state, whether the deceased were a resident or a nonresident.[53] And the same construction has recently been placed upon the Kentucky statute.[54] But in a later Kansas case the right to sue was denied to a Missouri administrator, on the ground that by the laws of that state the action was only maintainable by the persons actually interested, and that a foreign administrator could not exercise in Kansas powers which he could not exercise in his own state.[55]

§ 111. Appointment of administrator.

When the jurisdiction of the probate court to appoint an administrator depends upon the existence of assets of the deceased to be administered, the question arises whether a claim for damages for his death constitutes such assets. Such a

tate. Wabash, St. L. & P. Ry. Co. v. Shacklett, 10 Ill. App. 404, affirmed 105 Ill. 364; Union Ry. & T. Co. v. Shacklet, 119 Ill. 232, 10 N. E. Rep. 896.

[53] Kansas Pac. Ry. Co. v. Cutter, 16 Kan. 568.

[54] The right of action is given by Gen. St. Ky. c. 57, p. 550, to the personal representative of "any person" whose life is lost, etc., to be pursued "in the same manner that the person himself might have done for any injury where death did not ensue." The court held that, under its general powers, it had authority to require a bond to secure the payment of the claims of any Kentucky creditors. Marvin v. Maysville St. R. & T. Co., 49 Fed. Rep. 486.

[55] Limekiller v. Hannibal & St. J. R. Co., 33 Kan. 83, 5 Pac. Rep. 401. Kansas Pac. Ry. Co. v. Cutter is distinguished on the ground that in that case the law of Colorado was not pleaded or referred to. Hulbert v. City of Topeka, 34 Fed. Rep. 510. By a recent amendment, when the deceased was a nonresident, or no personal representative has been appointed, the widow or next of kin may sue. Gen. St. Kan. § 4519.

claim, although enforceable by the administrator, belongs in fact to the persons for whose benefit the right of action is given, and who do not include creditors of the estate; and, if the statutes which confer jurisdiction upon this ground are literally followed, jurisdiction in such cases cannot be obtained. This view has been taken in Indiana, Kansas, and Illinois;[56] while in Iowa, Minnesota, and Nebraska it has been held that the fact that this right of action is given to the personal representative implies the right to appoint, if necessary, an administrator to enforce it.[57]

[56] Jeffersonville R. Co. v. Swayne's Adm'r, 26 Ind. 477; Perry v. St. Joseph & W. R. Co., 29 Kan. 420. The Kansas statute provided that, upon the death of an inhabitant of the state, letters might be granted by the probate court of the county in which he was an inhabitant; and that, when any person should die intestate in any other state, leaving any estate to be administered in Kansas, administration might be granted in any county in which there was an estate to be administered. Whether the jurisdiction would depend on the existence of assets in the case of an inhabitant of the state, *quære*. Union Pac. Ry. Co. v. Dunden, 37 Kan. 1, 14 Pac. Rep. 501.

By the Iowa statute, the court had authority to grant administration when deceased was an inhabitant of the county, or left property. Letters were issued by the clerk of the Iowa probate court upon the estate of a resident of Illinois, who had no property in Iowa. In a suit by the Iowa administrator in Illinois, where deceased was killed, *held*, that the action could not be maintained. The court says that the act of the clerk being ministerial, and not judicial, his authority was open to collateral attack. Illinois Cent. R. Co. v. Cragin, 71 Ill. 177; Marvin v. Maysville St. R. & T. Co., 49 Fed. Rep. 436.

It is irrelevant to inquire as to assets where the jurisdictional fact recited is not *bona notabilia*, but residence in the county. Louisville & N. R. Co. v. Chaffin, 84 Ga. 519, 11 S. E. Rep. 891.

[57] An administrator may be appointed in Iowa for the purpose of bringing an action to recover for the death of his decedent, which occurred in Illinois, although decedent left no property in Iowa. Morris v. Chicago, R. I. & P. R. Co., 65 Iowa, 727, 23 N. W. Rep. 143; Hutchins v. St. Paul, M. & M. Ry. Co., 44 Minn. 5, 46 N. W. Rep. 79; Missouri Pac. Ry. Co. v. Lewis, 24 Neb. 848, 40 N. W. Rep. 401. Where a person was killed in Connecticut, *held*, that an administrator appointed in

In an action by the administrator for the death of his intestate his authority to sue cannot be questioned for mere irregularity in his appointment.[58] Whether it can be questioned in such collateral proceeding on the ground that, by reason of the nonexistence of assets, the probate court had no jurisdiction to make the appointment, is a point which has frequently been raised in cases in which the court did not deem it necessary to pass upon it.[59] In a Kansas case it has been decided that such a defense may be raised, upon the ground that the appointment, being made without jurisdiction, is void for all purposes.[60] An opposite conclusion was reached in a case in the United States district court for Oregon, which decides

Maine, where intestate was domiciled, was entitled to an ancillary administration in the former state, for the purpose of prosecuting the suit, and that it was enough if the probate court was satisfied that there was an apparent claim, and a *bona fide* intention to prosecute it. Hartford & N. H. R. Co. v. Andrews, 36 Conn. 218.

[58] The omission of the surrogate to require the administrator to file a bond cannot be taken advantage of by the defendant. Sullivan v. Tioga R. Co., 44 Hun, 304, 12 Civ. Proc. 301. Nor irregular service of notice where the court had obtained jurisdiction. Chilton v. Union Pac. Ry. Co., (Utah,) 29 Pac. Rep. 968.

[59] Jeffersonville R. Co. v. Swayne's Adm'r, *supra;* Illinois Cent. R. Co. v. Cragin, *supra;* Hutchins v. St. Paul, M. & M. Ry. Co., *supra;* Missouri Pac. Ry. Co. v. Lewis, *supra;* Louisville & N. R. Co. v. Chaffin, *supra.* See *In re* Estate of Hardy v. Minneapolis & St. L. Ry. Co., 35 Minn. 198, 28 N. W. Rep. 219; Denver, etc., Ry. Co. v. Woodward, 4 Colo. 1.

[60] Perry v. St. Joseph & W. R. Co., 29 Kan. 420. In Union Pac. Ry. Co. v. Dunden, 37 Kan. 1, 14 Pac. Rep. 501, the issue was raised and evidence was introduced tending to show that the decedent left no estate; but it was held that the evidence was not conclusive as against the records and findings of the probate court, which made a *prima facie* case, showing that decedent left "an estate of personal articles," and that the jury had a right to pass upon the weight of the evidence. In Jacobs' Adm'r v. Louisville & N. R. Co., 10 Bush, 263, plaintiff introduced in evidence the order appointing him, which did not set out the facts giving jurisdiction. *Held*, that the order was *prima facie* evidence, and that the burden of proving that there was no jurisdiction was on defendant, who raised the issue.

that when the jurisdiction depends upon the residence of the deceased in the county, and the decree expressly finds such residence, the decree cannot be attached on the ground of non-residence.[61]

In Indiana it has been held that a railroad company against whom an action is being prosecuted by the administrator has such an interest in his appointment as to enable it to maintain a petition to the probate court for a revocation of the letters, upon the ground that the decedent left no assets.[62] A person against whom an administrator is entitled to bring suit for the killing of his intestate cannot appeal from the order appointing such administrator, under a provision that an appeal "can be taken by a party aggrieved."[63]

§ 112. Widow.

The right of a widow to sue vests in her at the death of the husband, and is not divested by her subsequent marriage.[64]

[61] Holmes v. Oregon & C. Ry. Co., 5 Fed. Rep. 523. Deceased, a child, was killed on his arrival in New York, where his father had lived for seven months. In an action by the father, who was appointed administrator in New York, *held*, that the evidence was sufficient to show *prima facie* that the deceased was domiciled there, and that, assuming that the point could be raised collaterally, the letters were properly issued. Kennedy v. Ryall, 67 N. Y. 379.

[62] Jeffersonville R. Co. v. Swayne's Adm'r, 26 Ind. 477. Elliott, J., says that, the letters being void, a recovery would be no bar to a subsequent suit by the legal administrator, and that hence the company is interested in revoking the appointment. A similar petition was brought in Wheeler v. St. Joseph & W. Ry. Co., 31 Kan. 640, 3 Pac. Rep. 297, but it appeared that the deceased left sufficient estate, and the right of the company to maintain such a petition was not determined.

[63] *In re* Estate of Hardy v. Minneapolis & St. L. Ry. Co., 35 Minn. 198, 28 N. W. Rep. 219.

[64] Georgia, etc., R. Co. v. Garr, 57 Ga. 277; International & G. N. Ry. Co. v. Kuehn, 70 Tex. 582, 8 S. W. Rep. 484; Crockett (late Buell) v. St. Louis T. Co., 52 Mo. 457, (affirming Buel v. Same, 45 Mo. 562.) See § 176.

She is not prevented from maintaining the action by the fact that she had been living in separation from him.[65]

§ 113. Parents.[66]

§ 114. Heirs.[67]

§ 115. Guardian.[68]

Under the Indiana statute it has been held that the right of action of the guardian is limited to the recovery of damages to reimburse the estate of the ward for any actual loss.

§ 116. Right to sue confined to statutory plaintiffs.

The action is maintainable only by the person who is by the terms of the statute authorized to maintain it. If that person is the executor or administrator, the action cannot be brought by the beneficiaries;[69] and conversely, if the persons entitled to sue are those who are entitled to the benefit of the action, it cannot be maintained by the executor or administrator.[70]

[65] Dallas & W. Ry. Co. v. Spicker, 61 Tex. 427. But see Ft. Worth & D. C. Ry. Co. v. Floyd, 21 S. W. Rep. 544.

[66] See § 128. [67] See §§ 93, 41.

[68] Louisville, N. A. & C. Ry. Co. v. Goodykoontz, 119 Ind. 111, 21 N. E. Rep. 472. See § 89. The right to sue for the death of a ward is given in California, Colorado, Idaho, Indiana, Montana, Oregon, Utah, and Washington.

[69] Davis v. St. Louis, I. M. & S. Ry. Co., 53 Ark. 117, 13 S. W. Rep. 801; Kramer v. Market St. R. Co., 25 Cal. 434; Covington St. Ry. Co. v. Packer, 9 Bush, 455; City of Chicago v. Major, 18 Ill. 349; Hagen v. Kean, 3 Dill. 124; Peru & I. R. Co. v. Bradshaw, 6 Ind. 146; Nash v. Tousley, 28 Minn. 5, 8 N. W. Rep. 875; Scheffler v. Minneapolis & St. L. Ry. Co., 32 Minn. 125, 19 N. W. Rep. 656; Wilson v. Bumstead, 12 Neb. 1, 10 N. W. Rep. 411; Worley v. Cincinnati, H. & D. R. Co., 1 Handy, 481; Weidner v. Rankin, 26 Oh. St. 522; Goodwin v. Nickerson, 28 Atl. Rep. 12; Edgar v. Castello, 14 S. C. 20.

[70] Miller v. Southwestern R. Co., 55 Ga. 143; Gibbs v. Hannibal, 82 Mo. 143.

§ 117. Joinder of parties.

Whether it is necessary, under statutes providing that the action shall be brought directly by the persons in interest, to join all such persons, depends upon the requirements of the particular enactment.[71]

§ 118. Who may be sued.

The action being maintainable, according to the terms of most of the statutes, whenever the act or neglect causing death was such that the party injured might have maintained an action, the question who may be sued will in general depend in each case upon precisely the same considerations that would govern in an action for personal injury. It has been held that the action could be maintained against the trustee or receiver of a corporation,[72] against the master of a vessel,[73] and against the state,[74] and that it could not be maintained against a lessor.[75] Many

[71] See §§ 93. 100, 105. 107, 108.

[72] Texas & P. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. Rep. 905; Lamphear v. Buckingham, 33 Conn. 237; Meara's Adm'r v. Holbrook, 20 Oh. St. 137; Little v. Dusenberry, 46 N. J. L. 614; McNulta v. Lockridge, 27 N. E. Rep. 452. See Cardot v. Barney, 63 N. Y. 281. But in State v. Consolidated E. & N. A. Ry. Co., 67 Me. 479, it was *held* that a railroad corporation was not liable to indictment under the act, if it were in exclusive possession and control.

[73] Kennedy v. Ryall, 67 N. Y. 379, 40 N. Y. Super. Ct. 347.

[74] The fact that the statute giving a right of action for death omits to include actions against the state does not affect the right of an administratrix to proceed before the board of claims to recover damages for the drowning of her husband in the canal; the state assuming, under Laws 1870, c. 321, the same measure of liability incurred by individuals and corporations engaged in similar enterprises. Bowen v. State, 106 N. Y. 166, 15 N. E. Rep. 56; Splittorf v. State, 106 N. Y. 205, 15 N. E. Rep. 322. See Cannon v. Rowland, 34 Ga. 422.

[75] Blackwell v. Wiswall, 14 How. Pr. 257; s. c. 24 Barb. 355; Norton

of the statutes, in express terms, declare that corporations shall be liable; but, whether they are so included or not, the action is maintainable against them as much as against individuals.[76] Under a Minnesota statute, making vessels liable for all injuries done by them to persons or property, it has been held that an action is maintainable against a steamboat by the administrator of a person who was run down by the vessel and killed.[77]

§ 119. Abatement on death of wrongdoer.

The statutes which create a cause of action, with one or two exceptions,[78] do not undertake, either expressly or impliedly, to change the common-law rule which precludes the maintenance of personal actions against the representatives of the wrongdoer. Accordingly, where the statute makes no such exception, the right of action abates upon the death of the offending party.[79] A different view was, indeed, taken in the early New York case of Yertore v. Wiswall,[80] in which it was held

v. Wiswall, 26 Barb. 618. But in Palmer v. Utah & N. Ry. Co., 16 Pac. Rep. 558, it was *held* that a railroad company cannot avoid its liability by showing that its road and trains were operated by another company, without showing the consent of the power whence it obtained its franchise.

[76] Southwestern R. Co. v. Paulk, 24 Ga. 356; Chase v. American Steamboat Co., 10 R. I. 79; Donaldson v. Mississippi & M. R. Co., 18 Iowa, 280.

[77] Boutiller v. The Milwaukee, 8 Minn. 97, (Gil. 72.)

[78] Alabama, Arizona, Georgia, Iowa, Mississippi, North Carolina, Texas, Virginia. See appendix.

[79] Green v. Thompson, 26 Minn. 500, 5 N. W. Rep. 376; Hamilton v. Jones, 125 Ind. 176, 25 N. E. Rep. 192. *Cf.* Pennsylvania Co. v. Davis, (Ind. App.) 29 N. E. Rep. 425.

[80] 16 How. Pr. 8. See, also, Doedt v. Wiswall, 15 How. Pr. 128, which *held* that an action might be maintained against the representatives of the wrongdoer, if the complaint stated facts constituting a cause of action founded on contract. The earliest New York case was in accord with the later authorities. Norton v. Wiswall, 14 How. Pr. 49.

that the right of action survived by force of the statute of that state providing that actions for "wrongs done to the property rights or interests of another" might be maintained against the executor or administrator. But this case was overruled in Hegerich v. Keddie,[81] which holds that the "property rights or interests" referred to are those of the deceased, and that the statute simply provides for the survival, in case of the death of either party, or causes of action which had previously accrued to the testator or intestate. The same conclusion was reached in Arkansas,[82] under a substantially similar enactment; in Ohio,[83] where the statute provided for the survival of actions for injuries to the estate, real and personal; and in Pennsylvania,[84] where the statute provided that executors and administrators might prosecute and should be liable to be sued in "all personal actions which the decedent might have commenced, * * * except * * * actions for wrong done to the person." In the latter state it is held that a constitutional provision that the right of action for injuries resulting in death shall survive does not mean that it shall survive after the death of the wrongdoer.[85]

[81] 99 N. Y. 258, 1 N. E. Rep. 787, (overruling s. c. 32 Hun, 141;) Moriorty v. Bartlett, 99 N. Y. 651, 1 N. E. Rep. 794. Code Civil Proc. § 764, provides that after verdict, report, or decision, in an action for a personal injury, the action does not abate by the death of a party. *Held* that, on the death of the defendant, the plaintiff failing to show a verdict, etc., in her favor, the cause of action abated under the decision in Hegerich v. Keddie. Pessini v. Wilkins, 54 N. Y. Super. Ct. 146.

[82] Davis v. Nichols, 15 S. W. Rep. 880.

[83] Russell v. Sunbury, 37 Oh. St. 372.

[84] Moe v. Smiley, 125 Pa. St. 136, 17 Atl. Rep. 226.

[85] Moe v. Smiley, *supra*.

CHAPTER VII.

STATUTES OF LIMITATION.

§ 120. Limitation of time for commencing action.
121. Nature of limitation.
122. When the time begins to run.
123. Notice of claim.

§ 120. Limitation of time for commencing action.

Lord Campbell's act contains a proviso that "every such action must be commenced within twelve calendar months after the death of such deceased person," and a similar provision is contained in a majority of the statutes, some limiting the time to one year and some to a longer period. Other statutes provide that the action must be commenced "within one year," or "within two years," or within a certain period after it accrues. Still other statutes limit the time from the act or neglect or from the injury. A few statutes[1] contain no special limitation, and leave the period to be determined by the general provisions regulating the limitation of actions so far as they may be applicable.[2]

§ 121. Nature of limitation.

These special limitations differ in some respects from those created by the ordinary statutes of limitation. Inasmuch as the act which creates the limitation also creates the action to

[1] Delaware, Georgia, Iowa, Kentucky, Michigan, Nevada, North Dakota, Rhode Island, South Dakota, Tennessee, and Washington.

[2] An action may be maintained, under the statute, for the wrongful killing of plaintiff's intestate, although the death did not occur within a year and a day from the time of the injury. Schlichting v. Wintgen, 25 Hun, 626.

which it applies, the limitation is not merely of the remedy, but is of the right of action itself.[3] The right is given subject to the limitation, and a subsequent change in the period of limitation will not extend the period so as to affect an existing right of action.[4] If the right is enforceable in another jurisdiction than that of the courts of the state which enacted the statute, the right will be enforced subject to the limitation.[5]

[3]The declaration alleged the time of the death, which was within two years before the commencement of the action, without specifically alleging that it was within the two years. *Held*, that after verdict the declaration was good. Poland, C. J., says that the provision is not like an ordinary statute of limitation, which must be specially pleaded, but is an absolute bar, not removable by any of the ordinary exceptions or answers to the statute of limitations. Hill v. New Haven, 37 Vt. 501.

The summons and complaint showed that the action was not brought within the year, and the defendant answered the statute of limitation. *Held*, that judgment should be ordered for defendant on the pleadings. The court says: "This is not strictly a statute of limitation. It gives a right of action that would not otherwise exist. * * * It must be accepted in all respects as the statute gives it. Why the action was not brought within the time does not appear, but any explanation in that respect would be unavailing; as there is no saving clause as to the time within which the action must be begun." Taylor v. Cranberry I. & C. Co., 94 N. C. 525. Approved in Best v. Town of Kinston, 106 N. C. 205, 10 S. E. Rep. 997.

[4]Pittsburg, C. & St. L. Ry. Co. v. Hine, 25 Oh. St. 629; Benjamin v. Eldridge, 50 Cal. 612. See Commonwealth v. Boston & W. R. Corpo., 11 Cush. 512; Commonwealth v. East Boston Ferry, 13 Allen, 589.

[5]If a suit *in rem* can be maintained in admiralty against a vessel for the recovery of damages for the death of a human being, on the high seas, or on waters navigable from the sea, when an action at law is given by statute in the state where the wrong was done or where the vessel belonged, it must be commenced within the time prescribed by the statute. Chief Justice Waite observed: "The statute creates a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * If the ad-

The statute of limitation need not be pleaded, and, if the declaration shows that the action was not brought within the time limited, it is demurrable.[6] It is said that no exception can

miralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. * * * The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." The Harrisburg, 119 U. S. 199, 7 Sup. Ct. Rep. 140.

An action in the New York courts by a foreign administrator against a British corporation, for the death of his intestate while on defendant's ship on the high seas, was dismissed on the ground that a nonresident plaintiff cannot sue a foreign corporation for a cause of action arising out of the state. Subsequently a resident was apppointed administrator *d. b. n.*, who began suit against defendant more than a year after the death,—the limit of time fixed by Lord Campbell's act,—but within one year from the dismissal of the first action. The New York act fixed the limitation at two years. *Held*, that an action was barred, and that Code Civil Proc. N. Y. § 405, which extends the period of limitation for one year in favor of a plaintiff, whose action, commenced within due time, has been terminated in any other manner than by a voluntary discontinuance, etc., did not enable plaintiff to maintain the action after the time limited in the British statute, as such limitation inheres in the right of action itself. Cavanagh v. Ocean Steam Nav. Co., 13 N. Y. Sup. 540. See, also, s. c., 9 N. Y. Sup. 198; 11 N. Y. Sup. 547; 12 N. Y. Sup. 609; Boyd v. Clark, 8 Fed. Rep. 849.

The provision of Code Civil Proc. N. Y. § 401, that the time during which defendant is out of the state shall not be deemed part of the time limited for the commencement of actions, does not apply to an action for death under section 1902, for section 414 declares that the provisions of chapter 4 (which contains section 401) shall apply except where a different limitation is expressly prescribed by law. Londriggan v. New York, N. H. & H. R. Co., 5 Civ. Proc. R. 76. See, also, Bonnell v. Jewett, 24 Hun, 524.

[6] Hanna v. Jeffersonville R. Co., 32 Ind. 113. "Ordinarily," says Frazer, C. J., "statutes of limitations must be pleaded, though the facts appear by the averments of the complaint. The reason for this is that usually there are exceptions to the statute of limitations. * * * But in the case before us there are no exceptions." Approved in Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48. The action being purely statutory must be brought within the two years; a complaint that shows

be alleged to excuse the delay;[7] but whether the disabilities and exceptions which in general prevent the running of the statute of limitations are or are not applicable to the special limitation in question will depend upon the language of the provisions creating such exceptions and disabilities. In Texas[8] and Kentucky[9] the statute makes the ordinary disabilities available in this class of actions. What is to be deemed a commencement of suit must also depend upon the varying provisions of the statutes regulating practice.[10]

that the cause of action is barred is demurrable. George v. Chicago, M. & St. P. R. Co., 51 Wis. 603, 8 N. W. Rep. 374.

[7] Hill v. New Haven, *supra;* Taylor v. Cranberry, L. & C. Co., *supra;* Hanna v. Jeffersonville R. Co., *supra;* George v. Chicago, M. & St. P. R. Co., *supra.* The time between the death and the appointment of the administrator cannot be excluded. Rugland v. Anderson, 30 Minn. 386, 15 N. W. Rep. 676.

[8] The fact that at the time of the death one of the parties entitled to sue does not set the statute of limitations in motion against a posthumous child. Nelson v. Galveston, H. & S. A. Ry. Co., 78 Tex. 621, 14 S. W. Rep. 1021. But where the children are adults, the statute begins to run against them at once. Paschall v. Owen, 77 Tex. 583, 14 S. W. Rep. 208.

[9] Gen. St. Ky. c. 71, art. 3, § 3, provides that an action for an injury to the person "shall be commenced within one year next after the cause of action accrues," and chapter 71, art. 4, § 2, provides that "if a person entitled to bring any of the actions mentioned * * * was, at the time the cause of action accrued, an infant, * * * the action may be brought within the like number of years after the removal of such disability." *Held,* that there is but one cause of action, and can be but one recovery for damages for death resulting from personal injury, and that such action must be brought within one year from the time the cause of action accrues; and that the statutory provision on behalf of infants, etc., is operative only where there is no person *in esse,* as a widow or administrator, who has a right to sue. Louisville & N. R. Co. v. Sanders, 86 Ky. 259, 5 S. W. Rep. 563. In Nelson v. Galveston, H. & S. A. Ry. Co., the court distinguishes this case on the ground that in Kentucky there can be but one action.

[10] Under section 2532 of the Iowa Code providing that "placing the notice in the hands of the sheriff for immediate service * * * shall,

§ 122. When the time begins to run.

When the time is limited to a certain period "after the death," or after the act or omission, no question can arise as to the time when the statute begins to run. Such limitations, however, as within a certain period after the cause of action "accrues," or "within two years," must be construed in connection with the other provisions of the particular statute. Thus, under a former Connecticut statute, limiting the time "within one year after the cause of action shall have arisen," it was held that the cause of action did not exist, and that hence the time did not begin to run until after the appointment of an administrator.[11] But in Missouri, where the right of action is given directly to the persons interested, without the intervention of an administrator, under a provision that the action must be commenced within a year "after the cause of action shall accrue," it is held that the time begins to run at the death.[12] In Indiana a proviso that the action must be commenced "within two

so far as the statute of limitations is concerned, be deemed the commencement of the action," the delivery of the notice to the sheriff, and not the filing of the petition, is the commencement of the action. Ewell v. Chicago & N. W. Ry. Co., 29 Fed. Rep. 57.

The Wisconsin statute provided that "the presentment of any claim, in cases where by law such presentment is required, * * * to the board of audit of the proper town, * * * shall be deemed the commencement of an action within the meaning of any law limiting the time for the commencement of an action thereon." In an action against the town the notice was presented within two years from the death, but the summons was not served until after the two years. *Held*, that the action was not barred. Parish v. Town of Eden, 22 N. W. Rep. 899.

[11] Andrews v. Hartford & N. H. R. Co., 34 Conn. 57. And, under the Iowa Code providing that such actions should be barred two years "after their causes accrue," a similar construction was approved. Sherman v. Western Stage Co., 24 Iowa, 515. The Iowa statute has been changed, *infra*.

[12] Kennedy v. Burrier, 36 Mo. 128.

years" has been held to mean within two years from the death.[13]

In Iowa, Tennessee, and Kentucky there are no limitations applicable solely to this class of actions, and the question has arisen under the general statute of limitations applicable to actions founded on injuries to the person. In Iowa, where the statute provides that "actions founded on injuries to the person" may be brought within two years "after their causes accrue," and the statute giving the action in case of death declares that "such action shall be deemed a continuing one, and to have accrued to such representative or successor at the same time it did to the deceased if he had survived," it is held that the time begins to run from the injury.[14] In Tennessee, also, where the statute of limitations provides that actions for injuries to the person shall be brought within one year after the cause of action accrued, it is held that the action which is given in case of death accrues at the time of the injury, and is not suspended between the death and the qualification of the administrator.[15] But in Kentucky, under a similar limitation, it seems that the time does not begin to run until the administrator qualifies.[16]

[13] Hanna v. Jeffersonville R. Co., 32 Ind. 113. The court says that the widow and next of kin, to whom the action accrues, can procure administration when they wish; and that, in a class of actions that usually arise against corporations, whose business is performed by servants who are constantly being changed, the reason for a short period of limitation is imperative.

[14] Ewell v. Chicago & N. W. Ry. Co., 29 Fed. Rep. 57. Sherman v. Western Stage Co., *supra*, was decided before the amendment declaring that the action shall be deemed to have accrued to the representative at the same time as to the deceased. See, also, Sherman v. Western Stage Co., 22 Iowa, 556.

[15] Fowlkes v. Nashville & D. R. Co., 5 Baxt. 663; s. c., 9 Heisk. 839. The question was raised, but not answered, in Flatley v. Memphis & C. R. Co., 9 Heisk. 230. See Bledsoe v. Stokes, 1 Baxt. 312.

[16] Louisville & N. R. Co. v. Sanders, 86 Ky. 259, 5 S. W. Rep. 563. In

An amendment may be made after the expiration of the period of limitation, when it does not state a new cause of action.[17]

§ 123. Notice of claim.

It has been held in New Hampshire that a statute providing that, before an action can be brought against a city for injuries, the plaintiff must file his claim in the city clerk's office, does not apply to an action brought for damages for injuries resulting from death.[18] And in Wisconsin it has been held that a failure to give notice required to be given to the city within 90 days after the happening of injuries resulting from a defect in the street, in order to entitle the party injured to recover, would not defeat an action by the administrator for the death, when the death occurred within 90 days after the happening of the injury.[19]

the original act the action was to be commenced within one year from the death; and it was held that, unless the petition showed that the action was barred, the statute must be pleaded. Chiles v. Drake, 2 Metc. (Ky.) 146.

[17] See § 187.

[18] Clark v. City of Manchester, 62 N. H. 577; Jewett v. Keene, Id. 701.

[19] McKeigue v. City of Janesville, 68 Wis. 50, 31 N. W. Rep. 298. See Parish v. Town of Eden, 22 N. W. Rep. 899. In Dale v. Webster County, 76 Iowa, 870, 41 N. W. Rep. 1, it was held that the requirements of a statute providing for notice were sufficiently complied with without proof of the death or specification of the facts constituting negligence.

The cases concerning notice in Massachusetts have no application to cases arising under the statutes of other states for injuries resulting in death. See § 44, and cases cited in notes 70 and 82.

CHAPTER VIII.

MATTERS OF DEFENSE.

§ 124. Release or recovery by party injured.
125. Release or recovery by plaintiff or beneficiary.
126. Cause of action of party injured survives by statute in some states.
127. Concurrent actions by administrator.
128. Concurrent actions by parent or heirs and by administrator.

§ 124. Release or recovery by party injured.

If the deceased, in his lifetime, has done anything that would operate as a bar to a recovery by him of damages for the personal injury, this will operate equally as a bar in an action by his personal representatives for his death. Thus, a release by the party injured of his right of action,[1] or a recovery of dam-

[1] A plea of accord and satisfaction with the deceased in his lifetime is good. Read v. Great Eastern Ry. Co., 9 Best & S. 714, L. R. 3 Q. B. 555, 37 L. J. Q. B. 278, 18 L. T. (N. S.) 822, 16 Wkly. R. 1040.

Deceased contracted with his employer, for himself and his representatives, and any person entitled in case of death, not to claim any compensation under the employers' liability act for personal injury, whether resulting in death or not. *Held*, that his widow, suing under Lord Campbell's act, was bound by the contract. Griffiths v. Earl of Dudley, 9 Q. B. D. 357.

Defendant steamship company issued to deceased a passenger ticket which contained a condition that the company would not be responsible for any loss or damage arising from the perils of the sea, etc. *Held*, in an action under Lord Campbell's act, that this condition exempted defendant. Haigh v. Royal Mail S. P. Co., 52 L. J. Q. B. 640; 49 L. T. (N. S.) 802; 5 Asp. M. C. 189, (affirming s. c., 52 L. J. Q. B. 395.)

Defendant introduced in evidence a receipt, signed by deceased, showing that defendant had settled with deceased in his lifetime, and paid his claim for the injury in full. *Held*, a bar to the action. Dibble v. New York & E. R. Co., 25 Barb. 183. In Littlewood v. Mayor, *infra*, it is said that this case went before the court of appeals, but that the

ages by him for the injury,[2] is a complete defense in the statutory action.

But, while the courts have agreed in their decisions, they have had difficulty in reconciling them with the express dec-

appeal does not appear ever to have been decided, though several times argued, the court having been divided. 21 How. Pr. 593; 23 How. Pr. 599.

Deceased was killed while riding on a free pass exempting defendant from liability for the negligence of its agents. *Held*, in an action under the statute, that a charge that defendant would be liable for gross and culpable negligence, notwithstanding the exemption, was erroneous. Perkins v. New York C. R. Co., 24 N. Y. 196. See Blair v. Erie Ry. Co., 66 N. Y. 313. In Roesner v. Hermann, 10 Biss. 486, 8 Fed. Rep. 782, a plea setting up a contract between deceased and his employer, releasing the employer from all liability for injury or death, was held bad, but on the ground that the contract was void. See, also, Rose v. Des Moines V. R. Co., 39 Iowa, 246; Annas v. Milwaukee & N. R. Co., 67 Wis. 46, 30 N. W. Rep. 282.

Where deceased, during his lifetime, released the wrongdoer, his administrator cannot maintain the action, unless he shows that the release was procured by fraud or duress. Gen. St. S. C. § 2186, which excludes a right of action in the administrator for a death by wrongful act where deceased, in his lifetime, has recovered a final judgment for the injury, does not imply that the administrator may maintain the action in every other case, but was only intended to prevent a double remedy in any case. Price v. Richmond & D. R. Co., 33 S. C. 556, 12 S. E. Rep. 418.

Under the Georgia statute giving a right of action in case of homicide, a contract between deceased and his employer, exempting the latter from liability for negligence, is a bar in an action by the wife, if the deceased was killed under such circumstances as by his contract would have debarred him, if he had lived, from maintaining an action for personal injury. Western & A. R. Co. v. Strong, 52 Ga. 461; Hendricks v. Western & A. R. Co., 52 Ga. 467.

[2]The answer alleged, and it was admitted on trial, that plaintiff's intestate brought suit against defendant for injuries sustained at the time and place mentioned in the complaint, and recovered judgment, which was paid. *Held*, that the action was properly dismissed by the court Littlewood v. Mayor, 89 N. Y. 24, (affirming s. c., 15 J. & S. 547.) This case overrules Schlichting v. Wintgen, 25 Hun, 626. Hecht v. Ohio & M. Ry. Co., (Ind.) 33 N. E. Rep. 302; Whitford v. Panama

laration of the statute that the action may be maintained whenever the act, neglect, or default is such that the party injured, if death had not ensued, might have maintained an action. The question has sometimes been discussed as if it depended on whether the statutory right of action is a new right of action, or only a continuation of the right of action of the party injured. Thus, in Read v. Great Eastern Ry. Co., Blackburn, J., found it necessary to qualify the declarations of the earlier cases on this point, and observes that "the action is not new in the sense that there is an independent cause of action vested in the representatives of the deceased in their own right." He concludes: "I think it [the statute] meant to say that, if the party injured had not in his lifetime received compensation, the defendant would be liable to an action by the executor or relatives for the loss which they had sustained from his death." And in Griffiths v. Earl of Dudley, Field, J. says: "Read v. Great Eastern Ry. Co. is a clear decision that Lord Campbell's act did not give any new cause of action, but only substituted the right of the representative to sue in the place of the right which the deceased himself would have had if he had survived."[3] In Littlewood v. Mayor, on the other hand, Rapallo, J., maintains that the statutory right of action is a new right, and not a mere continuation of the right of the

R. Co., 23 N. Y. 465, opinion of Comstock, C. J. See Barley v. Chicago & A. R. Co., 4 Biss. 480, in which it was held that the recovery in a former action for medical attendance, expenses, and loss of service to time of death, does not affect the damages. The fact that a suit commenced by deceased was pending at his death is no bar. International & G. N. Ry. Co. v. Kuehn, 70 Tex. 582, 8 S. W. Rep. 484; Indianapolis & St. L. R. Co. v. Stout, 53 Ind. 143.

Evidence of payment by the defendant of the expenses of support of the party injured and of his funeral expenses, not in satisfaction of the wrong, is inadmissible in bar or in mitigation of damages. Murray v. Usher, 117 N. Y. 542, 23 N. E. Rep. 564, 46 Hun, 404.

[3] See, also, remarks of Olds, J., in Hecht v. Ohio & M. Ry. Co., 89 N. E. Rep. 802.

deceased. He is of opinion, however, that this is not the point on which the case turns, and that the true question is whether, in enacting the statute, the legislature had in view a case, like that under his consideration, where the deceased, in his lifetime, had recovered damages. "The language of the act," he says, "plainly indicates, I think, that the framers had in view the maxim '*actio personalis*,' etc., and that their main purpose was to deprive the wrongdoer of the immunity from civil liability afforded by that rule. * * * The form of expression employed in the act shows that the legislature had in mind the case of a party *entitled* to maintain an action, but whose right of action was by the rule of the common law extinguished by his death, and not the case of one who had maintained his action, or who had recovered damages. This still more strongly appears by reference to the words of the act which describe the wrongdoer against whom a right of action is given. He is not described in any language which is applicable to a party against whom judgment has beeen obtained by the deceased for the injury, but as 'the person who would have been liable if death had not ensued.' And the enactment is that this person shall be liable notwithstanding the death. It seems to me very evident that the only defense of which the wrongdoer was intended to be deprived was that afforded him by the death of the party injured. * * * The statute may well be construed as meaning that the party who, at the time of bringing the action, 'would have been liable if death had not ensued' shall be liable to an action notwithstanding the death."

§ 125. Release or recovery by plaintiff or beneficiary.

A release or compromise of his claim by the plaintiff is of course a defense to the action, and this, whether the release or

compromise was by the administrator,[4] or other person authorized to prosecute the claim, either in a representative capacity[5] or for his own benefit,[6] or by a person not the nominal plaintiff, but actually entitled to the benefit of the action.[7] A re-

[4] The administrator may stipulate for the dismissal of the action upon a settlement by which he receives less than the amount claimed. Henchey v. City of Chicago, 41 Ill. 136.

Under Code Civil Proc. § 1588, giving executors and administrators power to compromise, with the approval of the probate court, debts due decedent, the executor may compromise a suit for decedent's wrongful death. Hartigan v. Southern Pac. R. Co., 86 Cal. 142, 24 Pac. Rep. 851.

[5] A suit brought by the widow, although for the benefit of her children as well as herself, may be dismissed by her over their objection. Greenlee v. East Tennessee, V. & G. R. Co., 5 Lea, 418; Stephens v. Nashville, C. etc., Ry. Co., 10 Lea, 448. A compromise by her in behalf of herself and children will bar all further claims. Holder v. Nashville, C. & St. L. R. Co., (Tenn.) 20 S. W. Rep. 587.

Under Rev. Code 1880, § 1510, giving the widow the right to sue, and providing that, where she has children, the amount recovered "shall be distributed as personal property of the husband," the widow, pending an appeal by defendant, may compromise the case by accepting a certain sum in satisfaction of the judgment, and such compromise is binding on decedent's infant children. Natchez C. M. Co. v. Mullins, 67 Miss. 672, 7 So. Rep. 542.

The acceptance of a verdict against one of the wrongdoers is not conclusive of a compromise of the claim, and it should be left to the jury to say whether such compromise had been actually effected, and the judgment accepted in satisfaction for the injury. Owen v. Brockschmidt, 54 Mo. 285.

[6] In a suit by the widow, defendant, under a plea of accord and satisfaction, introduced a paper signed by both parties, which, after reciting that defendant had bought certain horses and mules of plaintiff surrendered certain notes of her husband, and paid her a certain sum, stated that these were in full of all demands of every name and nature whatsoever from one party to the other. Plaintiff testified that, at the time of signing, she knew she had a claim on account of the death. *Held*, that a verdict for defendant was properly ordered. Guldager v. Rockwell, 14 Colo. 459, 24 Pac. Rep. 556.

[7] A release given by the father of a minor child, whose death was caused by defendant's negligence, he being solely entitled to the pro-

lease by one of several persons so entitled is no bar, though it might affect his interest in the distribution of the proceeds.[8]

§ 126. Cause of action of party injured survives by statute in some states.

In many states the common-law rule has been changed by enactments which provide that the right of action for injury to the person shall survive. As the two causes of action are distinct, —the one in favor of the estate to recover such damages as might have been recovered by the party injured, the other in favor of the surviving members of his family to recover damages for the pecuniary injury resulting to them from the death,—it would logically follow that the administrator might, upon the same facts, avail himself of either remedy; and so it has been frequently held.[9] In Illinois, however, where the statute declares

ceeds of any recovery, is a bar to an action by the mother as administratrix. Stuebing v. Marshall, 10 Daly, 406.

Plaintiff brought action for the recovery of securities executed by defendant in settlement of a cause of action for damages for the killing of plaintiff's husband. *Held* that, while the personal representative of the deceased was the proper party to sue for damages, yet, as plaintiff would be entitled to any damages recovered, she had authority to settle with defendant for these damages and to sue for the possession of the securities executed in settlement. Schmidt v. Deegan, 69 Wis. 300, 34 N. W. Rep. 88.

[8] A release by the husband, he not being the sole party entitled, is no bar to an action by the administrator. South & N. A. R. Co. v. Sullivan, 59 Ala. 272.

An action by an administrator for the wrongful death of his intestate, "for the use and benefit of the widow and children," cannot be compromised by the widow without the consent of the children or administrator. Knoxville, C. G. & L. R. Co. v. Acuff, (Tenn.) 20 S. W. Rep. 348.

[9] Davis v. St. Louis, I. M. & S. Ry. Co., 58 Ark. 117, 18 S. W. Rep. 801; Vicksburg & M. R. Co. v. Phillips, 64 Miss. 698, 2 South. Rep. 537; Needham v. Grand Trunk R. Co., 38 Vt. 294. See, also, Earl v. Tupper, 45 Vt. 275. But see Legg v. Britton, (Vt.) 24 Atl. Rep. 1016.

that, in addition to the actions which survive at common law, actions to recover damages for injury to the person shall survive, it is held that this enactment is applicable only to cases where death results from some other cause than the injury; and that, if death results from the injury, the only right of action is for the death.[10] A similar statute in Kansas has received the same construction, although in a recent case in the federal court the correctness of this construction has been questioned.[11]

§ 127. Concurrent actions by administrator.

Whether the personal representative would be permitted to maintain both the action which survives by statute and the action for death is not entirely clear.[12] It was said by Long, J., in Hurst v. Detroit City Ry. Co.,[13] that the satisfaction of the claim for death would be no bar to the other claim if such action could be maintained. In Leggott v. Great Northern Ry. Co.,[14] it was held that a recovery by the administratrix in an action under Lord Campbell's act was no bar to an action by her (founded on the implied contract of the defendants as carriers) to recover for loss of time and expenses resulting from

[10] Holton v. Daly, 106 Ill. 131; Chicago & E. I. R. Co. v. O'Connor, 119 Ill. 586, 9 N. E. Rep. 263; s. c., 19 Ill. App. 591.

[11] McCarthy v. Chicago, R. I. & P. R. Co., 18 Kan. 46; Hulbert v. City of Topeka, 84 Fed. Rep. 510.

[12] The right of action given to an administrator by Pub. St. c. 52, § 17, to sue for his intestate's loss of life, caused by a defect in a highway, for the benefit of the widow and children, is independent of the administrator's right to sue for damages suffered by the intestate during his lifetime from the injury which caused his death, under Pub. St. c. 165, § 1, and both actions may proceed at the same time. Bowes v. City of Boston, (Mass.) 29 N. E. Rep. 633. This case, however, arising under the Massachusetts statutes, has little application.

[13] 84 Mich. 539, 48 N. W. Rep. 44.

[14] 1 Q. B. D. 599; 45 L. J. Q. B. 557; 35 L. T. (N. S.) 334. Barnett v. Lucas, 6 Ir. C. L. 247. See § 18.

personal injury to the intestate, who was a passenger on the defendants' railway. The opinions in that case point out that the administratrix sued in a different right in each case, and the principle of that decision is certainly equally applicable to an action by the administrator on the cause of action of his intestate for the personal injury, which is made to survive by the enactments in question. Whether Leggott v. Great Northern Ry. Co. is reconcilable with the cases which hold that a release or recovery by the party injured is a bar to an action for the death, is perhaps questionable. Certainly there is an apparent inconsistency in holding that a recovery of judgment by the party injured is a bar, and that a recovery by the administrator upon the identical cause of action is no bar, in an action for the death.[15]

§ 128. Concurrent actions by parent or heirs and by administrator.

The acts of many states give a right of action to the father or mother of a child, as well as a right of action to the per-

[15] The recent case of Legg v. Britton, (Vt.) 24 Atl. Rep. 1016, which disapproves the early case of Needham v. Grand Trunk Ry. Co., 38 Vt. 294, above cited, in effect holds that an action by the administrator upon the original cause of action would be a bar to an action for the death. The case arose under R. L. Vt. § 2134, which provides that where either party dies, pending an action for personal injuries, the action may be prosecuted to final judgment by or against the personal representative of decedent. It was held that where plaintiff, in an action for personal injuries, died from such injuries pending the action, and his administrator recovered judgment therein under section 2134, such judgment is a bar to an action by the administrator for the benefit of the widow and next of kin to recover for the injuries resulting from the death. Ross, C. J., who delivered the opinion, says: "The construction we have placed on the act of 1849 gives the administrator or executor the right to sue and recover for the wife and next of kin, wherever the intestate, if he were living, could have maintained an action for such act causing the injury occasioning the death."

sonal representative for the benefit of the widow and next of kin, or, as in Iowa, Oregon, and Washington, for the benefit of the estate. The right of the parents to recover is held to be confined to cases in which they were entitled to the child's services by reason of his minority, or because the relation of parent and child in fact continued after minority. Where, as in Indiana, the right of action of the personal representative is for the benefit of the widow and next of kin, it is difficult to see how a case could arise in which the parents would be entitled to recover for loss of the child's services, and in which all the damages that could result from the death would not be recoverable in an action by the parents; while, if the parents were not entitled to recover for the loss of the child's services, all the damages that could result would be recoverable in an action by the personal representative.[16] It would follow that in such jurisdictions the remedies of parent and of personal representative are practically exclusive, and that a recovery in an action by one would be a bar to an action by the other. In Alabama the act provides that a suit by the father or mother is a bar to a suit by the personal representative.

In Iowa and Washington, however, the recovery by the parent is confined to the loss of the child's services during minority, but the personal representative may recover for the loss to the child's estate after he should have attained his majority.[17] Upon this ground it has been held in Washington that a judgment in favor of the administrator is not a bar to an action by the father.[18] In Oregon, also, the measure of damages in an action by the personal representative is the loss to the estate. Where, however, the personal representative of a deceased adult recovered damages, it was held by a divided court that

[16] See opinion of Mitchell, C. J., in Mayhew v. Burns, 103 Ind. 328, 2 N. E. Rep. 793.

[17] See § 40 and § 57.

[18] Hedrick v. Ilwaco Ry. & Nav. Co., 30 Pac. Rep. 714.

this was a bar to an action for the same death by the parent, although the child, who was married, continued to render services to him after majority, as well as before.[19]

In some acts it is provided that the action may be brought by the personal representative or *heirs*. In California it is held that a recovery by the executor is a bar to an action by the heirs.[20]

[19] Putman v. Southern Pac. Co., 27 Pac. Rep. 1088.

[20] Hartigan v. Southern Pac. Co., 86 Cal. 142, 24 Pac. Rep. 851. See, also, St. Louis, I. M. & S. Ry. Co. v. Needham, 52 Fed. Rep. 871, 3 C. C. A. 129.

CHAPTER IX.

DAMAGES—THE STATUTES.

§ 129. Classification of statutes.
130. Alabama.
131. Colorado.
132. Connecticut.
133. Georgia.
134. Iowa.
135. Kentucky.
136. Louisiana.
137. Maine.
138. Massachusetts.
139. Missouri.
140. New Hampshire.
141. New Mexico.
142. North Carolina.
143. North Dakota.
144. Oregon.
145. Pennsylvania.
146. South Dakota.
147. Tennessee.
148. Texas.
149. Virginia.
150. Washington.
151. West Virginia.
152. Limit of recovery.

§ 129. Classification of statutes.

The distinguishing feature of Lord Campbell's act and of acts similar to it, in respect to damages, is that the damages to be recovered are solely such as result (1) from the death (2) to the persons for whose benefit the action is given. This feature is common to all the acts in force in the United States and Canada, with the following exceptions:

1. The acts of Iowa, Oregon, and Washington, as construed

by the courts, provide that the damages, except in actions by parents, shall be such as result from the death to *the estate*.

2. The acts of North Carolina, Virginia, and West Virginia, as construed by the courts, provide for a recovery notwithstanding that there may be in existence no one of the relatives for whose benefit the action is primarily given.

3. The act of Connecticut stands alone in providing simply for a survival of the right of action, and consequently for the recovery of such damages as result to the party injured.

4. The acts of Louisiana, New Hampshire, (it seems,) and Tennessee, and also of New Brunswick, provide, in effect, for the recovery *both* of such damages as result to the party injured from the injury and to the beneficiaries from the death.

5. The act of Georgia provides that the measure of damages shall be the full value of the life, without deduction for the expenses of the deceased had he lived.

6. The acts of Maine and Massachusetts provide for a forfeiture to be recovered by indictment. In Massachusetts a civil action may also be maintained under certain circumstances in which the damages are assessed with reference to the degree of culpability of the defendant.

7. The provisions of the Kentucky act are peculiar.

The provisions of these states in respect to damages will be considered before proceeding to a general discussion of the subject of damages. Certain peculiar features in respect to damages in the acts of Alabama, Colorado, Missouri, New Mexico, North Dakota, Pennsylvania, South Dakota, and Texas also require consideration.

§ 130. Alabama.

Code, § 2589, provides that a personal representative may "recover such damages as the jury may assess" for the wrongful act, omission, or negligence of any person whereby the

death was caused. Section 2591 (Employes' Act) provides that, if the injury results in death, the personal representative "is entitled to maintain an action therefor." Both sections provide that the damages are not subject to the payment of debts, but shall be divided according to the statute of distributions. Under section 2589 the damages are punitive, and the recovery is not confined to the pecuniary loss.[1] Under section 2591 the recovery is confined to the pecuniary loss,[2] and the measure of damage is the pecuniary value of the life to the persons entitled to inherit according to the statute of distributions.[3]

[1] Savannah & M. R. Co. v. Shearer, 58 Ala. 672; South & N. A. R. Co. v. Sullivan, 59 Ala. 272; see East Tennessee, V. & G. R. Co. v. King, 81 Ala. 177, 2 South. Rep. 152. This section is the act of Feb. 5, 1872, "An act to prevent homicides." (Code 1876, § 2641.) The court has said that the purpose of the act is the prevention of homicide, and that this purpose it accomplishes by such pecuniary mulct as the jury "deem just." Richmond & D. R. Co. v. Freeman, 11 South. Rep. 800.

[2] Columbus & W. Ry. Co. v. Bridges, 86 Ala. 448, 5 South. Rep. 864; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 8 South. Rep. 360; Thompson v. Louisville & N. R. Co., 91 Ala. 496. 8 South. Rep. 406; Louisville & N. R. Co. v. Trammell, 9 South. Rep. 870.

[3] Louisville & N. R. Co. v. Orr, *supra;* James v. Richmond & D. R. Co., 9 South. Rep. 335; Richmond & D. R. Co. v. Hammond, 9 South. Rep. 577. This value, in an action for the benefit of wife or child or other dependent relative, when there were no net earnings, is such a sum as would yield, during the probable duration of the life of the deceased, a benefit equal to what such relative would have derived from its continuance. Louisville & N. R. Co. v. Trammell, *supra.*

The measure of damages, where the heirs were in no relation of dependence on deceased for support, is such sum as, with legal interest during the period of his expectancy of life, would produce at the expiration of such period a sum equal to the accumulations of his earnings for the same period, estimated on the basis of his health, ability, habits of sobriety, industry, economy, gross earnings, and expenditures. McAdory v. Louisville & N. R. Co., (Ala.) 10 South. Rep. 507.

§ 131. Colorado.[4]

§ 132. Connecticut.

Gen. St. §§ 1008, 1009, provide that actions for injury to the person, whether the same do or do not instantaneously result in death, shall survive.

The measure of damages appears to be the same as if the action had been brought by the party injured, including punitive damages.[5]

§ 133. Georgia.

Code, § 2971,[6] as amended by Laws 1887, provides that the plaintiff may recover "the full value of the life of the deceased, as shown by the evidence," which "shall be held to mean the full value of the life of the deceased, as shown by the evidence, without any deduction for necessary or other personal expenses of the deceased had he lived."[7]

In estimating the value of the life, age, habits, health, occu-

[4] See § 139.

[5] Murphy v. New York & N. H. R. Co., 29 Conn. 496; s. c., 30 Conn. 184. Such seems also to have been the measure of damages under the act of 1853, c. 74, (Gen. St. 1866, tit. 7, c. 7, § 544,) which is not found in Gen. St. 1888. Goodsell v. Hartford & N. H. R. Co., 33 Conn. 51; Waldo v. Goodsell, 33 Conn. 432. See Lamphear v. Buckingham, 33 Conn. 237; Carey v. Day, 36 Conn. 152.

[6] Prior to Act Dec. 16, 1878, amending section 2971 of Code of 1873, the statute provided no measure of damages. Macon & W. R. Co. v. Johnson, 38 Ga. 409. This act is constitutional. Georgia R. Co. v. Pittman, 73 Ga. 325.

[7] Before the amendment of 1887, enacting that there should be no deduction for the expenses of the deceased, it was held that such deduction should be made. Central R. Co. v. Rouse, 77 Ga. 393, 3 S. E. Rep. 307; s. c., 80 Ga. 442; 5 S. E. Rep. 627; Augusta & K. R. Co. v. Killian, 79 Ga. 234, 4 S. E. Rep. 165; Savannah, etc., Ry. Co. v. Flannagan, 82 Ga. 579, 9 S. E. Rep. 471; Georgia R. Co. v. Pittman, 73 Ga. 325.

pation, expectation of life,[8] ability to labor, probable increase or diminution of that ability with lapse of time,[9] rate of wages, etc., should be considered.[10] In actions against railroad companies for the death of passengers, evidence of the negligence of the deceased may be shown in mitigation of damages.[11]

[8] Where there is no proof as to probable duration of life, a verdict should be directed for defendant. Savannah, F. & W. Ry. Co. v. Stewart, 71 Ga. 427. Life tables may be used, but are not conclusive. Id.; Georgia R. & B. Co. v. Oaks, 52 Ga. 410; Georgia R. Co. v. Pittman, 78 Ga. 825; Central R. Co. v. Crosby, 74 Ga. 737; Central R. Co. v. Thompson, 76 Ga. 770. Nevertheless, in Central R. Co. v. Crosby, where life tables were introduced, and the value of the services of the deceased proved, and after a verdict in excess of the damages proved plaintiff voluntarily wrote off a part of the verdict, so as to bring the amount within the measure of damages proved, it was *held* that the refusal to grant a new trial was not error. The court said that the life tables were not conclusive, yet that they established a fixed criterion of damages.

[9] It should be left to the jury to determine how far age would have diminished the capacity for labor. Georgia R. Co. v. Pittman, 78 Ga. 825; Central R. v. Thompson, 76 Ga. 770.

[10] Central R. Co. v. Rouse, *supra;* Savannah, etc., Ry. Co. v. Flannagan, *supra;* Atlanta & W. P. Ry. Co. v. Newton, 85 Ga. 517, 11 S. E. Rep. 776. The measure of damages is not affected by the wants of the family, but depends solely on the value of the life. Central R. Co. v. Rouse, 77 Ga. 393, 3 S. E. Rep. 307; s. c., 80 Ga. 442, 5 S. E. Rep. 627. Prior to the amendment of 1878 it had been held that the measure of damages was the amount that would be a reasonable support. Macon & W. R. Co. v. Johnson, 38 Ga. 409; David v. Southwestern R. Co., 41 Ga. 223; Atlanta & R. A. L. Ry. Co. v. Ayers, 53 Ga. 12; Atlanta & W. P. R. Co. v. Venable, 67 Ga. 697. Where the widow died pending suit, and the action survived to the children, *held* that the recovery should be for the damages to them, not to her. David v. Southwestern R. Co., *supra.*

[11] Macon & W. R. Co. v. Johnson, 38 Ga. 409; Atlanta & R. A. L. Ry. Co. v. Ayers, 53 Ga. 12. But not where deceased was an employe. Western & A. R. Co. v. Meigs, 74 Ga. 857. In an action for a homicide committed in resisting a battery where deceased was the assailant, this fact will go in mitigation of damages. Weekes v. Cottingham, 58 Ga. 559.

§ 134. Iowa.

Under the provisions of the Iowa Code, which are peculiar, it is held that the action lies, not for the benefit of the next of kin, but of the estate,[12] and that the measure of damages is the sum necessary to compensate the estate for the loss occasioned by the death;[13] hence all facts are admissible which show what his accumulations would probably have been.[14] In

[12] See § 40.

[13] Donaldson v. Mississippi & M. R. Co., 18 Iowa, 290; Sherman v. Western Stage Co., 24 Iowa, 515; Coates v Burlington, C. R. & N. R. Co., 62 Iowa, 486, 17 N. W. Rep. 760; McMarshall v. Chicago, R. I. & P. Ry. Co., 80 Iowa, 757, 45 N. W. Rep. 1065; Kelley v. Central R. Co., 5 McCrary, C. Ct. 658.

[14] The jury may consider the expectancy of the life of deceased; the nature of his calling; the wages he was receiving; and his physical condition and habits of industry. Wheelan v. Chicago, M. & St. P. Ry. Co., 52 N. W. Rep. 119; Van Gent v. Chicago, M. & St. P. R. Co., 80 Iowa, 526, 45 N. W. Rep. 918; Kelley v. Central Railroad of Iowa, 48 Fed. Rep. 668; Morris v. Chicago, M. & St. P. Ry. Co., 26 Fed. Rep. 22. But not the number of his family or the amount of property he left. Beems v. Chicago, R. I. & P. R. Co., 58 Iowa, 150, 12 N. W. Rep. 222. Nor can damages be given for the sufferings of deceased or the grief of his family. Kelley v. Central Railroad of Iowa, *supra;* Dwyer v. Chicago, St. P., M. & O. Ry. Co., 51 N. W. Rep. 244. *Cf.* Muldowney v. Illinois C. R. Co., 36 Iowa, 462.

The damages accruing to the estate of a married woman are not to be assessed as though she were unmarried. Stulmuller v. Cloughly, 58 Iowa, 738, 18 N. W. Rep. 55.

Deceased was 24 years old, without family, temperate and industrious, and his net earnings were $268 a year. *Held*, that a verdict of $10,000 should be reduced to $5,000. Rose v. Des Moines V. R. Co., 39 Iowa, 246.

Where the expectancy of life of deceased is 42 years, and his earnings about $650 annually, a verdict of $10,000 is not excessive. McDermott v. Iowa Falls & S. C. Ry. Co., 47 N. W. Rep. 1037. See Walter v. C. D. & M. R. Co., 39 Iowa, 38.

In an action to recover for the negligent killing of a boy such damages as his estate may have sustained, an instruction calling attention to his expectancy of life, character, intelligence, business experience,

an action by the parent for the death of a minor, the damages are measured by the loss of service during minority.[15]

§ 135. Kentucky.

Gen. St. c. 57, § 1, provides that where the life of any person not in the employment of a railroad shall be lost by the negligence of the proprietor, etc., the personal representative may "recover damages in the same manner that the person himself might have done for an injury where death did not ensue." Section 3 provides that, when the life of any person is lost by willful neglect, the widow, heir, or personal representative may "recover punitive damages for the loss or destruction of the life."

Under section 1, only compensatory damages are recoverable,[16] and the measure of recovery is the value of the power of the deceased to earn money, had he not been killed.[17] Under section 3, punitive damages may, but need not,[18] be given, and compensatory damages may also be allowed.[19]

etc., and telling the jury to make the best possible estimate therefrom of the loss, is not, considering the youth of deceased, and the meagerness of the data from which his future might have been estimated, objectionable for indefiniteness in failing to point out a specific method of calculating the probable amount of his accumulations, or in providing an abatement of interest therefrom so as to arrive at the present worth, but is as definite as practicable. Andrews v. Chicago, M. & St. P. Ry. Co., (Iowa,) 53 N. W. Rep. 399.

[15] See § 40.

[16] Louisville, C. & L. R. Co. v. Case's Adm'r, 9 Bush, 728. This case overrules the *dictum* in Bowler v. Lane, 8 Met. 311, to the effect that exemplary damages might be recovered.

[17] Louisville, C. & L. R. Co. v. Case's Adm'r, 9 Bush, 728; Kentucky C. R. Co. v. Gastineau's Adm'r, 83 Ky. 119; Louisville & N. R. Co. v. Morris' Adm'x, 20 S. W. Rep. 539.

[18] It is error to instruct the jury that if defendant was guilty of willful negligence, they *ought* to award punitive damages. Kentucky C. R. Co. v. Gastineau's Adm'r, 83 Ky. 119; Louisville & N. R. Co. v. Brooks' Adm'x, 83 Ky. 129.

[19] Chiles v. Drake, 2 Met. 146. In an action by the widow, as admin-

§ 136. Louisiana.

Under Rev. Civil Code, art. 2315, as amended, a recovery may be had (1) of such damages as the party injured could have recovered, and (2) of damages for the death.[20] No rule seems to be laid down in respect to the measure of damages under either cause of action, except that the damages are compensatory.[21] Punitive damages cannot be recovered.[22]

istratrix, proof of the ages and number of children of the deceased is admissible; both because, the object of the statute being compensatory as well as punitive, the question of the condition of the family directly affects the measure of damages, and because all attendant circumstances of aggravation may be shown. Louisville, C. & L. R. Co. v. Mahony's Adm'x, 7 Bush. 235.

Where a brakeman was killed by the willful negligence of a railroad company, a verdict of $10,000 *held* not so excessive as to to indicate that the jury were influenced by passion or prejudice. Louisville & N. R. Co. v. Brooks' Adm'x, 88 Ky. 129.

A verdict of $15,000 is not excessive for the death of a healthy and intelligent young man, 29 years old, who was earning $2.50 a day, and who was considered one of the best workmen in the company's service. Louisville & N. R. Co. v. Shivell's Adm'r, 18 S. W. Rep. 944.

[20] See § 42.

[21] In a case under the amendment of 1855 the court said that, in cases where no exact computation of damages can be made, discretion in fixing the amount is left to the judge and jury. Frank v. New Orleans & C. R. Co., 20 La. Ann. 25.

In an action by the father and mother of a son 18 years old, it appeared that the father was a policeman earning $50 a month, with 5 children, 3 of whom he provided for; that the son was earning $25 a month, which he devoted to the family. *Held*, that a verdict of $25,000 should be reduced to $2,000. Bermudez, C. J., said: "It is for the deprivation of his presence and support that his father and mother are entitled to relief. While we * * * admit that it is almost impossible, systematically, to figure out by items what may amount to an adequate relief, we think, under a somewhat instinctive appreciation,

[22] Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824, 8 So. Rep. 586.

§ 137. Maine.

In a prosecution under Rev. St. c. 51, § 68, the amount of the forfeiture between the maximum and the minimum fixed is to be assessed by the jury.[28]

considering that, as it is a probability that in course of time the circumstances of E. M. might have changed, had he lived, an allowance of $2,000 would not be unreasonable." Myhan v. Louisiana, E. L. & P. Co., 41 La. Ann. 964, 6 South. Rep. 799.

Deceased was 22 years old, and contributed somewhat to the support of his family, consisting of his mother, the plaintiff, with whom he lived, and her two daughters, the younger 16 years old. She had property of no great value, and was in debt. Plaintiff sued upon both causes of action. *Held*, that a verdict of $7,500 should be reduced to $6,000. Breaux, J., said: "The object is not benefit, but compensation. * * * We will not particularize the damages, and we will not dissect the purest sentiments, and the kindest impulses, to establish how much is allowed for each particular item of suffering." McFee v. Vicksburg, S. & P. R. Co., 43 La. Ann. 790, 7 South. Rep. 720.

An infant child was negligently run over by an engine and killed instantly. The father sued on the cause of action which accrued to the infant and survived to him. *Held* that, though there was no evidence of actual damages to the infant, the supreme court, would, in the exercise of its equitable powers, award compensatory damages in the nominal sum of $250, the circumstances of the injury having been such that the father had cause to seek a judicial investigation. Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824, 8 South. Rep. 586.

In an action by the widow of deceased in her own right and as tutrix of her minor daughter, it appeared that deceased was 62 years old, with an expectancy of 12 years, and earned $1.50 to $2 a day, gross, as wagon driver, but had to pay for keep of his horse. *Held*, that a verdict of $7,500 should be reduced to $1,000. Cline v. Crescent City R. Co., 9 South. Rep. 122.

A father sued for death of a boy five years old (1) for the damages suffered by the child, and (2) for damages suffered by plaintiff on account of the loss. There was no evidence offered to show damages under the latter cause of action. *Held*, that plaintiff was entitled to $1,000 on the first, and to nominal damages on the second, cause of action. Westerfield v. Levis, 9 South. Rep. 52.

[28] State v. Maine C. R. Co., 76 Me. 357. For the measure of damages under Acts 1891, c. 124, see § 153 et seq.

§ 138. Massachusetts.[24]

§ 139. Missouri.

In case of recovery under Rev. St. § 4425, that section provides that the defendant shall forfeit and pay for any person so dying the sum of $5,000. In case of recovery under section 4426, section 4427 provides that the jury may give such damages, not exceeding $5,000, as they may deem fair and just with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue, and also having regard to the mitigating and aggravating circumstances attending such wrongful act, neglect, or default.[25]

In actions under section 4425, if the plaintiff establishes a right to recover at all, he is entitled to the full sum of $5,000.[26] In actions under section 4427 the words "having regard to the mitigating and aggravating circumstances" authorize exemplary damages, when the circumstances justify the award.[27] But, in

[24] See § 44. [25] See § 45.

[26] Mangan v. Foley, 88 Mo. App. 250. Where the liability arises under section 4425, an instruction that the jury cannot take into consideration the anguish or suffering of the deceased or of the plaintiff is properly refused. Tobin v. Missouri Pac. Ry. Co., 18 S. W. Rep. 996. The sum is not intended as a penalty, but as compensatory damages liquidated by the statute. Coover v. Moore, 31 Mo. 574.

[27] Owen v. Brockschmidt, 54 Mo. 285; Gray v. McDonald, 16 S. W. Rep. 898. What circumstances will mitigate or aggravate is a question of law, and, if any such exist, they should be pointed out by proper instructions. Rains v. St. Louis, I. M. & S. Ry. Co., 71 Mo. 164; Nichols v. Winfrey, 79 Mo. 544. A general instruction that the jury should have regard to the mitigating and aggravating circumstances is bad, but, if there are no mitigating circumstances, the defendant cannot complain of the instruction for its generality. Nagel v. Missouri Pac. Ry. Co., 75 Mo. 653; Smith v. Wabash, St. L. & P. Ry. Co., 92 Mo. 360, 4 S. W. Rep. 129. Such an instruction is erroneous where there are no aggravating circumstances. Stoher v. St. Louis, I. M. & S. Ry. Co., 91 Mo. 509, 4 S. W. Rep. 389; Parsons v. Missouri Pac. Ry. Co., 94 Mo. 286, 6

the absence of circumstances justifying exemplary damages, only such damages can be recovered as will compensate the plaintiff for the pecuniary injury necessarily resulting from the death.[28]

The Missouri statute is peculiar in confining the right of action of a parent to the death of a minor child, and the measure of damages, apart from exemplary damages, is the pecuniary benefit the parent could have hoped to derive from the child during minority.[29] And, conversely, the right of action for the death of a parent is confined to minor children, and the damages are restricted to compensation for the loss of the parent's support, etc., during minority.[30]

S. W. Rep. 464. Evidence of contributory negligence will not justify an instruction based on mitigating circumstances. McGowan v. St. Louis, O. & S. Co., 16 S. W. Rep. 236. See Foppiano v. Baker, 8 Mo. App. 560.* Where there are no aggravating circumstances, evidence of the financial condition of defendant is inadmissible. Morgan v. Durfee, 69 Mo. 469.

[28] McGowan v. St. Louis, O. & S. Co., 16 S. W. Rep. 236; s. c., 19 S. W. Rep. 199. It seems that "necessary" is equivalent to "pecuniary." S. C., 19 S. W. Rep. 199, *per* Thomas, J. Morgan v. Durfee, 69 Mo. 469, *per* Sherwood, J. Hickman v. Missouri Pac. Ry. Co., 22 Mo. App. 344.

But an instruction to the jury that if they find for the plaintiffs they will assess the damages in such sum as they believe will compensate them for the pecuniary injury sustained by them in the death of deceased, not in excess of the sum of $5,000, is erroneous, as not furnishing the jury with a sufficiently definite rule for the measure of damages; although it is harmless error, where the verdict is only for $5,000, and the plaintiffs are four minor children, and deceased was only 40 years old, and was earning $3 a day. McGowan v. St. Louis O. & S. Co., 19 S. W. Rep. 199, (reversing on this point s. c., 16 S. W. Rep. 236.) See Schultz v. Moon, 33 Mo. App. 329.

[29] Parsons v. Missouri Pac. Ry. Co., 94 Mo. 286, 6 S. W. Rep. 464; Rains v. St. Louis, I. M. & S. Ry. Co., 71 Mo. 164.

[30] McPherson v. St. Louis, I. M. & S. Ry. Co., 97 Mo. 253, 10 S. W. Rep. 846. McGowan v. St. Louis O. & S. Co., 16 S. W. Rep. 236; s. c., 19 S. W. Rep. 199. The jury are not confined to nominal damages, though the earnings of the father are not shown. The loss of care in the education, maintenance, and support have a pecuniary value. Stoher v. St. Louis, I. M. & S. Ry. Co., 91 Mo. 509, 4 S. W. Rep. 389.

The provisions of the Colorado[31] and New Mexico statutes closely resemble that of Missouri. But in Colorado a different construction is put upon the words "having reference to the mitigating and aggravating circumstances," and it is held that they do not authorize exemplary damages.[32]

[31] Gen. St. 1883, §§ 1080–1083. The prior act of February 8, 1872, gave an action when death was caused by wrongful act, etc., to be brought by the personal representatives, for the benefit of the husband, wife, children, parents, etc. The measure of damages was held to be the estimated accumulations of the deceased during the probable remainder of his life, having reference to his age, occupation, habits, health, and ability. Kansas Pac. Ry. Co. v. Lundin, 3 Colo. 94; Denver, etc., Ry. Co. v. Woodward, 4 Colo. 1, (modifying Kansas Pac. Ry. Co. v. Miller, 2 Colo. 442.) This is also held to be the measure of damages under the present statute. Hayes v. Williams, 30 Pac. Rep. 352. In an action for the death of a minor son, the complaint stated the relationship, age, occupation, amount of earnings, etc., and alleged damages to plaintiff in a certain sum. *Held*, that the complaint was sufficient to permit the recovery of such damages as naturally result from the death, without alleging special damages. Orman v. Mannix, 30 Pac. Rep. 1087.

[32] "Taken in connection with the preceding language of the section, we are constrained to hold that the words 'mitigating and aggravating circumstances attending such wrongful act,' etc., contemplate circumstances not relating to the wrongful act itself, but such as affect the actual damages suffered by the surviving party entitled to sue, either by way of diminishing or enhancing the same. Hence the section allows compensatory damages only." Moffatt v. Tenney, 30 Pac. Rep. 348, approved in Hayes v. Williams, Id. 352, where the court intimates, however, that punitive damages may perhaps be recovered in actions of this kind under Act Feb. 19, 1889, (Mill's Ann. St. § 1512.) An instruction that the damages should be such a sum as would compensate plaintiff "in a pecuniary sense for the loss," and that "in arriving at this sum" they might take into consideration mitigating or aggravating circumstances connected with the neglect or injury complained of, was proper, it not being necessary that the court should enumerate each and every aggravating or mitigating circumstance. Hayes v. Williams, 30 Pac. Rep. 352.

§ 140. New Hampshire.[33]

§ 141. New Mexico.[34]

§ 142. North Carolina.[35]

§ 143. North Dakota.[36]

§ 144. Oregon.

Hill's Code, § 371, provides that, when death is caused by wrongful act or omission, the personal representative may maintain an action, and that the damages "shall be administered as other personal property of the deceased person." The statute does not further define the persons for whose benefit the action shall be brought, or exempt the amount recovered from the claims of creditors. It is accordingly held that the measure of damages is the pecuniary loss *to the estate*, which consists in what the deceased would probably have accumulated for the benefit of his estate during the residue of his life, taking into consideration his age, ability, and disposition to labor, and his habits of living and expenditure.[37]

In Washington, also, upon a similar construction, it seems that the measure of damages is the loss to the estate.[38]

§ 145. Pennsylvania.

The act of April 15, 1851, § 19,[39] provides that the widow, or, if no widow, the personal representatives, may recover "dam-

[33] See § 47. [34] See § 139. [35] See § 49. [36] See § 53.

[37] Holmes v. Oregon & C. Ry. Co., 5 Fed. Rep. 523, 6 Sawy. 262; Carlson v. Oregon S. L. & U. N. Ry. Co., 28 Pac. Rep. 497; Skottowe v. Oregon, S. L. & U. N. Ry. Co., 30 Pac. Rep. 222; Mullen v. Same, Id.; Ladd v. Foster, 31 Fed. Rep. 827; Holland v. Brown, 35 Fed. Rep. 43.

[38] Hedrick v. Ilwaco Ry. & Nav. Co., 30 Pac. Rep. 714. See § 57.

[39] 2 Bright. Purd. Dig. p. 1267, § 8.

ages for the death." The act of April 4, 1868, § 2,[40] provides that, in actions against common carriers and railroad corporations, "only such compensation for loss or damage shall be recovered as the evidence shall clearly prove to have been pecuniarily suffered or sustained."

The latter section simply declares the law as previously decided.[41] Damages are confined to such loss on the part of the surviving family as is capable of pecuniary estimate.[42]

§ 146. South Dakota.[43]

§ 147. Tennessee.

Code, § 3130,[44] provides that the right of action which a person who dies from injuries received from another, or whose

[40] 2 Bright. Purd. Dig. p. 1268, § 7. This act limited the liability of common carriers and railroad corporations in case of death to $5,000, and provided that, upon acceptance of the provisions of the act by any corporation, the same should become part of its act of incorporation. The act, so far as it limited the liability, was held to be avoided by Const. 1874, art. 3, § 21. See appendix. Lewis v. Hollahan, 103 Pa. St. 425. It was also held that the act did not constitute a contract between the state and an accepting corporation, having a previously granted charter, whose road was not constructed on the faith of it. Pennsylvania R. Co. v. Bowers, 124 Pa. St. 183, 16 Atl. Rep. 836, overruling Pennsylvania R. Co. v. Langdon, 92 Pa. St. 21. See, also, Kay v. Pennsylvania R. Co., 65 Pa. St. 269.

[41] Pennsylvania R. Co. v. Keller, 67 Pa. St. 300. See Cleveland & P. R. Co. v. Rowan, 66 Pa. St. 393.

[42] Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318. The court distinguishes this case, which was under the act of April 26, 1855, from Pennsylvania R. Co. v. McCloskey's Adm'r, 23 Pa. St. 526, which was under the act of April 15, 1851, on the ground that the later act changed the law by confining the recovery to the persons therein named. See, also, Pennsylvania R. Co. v. Butler, 57 Pa. St. 335; Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315; Pennsylvania Tel. Co. v. Varnau, 15 Atl. Rep. 624.

[43] See § 53.

[44] Sections 3130–1 are act of 1851, c. 17.

death is caused by the wrongful act, omission, or killing by another, would have had in case death had not ensued, shall pass to his widow, or, in case there is no widow, to his children or his personal representative, for the benefit of his widow or next of kin. Section 3134[45] provides that the plaintiff may recover for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose benefit the action survives from the death.

The right of action, whether the death was instantaneous or not, passes with all its incidents to the personal representative,[46] and, if fraud, malice, gross negligence, or oppression upon the part of the defendant be shown, exemplary damages may be recovered.[47]

The contributory negligence of the deceased may be shown in mitigation of damages.[48] In estimating the damages, the jury must consider the value of the life, as determined by the age, condition, capacity for earning money, and expectation of

[45] Section 3134 is act of 1883, c. 186. Before this act only such damages were recoverable as the deceased might have recovered if he had lived. Nashville & C. R. Co. v. Smith, 9 Lea, 471; East Tennessee, V. & G. R. Co. v. Toppins, 10 Lea, 58; Louisville & N. R. Co. v. Conley, Id. 531; Chicago, St. L. & N. O. R. Co. v. Pounds, 11 Lea, 130; Trafford v. Adams Exp. Co., 8 Lea, 96; East Tennessee, V. & G. R. Co. v. Gurley, 12 Lea, 46. Though the earlier cases had held that damages for the loss caused by the death were also recoverable. Nashville & C. R. Co. v. Prince, 2 Heisk. 580; Nashville & C. R. Co. v. Smith, 6 Heisk. 174; Nashville & C. R. Co. v. Stevens, 9 Heisk. 12; Collins v. East Tennessee, V. & G. R. Co., 9 Heisk. 841; East Tennessee, V. & G. R. Co. v. Mitchell, 11 Heisk. 400. *Cf.* Louisville & N. R. Co. v. Burke, 6 Coldw. 45.

[46] See note, § 75.

[47] Haley v. Mobile & O. R. Co., 7 Baxt. 289; Kansas City, Ft. S. & M. R. Co. v. Daughtry, 88 Tenn. 721, 13 S. W. Rep. 698.

[48] Louisville & N. R. Co. v. Burke, 6 Coldw. 45; Nashville & C. R. Co. v. Smith, 6 Heisk. 174; Louisville & N. R. Co. v. Howard, 90 Tenn. 144, 19 S. W. Rep. 116.

life of the deceased, and also the amount of compensation due for the physical or mental sufferings; but the principal inquiry is, how much negligence was displayed by the defendant, and to what extent did the negligence of the deceased contribute?[49]

§ 148. Texas.[50]

§ 149. Virginia.[51]

§ 150. Washington.[52]

§ 151. West Virginia.[53]

§ 152. Limit of recovery.

Many statutes provide that the amount that may be recovered as damages shall not exceed a certain sum. This sum is limited to $5,000 in Colorado, Connecticut, Illinois, Maine, Massa-

[49] Deceased was 57 years old, in declining health, his monthly earnings, $25, and his sufferings had not been extreme; the negligence of defendant was not gross, and there was evidence of contributory negligence. *Held*, that a verdict of $12,000 was excessive. Snodgrass, J., said: "The principal inquiry is not what is the value of the life taken. It is whether and how much negligence was displayed in taking it, and whether and to what extent the negligence of the deceased caused or contributed to it, and, from the reasonable and just compensation to be given upon determining the first inquiry against the negligent wrongdoer, what amount should be deducted on account of the contributing fault of the deceased." Louisville & N. R. Co. v. Stacker, 86 Tenn. 343, 6 S. W. Rep. 737. On the other hand, $8,000 damages for the death of a man earning $4 a day, of industrious and sober habits, with an expectation of life of 31 years, has been held not excessive. Tennessee, C. & R. Co. v. Roddy, 85 Tenn. 400, 5 S. W. Rep. 286. And where deceased was careful, and the defendant's engineer very reckless, it was held that a verdict for $15,000 would not be disturbed. Chesapeake, O. & S. W. R. Co. v. Hendricks, 88 Tenn. 710, 13 S. W. Rep. 696, and 14 S. W. Rep. 488.

[50] See § 55. [51] See § 56. [52] See § 57, § 144. [53] See § 58.

chusetts, Minnesota, Missouri, Nebraska, New York, Oregon, Wisconsin, and Wyoming; to $7,000 in New Hampshire; to $10,000 in the District of Columbia, Indiana, Kansas, Ohio, Oklahoma, Utah, Virginia, and West Virginia; and to $20,000 in Montana. In New Brunswick the reasonable expectation of benefit from the continuance of the life is confined to a period not exceeding 10 years. With these exceptions, the statutes impose no limit.

CHAPTER X.

DAMAGES.

§ 153. Measure of damages under statutes similar to Lord Campbell's act—Pecuniary loss to beneficiaries.
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175. Interest as damages.
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178. Excessive verdict—Reduction of amount.
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180. Nominal damages.

§ 153. Measure of damages under statutes similar to Lord Campbell's act—Pecuniary loss to beneficiaries.

Lord Campbell's act provides that the jury may assess such damages as they may think proportioned to the injury result-

ing from the death to the parties respectively for whose benefit the action shall be brought. This language has been substantially followed in Arizona, the District of Columbia, Maryland, Mississippi, South Carolina, and Texas, although in Arizona and Texas exemplary damages may also be given; and also in Nova Scotia and Ontario.

A more common form of language is that of the original New York act, viz. that the damages may be such a sum as the jury shall deem a fair and just compensation, with reference to the *pecuniary* injuries resulting from the death to the wife and next of kin. This language has been substantially followed in Arkansas, Illinois, Maine, Michigan, Montana, Nebraska, New Jersey, Ohio, Vermont, and Wisconsin, and (with certain important qualifications) in Colorado, Missouri, Nevada, and New Mexico.

In other states the language is broader, viz.: Alabama, "such damages as the jury may assess;" California, Idaho, and Utah, "such damages as, under all the circumstances of the case, may be just;" Wyoming, "such damages as they shall deem fair and just;" Florida, "such damages as the parties * * * may have sustained;" North Dakota and South Dakota, "damages for the loss or destruction of life;" Delaware and Pennsylvania, "damages for the death;" Rhode Island, "damages for the injury caused by the loss of life;" Quebec, "all damages occasioned by such death."

In Indiana, Kansas, Minnesota, and Oklahoma, there is no express provision as to the measure of damages, except that limiting the amount of recovery.

In spite of these differences in phraseology, it is believed that the principles applicable to the measure of damages under all these acts is the same, viz. that *the damages are measured by the pecuniary loss resulting to the beneficiaries of the action from the death.*[1] This statement, however, is subject to the qualifica-

[1] The same rule would apply, so far as concerns the damages to be recovered on account of the *death*, under acts like those of Louisiana,

tion that certain of the acts authorize exemplary, in addition to compensatory, damages.

§ 154. No damages for solatium.

In Blake v. Midland Ry. Co.,[2] which is perhaps the leading case upon the measure of damages, Coleridge, J., said: "The title of this act may be some guide to its meaning; and it is 'An act for compensating the families of persons killed,' not for solacing their wounded feelings;" and in that case it was held that, in assessing damages, the jury could not take into consideration the mental sufferings of the plaintiff for the loss of her husband, and that, as the damages exceeded any loss sustained by her admitting of a *pecuniary* estimate, they must be considered excessive. As has been stated, the New York act, and some others which have been modeled upon it, require the damages to be assessed with reference to the "pecuniary" injuries. But, irrespective of the use of "pecuniary" in the various enactments, the construction adopted in Blake v. Midland Ry. Co. has been almost universally followed, and it is held that the jury are confined to the pecuniary loss, and that nothing can be allowed by way of *solatium* for the grief and wounded feelings of the beneficiaries,[3] or to compensate them for the loss

New Hampshire, Tennessee, and Kentucky. As to these acts, and also the acts of North Carolina, Virginia, and West Virginia, see the preceding chapter. The same remark applies to the act of New Brunswick.

[2] 18 Q. B. 93; 21 L. J. Q. B. 233; 16 Jur. 562.

[3] This principle is expressly declared in nearly every case in which the measure of damages is discussed. It is sufficient to cite the following: Illinois Cent. R. Co. v. Barron, 5 Wall. 95; s. c., 1 Biss. 412, 458; Whiton v. Chicago & N. W. R. Co., 2 Biss. 282, 13 Wall. 270; Little Rock & Ft. S. Ry. Co. v. Barker, 33 Ark. 350; City of Chicago v. Major, 18 Ill. 349; Conant v. Griffin, 48 Ill. 410; City of Chicago v. Scholten, 75 Ill. 468; Chicago City Ry. Co. v. Gillam, 27 Ill. App. 386; Barley v. Chicago & A. R. Co., 4 Biss. 480; Brady v. Chicago, Id. 448; Kansas Pac. Ry. Co. v. Cutter, 19 Kan. 83; State v. Baltimore & O. R. Co., 24 Md. 84;

of society or of companionship which they have suffered.[4] A different rule was once declared in Indiana,[5] and was followed

Mynning v. Detroit, L. & N. R. Co., 59 Mich. 257, 26 N. W. Rep. 514; Hutchins v. St. Paul, M. & M. Ry. Co., 44 Minn. 5, 46 N. W. Rep. 79; Collins v. Davidson, 19 Fed. Rep. 88; Hardy v. Minneapolis & St. L. Ry. Co., 36 Fed. Rep. 657; Schaub v. Hannibal & St. J. R. Co. (Mo.) 16 S. W. Rep. 924; McGowan v. St. Louis, O. & S. Co., (Mo.) 16 S. W. Rep. 286; Atchison, T. & S. F. R. Co. v. Wilson, 48 Fed. Rep. 57, 1 C. C. A. 25; Besenecker v. Sale, 8 Mo. App. 211; Anderson v. Chicago, B. &. Q. R. Co., (Neb.) 52 N. W. Rep. 840; Oldfield v. New York & H. R. Co., 14 N. Y. 310; Tilley v. Hudson River R. Co., 29 N. Y. 252; s. c., 24 N. Y. 471; Wise v. Teerpenning, 8 N. Y. Leg. Obs. 153. The court having charged, in the language of the Code, that a fair and just compensation could be recovered for the pecuniary injuries resulting to the persons for whose benefit the action was brought, a refusal to charge additionally that plaintiff cannot recover for the suffering of the child or for his own mental suffering, and that the jury cannot award punitive damages, is reversible error, as such principles do not sufficiently appear in the instruction given. Dorman v. Broadway R. Co., 1 N. Y. Supp. 334. Steel v. Kurtz, 28 Oh. St. 191; Au v. New York, L. E. & W. R. Co., 29 Fed. Rep. 72; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Cleveland & P. R. Co. v. Rowan, 66 Pa. St. 393; Pennsylvania R. Co. v. Butler, 57 Pa. St. 335; March v. Walker, 48 Tex. 375; Southern Cotton P. & M. Co. v. Bradley, 52 Tex. 587; Galveston v. Barbour, 62 Tex. 172; Galveston, H. & S. A. Ry. Co. v. Matula, 79 Tex. 577, 15 S. W. Rep. 573; Taylor, B. & H. Ry. Co., v. Warner, 19 S. W. Rep. 449; McGown v. International & G. N. R. Co., 20 S. W. Rep. 80; Webb v. Denver & R. G. W. Ry. Co., 24 Pac. Rep. 616; Hyde v. Union P. Ry. Co., 26 Pac. Rep. 979; Wells v. Denver & R. G. W. Ry. Co., 27 Pac. Rep. 688; Needham v. Grand Trunk R. Co., 38 Vt. 294; Potter v. Chicago & N. W. Ry. Co., 21 Wis. 372. Under the Scotch law the jury may administer a *solatium*. Patterson v. Wallace, 1 Macq. H. L. Cas. 748.

[4] Gillard v. Lancashire & Y. Ry. Co., 12 L. T. 856; Schaub v. Hannibal & St. J. R. Co., (Mo.) 16 S. W Rep. 924; Atchison, T. & S. F. R. Co. v. Wilson, 48 Fed. Rep. 57, 1 C. C. A. 25; Green v. Hudson R. R.

[5] Long v. Morrison, 14 Ind. 595. This case, so far as it holds that damages for anything but the pecuniary injury can be recovered, was disapproved in Jeffersonville R. Co. v. Swayne's Adm'r, 26 Ind. 477. Louisville, N. A. & C. Ry. Co. v. Rush, 127 Ind. 545, 26 N. E. Rep. 1010. See, also, Ohio & M. R. Co. v. Tindall, 13 Ind. 366.

until recently in California,[6] but these states are no longer exceptions to the common rule. In Quebec, also, it was formerly held that damages could be allowed as a *solatium*,[7] but, under the later decisions, it is held that the damages must be confined to the pecuniary loss.[8] In Virginia,[9] however, the jury are not

Co., 2 Abb. Dec. 277, affirming s. c., 32 Barb. 27; Taylor, B. & H. Ry. Co. v. Warner, (Tex.) 19 S. W. Rep. 449; McGown v. International & G. N. R. Co., (Tex.) 20 S. W. Rep. 80, and cases in preceding note. In an action by the husband, the court charged that damages should be given as a pecuniary compensation, the jury measuring plaintiff's loss by a just estimate of the wife's services and companionship; that is, by their value in a pecuniary sense, nothing being allowed for plaintiff's wounded feelings. *Held*, no error, companionship evidently being intended to express service. Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329.

[6] Beeson v. Green M. G. M. Co., 57 Cal. 20; McKeever v. Market St. R. Co., 59 Cal. 294; Cook v. Clay St. Hill R. Co., 60 Cal. 604; Nehrbas v. Central Pac. R. Co., 62 Cal. 320; Cleary v. City R. Co., 76 Cal. 240, 18 Pac. Rep. 269. In Morgan v. Southern Pac. Co., 80 Pac. Rep. 603, all the cases are reviewed, and it is there held, in accordance with the general rule, that the recovery is limited to the actual pecuniary loss. Munro v. Pacific C. D. & R. Co., 84 Cal. 515, 24 Pac. Rep. 303. Under the original California act, exemplary damages were expressly provided for. Myers v. San Francisco, 42 Cal. 215.

[7] Ravary v. Grand Trunk Ry. Co., 6 Low. Can. Jur. 49, reversing 1 Low. Can. Jur. 280. The decision rested on the ground that the right to recover such damages existed under the civil law, and was not abolished by the statute.

[8] Canadian Pac. Ry. Co. v. Robinson, 14 Can. Sup. Ct. 105, reversing 2 M. L. R. Q. B. 25; City of Montreal v. Labelle, 14 Can. Sup. Ct. 741. See, also, Provost v. Jackson, 13 Low. Can. Jur. 170; Ruest v. Grand Trunk Ry. Co., 4 Quebec L. R. 181; Grand Trunk Ry. Co. v. Ruel, 1 Leg. News, 129.

[9] Baltimore & O. R. Co. v. Noell, 32 Grat. 394; Matthews v. Warner, 29 Grat. 570. The court in the latter case rests its decision on the language of the act which provides that the jury "may award such damages as to it may seem fair and just," and which it says differs from that of other states in not expressly or impliedly limiting the damages to pecuniary loss. Christian, J., says: "I think it is manifest that the legislature intended, as in Kentucky, Iowa, Connecticut, and California, (which states are exceptional to the English statute,) to allow the

confined to the pecuniary loss, but may give damages for the loss of society, and by way of solace and comfort for the sorrow, suffering, and mental anguish occasioned by the death. In Alabama,[10] also, under the "Act to prevent homicides," a different rule seems to prevail. The general rule obtains also in states like Iowa,[11] Oregon,[12] and Washington,[13] where the measure of damages is the pecuniary injury to the estate.

§ 155. Exemplary damages.

It follows from the rule that damages must be assessed with reference to the pecuniary loss to the beneficiaries that exemplary or punitive damages cannot be given.[14] They are, however, expressly authorized by the acts of Arizona, Kentucky, Missouri, Nevada, Texas, and Washington. In Connecticut,[15] where the right of action of the party injured survives; in Tennessee,[16] under the peculiar statutes of that state; and in Alabama,[17] under the "Act to prevent homicides,"—they may be given. It seems that they may also be given in Virginia,[18] un-

jury in such cases to award punitive and exemplary damages." It is to be observed, however, that the Connecticut statute provides for the survival of the original cause of action; that the Kentucky statute expressly provides for punitive damages; and that in Iowa and California the damages are held to be limited to the pecuniary injury. Bertha Zinc Co. v. Black's Adm'r, 13 S. E. Rep. 452; Simmons v. McConnell's Adm'r, 86 Va. 494, 10 S. E. Rep. 838.

[10] See § 130.

[11] Donaldson v. Mississippi & M. R. Co., 18 Iowa, 280; Kelley v. Central Railroad of Iowa, 48 Fed. Rep. 663. See § 134.

[12] Holmes v. Oregon & C. Ry. Co., 5 Fed. Rep. 523; Carlson v. Oregon S. L. & U. N. Ry. Co., 28 Pac. Rep. 497; Ladd v. Foster, 31 Fed. Rep. 827. See § 144.

[13] Klepsch v. Donald, 30 Pac. Rep. 991. See § 57.

[14] See cases cited in note 8, *supra*, and note 24, *infra*.

[15] Murphy v. New York & N. H. R. Co., 29 Conn. 496. See § 132.

[16] See § 147. [17] See § 130.

[18] Matthews v. Warner, 29 Grat. 570. And see note 9, *supra*.

der the anomalous construction there adopted. But, even where exemplary damages are authorized, they are not to be given in every case where a recovery of pecuniary damages would be proper.[19] Thus, in Kentucky,[20] the statute confines them to cases of "willful neglect;" and in Arizona and Texas [21] to cases of "willful act or omission or gross negligence of the defendant." In Missouri[22] they cannot be given unless there are "aggravating circumstances."

§ 156. No damages for injury to deceased.

It was observed by Pollock, C. B., in Franklin v. South Eastern Ry. Co.,[23] that the only way to ascertain what Lord Campbell's act did mean was to show what it did not mean. Inasmuch as these acts do not transfer the right of action of the party injured to his personal representative, but give a new right of action, in which the damages are to be assessed with reference to the injury resulting from the death to the beneficiaries, nothing can be allowed on account of the physical or mental suffering, or other injury, to the deceased.[24] The rule

[19] Under the statute which provides that the jury may give such damages, "pecuniary and exemplary," as may to them seem just, damages resulting from the negligence of defendant, free from moral or legal wrong amounting to willfulness, are limited to actual pecuniary loss. Klepsch v. Donald, (Wash.) 30 Pac. Rep. 991.

[20] See § 135.

[21] See § 55.

[22] See § 139. The language of the Colorado and New Mexico statutes is similar, but in Colorado it is *held* that the existence of "aggravating" circumstances does not authorize exemplary damages.

[23] 3 Hurl. & N. 211, 4 Jur. (N. S.) 565.

[24] Blake v. Midland Ry. Co., *supra;* Illinois Cent. R. Co. v. Barron, 5 Wall. 90; Railroad Co. v. Whitton, 13 Wall. 270; Donaldson v. Mississippi & M. R. Co., 18 Iowa, 280; Dwyer v. Chicago, St. P. M. & O. Ry. Co., 51 N. W. Rep. 244; Kelley v. Central Railroad of Iowa, 48 Fed. Rep. 663; Kansas Pac. Ry. Co. v. Cutter, 19 Kan. 83; Oldfield v. New York & H. R. Co., 14 N. Y. 310; Whitford v. Panama R. Co., 23 N. Y. 465, 469; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Pennsylvania R. Co. v. Hender-

is, of course, otherwise under the acts of Connecticut, where the original right of action survives,[25] and in New Hampshire, Tennessee,[26] and New Brunswick, where the statutes authorize the jury to consider the suffering of the deceased.

§ 157. Medical and funeral expenses.

Since the damages are based solely upon the injury which results from the death, it would logically follow that the expenses of nursing, medical attendance, etc., which result, not from the death, but from the injury causing it, cannot be recovered. It has been frequently held, however, in actions by parents for the death of minor children, that these expenses may be included.[27] As to funeral expenses, it has been held in England that they cannot be included.[28] "The subject-matter of the statute," says Willes, J., in Dalton v. South Eastern R. Co., "is compensation for injury by reason of the relative not being alive." In that case the action was for the benefit of a father on account of the death of a minor son, and the verdict was reduced by the amount of the funeral and mourning expenses which the father had paid. In the United States funeral expenses are generally held to be a legitimate element of dam-

son, 51 Pa. St. 315; Brady v. Chicago, 4 Biss. 448; Southern Cotton P. & M. Co. v. Bradley, 52 Tex. 587; Potter v. Chicago & N. W. Ry. Co., 21 Wis. 372; and cases cited in note 3, *supra*.

[25] See § 132.

[26] See § 147.

[27] Little Rock & Ft. S. Ry. Co. v. Barker, 33 Ark. 350; Pennsylvania Co. v. Lilly, 73 Ind. 252; Rains v. St. Louis, I. M. & S. Ry. Co., 71 Mo. 164; Roeder v. Ormsby, 13 Abb. Pr. 334, 22 How. Pr. 270; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Pennsylvania R. Co. v. Bantom, 54 Pa. St. 495; Cleveland & P. R. Co. v. Rowan, 66 Pa. St. 393; Lehigh Iron Co. v. Rupp, 100 Pa. St. 95; Galveston v. Barbour, 62 Tex. 172; Brunswig v. White, 70 Tex. 504, 8 S. W. Rep. 85. Holland v. Brown, 35 Fed. Rep. 48, *contra*.

[28] Dalton v. South Eastern R. Co., 4 C. B. (N. S.) 296, 4 Jur. (N. S.) 711, 27 L. J. C. P. 227. See Boulter v. Webster, 13 Wkly. R. 289.

ages, at least when paid by one of the beneficiaries who was under obligation to pay them.[29] The Minnesota act provides that, out of the money recovered, "any demand for the support of the deceased, and funeral expenses, duly allowed by the probate court, shall be first deducted and paid."[30]

§ 158. Meaning of "pecuniary."

The use of "pecuniary" to designate the kind of loss for which recovery can be had is misleading, for the damages are by no means confined to the loss of money, or of what can be estimated in money. As will be seen, damages are recoverable for the loss of the services of husband, wife, and child, and also for the loss by a child of the care, education, and counsel which he might have received from his parents. The word has been used rather for the purpose of excluding from the recovery damages to the feelings and affections than of confining the damages strictly to those injuries which are "pecuniary," according to the ordinary definition. As was observed by Denio, J., in Tilley v. Hudson River R. Co.:[31] "The word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though painful and grievous to be borne, cannot be measured or recompensed by money. It excludes, also, those

[29] Owen v. Brockschmidt, 54 Mo. 285; Murphy v. New York Cent. & H. R. R. Co. 88 N. Y. 445, (affirming s. c., 25 Hun, 311;) Petrie v. Columbia & G. R. Co., 29 S. C. 303, 7 S. E. Rep. 515; and cases cited in note 27, *supra*. In Holland v. Brown, *supra*, it was held that they did not result from the death. In Gay v. Winter, 34 Cal. 153, it was held that if recoverable they must be specially pleaded. See Bunyea v. Metropolitan R. Co., 19 D. C. 76.

[30] This does not make the fund subject to all debts incurred by the deceased for the support of himself and family, but only to such as were incurred in consequence of, or after, the injury. State v. Probate Court of Dakota County, 58 N. W. Rep. 468.

[31] 24 N. Y. 471; s. c., 29 N. Y. 252.

losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of value." The meaning would be better expressed by "material," as was suggested by Patterson, J. A., in an opinion in which he carefully reviews all the English decisions.[32] The construction placed upon the word by the courts can only be ascertained by an examination of the various rules which have been evolved for measuring the damages, and which differ, according as the action is brought for the benefit of husband, wife, minor child, or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled.

§ 159. Reasonable expectation of benefit.

The loss which a man suffers by the death of a relative may be the loss of something which he was legally entitled to receive, or may be the loss of something which it was merely reasonably probable he would receive. The first description of loss is principally [33] confined to a husband's loss of his wife's services, a wife's loss of her husband's support and services, a parent's loss of the services of a minor child, and a minor child's loss of the support of a parent. But the statutes do

[32] Lett v. St. Lawrence & O. Ry. Co., 11 Ont. Ap. 1; Patterson, Railway Accident Law, § 401.

[33] But not exclusively. Thus where the deceased had covenanted to pay his mother an annuity during their joint lives, this, of course, furnished a basis for damages. Rowley v. London & N. W. Ry. Co., L. R. 8 Ex. 221; 42 L. J. Ex. 153; 29 L. T. (N. S.) 180. And, where the deceased was a child of 8, and his mother lost by his death a pension of $2 a month, which under the pension laws she drew on his account, it was held that she could recover damages on account of its loss. Ewen v. Chicago & N. W. Ry. Co., 38 Wis. 613.

not confine the benefit of the action to husbands, wives, minor children, and parents of minor children; and hence a person entitled to the benefit of the action may recover damages for the loss of a pecuniary benefit to which he was not legally entitled, but which it is reasonably probable he would have received except for the death. The second description of loss includes the loss by the beneficiary of any pecuniary benefit which he might reasonably have expected to receive during the lifetime of the deceased by gift, and also the loss of any accumulations which it is probable that the deceased would have added to his estate had he lived out his natural life, and which the beneficiary would probably have received by inheritance. Thus the second description of loss may be divided into (1) losses of prospective gifts, and (2) losses of prospective inheritances. The loss sustained by a husband, wife, minor child, and parent of a minor child may be of both descriptions. The loss sustained by an adult child, parent of an adult child, or collateral relative can only be of the latter description. The measure of damages can most conveniently be considered by classifying the cases according as the action is brought for the benefit of (1) a husband, (2) wife, (3) minor child, (4) parent of a minor child, or for the benefit of (5) one seeking to recover for the loss of prospective gifts, or (6) of a prospective inheritance.

§ 160. Death of husband and father of minor.

The pecuniary loss which a wife sustains by the death of a husband, and which a minor child sustains by the death of a father, necessarily includes the loss of support which the deceased owed them respectively.[34] The measure of damages is the amount which the deceased would probably have earned during

[34] Illinois Cent. R. Co. v. Welden, 52 Ill. 290; Chicago, R. I. & P. R. Co. v. Austin, 69 Ill. 426; Chicago & A. R. Co. v. May, 108 Ill. 288.

his life for their benefit, taking into consideration his age, ability, and disposition to work, and habits of living and expenditure.[35] To this may, of course, be added, as in other cases, the amount which he would probably have accumulated, and which they might reasonably have expected to inherit.[36] The damages

[35] Pennsylvania R. Co. v. Butler, 57 Pa. St. 335; Pennsylvania Tel. Co. v. Varnau, 15 Atl. Rep. 624; Hudson v. Houser, 123 Ind. 309, 24 N. E. Rep. 243; Baltimore & O. R. Co. v. State, 24 Ind. 271. Schaub v. Hannibal & St. J. R. Co., (Mo.) 16 S. W. Rep. 924; Hogue v. Chicago & A. R. Co., 32 Fed. Rep. 365; Shaber v. St. Paul, M. & M. Ry. Co., 28 Minn. 103, 9 N. W. Rep. 575; Bolinger v. St. Paul & D. R. Co., 36 Minn. 418, 31 N. W. Rep. 856; Burton v. Wilmington & W. R. Co., 82 N. C. 504; s. c., 84 N. C. 192; Blackwell v. Lynchburg & D. R. Co., (N. C.) 16 S. E. Rep. 12; Pool v. Southern Pac. R. Co., (Utah,) 26 Pac. Rep. 654; Wells v. Denver & R. G. W. Ry. Co., (Utah,) 27 Pac. Rep. 688; Baltimore & O. R. Co. v. Wightman, 29 Grat. 431.

Opportunities of acquiring wealth by change of circumstances in life are not to be considered. Mansfield C. & C. Co. v. McEnery, 91 Pa. St. 185; Atlanta & W. P. Ry. Co. v. Newton, 85 Ga. 517, 11 S. E. Rep. 776. See Christian v. Columbus & R. Ry. Co., 15 S. E. Rep. 701. Deceased was a fireman, and evidence was introduced to prove that firemen on defendant's road, when they had acquired sufficient experience and skill, were sometimes promoted to be engineers at increased wages. *Held* that, as it was not shown that deceased possessed the skill to be an engineer, the admission was error. Brown v. Chicago, R. I. & P. R. Co., 64 Iowa, 652, 21 N. W. Rep. 193. The court refused to charge that, if deceased was largely indebted, the plaintiff would have no pecuniary interest in his life until his debts were paid, and that the jury must fix a period when he would have acquired property beyond his debts. *Held* no error. Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315.

But in Texas it is held that it is proper to show what were the deceased's chances of promotion. St. Louis, A. & T. Ry. Co. v. Johnston, 78 Tex. 536, 15 S. W. Rep. 104; Texas & P. Ry. Co. v. Robertson, 17 S. W. Rep. 1041. And that the standard is not to be fixed by what he was earning when he died. International & G. N. R. Co. v. Ormond, 64 Tex. 485; East Line & R. R. Ry. Co. v. Smith, 65 Tex. 167.

[36] Lake Erie & W. R. Co. v. Mugg, (Ind.) 31 N. E. Rep. 564; Catawissa R. Co. v. Armstrong, 52 Pa. St. 282; Castello v. Landwehr, 28 Wis. 522; Lawson v. Chicago, St. P. M. & O. Ry. Co., 64 Wis. 447, 24 N. W. Rep. 618.

to the widow should be calculated upon the basis of their joint lives; the damages to the minor children, for the loss of support, should be confined to their minority.[37] It seems that the pecuniary value of the support of the head of a family cannot be limited to the amount of his wages earned for the benefit of his family, but that his daily services, attention, and care on their behalf may be considered.[38] The testimony in such cases, as also in actions for the death of a minor child, necessarily takes a wider range than when the question is simply whether the beneficiaries have suffered a pecuniary loss, in a strict sense.[39] Provided that it appears that the deceased was appar-

[37] The court charged that the jury should estimate the reasonable probabilities of the life of deceased, and give plaintiffs such pecuniary damages as they had suffered, or would suffer, as the direct consequence of deceased's death; that for the children these prospective damages should be estimated to their majority, "and as to the widow, to such probability of life as the jury may find reasonable." *Held*, that this was correct, and, no objection being made to the part relating to the widow, it would be assumed that it was understood by the jury as meaning the probable duration of the joint lives of herself and her husband. President, etc., of Baltimore & R. T. R. v. State, 71 Md. 573; 18 Atl. Rep. 884; Baltimore & O. R. Co. v. State, 33 Md. 542; Baltimore & O. R. Co. v. State, 41 Md. 268.

[38] Bolinger v. St. Paul & D. R. Co., 36 Minn. 418, 31 N. W. Rep. 856.

[39] Staal v. Grand Rapids & I. R. Co., 57 Mich. 239, 23 N. W. Rep. 795.

Testimony as to the household and living expenses of decedent's family, by one who had kept the accounts, is competent to show the loss to decedent's family because of his death. Hudson v. Houser, 123 Ind. 309, 24 N. E. Rep. 243.

Evidence that deceased had been in the habit of turning his wages over to his wife was properly admitted for the purpose of showing the loss sustained by deceased's family. Lake Erie & W. R. Co. v. Mugg, (Ind.) 31 N. E. Rep. 564.

As having reference to the question of the reasonable expectation of pecuniary benefit to the widow, an instruction to the jury that they might consider his capacity to earn money, the injury to his business, his health, and general condition in life, as disclosed by the evidence, is not erroneous. Clapp v. Minneapolis & St. L. Ry. Co., 29 N. W. Rep. 340, 36 Minn. 6.

Evidence showing what property deceased had when he came to the

ently able to provide for the support of his family, the court will be slow to set aside a verdict for lack of exact proof.[40] Thus, it is not essential that the deceased should have been actually earning wages at the time of his death;[41] but, in default of such proof, the amount of the verdict will doubtless be more carefully scrutinized.[42] The amount of verdict which will be sustained differs considerably in different jurisdictions.[43]

state 20 years before, what occupation he had followed, how much he had accumulated, and what he was worth at the time of his death, *held* admissible. Phelps v. Winona & St. P. R. Co., 37 Minn. 485, 35 N. W. Rep. 278.

[40] Deceased left a wife and three children, two of them minors. He was a strong, healthy man, 48 years old, accustomed to earn good wages as a day laborer. *Held*, that a verdict of $5,000 was not clearly excessive. Bolinger v. St. Paul & D. R. Co., 36 Minn. 418, 31 N. W. Rep. 856.

The deceased was a laboring man, sober and industrious, who provided for his family as best he could under the circumstances, and was 36 years old. He left a widow and six young children. *Held*, that a verdict of $5,000 was not excessive. Board Com'rs Howard Co. v. Legg, 110 Ind. 479, 11 N. E. Rep. 612.

The deceased was the head of a family, 39 years old, able to perform the duties of fireman, and always at work. *Held*, that the jury were authorized to find more than nominal damages, and that a verdict of $3,500 was not excessive. Smith v. Wabash, St. L. & P. R. Co., 92 Mo. 364, 4 S. W. Rep. 129.

[41] Evidence was given of the age, habits, health, and occupation of the deceased, and of the condition of his family, etc., but there was no evidence of the specific wages paid him at the time of his death. *Held*, that the jury were not confined to nominal damages. Baltimore & O. R. Co. v. State, 24 Md. 271. Averments showing that deceased was a laboring man, working for defendant (without alleging that he was receiving any compensation for his labor) and that he left no widow, but left a child three years old, *held*, on demurrer, to show sufficiently that such child suffered pecuniary damage by the father's death. Kelley v. Chicago, M. & St. P. Ry. Co., 50 Wis. 381, 7 N. W. Rep. 291.

[42] The deceased was a common laborer, who left a widow and several minor children, but what wages he received was not shown. *Held*, that a verdict of $5,000 was excessive, in view of the absence of evidence that he earned annually so much as the interest on one half that sum. Illinois C. R. Co. v. Welden, 52 Ill. 290.

[43] Deceased earned $1 a day, which he always brought home and spent

§ 161. Death of husband — Evidence of number of children.

Where the children are included among the beneficiaries, as is the case under most statutes, evidence of their number and

on his wife. The probable duration of his life was 27 years. *Held*, that a verdict of $2,500 should be reduced to $1,650. Louisville & N. R. Co. v. Trammell, 9 South. Rep. 870.

Deceased was 31 years old, sober and industrious, a druggist, but at the time of his death was laying rails at $2.50 a day. In an action by the widow, *held* that $5,000 was not excessive. Dallas & W. Ry. Co. v. Spicker, 61 Tex. 427.

A verdict of $10,000 will not be set aside as excessive, in view of testimony that deceased was a "stout, healthy, and sober" laborer, about 35 years old, earning $1.25 a day, and that he left a widow and two infant children. Missouri Pac. Ry. Co. v. Lehmberg, 75 Tex. 61, 12 S. W. Rep. 838.

Where the average wages of the deceased were $125 per month, *held* that a verdict of $5,000 each in favor of the widow and seven year old daughter, respectively, was not excessive. St. Louis, A. & T. Ry. Co. v. Johnston, 78 Tex. 536, 15 S. W. Rep. 104.

The deceased was a healthy and robust man 29 years old, an engineer, and earning $125 a month. *Held*, that a verdict in favor of his wife for $10,000 was not excessive. Texas & P. Ry. Co. v. Geiger, 79 Tex. 13, 15 S. W. Rep. 214.

Where plaintiff's husband was a healthy man, 55 years old, who earned from $500 to $1,200 a year, and who had always supported plaintiff, a verdict for $6,250 actual damages *held* not excessive. Paschall v. Owen, (Tex.) 14 S. W. Rep. 203.

Deceased was 33 years old, in good health, earning $14 a week 7 months in the year. *Held*, in a suit for wife and five children, that $6,000 was not excessive. Byrd v. Corner, 6 Leg. News, 364.

Deceased was insolvent and in failing health, but able to superintend his business as innkeeper. Verdict of $4,000 apportioned among his children *held* excessive. Hutton v. Windsor, 34 Up. Can. Q. B. 487.

In suit for wife and children, £3,000 *held* not excessive. Secord v. Great Western Ry. Co., 15 Up. Can. Q. B. 631. In suit for wife and children, £5,000 *held* excessive. Morley v. Great Western R. Co., 16 Up. Can. Q. B. 504.

ages is, of course, necessary.[44] Where, however, the action is to be brought by the widow in her own name, the question arises whether such evidence is proper. In Pennsylvania, where the widow sues for the benefit of the children, as well as of herself, and the declaration must state who are the parties entitled, such evidence is required.[45] In Missouri, on the other hand, and in some other states, the action, when brought by the widow, is for her sole benefit. It is held, nevertheless, that, as the burden of supporting minor children is imposed upon her, evidence of their number and ages is admissible to show the extent of the burden cast upon her by the death.[46] So, in Wisconsin, although the action is for the sole benefit of the widow, and hence an instruction that damages may be allowed to the widow *and* children is erroneous,[47] the fact that the deceased left children who will be dependent on her may be considered in estimating her damages.[48]

[44] Breckenfelder v. Lake Shore & M. S. Ry. Co., 79 Mich. 560, 44 N. W. Rep. 957. See § 80.

[45] Huntingdon & B. T. R. Co. v. Decker, 84 Pa. St. 419.

[46] Tetherow v. St. Joseph & D. M. Ry. Co., 98 Mo. 74, 11 S. W. Rep. 310; Soeder v. St. Louis, I. M. & S. Ry. Co., 100 Mo. 673, 13 S. W. Rep. 714; Atchison, T. & S. F. R. Co. v. Wilson, 48 Fed. Rep. 57, 1 C. C. A. 25. Under Rev. St. 1889, § 4425, such evidence is, of course, improper. Schlereth v. Missouri Pac. R. Co., 19 S. W. Rep. 1184.

[47] Schadewald v. Milwaukee, L. S. & W. Ry. Co., 55 Wis. 569, 13 N. W. Rep. 458; Lierman v. Chicago, M. & St. P. Ry. Co., 52 N. W. Rep. 91.

It is error to direct the jury to give damages to recompense the estate of deceased, for such instruction in effect directs them to compensate the children as well as the widow. Gores v. Graff, 77 Wis. 174, 46 N. W. Rep. 48.

[48] Mulcairns v. Janesville, 67 Wis. 24, 29 N. W. Rep. 565; Abbot v. McCadden, 51 N. W. Rep. 1079.

§ 162. Death of parent of minor—Loss of education and personal training.

The damages for loss of support suffered by a minor child include the loss of such comforts, conveniences, and also of such education as the parent might have been expected to bestow upon him. In Pym v. Great Northern Ry. Co.,[49] Cockburn, C. J., said: "We are of opinion that, as the benefit of education, and the enjoyment of the greater comforts and conveniences of life, depend on the possession of pecuniary means to procure them, the loss of these advantages is one which is capable of being estimated in money,—in other words, is a pecuniary loss,—and therefore the loss of such advantages arising from the death of a father whose income ceases with his life is an injury in respect of which an action can be maintained on the statute." It has frequently been held, however, that damages are not confined to the loss of such education as is procurable only by pecuniary means, but that they may be given for the loss of the personal care, training, and instruction of a parent, and even of a mother, where the father still survives.[50] A leading case on this subject is Tilley v. Hudson

[49] 2 Best & S. 759, 10 Wkly. R. 737, 31 L. J. Q. B. 249, affirmed, 4 B. & S. 396, 11 Wkly. R. 922, 32 L. J. Q. B. 377.

[50] Tilley v. Hudson River R. Co., 24 N. Y. 471; s. c., 29 N. Y. 252; Howard County Com'rs v. Legg, 93 Ind. 523; Stoher v. St. Louis, I. M. & S. Ry. Co., 91 Mo. 509, 4 S. W. Rep. 389; Dimmey v. Wheeling & E. G. R. Co., 27 W. Va. 32; Searle's Adm'r v. Kanawha & O. Ry. Co., 32 W. Va. 370, 9 S. E. Rep. 248; Baltimore & O. R. Co. v. Wightman, 29 Grat. 431; St. Louis, I. M. & S. Ry. Co. v. Maddry, 21 S. W. Rep. 472. In Illinois Cent. R. Co. v. Welden, 52 Ill. 290, it was *held* that while, on principle, an instruction that the jury might consider the loss of instruction and physical, moral, and intellectual training of the father was correct, it should not have been given, because there was no evidence tending to show that the deceased was fitted by education or by disposition to furnish it. Followed in Chicago, R. I. & P. R. Co. v. Austin, 69 Ill. 426.

River R. Co., which was an action brought by a father as administrator for the benefit of children for the death of their mother. On the first appeal it was held that the value of the mother's earnings, and the probability that the children would have received an estate increased by such earnings on the death and intestacy of the father, could not be considered; but, upon the second appeal, it was held that evidence of the mother's capacity to bestow upon her children such training, instruction, and education as would be pecuniarily serviceable to them was admissible, and that, as indicating such capacity on her part, it was not improper to admit evidence of her capacity to conduct business and save money. "It is certainly possible," said Hogeboom, J., "and not only so, but highly probable, that a mother's nurture, instruction, and training, if judiciously administered, will operate favorably upon the worldly prospects and pecuniary interests of the child. * * * If they acquire health, knowledge, and a sound bodily constitution, and ample intellectual development, under the judicious training and discipline of a competent and careful mother, it is very likely to tell favorably upon their pecuniary interests."

§ 163. Death of wife—Loss of service.

The pecuniary injury to a husband from the death of a wife necessarily includes the loss of her services, and the measure of damages is their reasonable value.[51] Thus, in Whitton v. Chicago & N. W. Ry. Co.,[52] a case arising in the circuit court, under the Wisconsin statute, the plaintiff proved that

[51] Chicago & N. W. R. Co. v. Whitton, 13 Wall. 270; s. c., Whiton v. Chicago & N. W. R. Co., 2 Biss. 282; Chant v. South Eastern Ry. Co., Weekly Notes, (Eng.) 1866, p. 134; Pennsylvania R. Co. v. Goodman, 62 Pa. St. 329; Delaware, L. & W. R. Co. v. Jones, 128 Pa. St. 308, 18 Atl. Rep. 330; Lett v. St. Lawrence & O. Ry. Co., 11 Ont. App. 1, reversing s. c., 1 Ont. R. 548.

[52] *Supra*, note 51.

his wife was a superior woman, as wife, mother, and member of society. The court charged the jury (after stating that the damages were confined to the pecuniary loss; that it was impossible to lay down any fixed rule; and that the matter largely rested with the sound reason and discretion of the jury) that, taking all the facts and circumstances into consideration, they might consider the personal qualities, the ability to be useful, of the deceased, and also her capacity to earn money. The jury rendered a verdict of $5,000, which was held not to be excessive. The defendant having brought the case to the supreme court, the charge was approved, Mr. Justice Field, who delivered the opinion, declaring it to be clear and explicit as to the character of the damages which the jury were authorized to consider. Proof that the deceased actually rendered services is not necessary, but may be inferred by the jury. Thus, in Chant v. South Eastern Ry. Co.,[53] which was an action by a gardener, owing to the fact that the plaintiff, the only witness, broke down in course of his examination, no evidence was given of the pecuniary loss, but the jury gave a verdict of £200. This was moved against in the exchequer chamber, on the ground that there was no evidence of pecuniary assistance; but the court thought that, in the absence of evidence to the contrary, it must be assumed that she was a person of average health, industry, and good character, and that to a poor man such a wife gave pecuniary assistance in keeping house, etc., and declined to grant a new trial. So, in Delaware, L. & W. R. Co. v. Jones,[54] the plaintiff introduced evidence to show that the deceased was 66 years old and had always been healthy, and rested. The court refused to rule that this evidence did

[53] *Supra*, note 51. But see Mitchell v. New York C. & H. R. R. Co., 2 Hun, 585, where a verdict for $4,000 was set aside as unauthorized by the proof, the only pecuniary loss shown being what might be inferred from the fact that deceased was a married woman and aged 20.

[54] *Supra*, note 51.

not show a pecuniary loss, or that the plaintiff could only recover nominal damages; and in the supreme court the lower court was sustained, Sterrett, J., observing that the jury might infer that she was an ordinarily industrious and useful wife. In Pennsylvania R. Co. v. Goodman[55] it is said that the frugality, industry, usefulness, attention, and tender solicitude of a wife and the mother of children, inasmuch as they render her services more valuable than those of an ordinary servant, are elements which are not to be excluded from the jury in making their estimate of value.

§ 164. Death of minor child—Loss of service.

In an action for the benefit of a parent for the death of a minor child the damages necessarily include the loss of the child's services during minority,[56] and the measure of damages is the value of the services less the probable cost of support and maintenance.[57]

[55] 62 Pa. St. 329. The court charged that damages should be given as a pecuniary compensation, the jury measuring the plaintiff's loss by a just estimate of the services and companionship of the wife; that is, by their value in a pecuniary sense, nothing being allowed for the plaintiff's wounded feelings. The charge was sustained, on the ground that "companionship" was evidently used to express the relation of the deceased in the character of the *services* performed.

[56] Little Rock & Ft. S. Ry. Co. v. Barker, 33 Ark. 350; Chicago v. Keefe, 114 Ill. 222, 2 N. E. Rep. 267; Illinois Cent. R. Co. v. Slater, 129 Ill. 91, 21 N. E. Rep. 575; McGovern v. New York Cent. & H. R. R. Co., 67 N. Y. 417; Galveston v. Barbour, 62 Tex. 172; Rains v. St. Louis, I. M. & S. Ry. Co., 71 Mo. 164; Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Caldwell v. Brown, 53 Pa. St. 453. A widowed mother may recover notwithstanding that she has no right to the services of a minor child, since the act gives her a right of action. Pennsylvania R. Co. v. Bantom, 54 Pa. St. 495.

[57] Rockford, R. I. & St. L. R. Co. v. Delaney, 32 Ill. 198; Rajnowski v. Detroit, B. C. & A. R. Co., 74 Mich. 15, 41 N. W. Rep. 847; Pennsylvania Co. v. Lilly, 73 Ind. 252; Brunswig v. White, 70 Tex. 504, 8 S. W.

It is not essential that the child should ever have earned anything. Thus, in Duchworth v. Johnson,[58] a father, who was a working man, sued for the death of a son 14 years of age, who had earned 4s. a week for a year or more, but who, at the time of his death, was without employment. There was no evidence of the cost of boarding and clothing him, and the judge left it to the jury to say whether the plaintiff had sustained any pecuniary loss by the death; and, the jury having found a verdict of £20, it was held that the plaintiff was entitled to retain it. In Bramall v. Lees[59] a father recovered £15 for the death of a daughter 12 years old, who had never actually earned anything, but who might, if she had lived, have obtained work in a factory. So, in Condon v. Great Southern & W. Ry. Co.,[60] a widow recovered £10 for the death

Rep. 85. The value of the services is to be without regard to any peculiar value which the parent might attach to them. St. Louis, I. M. & S. Ry. Co. v. Freeman, 36 Ark. 41.

[58] 4 Hurl. & N. 658, 29 L. J. Ex. 25, 5 Jur. (N. S.) 630.

[59] 29 L. T. 111. See Chapman v. Rothwell, 4 Jur. (N. S.) 1180, where Crompton, J., comments upon the case with approval.

[60] 16 Ir. Com. Law, 415. See Burke v. Cork, etc., R. Co., 10 Cent. L. J. 48.

In an action by a father for the death of his daughter, aged 10, it was proved that deceased lived with her parents, and was maintained by them, rendering services which enabled them to dispense with a servant. No evidence was given of the exact value of her services, or as to the cost of her maintenance. *Held*, that there was evidence for the jury, but a verdict for £150 should be reduced to £50. Wolfe v. Great Northern Ry. Co., 26 L. R. Ir. 548.

The plaintiff's father and stepmother were killed simultaneously. An action for the loss of the father had been instituted in which £100 was obtained; but 1s. only was allocated to plaintiff, who sued in a second action for the death of her stepmother. The parties were in humble life. The stepmother earned 6s. a week besides her food, which earnings were applied to the support of the family. Plaintiff resided with her father and stepmother. For six months preceding the death she earned 5s. a week, but previously had not been able to work from weakness of health. *Held*, that a verdict in the former case was no bar; also that

of a son of 14, who had never earned anything, but whose capabilities were valued at 6d. a day.

In no English case does it appear that damages have been given for the death of a child of such tender years as to be incapable of earning wages. But in the United States it is well settled that substantial damages may be recovered in such cases. Ihl v. Forty-Second St. Ry. Co.[61] is a leading case in point. The action was brought for the death of a child three years old, and the verdict was $1,800. The court of appeals sustained the lower court in refusing to nonsuit the plaintiff, or to direct a verdict for nominal damages, for absence of proof of pecuniary damages to the next of kin. "It was within the province of the jury," said Rapallo, J., "who had before them the parents, their position in life, the occupation of the father, and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present or prospective, resulting to the next of kin. Except in very rare instances, it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years; and to hold that, without such proof, the plaintiff could not recover, would, in effect, render the statute nugatory in most cases of this description. It cannot be said, as a matter of law, that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exceed any pecuniary advantage which the parents could have derived from his services had he lived. These calculations are for the jury, and any evidence on the subject beyond the age and sex of the child, the circumstances and condition in life of the parents, or other facts existing at the time of the death or trial, would necessarily be speculative and hypothetical, and would not aid the jury in arriving at a conclusion." He adds that the

there was evidence of pecuniary loss sufficient to sustain the action. Johnston v. Great Northern Ry. Co., 26 L. R. Ir. 691.

[61] 147 N. Y. 317.

amount of damages could have been reviewed in the court below, but could not in the court of appeals; the only question for the higher court being whether any, or more than nominal, damages could be recovered.[62]

[62] In Lehman v. City of Brooklyn, 29 Barb. 234, a stricter construction of the statute was adopted. In that case Brown, J., held that a verdict of $1,500 for a child of four years was excessive, and forcibly states the argument against the allowance of substantial damages in such cases: "For the next ten years," he says, "had he lived, it may safely be said that he would have been a burden in place of a benefit, pecuniarily, to his parents. And for the next seven years after that, if educated to a profession or mercantile calling, or put to a trade, he would have done well—much better than the majority of lads—if he supported himself. During all this time he would have been exposed to disease and death. * * * The life of this little boy, however priceless may have been its value in other aspects, had no pecuniary value which the jury could justly estimate at $1,500. If the plaintiff recovered at all, the damages should have been nominal." But this decision is opposed to the decisions earlier and later. Indeed, in actions for the death of minor children, as in other actions under the statute, the New York courts have gone farther than those of any other state in yielding the question of damages to the discretion of the jury.

Thus in Oldfield v. New York & H. R. Co., 14 N. Y. 310, affirming s. c., 8 E. D. Smith, 103, which was an action for the death of a daughter six years old, the judge charged that the plaintiff could recover whatever pecuniary loss the next of kin (the mother) might be supposed to incur in consequence of the loss of the child, and qualified this by adding that the jury were to give what they should deem fair and just, with reference to the pecuniary injury resulting from the death. The judge also excluded all considerations arising from the suffering of the child or the anguish of the parents, and confined the rule of damages exclusively to indemnification for a pecuniary loss. This instruction was sustained by the court of appeals, Wright, J., observing that it was only another way of instructing the jury that the damages were a sum which, in their opinion, taking into consideration all the circumstances of the case, would be the pecuniary loss to the next of kin. "This," he concludes, "was right, *unless the statute limits the recovery to the actual loss proved at the trial. We think it does not.*" See Quin v. Moore, 15 N. Y. 432.

In O'Mara v. Hudson River R. Co., 38 N. Y. 445, the jury rendered a verdict of $1,500 for a boy 11 years old. The defendant moved for a new

In conformity with the views expressed in Ihl v. Forty-Second St. Ry. Co., it is established that the jury may infer

trial on the ground that there was no evidence of the pecuniary value of the life, which was denied, and in the court of appeals the lower court was sustained, Hunt, C. J., observing that the jury would have the right, acting upon their own knowledge, and without proof, to say that the services of a boy from 11 until 21 years of age were valuable to his father, and to estimate their value.

The court went to the extreme length in Houghkirk v. Delaware & H. Canal Co., 92 N. Y. 219; s. c., 28 Hun, 407, (general term;) s. c., 11 Abb. N. C. 72, 68 How. Pr. 328, (special term,)—in which case a verdict of $5,000 was rendered for an only child 6 years old, intelligent and healthy, the daughter of a market gardener,—these facts and the circumstance of her death constituting the only evidence. The general term declined to set the verdict aside as excessive, and the court of appeals declared that it was impossible to say that error had been committed thereby, although it granted a new trial on another ground. In the opinion of the court at general term the difficulty of any court called upon to review the damages in such cases is clearly set forth as follows: "The court in that case" [Ihl v. Forty-Second St. F. R. Co.] "says that the damages could be reviewed in this court. But the difficulty is, by what test are we to review them? If it is a matter of guess work, the jury can guess as well as we. If we are to review them by the test of the evidence, then the difficulty is that there is no direct evidence proving the amount of loss. The facts to which the consideration of the jury is limited by the case cited would be, in the present case, substantially and in brief: A girl of six years, healthy and bright, only child of a gardener and his wife, both of whom survived her. Given her death; what is their pecuniary loss?" Referring to the position taken by the general term, that the doctrine of the court of appeals leaves it impossible for a court to say in any instance that damages are excessive, Finch, J., who delivered the opinion of the court of appeals, says: "The damages to the next of kin * * * are necessarily indefinite, prospective, and contingent. They cannot be proved with even an approach to accuracy, and yet they are to be estimated and awarded, for the statute has so commanded. But even in such case there is, and there must be, some basis in the proof for the estimate, and that was given here, and always has been given. Human lives are not all of the same value to the survivors. The age and sex, the general health and intelligence, of the person killed, the situation and condition of the survivors, and their relation to the deceased,—these elements furnish some basis for judgment. That it is

the amount of loss from proof of the age, sex, and condition in life of the deceased child, and that testimony as to the value of the services is unnecessary,[63] though perhaps not improper.[64] It would seem, however, that such proof would not dispense with the necessity of evidence showing the expectancy of life of the parents.[65] It is said in some of the cases that where the deceased is a minor, and leaves a parent entitled to his services, the law presumes a loss for which more than nominal

slender and inadequate is true; but it is all that is possible, and, while that should be given, more cannot be required. Upon that basis and from such proof the jury must judge; and, having done so, it is possible, though not entirely easy, for the general term to review such judgment, and set it aside if it appears excessive, or the result of sympathy and prejudice."

In Ahern v. Steele, 48 Hun, 517, 1 N. Y. Sup. 257, in sustaining a verdict of $4,500 for a child of six, Van Brunt, P. J., remarked: "The damages appear to be excessive, as it does not seem that there can be any pecuniary damage resulting from the death of so young a child; * * * but as recoveries have been sustained, based on the death of much younger children, we see no reason for interference with the verdict upon this account." Gorham v. New York Cent. & H. R. R. Co., 28 Hun. 449; Huerzeler v. Central Cross T. R. Co., 20 N. Y. Sup. 676. But in Carpenter v. Buffalo, N. Y. & C. R. Co., 88 Hun, 116, it was held that a verdict could not be sustained on evidence merely of the relationship, age, and habits of the child, when there was no evidence of the condition, pecuniary and physical, of the parents or of their age. See, also, Gill v. Rochester & P. R. Co., 87 Hun, 107; Birkett v. Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. Rep. 108.

[63] Little Rock & Ft. S. Ry. Co. v. Barker, 39 Ark. 491; City of Chicago v. Major, 18 Ill. 349; City of Chicago v. Scholten, 75 Ill. 468; City of Chicago v. Hesing, 83 Ill. 204; Union Pac. Ry. Co. v. Dunden, 37 Kan. 1, 14 Pac. Rep. 501; Nagel v. Missouri Pac. Ry. Co., 75 Mo. 653; Grogan v. Broadway Foundry Co., 87 Mo. 321; Brunswig v. White, 70 Tex. 504, 8 S. W. Rep. 85.

[64] Rajnowski v. Detroit, B. C. & A. R. Co., 74 Mich. 15, 20, 41 N. W. Rep. 847, 849; Pennsylvania Coal Co. v. Nee, 13 Atl. Rep. 841; Pennsylvania R. Co. v. Henderson, 51 Pa. St. 315. See, also, Klanowski v. Grand Trunk Ry. Co., 57 Mich. 525, 24 N. W. Rep. 801.

[65] Carpenter v. Buffalo, N. Y. & C. R. Co., 88 Hun, 116.

damages can be recovered.[66] Such damages may be enhanced by proof of the personal characteristics, capacity to render service, and habits of industry.[67] The jury may take into account the services which the child might reasonably have performed in the family, including acts of kindness and attention which would administer to the comfort of the family.[68] From the nature of the case, juries cannot be held to fixed and precise rules in estimating damages in case of the death of young children.[69] Nevertheless, as in other cases, the courts exercise their right to set aside and reduce excessive verdicts, though upon what principle the limit is determined it is often difficult to understand. The extent and character of the supervision exercised is illustrated in the cases collected in the subjoined note.[70]

[66] Where the next of kin are collateral kindred of the deceased, and have not received pecuniary aid from him, proof of such relationship will warrant a recovery of nominal damages only; but where the deceased is a minor, and leaves a father entitled to his services, the law presumes there has been a pecuniary loss. City of Chicago v. Scholten, 75 Ill. 468; City of Chicago v. Hesing, 83 Ill. 204.

Deceased was a brakeman over 20 years old, whose next of kin was a father, living in Germany. *Held*, that the plaintiff was entitled to more than nominal damages. The court says that while the measure of recovery would be affected by proof, or by the absence of it, of facts showing the value of the life to the survivors, the law presumes some value. Robel v. Chicago, M. & St. P. Ry. Co., 35 Minn. 84, 27 N. W. Rep. 305.

It is not competent for the defendant to prove that the child's services were of no value. Foppiano v. Baker, 3 Mo. App. 559.

[67] City of Chicago v. Scholten, 75 Ill. 468.

[68] Louisville, N. A. & C. Ry. Co. v. Rush, 127 Ind. 545, 26 N. E. Rep. 1010.

[69] Potter v. Chicago & N. W. Ry. Co., 22 Wis. 615; Ewen v. Chicago & N. W. Ry. Co., 38 Wis. 613.

[70] The mother was a widow, poor, and kept boarders. Deceased was a boy, an only child, healthy, intelligent, and obedient. The physician's bills and funeral expenses were $290. On the first trial the jury gave

§ 165. Death of minor child—Expectancy of benefit after majority.

Damages for the death of an adult child, as will be seen, are usually confined, except where they are based upon the loss of

$4,500, which was set aside as excessive. Little Rock & Ft. S. Ry. Co. v. Barker, 38 Ark. 350. On the second trial the jury gave $3,500, of which the plaintiff remitted $1,285. *Held*, that a third trial would not be granted on the ground of excessive damages. S. C., 39 Ark. 491.

Deceased was a son six or seven years old. *Held*, that a verdict of $2,000 was not so excessive as to justify the court to interfere. Chicago & A. R. Co. v. Becker, 84 Ill. 483.

Deceased was within 18 months of majority, and fitting herself to be a teacher, at the expense of her father. Her next of kin were her parents and a sister. *Held*, that these facts did not justify a verdict of $2,000, or more than nominal damages. Lake Shore & M. S. Ry. Co. v. Sunderland, 2 Ill. App. 307.

Whether the damages were excessive is a question of fact which will not be reviewed in the supreme court. City of Joliet v. Weston, 123 Ill. 641, 14 N. E. Rep. 665; s. c., 22 Ill. App. 225; City of Salem v. Harvey, 29 Ill. App. 483, 129 Ill. 344, 21 N. E. Rep. 1076.

A judgment for $3,000 for a minor, who was 11 years and 8 months old, intelligent, healthy, and promising, and left surviving him a father, earning $700 or $800 a year as an engineer, and having a wife and 3 children, is not grossly excessive. Union Pac. Ry. Co. v. Dunden, 37 Kan. 1, 14 Pac. Rep. 501.

Deceased was 18 years old, and was employed at $1.40 a day. His next of kin were a father and brother. *Held*, that a verdict of $3,400 was excessive, as it would realize a perpetual income equal to more than three quarters of his annual earnings. Chicago & N. W. R. Co. v. Bayfield, 37 Mich. 205.

A verdict of $1,500 for a strong, healthy girl 11 years old, *held* not excessive. Cooper v. Lake Shore & M. S. Ry. Co., 66 Mich. 261, 33 N. W. Rep. 306.

Deceased was 6 years old, in good health, and of ordinary intelligence and promise. His father and sole heir was working on a salary, and was 40 years old. The jury gave a verdict of $5,000, which the trial court reduced to $3,000. *Held*, that it should be set aside as excessive. Gunderson v. Northwestern Elevator Co., (Minn.) 49 N. W. Rep. 694. *Cf.* O'Malley v. St. Paul, M. & M. Ry. Co., 43 Minn. 289, 45 N. W. Rep. 441. In Strutzel v. St. Paul City Ry. Co., (Minn.) 50 N. W. Rep. 690, it

a prospective inheritance, to cases where the child has manifested his willingness to assist his parents by actually doing so.

was *held*, "though not without some hesitancy," that a verdict of $2,300 for a boy of 6 years should not be disturbed.

A verdict of $4,000 for a boy of 8 years *held* excessive, and reduced to $2,000. City of Vicksburg v. McLain, 67 Miss. 4, 6 South. Rep. 774.

A verdict of $5,000 for a son 18 years old, employed as a brakemen, where there is no evidence of the amount of his earnings, and no aggravating circumstances exist, is excessive. Parsons v. Missouri Pac. Ry. Co., 94 Mo. 286, 6 S. W. Rep. 464.

A verdict of $2,250 for a son 18 years old, earning $50 a month, the expenses of sickness and funeral being $200, is excessive. Hickman v. Missouri Pac. Ry. Co., 23 Mo. App. 344.

A verdict of $1,846 for death of a boy 15 years old, strong, robust, and attentive to business, and already earning $4 a week, cannot be held excessive. Franke v. City of St. Louis, 19 S. W. Rep. 988.

Verdicts of $936 and $1,056 for two sons, aged 13 and 15, respectively, *held* excessive. Telfer v. Northern R. Co., 30 N. J. Law, 188.

It was in evidence that the son was 14 years old when he was killed; that the average earning capacity of a lad from 14 to 21 years was from 75 to 90 cents a day; and that the expense of his maintenance was from 40 to 60 cents a day. *Held*, that $1,250 was not excessive damages. Pennsylvania Coal Co. v. Nee, (Pa.) 13 Atl. Rep. 841.

A verdict of $2,500 for a healthy five-year-old boy, with a fine mind, and well grown, kind, and dutiful, where the parents are poor, does not clearly show that the jury committed some palpable error, or totally mistook the rule of law, or were swayed by passion or prejudice, so as to warrant the court in setting it aside as excessive. Ross v. Texas & P. Ry. Co., 44 Fed. Rep. 44.

Deceased was a boy of eight, and his mother was in poor health, and dependent on friends, and lost by his death a pension of $2 a month. *Held*, that a verdict of $2,000 was not excessive. Ewen v. Chicago & N. W. Ry. Co., 38 Wis. 613.

Deceased was a healthy boy, 16 months old, whose parents were poor and approaching middle life. *Held*, that a verdict of $1,000 was not excessive. Hoppe v. Chicago, M. & St. P. Ry. Co., 61 Wis. 359, 21 N. W. Rep. 227.

A verdict of $1,200 for a boy eight years old, whose parents were poor and had a large family, *held* not excessive. Strong v. City of Stevens Point, 62 Wis. 255, 22 N. W. Rep. 425.

Deceased was seven years old. His father was poor, troubled with rheumatism, and sawed wood for a living, and his mother at times

In accordance with the principle of these cases, it is held in Arkansas,[71] Maryland,[72] Michigan,[73] and Pennsylvania[74] that, in an action for the death of a minor child of tender years, damages are limited to the loss of service during the child's minority, and that the chances of his surviving his parents and of his ability and willingness to assist them after that period, should be excluded from consideration. In Maryland[75] the same rule has been held to apply, although the minor is old enough to be self-supporting, and has actually contributed to the support of the parent; and the rule as declared in Pennsylvania would cover such a case.[76] But in Arkansas the rule does not apply where the minor has shown himself able and willing to make his own living, and to contribute to the support of his parents.[77]

In Missouri and some other states the right of action is confined by the terms of the statute to the death of a minor child.

In New York, Kansas,[78] Texas,[79] and Wisconsin, damages

worked out. *Held*, that a verdict of $2,500 was not excessive. Johnson v. Chicago & N. W. Ry. Co., 64 Wis. 425, 25 N. W. Rep. 223.

A verdict of $2,000 for a boy 18 months old *held* not excessive. Schrier v. Milwaukee, L. S. & W. Ry. Co., 65 Wis. 457, 27 N. W. Rep. 167.

[71] Little Rock & Ft. S. Ry. Co. v. Barker, 33 Ark. 350; St. Louis, I. M. & S. Ry. Co. v. Freeman, 36 Ark. 41.

[72] State v. Baltimore & O. R. Co., 24 Md. 84.

[73] Cooper v. Lake Shore & M. S. Ry. Co., 66 Mich. 261, 33 N. W. Rep. 306.

[74] Pennsylvania R. Co. v. Zebe, 33 Pa. St. 318; Caldwell v. Brown, 53 Pa. St. 453; Lehigh Iron Co. v. Rupp, 100 Pa. St. 95.

[75] No expectation of pecuniary benefit to the father from the continuance of the life, after minority, of a son 19 years old, can be considered, although the son had been emancipated 2 years before his death, and had paid to his father the greater part of his earnings, and had promised to help him after becoming of age. Agricultural & M. Ass'n v. State, 71 Md. 86, 18 Atl. Rep. 37.

[76] Lehigh Iron Co. v. Rupp, 100 Pa. St. 95.

[77] St. Louis, I. M. & S. Ry. Co. v. Davis, 18 S. W. Rep 628.

[78] Missouri Pac. R. Co. v. Peregoy, 36 Kan. 424, 14 Pac. Rep. 7.

[79] Gulf, C. & S. F. Ry. Co. v. Compton, 75 Tex. 667, 13 S. W. Rep. 667. See Houston & C. R. Co. v. Nixon, 52 Tex. 19.

are not limited to the value of the services during minority.[80] In New York[81] the right of action, even in case of the death of an adult child or of a collateral relative, is not confined to cases where there is evidence of past benefits upon which to base a reasonable probability of future benefits; and it is accordingly held that in an action for the death of a minor child the jury are not confined to a consideration of the benefits which would have resulted to the parents during minority, but may consider the probable, and even possible, benefits which might have resulted to them from his life, modified by the chances of failure and misfortune. In Wisconsin[82] it is held that the jury may take into consideration the reasonable expectation of pecuniary advantage that would have resulted from the child living beyond minority; but that it must be shown that the circumstances were such as to render it probable that the parents might need the services of the child, or aid from him, after majority; and that a sufficient foundation for such damages is laid by showing that the physical or pecuniary circumstances of the parents were such as to show that they might need such services or aid.

In Iowa[83] and Washington[84] two actions may be main-

[80] In an action by the administrator for the death of a child 18 months old, owing to the fact that another action had been (erroneously) begun by the father to recover for the loss of services of the child during minority, only such damages were claimed as would accrue to the father or next of kin by reason of the loss of such pecuniary benefit as he might have received after the minority. A new trial was granted for error in the instructions, but the court intimates that the action might be maintained. Scheffler v. Minneapolis & St. L. Ry. Co., 32 Minn. 518, 21 N. W. Rep. 711.

Although the father had given his time to the deceased, (a minor son,) the parents may recover more than nominal damages. St. Joseph & W. R. Co. v. Wheeler, 35 Kan. 185, 10 Pac. Rep. 461.

[81] Birkett v. Knickerbocker Ice Co., 110 N. Y. 504, 18 N. E. Rep. 108.

[82] Potter v. Chicago & N. W. R. Co., 22 Wis. 615; s. c., 21 Wis. 372. *Cf.* Seaman v. Farmers' L. & T. Co. 15 Wis. 578.

[83] See § 40.

[84] See § 57.

tained,—one by the personal representative to recover damages to the estate for the loss of benefits that would have accrued after majority, and one by the parent for loss of services during minority.

§ 166. Loss of prospective gifts and inheritance.

The measure of damages in actions where the pecuniary injury consists in loss of services and of support, or of other benefits which are peculiar to the mutual relation of husband and wife, and of parent and of minor child, have been considered. It remains to consider what other damages may be recovered, as well in actions which involve these peculiar relations, as in cases which do not involve them. As has been stated, such damages may be recovered (1) for the loss of prospective gifts, and (2) for the loss of a prospective inheritance.

§ 167. Loss of prospective gifts.

The cases in which, upon the facts, damages are recoverable for the loss of prospective gifts, are commonly actions by parents for the death of adult children, although cases also arise in which such damages may be recovered for the benefit of adult children on account of the death of a parent, or for the benefit of brothers and sisters and other collateral relatives. As has been said, such damages are not confined to cases of these descriptions, but may be recovered, where the facts furnish a proper basis, in addition to damages for loss of services, support, etc., in actions for the benefit of husbands, wives, minor children,[85] and, in some jurisdictions at least, of parents of minor children.

In order to lay a foundation for the recovery of damages for the loss of prospective gifts, it is usually held necessary, ex-

[85] Pym v. Great Northern Ry. Co., 2 B. & S. 759, 4 B. & S. 396.

cept in New York, for the plaintiff to show that the deceased, during his life, gave assistance to the beneficiaries, by way of money, services, or other material benefits, which, in reasonable probability, would have continued but for the death.[86]

§ 168. Loss of prospective gifts—Death of adult child.

Thus, in Dalton v. South Eastern Ry. Co.,[87] where it appeared that the plaintiff's son, who was 27 years old and unmarried, and lived away from his parents, had in the last 7 or 8 years been in the habit of making them occasional presents of provisions and money, amounting to about £20 a year, it was held that the jury were warranted in inferring that the father had such a reasonable expectation of pecuniary benefit from his son's life as to entitle him to recover damages. And in Franklin v. South Eastern Ry. Co.[88] it appeared that the father was old and infirm, and that the son, who was young and earning good wages, assisted him in some work, for which he was paid 3s. 6d. a week; and, the jury having found that the father had a reasonable expectation of benefit from the continuance of the son's life, it was held that the action was maintainable, although the verdict of £75 was excessive. In Sykes v. North Eastern Ry. Co.,[89] on the contrary, where the deceased was a bricklayer, and received from his father the

[86] Cases cited in notes to sections 168–170.

[87] 4 C. B. (N. S.) 296, 4 Jur. (N. S.) 711, 27 L. J. C. P. 227.

[88] 3 Hurl & N. 211, 4 Jur. (N. S.) 565. The plaintiff was 59 years old, nearly blind, injured in his leg and hands, and unable to work as formerly. Some 5 or 6 years before the death of his son, when the plaintiff was out of work for 6 months, the son had assisted the father pecuniarily, but had not done so since. *Held*, that there was evidence of pecuniary injury. Hetherington v. North Eastern Ry. Co., 9 Q. B. D. 160.

[89] 44 L. J. C. P. 191, 32 L. T. (N. S.) 199, 23 Wkly. R. 473.

wages of a skilled workman, and was of great assistance to his father, who was also a bricklayer, and who, owing to the loss of assistance from the deceased, could not take the contracts which he had done during his son's life, it was held that, inasmuch as the benefit which the father derived accrued, not from the relationship, but from a contract, and there was no evidence that he paid his son less than the usual wages, he had suffered no pecuniary loss from the death.[90]

The distinction taken in the English cases has generally been observed in the United States.[91] The proper measure of damages is the present worth of the amount which it is reasonably probable the deceased would have contributed to the support of the parent during the latter's expectancy of life, in propor-

[90] The injury to the sons of deceased by the dissolution of a partnership between him and them cannot be considered. Demarest v. Little, 47 N. J. Law, 28.

[91] In an action for the benefit of a father for the death of an unmarried son 23 years of age, plaintiff can recover only by showing that deceased gave assistance to his father, contributed money to his support, or that the father had reasonable expectation of pecuniary benefit from the continued life of the son, the reasonable character of this expectation to appear from the facts in proof. In the absence of such proof, only nominal damages can be recovered. Fordyce v. McCants, 51 Ark. 509, 11 S. W. Rep. 694.

A verdict of $10,000 should be set aside, it appearing that the next of kin entitled to the benefit of the verdict was a mother in comfortable pecuniary circumstances, who had derived no profit from the earnings of her son, and was not likely to profit by his earnings had he lived. Atchison, T. & S. F. R. Co. v. Brown, 26 Kan. 443.

The son lived apart from his parents, but was unmarried. No proof was offered of the parents' financial condition, or that they had ever received any actual pecuniary benefits from him during his lifetime; nor was there any evidence showing a reasonable probability of pecuniary advantage to them from the continuance of the son's life. *Held*, that no more than nominal damages should have been recovered. Cherokee & P. Coal & Min. Co. v. Limb, (Kan.) 28 Pac. Rep. 181.

The deceased contributed to the support of his mother and invalid sister, but not of his other brothers and sisters. *Held*, that damages

tion to the amount he was contributing at the time of his death, not exceeding his expectancy of life;[92] though it would seem that the rule is not to be applied with mathematical strictness, and that the jury may properly take into consideration the increasing wants of the parent, and the increasing

should be allowed only on account of the first two. Richmond v. Chicago & W. M. Ry. Co., (Mich.) 49 N. W. Rep. 621.

Damages for the death of a son must be shown by evidence regarding the earnings of deceased and other circumstances, unless such evidence is not accessible. A verdict for $9,000, based on no evidence showing the value of deceased's life to plaintiff, set aside. Houston & T. C. Ry. Co. v. Cowser, 57 Tex. 293.

The petition must show that the son supported plaintiff, or contributed to his support, or that there was some expectation of pecuniary benefit to be derived from deceased; and a mere allegation that plaintiff, "as his sole surviving parent, had been damaged $10,000 actual damages," is insufficient. Winnt v. International & G. N. Ry. Co., 74 Tex. 82, 11 S. W. Rep. 907.

But see Johnson v. Missouri Pac. Ry. Co., 18 Neb. 690, 26 N. W. Rep. 347, where the father lived in Sweden, and had received no aid from the deceased since his coming to the United States, a short time before the death, and it was held that the evidence should have been submitted to the jury.

In Pennsylvania it is said that "parents" and "children," as used in the act, indicate the family relation in point of fact as the foundation of the right of action, without regard to age. Pennsylvania R. Co. v. Adams, 55 Pa. St. 499. If the child was of age and the family relation existed, damages may be recovered for the loss of the reasonable expectation of pecuniary advantage, if any, from the continuance of the relation. Pennsylvania R. Co. v. Adams, *supra;* Pennsylvania R. Co. v. Keller, 67 Pa. St. 300; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15. But if the family relation has ceased, and the child does not contribute to his parents' support, no damages can be recovered. Lehigh Iron Co. v. Rupp, 100 Pa. St. 95.

[92] Richmond v. Chicago & W. M. Ry. Co., *supra.* But in Virginia, in an action for the benefit of a widowed mother for the death of an unmarried son, who lived with and cared for her, it was held that the jury might allow such sum as would be *equal to his probable earnings* during his and her expectancy of life. Baltimore & O. R. R. Co. v. Noell, 32 Gratt. 394.

ability of the child to supply them.[93] In Hutchins v. St. Paul, M. & M. Ry. Co.,[94] it was said: "The proper estimate can usually be arrived at with approximate accuracy by taking into account the calling of the deceased, and the income derived therefrom; his health, age, talents, habits of industry; his success in life in the past, as well as the amount of aid in money or services which he was accustomed to furnish the next of kin; and, if the verdict is greatly in excess of the sum thus arrived at, the court will set it aside or cut it down."[95]

[93] International & G. N. R. Co. v. Kindred, 57 Tex. 491; Texas & P. Ry. Co. v. Lester, 75 Tex. 56, 12 S. W. Rep. 955. See Hetherington v. Northeastern Ry. Co., 9 Q. B. D. 160. It is error to instruct the jury as to the disposition of the child to help, since the question is, did he help? Chicago & N. W. R. Co. v. Swett, 45 Ill. 197.

[94] 44 Minn. 5, 46 N. W. Rep. 79. In that case the verdict was $3,500, while the evidence showed that the contributions of the son to his mother did not exceed $50 a year, and that her expectancy of life was only 7½ years. The court reduced the verdict to $2,000. Opsahl v. Judd, 30 Minn. 126, 14 N. W. Rep. 575.

[95] The jury may consider the circumstances of the son, his occupation, age, health, habits of industry, sobriety, and economy, his annual earnings, and his probable duration of life at the time of the accident; also the amount of property, age, health, and probable duration of plaintiff's life, and the amount of assistance he had a reasonable expectation of receiving from the son. Hall v. Galveston, H. & S. A. Ry. Co., 39 Fed. Rep. 18.

Though the true measure of damages for the killing of plaintiff's son is "a sum equal to the pecuniary benefit the parent had a reasonable expectation of receiving from her child had he not died," it is not misleading to charge that the damages are "such sum as you may, under the evidence, reasonably believe plaintiff might have received from the assistance of deceased had he not been killed; and you may, in estimating such sum, if any, consider, under the evidence before you, the age of deceased, the time he might have lived, the age of the plaintiff, the time she may probably live, and any other evidence tending to show what damages, if any, she may have suffered by the killing of deceased. You will find for plaintiff such damages, under the instructions heretofore given, as you may think will compensate her for the loss, if any, she may have sustained by the killing." Missouri Pac. R. Co. v. Lee, 70 Tex. 496, 7 S. W. Rep. 857.

The application of the rules in actions for the death of adult children, particularly with reference to the amount of the verdict, is illustrated in the cases in the subjoined note.[96]

[96] Deceased contributed to the support of his mother and her invalid daughter $30 to $50 a month, and gave his sister $5 to $20 a month when necessary. He was healthy, and his expectancy of life was 32½ years. His mother was 59 years old, and her expectancy was 14¼ years. His sister was 19 years old, and her expectancy 42 years. He earned $100 to $150 a month. *Held*, that a verdict for $6,500 was not excessive; and that the jury were at liberty to consider that, in aiding the daughter, who belonged to his mother's family, the son was contributing to the support of his mother, who was his next of kin. Little Rock & Ft. S. Ry. Co. v. Voss, (Ark.) 18 S. W. Rep. 172.

Deceased first received $25 and afterwards $35 per month and board; his services were constantly increasing in value; his living expenses were about $125 a year, and the balance of his wages was sent to his parents. His father was poor, and dependent on his relatives for support, and his expectancy of life was about 17 years. *Held*, that a judgment of $2,391.50 was not excessive. Fordyce v. McCants, (Ark.) 18 S. W. Rep. 371.

When deceased was 23 years old, of good habits, and the sole support of his mother and her minor children, to whom he gave from $40 to $50 per month, a verdict for $3,000 is not excessive. O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. Rep. 269.

The father was 50 years old, and had little property besides his homestead. When not on the road the son lived with him and contributed to the support of the family. There was a policy of insurance on the life of the father for the benefit of the mother, upon which the son paid the premium, and he had promised to keep it paid. *Held*, that a verdict for $2,000 was not excessive. Chicago & A. R. Co. v. Shannon, 43 Ill. 388.

The fact that deceased, whose next of kin were a father and younger brothers and sisters, contributed to the support of his brothers, is sufficient to entitle his administrator to recover more than nominal damages. Illinois & St. L. R. Co. v. Whalen, 19 Ill. App. 116.

Deceased was a butcher, 22 years old, and gave all his earnings to his mother, at one time paying a debt of $400 for her. *Held*, that a verdict of $2,400 was not excessive. Chicago & A. R. Co. v. Adler, 28 Ill. App. 102.

Deceased left, surviving her, a father, mother, two brothers, and a sister. She lived with her father, mother, and sister, and had contrib-

§ 169. Loss of prospective gifts—Death of parent of adult child.

Although the benefit of the action, unless, as in Missouri, the statute otherwise provides, is not confined to minor children,[97] cases in which the facts warrant a recovery of damages by adult children for the loss of pecuniary benefits in the

uted to the support of her family as well as she could, and was under an engagement to teach school. *Held*, that a verdict of $1,500 was not excessive. City of Salem v. Harvey, 29 Ill. App. 483; affirmed, 21 N. E. Rep. 1076, 129 Ill. 344.

Deceased was 22 years old, and left as next of kin a mother aged 42, able to support herself by the needle, and two brothers aged 16 and 19. The evidence of his assistance to his mother was only of a general character. *Held*, that a verdict of $3,000 was excessive. Paulmier v. Erie R. Co., 34 N. J. Law, 151.

Deceased was industrious and economical, and, at the age of 26 years, earning $1,000 a year, out of which he was furnishing plaintiff, his mother, then 51 years old, $200 per annum. *Held*, that a verdict of $4,200 would not be disturbed. Texas & P. Ry. Co. v. Lester, 75 Tex. 56, 12 S. W. Rep. 955.

Where a mother who is 60 years old, and in good health, had for many years been supported by her son, aged 22½ years, and who at the time of his death was earning from $60 to $65 per month, one half of which he had been in the habit of giving to his mother, a verdict for $3,550 is not excessive. Missouri Pac. Ry. Co. v. Henry, 75 Tex. 220, 12 S. W. Rep. 828.

A verdict for $4,995 was not so excessive as to justify reversal, where decedent, at the time of his death, was a strong, healthy man 28 years old, of good habits, and earning $1.75 per day. Webb v. Denver & R. G. Ry. Co., (Utah,) 26 Pac. Rep. 981.

Action by father for death of son who had just come of age, and who, for two years previous to death, while attending school, had worked on his father's farm without wages. It was intended that he should study medicine at an expense to his father of $1,000 for three or four years, and in vacation work at home. *Held*, that there was no reasonable expectation of pecuniary benefit. Mason v. Bertram, 18 Ont. Rep. 1.

[97] Baltimore & O. R. Co. v. State, 60 Md. 449.

nature of prospective gifts are rare. The recovery must, of course, be based upon evidence of pecuniary benefits conferred by the deceased during his life, the continuance of which might reasonably have been expected.[98] Nothing can be allowed for the loss of a father's counsel and services, except so far as they can be estimated in money.[99]

[98] In an action for the benefit of two sons and a daughter, all married and of age, it appeared that the deceased lived with her daughter, thus enabling the latter to work and earn six dollars a week, and that the deceased also frequently assisted in nursing the sick in her sons' families; but it did not appear how often she went, how long she stayed, or what was the value of such services. *Held* (1) that, as the services rendered by the mother constituted the pecuniary benefit which the daughter had a right to expect from the continuance of the life, the value of such services, and not what the daughter might earn, was the measure of damages; (2) that there was no evidence sufficient to warrant the jury in finding any pecuniary loss to the sons. Baltimore & O. R. Co. v. State, 63 Md. 135.

The deceased lived with one married daughter, and was in the habit of rendering services (the value of which did not appear) to her and to her husband, who was an invalid, and to her other adult children. *Held*, that a nonsuit was properly denied. Petrie v. Columbia & G. R. Co., 29 S. C. 303, 7 S. E. Rep. 515. The court lays stress on the absence of the word "pecuniary" from the statute.

A married daughter and son, nearly 21 years old, neither of them supported by their father, who left also a widow and dependent minor children, have no right to damages. 78 Tex. 536, 15 S. W. Rep. 104.

In an action by a daughter for the death of her mother, it appeared that deceased lived with plaintiff, who was a laundress, and by whom she was maintained, the deceased assisting her in the laundry, etc. It was not shown that the value of the services of the deceased exceeded her support. *Held*, that a verdict for plaintiff should be set aside. Hull v. Great Northern Ry. Co., 26 L. R. Ir. 289.

[99] Demarest v. Little, 47 N. J. Law, 28.

§ 170. Loss of prospective gifts—Death of collateral relative.

The same rules apply to the recovery of damages for the death of collateral relatives.[100]

§ 171. Loss of prospective inheritance.

Where the evidence shows that it is probable that the decedent, but for his death, would have accumulated property, which, if he had died intestate, would have been inherited by the beneficiaries of the action, these facts constitute such a reasonable expectation of pecuniary benefit as to authorize a recovery of damages for its loss.[101]

In Pym v. Great Northern Ry. Co.,[102] where the party killed

[100] Where decedent was addicted to the use of intoxicating liquors, was careless in his work, and did not save his earnings, his brothers and sisters, to whose support he had never contributed, were entitled to nominal damages only. Anderson v. Chicago, B. & Q. R. Co., (Neb.) 52 N. W. Rep. 840. But see Grotenkemper v. Harris, 25 Oh. St. 510.

Deceased had a sister and two brothers living in Denmark. He was a bridge carpenter, and received $2 a day. He had been at work three or four months, and had sent some money to his sister, (how much did not appear.) There was no evidence as to his age or his capacity for earning and saving money, or as to the expectation of pecuniary benefit to be derived by the next of kin from his estate if he had lived longer. *Held*, that a verdict of $1,750 should be set aside as excessive. Serensen v. Northern Pac. R. Co., 45 Fed. Rep. 407.

[101] Pym v. Great Northern Ry. Co., 2 Best & S. 759, 31 L. J. Q. B. 249, 8 Jur. (N. S.) 819, 10 Wkly. R. 737, 6 L. T. (N. S.) 1537; affirmed in 4 Best & S. 396, 32 L. J. Q. B. 377, 10 Jur. (N. S.) 199, 11 Wkly. R. 922; Illinois Cent. R. Co. v. Barron, 5 Wall. 90; Lake Erie & W. R. Co. v. Mugg, (Ind.) 31 N. E. Rep. 564; McAdory v. Louisville & N. R. Co., 10 South. Rep. 507; Castello v. Landwehr, 28 Wis. 522. The loss of the chance to be endowed out of her husband's accumulations is a pecuniary injury to the wife. Catawissa R. Co. v. Armstrong, 52 Pa. St. 282, 282.

[102] 2 B. & S. 759, 4 B. & S. 396.

was in possession of personalty to the amount of £3,400, and was tenant for life of an estate in land worth nearly £4,000 a year, with remainder to his eldest son in tail, and, by settlement, a jointure of £1,000 a year was settled on his wife, and £20,000 secured to the younger children on his death, and the deceased died intestate, it was held that the widow and younger children had a sufficient expectation of pecuniary benefit to render its loss a ground for action. Cockburn, C. J., after observing that the loss of education and the greater comforts and enjoyments of life arising from the death of a father whose income ceases with his life is an injury in respect of which an action can be maintained, continues as follows: "*A fortiori*, the loss of a pecuniary provision, which fails to be made owing to the premature death. * * * It is true that it must always remain matter of uncertainty whether the deceased person would have applied the necessary portion of income in securing to his family the social and domestic advantages of which they are said to have been deprived by his death; still more, whether he would have laid by any and what portion of his income to make provision for them at his death. But * * * it is for the jury to say, under all the circumstances, taking into account all the uncertainties and contingencies of the particular case, whether there was such a reasonable and well-founded expectation of pecuniary benefit as can be estimated in money." The jury having given £13,000,—£1,000 to the widow, and £1,500 to each of the younger children,—it was held that the latter sum ought in each case to be reduced to £1,000.

In Illinois Cent. R. Co. v. Barron,[103] an action brought under the Illinois statute, the testator was a bachelor, 35 years old, and had an estate of $35,000, which he left by will to his father. He was an attorney, but for four years prior to his death had

[103] 5 Wall. 90.

been a judge. His term of office having expired, he was about to resume his profession, with a fair promise of doing as well as before he was elected judge, when his professional income had been about $3,000 a year. The action was for the benefit of his father, brothers, and sisters, one of whom had formerly received some assistance from him for support. The court refused to charge that it was necessary that the beneficiaries should have a legal interest in the life, but charged, among other things, that the jury had a right, in estimating the amount of pecuniary injury, to take into consideration the relations between the deceased and his next of kin, the amount of his property, the character of his business, and the prospective increase of wealth likely to accrue to a man of his age with the business and means which he had, the possibility that his estate would have decreased rather than increased, and the contingency that he might have married, and his property descended in another channel. The verdict and judgment were for $3,750; and, the case coming before the supreme court on exceptions to the charge, and on the refusal to charge as requested, the judgment was affirmed. The opinion was delivered by Mr. Justice Nelson, who said: "The damages in these cases, whether the suit is in the name of the injured party, or, in case of his death, under the statute, by the legal representative, must depend very much on the good sense and sound judgment of the jury, upon all the facts and circumstances of the particular case. If the suit is brought by the party, there can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time and care in business, or the permanent injury to health and body. So, when the suit is brought by the representative, the pecuniary injury resulting from the death to the next of kin is equally uncertain and indefinite. If the deceased had lived, they may not have been benefited, and, if not, then no pecuniary injury could have resulted to

them from his death. But the statute in respect to the measure of damages seems to have been enacted upon the idea that, as a general fact, the personal assets of the deceased would take the direction given them by the law, and hence the amount recovered is to be distributed to the wife and next of kin in the proportion provided for in the distribution of personal property left by a person dying intestate. If the person injured had survived and recovered, he would have added so much to his personal estate, which the law, on his death, if intestate, would have passed to his wife and next of kin. In case of his death by the injury, the equivalent is given by a suit in the name of his representative."

It would seem that, where there is no evidence tending to show that the deceased would probably have accumulated anything if he had lived, no more than nominal damages should be awarded,[104] and that the verdict should be set aside if the amount is grossly out of proportion to the reasonable probabilities of the case.[105]

§ 172. Rule of damages in New York.

A looser rule in respect to the measure of damages prevails in New York than elsewhere, under similar statutory provisions;

[104] In an action for the benefit of brothers and sisters, where the deceased had accumulated nothing, *held*, that only nominal damages should be awarded. Howard v. Delaware & H. Canal Co., 40 Fed. Rep. 195. But in Grotenkemper v. Harris, 25 Oh. St. 510, where the deceased was only four or five years old, and the beneficiaries were a brother and sisters, it was *held* not to be error to charge that the reasonable expectation of pecuniary benefit may consist of what a person may give to his next of kin while living, as well as what they may inherit from him at his death.

[105] The injury claimed was the deprivation of the probable accumulations of deceased in his business. The jury gave a verdict of $27,500. To reach this result, they must have found that deceased, who had already acquired a competence, would have continued in business for

for in that state it is held in all cases that it is enough for the plaintiff to show the age, sex, condition, physical and mental, and the circumstances and situation in life of the deceased, and the age, circumstances, and condition of the next of kin, and that, provided such evidence is introduced, it is for the jury to estimate the "pecuniary injuries," present and prospective, to the next of kin.[106] This rule differs little, if at all, from the rule elsewhere applied in actions brought by parents for the death of young children, but in New York the rule is also ap-

his full expectancy of life; would have retained sufficient health and vigor of mind to enable him to do so as successfully as before; would have avoided business losses; would have safely invested his accumulations; and that the children would have received them at his death. *Held*, that the verdict should be set aside, unless the plaintiff would consent to a reduction to $15,000. Demarest v. Little, 47 N. J. L. 28.

In an action by a widow for the death of her husband, where it appeared that plaintiff was 20 years old and her husband 22 at the time of his death, and that his wages up to that time had been entirely consumed in the expenses of his household, it was error to charge that, if the jury believed the widow's expectancy of life was greater than her husband's, they should allow her the present value of any property she would probably have received from her husband as dower if he had not been killed, as the realization of any sum as dower depended on too many remote contingencies. St. Louis, I. M. & S. Ry. Co. v. Needham, 52 Fed. Rep. 371, 3 C. C. A. 129.

Decedent was a widow 61 years old, who had done a profitable business as a boardinghouse keeper, and had made some money, beside supporting a daughter, and occasionally gave small amounts to a son. *Held* that, as the jury were authorized to take into consideration the reasonable expectation of her property being increased for the benefit of her children, who were of age, and the reasonable expectation of pecuniary benefit to them by support or otherwise, a verdict of $1,000 was sustained by the evidence. Tuteur v. Chicago & N. W. R. Co., 77 Wis. 505, 46 N. W. Rep. 897.

Decedent was a widower, 73 years old, strong and vigorous, and actively engaged in business. The children were of age, and not dependent on him. *Held*, that $1,000 was not excessive. City of Wabash v. Carver, (Ind.) 29 N. E. Rep. 25.

[106] See note 62, *supra*.

plied in cases in which the only possible basis for damages would seem to be the loss of prospective gifts, or of a prospective inheritance,—cases in which, in other jurisdictions, some evidence either of past gifts, or of the probability of future accumulations, is usually required.

Thus, in Tilley v. Hudson River R. Co.,[107] it was held that damages for the loss of the training, instruction, and education of a mother were not confined to minor children. The opinion by Hogeboom, J., upon the measure of damages, is frequently referred to with approval.[108] The jury, he says, "are to give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death. They are not tied down to any precise rule. Within the limit of the statute, as to the amount and the species of injury sustained, the matter is to be submitted to their sound judgment and sense of justice. They must be satisfied that pecuniary injuries resulted. If so satisfied, they are at liberty to allow them from whatever source they actually proceeded, which could produce them. If they are satisfied, from the history of the family, or the intrinsic probabilities of the case, that they were sustained by the loss of bodily care or intellectual culture or moral training which the mother had before supplied, they are at liberty to allow for it. *The statute has set no bounds to the sources of these pecuniary injuries.*"

[107] 29 N. Y. 252; s. c., 24 N. Y. 471.

[108] McIntyre v. New York C. R. Co., 37 N. Y. 287, affirming 47 Barb. 515. In this case the deceased was a widow about 48 years old, who left three children, all of age, one a married daughter with whom she lived. She was a seamstress, capable of earning $1 a day above her board, and left only a small amount of property. She had been in the habit of making small articles of clothing for her children from time to time. A verdict for $3,500 was reduced to $1,500, and an appeal sustained for that amount. A nonsuit was granted at a former trial, and overruled in 43 Barb. 532. See, also, Keller v. New York C. R. Co., 2 Abb. Dec. 480, 24 How. Pr. 172; affirming s. c., 17 How. Pr. 102, 28 Barb. 44.

In Dickens v. New York Cent. R. Co.[109] the plaintiff sued as administrator of his wife, for the benefit (the action being prior to the act of 1870) of brothers and sisters and nephews and nieces. The court refused to charge, as requested, that the plaintiff could only recover nominal damages, on the ground that, as the deceased had left neither child nor parent, the only loss incurred by her next of kin would be the chance of her accumulating a separate estate and dying intestate, or making a will in their favor, and that this would be too remote a contingency to be of any substantial value to them. The court charged, in the language of the statute, that the only damages the jury could give were such as they might deem a fair and just compensation, not exceeding $5,000, with reference to the pecuniary damages resulting from the death to the next of kin; and that whether more than nominal damages, and, if so, how much, resulted to the next of kin, were questions for the jury. The defendant excepted, and requested the judge to charge that there was no evidence of any pecuniary injury, and that the relation of brother and sister did not raise a presumption of pecuniary loss, which was refused. The jury rendered a verdict for $500. The court of appeals held the charge correct, within Tilley v. Hudson River R. Co. Hogeboom, J., in delivering the opinion, says: "I think the defendants cannot successfully assail the charge * * * unless it is a case for limiting the plaintiff to nominal damages. We are not at liberty to lay down any such restricted rule, without violating the statute and the current of former decisions. * * * It is not always easy to see how the death of a particular individual, *and she a wife*, will operate to the pe-

[109] 1 Abb. Dec. 504. At a former trial the plaintiff obtained judgment, which was sustained by the general term, (28 Barb. 41,) but reversed in the court of appeals, (23 N. Y. 158,) on the ground that the verdict included damages to the *husband* for loss of service. Thomas v. Utica & B. R. R. Co., 6 Civ. Proc. 358.

cuniary injury of *collateral relatives*, and, if so, to what extent. But as the law does not require direct and precise proof on this subject, and has committed to the jury a liberal discretion in its actual disposition, we cannot say, in view of the not very extravagant sum assessed by the jury in this particular case, if any sum whatever were to be allowed, that any principle of law has been violated."

In Lockwood v. New York, L. E. & W. R. Co.[110] the court of appeals seems to recognize that it has gone beyond the courts of other states in its rulings upon this subject. The deceased was 68 years old, and left seven children, all of age, self-supporting, and living away from home, except an unmarried daughter, who lived with him and did household work, in consideration of her board, and a married son, who lived with him, but worked for himself, and used his own earnings. The plaintiff, against objection, was permitted to prove that the children had no property, and that the daughter who lived at home had a disease which prevented her from working, as she could otherwise have done. The court refused to charge that where the children are of full age, and living away from home, and self-supporting, no such pecuniary loss has been sustained by them as can be recovered. The opinion of the court of appeals was delivered by Earl, J., who said: "*Whatever the rule may be in other states*, there are many cases in this which in principle sustain the rulings of the trial judge. * * * In but few cases arising under this act is the plaintiff able to show direct, specific pecuniary loss, * * * and generally the basis for the allowance of damages has to be found in the proof of the character, qualities, capacity, and condition of the deceased, and in the age, sex, circumstances, and condition of the next of kin. The proof may be unsatisfactory, and the damages may be quite uncertain and contingent; yet the jurors in each case must take

[110] 98 N. Y. 523. Lustig v. New York, L. E. & W. R. Co., 20 N. Y. Sup. 477.

the elements thus furnished, and make the best estimate of damages they can. There seems to be no other mode of administering the statute referred to, and protection against excessive damages must be found in the power of courts in some of the modes allowed by law to revise or set aside the verdicts of juries."[111]

In Bierbauer v. New York Cent. & H. R. R. Co.,[112] the in-

[111] How slight is the protection thus afforded is illustrated by Pineo v. New York Cent. & H. R. R. Co., 34 Hun, 80, which was an action brought by the brother as administrator of a girl of 14, whose next of kin was supposed to be her father, who had abandoned his family years before, and concerning whom it was not known whether he was alive or dead. It was *held* that a refusal to charge that there was no evidence that the life of deceased had any pecuniary value to her father was not error, and that a verdict of $3,500 should not be set aside as excessive. In a dissenting opinion, Barker, J., pertinently remarks: "If we uphold this verdict, we do, in effect, say that the jury are omnipotent in this class of cases, and that there is no rule of law to be observed by them in assessing damages."

[112] 15 Hun, 559; affirmed, 77 N. Y. 588.

The deceased was an engineer, industrious and faithful to his mother, who was his next of kin. *Held*, that a verdict for $5,000 was not excessive. Erwin v. Neversink Steamboat Co., 23 Hun, 573; Quinn v. Power, 29 Hun, 183.

Decedent was a single woman 36 years old, without other near relatives than her parents, who were 66 and 58 years old. Both were poor, and the father infirm, and, for 20 years decedent had contributed $300 or $400 per annum to their support. She was in good health, and receiving a salary of $8 or $9 per week. *He'd*, that a verdict for $4,000 damages was not excessive. Bowles v. Rome, W. & O. R. Co., 46 Hun, 324.

In Kelly v. Twenty-Third St. Ry. Co., 14 Daly, 418, the only relatives of the deceased were a brother and sister in Ireland, and three nephews in New York. There was no evidence that he ever did anything to assist them, nor was it shown what the proceeds of his business were, nor what, if anything, was the value of his life to his next of kin. A verdict of $1,000 was held not excessive. The court points out that the courts of New York have not discriminated between the immediate and collateral kindred, and that in other states proof is necessary that the relatives had received or were likely to receive support from

testate was 21 years old, earning $25 a month. He was unmarried, but left, as next of kin, a father, aged 65, residing in Germany. The court declined to set aside as excessive a verdict for $5,000. Bockes, J., observed: "It is admissible to permit a reduction of the damages as alternative to the granting of a new trial. In my judgment, this is a proper case for the exercise of a fair discretion in that regard; but my associates are of opinion that the court should not trench upon the right of the jury to determine the damages to be awarded in cases of this character, unless it can be plainly seen that some improper element was considered and allowed in their estimate, or that they were influenced by passion, partiality, prejudice, or corrupt motives. In this view of the case, the verdict must be allowed to stand."

§ 173. Evidence of pecuniary condition of beneficiaries.

As a general rule, it is inadmissible to introduce evidence of the poverty [113] or bad health [114] or of other facts tending to

the deceased. But where no facts appeared except that the deceased was a married woman aged 20 years, and a verdict of $4,000 was rendered, it was *held* that a new trial should be granted. Mitchell v. New York Cent. & H. R. R. Co., 2 Hun, 535.

[113] Illinois Cent. R. Co. v. Baches, 55 Ill. 379; Chicago & N. W. Ry. Co. v. Moranda, 93 Ill. 302; Chicago & N. W. R. Co. v. Howard, 6 Ill. App. 569; Heyer v. Salsbury, 7 Ill. App. 93; Chicago, R. I. & P. R. Co. v. Henry, Id. 322; Beard v. Skeldon, 13 Ill. App. 54; Illinois Cent. R. Co. v. Slater, 28 Ill. App. 73, affirmed 129 Ill. 91, 21 N. E. Rep. 575; City of Delphi v. Lowery, 74 Ind. 520; Overholt v. Vieths, 93 Mo. 422, 6 S. W. Rep. 74; Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205; Hunn v. Michigan Cent. R. Co., 78 Mich. 513, 44 N. W. Rep. 502; Central R. R. v. Rouse, 77 Ga. 393, 3 S. E. Rep. 307; Central R. R. v. Moore, 61 Ga. 151. The Illinois cases on this subject are somewhat

[114] Illinois Cent. R. Co. v. Baches, *supra;* Benton v. Chicago, R. I. & P. R. Co., 55 Iowa, 496, 8 N. W. Rep. 330.

show the necessities of the beneficiaries, since such facts do not tend to prove that they have suffered a pecuniary loss. "If the moral obligation to support near relatives," says Cooley, C. J., in Chicago & N. W. R. Co. v. Bayfield, "were to be the criterion, we might take their poverty into account; * * * but as this may or may not have been recognized, and, if recognized, may have been very imperfectly responded to, it is manifest that it can be no measure of the pecuniary injury the family received, or was likely to receive, from the death." But an exception to this rule is recognized in some cases where damages are based upon the loss of prospective gifts, and especially in cases for the benefit of parents on account of the death of minor children, as tending to show the probability that such gifts would have been made.[115] In Wisconsin[116] and New York[117] such evidence seems to be admissible in all cases.

modified by the recent case of Pennsylvania Co. v. Keane, 32 N. E. Rep. 260, in which it was *held* that, in an action by the widow as administratrix, it is proper to allow her to testify that the deceased was at the time of her death her sole support. The opinion says: "We take it that the rule deducible from the cases is substantially this: that it is not competent to show what the pecuniary circumstances of the widow, family, or next of kin are or have been since the decease of the intestate, but that it is competent to show that the wife, children, or next of kin were dependent upon him for support before and at the time of his death."

[115] Potter v. Chicago & N. W. Ry. Co., 21 Wis. 373; s. c., 22 Wis. 615; Ewen v. Chicago & N. W. Ry. Co., 38 Wis. 613; Johnson v. Chicago & N. W. Ry. Co., 64 Wis. 425, 25 N. W. Rep. 223; Wiltse v. Town of Tilden, 77 Wis. 152, 46 N. W Rep. 234; Staal v. Grand Rapids & I. R. Co., 57 Mich. 239, 23 N. W. Rep. 795; Cooper v. Lake Shore & M. S. Ry. Co., 66 Mich. 261, 33 N. W. Rep. 306; Missouri Pac. R. Co. v. Peregoy, 36 Kan. 424, 14 Pac. Rep. 7; Little Rock, M. R. & T. Ry. Co. v. Leverett, 48 Ark. 333, 3 S. W. Rep. 50; International & G. N. R. Co. v. Kindred, 57 Tex. 491; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291; Chicago v. McCulloch, 10 Ill. App. 459; Illinois Cent. R. Co. v. Slater, 28 Ill. App. 73, *contra*. See City of Chicago v. Powers, 42 Ill. 169.

[116] Annas v. Milwaukee & N. R. Co., 67 Wis. 46, 30 N. W. Rep. 282; McKeigue v. City of Janesville, 68 Wis. 50, 31 N. W. Rep. 298.

[117] See last section.

§ 174. Expectation of life—Life tables.

In order to show the expectation of life of the deceased and of the beneficiaries the Carlisle, Northampton, and other standard life tables may be introduced;[118] though such tables are not conclusive, since the jury should consider them with the other evidence in the case,[119] and may determine the probable length of life solely upon evidence of the age, health, habits, etc., of the person.[120] The computation should be made from the death of the deceased;[121] and where, as in Iowa, the action is brought for the death of a minor to recover damages for the

[118] Donaldson v. Mississippi & M. R. R. Co., 18 Iowa, 280; Coates v. Burlington, C. R. & N. R. Co., 62 Iowa, 486, 17 N. W. Rep. 760; Worden v. Humeston & S. R. Co., 76 Iowa, 310, 41 N. W. Rep. 26; Gorman v. Minneapolis & St. L. Ry. Co., 78 Iowa, 509, 43 N. W. Rep. 303; Louisville, C. & L. R. Co. v. Mahony's Adm'x, 7 Bush, 235; Cooper v. Lake Shore & M. S. Ry. Co., 66 Mich. 261, 33 N. W. Rep. 306; Hunn v. Michigan Cent. R. Co., 78 Mich. 513, 44 N. W. Rep. 502; Sellars v. Foster, 27 Neb. 118, 42 N. W. Rep. 907; Sauter v. New York Cent. & H. R. R. Co., 66 N. Y. 50; Mississippi & T. R. Co. v. Ayres, 16 Lea, 725; San Antonio & A. P. Ry. Co. v. Bennett, 76 Tex. 151, 13 S. W. Rep. 319.

[119] Scheffler v. Minneapolis & St. L. Ry. Co., 32 Minn. 518, 21 N. W. Rep. 711; McKeigue v. City of Janesville, 68 Wis. 50, 31 N. W. Rep. 298; Georgia R. R., etc., Co. v. Oaks, 52 Ga. 410; Georgia R. Co. v. Pittman, 73 Ga. 325; Central R. Co. v. Crosby, 74 Ga. 737; Central R. Co. v. Thompson, 76 Ga. 770.

[120] Beems v. Chicago, R. I. & P. Ry. Co., 67 Iowa, 435, 25 N. W. Rep. 693; Deisen v. Chicago, St. P., M. & M. Ry. Co., 43 Minn. 454, 45 N. W. Rep. 864; Gulf, C. & S. F. Ry. Co. v. Compton, 75 Tex. 667, 13 S. W. Rep. 667. Where the court erroneously gives positive directions for ascertaining the damages by certain mathematical calculations, the error is not cured by the subsequent statement that in the end the whole matter of damages is left entirely to the sound judgment of the jury as to what is proper under all the circumstances. St. Louis, I. M. & S. Ry. Co. v. Needham, 52 Fed. Rep. 371, 3 C. C. A. 129.

[121] Plaintiff's intestate being only five years old at the time of his death, it was error to admit in evidence tables giving no expectancy of life for any age under ten years. Rajnowski v. Detroit, B. C. & A. R. Co., 74 Mich. 15, 20, 41 N. W. Rep. 847, 849.

loss of benefits that would have accrued to the estate after his majority, it is error to compute the expectation from the age of 21.[122] The calculation of the amount of pecuniary loss should be based upon the joint lives of the deceased and of the beneficiary.[123]

§ 175. Interest as damages.

While the jury may, perhaps, take into account the time which has elapsed since the death, as affecting the amount of damages, it is improper for them, after computing the amount of damages, to add interest upon that sum.[124] The New York act provides that the amount recovered shall draw interest from the death, which interest shall be added to the verdict, and inserted in the entry of judgment. This provision is not unconstitutional.[125] The rate of interest is governed by the statute regulating interest in force at the time of the verdict.[126] The interest is to be added and inserted by the clerk.[127]

§ 176. Reduction of damages.

Where the beneficiary acquires property by descent or otherwise upon the death of the deceased, it is not proper for the jury

[122] Walters v. Chicago, R. I. & P. R. Co., 41 Iowa, 71; Wheelan v. Chicago, M. & St. P. Ry. Co., 52 N. W. Rep. 119.

[123] Rowley v. London & N. W. Ry. Co., L. R. 8 Ex. 221, 42 L. J. Ex. 158, 29 L. T. (N. S.) 180; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291.

[124] Central R. Co. v. Sears, 66 Ga. 499; Cook v. New York Cent. & H. R. R. Co., 10 Hun, 426, (before act of 1870.)

[125] Cornwall v. Mills, 44 N. Y. Superior, 45.

[126] Salter v. Utica & B. R. R. Co., 86 N. Y. 401; s. c., 23 Hun. 533, overruling Erwin v. Neversink S. Co., 23 Hun. 578.

[127] See Manning v. Port Henry I. O. Co., 91 N. Y. 665, reversing s. c., 27 Hun, 219. An extra allowance should be computed on the sum awarded by the jury plus the interest inserted in the entry of judgment. Boyd v. New York Cent. & H. R. R. Co., 6 Civ. Proc. 222; 1 How. Pr. (N. S.) 1. Sinne v. City of New York, 8 Civ. Proc. 252, note, *contra*.

to reduce the damages on that account; for it may fairly be assumed that the beneficiary would, in the natural course of events, have acquired the property ultimately, and his damages are for the loss of benefits which he might have received during the remainder of the life of the deceased, or of the accumulations which the deceased might have added to his estate, and which the beneficiary would have acquired, in addition to the estate existing at the time of the premature death. Thus, in Terry v. Jewett,[128] it was held that it was not error to refuse to charge the jury that they might take into consideration that the plaintiff would be entitled to the property of the deceased as next of kin. A distinction was suggested in Grand Trunk Ry. Co. of Canada v. Jennings,[129] by Lord Watson, who said: "Money provisions made by a husband for the maintenance of a widow, in whatever form, are matters proper to be considered by the jury in estimating her loss; but the extent, if any, to which these ought to be imputed in reduction of damages, must depend upon the nature of the provision, and the position and means of the deceased. When the deceased did not earn his own living, but had an income from property, one half of which had been settled upon his widow, a jury might reasonably come to a conclusion that, to the extent of that half, the widow was not a loser by his death, and might properly confine their estimate of her loss to the interest which she might probably have had in the other half."

Similarly, where the beneficiary receives money on account of an insurance policy on the life of the deceased, this fact is not to be considered in reduction of damages.[130] In England, how-

[128] 78 N. Y. 338, 17 Hun, 395. It is error to permit the plaintiff to show that her intestate left no property. Koosorowska v. Glasser, 8 N. Y. Sup. 197.

[129] 13 App. Cas. 800, 58 L. J. P. C. 1, 59 L. T. (N. S.) 679, 37 Wkly. R. 403. See Pym v. Great Northern Ry. Co., *supra*.

[130] Althorp v. Wolfe, 22 N. Y. 355; Kellogg v. New York Cent. & H. R. R. Co., 79 N. Y. 72; Sherlock v. Alling, 44 Ind. 184; Carroll v. Mis-

ever, it has been held that the jury may properly take into consideration the probable amount of future premiums which would have been payable during the life of the deceased.[131] Says Lord Watson in Grand Trunk Ry. Co. v. Jennings: "The pecuniary benefit which accrued to the respondent from his premature death consisted in the accelerated receipt of a sum of money, the consideration of which had been paid by him out of his earnings. In such case the extent of the benefit may fairly be taken to be represented by the use and interest of the money during the period of acceleration; and it was upon that footing that Lord Campbell, in Hicks v. Newport, A. & H. Ry Co., suggested to the jury that, in estimating the widow's loss, the benefit which she derived from acceleration might be compensated by deducting from their estimate of the future earnings of the deceased the amount of the premiums which, if he had lived, he would have had to pay."

Since the right of action vests upon the death of the deceased, it is not permissible to show that pecuniary benefits have, from another source, subsequently accrued to the beneficiary, which are equivalent to those of which he has been deprived. Thus, in an action for the death of a wife and mother, evidence that the husband had again married, and that his second wife performed like services to those performed by the deceased, is inadmissible in mitigation of damages.[132]

souri Pac. Ry. Co., 88 Mo. 239; North Pennsylvania R. Co. v. Kirk, 90 Pa. St. 15; Baltimore & O. R. Co. v. Wightman, 29 Grat. 431; Western & A. R. Co. v. Meigs, 74 Ga. 857. See Harding v. Townshend, 43 Vt. 536. Beckett v. Grand Trunk Ry. Co., 8 Ont. Rep. 601, 13 Ont App. 174, *contra.*

[131] Hicks v. Newport A. & H. Ry. Co., 4 Best & S. 403, note. See Bradburn v. Great Western R. Co., 44 L. J. Ex. 9; L. R. 10 Ex. 1, *per* Bramwell, B.; Grand Trunk Ry. Co. v. Jennings, *supra;* Jennings v. Grand Trunk Ry. Co., 15 Ont. App. 477.

[132] Davis v. Guarnieri, 45 Oh. St. 470, 15 N. E. Rep. 350; Georgia R. R., etc., Co. v. Garr, 57 Ga. 277. It is improper on cross-examination to

§ 177. Discretion of jury—Instructions.

From the indefinite nature of the proof of pecuniary loss possible in such cases, much is left to the discretion and judgment of the jury, and it is not improper to instruct them to that effect.[133] But such an instruction should not be given without charging them definitely upon the proper measure of damages in the particular case,[134] and instructing them that the damages must be based upon the evidence,[135] and upon the pecuniary injury to the beneficiaries;[136] though, as has been shown, much is left, especially in actions for the death of minor children, to the jury's knowledge and experience.[137]

ask the husband if he is not engaged to be married again. Dimmey v. Wheeling & E. G. R. Co., 27 W. Va. 32.

[133] Illinois Cent. R. Co. v. Barron, 5 Wall. 90; Chicago & N. W. Ry. Co. v. Whitton, 13 Wall. 270; Pennsylvania R. Co. v. Ogier, 35 Pa. St. 60; City of Vicksburg v. McLain, 67 Miss. 4, 6 South. Rep. 774; Kansas Pac. R. Co. v. Cutter, 19 Kan. 83.

[134] Pennsylvania R. Co. v. Ogier, *supra;* Pennsylvania R. Co. v. Vandever, 36 Pa. St. 298; Catawissa R. Co. v. Armstrong, 52 Pa. St. 282; Parsons v. Missouri Pac. Ry. Co., 94 Mo. 286, 6 S. W. Rep. 464. The fact that the damages are larger than would probably upon the testimony have been found by the court is not ground for reversal. Missouri Pac. R. Co. v. Lee, 70 Tex. 496, 7 S. W. Rep. 857.

[135] Chicago & N. W. R. Co. v. Swett, 45 Ill. 197; Chicago & A. R. Co. v. Shannon, 43 Ill. 338; North Chicago R. M. Co. v. Morrissey, 111 Ill. 646; Chicago, M. & St. P. Ry. Co. v. Dowd, 115 Ill. 659, 4 N. E. Rep. 368. And see Chicago, B. & Q. R. Co. v. Sykes, 96 Ill. 162; Chicago, R. I. & P. R. Co. v. Austin, 69 Ill. 426; Conant v. Griffin, 48 Ill. 410; Lake Shore & M. S. R. Co. v. Parker, 131 Ill. 557, 23 N. E. Rep. 237.

[136] Chicago & A. R. Co. v. Becker, 76 Ill. 25; Chicago, B. & Q. R. Co. v. Harwood, 80 Ill. 88.

[137] City of Chicago v. Scholten, 75 Ill. 468; Ohio & M. Ry. Co. v. Voight, 122 Ind. 288, 23 N. E. Rep. 774.

§ 178. Excessive verdict—Reduction of amount.

In cases where the amount of the verdict is deemed by the court to be excessive, it is a common practice to allow the verdict to stand upon condition that the plaintiff remit a part of the sum awarded.[138] In Wisconsin, however, it is held that this practice is allowable only when the illegal portion of the judgment is readily severable from the rest, and hence that there can be no *remittitur* in actions for death;[139] and this view has been in several cases maintained in dissenting opinions.[140]

§ 179. Inadequate verdict.

Where the damages are inadequate, the court may, in its discretion, set the verdict aside, and order a new trial.[141]

§ 180. Nominal damages.

Since the damages are based upon the pecuniary loss of the beneficiaries, it would seem to follow that, if there is no pecuniary loss, the action cannot be maintained for the recovery

[138] Pym v. Great Northern Ry. Co., 2 Best & S. 759, 31 L. J. Q. B. 249, 10 Wkly. R. 787, 6 L. T. (N. S.) 537, 8 Jur. (N. S.) 819; s. c., 4 Best & S. 396, 32 L. J. Q. B. 377, 11 Wkly. R. 922, 10 Jur. (N. S.) 199; Little Rock & F. S. Ry. Co. v. Barker, 39 Ark. 491; Central R. R. v. Crosby, 74 Ga. 737; Rose v. Des Moines V. R. Co.; 39 Iowa, 246; Hutchins v. St. Paul, M. & M. Ry. Co., 44 Minn. 5, 46 N. W. Rep. 79; Smith v. Wabash, St. L. & P. Ry. Co., 92 Mo. 360, 4 S. W. Rep. 129; Demarest v. Little, 47 N. J. L. 28; McIntyre v. New York Cent. & H. R. R. Co., 37 N. Y. 287.

[139] Potter v. Chicago & N. W. R. Co., 22 Wis. 615.

[140] Little Rock & F. S. Ry. Co. v. Barker; Central R. R. v. Crosby; Rose v. Des Moines V. R. Co.,—*supra*, note 138.

[141] Mariani v. Dougherty, 46 Cal. 27; Wolford v. Lyon G. G. M. Co., 63 Cal 483; James v. Richmond & D. R. Co., 9 South. Rep. 335. See Springett v. Balls, 7 Best & S. 477, 4 Fost. & F. 472. See next section.

even of nominal damages. This has been intimated in England,[142] and held in Michigan,[143] Texas,[144] and Wisconsin.[145] Thus, in Duckworth v. Johnson, Pollock, C. B., said: "If there was no damage the action is not maintainable. It appears to me that it was intended by the act to give compensation for damage sustained, and not to enable persons to sue in respect of some imaginary damage, and so punish those who are guilty of negligence by making them pay costs." And in Hurst v. Detroit City Ry. Co., Long, J., said: "The statute does not imply that damages and pecuniary loss necessarily flow from the negligent killing." On the other hand, it has been held, or rather intimated, in a great number of cases, that damages do necessarily flow from the negligent killing, and that whenever there is proof of the negligence of the defendant, and of the existence of next of kin, the action lies for at least nominal damages;[146]

[142] Duckworth v. Johnson, 4 Hurl. & N. 653, 29 L. J. Ex. 25, 5 Jur. (N. S.) 630. See Boulter v. Webster, 13 Wkly. R. 289, 11 L. T. (N. S.) 598. In the earlier case of Chapman v. Rothwell, E. B. & E. 168, Crompton, J., had said that section 1 of Lord Campbell's act appears to contemplate giving damages, wherever the party injured could have recovered them, whether nominal or not. The jury found a verdict of £1 for the widow, and 10s. for each of the children. The court granted a new trial, without imposing costs on the plaintiff, on the ground that the jury had shrunk from their duty of deciding the issue. Springett v. Balls, 7 Best & S. 477, 4 Fost. & F. 472.

[143] Hurst v. Detroit City Ry. Co., 84 Mich. 539; 48 N. W. Rep. 44; Van Brunt v. Cincinnati, J. & M. R. Co., 78 Mich. 530, 44 N. W. Rep. 321; Charlebois v. Gogebic & M. R. R. Co., 51 N. W. Rep. 812.

[144] McGown v. International & G. N. R. Co., 20 S. W. Rep. 80.

[145] Regan v. Chicago, M. & St. P. Ry. Co., 51 Wis. 599, 8 N. W. Rep. 392.

[146] Chicago & A. R. Co. v. Shannon, 43 Ill. 338; Chicago & N. W. R. Co. v. Swett, 45 Ill. 197; Chicago v. Scholten, 75 Ill. 468; Quincy Coal Co. v. Hood, 77 Ill. 68; Quin v. Moore, 15 N. Y. 432; Dickens v. New York Cent. R. Co., 1 Abb. Dec. 504; Ihl v. Forty-Second St., etc., Ry. Co., 47 N. Y. 317; Lehman v. City of Brooklyn, 29 Barb. 234; Atchison, T. & S. F. R. Co. v. Weber, 33 Kan. 543, 6 Pac. Rep. 877; Thompson, Neg. p. 1293.

although the question of nominal damages has in few cases been actually involved in the decision.[147]

[147] Lyons' Adm'r v. Cleveland & T. R. Co., 7 Oh. St. 336; Kenney v. New York Cent. & H. R. R. Co., 2 N. Y. Sup. 512; Korrady v. Lake Shore & M. S. Ry. Co., 29 N. E. Rep. 1069.

CHAPTER XI.

PLEADING AND PRACTICE.

§ 181. The wrongful act or neglect.
182. Existence of beneficiaries.
183. Appointment of executor or administrator.
184. Allegations of damages.
185. Bill of particulars.
186. Indictment.
187. Amendment.
188. Liability of personal representative for costs.

§ 181. The wrongful act or neglect.

It is not necessary, unless the action is based upon a foreign statute,[1] that the declaration or complaint should refer to the statute under which the action is brought, but it is sufficient to allege facts that bring the case within the statute.[2] Nor is it necessary to allege that the act or neglect of the defendant was such that, if death had not ensued, the person injured might have maintained an action.[3] Since it is a part of the plaintiff's case to show that the act or neglect by which death was caused was such that the party injured, had death not ensued, might have maintained an action, the complaint must, of course, allege the facts which would have been necessary to establish a cause of action in the party injured in the same manner as would have been required in an action by him. So far as concerns the allegations of the complaint necessary to establish a cause of action in the party injured, it must be

[1] See §§ 195, 202.

[2] Brown v. Harmon, 21 Barb. 508; Kennayde v. Pacific R. Co., 45 Mo. 255; White v. Maxcy, 64 Mo. 552; Westcott v. Central Vt. R. Co., 61 Vt. 488, 17 Atl. Rep. 745.

[3] Philadelphia, W. & B. R. Co. v. State, 58 Md. 372.

tested by the rules of pleading that would be applicable in an action for personal injury.[4]

§ 182. Existence of beneficiaries.

The existence of some person entitled to the benefit of the recovery being under most acts essential to the maintenance of the action, the existence of such person must be alleged in the complaint.[5] But it seems that it is unnecessary to set forth the names of the beneficiaries,[6] although, as the action is based

[4] See by way of illustration: Louisville & N. R. Co. v. Jones, 88 Ala. 376, 8 South. Rep. 902; Brown v. St. Louis, I. M. & S. Ry. Co., 52 Ark. 120, 12 S. W. Rep. 203; Brown v. Central Pac. R. Co., 68 Cal. 171, 7 Pac. Rep. 447, and 8 Pac. Rep. 828; Davies v. Oceanic S. S. Co., 89 Cal. 280, 26 Pac. Rep. 827; Central R. Co. v. Hubbard, 86 Ga. 623, 12 S. E. Rep. 1020; Pennsylvania Co. v. O'Shaughnessy, 122 Ind. 588, 23 N. E. Rep. 675; Mobile & O. R. Co. v. Stroud, 64 Miss. 784, 2 South. Rep. 171; Sullivan v. Missouri Pac. Ry. Co., 97 Mo. 113, 10 S. W. Rep. 852; Pope v. Kansas City C. Ry. Co., 99 Mo. 400, 12 S. W. Rep. 891; Parker v. Providence & S. S. S. Co., 22 Atl. Rep. 284; San Antonio St. Ry. Co. v. Cailloutte, 79 Tex. 341, 15 S. W. Rep. 390; Norfolk & W. R. Co. v. Harman, 83 Va. 553, 8 S. E. Rep. 251; Searle's Adm'r v. Kanawha & O. Ry. Co., 32 W. Va. 370, 9 S. E. Rep. 248; Fitts v. Waldeck, 51 Wis. 567, 8 N. W. Rep. 363.

[5] See § 80. But in Alabama it is *held* that the existence of heirs is a collateral fact which will be presumed. Columbus & W. Ry. Co. v. Bradford, 86 Ala. 574, 6 South. Rep. 90; Alabama & F. R. Co. v. Waller, 48 Ala. 459.

[6] In Conant v. Griffin, 48 Ill. 410, it was *held* unnecessary to allege the names; but in Quincy Coal Co. v. Hood, 77 Ill. 68, where the declaration limited the next of kin to the father, it was *held* error to admit proof that deceased left a father, mother, and brothers and sisters. The court observed that if the complaint had simply alleged that the deceased left a widow, or next of kin, without naming them, no question of variance could have been raised. In Indianapolis, P. & C. R. Co. v. Keely's Adm'r, 28 Ind. 138, it was said that the names and relationship should be stated, but in Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48, the court declares that this is unnecessary. A declaration which sets forth adequately the right of a personal representative to

solely upon the pecuniary loss to the beneficiaries, it would not be unreasonable to require the plaintiff to allege the names of the persons damaged.[7] A few of the acts require the plaintiff to furnish a full particular of the persons for whom the action is brought.[8] In an action by a mother under a statute authorizing her, if the father be dead, to sue for the death of a minor child, the complaint must show that the father is not in being.[9] Where the proceeding is by indictment, it must be averred that the deceased left widow or heirs;[10] and in Maine, where the forfeiture is payable directly to them, and not, as in Massachusetts, to the administrator, their names must be set out.[11]

recover is sufficient without alleging specifically the rights of the respective distributees. Howard v. Delaware & H. Canal Co., 40 Fed. Rep. 195.

[7] In Barnum v. Chicago, M. & St. P. Ry. Co., 30 Minn. 461, 16 N. W. Rep. 364, a complaint which set forth the names of the next of kin, and how they were related, with an allegation of damage to them, was *held* sufficient, the court observing that upon it the plaintiff could recover all the damages which could be recovered in such an action. A variance between the allegations of the petition and the proof as to the sex of the minor children, brothers and sisters of deceased, is not material. O'Callaghan v. Bode, 84 Cal. 489, 24 Pac. Rep. 269. The declaration need not negative the existence of any relatives other than those named. Barnes v. Ward, 9 C. B. 392.

[8] See § 185.

[9] An allegation that the mother was next of kin *held* sufficient after verdict, as it could have been sustained only by showing that the father was dead. David v. Waters, 11 Or. 449, 5 Pac. Rep. 748. It is not sufficient to allege that the plaintiff is a widow, since it is consistent with this allegation that she may have been divorced and remarried, and that her first husband is still alive. St. Louis, I. M. & S. Ry. Co. v. Yocum, 34 Ark. 493.

[10] Commonwealth v. Boston & W. R. Corp., 11 Cush. 512; Commonwealth v. Eastern R. Co., 5 Gray, 473; Commonwealth v. Boston & A. R. Co., 121 Mass. 36; State v. Gilmore, 24 N. H. 461.

[11] State v. Grand Trunk Ry. Co., 60 Me. 145.

§ 183. Appointment of executor or administrator.

Where the statute requires the action to be brought in the name of the personal representative, the complaint must allege the appointment of the plaintiff as executor or administrator. Thus, where suit was brought by the widow, and on her motion an order was made substituting as plaintiff a person who was represented to be the administrator, it was held that failure to amend the complaint so as to show that the substituted plaintiff was administrator of the estate of the deceased was a fatal defect.[12] But where the complaint was in the name of the plaintiff "as administratrix," and in the body of the complaint the deceased was referred to as "plaintiff's intestate," it was held that the representative capacity of the plaintiff sufficiently appeared.[13] The appointment of the administrator is not put in issue by a general denial, but that issue must be raised by a special plea or denial.[14] Where the administrator had authority when the action was begun, a subsequent revocation of his authority is not put in issue by a denial of his authority to maintain the action, but must be specially pleaded.[15]

[12] City of Atchison v. Twine, 9 Kan. 350; Hagerty v. Hughes, 4 Baxt. 222. But where the allegations of the administrator's appointment, etc., were sufficient, although the plaintiff averred that by the death of the intestate "*he* is damaged," the complaint was *held* good. Clore v. McIntire, 120 Ind. 262, 22 N. E. Rep. 128.

[13] Louisville & N. R. Co. v. Trammell, 9 South. Rep. 870. Where the style of the action was "E. L., plaintiff, administratrix of L. M.," it was *held* that this conclusively showed the character of the action, and that an amended petition which distinctly averred that the action was brought by the administratrix (which the original petition failed to do) did not change the character of the action. Bowler v. Lane, 3 Metc. (Ky.) 311.

[14] Ewen v. Chicago & N. W. Ry. Co., 38 Wis. 613; Union Ry. & Transp. Co. v. Shacklet, 119 Ill. 232, 10 N. E. Rep. 896.

[15] Burlington & M. R. Co. v. Crockett, 17 Neb. 570, 24 N. W. Rep. 219.

§ 184. Allegations of damages.

As has been stated, it is held in some jurisdictions that the statute necessarily implies pecuniary loss to the beneficiaries from the death, and that the action can consequently be maintained in the absence of pecuniary loss for at least nominal damages; while in other jurisdictions it is held that, without pecuniary loss, the action is not maintainable, even for nominal damages.[16] In the latter jurisdictions it appears to be necessary to allege in the complaint the facts showing pecuniary loss. Thus, in Michigan it is said that the damages are special, and that it must be made to appear by proper allegations that pecuniary loss necessarily resulted.[17] And in Wisconsin it is held that the complaint must allege facts showing that loss, present or prospective, has resulted,[18] although in the latter state, where the complaint showed that the deceased was a laboring man, working for the defendant, (without alleging that he received any compensation,) and that he left a child of three years, it was held on demurrer that it sufficiently showed that the child had suffered pecuniary loss.[19]

On the other hand, in jurisdictions where it is held that nominal damages necessarily result from the death, it seems that a complaint is good on demurrer although it does not allege more than the death and the survival of beneficiaries. Thus, in New York, in an action for the benefit of a widow, the complaint was held good on demurrer notwithstanding

[16] See § 180.

[17] Hurst v. Detroit City Ry., 84 Mich. 539, 48 N. W. Rep. 44.

[18] Regan v. Chicago, M. & St. P. Ry. Co., 51 Wis. 599, 8 N. W. Rep. 292. But in Ewen v. Chicago & N. W. R. Co., 38 Wis. 613, where an element in the pecuniary injury was the loss of a pension cut off by the death of deceased, it was *held* unnecessary to allege this fact in order to admit proof of it.

[19] Kelley v. Chicago, M. & St. P. Ry. Co., 50 Wis. 381, 7 N. W. Rep. 291.

that it contained no allegations that damages had been sustained, although the court declined to express an opinion whether, without further allegations, proof of substantial damages would be admissible.[20] And, in an Indiana case, a complaint which showed that the deceased left a widow and infant children surviving was held good on demurrer although it did not directly allege that the beneficiaries sustained actual damages; the court saying that the legal presumption is that the infant children and wife are entitled to the services of a father and husband, and that such services are valuable to them.[21] In order to allow proof of damages in these jurisdictions, it appears to be sufficient to allege that the beneficiaries have sustained damages in a certain amount.[22] It has been held in Indiana, however, in an action by a father for the death of a minor child, that, in order to recover for loss of services beyond the date of the beginning of suit, such damages must be specially averred.[23] And a California case has held that damages for funeral expenses, if recoverable at all, must be specially alleged.[24]

[20] Kenney v. New York Cent. & H. R. R. Co., 49 Hun, 535, 2 N. Y. Sup. 512.

[21] Korrady v. Lake Shore & M. S. Ry. Co., 29 N. E. Rep. 1069.

[22] Safford v. Drew, 3 Duer, 627; Louisville, N. A. & C. Ry. Co. v. Buck, 116 Ind. 566, 19 N. E. Rep. 458; Barron v. Illinois Cent. R. Co., 1 Biss. 412; Serensen v. Northern Pac. R. Co., 45 Fed. Rep. 407; Barnum v. Chicago, M. & St. P. Ry. Co., 30 Minn. 461, 16 N. W. Rep. 364. See, also, Westcott v. Central Vt. R. Co., 61 Vt. 438, 17 Atl. Rep. 745; Ewen v. Chicago & N. W. R. Co., *supra;* Kenney v. New York Cent. & H. R. R. Co., *supra.* The declaration averred that by the death the widow and minor children were deprived of their support and the children of their means of education, to the damage, etc. *Held*, that such averments were sufficient to admit evidence of the ability of deceased to earn money. Chicago & A. Ry. Co. v. Carey, 115 Ill. 115, 3 N. E. Rep. 519.

[23] Pennsylvania Co. v. Lilly, 73 Ind. 252.

[24] Gay v. Winter, 34 Cal. 153.

§ 185. Bill of particulars.

Lord Campbell's act provides that the plaintiff must, together with the declaration, deliver to the defendant full particular of the person or persons for whom the action is brought, and of the nature of the claim in respect to the damages sought to be recovered. The Maryland and New Jersey acts contain similar provisions, the particular in the latter state to be furnished on request. Under Lord Campbell's act, the omission to furnish particulars has been held ground for setting aside the service of the writ, but not the writ itself.[25] In Maryland, where the declaration fully stated the nature and amount of the claim, and the defendant pleaded without demanding a particular, the failure to furnish a particular was held no objection.[26] The particular is intended for the same purpose as in other cases.[27] In a New York case, a bill of particulars was denied, the court saying that it would be unreasonable to require the plaintiff to state, by anticipation, all the items and amounts that would properly enter into a computation of damages.[28] But in a recent Vermont case it was intimated that, where the damages are not sufficiently set forth, the court would order suitable specifications.[29]

§ 186. Indictment.

The proceeding by indictment provided for by the statutes of Maine, Massachusetts, and formerly of New Hampshire, though criminal in form, is to be treated in its main features

[25] McCabe v. Guinness, 9 Ir. R. Com. Law, 510.

[26] Philadelphia, W. & B. R. Co. v. State, 58 Md. 372.

[27] Baltimore & O. R. Co. v. State, 41 Md. 279; Telfer v. Northern R. Co., 30 N. J. Law, 188.

[28] Murphy v. Kipp, 1 Duer, 659.

[29] Westcott v. Central Vt. R. Co., 61 Vt. 488, 17 Atl. Rep. 745.

as a civil action for the recovery of damages, and the same rules of evidence and principles of law are to be applied as in civil cases.[30] Thus, the indictment may be discontinued, with leave of court, by a *nolle prosequi*, entered by the prosecutor while the cause is on trial, against the objection of the defendant.[31]

§ 187. Amendment.

The complaint or declaration may be amended as in other actions where the amended pleading does not state a new cause of action; and such amendment, although made after the expiration of the period of limitation, will relate back to the commencement of the suit. Thus, an amendment may be made which merely adds more particular[32] or different[33] allegations in respect to the defendant's negligence; or which alleges that the deceased was killed while being carried as an employe, instead of as a passenger;[34] or which adds an allegation that the deceased left a wife and children;[35] or which alleges that one of two joint defendants was solely guilty of the negligence charged,

[30] State v. Grand Trunk Ry. Co., 58 Me. 176; State v. Manchester & L. R. Co., 52 N. H. 528. See § 44.

[31] State v. Maine Cent. R. Co., 77 Me. 244.

[32] Jeffersonville, M. & I. R. Co. v. Hendricks, 41 Ind. 48; Kuhns v. Wisconsin, I. & N. Ry. Co., 76 Iowa, 67, 40 N. W. Rep. 92; Moody v. Pacific R. Co., 68 Mo. 470.

[33] Harris v. Central R. Co., 78 Ga. 525, 3 S. E. Rep. 355.

A declaration in a suit by an administrator, in one count stated a cause of action for personal injuries of the intestate good at common law, and imperfectly stated a cause of action under the statute for the benefit of the minor children of the intestate for his death. *Held*, that it was not error to allow plaintiff to amend by stating the latter cause of action correctly, and then, the actions not being proper to join in one suit, to allow plaintiff to strike out his original count. Daley v. Boston & A. R. Co., 147 Mass. 101, 16 N. E. Rep. 690.

[34] Kansas Pac. Ry. Co. v. Salmon, 14 Kan. 512.

[35] South Carolina R. Co. v. Nix, 68 Ga. 572; Haynie v. Chicago & A. R. Co., 9 Ill. App. 105.

(the action being dismissed as to the other defendant;)[36] or which makes a party co-plaintiff who was originally made defendant;[37] or, if the action is based upon a foreign statute, which alleges the provisions of such statute.[38] But, where the proposed amendment states a new cause of action, it cannot be allowed, although the decisions are not entirely harmonious in the application of the rule. Thus, in a Tennessee case, where the widow began the action for the use of herself and children, it was held error, after the expiration of the period of limitation, to substitute the administrator for the use of the widow; the court saying that the fiction of relation cannot be applied as to defeat the defense of the statute of limitations.[39] And in a South Carolina case, where the proposed amendment alleged that the plaintiff was widow of the deceased, and that she sued for the benefit of the children, it was held that this was properly refused.[40] So, in Georgia, where the mother may maintain an action for the loss of the services of a minor child resulting from his death, but not for the homicide, a declaration merely counting on the homicide, without alleging that the plaintiff is entitled to his services, cannot be amended so as to allege the

[36] Lottman v. Barnett, 62 Mo. 159; Reed v. Northeastern R. Co., (S. C.) 16 S. E. Rep. 289.

[37] Buel v. St. Louis Transfer Co., 45 Mo. 562.

[38] Lustig v. New York, L. E. & W. R. Co., 20 N. Y. Sup. 477; South Carolina R. Co. v. Nix, 68 Ga. 572. But see Selma, R. & D. R. Co. v. Lacey, 49 Ga. 106.

[39] Flatley v. Memphis & C. R. Co., 9 Heisk, 280. *Cf.* Bowler v. Lane, 2 Met. (Ky.) 311.

[40] Lilly v. Charlotte, C. & A. R. Co., 32 S. C. 142, 10 S. E. Rep. 932. After sustaining a demurrer to a complaint, in a suit by an administratrix for the death of her intestate, the court properly refused to permit an amendment, so as to raise the question whether an action could be maintained for such damages for general administration, instead of for the benefit of the surviving family of the deceased, as such amendment would change the purpose of the action. All v. Barnwell County, 29 S. C. 161, 7 S. E. Rep. 58.

plaintiff's right to his services.[41] But in Pennsylvania, where the declaration in an action for negligence resulting in an injury to the plaintiff's minor son alleged a permanent disability, and a total loss of services, an amended declaration, setting up the death of the child as a result of the injury, and claiming damages for the loss of services resulting from the death, was allowed.[42]

§ 188. Liability of personal representative for costs.

Whether the liability of the personal representative for costs in case the action fails should be governed by the same rules as if he were suing as representative of the estate has been differently answered. Thus, in New Jersey, where the statute provided that, if the plaintiff prosecute a suit in the right of his intestate, no costs can be recovered against him, it was held that the same rule applied to an administrator suing for the death.[43] And in Indiana it was held erroneous to direct that, if there be no property of the decedent, costs should be levied out of the property of the administrator personally.[44] But in Alabama, it was held that because he was suing as trustee of the beneficiaries, and not as representative of the estate, the judgment should be *de bonis propriis*, and not *de bonis intestati*, and that consequently the sureties on the administrator's bond were not liable for his failure to pay such judgment out of the assets of the estate.[45]

[41] Smith v. East & W. R. Co., 84 Ga. 188, 10 S. E. Rep. 602; Bell v. Central R. Co., 73 Ga. 520.

[42] City of Bradford v. Downs, 126 Pa. St. 622, 17 Atl. Rep. 884.

[43] Kinney v. Central R. Co., 34 N. J. Law, 278.

[44] Evans v. Newland, 34 Ind. 112.

[45] Hicks v. Barrett, 40 Ala. 291.

CHAPTER XII.

EVIDENCE.

§ 189. Character of evidence in actions for death.
190. Defendant as witness.
191. Beneficiary as witness.
192. Testimony of deceased witness.
193. Verdict of acquittal—Coroner's verdict.
194. Declarations and admissions of the deceased.

§ 189. Character of evidence in actions for death.

The questions of evidence that arise in actions for death are, for the most part, the same as those that arise in ordinary personal injury cases. It is to be observed, however, that, by reason of the death of the person injured, it is often impossible to prove the facts and circumstances immediately surrounding the injury, and especially the absence of contributory negligence of the deceased, with the same precision and fullness that would be required in an action in which the person injured was alive and able to testify. For this reason, courts incline to greater liberality in this class of cases in allowing the questions of the negligence of the defendant, and of the contributory negligence of the plaintiff, to go to the jury, upon slight evidence.[1] A

[1] Central R. R. v. Rouse, 77 Ga. 393, 3 S. E. Rep. 307; Chicago, B. & Q. R. Co. v. Gregory, 58 Ill. 272; Missouri Furnace Co. v. Abend, 107 Ill. 44; Chicago, R. I. & P. Ry. Co. v. Clark, 108 Ill. 113; Chicago & A. Ry. Co. v. Carey, 115 Ill. 115, 3 N. E. Rep. 519; McDermott v. Iowa F. & S. C. Ry. Co., 47 N. W. Rep. 1037; Louisville & N. R. Co. v. Brooks' Adm'x, 83 Ky. 129; Northern Cent. Ry. Co. v. State, 29 Md. 420; Maguire v. Fitchburg R. Co., 146 Mass. 379, 15 N. E. Rep. 904; Kelly v. Hannibal & St. J. R. Co., 70 Mo. 604; Buesching v. St. Louis Gaslight Co., 73 Mo. 219; Soeder v. St. Louis, I. M. & S. Ry. Co., 100 Mo. 673, 13 S. W. Rep. 714; Galvin v. City of New York, 112 N. Y. 223, 19 N. E. Rep. 675; Jones v. New York Cent. & H. R. R. Co., 62 How. Pr. 450;

discussion of these cases, involving, as it would, a consideration of the varying rules that prevail in different jurisdictions in respect to the burden of proving contributory negligence, and in respect to kindred questions of negligence, is beyond the scope of this book.

§ 190. Defendant as witness.

Notwithstanding the general abrogation of the common-law rule disqualifying parties and persons interested from testifying, the statutes in force in most of the states provide that, in actions by or against executors or administrators, neither party shall be allowed to testify against the other, this exclusion being commonly confined, however, to the testimony of such persons as to transactions with or statements by the testator or intestate. Whether these statutes exclude the parties to an action for death must, of course, depend much upon the terms of the particular statute. But where the action is brought, not in the name of the personal representative, but directly in the name of the beneficiary, such statutes have been held not to exclude the defendant.[2] And in Missouri, where the statute provided that, in actions where one of the original parties to the contract or cause of action is dead, the other party shall not be allowed to testify in his own favor, it was held, in an action by a widow, that the defendant was a competent witness, since the plaintiff was not suing on a contract or cause of action to which the deceased was a party.[3] On the other hand, where the action is

Flanagan v. New York, N. H. & H. R. Co., 55 Hun, 611, 8 N. Y. Sup. 744; Atkinson v. Abraham, 45 Hun, 238; Phillips v. Milwaukee & N. R. Co., 77 Wis. 349, 46 N. W. Rep. 543. See Sweeney v. New York Steam Co., 15 Daly, 312, 6 N. Y. Sup. 528, *per* Larremore, C. J., and Mulligan v. New York Cent. & H. R. R. Co., 58 Hun, 602, 11 N. Y. Sup. 452, *per* Dwight, P. J.

[2] Mann v. Weiand, 81 Pa. St. 243; Wallace v. Stevens, 74 Tex. 559, 12 S. W. Rep. 288; McEwen v. Springfield, 64 Ga. 159.

[3] Entwhistle v. Feighner, 60 Mo. 214.

brought in the name of the executor or administrator, it has been held in Illinois[4] and Indiana[5] that the defendant is incompetent,—in the former state under a statute excluding parties and persons interested from testifying in suits by executors and administrators; and in the latter state under a statute providing that in suits in which an executor or administrator is a party, involving matters which occurred during the lifetime of the decedent, where a judgment may be rendered for or against the estate, any person who is a necessary party to the issue or record, whose interest is adverse to such estate, shall not be a competent witness as to such matters against the estate. In Tennessee, on the contrary, although the statute made evidence as to transactions with or statements by the decedent incompetent in all cases in which judgment might be rendered for or against the administrator, it was held in an action by the widow, in the name of the administrator, who refused to act, for the benefit of herself and an infant child, that the defendant might testify; the court observing that the administrator was only a nominal party, and had no interest in the suit, no judgment being capable of affecting the estate.[6]

§ 191. Beneficiary as witness.

Where the beneficiary sues in his own name, the same rule would, of course, apply to his competency as a witness as to that of the defendant.[7] Whether, in an action by the adminis-

[4] Forbes v. Snyder, 94 Ill. 374. The president, who is also a stockholder, of a defendant corporation is incompetent. Consolidated Ice M. Co. v. Keifer, 134 Ill. 481, 25 N. E. Rep. 799.

[5] Hudson v. Houser, 123 Ind. 309, 24 N. E. Rep. 243; Sherlock v. Alling, 44 Ind. 184.

[6] Hale v. Kearly, 8 Baxt. 50.

[7] A husband, who is co-plaintiff with his wife in an action for the death of their son, is competent. Bell v. Hannibal & St. J. Ry. Co., 86 Mo. 599; Reilly v. Hannibal & St. J. R. Co., 94 Mo. 600, 7 S. W. Rep. 407. See, also, Owen v. Brockschmidt, 54 Mo. 285.

trator, the beneficiary would be competent to testify under a statute excluding parties in such case, does not appear to have been expressly decided, although in an Indiana case it was intimated that he would not be deemed a party, and would be competent.[8] And in New York, under a provision that the exemption should not apply to a party to the action, nor to any person for whose immediate benefit the action is prosecuted or defended, it was held that the beneficiary was not incompetent, the rule only applying to a person into whose hands the money would go immediately when collected, and hence not to a case where it would go first into the hands of the administrator.[9] But in Wisconsin, where the only statutory exception to the common-law rule—that the husband and wife may not be witnesses for or against each other—was a provision that a party to a civil action or proceeding may be examined as a witness, it was held, in an action by the husband as administrator, for the benefit of himself and wife, on account of the death of a son, that the wife, being a real party in interest, was a competent witness.[10]

§ 192. Testimony of deceased witness.

It has been held that, in an action under the statute, it is admissible to prove the testimony of a deceased witness in a suit by the intestate for the personal injury which abated on

[8] Louisville, N. A. & C. Ry. Co. v. Thompson, 107 Ind. 442, 8 N. E. Rep. 18, and 9 N. E. Rep. 357.

[9] Quin v. Moore, 15 N. Y. 432.

[10] Strong v. City of Stevens Point, 62 Wis. 255, 22 N. W. Rep. 425. In suit by a widow as administratrix, declarations of plaintiff during her husband's lifetime as to the circumstances of the accident are admissible to contradict her testimony, but not for the purpose of proving negligence of the deceased, plaintiff not having been the party interested adversely to defendant at the time of such declarations. Fitzgerald v. Weston, 52 Wis. 354, 9 N. W. Rep. 18.

his death, upon the ground that the causes of action were the same, and that the admissibility of such evidence turns rather upon the right to cross-examine than upon the precise nominal identity of the parties.[11] But the testimony of a deceased witness at a coroner's inquest, where the plaintiff had no opportunity to cross-examine, is inadmissible, as well upon that ground[12] as upon the ground that the inquest is not a judicial proceeding.[13]

§ 193. Verdict of acquittal—Coroner's verdict.

A verdict of not guilty upon an indictment for the homicide is inadmissible.[14] *A fortiori* the verdict of a coroner's jury, the inquest not being a judicial proceeding, is inadmissible in favor of either party.[15]

[11] Indianapolis & St. L. R. Co. v. Stout, 53 Ind. 143. See Greenl. Ev. § 164. Where deceased began suit for the injury, and afterwards an action was brought for the death, under a statute which provided that the testimony taken in one action might be used in another if the parties and issues were substantially the same, it was *held* that answers by deceased to interrogatories taken in the suit by him were admissible. Atlanta & W. P. R. Co. v. Venable, 67 Ga. 697.

[12] Jackson v. Crilly, 26 Pac. Rep. 331.

[13] Cook v. New York Cent. R. Co., 5 Lans. 401. See Erwin v. Neversink S. Co., 88 N. Y. 184.

[14] Marsh v. Walker, 48 Tex. 372; Cottingham v. Weeks, 54 Ga. 275; Gray v. McDonald, 16 S. W. Rep. 898.

In an action against a railroad company for the death of an engineer, caused by a misplaced switch, it is not competent for the company to put in evidence the conviction of a trespasser under an indictment for the murder of the engineer by tampering with the switch, nor can the company prove confessions made by the accused. Miller v. Southern Pac. R. Co., 20 Or. 285, 26 Pac. Rep. 70; Guthrie v. Same, 26 Pac. Rep. 76.

[15] State v. Cecil Co. Comm'rs, 54 Md. 426; Memphis & C. R. Co. v. Womack, 84 Ala. 149, 4 South. Rep. 618; Central R. Co. v. Moore, 61 Ga. 151.

§ 194. Declarations and admissions of the deceased.

The declarations of the deceased, although made under such circumstances as would, upon an indictment for homicide, render them admissible as dying declarations, are inadmissible on that ground.[16] Whether the declarations of the deceased are admissible in favor of the plaintiff will depend upon whether they were made under such circumstances as to form part of the *res gestæ*.[17] It would seem that such declarations, if not admissible as part of the *res gestæ*, are not admissible in favor of the defendant as admissions, since the plaintiff in such case does not claim in the right of the deceased, but upon a new cause of action; but the point has been decided both in the affirmative[18] and in the negative.[19]

[16] East Tennessee, V. & G. R. Co. v. Maloy, 77 Ga. 237, 2 S. E. Rep. 941; Louisville & N. R. Co. v. Stacker, 86 Tenn. 343, 6 S. W. Rep. 737; Friedman v. Railroad Co., 7 Phila. 203; Chicago & N. W. Ry. Co. v. Howard, 6 Ill. App. 569.

[17] Brownell v. Pacific R. Co., 47 Mo. 240; Entwhistle v. Feighner, 60 Mo. 214; Stoeckman v. Terre Haute & I. R. Co., 15 Mo. App .503; Galveston v. Barbour, 62 Tex. 172; McKeigue v. City of Janesville, 68 Wis. 50, 31 N. W. Rep. 298; Merkle v. Bennington Tp., 58 Mich. 156, 24 N. W. Rep. 776; Chicago & N. W. Ry. Co. v. Howard, 6 Ill. App. 569; Waldele v. New York Cent. & H. R. R. Co., 61 How. Pr. 350; Richmond & D. R. Co. v. Hammond, 9 South. Rep. 577; Little Rock, M. R. & T. Ry. Co. v. Leverett, 48 Ark. 333, 3 S. W. Rep. 50; Fordyce v. McCants, 51 Ark. 509, 11 S. W. Rep. 694.

[18] Perigo v. Chicago, R. I. & P. R. Co., 55 Iowa, 326, 7 N. W. Rep. 621; Lord v. Pueblo S. & R. Co., 12 Colo. 390, 21 Pac. Rep. 148; Lax v. Forty-Second St. F. R. Co., 46 N. Y. Superior, 448, (*semble.*)

[19] City of Bradford v. Downs, 126 Pa. St. 622, 17 Atl. Rep. 884; Pennsylvania Co. v. Long, 94 Ind. 250. In Stein v. Railway Co., 10 Phila. 440, such an admission was said to be admissible, but it was also *held* that the declaration was part of the *res gestæ*.

Evidence of previous threats of the deceased communicated to the defendants before the murder are inadmissible, where there is no evidence to show that the killing was done in self-defense. Forbes v. Snyder, 94 Ill. 374.

CHAPTER XIII.

JURISDICTION OF STATE COURTS—CONFLICT OF LAWS.

§ 195. Statute has no extraterritorial force.
196. Action based on foreign statute—Jurisdiction sustained.
197. Whether a similar statute must exist in the state of the tribunal.
198. Action based on foreign statute—Jurisdiction denied.
199. Death on navigable waters within the state.
200. Death on high seas on vessel owned in state.
201. Who may sue under a foreign statute.
202. Pleading foreign statute.

§ 195. Statute has no extraterritorial force.

It is a general rule that for the purpose of redress it is immaterial where a tort was committed; in other words, the wrong being personal, the action is transitory, and may be brought wherever the wrongdoer may be found. But to support an action the act must have been wrongful where it was committed.

Where the wrong complained of was one for which an action is given by the common law, it will be presumed, in the absence of proof to the contrary, that the common law was in force in the place where the wrong was committed. But, where the wrong is one for which the right of action is purely statutory, no presumption arises that such statute is in force outside the state which enacted it. Since the right of action for death is statutory, it follows that, if the death occurred outside the state which enacted the statute, no action can be maintained by virtue of it. No doubt it would be within the competency of the legislature of a state to declare that any wrong which might be committed against its citizens abroad might be redressed at home, according to the principles of its law, if the wrongdoer could be found there, so as to subject

him to the jurisdiction of its courts;[1] but such a construction has never been placed upon any of the acts in question.

Thus, where the death was caused in New Granada, it was held that no action was maintainable in New York, although the defendant was a corporation of that state.[2] So, also, it has been held where the death occurred on the high seas,[3] and in a state where no right of action existed.[4] And, if the action is based upon the foreign law, it cannot be maintained if that law is not alleged and proved.[5]

§ 196. Action based on foreign statute—Jurisdiction sustained.

But, although these statutes have no extraterritorial force, it is held by the greater weight of authority that, if a right of action is given by a statute of the state in which the death occurred, the remedy may be enforced in any tribunal having jurisdiction of the defendant, provided, at least, that a substantially similar statute exists in the state of the tribunal.[6] A leading

[1] Whitford v. Panama R. Co., 23 N. Y. 465, *per* Denio, J.

[2] Whitford v. Panama R. Co., 23 N. Y. 465, (affirming 8 Bosw. 67;) Crowley v. Panama R. Co., 30 Barb. 99.

[3] Armstrong v. Beadle, 5 Sawy. 484.

[4] Needham v. Grank Trunk R. Co., 38 Vt. 294; Campbell v. Rogers, 2 Handy, 110; Willis v. Missouri Pac. Ry. Co., 61 Tex. 432; Hover v. Pennsylvania Co., 25 Oh. St. 667; Davis v. New York & N. E. R. Co., 143 Mass. 301, 9 N. E. Rep. 815.

[5] Vanderwerken v. New York & N. H. R. Co., 6 Abb. Pr. 239; Beach v. Bay State S. Co., 30 Barb. 433, 10 Abb. Pr. 71, (reversing 6 Abb. Pr. 415, 16 How. Pr. 1, 27 Barb. 248;) Deboise v. New York, L. E. & W. R. Co., 98 N. Y. 377; Kahl v. Memphis & C. R. Co., (Ala.) 10 South. Rep. 661; Selma. R. & D. R. Co. v. Lacy, 43 Ga. 461; Chicago & W. I. R. Co. v. Schroeder, 18 Ill. App. 328; Hyde v. Wabash, St. L. & P. Ry. Co., 61 Iowa. 441, 16 N. W. Rep. 351; State v. Pittsburgh & C. R. Co., 45 Md. 41; Nashville & C. R. Co. v. Eakin, 6 Coldw. 582.

[6] Dennick v. Central R. Co., 103 U. S. 11; Texas & P. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. Rep. 905; South Carolina R. Co. v. Nix, 68 Ga.

case on this subject is Dennick v. Central R. Co.,[7] decided in the supreme court of the United States in 1880. The plaintiff, as administratrix appointed in New York, brought suit in that state to recover damages for the death of her husband in New Jersey. The defendant removed the case into the circuit court of the United States, on the ground of citizenship, and judgment was rendered for the defendant, on the ground that the liability of the defendant under the New Jersey statute could be enforced by no one but a personal representative of the deceased, appointed by the authority of that state. This judgment was reversed in the supreme court, upon the broad ground that wherever, either by the common law or by the statute law of a state, a right of action has become fixed, and a legal liability incurred, that liability may be enforced or the right of action pursued in any court which has jurisdiction of such matters, and can ob-

572; Central R. Co. v. Swint, 78 Ga. 651; Shedd v. Moran, 10 Ill. App. 618; Burns v. Grand Rapids & I. R. Co., 113 Ind. 169, 15 N. E. Rep. 230; Cincinnati, H. & D. R. Co. v. McMullen, 117 Ind. 439, 20 N. E. Rep. 287; Morris v. Chicago, R. I. & P. R. Co., 65 Iowa, 727, 23 N. W. Rep. 143, (see, also, Boyce v. Wabash Ry. Co., 63 Iowa, 70, 18 N. W. Rep. 673,) Bruce's Adm'r v. Cincinnati R. Co., 83 Ky. 174, (overruling Taylor's Adm'r v. Pennsylvania Co., 78 Ky. 348;) Louisville & N. R. Co. v. Shivell's Adm'r, (Ky.) 18 S. W. Rep. 944; Wintuska's Adm'r v. Louisville & N. R. Co., (Ky.) 20 S. W. Rep. 819; Chicago, St. L. & N. O. R. Co. v. Doyle, 60 Miss. 977; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291; Missouri Pac. Ry. Co. v. Lewis, 24 Neb. 848, 40 N. W. Rep. 401; Leonard v. Columbia S. N. Co., 84 N. Y. 48; Wooden v. Western N. Y. & P. R. Co., 126 N. Y. 10, 26 N. E. Rep. 1050, (affirming 12 N. Y. Sup. 908;) Stallknecht v. Pennsylvania R. Co., 13 Hun, 451, (affirming 53 How. Pr. 305;) Gurney v. Grand Trunk Ry. Co., 13 N. Y. Sup. 645; Lustig v. New York, L. E. & W. R. Co., 20 N. Y. Sup. 477; Knight v. West Jersey R. Co., 108 Pa. St. 250, (see, also, Patton v. Pittsburgh, C. & St. L. Ry. Co., 96 Pa. St. 169;) Nashville & C. R. Co. v. Sprayberry, 9 Heisk. 852; Mississippi & T. R. Co. v. Ayres, 16 Lea, 725; Nelson's Adm'r v. Chesapeake & O. Ry. Co., (Va.) 14 S. E. Rep. 838. See, also, McLeod v. Connecticut & P. R. Co., 58 Vt. 727, 6 Atl. Rep. 648; Herrick v. Minneapolis & St. L. Ry. Co., 31 Minn. 11, 16 N. W. Rep. 418.

[7] 103 U. S. 11.

tain jurisdiction of the parties. Mr. Justice Miller, who delivered the opinion, says: "The action in the present case is in the nature of trespass to the person, always held to be transitory, and the venue immaterial. * * * We do not see how the fact that it was a statutory right can vary the principle. A party legally liable in New Jersey cannot escape that liability by going to New York. * * * It would be a very dangerous doctrine to establish that, in all cases where the several states have substituted the statute for the common law, the liability can be enforced in no other state but that where the statute was enacted and the transaction occurred." The court also considers the objection that the right of action was limited to the personal representative appointed in New Jersey, and amenable to its jurisdiction, and holds that the statute could not be construed as confining the right of action to a personal representative so appointed; distinguishing the case from that of an administrator appointed in one state, suing in that character in the courts of another state, without authority from the latter. As to the objection that the administrator is not responsible to the courts of New Jersey, the opinion says: "But the courts of New York are as capable of enforcing the rights of the widow and next of kin as the courts of New Jersey. And, as the court which renders the judgment for damages in favor of the administratrix can only do so by virtue of the New Jersey statute, so any court having control of her can compel distribution of the amount received in the manner prescribed by that statute." Again, as to the objection that, by virtue of her appointment in New York, the administratrix could only act upon or administer that which was the estate of the deceased in his lifetime, the opinion says: "No reason is perceived why the specific direction of the law on this subject may not invest the administrator with the right to receive or recover by suit, and impose on him the duty of distributing under that law."

§ 197. Whether a similar statute must exist in the state of the tribunal.

In Dennick v. Central R. Co. the opinion notices the fact that a statute like that of New Jersey existed in New York, but it is not there said to be essential to the maintenance of the action that a similar statute should exist in the state of the tribunal. In Nashville & C. R. Co. v. Sprayberry,[8] decided in Tennesee in 1872, no such limitation was suggested. In Leonard v. Columbia Steam Nav. Co.,[9] however, decided in New York about the same time as Dennick v. Central R. Co., and cited in the opinion, it is laid down that this is essential. In that case Miller, J., refers to the fact that in McDonald v. Mallory[10] such a rule had been laid down, although the point was not there involved; and he says that the rule is just and reasonable. "It is not essential," he observes, "that the statute should be precisely the same, * * * but merely requires that it should be of a similar import and character." The case held that the statute of Connecticut was sufficiently similar to that of New York. And in Wooden v. Western N. Y. & P. R. Co.[11] the rule was approved, and it was held that the Pennsylvania statute was sufficiently similar, notwithstanding that by it the action could, upon the facts, be maintained only by the widow, instead of by the personal representative, as required by the New York statute; and that the amount of recovery by the former statute was unlimited, and by the latter was limited to $5,000. The latter provision was held to pertain to the remedy, rather than to the right, and to indicate the public policy of New York as to the extent of the remedy, and to be a limit upon the amount which might be recovered in the action. The difference between the rule as laid down in Den-

[8] 9 Heisk. 852.
[9] 84 N. Y. 48.
[10] 77 N. Y. 546.
[11] 126 N. Y. 10, 26 N. E. Rep. 1050.

nick v. Central R. Co. and in Leonard v. Columbia Steam Nav. Co. has been referred to in several subsequent cases, in which the court did not deem it necessary to pass upon the question for the reason that the statutes under consideration were sufficiently similar. This was held to be the case in Bruce's Adm'r v. Cincinnati R. Co.,[12] brought in Kentucky, under the statute of Tennessee; in Morris v. Chicago, R. I. & P. R. Co.,[13] brought in Iowa, under the statute of Illinois; and in Burns v. Grand Rapids & I. R. Co.,[14] brought in Indiana, under the statute of Michigan,—although in the latter case the court observes that the better view seems to be that taken in Leonard v. Columbia Steam Nav. Co. In Shedd v. Moran,[15] brought in Illinois, under the statute of Indiana, it was said that the law of Illinois had no application, except as showing that the foreign statute was not repugnant to the public policy of that state. And in Knight v. West Jersey R. Co.,[16] brought in Pennsylvania, under the statute of New Jersey, Trunkey, J., says: "If the statute of New Jersey * * * is similar to the statute of this state upon the same subject, it is plain that the law sought to be enforced is not contrary to the public policy of this state, or prejudicial to its interests." The opinion in Chicago, St. L. & N. O. R. Co. v. Doyle,[17] brought in Mississippi, under the statute of Tennessee, is to the same effect. In the following cases, also, the right to sue under the foreign statute was maintained: South Carolina R. Co. v. Nix,[18] brought in Georgia, under the statute of South Carolina; Central R. Co. v. Swint,[19] in the same state, under the statute of Alabama; Missouri Pac. Ry. Co. v. Lewis,[20] in Nebraska, under the statute of Kansas; Nashville & C. R. Co. v. Sprayberry,[21] in Tennessee, under statute of

[12] 88 Ky. 174.
[13] 65 Iowa, 727, 23 N. W. Rep. 143.
[14] 113 Ind. 169, 15 N. E. Rep. 230.
[15] 10 Ill. App. 618.
[16] 108 Pa. St. 250.
[17] 60 Miss. 977.
[18] 68 Ga. 572.
[19] 78 Ga. 651.
[20] 24 Neb. 848, 40 N. W. Rep. 401.
[21] 9 Heisk. 852.

Mississippi; Mississippi & T. R. Co. v. Ayres,[22] in Tennessee, under the statute of Mississippi; Nelson's Adm'r v. Chesapeake & O. Ry. Co.,[23] in Virginia, under the statute of West Virginia; Cincinnati, H. & D. R. Co. v. McMullen,[24] in Indiana, under the statute of Ohio; Louisville & N. R. Co. v. Shivell's Adm'r,[25] in Kentucky, under the statute of Alabama.

The question was brought before the supreme court of the United States for a second time in Texas & P. Ry. Co. v. Cox,[26] in an action brought in the circuit court for the eastern district of Texas, under the statute of Louisiana. It was held, affirming the judgment of the lower court, that the action could be maintained. The opinion was delivered by the Chief Justice, who, after citing Dennick v. Central R. Co., says: "And, notwithstanding some contrariety of decision upon the point, the rule thus stated is generally recognized and applied where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced. The statutes of these two states on this subject are not essentially dissimilar, and it cannot be successfully asserted that the maintenance of jurisdiction is opposed to a settled public policy of the state of Texas." In construing these same statutes, the Texas court, in Texas & P. Ry. Co. v. Richards,[27] had arrived at an opposite conclusion, but the Chief Justice says that the question is one of general law, and settled by Dennick v. Central R. Co.

§ 198. Action based on foreign statute—Jurisdiction denied.

The right of an administrator appointed in the state of the tribunal to maintain an action based on the foreign statute has

[22] 16 Lea. 725.
[23] 14 S. E. Rep. 838.
[24] 117 Ind. 439, 20 N. E. Rep. 267.
[25] 18 S. W. Rep. 944.
[26] 145 U. S. 593, 12 Sup. Ct. Rep. 905.
[27] 68 Tex. 375, 4 S. W. Rep. 627.

been denied, upon grounds that do not rest upon the dissimilarity of particular statutes, in Ohio, Massachusetts, and Kansas.[28] The right to maintain the action has also been denied, in cases that turned to a greater or less extent upon the dissimilarity of the statutes involved, in Missouri, Maryland, and Texas.[29]

In Woodard v. Michigan, S. & N. I. R. Co.,[30] which is the earliest case in point, it was held that an Ohio administrator could not maintain an action in that state under the statute of Illinois. The two main grounds of decision were that the Illinois statute had no extraterritorial force, and that the jurisdiction of the Ohio statute under which the administrator was appointed did not extend to trusts to be carried out in pursuance of the law of another state; but the court also questioned whether the petition sufficiently showed that the act was one for which the deceased, had he lived, might have maintained an action.

[28] Woodard v. Michigan S. & N. I. R. Co., 10 Oh. St. 121; Richardson v. New York Cent. R. Co., 98 Mass. 85, (see, also, Davis v. New York & N. E. R. Co., 143 Mass. 301, 9 N. E. Rep. 815; but see Higgins v. Central N. E. & W. R. Co., 29 N. E. Rep. 534;) McCarthy v. Chicago, R. I. & P. R. Co., 18 Kan. 48. In Mackay v. Central R. Co., 14 Blatchf. 65, 4 Fed. Rep. 617, it was *held* in the circuit court, southern district of New York, that an administrator appointed in New York could not recover for a death which occurred in New Jersey under the statute of that state; but this case may be considered as overruled by Dennick v. Central R. Co., 103 U. S. 11. Taylor's Adm'r v. Pennsylvania Co., 78 Ky. 348, which *held* that an action could not be maintained in Kentucky under the statute of Indiana, where the death occurred, was overruled by Bruce's Adm'r v. Cincinnati R. Co., 88 Ky. 174. See Anderson v. Milwaukee & St. P. Ry. Co., 37 Wis. 321.

[29] Vawter v. Missouri Pac. Ry. Co., 84 Mo. 679; Oates v. Union Pac. Ry. Co., 16 S. W. Rep. 487; Ash v. Baltimore & O. R. Co., 72 Md. 144, 19 Atl. Rep. 643; Texas & P. Ry. Co. v. Richards, 68 Tex. 375, 4 S. W. Rep. 627; St. Louis, I. M. & S. Ry. Co. v. McCormick, 71 Tex. 660, 9 S. W. Rep. 540.

[30] 10 Oh. St. 121.

The next case was Richardson v. New York Cent. R. Co.,[31] which held that an action could not be maintained under the New York statute in Massachusetts. Hoar, J., who delivered the opinion, took the view that the statute was penal, but rested the decision on the ground that the right of action of the administrator, who was appointed in Massachusetts, was confined to actions which accrued to his intestate, or which grew out of his rights of property or those of his creditors; and that the right of action which the New York statute gave to the personal representative was not a right of property passing as assets to the decedent, but a specific power to sue, which was created by the law of that state, and which consequently did not pass to the plaintiff as administrator. This objection, which is similar to that raised in the Ohio case, was discussed in Dennick v. Central R. Co. It is to be observed that no statute similar to that of New York existed in Massachusetts, though the decision was not placed on that ground. In a later Massachusetts case,[32] where the deceased was instantly killed in Connecticut, it was held that an action might be maintained under the statute of that state, which provides that "all actions for injury to the person, whether the same do or do not instantaneously or otherwise result in death," shall survive. The court distinguishes the case from Richardson v. New York Cent. R. Co., on the ground that in that case the right of action was not one that passed to the administrator by succession; but in spite of the fact that the Connecticut statute provides, in terms, that the right of action, even in case of an instantaneous death, shall "survive," it creates, in effect, a new right of action for the benefit of certain designated persons; and the distinction drawn between these two cases is a very narrow one.

[31] 98 Mass. 85. See Davis v. New York & N. E. R. Co., 143 Mass. 301, 9 N. E. Rep. 815.

[32] Higgins v. Central N. E. & W. R. Co., 29 N. E. Rep. 584.

In McCarthy v. Chicago, R. I. & P. R. Co.,[33] it was held that a Kansas administrator could not recover for a death that occurred in Missouri. The petition does not appear to have alleged the Missouri law, but the court discusses the question as if such were the case, and reasons substantially in accordance with the opinions in Woodard v. Michigan, S. & N. I. R. Co. and Richardson v. New York Cent. R. Co. It is also pointed out that the two statutes are in many respects dissimilar.

In Vawter v. Missouri Pac. Ry. Co.[34] it was held, conversely, that a Missouri administrator could not recover for a death that occurred in Kansas. The reasoning of Woodard v. Michigan, S. & N. I. R. Co. and Richardson v. New York Cent. R. Co. is approved, but the court also lays stress on the fact that the statutes are dissimilar, and especially on the fact that by the Missouri statute it is expressly provided that the action shall not be brought by the personal representative.

In Ash v. Baltimore & O. R. Co.[35] it was held that a Maryland

[33] 18 Kan. 46. In Hamilton v. Hannibal & St. J. R. Co., 39 Kan. 56, 18 Pac. Rep. 57, the court declined to enter upon a re-examination of the question, because the complaint did not show that the suit was begun within the time prescribed by the Missouri statute.

[34] 84 Mo. 679. In Stoeckman v. Terre Haute & I. R. Co., 15 Mo. App. 503, it had been *held* that an administrator appointed in Missouri could maintain an action under the Illinois statute. While this case is not in terms overruled, it is not easy to reconcile it with Vawter v. Missouri Pac. Ry. Co. In Oates v. Union Pac. Ry. Co., 16 S. W. Rep. 487, it was *held* that where a resident of Missouri was killed in Kansas no action could be maintained in Missouri by the wife, though no administrator could be appointed in Kansas, because the deceased left no estate there, and though no action could be brought in either state by an administrator appointed in Missouri. In Marshall v. Wabash R. Co. 46 Fed. Rep. 269, in the circuit court, it was *held* that Rev. St. Mo. 1889, § 4425, providing that the defendant shall forfeit the sum of $5,000, etc., is a penal statute, and hence that the court in Ohio would not entertain an action thereon.

[35] 72 Md. 144, 19 Atl. Rep. 642.

administrator could not maintain an action under the statute of West Virginia. The court adopts the reasoning of the Ohio and Massachusetts cases, but distinguishes the case from Dennick v. Central R. Co., on the ground that the statutes of Maryland and West Virginia are essentially different,—in respect to the beneficiaries, the period of limitation, the amount of recovery, and the nominal plaintiff. Whether an action could be maintained under a foreign statute similar to that of Maryland the court declines to say.

In Texas & P. Ry. Co. v. Richards[36] it was held that an action could not be maintained in Texas under the Louisiana statute, upon the ground that the latter statute provided that the cause of action should survive, but created no new cause of action. Again, in St. Louis, I. M. & S. Ry. Co. v. McCormick,[37] the court declined to entertain an action by a Texas administrator under the Arkansas statute. The decision, which leaves the main question open, is placed upon the dissimilarity of the statutes.

Without discussing in detail the questions of the similarity and dissimilarity of the various statutes involved in the foregoing decisions, it is enough to say that the dissimilarity was not greater in any of them, except, perhaps, in the cases involving the Missouri statute, than that between the statutes involved in many of the cases cited in the preceding section, in which the jurisdiction was sustained.

[36] 68 Tex. 375, 4 S. W. Rep. 627. In an action begun in the circuit court involving the same statutes, an opposite conclusion was reached by the supreme court. Texas & P. Ry. Co. v. Cox, 145 U. S. 593, 12 Sup. Ct. Rep. 905.

[37] 71 Tex. 660, 9 S. W. Rep. 540.

§ 199. Death on navigable waters within the state.

The constitution of the United States declares that "the judicial power shall extend * * * to all cases of admiralty, and maritime jurisdiction;" and the ninth section of the judiciary act of 1789 enacts that "the district courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, *saving to suitors in all cases the right of a common-law remedy where the common law is adequate to give it.*" By reason of the above saving clause, the state courts have jurisdiction to entertain an action under the statutes giving a right of action for injuries resulting in death, although the death occurred on navigable waters of the United States, provided, of course, that it occurred within the territorial limits of the state under whose statute the remedy is sought.[38] Thus, in American Steamboat Co. v. Chase,[39] where the death occurred on Narragansett bay, within the state of Rhode Island, the supreme court decided that the action was maintainable under the Rhode Island statute, in the courts of that state. The opinion was delivered by Mr. Justice Clifford, who held that the state court had jurisdiction, irrespective of the question whether the case was or was not also within the jurisdiction of the admiralty courts, which was not decided. "Attempt is made," he observes, "to deny the right to such a remedy in this case, upon the ground that the operation of the saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the judiciary act; and the argument is that

[38] American Steamboat Co. v. Chase, 16 Wall. 522, 9 R. I. 419; Sherlock v. Alling, 93 U. S. 99, 44 Ind. 184; Mahler v. Norwich & N. Y. Transp. Co., 35 N. Y. 352, (reversing 45 Barb. 226; s. c., 30 How. Pr. 237;) Dougan v. Champlain Transp. Co., 56 N. Y. 1, (affirming 6 Lans. 430;) Opsahl v. Judd, 30 Minn. 126, 14 N. W. Rep. 575.

[39] 16 Wall. 522, 9 R. I. 419.

the cause of action alleged was not known to the common law at that period, which cannot be admitted, as actions to recover damages for personal injuries, prosecuted in the name of the injured party, were well known even in the early history of the common law. Such actions, it must be admitted, did not ordinarily survive, but nearly all the states have passed laws to prevent such a failure of justice, and the validity of such laws has never been questioned." The decision of the same court in Sherlock v. Alling[40] is to the same effect. In that case the deceased was killed by a collision of two steamboats on the Ohio river, between the states of Kentucky and Indiana, but above low-water mark on the Indiana side. It was admitted that the territorial limits of Indiana included the place in question. The decision held that the legislation of Indiana could be enforced with respect to any matter occurring on the river within the state limits, as much as with respect to any matter occurring on the land; and that, although the colliding boats were engaged in carrying on interstate commerce under the laws of the United States, until congress made some regulation touching the liabilities of parties for maritime torts resulting in death, the statute of Indiana applied, and constituted no encroachment upon the commercial power of congress. So, where the legislation of congress, and the constitutions of Minnesota and Wisconsin, adopted in conformity therewith, gave concurrent jurisdiction to both states on the St. Croix river, it was held that an action might be maintained in the state courts of Minnesota for an injury causing the death of the decedent while navigating that river, and that the jurisdiction was not affected by the fact that the boat, at the time of the accident, was on the Wisconsin side of the stream.[41]

[40] 93 U. S. 99, 44 Ind. 184.

[41] Opsahl v. Judd, 30 Minn. 126, 14 N. W. Rep. 575.

§ 200. Death on high seas on vessel owned in state.

Although the statute of a state has no extraterritorial force extending over the high seas,[42] it has been held in New York, in a case[43] where the death occurred on the high seas, in a vessel owned and registered in a port of that state, that an action might be maintained under the New York statute. The case is placed upon the authority of the decision of the United States supreme court in Crapo v. Kelly.[44] The decision rests upon the ground that, in respect to matters not committed by the constitution exclusively in the federal government, or legislated upon by congress, but which are regulated entirely by state laws, a state to which a vessel belongs can be regarded as the sovereignty whose laws follow her until she comes within the jurisdiction of some other government, and that hence such vessel, while on the high seas, is to be regarded, so far as concerns the operation of such laws, as a portion of the territory of the state.

[42] Armstrong v. Beadle, 5 Sawy. 484; The E. B. Ward, 16 Fed. Rep. 255.

[43] McDonald v. Mallory, 77 N. Y. 546, (reversing 44 N. Y. Superior, 80.) See, also, Cavanagh v. Ocean Steam Nav. Co., 13 N. Y. Sup. 540. This reasoning was approved by Pardee, J., in The E. B. Ward, 17 Fed. Rep. 456.

[44] 16 Wall. 610, (reversing 45 N. Y. 86.) In this case the vessel was owned and registered in Massachusetts, and, while she was on the high seas and bound for the port of New York, an involuntary transfer of all the property of her owner was executed to an assignee by the Massachusetts insolvency court. In a suit between the assignee and the sheriff of New York, who had attached the vessel on her arrival in that port, it was *held* that, for the purposes of the suit, the ship, though on the high seas, was a portion of the territory of Massachusetts, and that the assignment by the insolvency court passed the title to her with like effect as if she had been physically within the bounds of that state, and that the prior right was with the assignee as against the attaching creditor.

§ 201. Who may sue under a foreign statute.

The proper party plaintiff in an action under the foreign statute is the person thereby authorized to sue. The question as to the proper plaintiff is not a question of remedy, determinable by the *lex fori*, but of right. Thus, if the statute provides that the action shall be brought by the personal representative, only he is entitled to sue; and this, notwithstanding that the statute of the state where the remedy is sought requires the action to be brought by the beneficiaries.[45] On the other hand, if the right to sue is given by the foreign statute directly to the beneficiaries, they only are entitled to sue, notwithstanding that the statute of the state of the tribunal gives the right of action to the personal representative.[46] The personal representative who is entitled to sue is, of course, one appointed by authority of the state where the suit is brought.[47] It is not necessary that letters of administration should have been taken out in the state where the death occurred.[48] Under the New York statute providing that foreign corporations may be sued by residents, an action cannot be maintained by a nonresident who has been appointed administrator in that state.[49]

[45] Usher v. West Jersey R. Co., 126 Pa. St. 206, 17 Atl. Rep. 597; Patton v. Pittsburgh, C. & St. L. Ry. Co., 96 Pa. St. 169; Selma, R. & D. R. Co. v. Lacey, 49 Ga. 106; Western & A. R. Co. v. Strong, 52 Ga. 461; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291.

[46] Wooden v. Western N. Y. & P. R. Co., 126 N. Y. 10, 26 N. E. Rep. 1050, (affirming 12 N. Y. Sup. 908;) Nashville & C. R. Co. v. Sprayberry, 9 Heisk. 852; Same v. Same, 8 Baxt. 342.

[47] Leonard v. Columbia S. N. Co., 84 N. Y. 48; Dennick v. Central R. Co., 103 U. S. 11; Bruce's Adm'r v. Cincinnati R. Co., 83 Ky. 174; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291. See § 110. But a foreign administrator is authorized, upon complying with certain formalities, to sue in Georgia. South Carolina R. Co. v. Nix, 68 Ga. 573; Central R. Co. v. Swint, 73 Ga. 651.

[48] Gurney v. Grand Trunk Ry. Co., 59 Hun, 625, 13 N. Y. Sup. 645.

[49] Robinson v. Navigation Co., 112 N. Y. 315, 19 N. E. Rep. 625.

§ 202. Pleading foreign statute.

The plaintiff whose right of action arises under a foreign statute must allege and prove it.[50] Where the declaration sets out a good cause of action, according to the law of the forum, without alleging that the killing was in the state, the declaration will be held good, as setting out a cause of action arising within the state.[51] If the declaration fails to allege the foreign statute, an amendment alleging it is not open to the objection that it sets up a new cause of action,[52] although the period of limitation prescribed by the foreign statute has elapsed.[53]

[50] Cases cited note 5, *supra*.

[51] Hobbs v. Memphis & C. R. Co., 12 Heisk. 526. See Woodward v. Chicago & N. W. R. Co., 21 Wis. 309.

[52] Lustig v. New York, L. E. & W. R. Co., 20 N. Y. Sup. 477.

[53] South Carolina R. Co. v. Nix, 68 Ga. 572. But in Selma, R. & D. R. Co. v. Lacey, 49 Ga. 106, where the suit was originally brought in the name of the wife for the death of her husband in Alabama, and the declaration did not allege the laws of that state, it was *held* that an amendment after the year limited by the Alabama statute, setting up the laws of that state, could not be allowed, because it set up a new cause of action, but also because by the Alabama law the action was not maintainable by the wife.

CHAPTER XIV.

JURISDICTION OF FEDERAL COURTS.

§ 203. Jurisdiction of circuit courts.
204. Suit in admiralty for death not maintainable independently of statute.
205. Jurisdiction in admiralty under state statutes. *In rem.*
206. Jurisdiction *in personam*—Jurisdiction *in rem* where statute creates lien.
207. Decisions reviewed.
208. Jurisdiction of admiralty in England.
209. Jurisdiction under limited liability act.

§ 203. Jurisdiction of circuit courts.

An action for injuries resulting in death may be brought in or removed into the circuit court, if the citizenship of the parties is such as to confer jurisdiction upon that ground.[1] And notwithstanding the provision of the Wisconsin statute "that such actions shall be brought for a death caused in this state, and in some court established by the constitution and laws of the same," it was held in Chicago & N. Ry. Co. v. Whitton's Adm'r[2] that a nonresident plaintiff might remove an action, begun by him in the state court, into the circuit court. If the administrator is a citizen of another state, he may bring the action in the circuit court, although the deceased was a citizen of the state where the cause of action arose, and the beneficiaries and the defendant are also citizens of the same state.[3] Nor does

[1] Chicago & N. W. Ry. Co. v. Whitton's Adm'r, 13 Wall. 270; Dennick v. Railroad Co., 103 U. S. 11; American Steamboat Co. v. Chase, 16 Wall. 522, *per* Clifford, J. See Lung Chung v. Northern Pac. Ry. Co., 19 Fed. Rep. 254.

[2] 13 Wall. 270.

[3] Harper v. Norfolk & W. R. Co., 36 Fed. Rep. 102.

the fact that a citizen of another state is selected as administrator, for the purpose of conferring jurisdiction on the federal court, defeat that jurisdiction.[4]

§ 204. Suit in admiralty for death not maintainable independently of statute.

The rule of the common law that no suit can be maintained to recover damages for the death of a human being also prevails in admiralty.[5]

Whether such a suit might not be maintained in the admiralty courts of the United States independently of any statute was a question in respect to which much doubt existed[6] until

[4] Gaff's Adm'r v. Norfolk & W. R. Co., 36 Fed. Rep. 299.

[5] The Harrisburg, 119 U. S. 199, 7 Sup. Ct. Rep. 140, (overruling s. c., 15 Fed. Rep. 610;) The Alaska, 180 U. S. 201, 9 Sup. Ct. Rep. 461.

[6] The jurisdiction of the admiralty courts, independently of statute, was sustained in the following cases: The Sea Gull, Chase's Dec. 145; The Towanda, 84 Leg. Int. 394; s. c., under the name of Coggins v. Helmsley, 5 Cent. Law J. 418; The Charles Morgan, 2 Flip. 274; The David Reeves, 5 Hughes, 89; The E. B. Ward, 17 Fed. Rep. 456; The E. B. Ward, 23 Fed. Rep. 900; The Columbia, 27 Fed. Rep. 704. The following cases contained *dicta* to the same effect: Plummer v. Webb, 1 Ware, 75; Cutting v. Seabury, 1 Sprague, 522; The Epsilon, 6 Ben. 378; The Highland Light, Chase's Dec. 150; Holmes v. Oregon & C. Ry. Co., 6 Sawy. 262, 5 Fed. Rep. 75; The Garland, 5 Fed. Rep. 924; The Manhasset, 18 Fed. Rep. 918. See, also, In re Long Island, N. S. P. & F. Transp. Co., 5 Fed. Rep. 599; The Clatsop Chief, 8 Fed. Rep. 163; The Cephalonia, 29 Fed. Rep. 332; s. c., 32 Fed. Rep. 112; Ladd v. Foster, 31 Fed. Rep. 827. In the City of Brussels, 6 Ben. 370, Mr. Justice Blatchford, then judge of the district court, sustained a libel by an administrator of an infant child who took passage from Liverpool to New York, and while on the voyage was poisoned by the carelessness of the officers of the vessel. He placed the decision, however, on the ground of a breach of the contract of carriage. The jurisdiction was denied in The Sylvan Glen, 9 Fed. Rep. 335; The E. B. Ward, 16 Fed. Rep. 255. In *Ex parte* Gordon, 104 U. S. 515, the supreme court refused to issue a writ of prohibition to a dis-

it was set at rest by the decision of the supreme court in The Harrisburg.[7] In that case a suit *in rem* was brought in the eastern district of Pennsylvania, against the steamer Harrisburg, by the widow and child of the first officer of the schooner Marietta Tilton, to recover damages for his death in a collision between the two vessels, which occurred in a sound of the sea embraced between the islands of Martha's Vineyard and Nantucket, parts of the state of Massachusetts. The steamer was engaged in the coasting trade, and belonged to the port of Philadelphia, where she was duly enrolled, according to the laws of the United States. The district court entered a decree in favor of the libelants, which was affirmed in the circuit court. This decree was reversed in the supreme court, after an elaborate consideration of the authorities, in an opinion delivered by Chief Justice Waite. The questions for decision were stated by the chief justice as follows:

1. Can a suit in admiralty be maintained in the courts of the United States to recover damages for the death of a human being on the high seas, or waters navigable from the sea, caused by negligence, in the absence of an act of congress or a statute of a state giving a right of action therefor?

2. If not, can a suit *in rem* be maintained in admiralty against an offending vessel for the recovery of such damages, when an action at law has been given therefor by statute in the state where the wrong was done, or where the vessel belonged?

trict court sitting in admiralty, wherein a libel claiming damages was filed against a steamer for drowning certain seamen of a vessel with which, as she was navigating Chesapeake bay, the steamer, as was alleged, wrongfully collided. The supreme court *held* that the district court, having jurisdiction of the steamer and of the collision, was competent to decide the question whether, under the circumstances, it might estimate the damages which one person had sustained by the killing of another. To the same effect, *Ex parte* Detroit River Ferry Co., 104 U. S. 519. See 20 Amer. Law Reg. 742, The Garland, note.

[7] 119 U. S. 199, 7 Sup. Ct. Rep. 140.

3. If it can, will the admiralty courts permit such a recovery in a suit begun nearly five years after the death, when the statute which gives the right of action provides that the suit shall be brought within one year?

The opinion answers the first branch of the question in the negative, and concludes: "The argument everywhere in support of such suits in admiralty has been, not that the maritime law, as actually administered in common-law countries, is different from the common law in this particular, but that the common law is not founded on good reason, and is contrary to 'natural equity and the general principles of law.' Since, however, it is now established that in the courts of the United States no action at law can be maintained for such a wrong in the absence of a statute giving the right, and it has not been shown that the maritime law, as accepted and received by maritime nations generally, has established a different rule for the government of the courts of admiralty from those which govern courts of law in matters of this kind, we are forced to the conclusion that no such action will lie in the courts of the United States under the general maritime law." As to the second branch of the question, the court expressed no opinion, since it was satisfied that the suit under the limitation common to both the Massachusetts and the Pennsylvania statutes was begun too late.

The question decided in The Harrisburg was brought before the supreme court a second time in The Alaska.[8] In that case the libel was filed to recover damages for the loss of the pilot boat Columbia, and the personal effects of her crew, in consequence of a collision with the steamer Alaska, in which the pilot boat was sunk, and all the men on board were drowned. A supplemental libel was filed to recover damages for the death of the persons lost, on behalf of their respective widows. In the circuit court it was held that the supplemental libel was

[8] 180 U. S. 201, 9 Sup. Ct. Rep. 461.

properly dismissed, and in the supreme court the decree of the lower court was affirmed. The opinion was delivered by Mr. Justice Blatchford, who said: "It is admitted by the counsel for the libelants that the statute of New York on the subject of actions for death by negligence does not apply to the present case, because the deaths did not occur within the state of New York, or in waters subject to its jurisdiction. * * * A distinction is sought to be drawn between the present case and that of The Harrisburg, on the ground that in that case the vessel was owned in Pennsylvania, while here the Alaska is a British vessel, and that in that case the wrongful killing occurred in the waters of the state of Massachusetts, while here it occurred on the high seas. But we see no sound distinction between the two cases."

§ 205. Jurisdiction in admiralty under state statutes—*In rem*.

In The Harrisburg the question was left unanswered whether a suit *in rem* could be maintained in admiralty against an offending vessel for the recovery of damages for the death of a human being, where an action therefor had been given, in the state where the wrong was done, or where the vessel belonged. Prior to that decision a number of libels founded upon state statutes, both *in rem* and *in personam*, had been brought for loss of life, in the courts of the different districts, and, as a rule, the liability was held to exist,[9] though the weight of authority was against the maintenance of a libel *in rem*.[10] The question left open in The Harrisburg, however, has recently been determined by the supreme court in the negative in The Corsair,[11]

[9] See §§ 206, 207.

[10] The Sylvan Glen, 9 Fed. Rep. 335; The Manhasset, 18 Fed. Rep. 918. Followed in Welsh v. The North Cambria, 40 Fed. Rep. 655. See The Wydale, 37 Fed. Rep. 716.

[11] 12 Sup. Ct. Rep. 949.

which decides that no action *in rem* for loss of life is maintainable where no lien is expressly created by the local law. The libel was *in rem* against the tug Corsair by the mother of a passenger whose death was caused by the tug running against the bank of the Mississippi river within the state of Louisiana. The suit was founded on article 2315, Rev. Civil Code of Louisiana, as amended by the Laws of 1884, and was upon two causes of action,—one for damages for the pains and sufferings endured by the deceased, and the other for damages sustained by the mother in the loss of the life of her daughter. Exceptions were sustained, upon the ground that a suit *in rem* would not lie for injuries resulting in death; but leave was given to amend, by proceeding *in personam* against the owner of the tug. Exceptions were also sustained as to the amended libel, and the suit was dismissed. Upon appeal to the supreme court, it was held that the decree of dismissal was proper, so far as it operated upon the amended libel, (1) because the amendment by introducing new parties was in violation of admiralty rule 15, which prohibits joining the ship and her owner in the same suit, and (2) because, if the amended libel be considered as an independent libel against the owners *in personam*, it was defective, in failing to aver that the respondents were the owners at the time of the accident. As to the dismissal of the original libel, the opinion, which was delivered by Mr. Justice Brown, says: "An important question arises in connection with the dismissal of the original libel, which has never been squarely presented to this court before, and that is as to the power of the district court to entertain a libel *in rem* for damages incurred by loss of life, where, by the local law, a right of action survives to the administrator or relatives of the deceased, but no lien is expressly created by the act. * * * A maritime lien is said by writers upon maritime law to be the foundation of every proceeding *in rem* in the admiralty. In much the larger class of cases the

lien is given by the general admiralty law, but in other instances—such, for example, as insurance, pilotage, wharfage, and materials furnished in the home port of the vessel—the lien is given, if at all, by the local law. As we are to look, then, to the local law in this instance for the right to take cognizance of this class of cases, we are bound to inquire whether the local law gives a lien upon the offending thing. If it merely gives a right of action *in personam* for a cause of action of a maritime nature, the district court may administer the law by proceedings *in personam*, as was done with a claim for half pilotage dues under the law of New York, in the case of Ex parte McNiel, 13 Wall. 237; but, unless a lien be given by the local law, there is no lien to enforce by proceedings *in rem* in the court of admiralty. The Louisiana act declares, in substance, that the right of action for every act of negligence which causes damage to another shall survive, in case of death, in favor of the minor children or widow of the deceased, and, in default of these, in favor of the surviving father or mother; and that such survivors may also recover the damages sustained by them by the death of the parent, child, husband, or wife. Evidently nothing more is here contemplated than an ordinary action, according to the course of the law as it is administered in Louisiana. There is no intimation of a lien or privilege upon the offending thing, which, as we have already held, is necessary to give a court of admiralty jurisdiction to proceed *in rem*."

As to the question whether a libel *in rem* would lie upon the first cause of action for injuries, suffered by the deceased before her death, the court did not find it necessary to express an opinion, because there was no averment from which it could be gathered that the pains and sufferings were not substantially contemporaneous with her death, and inseparable, as matter of law, from it.

Where the state statute gives a lien, it has been held that a libel *in rem* may be maintained.[13] Whether a suit in admiralty is maintainable at all under the state statute will be considered in the next section.

§ 206. Jurisdiction *in personam*. Jurisdiction *in rem* where statute creates lien.

It is said in The Corsair that, if the state statute gives a right of action *in personam* for a cause of action of a maritime nature, the district court may administer the law by proceedings *in personam*; and that, if the statute gives a lien, it may be enforced by proceedings *in rem*. The jurisdiction *in personam* in actions arising under state statutes giving a right of action for death has frequently been sustained in the district court;[13] and in The Oregon[14] the jurisdiction *in rem* was sustained on the ground that the local law created a lien.

Nevertheless, in Butler v. Boston & S. S. S. Co.[15] it is intimated that it is still an open question whether, under such circumstances, a court of admiralty will entertain a suit at all. In that case the opinion, delivered by Mr. Justice Bradley, concludes: "We have no question, therefore, in saying that the limited liability act applies to the present case, notwithstanding the disaster happened within the technical limits of a county of Massachusetts, and notwithstanding the liability itself may have arisen from a state law. It might be a much more serious question *whether a state law can have force to create a liability in a maritime case at all*, within the dominion of the admiralty and maritime jurisdiction, where neither the general maritime law

[13] The Oregon, 45 Fed. Rep. 62.

[13] Holmes v. Oregon & C. Ry. Co., 5 Fed. Rep. 75, 6 Sawy. 262; The Chenop Chief, 8 Fed. Rep. 163; Holland v. Brown, 35 Fed Rep. 43. See § 207, and cases there cited.

[14] 45 Fed. Rep. 62.

[15] 130 U. S. 527, 9 Sup. Ct. Rep. 612.

nor an act of congress has created such a liability. On this subject we prefer not to express an opinion." So, too, in The A. W. Thompson[16] and in Jones v. The St. Nicholas[17] doubts of a similar nature are expressed; while the power of a state to create a maritime lien in such case has several times been seriously questioned.[18] In view of the fact that these questions have not yet been passed upon by the supreme court, the decisions which bear directly upon them will be briefly reviewed.

§ 207. Decisions reviewed.

The question of the jurisdiction of the admiralty courts was first referred to in American Steamboat Co. v. Chase,[19] which upheld the jurisdiction of the state courts in such case where the wrong was done on navigable waters of the United States within the lim-

[16] 89 Fed. Rep. 115. A collision occurred between a steamer and a schooner through the fault of both. The captain was personally in charge of the schooner, and was killed. In an action by his administratrix under the New York statute, Brown, J., declined to consider whether or not a maritime cause of action, cognizable in an admiralty court, either in a proceeding *in personam* or *in rem*, could be created by state legislation, holding that in any case the action would only lie under the conditions imposed by the statute, and that the contributory negligence of the captain was a bar.

[17] Many persons were killed and others injured by the collision of a river steamboat with a railroad bridge, in Georgia. The boat was libeled by persons injured, and, on petition of the owner, under the limited liability act, the representatives of the persons killed were made parties, and enjoined from suing elsewhere. *Held*, that (while it was an open question whether a state law could create a liability in a maritime case) the owner was estopped by his action from denying the right of such representatives to share in the fund realized from the sale of the boat, if negligence was found, though the Georgia statute, giving a right of action for wrongful death, creates no lien therefor. Jones v. The St. Nicholas, 49 Fed. Rep. 671.

[18] The Sylvan Glen, 9 Fed. Rep. 835; The Manhasset, 18 Fed. Rep. 918; The North Cambria, 40 Fed. Rep. 655.

[19] 16 Wall. 522. See § 199.

its of the state. "Doubts, however, may arise," says Mr. Justice Clifford, "whether the action survives in the admiralty, and, if not, whether a state statute can be regarded as applicable in such a case to authorize the legal representatives of the deceased to maintain such an action for the benefit of the widow and children of the deceased. Undoubtedly the general rule is that state laws cannot extend or restrict the jurisdiction of the admiralty courts, but it is suggested that the action may be maintained in this case, without any departure from that principle, as the only practical effect allowed to the state statute is to take the case out of the application of the common-law maxim that personal actions die with the person. * * * Difficulties, it must be conceded, will attend the solution of the question, but it is not necessary to decide it in the present case, as the jurisdiction of the state court may be supported, whether such a suit may or may not be maintained in the admiralty courts."

And in The Highland Light,[20] in the Maryland district, where the widow and son of a hand killed from escape of steam on a steamboat brought a libel *in rem*, Chief Justice Chase was of opinion that it might have been maintained by force of the Maryland statute giving a right of action for death, although he dismissed it on the ground that by act of congress the remedy *in rem* for injuries from escape of steam was confined to passengers. Referring to the fact that the Maryland statute gave no action *in rem*, he said: "The right is quite separate from the remedy. The right, like that of a statute lien upon a vessel for repairs in home ports, may be enforced in admiralty, by its own processes. It is not necessary to pursue the statutory remedy in order to enforce the statutory rights."

The first decision in point is Holmes v. Oregon & C. Ry. Co.,[21] in the Oregon district, where a passenger on a railway ferryboat, plying across the Wallamet river, in that state, was

[20] Chase Dec. 150. [21] 5 Fed. Rep. 75, 6 Sawy. 262.

drowned by the negligence of the owners of the boat. It was held by Deady, J., that a suit might be maintained by the administrator to recover the damages given by the Oregon statute. The conclusion reached by the judge was that, as the tort which caused the death occurred upon navigable waters of the United States, it was a marine tort; and that, even if the marine law does not give a remedy for such a wrong, the law of the state having given the right to the administrator to recover damages therefor, the district court, as a court of admiralty, had jurisdiction of a suit to enforce the right. This decision has been adhered to in the same district,[23] and was cited with approval in Re Long Island, N. S., P. & F. T. Co., by Choate, J., who was also of the opinion that there was no valid distinction in this respect as to the powers of the court between suits *in personam* and suits *in rem*.[24] In that case the point decided, however, was only that claims given by a state statute to the personal representatives of a person killed are among the claims the liability for which is limited by Rev. St. U. S. § 4282. Holmes v. Oregon & C. Ry. Co. was followed in The Garland[24] in the Michigan district, in which Brown, J., held that the administrator might proceed by libel *in rem*. In The E. B. Ward,[25] also, in the Louisiana district, where the killing occurred on the high seas, but the owners of the vessel resided in Louisiana, and her home port was in that state, Pardee, J., expressed the opinion that the vessel was a part of the state territory, and that, a right of action being given by the state law, the representatives of the deceased might proceed *in rem*. And in Grimsley v. Hankins,[26] in the Alabama district, it was held that a libel might be maintained by the mother of a minor under the statute of that state.

[22] The Clatsop Chief, 8 Fed. Rep. 163; Ladd v. Foster, 31 Fed. Rep. 827; Holland v. Brown, 35 Fed. Rep. 43; The Oregon, 45 Fed. Rep. 62.

[23] 5 Fed. Rep. 599.

[24] 5 Fed. Rep. 924.

[25] 17 Fed. Rep. 456.

[26] 46 Fed. Rep. 400.

The jurisdiction of the district court was denied in The Sylvan Glen,[27] The Manhasset,[28] and in Welsh v. The North Cambria,[29] upon the ground that the proceedings were *in rem*, and that no lien was created by the state statutes. But it is also strenuously denied in these cases that the state statute would have power to create a maritime lien in such case. Thus, in The Sylvan Glen, Benedict, J., says: "The words of the statute are: 'The person who, or the corporation which.' Those words create no lien, much less a maritime lien; and, if they did, how can it be held that a state has power to create a maritime lien for the benefit of this husband and next of kin? It is true that it is held by the supreme court of the United States that a lien, created by a state statute, for supplies and repairs to a domestic vessel, may be enforced by admiralty proceedings in the courts of the United States. But the rule in the class of cases referred to is peculiar. It is conceded by the court to be anomalous, and its basis upon any sound principle doubted, (The Lottawanna, 21 Wall. 581;) and I know of no expression of that court that will warrant the belief that any extension of such an anomaly would be approved." And in Welsh v. The North Cambria, Butler, J., says: "There is nothing whatever in the statute indicative of a purpose to create such a lien; and, if there was, I would hold the statute to be inoperative in this respect. The states have no power to interfere with the admiralty system of laws." On the other hand, in The Oregon[30] the jurisdiction *in rem* was sustained upon the ground that a lien was created by the Oregon statute. After citing the section of the Oregon statute which gives the right of action, Deady, J., says: "It is admitted that the right of action conferred by this section on the personal representative of the deceased is not accompanied by any privilege or lien on the offending thing, if any; and therefore, although

[27] 9 Fed. Rep. 885.
[28] 18 Fed. Rep. 918.
[29] 40 Fed. Rep. 655.
[30] 45 Fed. Rep. 62.

it may, as in this case, arise out of a marine tort, it can only be asserted in admiralty *in personam*. But the statute also gives this privilege or lien. Section 3690 [Comp. Laws 1887] provides: 'Every boat or vessel used in navigating the waters of this state * * * shall be liable and subject to a lien * * * for all * * * damages or injuries done to persons or property by such boat or vessel.' The Oregon was being used to navigate the waters of this state, and the injury complained of was suffered thereon, and she is clearly within the purview of the statute. A state may give a lien for building a ship, (Edwards v. Elliott, 21 Wall. 532,) or for materials furnished in the home port, (The Lottawanna, 21 Wall. 558,) and such liens may be enforced in admiralty."

In view of the conflict of opinions that exists in the decisions, it can hardly be denied that, pending a decision by the supreme court, the jurisdiction of the courts of admiralty *in personam* and their jurisdiction *in rem*, although the local law creates a lien, must both be considered to be open questions.

§ 208. Jurisdiction of admiralty in England.

The English cases throw little light upon the jurisdiction of the courts of admiralty in the United States in such cases, since the jurisdiction of the admiralty division is derived from an act of parliament,[31] which gives "jurisdiction over any claim of damage done by any ship." Under the construction placed upon these words, it is held that the admiralty division cannot entertain an action *in rem* for loss of life under Lord Campbell's act.[32] But, while the denial of jurisdiction is based upon the

[31] Admiralty Court Act 1861, (24 Vict. c. 10, § 7.)

[32] Seward v. The Vera Cruz, 10 App. Cas. 59, affirming 9 P. D. 96, which reversed Id. 88. Prior to the decision of this case a conflict of authority had existed. The jurisdiction had been maintained in The Guldfaxe, 38 L. J. (N. S.) Adm. 12, L. R. 2 A. & E. 325, and in The Ex-

construction of the statute, it has been pointed out that the purpose of Lord Campbell's act was to give the parties a right to compensation, to be recovered according to the procedure of the common law; and that a transfer of jurisdiction to the admiralty would not only deprive parties of the common-law procedure and mode of trial, but would materially alter their rights and relative positions.[33]

The admiralty division has jurisdiction, however, as a branch of the high court, to entertain an action under Lord Campbell's act *in personam;* but such a suit is not an admiralty action, and the admiralty rule as to half damages does not apply.[34]

§ 209. Jurisdiction under limited liability act.

The limited liability act,[35] which provides that the liability of the shipowner "for any loss, damage, or injury by collision, or for any act, matter, or thing, [loss,] damage, or forfeiture, done, occasioned, or incurred without the privity or knowledge" of the owner, shall in no case exceed the value of the interest of the owner, applies to damages for loss of life; and, where the owner has taken appropriate proceedings to obtain the benefit of that act, the person injured is barred of the right to maintain a separate action for such injuries.[36] The act applies notwith-

plorer, 40 L. J. (N. S.) Adm. 41, L. R. 3 A. & E. 289. In Smith v. Brown, L. R. 6 Q. B. 729, however, the court of queen's bench, by writ of prohibition, restrained the court of admiralty from proceeding with such a suit, on the ground that it had no jurisdiction to entertain it. The court of admiralty again asserted its jurisdiction in The Franconia, 2 P. D. 163, and was sustained in the court of appeal by a divided court. The question was discussed in Monaghan v. Horn, 7 Can. Sup. Ct. 409, but the case was determined on other grounds.

[33] Smith v. Brown, L. R. 6 Q. B. 729, *per* Cockburn, C. J. See, also, remarks of Lindley, L. J., in The Bernina, 12 P. D. 58.

[34] The Bernina, 13 App. Cas. 1, (affirming 12 P. D. 58, which, upon this point, affirmed 11 P. D. 31.)

[35] Rev. St. U. S. §§ 4283–4285.

[36] Butler v. Boston & S. S. S. Co., 130 U. S. 527, 9 Sup. Ct. Rep. 612;

standing that the death was caused within the technical limits of a state, and that the liability sought to be enforced arose from the state law; but whether the state law can have force to create any liability at all in such a case, within the dominion of the admiralty and maritime jurisdiction, has not yet been determined.[57]

The City of Columbus, 22 Fed Rep. 460; The Epsilon, 6 Ben. 378; In re Long Island, etc., Transp. Co., 5 Fed. Rep. 599.

[57] Butler v. Boston & S. S. S. Co., *supra*, *per* Bradley, J.; Jones v. The St. Nicholas, 49 Fed. Rep. 671. In England, damages for an action arising under Lord Campbell's act may be ascertained and awarded in a proceeding to limit the liability of the shipowner. Glaholm v. Barker, L. R. 2 Eq. 598; affirmed, L. R. 1 Ch. App. 228.

APPENDIX.

STATUTES GIVING A RIGHT OF ACTION FOR INJURIES RESULTING IN DEATH IN FORCE IN ENGLAND, UNITED STATES, AND CANADA.

ENGLAND.

9 & 10 Vict. c. 93.

[An act for compensating the families of persons killed by accidents.]

Whereas, no action at law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him: Be it therefore enacted, * * * that whensoever the death of a person shall be caused by wrongful act, neglect, or default, and 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, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2. And it be enacted, that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and

in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury, by their verdict, shall find and direct.

Sec. 3. Provided, always, and be it enacted, that not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of such deceased person.

Sec. 4. And be it enacted, that in every such action the plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

Sec. 5. And be it enacted, that the following words and expressions are intended to have the meanings hereby assigned to them, respectively, so far as such meanings are not excluded by the context or by the nature of the subject-matter, that is to say: Words denoting the singular number are to be understood to apply also to a plurality of persons or things; and words denoting the masculine gender are to be understood to apply also to persons of the feminine gender; and the word "person" shall apply to bodies politic and corporate; and the word "parent" shall include father and mother, and grandfather and grandmother, and stepfather and stepmother; and the word "child" shall include son and daughter, and grandson and granddaughter, and stepson and stepdaughter.

Sec. 6. And be it enacted, that this act shall come into operation from and immediately after the passing thereof, and that nothing therein contained shall apply to that part of the United Kingdom called "Scotland."

Sec. 7. And be it enacted, that this act may be amended or repealed by any act to be passed in this session of parliament.

27 and 28 Vict. c. 95.

[An act to amend the act 9 & 10 Vict. c. 93.]

Section 1. If and so often as it shall happen, at any time or times hereafter, in any of the cases intended and provided for by the said act, that there shall be no executor or administrator of the person deceased, or that, there being such executor or admininstrator, no such action as in the said act mentioned shall within six calendar months after the death of such deceased person, as therein mentioned, have been brought by and in the name of his or her executor or administrator, then, and in every such case, such action may be brought by and in the name or names of all or any of the persons (if more than one) for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator; and every action so to be brought shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure as nearly as may be, as if it were brought by and in the name of such executor or administrator.

Sec. 2. It shall be sufficient, if the defendant is advised to pay money into court, that he pay it as a compensation in one sum to all persons entitled under the said act for his wrongful act, neglect, or default, without specifying the shares into which it is to be divided by the jury; and if the said sum be not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the jury shall think the same sufficient, the defendant shall be entitled to the verdict upon that issue.

Sec. 3. This act and the said act shall be read together as one act.

ALABAMA.

Code 1887.

Sec. 2587. A father, or in case of his death or desertion of his family, or of his imprisonment for a term of two years or more, under a conviction for crime, or of his confinement in an insane asylum, or if he has been declared of unsound mind, the mother, may sue for an injury to a minor child, a member of the family.

Sec. 2588. When the death of a minor child is caused by the wrongful act or omission or negligence of any person or persons or corporation, his or their servants or agents, the father, or the mother, in the cases mentioned in the preceding section, or the personal representative of such minor, may sue and recover such damages as the jury may assess; but a suit by the father or mother, in such case, is a bar to a suit by the personal representative.

Sec. 2589. A personal representative may maintain an action, and recover such damages as the jury may assess, for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative, and may be maintained though there has not been prosecution or conviction or acquittal of the defendant for such wrongful act, or omission or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions. Such action must be brought within two years from and after the death of the testator or intestate.

Sec. 2590. When a personal injury is received by a servant or employe in the service or business of the master or employer, the master or employer is liable to answer in damages to such servant or employe, as if he were a stranger, and not engaged in such service or employment, in the cases following:

1. When the injury is caused by reason of any defect in the condition of the ways, works, machinery, or plant connected with, or used in, the business of the master or employer.

2. When the injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has any superintendence intrusted to him, whilst in the exercise of such superintendence.

3. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, to whose orders or directions the servant or employe, at the time of the

injury, was bound to conform, and did conform, if such injuries resulted from his having so conformed.

4. When such injury is caused by reason of the act or omission of any person in the service or employment of the master or employer, done or made in obedience to the rules and regulations or by-laws of the master or employer, or in obedience to particular instructions given by any person delegated with the authority of the master or employer in that behalf.

5. When such injury is caused by reason of the negligence of any person in the service or employment of the master or employer, who has the charge or control of any signal, points, locomotive engine, switch, car, or train upon a railway, or of any part of the track of a railway.

But the master or employer is not liable under this section if the servant or employe knew of the defect or negligence causing the injury, and failed in a reasonable time to give information thereof to the master or employer, or to some person superior to himself engaged in the service or employment of the master or employer, unless he was aware that the master or employer, or such superior, already knew of such defect or negligence; nor is the master or employer liable under subdivision one, unless the defect therein mentioned arose from, or had not been discovered or remedied owing to, the negligence of the master or employer, or of some person in the service of the master or employer, and intrusted by him with the duty of seeing that the ways, works, machinery, or plant were in proper condition.

Sec. 2591. If such injury results in the death of the servant or employe, his personal representative is entitled to maintain an action therefor, and the damages recovered are not subject to the payment of debts or liabilities, but shall be distributed according to the statute of distributions.

Sec. 2593. The personal representative, and the sureties on his bond, are liable to the parties in interest for the due and legal distribution of all damages recovered by such representative under section 2588, or section 2589, or section 2591, and are subject to all remedies which may be pursued against such representative and sureties for the due administration of personal assets.

ARIZONA.

Rev. St. 1887.

Sec. 2145. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases:

1. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of any railroad, steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, gross negligence, or carelessness of their servants or agents.

2. When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another.

Sec. 2146. The wrongful act, negligence, carelessness, unskillfulness, or default mentioned in the preceding section must be of such character as would, if death had not ensued, have entitled the party injured to maintain action for injury.

Sec. 2147. When the death is caused by the willful act or omission or gross negligence of the defendant, exemplary, as well as actual, damages may be recovered.

Sec. 2148. The action may be commenced and prosecuted although the death shall have been caused under such circumstances as amounts in law to a felony, and without regard to any criminal proceeding that may or may not be had in relation to the homicide.

Sec. 2149. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased.

Sec. 2150. The action may be brought by all the parties entitled thereto, or by any one or more of them for the benefit of all.

Sec. 2151. If the parties entitled to the benefit of the action shall fail to commence the same within six months after the death of the deceased, it shall be the duty of the executor or administrator of the deceased to commence and prosecute the action, unless re-

quested by all of the parties entitled thereto not to prosecute the same.

Sec. 2152. The action shall not abate by the death of either party to the record if any person entitled to the benefit of the action survives. If the plaintiff die pending the suit, when there is only one plaintiff, some one or more of the parties entitled to the money removed may, by order of the court, be made plaintiff, and the suit be prosecuted to judgment in the name of such plaintiff, for the benefit of the persons entitled.

Sec. 2153. If the sole plaintiff dies pending the suit, and he is the only party entitled to the money recovered, the suit shall abate.

Sec. 2154. If the defendant die pending the suit, his executor or administrator may be made a party, and the suit be prosecuted to judgment as though such defendant had continued alive. The judgment in such case, if rendered in favor of the plaintiff, shall be paid in due course of administration.

Sec. 2155. The jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict.

Sec. 2309. There shall be commenced and prosecuted within one year after the cause of action shall have accrued, and not afterwards, all actions or suits, in court, of the following description:

* * * * * * * * * * * * *

4. Actions for injuries done to the person of another where death ensued from such injuries; and the cause of action shall be considered as having accrued at the death of the party injured.

ARKANSAS.

Const. art. 5.

Sec. 32. No act of the general 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.

Manif. Dig.

Sec. 5225. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and 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, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

Sec. 5226. Every such action shall be brought by, and in the name of, the personal representatives of such deceased person, and, if there be no personal representatives, then the same may be brought by the heirs at law of such deceased person; and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person: provided, that every such action shall be commenced within two years after the death of such person.

CALIFORNIA.

Code Civil Proc.

Sec. 376. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person

causing the injury or death, or if such person be employed by another person, who is responsible for his conduct, also against such other person.

Sec. 377. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an acton for damages against the person causing the death; or if such person be employed by another person, who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as, under all the circumstances of the case, may be just.

Sec. 335. The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:

* * * * * * * * * * * * *

Sec. 339. Within two years.

* * * * * * * * * * * * *

3. An action to recover damages for the death of one caused by the wrongful act or neglect of another.

COLORADO.

Gen. St. 1883.

Sec. 1030. Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employe whilst running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any coach or other public conveyance whilst in charge of the same as a driver, and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any stagecoach or other public conveyance, the corporation, individual, or individuals in whose employ any such officer, agent, servant, employe, master, pilot, engineer, or driver shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stagecoach, or other public conveyance at the time any such injury is received, and resulting from or occasioned by

defect or insufficiency above described, shall forfeit and pay for every person and passenger so injured the sum of not exceeding five thousand dollars, and not less than three thousand dollars, which may be sued for and recovered:

First. By the husband or wife of deceased; or

Second. If there be no husband or wife, or he or she fails to sue within one year after such death, then by the heir or heirs of the deceased; or

Third. If such deceased be a minor or unmarried, then by the father or mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. In suits instituted under this section it shall be competent for the defendant, for his defense, to show that the defect or insufficiency named in this section was not a negligent defect or insufficiency.

Sec. 1031. Whenever the death of a person shall be caused by a wrongful act, neglect, or default of another, and 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, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the party injured.

Sec. 1032. All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in the first section of this act; and in every such action the jury may give such damages as they may deem fair and just, not exceeding five thousand, [dollars,] with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending any such wrongful act, neglect, or default.

Sec. 1033. All actions provided for by this act shall be brought within two years from the commission of the alleged negligence resulting in the death for which suit is brought.

Code Civil Proc.

Sec. 9. A father, or in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward.

CONNECTICUT.

Gen. St. 1888.

Sec. 1008. All actions for injury to the person, whether the same do or do not instantaneously or otherwise result in death, to the reputation, or to the property, and actions to recover damages for injury to the person of the wife, child, or servant of any person, shall survive to his executor or administrator: provided, the cause of action shall not have arisen more than one year before the death of the deceased; but all damages for an injury resulting in death, recovered in an action brought by any executor or administrator, shall inure to the benefit of the husband or widow and heirs of the deceased person, after deducting the costs and expenses of suit, as follows: Half to the husband or widow, and half to the lineal descendants of the deceased, per stirpes; but, if there be no descendants, the whole shall go to the husband or widow, and, if no husband or widow, to the heirs, according to the law regulating the distribution of intestate personal estate.

Sec. 1009. In all actions by an executor or administrator for injuries resulting in death from negligence, such executor or administrator may recover from the party legally in fault for such injuries just damages, not exceeding five thousand dollars, to be distributed as is provided in the preceding section: provided, that no action shall be brought upon this statute but within one year after the neglect complained of: and provided, further, that if suit for the injuries caused by such neglect shall be pending when the death occurs, and the executor or administrator of such deceased person shall enter and prosecute the same to final judgment, the damages recovered in such suit shall be distributed as provided in said section.

Sec. 1383. No suit against a railroad company for damages for the loss of any life shall be brought by the executor or administrator of the deceased person, except within eighteen months from and after the death of such person.

DELAWARE.

Rev. Code 1852, p. 644, (as amended by Laws 1874, p. 644.)

Sec. 2. Whenever death shall be occasioned by unlawful violence or negligence, and no suit be brought by the party injured to recover damages during his or her life, the widow of any such deceased person, or, if there be no widow, the personal representatives, may maintain an action for, and recover damages for, the death thus occasioned.

DISTRICT OF COLUMBIA.

Act Cong. Feb. 17, 1885, (23 St. p. 307, c. 126.)

Whenever, by an injury done or happening within the limits of the District of Columbia, the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured, or, if the person injured be a married woman, have entitled her husband, either separately or by joining with the wife, to maintain an action and recover damages, the person who, or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages for such death, notwithstanding the death of the person injured, even though the death shall have been caused under circumstances which constitute a felony; and such damages shall be assessed with reference to the injury resulting from such act, neglect, or default causing such death, to the widow and next of kin of such deceased person: provided, that in no case shall the recovery under this act exceed the sum of ten thousand dollars: and provided, further, that no action shall be maintained under this act in any case when the party injured by such wrongful act, neglect, or default has recovered damages therefor during the life of such party.

Sec. 2. Every such action shall be brought by and in the name of the personal representative of such deceased person, and within one year after the death of the party injured.

Sec. 3. The damages recovered in such action shall not be appropriated to the payment of the debts or liabilities of such deceased person, but shall inure to the benefit of his or her family, and be distributed according to the provisions of the statute of distributions in force in the said District of Columbia.

FLORIDA.

Laws 1883, c. 3439, (No. 27.)

Section 1. Whenever the death of any person in this state shall be caused by the wrongful act, negligence, carelessness, or default of any individual or individuals, or by the wrongful act, negligence, carelessness, or default of any corporation, or by the wrongful act, negligence, carelessness, or default of any agent of any corporation, when acting in his capacity of agent of such corporation, and the act, negligence, carelessness, or default is such as would, if death had not ensued, have entitled the party injured thereby to maintain an action for damages in respect thereof, then, and in every such case, the person or persons who, or corporation which, would have been liable in damages if death had not ensued, shall be liable to an action for damages notwithstanding the death shall have been caused under such circumstances as make it in law amount to a felony.

Sec. 2. Every such action shall be brought by and in the name of the widow or husband, as the case may be; and, where there is neither a widow or husband surviving the deceased, then the minor child or children may maintain an action; and, where there is neither a widow or husband, or minor child or children, then the action may be maintained by any person or persons dependent on such person killed for a support; and, where there is neither of the above class of persons to sue, then the action may be maintained by the executor or administrator, as the case may be, of the person so killed; and in every such action the jury shall give such damages as the party or parties entitled to sue may have sustained by reason of the death of the party killed: provided, that any action insti-

tuted under this act, by or in behalf of a person or persons under twenty-one years of age, shall be brought by and in the name of a next friend.

Sec. 8. That no action provided for by this act shall be brought after the expiration of two years from the date of the death of the party from whose death such action shall accrue.

GEORGIA.

Code 1882, § 2967, (as amended by Laws 1889, No. 735, p. 73.)

No action for a tort shall abate by the death of either party where the wrongdoer received any benefit from the tort complained of; nor shall any action of tort for the recovery of damages for homicide, injury to person, or injury to property abate by the death of either party; but such cause of action, in case of the death of the plaintiff, shall, in the event there is no right of survivorship in any other person, survive to the personal representative of the deceased plaintiff, and, in case of the death of the defendant, shall survive against said defendant's personal representative.

Code 1882, § 2971, (as amended by Laws 1887, No. 588, p. 43.)

A widow, or, if no widow, a child or children, may recover for the homicide of the husband or parent; and if suit be brought by the widow or children, and the former, or one of the latter, dies pending the action, the same shall survive in the first case to the children, and in the latter case to the surviving child or children. The husband may recover for the homicide of his wife, and, if she leaves child or children surviving, said husband and children shall sue jointly, and not separately, with the right to recover the full value of the life of the deceased, as shown by the evidence, and with the right of survivorship as to said suit if either die pending the action. A mother, or, if no mother, a father, may recover for the homicide of a child, minor or sui juris, upon whom she or he is dependent, or who contributes to his or her support, unless said child leaves a wife, husband, or child. Said mother or father shall be entitled to recover the full value of the life of said child. The word "homicide," used in this section, shall be held to include all cases where

the death of a human being results from a crime or from criminal or other negligence. The plaintiff, whether widow or child or children, may recover the full value of the life of the deceased, as shown by the evidence. In the event of a recovery by the widow she shall hold the amount recovered subject to the law of descents, just as if it had been personal property descending to the widow and children from the deceased, and no recovery had under the provisions of this section, and the law of which it is amendatory, shall be subject to any debt or liability of any character of the deceased husband or parent. The full value of the life of the deceased, as shown by the evidence, as used in this section, shall be held to mean the full value of the life of the deceased, as shown by the evidence, without any deduction for necessary or other personal expenses of the deceased had he lived.

Code 1882.

Sec. 2970. If the injury amounts to a felony, as defined by this Code, the person injured must either simultaneously or concurrently or previously prosecute for the same, or allege a good excuse for the failure so to prosecute: provided, that this section shall not apply to torts committed by railroad corporations or other incorporated companies, or their agents or employes, nor shall the same apply to natural persons.

Sec. 2972. If the plaintiff, by ordinary care, could have avoided the consequences to himself caused by the defendant's negligence, he is not entitled to recover, but in other cases the defendant is not relieved, although the plaintiff may in some way have contributed to the injury sustained.

Sec. 3003. A person who knowingly or carelessly sells to another unwholesome provisions of any kind, the defect being unknown to the purchaser, and damage results to the purchaser or his family or his property, such person shall be liable in damages for such injury.

Sec. 3004. A person who knowingly or carelessly, by himself or his agents, sells to another adulterated drugs or liquors, by the use of which damage accrues to the purchaser, or his patients or his family or his property, shall be liable in damages for the injury done.

Sec. 3005. If a vendor of drugs and medicines, by himself or his agent, either knowingly or negligently furnishes the wrong article or medicine, and damage accrues from the use of the drug or medicine furnished to the purchaser or his patients or his family or his property, the vendor shall respond in damages for the injury done. If death ensues to the purchaser, in any case arising under this or the two foregoing paragraphs, the right of action shall be to the widow or children, as prescribed in cases of physical injuries.

IDAHO.

Rev. St. 1887.

Sec. 4099. A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person, who is responsible for his conduct, also against such other person.

Sec. 4100. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person, who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as, under all the circumstances of the case, may be just.

Sec. 4050. The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:

* * * * * * * * * * * *

Sec. 4055. Within two years:

* * * * * * * * * * * *

4. An action to recover damages for the death of one caused by the wrongful act of another.

ILLINOIS.

1 Starr & C. Ann. St. c. 70.

Section 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and 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, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the wife and next of kin of such deceased person, not exceeding the sum of $5,000: provided, that every such action shall be commenced within two years after the death of such person.

8 Starr & C. Ann. St. c. 93.

Sec. 14. For any injury to person or property occasioned by any willful violations of this act,[1] or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby; and in case of loss of life by reason of such willful violation or willful failure, as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any other per-

[1] An act to provide for the health and safety of persons employed in coal mines.

son or persons who were before such loss of life dependent for support on the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives, not to exceed the sum of five thousand dollars.

INDIANA.

Rev. St. 1881.

Sec. 266. A father, or, in case of his death or desertion of his family or imprisonment, the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward; but, when the action is brought by the guardian for an injury to his ward, the damages shall inure to the benefit of his ward.

Sec. 284. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

Sec. 282. A cause of action arising out of an injury to the person dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person, and actions for seduction, false imprisonment, and malicious prosecution.

IOWA.

McClain's Ann. Code.

Sec. 3730. All causes of actions shall survive, and may be brought, notwithstanding the death of the person entitled or liable to the same.

Sec. 3731. The right of civil remedy is not merged in a public offense, but may, in all cases, be enforced independently of, and

in addition to, the punishment of the latter. When a wrongful act produces death, the damages shall be disposed of as personal property belonging to the estate of the deceased, except that if the deceased leaves a husband, wife, child, or parent, it shall not be liable for the payment of debts.

Sec. 3732. The actions contemplated in the two preceding sections may be brought, or the court, on motion, may allow the action to be continued, by or against the legal representatives or successors in interest of the deceased. Such action shall be deemed a continuing one, and to have accrued to such representative or successor at the same time it did to the deceased if he had survived. If such is continued against the legal representative of the defendant, a notice shall be served on him as provided for service of original notices.

Sec. 3761. A father, or, in case of his death or imprisonment or desertion of his family, the mother, may prosecute as plaintiff an action for the expenses and actual loss of service resulting from the injury or death of a minor child.

Sec. 3734. The following actions may be brought within the times herein limited, respectively, after their causes accrue, and not afterwards, except when otherwise specially declared:

1. Actions founded on injuries to the person or reputation, whether based on contract or tort, or for a statute penalty, within two years.

KANSAS.

Gen. St. 1889.

Par. 4518. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter if the former might have maintained an action, had he lived, against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

Par. 4519. In all cases where the residence of the party whose death has been, or hereafter shall be, caused as set forth in section

422 of chapter 80, Laws of 1868, (4518,) is or has been at the time of his death in any other state or territory, or when, being a resident of this state, no personal representative is or has been appointed, the action provided in said section 422 (4518) may be brought by the widow, or, where there is no widow, by the next of kin of such deceased.

KENTUCKY.

Gen. St. c. 57.

Section 1. If the life of any person not in the employment of a railroad company shall be lost in this commonwealth by reason of the negligence or carelessness of the proprietor or proprietors of any railroad, or by the unfitness or negligence or carelessness of their servants or agents, the personal representative of the person whose life is so lost may institute suit and recover damages in the same manner that the person himself might have done for any injury where death did not ensue.

Sec. 3. If the life of any person or persons is lost or destroyed by the willful neglect of another person or persons, company or companies, corporation or corporations, their agents or servants, then the widow, heir, or personal representative of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover punitive damages for the loss or destruction of the life aforesaid.

Gen. St. c. 1.

Sec. 6. The widow and minor child or children (or either or any of them) of a person killed by the careless, wanton, or malicious use of firearms, or by any weapon popularly known as "Colts," "brass knucks," or "slung shots," or other deadly weapons, not in self-defense, may have an action against the person or persons who committed the killing, and all others aiding or promoting the killing, or any one or more of them, for reparation of the injury; and in such action the jury may give vindictive damages.

Gen. St. c. 32.

Section 1. The widow and minor child of a person killed in a duel, or either of them, may have an action against the surviving princi-

pal, the seconds, and all others aiding or promoting the duel, or against any one or more of them, for reparation of the injury, and in which the jury may give vindictive damages, for the suppression of the practice of dueling.

Sec. 2. The failure to include any of the persons designated by the last section as defendants in the action shall discharge them from liability under that section. The testimony of such persons, thus given, shall not be used in any prosecution by the commonwealth or other procedure to recover a penalty against such persons.

Gen. St. c. 71, art. 3.

Sec. 3. An action for an injury to the person of the plaintiff, or of his wife, child, ward, apprentice, or servant, or for injuries to person, cattle, or stock by railroads, or by any company or corporation; an action for a malicious prosecution, conspiracy, arrest, seduction, criminal conversation, or breach of promise of marriage; an action for libel or slander; an action for the escape of a prisoner arrested or imprisoned on civil process,—shall be commenced within one year next after the cause of action accrued, and not thereafter.

LOUISIANA.

Civil Code, art. 2315, (as amended by Act No. 71, 1884, p. 94.)

Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it. The right of this action shall survive in case of death in favor of the minor children or widow of the deceased, or either of them, and, in default of these, in favor of the surviving father and mother, or either of them, for the space of one year from the death.

The survivors above mentioned may also recover the damages sustained by them by the death of the parent or child, or husband or wife, as the case may be.

MAINE.

Rev. St. 1883, c. 51.

Sec. 68. Any railroad corporation by whose negligence or carelessness, or by that of its servants or agents, while employed in its business, the life of any person, in the exercise of due care and diligence, is lost, forfeits not less than five hundred nor more than five thousand dollars, to be recovered by indictment found within one year, wholly to the use of his widow, if no children; and to the children, if no widow; if both, to her and them equally; if neither, to his heirs.

Chapter 52, § 7, makes section 68 applicable to corporations created for navigation by steam, proprietors of stagecoaches, and common carriers.

Sec. 69. No railroad corporation shall be fined for the death of a person walking or being on its road contrary to law, or to its valid rules and regulations.

Rev. St. 1883, c. 18.

Sec. 80. Whoever receives any bodily injury, or suffers damage in his property, through any defect or want of repair or sufficient railing, in any highway, townway, causeway, or bridge, may recover for the same in a special action on the case, to be commenced within one year from the date of receiving such injury or suffering damage, of the county or town obliged by law to repair the same, if the commissioners of such county, or the municipal officers, highway surveyors, or road commissioners of such town, had twenty-four hours' actual notice of the defect or want of repair, but not exceeding two thousand dollars in case of a town; and, if the sufferer had notice of the condition of such way previous to the time of the injury, he cannot recover of a town unless he has previously notified one of the municipal officers of the defective condition of such way; and any person who sustains injury or damage, as aforesaid, shall, within fourteen days thereafter, notify one of the county commissioners of such county, or of the municipal officers of such town, by letter or otherwise, in writing, setting forth his claim for damages, and specifying the nature of his injuries, and the nature and location of the defect, which caused such injury. If the life of any person is lost through such deficiency, his executors or administrators may recover of such county or town liable to keep the same in repair, in an action on the case, brought for the benefit of the estate of the deceased, such sum as the jury may deem reasonable as damages, if the parties liable had said notice of the deficiency which caused the loss of life.

Acts 1891, c. 124.

Section 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and 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, then, and in every such case, the person who, or the corporation which, would have been liable, if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as shall amount to a felony.

Sec. 2. Every such action shall be brought by and in the name of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of his widow, if no children, and of the children, if no widow, and if both, then of her and them equally, and if neither, of his heirs. The jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the persons for whose benefit such action is brought: provided, that such action shall be commenced within two years after the death of such person.

MARYLAND.

Pub. Gen. Laws, art. 67.

Section 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and 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, the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2. Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the state of Maryland, for the use of the person entitled to damages; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the above-mentioned parties in such shares as the jury, by their verdict, shall find and direct: provided, that not more than one action shall lie for and in respect of the same subject-matter of complaint; and that every such action shall be commenced within twelve calendar months after the death of the deceased person.

Sec. 3. In every such action the equitable plaintiff on the record shall be required, together with the declaration, to deliver to the defendant or his attorney a full particular of the persons for whom and on whose behalf such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

Sec. 4. The word "person" shall apply to bodies politic and corporate, and all corporations shall be responsible under this article for the wrongful acts, neglect, or default of all agents employed by them.

MASSACHUSETTS.

Pub. St. 1882, c. 112.

Sec. 212. If by reason of the negligence or carelessness of a corporation operating a railroad or street railway, or of the unfitness or gross negligence or carelessness of its servants or agents while engaged in its business, the life of a passenger, or of a person being in the exercise of due diligence, and not a passenger or in the employment of such corporation, is lost, the corporation shall be punished by fine of not less than five hundred, nor more than five thousand, dollars, to be recovered by indictment, prosecuted within one year from the time of the injury causing the death, and paid to the executor or administrator, for the use of the widow and children of the deceased, in equal moieties; or, if there are no children, to the use of the widow; or, if no widow, to the use of the next of kin; but a corporation operating a railroad shall not be so liable for the loss of life by a person while walking or being upon its road contrary to law, or to the reasonable rules and regulations of the corporation. If the corporation is a railroad corporation, it shall also be liable in damages, not exceeding five thousand, nor less than five hundred, dollars, to be assessed with reference to the degree of culpability of the corporation or of its servants or agents, and to be recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the persons hereinbefore specified in the case of an indictment; but no executor or administrator shall, for the same cause, avail himself of more than one of the remedies given by this section.

Sec. 213. If a person is injured in his person or property by collision with the engines or cars of a railroad corporation at a crossing, such as is described in section one hundred and sixty-three, and it appears that the corporation neglected to give the signals required by said section, and that such neglect contributed to the injury, the corporation shall be liable for all damages caused by the collision, or to a fine recoverable by indictment, as provided in the preceding section, or, in case the life of a person so injured is lost, to damages recoverable in an action of tort, as provided in said

section, unless it is shown that, in addition to a mere want of ordinary care, the person injured, or the person having charge of his person or property, was, at the time of the collision, guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury.

Sec. 163. Every railroad corporation shall cause a bell of at least thirty-five pounds in weight, and a steam whistle, to be placed on each locomotive engine passing upon its road; and such bell shall be rung or such whistle sounded at the distance of at least eighty rods from the place where the road crosses upon the same level any highway, townway, or traveled place over which a signboard is required to be maintained, as provided in the two following sections; and such bell shall be rung or such whistle sounded, continuously or alternately, until the engine has crossed such way or traveled place.

St. 1883, c. 243.

Section two hundred and twelve of chapter one hundred and twelve of the Public Statutes is hereby amended by inserting after "indictment," in the twenty-second line, the following words, "and if an employe of such corporation, being in the exercise of due care, is killed, under such circumstances as would have entitled the deceased to maintain an action for damages against such corporation if death had not resulted, the corporation shall be liable in the same manner and to the same extent as it would have been if the deceased had not been an employe."

St. 1886, c. 140.

If by reason of the negligence or carelessness of a corporation operating a street railway, or of the unfitness or gross negligence or carelessness of its servants or agents, while engaged in its business, the life of a passenger or of a person, being in the exercise of due diligence, and not a passenger or in the employment of such corporation, is lost, the corporation shall be liable in damages, not exceeding five thousand, nor less than five hundred, dollars, to be assessed with reference to the degree of culpability of said corporation or of its servants or agents, and to be recovered in an action of tort com-

menced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the widow and children of the deceased, in equal moieties; or, if there are no children, to the use of the widow; or, if no widow, to the use of the next of kin; but no executor or administrator shall, for the same cause, avail himself of more than one of the remedies given by this act and section two hundred and twelve of chapter one hundred and twelve of the Public Statutes.

Pub. St. 1882, c. 73.

Sec. 6. If the life of a passenger is lost by reason of the negligence or carelessness of the proprietor or proprietors of a steamboat or stagecoach, or of common carriers of passengers, or by the unfitness or gross negligence or carelessness of their servants or agents, such proprietor or proprietors and common carriers shall be liable in damages, not exceeding five thousand, nor less than five hundred, dollars, to be assessed with reference to the degree of culpability of the proprietor or proprietors or common carriers liable, or of their servants or agents, and recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the widow and children of the deceased, in equal moieties; or, if there are no children, to the use of the widow; or, if no widow, to the use of the next of kin.

Pub. St. 1882, c. 52.

Sec. 17. If the life of a person is lost by reason of a defect or want of repair of a highway, townway, causeway, or bridge, or for want of suitable rails on such way or bridge, the county, town, or person by law obliged to repair the same shall be liable in damages not exceeding one thousand dollars, to be assessed with reference to the degree of culpability of the county, town, or person liable, and recovered in an action of tort, commenced within one year from the injury causing the death, by the executor or administrator of the deceased person, for the use of the widow and children of the deceased, in equal moieties; or, if there are no children, to the use of the widow; or, if no widow, to the use of the next of kin: provided, that the county, town, or person had previous reasonable notice of the defect or want of repair of such way or bridge.

St. 1887, c. 270, (as amended by St. 1888, c. 155, and St. 1892, c. 260.)

Section 1. Where, after the passage of this act, personal injury is caused to an employe, who is himself in the exercise of due care and diligence at the time, (1) by reason of any defect in the condition of the ways, works, or machinery connected with or used in the business of the employer, which arose from, or had not been discovered or remedied owing to, the negligence of the employer, or of any person in the service of the employer, and intrusted by him with the duty of seeing that the ways, works, or machinery were in proper condition; or (2) by reason of the negligence of any person in the service of the employer, intrusted with and exercising superintendence, whose sole or principal duty is that of superintendence; (3) by reason of the negligence of any person in the service of the employer who has the charge or control of any signal, switch, locomotive engine, or train upon a railroad,—the employe, or, in case the injury results in death, the legal represenatives of such employe, shall have the same right of compensation and remedies against the employer as if the employe had not been an employe of, nor in the service of, the employer, nor engaged in its work; and in case such death is not instantaneous, or is preceded by conscious suffering, said legal representatives may, in the action brought under this section, except as hereinafter provided, also recover damages for such death. The total damages awarded hereunder, both for said death and said injury, shall not exceed five thousand dollars, and shall be apportioned by the jury between the legal representatives and the persons, if any, entitled under the succeeding section of this act, to bring an action for instantaneous death. If there are no such persons, then no damages for such death shall be recovered, and the damages, so far as the same are awarded for said death, shall be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable.

Sec. 2. Where an employe is instantly killed, or dies without conscious suffering, as the result of the negligence of an employer, or of the negligence of any person for whose negligence the employer is liable under the provisions of this act, the widow of the deceased,

or, in case there is no widow, the next of kin, provided that such next of kin were at the time of the death of such employe dependent upon the wages of such employe for support, may maintain an action for damages therefor, and may recover in the same manner, to the same extent, as if the death of the deceased had not been instantaneous, or as if the deceased had consciously suffered.

Sec. 3. Except in actions brought by the personal representatives, under section one of this act, to recover damages for both the injury and death of an employe, the amount of compensation receivable under this act in cases of personal injury shall not exceed the sum of four thousand dollars. In case of death which follows instantaneously, or without conscious suffering, compensation in lieu thereof may be recovered in not less than five hundred, and not more than five thousand, dollars, to be assessed with reference to the degree of culpability of the employer herein, or the person for whose negligence he is made liable; and no action for the recovery of compensation for injury or death under this act shall be maintained unless notice of the time, place, and cause of the injury is given to the employer within thirty days, and the action is commenced within one year, from the occurrence of the accident causing the injury or death. The notice required by this section shall be in writing, signed by the person injured, or by some one in his behalf; but, if from physical or mental incapacity it is impossible for the person injured to give the notice within the time provided in said section, he may give the same within ten days after such incapacity is removed; and in case of his death without having given the notice, and without having been for ten days at any time after his injury of sufficient capacity to give the notice, his executor or administrator may give such notice within thirty days after his appointment. But no notice given under the provisions of this section shall be deemed to be invalid or insufficient solely by reason of any inaccuracy in stating the time, place, or cause of the injury: provided, it is shown that there was no intention to mislead, and that the party entitled to notice was not in fact misled thereby.

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MICHIGAN.

How. St.

Sec. 8313. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and 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, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 8314. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be distributed to the persons and in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to those persons who may be entitled to such damages when recovered.

Sec. 3391. Whenever the death of a person shall be caused by wrongful act, neglect, or default of any railroad company, or its agents, and the act, neglect, or default is such as would, if death had not ensued, entitle the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the railroad corporation which would have been liable if death had not ensued shall be liable to an action on the case for damages notwithstanding the death of the person so injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 3392. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in any such action shall be distributed to the persons and in the proportion provided by law in relation to the distri-

bution of personal property left by persons dying intestate; and in every such action the jury may give such amount of damages as they shall deem fair and just to the persons who may be entitled to such damages when recovered: provided, nothing herein contained shall affect any suit or proceedings heretofore commenced and now pending in any of the courts of this state.

Sec. 3491. Whenever the death of a person shall be caused by wrongful act, neglect, or default of any such company[1] or its agents, and the act, neglect, or default is such as would, if death had not ensued, entitle the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the corporation which would have been liable if death had not ensued shall be liable to an action on the case for the damages notwithstanding the death of the person so injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 3492. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in any such action shall be distributed to the persons and in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such amount of damages as they shall deem fair and just to the persons who may be entitled to such damages when recovered.

Sec. 8713. The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards, that is to say:

* * * * * * * * * * * * *

7. All other actions on the case, except actions for slanderous words or for libels.

MINNESOTA.

Laws 1891, c. 123.

Section 1. When death is caused by the wrongful act or omission of any party or corporation, the personal representative of the de-

[1] Union Railroad Station & Depot Company.

ceased may maintain an action, if he might have maintained an action had he lived, for an injury caused by the same act or omission by which the death was caused. But the action shall be commenced within two years after the act or omission by which the death was caused. The damages therein cannot exceed five thousand dollars, and the amount received is to be for the exclusive benefit of the widow and next of kin, to be distributed to them in the same proportion as the personal property of deceased persons: provided, that any demand for the support of the deceased, and funeral expenses, duly allowed by the probate court, shall be first deducted and paid.

Sec. 2. The provisions of this act shall apply to estates now pending, as well as to future cases.

Sec. 3. This act shall take effect and be in force from and after its passage.

Approved April 18, 1891.

MISSISSIPPI.

Code 1892.

Sec. 663. Whenever the death of any persons shall be caused by any such wrongful or negligent act or omission as would, if death had not ensued, have entitled the party injured or damaged thereby to maintain an action and recover damages in respect thereof, and such deceased person shall have left a widow or children, or both, or husband or father or mother, the person or corporation, or both, that would have been liable if death had not ensued, and the representative of such person, shall be liable for the damages notwithstanding the death; and the action may be brought in the name of the widow for the death of her husband, or by the husband for the death of his wife, or by the parent for the death of a child, or in the name of a child for the death of an only parent; the damages to be for the use of such widow, husband, or child, except that, in case a widow should have children, the damages shall be distributed as personal property of the husband. In every such action the jury may give such damages as shall be fair and just, with reference to the injury resulting from such death to the person

suing; but every such action shall be commenced within one year after the death of such deceased person.

MISSOURI.

Rev. St. 1889.

Sec. 4425. Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employe whilst running, conducting, or managing any locomotive, car, or train of cars, or of any master, pilot, engineer, agent, or employe whilst running, conducting, or managing any steamboat, or any of the machinery thereof, or of any driver of any stagecoach or other public conveyance whilst in charge of the same as a driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any steamboat, or the machinery thereof, or in any stagecoach or other public conveyance, the corporation, individual, or individuals in whose employ any such officer, agent, servant, employe, master, pilot, engineer, or driver shall be at the time such injury is committed, or who owns any such railroad, locomotive, car, stagecoach, or other public conveyance at the time any injury is received, resulting from or occasioned by any defect or insufficiency, unskillfulness, negligence, or criminal intent above declared, shall forfeit and pay for every person or passenger so dying the sum of five thousand dollars, which may be sued for and recovered—First, by the husband or wife of the deceased; or, second, if there be no husband or wife, or he or she fails to sue within six months after such death, then by the minor child or children of the deceased, whether such minor child or children of the deceased be the natural-born or adopted child or children of the deceased: provided, that, if adopted, such minor child or children shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption; or, third, if such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural-born or adopted child, if such deceased unmarried minor shall have been duly adopted according to the laws of adoption of the

state where the person executing the deed of adoption resided at the time of such adoption, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. In suits instituted under this section, it shall be competent for the defendant, for his defense, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency, and that the injury received was not the result of unskillfulness, negligence, or criminal intent.

Sec. 4426. Whenever the death of a person shall be caused by a wrongful act, neglect, or default of another, and 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, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured.

Sec. 4427. All damages accruing under the last preceding section shall be sued for and recovered by the same parties and in the same manner as provided in section 4425; and in every such action the jury may give such damages, not exceeding five thousand dollars, as they may deem fair and just, with reference to the necessary injury resulting from such death to the surviving parties who may be entitled to sue, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect, or default.

Sec. 4429. Every action instituted by virtue of the preceding sections of this chapter shall be commenced within one year after the cause of such action shall accrue.

Sec. 3970. In no case shall the right of action of any party injured by the commission of any felony or misdemeanor be deemed or adjudged to be merged in such felony or misdemeanor, but he may recover the amount of damage sustained thereby in an action to be brought before any court or tribunal of competent jurisdiction.

Sec. 7074. For any injury to persons or property occasioned by any willful violation of this article,[1] or willful failure to comply

[1] An act providing for the safety and inspection of mines.

with any of its provisions, a right of action shall accrue to the party injured for any direct damages sustained thereby; and, in case of loss of life by reason of such willful violation or willful failure as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or adopted children, or to any person or persons who were, before such loss of life, dependent for support on the person or persons so killed, for a like recovery of damages sustained by reason of such loss of life or lives.

MONTANA.

Comp. St. 1888, p. 62.

Sec. 13. A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the injury or death of a child, and a guardian for the injury or death of his ward.

Sec. 14. Where the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or if such person be employed by another person, who is responsible for his action, then also against such other person. In every action under this and the preceding section, such damages may be given as, under all the circumstances of the case, may be just.

Comp. St. 1888, p. 911.

Sec. 981. Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and 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, then, and in every such case, the person who, or the corporation or company which, would have been liable if death had not ensued, shall be liable for an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 982. Every such action shall be brought by and in the name of the personal representatives of such deceased persons, and the amount recovered in every such action shall be for the exclusive

benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages, not exceeding twenty thousand dollars, as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person: provided, that every such action shall be commenced within three years after the death of such person.

NEBRASKA.

Comp. Laws 1881, c. 21.

Section 1. That whenever the death of a person shall be caused by the wrongful act, neglect, or default, and 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, then, and in every such case, the person who, or company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportion provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem a fair and just compensation, with reference to the pecuniary injuries resulting from such death, to the wife and next of kin of such deceased person, not exceeding the sum of five thousand dollars: provided, that every such action shall be commenced within two years after the death of such person.

NEVADA.

Gen. St. 1885.

Sec. 3898. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and 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, then, and in every such case, the persons who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

Sec. 3899. The proceeds of any judgment obtained in any action brought under the provisions of this act shall not be liable for any debt of the deceased: provided, he or she shall have left a husband, wife, child, father, mother, brother, sister, or child or children of a deceased child; but shall be distributed as follows: First, if there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife, and a child or children or grandchildren, then equally to each, the grandchild or children taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or children, then to such child or children, and grandchild or children, by right of representation; if there be no child or grandchild, then to a surviving brother or sister, or brothers or sisters, if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons: provided, every such action shall be brought by and in the name of the personal representative or representatives of such deceased person; and, provided, further, the jury in every such action may give such damages, pecuniary and exemplary, as they shall deem fair and just, and may take into consideration the pecuniary injury resulting from such death to the kindred as herein named.

NEW HAMPSHIRE.

Pub. St. 1891, c. 191.

Sec. 8. Actions of tort for physical injuries to the person, although inflicted by a person while committing a felony, and the causes of such actions, shall survive to the extent, and subject to the limitations, set forth in the five following sections, and not otherwise:

Sec. 9. If such an action is pending at the time of the decease of one of the parties, it shall abate, and be forever barred, unless the administrator of the deceased party, if the deceased was plaintiff, shall appear and assume the prosecution of the action before the end of the second term after the decease of such party; or, if the deceased party was defendant, unless the plaintiff shall procure a scire facias to be issued to the administrator of the deceased party before the end of the second term after the original grant of administration upon his estate.

Sec. 10. If an action is not then pending and has not already become barred by the statute of limitations, one may be brought for such cause at any time within two years after the death of the deceased party, and not afterwards.

Sec. 11. The damages recoverable in any such action shall not exceed seven thousand dollars.

Sec. 12. If the administrator of the deceased party is plaintiff, and the death of such party was caused by the injury complained of in the action, the mental and physical pain suffered by him in consequence of the injury, the reasonable expenses occasioned to his estate by the injury, the probable duration of his life but for the injury, and his capacity to earn money, may be considered as elements of damage, in connection with other elements allowed by law.

Sec. 13. In such case the damages recovered, less the expenses of recovery, shall belong and be distributed as follows:

1. To the widow or widower of the deceased, one half thereof; and to the children of the deceased the other half, in equal shares.

2. If there be no child, to the widow or widower, the whole thereof.

3. If there be no child and no widow or widower, to the heirs at law of the deceased, according to the laws of distribution.

NEW JERSEY.

Revision 1878, p. 294.

Section 1. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and 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, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2. Every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount recovered in every such action shall be for the exclusive benefit of the widow and next of kin of such deceased person, and shall be distributed to such widow and next of kin in the proportions provided by law in relation to the distribution of personal property left by persons dying intestate; and in every such action the jury may give such damages as they shall deem fair and just, with reference to the pecuniary injury resulting from such death, to the wife and next (of) kin of such deceased person: provided, that every such action shall be commenced within twelve calendar months after the death of such deceased person.

Sec. 3. On request by the defendant or the defendant's attorney, the plaintiff on the record shall be required to deliver to the defendant or to the defendant's attorney a particular account, in writing, of the nature of the claim in respect to which damages shall be sought to be recovered.

NEW MEXICO.

Comp. Laws 1884, (as amended by Laws 1891, c. 49.)

Sec. 2308. Whenever any person shall die from any injury resulting from or occasioned by the negligence, unskillfulness, or criminal intent of any officer, agent, servant, or employe whilst running, conducting, or managing any locomotive, car, or train of cars, or of any driver of any stagecoach or other public conveyance while in charge of the same as driver; and when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad, or any part thereof, or in any locomotive or car, or in any stagecoach or other public conveyance, the corporation, individual, or individuals in whose employ any such officer, agent, servant, employe, engineer, or driver shall be at the time such injury was committed, or who owns any such railroad, locomotive, car, stagecoach, or other public conveyance at the time any injury is received resulting from or occasioned by any defect or insufficiency above declared, shall forfeit and pay for every person or passenger so dying the sum of five thousand dollars, which may be sued and recovered—First, by the husband or wife of the deceased, or, second, if there be no husband or wife, or if he or she fails to sue within six months after such death, then by the minor child or children of the deceased; or, third, if such deceased be a minor and unmarried, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or, if either of them be dead, then by the survivor. In suits instituted under this section it shall be competent for the defendant, for his defense, to show that the defect or insufficiency named in this section was not of a negligent defect or insufficiency.

Sec. 2309. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, although such death shall have been caused under such circumstances as amount in law to a felony, and the act or 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, then, and in every such case, the person who, or the corporation which, would have

been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured.

Sec. 2310. Every such action as mentioned in the next preceding section shall be brought by and in the name or names of the personal representative or representatives of such deceased person, and the jury in every such action may give such damages, compensatory and exemplary, as they shall deem fair and just, taking into consideration the pecuniary injury or injuries resulting from such death to the surviving party or parties entitled to the judgment, or any interest therein, recovered in such action, and also having regard to the mitigating or aggravating circumstances attending such wrongful act, neglect or default. The proceeds of any judgment obtained in any such action shall not be liable for any debt of the deceased: provided, he or she shall have left a husband, wife, child, father, mother, brother, sister, or child or children of the deceased child, but shall be distributed as follows: First. If there be a surviving husband or wife, and no child, then to such husband or wife; if there be a surviving husband or wife, and a child or children or grandchildren, then equally to each, the grandchild or grandchildren taking by right of representation; if there be no husband or wife, but a child or children, or grandchild or grandchildren, then to such child or children, and grandchild or grandchildren, by right of representation; if there be no child or grandchild, then to a surviving brother or sister, or brothers or sisters, if there be any; if there be none of the kindred hereinbefore named, then the proceeds of such judgment shall be disposed of in the manner authorized by law for the disposition of the personal property of deceased persons.

Sec. 2316. Every action instituted by virtue of the provisions of this act must be brought within one year after the cause of action shall have accrued, or after this act shall go into effect.

NEW YORK.

Ann. Code Civil Proc. 1888, (Banks' Ed.)

Sec. 1902. The executor or administrator of a decedent who has left, him or her surviving, a husband, wife, or next of kin, may main-

tain an action to recover damages for a wrongful act, neglect, or default, by which the decedent's death was caused, against a natural person who, or a corporation which, would have been liable to an action in favor of the decedent, by reason thereof, if death had not ensued. Such an action must be commenced within two years after the decedent's death.

Sec. 1903. The damages recovered in an action brought as prescribed in the last section are exclusively for the benefit of the decedent's husband or wife and next of kin; and, when they are collected, they must be distributed by the plaintiff as if they were unbequeathed assets, left in his hands after payment of all debts and expenses of administration. But the plaintiff may deduct therefrom the expenses of the action, and his commissions upon the residue which must be allowed by the surrogate upon notice given in such a manner and to such persons as the surrogate deems proper.

Sec. 1904. The damages awarded to the plaintiff may be such a sum, not exceeding five thousand dollars, as the jury, upon a writ of inquiry or upon a trial, or, where issues of fact are tried without a jury, the court or the referee, deems to be a fair and just compensation for the pecuniary injuries resulting from the decedent's death to the person or persons for whose benefit the action is brought. When final judgment for the plaintiff is rendered, the clerk must add to the sum so awarded interest thereupon from the decedent's death, and include it in the judgment. The inquisition, verdict, report, or decision may specify the day from which interest is to be computed. If it omits so to do, the day may be determined by the clerk, upon affidavits.

Sec. 1905. The term "next of kin," as used in the foregoing sections, has the meaning specified in section 1870 of this act.

Sec. 1870. The term "next of kin," as used in this title, includes all those entitled, under the provisions of law relating to the distribution of personal property, to share in the unbequeathed assets of a decedent, after payment of debts and expenses, other than a surviving husband or wife.

Sec. 1899. Where the violation of a right admits of a civil and also of a criminal prosecution, the one is not merged in the other.

NORTH CAROLINA.

Code 1883.

Sec. 1498. Whenever the death of a person is caused by a wrongful act, neglect, or default of another, such as would, if the injured party had lived, have entitled him to an action for damages therefor, the person or corporation that would have been so liable, and his or their executors, administrators, collectors, or successors, shall be liable to an action for damages, to be brought within one year after such death by the executor, administrator, or collector of the decedent; and this, notwithstanding the death, and although the wrongful act, neglect, or default causing the death amount in law to a felony.

Sec. 1499. The plaintiff in such action may recover such damages as are a fair and just compensation for the pecuniary injury resulting from such death.

Sec. 1500. The amount recovered in such action is not liable to be applied as assets in the payment of debts or legacies, but shall be disposed of as provided in this chapter for the distribution of personal property in case of intestacy.

Sec. 1504. All sums of money, or other estate, of whatever kind, which shall remain in the hands of any executor, administrator, or collector for five years after his qualification, unrecovered or unreclaimed by suit, by creditors, next of kin, or others entitled thereto, shall be paid by the executor, administrator, or collector to the trustees of the University of North Carolina; and the said trustees are authorized to demand, sue for, recover, and collect such moneys or other estate, of whatever kind, and hold the same without liability for profit or interest, until a just claim therefor shall be preferred by creditors, next of kin, or others entitled thereto; and, if no such claim shall be preferred within ten years after such money or other estate be received by the said trustees, then the same shall be held by them absolutely.

NORTH DAKOTA.

Comp. Laws Dakota,[1] *1887.*

Sec. 5498. If the life of any person, not in the employment of a railroad corporation, shall be lost in this territory by the reason of the negligence or carelessness of the proprietor or proprietors of any railroad, or by the unfitness or negligence or carelessness of their employes or agents, the personal representatives of the person whose life is so lost may institute suit and recover damages in the same manner that the person might have done for any injury where death did not ensue.

Sec. 5499. If the life of any person or persons is lost or destroyed by the neglect, carelessness, or unskillfulness of another person or persons, company or companies, corporation or corporations, their or his agents, servants, or employes, then the widow, heir, or personal representatives of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover damages for the loss or destruction of the life aforesaid.

OHIO.

Rev. St., (as amended by Act April 13, 1880.)

Sec. 6134. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and 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, then, and in every such case, the person who, or the corporation which,would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.

[1]The laws of the territory of Dakota were adopted by this state. Const. N. D. Schedule, § 2.

Sec. 6135. Every such action shall be for the exclusive benefit of the wife or husband and children, or, if there be neither of them, then of the parents and next of kin, of the person whose death shall be so caused; and it shall be brought in the name of the personal representative of the deceased person; and in every action the jury may give such damages, not exceeding in any case ten thousand dollars, as they may think proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit such action shall be brought. Every such action shall be commenced within two years after the death of such deceased person. Such personal representative, if he was appointed in this state, with the consent of the court making such appointment may, at any time before or after the commencement of a suit, settle with the defendant the amount to be paid; and the amount received by such personal representative, whether by settlement or otherwise, shall be apportioned among the beneficiaries, unless adjusted between themselves, by the court making the appointment, in such manner as shall be fair and equitable, having reference to the age and condition of such beneficiaries and the laws of descent and distribution of personal estates left by persons dying intestate.

OKLAHOMA.

St. 1890, c. 70, art. 4.

Par. 4336. A cause of action arising out of an injury to the person dies with the person of either party, except in cases in which an action is given for an injury causing the death of any person, and actions for seduction, false imprisonment, and malicious prosecution.

Par. 4338. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or the next of kin, to be distributed in the same manner as personal property of the deceased.

OREGON.

Hill's Code.

Sec. 34. A father, or, in case of the death or desertion of his family, the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward.

Sec. 369. A cause of action arising out of an injury to the person dies with the person of either party, except as provided in section 371, [367.] But the provisions of this title shall not be construed so as to abate the action mentioned in section 39, [38,] or to defeat or prejudice the right of action given by section 34, [33.]

Sec. 370. All other causes of action by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former, and against the personal representatives of the latter. When the cause of action survives as herein provided, the executors or administrators may maintain an action at law thereon against the party against whom the cause of action accrued, or, after his death, against his personal representatives.

Sec. 371. When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury done by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person.

PENNSYLVANIA.

Const. 1874, art. 3.

Sec. 21. No act of the general 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 actions shall be prosecuted. No act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes, different from those fixed by general laws regulating actions against natural persons; and such acts now existing are avoided.

2 Bright. Purd. Dig. Pa. pp. 1267, 1268.

Section 1. No act of the general 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. No act shall prescribe any limitations of time within which suits may be brought against corporations for injuries to persons or property, or for other causes, different from those fixed by general laws regulating actions against natural persons; and such acts now existing are avoided.

Sec. 2. No action hereafter brought to recover damages for injuries to the person by negligence or default shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction.

Sec. 3. Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such deceased, or, if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned.

Sec. 4. The persons entitled to recover damages for any injury causing death shall be the husband, widow, children, or parents of the deceased, and no other relative; and the sum recovered shall go to them in the proportion they would take his or her personal estate in case of intestacy, and that, without liability to creditors.

Sec. 5. The declaration shall state who are the parties entitled in such action. The action shall be brought within one year after the death, and not thereafter.

Sec. 6. When any person shall sustain personal injury or loss of life while lawfully engaged or employed on or about the roads, works, depots, and premises of a railroad company, or in or about any train or car therein or thereon, of which company such person is not an employe, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employe: provided, that this section shall not apply to passengers.

Sec. 7. In all actions now or hereafter instituted against common carriers, or corporations owning, operating, or using a railroad as a public highway, whereon steam or other motive power is used, to recover for loss and damage sustained, and arising either from personal injuries or loss of life, and for which, by law, such carrier or corporation could be held responsible, only such compensation for loss and damage shall be recovered as the evidence shall clearly prove to have been pecuniarily suffered or sustained.

Bright. Purd. Dig. Supp. p. 2252.

Sec. 70. For any injury to person or property occasioned by any violation of this act,[1] or any willful failure to comply with its provisions, a right of action against the party at fault shall accrue to the party injured for the direct damage sustained thereby; and, in any case of loss of life by reason of such violation or willful failure, a right of action against the party at fault shall accrue to the widow and lineal heirs of the person whose life shall be lost, for like recovery of damages for the injury they shall have sustained.

RHODE ISLAND.

Pub. St. c. 204.

Sec. 15. If the life of any person, being a passenger in any stage-coach or other conveyance, when used by common carriers, or the life of any person, whether a passenger or not, in the care of proprietors of, or common carriers by means of, railroads or steamboats, or the life of any person crossing upon a public highway with reasonable care, shall be lost by reason of the negligence or carelessness

[1] Act providing for safety of persons employed in mines.

of such common carriers, proprietor or proprietors, or by the unfitness or negligence or carelessness of their servants or agents, in this state, such common carriers, proprietor or proprietors shall be liable to damages for the injury caused by the loss of life of such person, to be recovered by action of the case, for the benefit of the husband or widow and next of kin of the deceased person; one half thereof to go to the husband or widow, and one half thereof to the children of the deceased.

Sec. 16. If, in such case, there shall be no children, the whole of such damages shall go to the husband or widow; and, if there be no husband or widow, to the next of kin, according to the law of this state regulating the distribution of intestate personal estate among the next of kin.

Sec. 17. In addition to such action in favor of the widow and kindred of the deceased, a like action may be maintained for damages for such loss of life by any person having a direct pecuniary interest in the continuance of the life of such deceased person.

Sec. 18. Actions for the benefit of the widow and next of kin of such passenger or person may in all cases be brought by the executor or administrator of the deceased, whether such executor or administrator be appointed and qualified as such within or without the state; but, where there is a widow only, she may, at her option, sue in her own name.

Sec. 19. To maintain such actions, it shall not be necessary, first, to institute criminal proceedings against the defendants.

Sec. 20. In all cases in which the death of any person ensues from injury inflicted by the wrongful act of another, and in which an action for damages might have been maintained at the common law had death not ensued, the person inflicting such injury shall be liable to an action for damages for the injury caused by the death of such person, to be recovered by action of the case for the use of the husband, widow, children, or next of kin, in like manner and with like effect as in the preceding five sections provided.

Pub. St. c. 205.

Sec. 3. All actions * * * of the case, except for words spoken, * * * shall be commenced and sued within six years next after the cause of such action shall accrue, and not after.

SOUTH CAROLINA.

Gen. St. 1882.

Sec. 2183. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of another, and 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, then, and in every such case, the person or corporation who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, although the death shall have been caused under such circumstances as make the killing in law a felony.

Sec. 2184. Every such action shall be for the benefit of the wife, husband, parent, and children of the person whose death shall have been so caused, and shall be brought by or in the name of the executor or administrator of such person; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought, and the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate, and the amount recovered had been personal assets of his or her estate.

Sec. 2185. All such actions must be brought within two years from the death of such person, and the executor or administrator, (plaintiff in the action) shall be liable to costs, in case there be a verdict for the defendant or nonsuit or discontinuance, out of the goods, chattels, and lands of the testator or intestate, if any, and, if none, then out of the proper goods and chattels of such executor or administrator.

Sec. 2186. The provisions of the three preceding sections of this chapter shall not apply to any case where the person injured has,

for such injury, brought action, which has proceeded to trial and final judgment before his or her death.

SOUTH DAKOTA.

See North Dakota.

The laws of the territory of Dakota were adopted by this state. Laws N. D. 1890, c. 105.

TENNESSEE.

Mill. & V. Code.

Sec. 3130. The right of action which a person who dies from injuries received from another, or whose death is caused by the wrongful act, omission, or killing by another, would have had against the wrongdoer in case death had not ensued, shall not abate or be extinguished by his death, but shall pass to his widow, and, in case there is no widow, to his children, or to his personal representative, for the benefit of his widow or next of kin, free from the claims of creditors.

Sec. 3131. The action may be instituted by the personal representative of the deceased; but, if he decline it, the widow and children of the deceased may, without the consent of the representative, use his name in bringing and prosecuting the suit, on giving bond and security for costs, or in the form prescribed for paupers. The personal representative shall not in such case be responsible for costs unless he sign his name to the prosecution bond.

Sec. 3132. The action may also be instituted by the widow in her own name, or, if there be no widow, by the children.

Sec. 3133. If the deceased had commenced an action before his death, it shall proceed without a revivor. The damages shall go to the widow and next of kin, free from the claims of the creditors of the deceased, to be distributed as personal property.

Sec. 3134. Where a person's death is caused by the wrongful act, fault, or omission of another, and suit is brought for damages, the party suing shall, if entitled to damages, have the right to recover

for the mental and physical suffering, loss of time, and necessary expenses resulting to the deceased from the personal injuries, and also the damages resulting to the parties for whose use and benefit the right of action survives from the death consequent upon the injuries received.

Sec. 3469. Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, and statute penalties, within one year after cause of action accrued.

TEXAS.

Const. 1876, art. 16.

Sec. 26. Every person, corporation, or company that may commit a homicide, through willful act or omission or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide.

Sayles' Civil St.

Art. 2899. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases:

1. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer, or hirer of any railroad, steamboat, stagecoach, or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence, or carelessness of their servants or agents.

2. When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another.

Art. 2900. The wrongful act, negligence, carelessness, unskillfulness, or default mentioned in the preceding article must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury.

Art. 2901. When the death is caused by the willful act or omission or gross negligence of the defendant, exemplary, as well as actual, damages may be recovered.

Art. 2902. The action may be commenced and prosecuted although the death shall have been caused under such circumstances as amount in law to a felony, and without regard to any criminal proceeding that may or may not be had in relation to the homicide.

Art. 2903. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children, and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased.

Art. 2904. The action may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all.

Art. 2905. If the parties entitled to the benefit of the action shall fail to commence the same within three calendar months after the death of the deceased, it shall be the duty of the executor or administrator of the deceased to commence and prosecute the action, unless requested by all of the parties entitled thereto not to prosecute the same.

Art. 2906. The action shall not abate by the death of either party to the record if any person entitled to the benefit of the action survives. If the plaintiff die pending the suit, when there is only one plaintiff, some one or more of the parties entitled to the money recovered may, by order of the court, be made plaintiff, and the suit be prosecuted to judgment in the name of such plaintiff, for the benefit of the persons entitled.

Art. 2907. If the sole plaintiff die pending the suit, and he is the only party entitled to the money recovered, the suit shall abate.

Art. 2908. If the defendant die pending the suit, his executor or administrator may be made a party, and the suit be prosecuted to judgment, as though such defendant had continued alive. The judgment in such case, if rendered in favor of the plaintiff, shall be: To be paid in due course of administration.

Art. 2909. The jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the ben-

eft of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict.

Art. 3202. There shall be commenced and prosecuted within one year after the cause of the action shall have accrued, and not afterwards, all actions or suits in court of the following description:

* * * * * * * * * * * *

4. Actions for injuries done to the person of another where death ensued from such injuries; and the cause of action shall be considered as having accrued at the death of the party injured.

UTAH.

Comp. Laws 1888.

Sec. 2961. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if the death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the company or corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2962. That every such action shall be brought by and in the names of the personal representatives of such deceased person, and the amount received in every such action shall be distributed, by direction and decree of the proper probate court, to such persons (other than creditors) as are by law entitled to distributive shares of the estate of such deceased person, and in such proportions as are prescribed by law: provided, that every such action shall be commenced within two years after the death of such deceased person: and provided, further, that the damages so recovered shall not in any case exceed the sum of ten thousand dollars.

Sec. 3178. A father, or, in case of his death or desertion of his family, the mother, may maintain an action for the death or injury of a minor child, and a guardian for the injury or death of his ward, when such injury or death is caused by the wrongful act or neglect

of another. Such action may be maintained against the person causing the injury or death, or if such person be employed by another person, who is responsible for his conduct, also against such other person.

Sec. 3179. When the death of a person, not being a minor, is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death, or if such person be employed by another person, who is responsible for his conduct, then also against such other person. In every action under this and the preceding section such damages may be given as, under all the circumstances of the case, may be just.

Sec. 3141. The periods prescribed for the commencement of actions other than for the recovery of real property are as follows:

* * * * * * * * * * * *

Sec. 3145. Within two years:

* * * * * * * * * * * *

8. An action to recover damages for the death of one caused by the wrongful act or neglect of another.

VERMONT.

Rev. Laws 1880.

Sec. 2138. When the death of a person is caused by the wrongful act, neglect, or default of a person, either natural or artificial, and 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, the person or corporation liable to such action if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death is caused under such circumstances as amount in law to a felony.

Sec. 2139. Such action shall be brought in the name of the personal representative of such deceased person, and commenced within two years from the decease of such person, and the court or jury before whom the issue is tried may give such damages as are just, with ref-

erence to the pecuniary injury resulting from such death, to the wife and next of kin, and the amount recovered shall be for the benefit of such wife and next of kin, who shall receive the same proportions as in the distribution of the personal estate of persons dying intestate.

VIRGINIA.

Code 1887.

Sec. 2902. Whenever the death of a person shall be caused by the wrongful act, neglect, or default of any person or corporation, or of any ship or vessel, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action, or to proceed in rem against said ship or vessel, or in personam against the owners thereof, or those having control of her, and to recover damages in respect thereof, then, and in every such case, the person who, or corporation or ship or vessel which, would have been liable if death had not ensued, shall be liable to an action for damages, or, if a ship or vessel, to a libel in rem, and her owners, or those responsible for her acts or defaults or negligence, to a libel in personam, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to a felony.

Sec. 2903. Every such action shall be brought by and in the name of the personal representative of such deceased person, and within twelve months after his or her death. The jury in any such action may award such damages as to it may seem fair and just, not exceeding ten thousand dollars, and may direct in what proportion they shall be distributed to the wife, husband, parent, and child of the deceased. But nothing in this section shall be construed to deprive the court of the power to grant new trials as in other cases.

Sec. 2904. The amount recovered in any such action shall, after the payment of costs and reasonable attorneys' fees, be paid to the wife, husband, parent, and child of the deceased, in such proportion as the jury may have directed, or, if they have not directed, according to the statute of distributions, and shall be free from all debts and liabilities of the deceased; but, if there be no wife, husband, parent,

or child, the amount so received shall be assets in the hands of the personal representative, to be disposed of according to law.

Sec. 2905. The personal representative of the deceased may compromise any claim to damages arising under section twenty-nine hundred and two, with the consent of the persons who would be entitled to the damages recovered in an action therefor brought by such representative under section twenty-nine hundred and three; or, if any such persons are incapable, from any cause, of giving consent, the personal representative may make the compromise, with the approval of the judge of the circuit court of the county, or the circuit or corporation court of the corporation, wherein such an action is allowed by law to be brought. Such approval may be applied for by the personal representative on petition to the said judge, in term or vacation, stating the compromise, the terms thereof, and reasons therefor, and convening the parties in interest. If the judge approve the compromise, and the parties in interest do not agree upon the distribution to be made of what has been or may be received by the personal representative under the said compromise, or if any of them are incapable of making a valid agreement, the judge may direct such distribution as a jury might direct under section twenty-nine hundred and three, as to damages awarded by them. In other respects, what is received by the personal representative under the compromise shall be treated as if recovered by him in an action under the section last mentioned. When the judge acts in vacation, he shall return all the papers in the case, and orders made therein, to the clerk's office of his said court. The clerk shall file the papers in his office as soon as received, and forthwith enter the orders in the order book on the law side of the court. Such orders, and all the proceedings in vacation, shall have the same force and effect as if made or had in term.

Sec. 2906. The right of action under sections twenty-nine hundred and two and twenty-nine hundred and three shall not determine, nor the action, when brought, abate, by the death of the defendant, or the dissolution of the corporation when a corporation is the defendant; and, where an action is brought, by a party injured, for damage caused by the wrongful act, neglect, or default of any person or corporation, and the party injured dies pending the action, and his death is caused by such wrongful act, neglect, or default,

the action shall not abate by reason of his death, but, his death being suggested, it may be revived in the name of his personal representative, and the declaration and other pleadings shall be amended so as to conform to an action under sections twenty-nine hundred and two and twenty-nine hundred and three, and the case proceeded with as if the action had been brought under the said sections.

WASHINGTON.

Hill's Ann. St. & Code 1891. Code Proc.

Sec. 138, (8.) The widow, or widow and her children, or child or children, if no widow, of a man killed in a duel, shall have a right of action against the person killing him, and against the seconds and all aiders and abettors. When the death of a person is caused by the wrongful act or neglect of another, his heirs or personal representatives may maintain an action for damages against the person causing the death; or, when the death of a person is caused by an injury received in falling through any opening or defective place in any sidewalk, street, alley, square, or wharf, his heirs or personal representatives may maintain an action for damages against the person whose duty it was, at the time of the injury, to have kept in repair such sidewalk or other place. In every such action the jury may give such damages, pecuniary or exemplary, as, under all circumstances of the case, may to them seem just.

Sec. 139, (9.) A father, or in case of the death or desertion of his family, the mother, may maintain an action as plaintiff for the injury or death of a child, and a guardian for the injury or death of his ward.

Sec. 703, (717.) When the death of a person is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action at law therefor against the latter, if the former might have maintained an action, had he lived, against the latter, for an injury caused by the same act or omission. Such action shall be commenced within two years after the death, and the damages therein shall not exceed five thousand dollars, and the amount recovered, if any, shall be administered as other personal property of the deceased person. [See ante, p. 72, § 57, n. 123.]

WEST VIRGINIA.

Code, c. 103.

Sec. 5. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.

Sec. 6. Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportions provided by law in relation to the distribution of personal estate left by persons dying intestate. In every such action the jury may give such damages as they shall deem fair and just, not exceeding ten thousand dollars, and the amount so recovered shall not be subject to any debts or liabilities of the deceased: provided, that every such action shall be commenced within two years after the death of such deceased person.

WISCONSIN.

Rev. St. 1878.

Sec. 4255. Whenever the death of a person shall be caused by a wrongful act, neglect, or default, and 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, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured: provided, that such action shall be brought for a

death caused in this state, and in some court established by the constitution and laws of the same.

Sec. 4256. Every such action shall be brought by and in the name of the personal representative of such deceased person, and the amount recovered shall belong and be paid over to the husband or widow of such deceased person, if such relative survive him or her; but, if no husband or widow survive the deceased, the amount recovered shall be paid over to his or her lineal descendants, and to his or her lineal ancestors in default of such descendants; and in every such action the jury may give such damages, not exceeding five thousand dollars, as they shall deem fair and just, in reference to the pecuniary injury resulting from such death, to the relatives of the deceased specified in this section.

Sec. 4219. The following actions must be commenced within the periods, respectively, hereinafter prescribed, after the cause of action has accrued:

* * * * * * * * * * * * * *

Sec. 4224. Within two years:

* * * * * * * * * * * * * *

3. An action brought by the personal representatives of a deceased person to recover damages, when the death of such person was caused by the wrongful act, neglect, or default of another.

WYOMING.

Rev. St. 1887.

Sec. 2364a. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would, if death had not ensued, have entitled the party injured to maintain an action to recover damages in respect thereof, then, and in every such case, the person who, or the corporation which, would have been liable if death had not ensued, shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter.

Sec. 2364b. Every such action shall be brought by and in the name of the personal representative of such deceased person; and the amount recovered in every such action shall be distributed to the parties and in the proportions provided by law in relation to the distribution of personal estates left by persons dying intestate. In every such case the jury shall give such damages as they shall deem fair and just, not exceeding five thousand dollars, and the amount so recovered shall not be subject to any debts or liabilities of the deceased: provided, that every such action shall be commenced within two years after the death of such deceased person.

NEW BRUNSWICK.

Consol. St. c. 86.

Section 1. Whenever hereafter the death of any person shall be caused by wrongful act, neglect, or default, and 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, then, and in every such case, the person or body corporate, who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured.

Sec. 2. Every such action shall be for the benefit of the wife, husband, parent, and child, or either of them, of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages, by way of fair compensation, as they may think proportioned to the pecuniary loss resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought: provided, that for the purposes of this chapter the reasonable expectation of pecuniary benefit from the continuance of the life of the deceased shall not be estimated for a period exceeding ten years.

Sec. 3. Any expenses incurred or pecuniary loss sustained prior to his death by the person injured, and in consequence of such injury, and which would have been recoverable as damages by the person injured if death had not ensued, may also be recovered in such ac-

tion; and such amount as may be found by the jury in respect thereof shall be held by the executor or administrator as assets of the estate of the deceased.

Sec. 4. The amount recovered in such action, after deducting the costs and expenses in respect thereof not recovered from the defendant, shall be divided amongst the several parties for whose benefit the action is brought, whether wife, husband, parent, child, or executor or administrator, in such shares or amounts as the jury, by their verdict, shall find and direct.

Sec. 5. Not more than one action shall lie for and in respect of the same subject-matter of complaint under this chapter; and every such action shall be commenced within twelve calendar months after the death of such deceased person.

Sec. 6. In every such action the plaintiff shall be required, together with the declaration, to deliver to the defendant or his attorney, as the case may be, a full particular of the person or persons for whom and on whose behalf such action shall be brought, and of the manner in which the pecuniary loss to the different persons for whose benefit the action is brought is alleged to have arisen.

Sec. 7. The word "parent" shall include father and mother, and grandfather and grandmother, and the word "child" shall include son and daughter, and grandson and granddaughter.

NOVA SCOTIA.

Rev. St. 1884, c. 116.

Section 1. Whensoever the death of a person shall be caused by the wrongful act, neglect, or default of another, and 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, then, and in every such case, the person who would have been liable if death had not ensued shall be liable to an action of damages notwithstanding the death of the party injured, and although the death shall have been caused under such circumstances as amount in law to felony.

Sec. 2. Every such action shall be for the benefit of the wife, husband, parent, or child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in any such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered, if any, from the defendant, shall be divided among the before-mentioned parties in such shares as the jury by their verdict shall find and direct.

Sec. 3. Not more than one action shall lie for and in respect of the same subject-matter of complaint, and every such action shall be begun within twelve months after the death of such deceased persons.

Sec. 4. In every such action the plaintiff on the record shall, with the writ of summons, deliver to the defendant or his attorney full particulars of the person or persons for and on behalf of whom such action shall be brought, and of the nature of the claim in respect of which damages shall be sought to be recovered.

Sec. 5. In this chapter the word "parent" shall include father, mother, grandfather, grandmother, stepfather, and stepmother; and the word "child" shall include son, daughter, grandson, granddaughter, stepson, and stepdaughter.

ONTARIO.

Rev. St. 1887, c. 135.

Section 1. Where the words following occur in this act, they shall be construed in the manner hereinafter mentioned, unless a contrary intention appears:

1. "Parent" shall include father, mother, grandfather, grandmother, stepfather, and stepmother; and

2. "Child" shall include son, daughter, grandson, granddaughter, stepson, and stepdaughter.

Sec. 2. Where the death of a person has been caused by such wrongful act, neglect, or default as would, if death had not ensued,

have entitled the party injured to maintain an action and recover damages in respect thereof, in such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to felony.

Sec. 3. Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death has been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased, and in every such action the judge or jury may give such damages as he or they think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action has been brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the judge or jury find and direct.

Sec. 4. Where the death of a person has been caused by any wound or injury received in a duel, which wound or injury has been inflicted by the use of any description of firearms or other deadly weapon whatsoever, in such case the person inflicting such wound or injury, and all persons present aiding or abetting the parties in such duel, as seconds or assistants therein, may be proceeded against under this act, although no action for damages could have been brought by the person whose death was so caused had death not ensued from the infliction of such wound or injury.

Sec. 5. Not more than one action shall lie for and in respect of the same subject-matter of complaint, and every such action shall be commenced within twelve months after the death of the deceased person.

Sec. 6. In every such action the plaintiff shall, in his statement of claim, set forth or deliver therewith full particulars of the persons for whom and on whose behalf such action is brought.

Sec. 7. If and so often as it shall happen, at any time or times hereafter, in any of the cases intended and provided for by this act, that there shall be no executor or administrator of the person so deceased, or that, there being such executor or administrator, no such action as in this act mentioned shall, within six months after the death of such deceased person, have been brought by and in the name of his or her executor or administrator, then, and in every

such case, such action may be brought by and in the name or names of all or any of the persons, if more than one, for whose benefit such action would have been if it had been brought by and in the name of such executor or administrator; and every action so to be brought, shall be for the benefit of the same person or persons, and shall be subject to the same regulations and procedure, as nearly as may be, as if it were brought by and in the name of such executor or administrator.

Sec. 8. * * * It shall be sufficient, if the defendant is advised to pay money into court, that he pay it as a compensation in one sum to all persons entitled under this act for his wrongful act, neglect, or default, without specifying the shares into which it is to be divided by the judge or jury; and if the said sum be not accepted, and an issue is taken by the plaintiff as to its sufficiency, and the judge or jury shall think the same sufficient, the defendant shall be entitled to the verdict upon that issue.

Sec. 9. In all cases where the compensation is not apportioned as hereinbefore provided, it shall be referred to a judge to apportion the same among the parties entitled, and to provide for the costs thereof, as he may think meet.

QUEBEC.

Civil Code, L. Can.

Art. 1056. In all cases where the person injured by the commission of an offense or a quasi offense dies in consequence, without having obtained indemnity or satisfaction, his consort and his ascendant and descendant relations have a right, but only within a year after his death, to recover from the person who committed the offense or quasi offense, or his representatives, all damages occasioned by such death.

In the case of a duel, action may be brought in like manner, not only against the immediate author of the death, but also against all those who took part in the duel, whether as seconds or as witnesses.

In all cases no more than one action can be brought in behalf of those who are entitled to the indemnity, and the judgment determines the proportion of such indemnity which each is to receive.

These actions are independent, and do not prejudice the criminal proceedings to which the parties may be subject.

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