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Abatement and Revival—Death of the Wrongdoer

L. E. T. II

West Virginia University College of Law

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RECENT CASE COMMENTS

ABATEMENT AND REVIVAL — DEATH OF THE WRONGDOER. — A deputy sheriff wrongfully shot *P* causing him bodily injury. The deputy having died before suit could be brought, *P* joined the personal representative of the decedent and the bonding company in an action. *Held*, that notwithstanding the provisions of the code as amended,¹ the common law rule, that an action for personal injuries not resulting in death does not survive the death of the wrongdoer, prevails. *Byrd, Sheriff v. Byrd*.²

At common law no tort action survives the death of either the wrongdoer or the injured person.³ Various reasons are given for denying liability.⁴ The legislative inroad on this doctrine began with the famous "Lord Campbell's Act",⁵ giving a right of action against the wrongdoer when the personal injuries resulted in death. Statutory provisions to the same effect were soon adopted in the United States.⁶ The West Virginia statute, as it existed until

¹ W. VA. REV. CODE (1931) c. 55, art. 7, § 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," W. Va. Acts 1931, c. 20 [W. VA. CODE (Michie, 1937) c. 55, art. 7, § 5], adds the following sentence: "Any right of action which may hereafter accrue by reason of *such injury done to the person of another* shall survive the death of the wrongdoer, and may be enforced against the executor or administrator, either by reviving against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his personal representative after his death, whether or not the death of the wrongdoer occurred before or after *the death of the injured party*." (Italics supplied.)

² 7 S. E. (2d) 507 (W. Va. 1940).

³ *Flint v. Gilpin*, 29 W. Va. 740, 742, 3 S. E. 33 (1887); *The Harrisburg v. Rickards*, 119 U. S. 199, 201, 7 S. Ct. 140, 30 L. Ed. 358 (1886); *Brown v. Southern Ry.*, 202 N. C. 256, 261, 162 S. E. 613 (1932); *Coliseum Motor Co. v. Hester*, 43 Wyo. 298, 299, 3 P. (2d) 105 (1931).

⁴ Some authorities base the rule on the maxim, "*Actio personalis moritur cum persona*." *Stewart v. Baltimore & O. R. R.*, 168 U. S. 445, 448, 18 S. Ct. 105, 42 L. Ed. 537 (1897); *Flint v. Gilpin*, 29 W. Va. 740, 742, 3 S. E. 33 (1887). One commentator says it is against public policy to permit the value of a human life to become the subject of computation. 6 THOMPSON, NEGLIGENCE (2d ed. 1905) § 6980. Other authorities say there should be no recovery against the estate of the wrongdoer because the tort action is considered as punitive in nature and consequently the death of the wrongdoer obviates this necessity. Comment (1932) 80 U. OF PA. L. REV. 1018; POLLOCK, TORTS (12th ed. 1923) 61.

⁵ 9 & 10 VICT. c. 93 (1846).

⁶ New York adopted a similar act in 1847. 8 R. C. L. 724.

1931,⁷ was interpreted not to change the common law rule that the cause of action for personal injuries died with the wrongdoer.⁸

The contention in the present case was that the amendment⁹ had changed the common law rule, but the court held that the statute as amended applies only when the injuries result in death.¹⁰ Whether we construe such statutes strictly, as some courts advise, because they consider them to be in derogation of the common law,¹¹ or liberally, as other courts, including West Virginia, advise, because they claim them to be remedial,¹² only one conclusion can be drawn — the court was correct in its interpretation. The language used in the statute is plain, its meaning clear, and it should not, by judicial interpretation, be extended beyond its obvious import.¹³

Some time before the present case, the Special Committee on Code Correction, in one of its reports to the West Virginia Bar Association,¹⁴ listed the amended section as defective. The flaw pointed out was the one demonstrated by this case, that is, the omission of a provision giving a right of action against the personal representative for personal injuries of a less than fatal na-

⁷ W. VA. REV. CODE (1931) c. 55, art. 7, § 5. The pertinent part of the section is quoted *supra* n. 1.

⁸ *Martin v. Baltimore & O. R. R.*, 151 U. S. 673, 695, 14 S. Ct. 533, 38 L. Ed. 311 (1893); *Curry v. Mannington*, 23 W. Va. 14, 18 (1883); *Flint v. Gilpin*, 29 W. Va. 740, 742, 3 S. E. 33 (1887).

⁹ W. Va. Acts 1931, c. 20. This amendment is set forth *supra* n. 1.

¹⁰ The court gave two reasons: (1) "By reason of such injury done to the person of another" was held to mean an injury resulting in death as was previously referred to in the section, the sole and only purpose of the amendment being to cause an action for wrongful death to survive as against the personal representative of the wrongdoer. (2) Under the title of the act there is no place for legislation relating to anything other than actions for wrongful death, and it must be assumed that the legislature did not intend to include matters not within the title of the act.

Although not mentioned by the court, it would seem that the concluding words of the act, "whether or not the death of the wrongdoer occurred before or after the death of the injured party", necessarily indicate that only if the injuries result in death can the amendment be applicable.

¹¹ *Central of Ga. Ry. v. Henson*, 121 Ga. 462, 463, 49 S. E. 278 (1904); *Strotzman v. St. Louis, I. M. & S. Ry.*, 211 Mo. 227, 258, 109 S. W. 769 (1908); *Fubrano v. Atlantic Mills*, 19 R. I. 129, 133, 32 Atl. 205 (1895).

¹² *Richards v. Riverside Ironworks*, 56 W. Va. 510, 515, 49 S. E. 437 (1904); *Stewart v. Baltimore & O. R. R.*, 168 U. S. 445, 448, 18 S. Ct. 105, 42 L. Ed. 537 (1897); *White v. Atchison, T. & S. F. Ry.*, 125 Kan. 537, 538, 265 Pac. 73 (1928); *Albrecht v. Potthoff*, 192 Minn. 557, 561, 257 N. W. 377 (1934).

¹³ *Kellar v. James*, 63 W. Va. 139, 142, 59 S. E. 939 (1907); *Regan v. Davis*, 290 Pa. 167, 172, 138 Atl. 751 (1927); *Fairbanks, Morse & Co. v. Town of Cape Charles*, 144 Va. 56, 63, 131 S. E. 437 (1926); *Chesapeake & O. R. R. v. Bullington's Adm'r*, 135 Va. 307, 316, 116 S. E. 237 (1923). "This would be but an assumption by the judicial of the duties of the legislative department", *Swift v. Luce*, 27 Me. 285, 286 (1847).

¹⁴ W. VA. BAR ASS'N REP. (1934) 178.

ture inflicted by the deceased tortfeasor. The report of the committee was actuated by correspondents who could not understand why relief should be granted when a husband or father was killed, and yet relief not be granted in cases where, because of injuries sustained, his existence would be an added liability, irrespective of whether the deceased wrongdoer left an abundant estate. Another question asked was why recovery against the estate of the wrongdoer would be more burdensome on his family than satisfaction against his estate of a judgment secured before his death.

The difficulty of finding an adequate answer to these queries leads one to believe that the omission was one of inadvertence rather than intention on the part of the legislature. The recurrence of the result reached in this case is undesirable and should be avoided by an express statutory provision changing the existing law.

L. E. T., II.

ADMINISTRATION OF ESTATES — FOREIGN ADMINISTRATOR — RIGHT TO SUE IN WEST VIRGINIA. — *P*, a citizen of Indiana and administrator of *X*, sued *D*, a citizen of West Virginia, to recover for the death of *X* resulting from wrongful acts committed by *D* in West Virginia. *Held*, that an administrator appointed in Indiana cannot maintain an action in West Virginia. *Rybolt v. Jarrett*.¹

The court's conclusion was based upon a West Virginia statute, restrictive in nature, providing that "Notwithstanding any other provision of law, no person not a resident of this State shall be appointed *or act* as executor, administrator, curator, guardian, or committee . . ." ² The application of this statute achieves the same result as the general common law rule that, in the absence of a statute permitting it, a personal representative may sue only in the state of his appointment.³

In a majority of the jurisdictions, however, a foreign representative is frequently permitted to sue by comity when the citizens

¹ 112 F. (2d) 642 (C. C. A. 4th, 1940).

² W. VA. CODE (Michie, 1937) c. 44, art. 5, § 3. (Italics supplied.) See also a recent case, *Monfils v. Hazlewood*, 10 S. E. (2d) 673 (N. C. 1940), in which a similar restrictive statute, N. C. CODE (Michie, 1939) c. 1, art. 3, § 8, was construed as precluding the foreign administrator from suing in a wrongful death case.

³ RESTATEMENT, CONFLICT OF LAWS (1934) § 507; *id.* W. VA. ANNOT. (1937) § 507. This section collects the West Virginia cases in accord with the general common law rule and concludes also that "there is no statute in West Virginia permitting a foreign administrator to sue."