

1959

Leonard Meads v. Richard C. Dibblee and Merrill B. Colton : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

OCT 7 - 1959

LEONARD MEADS,

Plaintiff and Appellant, Supreme Court, Utah

—vs.—

RICHARD C. DIBBLEE, Administrator
of the estate of JOHN RICHARD SAL-
MON, Deceased, and MERRILL B. COL-
TON,

Defendants and Respondents.

BRIEF OF RESPONDENT

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IN THE SUPREME COURT of the STATE OF UTAH

LEONARD MEADS,

Plaintiff and Appellant,

—vs.—

RICHARD C. DIBBLEE, Administrator
of the estate of JOHN RICHARD SAL-
MON, Deceased, and MERRILL B. COL-
TON,

Defendants and Respondents.

Case No.
9080

BRIEF OF RESPONDENT

STATEMENT OF FACTS

This lawsuit was brought by the father of Ellen Meads, a minor 17 years of age, to recover damages on account of her alleged wrongful death arising out of an accident that occurred on the 10th day of June, 1958, at about 10:45 P.M. on U. S. Highway 91 in American Fork, Utah, (R. 1). Ellen Meads and the deceased, John Richard Salmon, had gone together for over a year and at the time of the accident were engaged to be married, (Leon-

ard Mead's deposition p. 5 and 6).

Salmon and Meads had left the Meads' home in Salt Lake about 8:00 P.M. They went for a ride and had proceeded south along U.S. Highway 91 to American Fork, Utah, (R. 11, 12).

According to the complaint, Salmon was driving east along U. S. Highway 91, pulled off the highway, and attempted to make a left turn in front of an eastbound truck and trailer outfit driven by the defendant, Colton. The two vehicles collided. Salmon died almost immediately, but Meads lived for a week. Salmon's death, therefore, preceded the death of Ellen Meads by approximately one week, (Leonard Meads' deposition, p. 14, 15, 18). This was admitted by Meads' counsel at the pre-trial, (Appellant's brief, page 3).

Plaintiff, the father of Meads, filed the suit against Salmon's estate and also against Colton. It was claimed that Colton was negligent and that Salmon was guilty of wilful misconduct. As far as the defendant Salmon was concerned, the action was one under the guest statute, (R. 2).

During the week that Meads lived she repeatedly tried to impress upon her parents that the accident was not Salmon's fault, (Leonard Meads' deposition p. 7).

At the pre-trial hearing the defendant, Salmon, moved to dismiss the case as against the estate on the ground that since Salmon was instantly killed in the accident and Meads lived for a week thereafter, that the

action did not come into existence until a week following Salmon's death and, therefore, could not be maintained as against Salmon's estate. A judgment was entered dismissing the case as against the estate, but continuing the action as against the defendant, Colton, (R. 22, 23). It is from this judgment that the plaintiff has taken this intermediate appeal.

STATEMENT OF POINTS

POINT I

THE TRIAL COURT PROPERLY DISMISSED THE ACTION AS AGAINST THE ESTATE.

ARGUMENT

POINT I

THE TRIAL COURT PROPERLY DISMISSED THE ACTION AS AGAINST THE ESTATE.

At common law no one could maintain a wrongful death action nor could such an action be brought against the estate of the wrongdoer. By statute in this state the common law rule was changed to permit wrongful death actions to be filed by a personal representative or by the heirs of the deceased against a living person. The common law rule still remained in effect in Utah precluding actions for injuries or death against the estate of the wrongdoer.

In 1953 the Utah Legislature enacted Section 78-11-12 which provides as follows:

"Causes of action arising out of physical in-

jury to the person or death, caused by the wrongful act or negligence of another, *shall not abate* upon the death of the wrongdoer. ***." (Italics ours)

The Utah Supreme Court considered this statute in the case of *Fretz v. Anderson*, 5 Utah (2d) 290, 300 Pac. (2d) 642. In that case one Anderson while driving south on U. S. Highway 91 overturned his car near Holden, Utah. The car blocked the northbound lane of traffic. The plaintiff while proceeding north along the highway at night failed to see the Anderson vehicle blocking her lane, and crashed into it. Following that accident, Anderson was dead. No evidence was presented as to whether Anderson had died prior to the second accident. This Court in that case stated as follows:

"The survival statute, U. C. A. 1953, 78-11-12, provides that the cause of action shall not abate upon the death of the wrongdoer; *thus, the cause of action cannot arise at a time beyond the life of the tortfeasor.*" (Italics ours)

The reasoning of this Court was that the language "shall not abate" required that a cause of action had to be in existence prior to the death of the wrongdoer. Accordingly, this Court reversed the judgment in favor of the plaintiff and sent the case back for a new trial to determine whether Anderson was alive or dead at the time of the second accident.

In the Fretz case this court has construed Section 78-11-12 and said that if the action is not to be abated, it must have been in existence before the death of the

tortfeasor, or putting the matter another way, the cause of action cannot arise after the death of the tortfeasor. This being the case, the only question involved on this appeal is whether there was a wrongful death action in existence at the time of Salmon's death. If not, Section 78-11-12 does not cover the situation. The matter is still governed by the common law. The plaintiff would have no cause of action against the estate. It was and is the respondent's position in this case that since the plaintiff's intestate did not die until a week after Salmon, any cause of action which the plaintiff had for wrongful death did not and could not arise until the death of the plaintiff's intestate. It was, therefore, not in existence prior to Salmon's death which is the requirement in the Fretz case. There was nothing on which our survival statute could, therefore, apply.

Counsel for appellant in his brief refers to certain constitutional provisions of the Utah State Constitution to the effect that a right of action to recover damages for wrongful death shall not be abrogated. This is wholly inapplicable. Prior to the passage of Section 78-11-12 there was no right of action to recover for personal injuries or wrongful death against the estate of the wrongdoer. For that matter, prior to the enactment of Section 78-11-6, or its earlier counterpart, the plaintiff would not have had a cause of action for wrongful death even as against a living wrongdoer.

Any tortious cause of action requires at least two elements, namely, a negligent act, and damage. Before

a wrongful death action can be maintained, the death of some person must have occurred. The action is simply not in existence and can not be filed until the death.

Bouv. Law Dictionary defines a cause of action as follows:

“A cause of action is said to accrue to any person *when that person first comes to a right to bring an action.*” (Italics ours.)

Obviously, the plaintiff in this action did not have a right to bring an action until his daughter's death. At that time it is equally true that Salmon was dead. The plaintiff under our survival statute, particularly as interpreted by this Court in the Fretz case, cannot recover as against Salmon.

See also *Post v. Campan*, 3 N.W. 272 at page 275, wherein the Court held:

“The elements of a cause of action are—First, a breach of duty owing by one person to another; and, second, a damage resulting to the other from the breach.”

See also *Hegel v. George* (Wis.), 259 N.W. 862, at page 863, wherein the court, in holding that a cause of action for wrongful death does not arise until the victim's death, stated:

“It is true, of course, that in part the cause of action springs from or arises out of negligence or willful wrong. Certainly, it is dependent upon the doing of a tortious act. *It is equally true that it has no existence unless and until death occurs, any more than a cause of action for negligence*

comes into being in advance of injury proximately caused by the act. No one can sue upon it, not because of any personal disability, but because there is no cause of action." (Italics ours)

Appellant's counsel at page 9 of his brief concedes that the wrongful death action "is not complete until the injured person has died," and says that "technically speaking" the death action does not arise until the death of the injured person. This Court in the case of *Van Wagoner v. Union Pacific Railroad Co.*, 112 Utah 189, 186 Pac. (2d) 293, in speaking of the wrongful death action stated that the same "is founded on the same unlawful acts of the defendant, but the loss and damages suffered by them *arise out of the death of the deceased.*" The Legislature has thus said the right of action vests in the heirs at law *if death ensues* * * * it bases recovery on the wrongful death by another." (Italics ours) This being the case, we believe the conclusion is inescapable that there was no wrongful death action as against Salmon in existence prior to his own death. Since this Court already has held in the Fretz case that "the cause of action cannot arise at a time beyond the life of the tort feisor," the conclusion is likewise inescapable that the action cannot be maintained against the estate.

Counsel for appellant complains that the judgment entered in this case emasculates the statute and brings about a harsh and unjust result. The answer to this argument has been well stated by this Honorable Court in the case of *Brown v. Wightman*, 47 Utah 31, 151 Pac. 366, wherein it was said:

“While the common-law rule is a harsh one, and its enforcement in this case is peculiarly unjust, we nevertheless can see no way of escaping it. The right and power, as well as the duty, of creating rights and to provide remedies, lies with the Legislature, and not with the courts. Courts can only protect and enforce existing rights, and they may do that only in accordance with established and known remedies.”

See also *Claussen v. Brothers*, (S.C.), 145 S.E. 539, wherein it is said:

“While the act is remedial, and a liberal construction should be given to its provisions (*Morris v. Spartanburg Gas & E. Co.*, 70 S.C. 281, 49 S.E. 855), we must resort, in arriving at the intent of the Legislature, to the actual words used in the Statute, and the court should not place such judicial construction upon the language used as to effectuate its own conception of right rather than the intent of the Legislature.”

See also *Martinelli v. Burke*, (Mass.) 10 N.E. (2d) 113, wherein the Massachusetts court quotes with approval from one of its previous decisions as follows:

“A statute cannot be extended by construction or enlargement beyond its fair import. If it does not reasonably include a right of action, none can be implied. The argument of hardship or unintentional omission is not enough.”

In considering legal authorities cited in our own brief as well as those cited by the appellant's counsel it is important to make certain distinctions.

1. ACTIONS FOR PERSONAL INJURIES MUST BE DISTINGUISHED FROM THOSE FOR WRONGFUL DEATH.

Although the authorities are in conflict, those cases which hold that the plaintiff may sue for personal injuries against the estate of the deceased wrongdoer do so either under their own peculiar statute, or because it is impossible to say that a person died before the injury was inflicted.

The following cases cited by appellant involve personal injury only: *Cash v. Addington*, (N.M.) 131 Pac. (2d) 265; *Ford v. Maney's Estate* (Mich.) 232 N.W. 393; *Booth v. Frankenstein*, (Wis.) 245 N.W. 191; *Merrill v. Beckwith* (5th) 61 Fed. (2d) 912; *Maloney v. Victor*, 25 NYS (2d) 257.

The reasoning in *Cash v. Addington*, (N.M.), 131 Pac. (2d) 265, is as follows:

“*** Addington’s injury necessarily preceded his death, and life could not possibly have become extinct before Cash and his automobile were injured. ***”

In *Ford v. Maney's Estate*, (Mich.) 232 N.W. 393, the Michigan court used the same reasoning and then added this statement:

“Whether an action would survive where the tortfeasor is in fact killed at the instant of injury to a plaintiff may be left to a proper case and the assistance of briefs upon the specific point.”

This clearly indicates that the opinion of the Michigan Court does not cover the present situation.

In *Booth v. Frankenstein*, (Wis.) 245 N.W. 191, the court in that case said:

“However, we do not find it necessary to decide, *and we do not decide* whether the principle contended for is valid.” (Italics ours)

The principle contended for in that case was that the personal injury action did not arise until the injury was complete.

In *Merrill v. Beckwith*, (Fifth Circuit) 61 Fed. (2d) 912, the court said:

“Merrill’s injury necessarily preceded his death and life could not possibly have become extinct before Billy Beckwith was injured.”

In *Maloney v. Victor*, 25 N.Y.S. (2d) 257, the same reasoning was applied. The appellant in commenting upon this case states that it rejected the Massachusetts case of *Martinelli v. Burke*. In this connection the New York Court in referring to the case of *Martinelli v. Burke* said:

“It is at least questionable whether the decision is strictly in point in view of the terms of the statute involved, ***”

indicating that there was a difference in the statutes in the two states.

From the foregoing it is apparent that cases involving personal injury are clearly distinguished from those involving wrongful death. All of them go upon the theory that plaintiff’s injury necessarily preceded defendant’s death, however instantaneous. Both elements of the cause of action, to-wit: negligence and injury, were in existence prior to the death. That argument cannot pos-

sibly be made in death cases. In the injury case both the wrong and the damage are in existence prior to the death. In this action, the death, which this Court has stated is the basis for the action, did not occur until a week after Salmon died. Personal injury cases are, therefore, simply not in point on the question presented by this appeal.

2. IN WRONGFUL DEATH CASES STATUTES INVOLVED MUST BE CAREFULLY ANALYZED.

In considering the cases on the subject involving wrongful death actions against the estate of the tortfeasor, it is of the utmost importance to distinguish between the statutes in force in those states and the statute as it exists in the State of Utah. The decisions in the various courts readily reflect that they have been based entirely upon the particular statute involved.

The statutes in general upon which the cases have been based can be put into two separate groups which are hereinafter separately stated and considered.

(a) STATUTES, LIKE UTAH, IN WHICH IT IS SAID THE ACTION "SHALL NOT ABATE."

We know of only two cases in which the statutes construed had the words "shall not abate." In each of these cases the courts held that the wrongful death action did not lie against the estate of the tortfeasor.

The first of these cases is *McLellan v. Automobile Ins. Co. of Hartford, Conn.* (Ninth Circuit) 80 Fed. (2d) 344. This was an action by a special administrator against an insurance company. The sole issue presented

on the appeal was whether under the statutes of Arizona there was a survival of the right of action in favor of the appellant administrator to recover against the administrator of the estate of the deceased wrongdoer. This was the sole basis of the demurrer and of the decision of the lower court. Arizona statute provided that an action "may not abate" by the death or disability of a party. The specific question, as indicated by the Federal Court, was:

"We must therefore examine the statutes of Arizona, and determine whether or not they specifically authorize an action for 'death by wrongful act' after the death of the alleged wrongdoer."

The Court then held that under the Arizona statute the cause of action did not survive against the estate of the wrongdoer.

See also in this same class the case of *Yount v. National Bank of Jackson, Executor*, (Mich.), 42 N.W. (2d) 110. There an automobile accident had occurred in Alabama resulting in the death of certain Michigan residents. The driver died first and one of the passengers a few hours later. Administration on both estates was in Michigan. The passenger's administrator brought the instant action against the driver's executor in Michigan under the wrongful death statute of Alabama. The statute, after authorizing actions for wrongful death, provided that "such action *shall not abate* by the death of the defendant but may be revived against his personal representative." (Italics ours)

The principal question was whether the cause of action survived the death of the driver. This, the court held, was governed by the law of Alabama. The court then held, considering the terms of the statute and the construction placed upon it by the Alabama Courts, that there was no change in the common-law rule, and the cause of action did not survive.

The Michigan court after reviewing the Alabama Statute and decisions, said:

“The statute relied upon by plaintiff does not change the common law rule that ex delicto causes of action do not survive the death of the tortfeasor where the tortfeasor’s death precedes that of his victim.”

Thus, in the only cases where the statute used the language “shall not abate” the decisions are in harmony and to the effect that the action does not lie against the estate of the wrongdoer.

(b) STATUTES WHICH PROVIDE IN SUBSTANCE THAT THE PERSON WHO WOULD HAVE BEEN LIABLE IF DEATH HAD NOT ENSUED SHALL BE LIABLE, AND WHEN THE ACTION IS AGAINST AN ADMINISTRATOR OR ESTATE, THE DAMAGES RECOVERED SHALL BE A VALID CLAIM AGAINST THE ESTATE OF SUCH DECEASED PERSON.

Cases in this classification with statutes different than ours are based upon their own peculiar provisions and are clearly not in point for that reason. The general type of statute for this classification of cases permits the action to be brought against the estate of the wrongdoer

if the action might have been maintained by the decedent in his lifetime. That is something wholly different from our own statute. Clearly, the decedent could have maintained an action for injury in his lifetime, and that being the case, under those statutes an action could be maintained against the estate of the wrongdoer. However, even under statutes having this particular wording, the authorities are in irreconcilable conflict. In this category the following cases have held the action cannot be maintained: *In-re Olney's Estate* (Mich.) 14 N.W. (2d) 574; *Martinelli v. Burke* (Mass.) 10 N.E. (2d) 113; *Silva v. Keegan* (Mass.) 23 N.E. (2d) 867; *Claussen v. Brothers*, (S.C.) 145 S.E. 539; *Beaver's Adm'r v. Putnam's Curator* (Va.) 67 S.E. 353, and *Hegel v. George*, (Wis.) 259 N.W. 862. Cases adopting the contrary view are *Kerr v. Basham*, 252 N.W. 853, 353 N.W. 490, 264 N.W. 187; *Fish v. Liley*, (Colo.) 208 Pac. (2d) 930; *Ehrlich v. Merritt*, 96 Fed. (2d) 251, (3rd Cir.), and *Kuhle et al. v. Swedlund*, (Minn.) 20 N.W. (2d) 396.

In this category we will first consider the cases cited by and relied upon by counsel for appellant and show that they are based upon their own peculiar statute and therefore clearly distinguishable from our own case.

In *Kerr v. Basham*, 252 N.W. 853, 253 N.W. 490, 264 N.W. 187, the statute provided:

“* * * The corporation which, or the person who, would have been liable, if death had not ensued, or the administrator or executor of the estate of such person as such administrator or executor, shall be liable to an action for damages, not-

withstanding the death of the person injured; *** and when the action is against such administrator or executor, the damages recovered shall be a valid claim against the estate of such deceased person."

The South Dakota court in that case held:

"We think this amounts to more than a mere provision for the survival of a cause of action which existed against the wrongdoer in his lifetime. *** When Bennett died from the injury, the liability previously contingent became absolute, and the cause of action accrued, *and under this particular statute* we believe it accrued against Basham, if living (with survival against his estate if he subsequently died), or against Basham's estate, as such, if he had predeceased Bennett. *In view of the language of our statute*, we do not believe it was intended that the existence of the cause of action for wrongful death should depend upon whether or not the wrongdoer survived his victim." (Italics ours.)

In *Fish v. Liley*, (Colo.) 208 Pac. (2d) 930, the Colorado statutes were as follows:

Section 2, Chapter 50, 1935 C. S. A.:

"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."

Section 247, Chapter 176, 1935 C. S. A.:

"All actions in law whatsoever, save and except actions on the case for slander or libel, or trespass for injuries done to the person, and actions brought for the recovery of real estate, shall survive to and against executors, administrators and conservators."

The Colorado Court held that the decided cases from other jurisdictions showed two lines of authorities upon which statutes giving survivors an action for wrongful death were based, namely, the survival theory and the new cause of action theory. The Colorado Court followed the new cause of action theory and said the statute was not a survival statute. The Colorado Court said:

"As hereinabove pointed out, the Death Act is not in its essence a 'survival' statute, but operates to create a new cause of action. *The material condition precedent to the creation of the new cause of action in the plaintiff, as set forth in the statute, is that the wrongful act of Drennan must be such as would have entitled Fish to maintain an action and recover damages in respect thereof.* We construe the provision to be descriptive of the kind of conduct on the part of the tort-feasor which gives rise to the liability created by the statute. Therefore if at any time subsequent to the wrongful act of Drennan, and by reason of the nature of said wrongful act, Fish was entitled to maintain an action and as of that moment to recover damages, the statutory action accruing to the plaintiff is perfected upon the death of Fish. The Death Statute contemplates 'entitlement' to an action at any time, and 'entitlement' to damages at any time following the wrongful act of the tort-

feasor, and does not contemplate a destruction of the cause of action created, by the death of the tort-feasor subsequent to the wrongful act resulting in injuries, and ultimately death, to another.” (Italics ours)

A further comment of the Colorado Court in this case is of particular interest:

“The decided cases from other jurisdictions bearing upon the question under discussion are in irreconcilable conflict. Whether the views hereinabove expressed follow the majority or minority of the decided cases is debatable *when variations in the statutory provisions are considered.* ***” (Italics ours)

In *Ehrlich v. Merritt*, 96 Fed. (2d) 251, (Third Circuit), two New Jersey statutes were involved. The first was the so-called Death Act, and the other was the Executors Act. The first authorized an administrator to recover damages on behalf of the heirs for wrongful death, and the second gave the executor or administrator a right of action for conscious suffering, medical and hospital expenses, which the injured party could have recovered had he lived. Section 5 of the Executors Act provided that the estate of a deceased wrongdoer should be liable for “any trespass to the person committed by him or her during his or her lifetime,” and the decision of the Third Circuit Court in that case was based upon the wording of the New Jersey statute and particularly that portion providing that an estate of a wrongdoer should be liable for any trespass to the person committed by him or her during his or her lifetime, saying that the statute made no

distinction in cases in which the tortfeasor predeceased the injured party and those in which he did not. It also said that the cause of action created by the Death Act was based upon the wrongful act, neglect or default of another and was, therefore, founded upon the trespass to the person and therefore survived. The court in that case said:

“*** It is therefore obvious that the defendant, being the personal representative of Ehrlich, who, in his lifetime, by his wrongful act, neglect or default, committed a trespass to the person of Merritt is liable in her representative capacity, in an action brought by the personal representative of Merritt, for damages caused by Ehrlich’s trespass.”

The statutes involved in that case bear no similarity whatsoever to the Utah statute and the decision was based upon the wording of the statutes in that case.

The appellant cites certain Michigan cases. The situation in Michigan is extremely interesting and shows the importance of carefully distinguishing between the different types of statutes involved. The case of *Ford v. Maney’s Estate*, (Mich.) 232 N.W. 393, as we have heretofore indicated, involved a personal injury action, and was discussed herein supra, page 9.

Justin v. Ketcham, (Mich.) 298 N.W. 294 was the next Michigan case. That involved a situation where the defendant’s decedent was killed almost instantly and the plaintiff’s decedent died 15 hours after the accident. The statutes referred to in that Michigan case, as indicated by the footnotes, are as follows: Compiled Laws

1929, Sections 14061 and 14062, and Compiled Laws 1929, Section 14040. Section 14061 is known as the Death Act and Section 1 thereof reads as follows:

"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 for the recovery of 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."

Section 14040 is known as the Survival Act and so far as pertinent to the question involved in this case, reads as follows:

"In addition to the actions which survive by the common law the following shall also survive, that is to say, actions of replevin, actions for the conversion of property, for deceit, for assault and battery, for false imprisonment, for negligent injuries to persons, ***"

The only question involved in that case was under the Survival Act and particularly whether a cause of action accrued upon which the Survival Act could apply. The statute is not similar at all to the Utah statute.

In a latter case *In-re Olney's Estate*, (Mich.) 14 N.W. (2d) 574, Olney was the driver of a car which collided with another vehicle operated by one Bennett and in

which Bennett's wife and daughter were occupants. Olney died within 24 hours after the collision. Mrs. Bennett died six days after the accident. Bennett filed a claim in the Olney Estate for his personal injuries and property damage and also as administrator for the death of his wife. The probate court allowed both the Bennetts' claims, from which an appeal was taken. The defendant contended that under the present Death Act (Act No. 297 Public Acts 1939) Olney having predeceased Bennett, no cause of action for his death existed against any person at the time of the death and that the same could not, therefore, survive. The case reviewed the common law and prior enactments in the State of Michigan. In speaking of the changes the court said:

"The Legislature has made not only the wrongful act, neglect or default of the wrongdoer a necessary element in the cause of action, but also the *death* of the insured party is a necessary fact to the right of his representative to maintain an action under this amendment. *Death is a part of the substance or essence of the right.*"

"It inevitably follows that the cause of action for injuries resulting in death created by this statute does not arise or come into being until the death occurs. The cause of action which the injured party has for his injuries now abates upon his death, at which time the new cause of action in his personal representative created by the statute arises. The Legislature has given a new right of recovery in substitution for the right which the injured party had during his lifetime, the basis of which is the same wrongful act, but which does not come into being until his death." (Italics ours.)

Section 9657 provides:

“When death is caused by the wrongful act or omission of any person or corporation, the personal representative of the decedent may maintain an action therefor if he might have maintained an action, had he lived, or an injury caused by the same act or omission. *** The damages therein *** shall be for the exclusive benefit of the surviving spouse and next of kin.”

Section 9656 reads as follows:

“A cause of action arising out of an injury to the person, dies with the person of either party except as provided in Section 9657.”

Section 9656 was amended in 1941 to read as follows:

“A cause of action arising out of an injury to the person dies with the person of the party in whose favor it exists, except as provided in Section 9657. It also dies with the person against whom it exists, except a cause of action arising out of bodily injuries or death caused by the negligence of a decedent survives against his personal representative.”

The Minnesota court in interpreting these statutes said:

“Under the death by wrongful act statute, if the wronged person might have maintained an action had he lived, the personal representatives of the deceased wronged person may maintain such action.”

It held that the amended statute clearly provided that an action could be brought against the administrator. The statutes, however, involved in that case were not the

same as those in this state, and the decision, therefore, is inapplicable.

Counsel also refers to the Alabama case of *Shirley v. Shirley*, 73 So. (2d) 77. His own description of that case clearly shows it is not in point. The appellant places great emphasis and marks in italics that the plaintiff's deceased died before the defendant's deceased. If the plaintiff's deceased had died before the decedent in this action, we would have no problem. We readily concede that if the plaintiff's decedent dies first, then all of the elements of a wrongful death action are present. That case, however, is no authority for the proposition where the plaintiff's decedent, as here, dies after the death of the alleged wrongdoer. To show that this was clearly the situation presented in that case, we quote briefly from the Court's opinion:

"This is a suit by a mother for the wanton death of her minor child caused by another minor who died in the same accident two or three hours *after* the death of plaintiff's intestate."

Furthermore, the court in that case in speaking of the *Martinelli v. Burke* case said:

"It is at least questionable whether the decision is strictly in point in view of the terms of the statute involved, ***"

The cases cited and relied upon by plaintiff are not in point. Different statutes were involved. The decisions were based upon the particular statutes.

As previously indicated, the cases in this category

are in conflict. We will now consider those supporting the opposite view.

The case of *Martinelli v. Burke*, (Mass.) 10 N.E. (2d) 113, involved four wrongful death actions brought to recover damages for the death of the wife and three minor children who while riding in an automobile operated by the defendant's intestate were killed at a railroad crossing due to the negligence of the defendant's intestate. Of the five victims of the accident the defendant's intestate died first. The question was whether the respective plaintiffs as administrators of the estates of the wife and the minor children had a right to recover damages. Massachusetts statute provided in substance: "A person who by his negligence or by his wilful, wanton or reckless acts *** causes the death of a person *** shall be liable." The Massachusetts court also stated:

"It has been stated repeatedly that *no cause of action arises until the actual occurrence of the death for which recovery is sought.* *** When that event took place in each of the cases at bar the 'person' who, in the language of the statute, would 'be liable' was himself dead. 'It is axiomatic that a corpse is not a person.' *** *A dead person cannot 'be liable,' nor can a cause of action arise against a person who does not exist.* *** There are no words in the statute which can be construed as creating a new cause of action against the administrator of the wrongdoer after his appointment. The actor himself and not his administrator is named as the 'person' who is to 'be liable.' The administrator of the person killed is in a different position. The statute is explicit in granting to him the right to prosecute in behalf of the specified

beneficiaries the cause of action which arose upon the death of his intestate. In reference to this same statute it was said in *Prodecka v. Turners Falls Power & Electric Co.*, 238 Mass. 239, 243, 130 N.E. 386, 388, ***.

"The conclusion is inescapable that none of the actions can be maintained. That result has been reached in the only cases which we have seen dealing with the precise question and is supported by the reasoning in cognate cases. *Beavers' Adm'x v. Putnam's Curator*, 110 Va. 713, 67 S.E. 353; *Hegel v. George* 218 Wis. 327, 259 N.W. 662, 261 N.W. 14; *Willard v. Mohn*, 24 N.D. 390, 139 N.W. 979; *Clark v. Goodwin*, 170 Cal. 527, 150 P. 357, L.R.A. 1916 A., 1142; *Hamilton v. Jones*, 125 Ind. 176, 25 N.E. 192; *Bates v. Sylvester*, 295 Mo. 493, 104 S.W. 73, 11 L.R.A. (N.S.) 1157, 120 Am. St. Rep. 761, 12 Ann. Cas. 457; *Moe v. Smiley*, 125 Pa. 136, 17 A. 228, 3 L.R.A. 341; *Carrigan v. Cole*, 35 R.I. 162, 85 A. 934; *Johnson v. Farmer*, 89 Tex. 610, 35 S.W. 1062." (Italics ours)

See also *Silva v. Keegan*, (Mass.) 23 N.E. (2d) 867. This was an action for both death and conscious suffering of the plaintiff's intestate Silva alleged to have been caused by the negligence of the defendant's intestate Keegan. Silva was a guest passenger in the vehicle operated by Keegan. Both Silva and Keegan died as a result of the accident. The trial judge directed a verdict in favor of the defendant on the ground that there was no evidence that Keegan was still alive at the moment of the injury. It was conceded that Keegan died at the scene of the accident and that Silva died several hours afterwards. The court held that the New York law applied. The New York statute as indicated by the Massachusetts court:

“*** creates the right of action by an executor or administrator for wrongful act, neglect or default causing death ‘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.’ In this case it is not shown that Keegan ‘would have been liable to an action in favor of ‘Silva if Silva had not died, because it is not shown that Keegan was a living person against whom a cause of action could arise when Silva was injured. Moreover Keegan was dead and therefore was not ‘a natural person’ when Silva died. Section 118 provides for the survival of actions and causes of action after the death of ‘the person liable for the injury,’ while section 119 provides for the survival of actions and causes of action after the death of the ‘person in whose favor the cause of action existed.’ Neither section 118 nor section 119 seems to us intended to create a new cause of action after the death either of the wrongdoer or of the person wronged. Both sections assume that a cause of action has arisen against a ‘person liable’ under some other law or statute and merely provide for the continuance of that cause of action after death. The ‘deceased person’ against whose executor or administrator an action may be brought or continued under section 118 is the ‘person liable,’ whose death is referred to in the preceding sentence. If no cause of action has arisen against a living ‘person liable’ there is nothing upon which either of these sections can operate.” (Italics ours)

See also *Claussen v. Brothers*. (S.C.), 145 S.E. 539. wherein the court said:

“As has been pointed out, it has been consistently held in this state, in line with the greater

weight of authority, that the right of action for death by wrongful act under the death statute not accruing until the death of the person injured, is a new right of action, and not a continuation of an old one, and we cannot see, nor can it be successfully shown, how a cause of action can be held to survive a certain event, when it is not brought into existence until and except by the happening of that event."

See also to the same effect *Beaver's Adm'x v. Putnam's Curator* (Va.), 67 S.E. 353, and *Hegel v. George* (Wis.), *supra*.

CONCLUSION

Cases involving statutes different from the Utah statute are in great conflict. The decisions in those cases are based upon the particular statutes involved. Different and varying conclusions have been reached. However, in the only two decided cases where the language: "shall not abate" is contained in the statutes, the same being identical with that in the Utah Code, the courts have held that the wrongful death action cannot be maintained against the estate of the wrongdoer where the wrongdoer's death preceded that of the plaintiff's intestate.

When the Utah Legislature considered this problem, it must have given some thought to the wording used and had before it the statutes of the other states which had been enacted upon this particular subject. Those statutes had been construed. The Utah Legislature adopted the language: "shall not abate". This language had been

used in two other states whose decisions had been construed by appellate courts, and the decisions in each instance are in support of respondent's position. Our own Supreme Court in the Fretz case has stated that the language: "shall not abate," requires the cause of action to be in existence prior to the tortfeasor's death. The cause of action in this case could not possibly have been in existence until the plaintiff's decedent died, which was seven days after the alleged tortfeasor had himself died. It is, therefore, respectfully submitted that the decision of the lower court should be affirmed.

Respectfully submitted,

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